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REPORTS OF CASES

DECIDED BETWEEN

AUGUST 13, 1993 and JANUARY 27, 1994

IN THE

Supreme Court of Nebraska

VOLUME CCXLIV

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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DURING THE PERIOD OF THESE REPORTS

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LESLIE BOSLAUGH, Associate Justice
C. THOMAS WHITE, Associate Justice
D. NICK CAPORALE, Associate Justice
THOMAS M. SHANAHAN, Associate Justice[1]
DALE E. FAHRNBRUCH, Associate Justice
DAVID J. LANPHIER, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

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WILLIAM M. CONNOLLY, Associate Judge
EDWARD E. HANNON, Associate Judge
JOHN F. IRWIN, Associate Judge
LINDSEY MILLER-LERMAN, Associate Judge
JOHN F. WRIGHT, Associate Judge

PEGGY POLACEK ..... Reporter
LANET ASMUSSEN ..... Clerk
JOSEPH C. STEELE ..... State Court Administrator

[1]Until December 3, 1993

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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
		William B. Rist	Beatrice
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
Third	Lancaster	William D. Blue	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
Fourth	Douglas	James A. Buckley	Omaha
		John E. Clark	Omaha
		James M. Murphy	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence J. Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Michael McGill	Omaha
		Richard J. Spethman	Omaha
		Mary G. Likes	Omaha
		Gerald E. Moran	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Bryce Bartu	Seward
		Everett Inbody	Wahoo
		Robert R. Steinke	Columbus
		John C. Whitehead	Columbus

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
		Maurice Redmond	Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard P. Garden	Norfolk
		Robert B. Ensz	Wayne
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	William Cassel	Ainsworth
		Ronald D. Olberding	Burwell
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James Livingston	Grand Island
		Joseph D. Martin	Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Bernard Sprague	Red Cloud
		Stephen Illingworth	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	McCook
		John P. Murphy	North Platte
		Donald E. Rowlands II	North Platte
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson	Chadron
		Alfred J. Kortum	Gering
		Robert O. Hippe	Gering
		John D. Knapp	Kimball
		Brian Silverman	Alliance

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven Bruce Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Jeffrey L. Campbell	Papillion
		Larry F. Fugit	Papillion
		William B. Zastera	Nebraska City
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Donald R. Grant	Lincoln
		Jack B. Lindner	Lincoln
		Richard H. Williams	Lincoln
		Mary L. Doyle	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Walter H. Cropper	Omaha
		John J. McGrath	Omaha
		Robert C. Vondrasek	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. Ferer	Omaha
		Thomas G. McQuade	Omaha
		Richard M. Jones	Omaha
		W. Mark Ashford	Omaha
		Edna R. Atkins	Omaha
Fifth	Boone, Butler, Colfax, Dodge, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Alan G. Gless	Seward
		Mary C. Gilbride	Wahoo
		Gerald E. Rouse	Columbus
		Gary F. Hatfield	Central City

JUDICIAL DISTRICTS AND COUNTY JUDGES

Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Daniel J. Beckwith	Fremont
		F. A. Gossett III	Blair
		Rodney R. Smith	Dakota City
		Paul R. Robinson	Hartington
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Stephen P. Finn	Neligh
		Philip R. Riley	Creighton
		Richard W. Krepela	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	August F. Schuman	Ainsworth
		Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philp M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Harry C. Haverly	Hastings
		Jack Robert Ott	Hastings
		Daniel Bryan, Jr.	Geneva
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Lloyd G. Kaufman	Lexington
		Kristine R. Cecava	Ogallala
		Kent E. Florom	North Platte
		Cloyd Clark	McCook
		B. Bert Leffler	Benkelman
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		James L. Macken	Gering
		G. Glenn Camerer	Gering
		Thomas H. Dorwart	Sidney
		C. G. Wallace	Kimball

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Colleen R. Buckley	Omaha
	Douglas F. Johnson	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
Sarpy	Lawrence D. Gendler	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
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Mark A. Buchholz	Lincoln
Paul E. LeClair	Omaha
James P. Monen	Lincoln
Michael P. Cavel	Omaha
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Laureen K. Van Norman	Lincoln
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No. S-91-788: **Prince v. Lamplot.** Affirmed. Caporale, J.

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No. S-89-015: **In re S.I.D. No. 151.** Motion of appellant to lift bankruptcy stay and dismiss appeal sustained. Bankruptcy stay lifted; appeal dismissed.

No. S-91-818: **State on behalf of Slattery v. Green.** Stipulation allowed; appeal dismissed.

No. S-92-077: **Rhodes v. Laux.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-92-350: **Hammerstrom v. Hammerstrom.** It not being the office of an order nunc pro tunc to change or revise an earlier order, and the court below lacking jurisdiction to enter such an order during pendency of cause in this court, appeal is dismissed for want of jurisdiction.

No. S-92-660: **Higher Educ. Assistance Found. v. Abbott.** Appeal dismissed. See Rule 7A(2).

No. A-92-912: **State v. Curry.** Cause remanded to Court of Appeals for further consideration in light of *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993).

No. A-92-913: **State v. Curry.** Cause remanded to Court of Appeals for further consideration in light of *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993).

No. A-92-914: **State v. Curry.** Cause remanded to Court of Appeals for further consideration in light of *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993).

No. S-92-921: **State v. Boppre.** Cause having not been shown, appeal dismissed.

No. S-92-1104: **State v. Dixon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-93-028: **Miller v. Conrad.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-93-086: **State v. Kennedy.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-93-117: **Simmons, Olsen, Ediger & Selzer, P.C. v. County Bd. of Morrill Cty.** The district court having lacked jurisdiction to entertain the purported appeal of the plaintiff, Simmons, Olsen, Ediger & Selzer, P.C., from the action of the defendants, County Board of Morrill County et al., the appeal to this court is hereby dismissed for lack of jurisdiction.

No. S-93-142: **Nebraska Foundation for Boys Sky Ranch v. Department of Revenue.** Appeal dismissed. See Rule 7A(2).

No. S-93-381: **State v. Purcell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-93-520: **State v. Jacob.** There being no constitutional requirement that defendant's double jeopardy claim be reviewed at this point in the proceedings, and defendant's purported "Amended Plea in Bar" not constituting a plea in bar as contemplated by Neb. Rev. Stat. § 29-1817 (Reissue 1989), defendant has attempted to appeal from a nonfinal, nonappealable interlocutory order. Plaintiff's motion for summary dismissal is therefore sustained, and defendant's appeal is hereby dismissed.

No. S-93-559: **State ex rel. NSBA v. Campbell.** By order of the court, William H. Campbell reinstated as a member of the Nebraska State Bar Association.

No. S-93-791: **Bill v. O'Hara.** The transcript failing to contain the pleadings on which the order appealed from is predicated, the appeal is dismissed for want of jurisdiction. See Neb. Ct. R. of Prac. 4A(1)(a) and 7A(2) (rev. 1992).

CUMULATIVE LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-91-299: **Murrish v. Burkey**, 3 NCA 119 (1993). Petition of appellee for further review overruled on October 20, 1993.

No. A-91-437: **Adams v. Adams**, 3 NCA 352 (1993). Petition of appellee for further review overruled on October 20, 1993.

No. A-91-623: **Mitchell v. Shallenberger**, 4 NCA 605 (1993). Petition of appellant for further review overruled on November 10, 1993.

No. A-91-624: **Woods v. Shallenberger**, 4 NCA 605 (1993). Petition of appellant for further review overruled on November 10, 1993.

No. A-91-665: **Brauer v. Magdanz**, 4 NCA 1 (1993). Petition of appellant for further review overruled on August 25, 1993.

No. S-91-747: **Plambeck v. Union Pacific RR. Co.** Petition of appellant for further review sustained on September 9, 1993.

No. S-91-826: **Hicklin v. Hicklin**, 3 NCA 805 (1993). Petition of appellee for further review sustained on August 18, 1993.

No. A-91-836: **State v. Owen**, 4 NCA 382 (1993). Petition of appellant for further review overruled on January 12, 1994.

No. A-91-836: **State v. Owen**, 4 NCA 382 (1993). Petition of appellee for further review overruled on January 12, 1994.

No. A-91-908: **State v. One 1986 Toyota 4-Runner**, 4 NCA 672 (1993). Petition of appellant for further review overruled for lack of jurisdiction on October 20, 1993.

No. A-91-971: **Coran v. Board of Regents**, 3 NCA 967 (1993). Petition of appellant for further review overruled on September 9, 1993.

No. A-91-995: **Eggers Personnel, Inc. v. Hawbaker.** Petition of appellant for further review overruled on October 6, 1993.

No. A-91-1014: **Keating v. Wiese**, 3 NCA 882 (1993). Petition of appellee for further review overruled on September 9, 1993.

No. A-91-1023: **Christen v. Christen**, 4 NCA 132 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-91-1125: **Wisnieski v. Rolf**, 93 NCA No. 42. Petition of appellant for further review overruled on December 15, 1993.

No. A-91-1125: **Wisnieski v. Rolf**, 93 NCA No. 42. Petition of appellee for further review overruled on December 15, 1993.

No. S-91-1142: **Novak v. Novak**, 2 Neb. App. 21 (1993). Petition of appellant for further review sustained on November 17, 1993.

No. S-91-1155: **Macholan v. Wynegar.** Petition of appellant for further review sustained on October 20, 1993.

No. S-91-1159: **State on behalf of Matchett v. Dunkle**, 3 NCA 912 (1993). Petition of appellee for further review sustained on question of retroactive child support in paternity actions only on August 25, 1993.

No. A-91-1177: **Rosenberry v. Rosenberry.** Petition of appellee for further review overruled on December 8, 1993.

No. A-91-1178: **State v. One 1986 Mercury Lynx**, 4 NCA 675 (1993). Petition of appellant for further review overruled on November 10, 1993.

No. A-91-1233: **Brown v. Hansen**, 4 NCA 164 (1993). Petition of appellee for further review overruled on October 6, 1993.

No. S-91-1242: **Rohde v. Farmers Alliance Mut. Ins. Co.**, 4 NCA 69 (1993). Petition of appellant for further review sustained on September 9, 1993.

No. A-91-1245: **Vogel v. Bartels**, 4 NCA 472 (1993). Petition of appellant for further review overruled on October 6, 1993.

No. S-91-1247: **Morgan v. Morgan**, 93 NCA No. 42. Petition of appellee for further review sustained on December 15, 1993.

No. A-91-1249: **Mitchell v. Caldwell**, 4 NCA 176 (1993). Petition of appellant for further review overruled on October 6, 1993.

No. A-92-005: **Bauermeister v. Bauermeister.** Petition of appellant for further review overruled on September 9, 1993.

No. A-92-020: **Coates v. Coates**, 93 NCA No. 38. Petition of appellant for further review overruled on December 8, 1993.

No. A-92-036: **Shkolnick v. American Family Mut. Ins. Co.**, 2 Neb. App. 61 (1993). Petition of appellant for further review overruled on November 17, 1993.

No. S-92-038: **In re Application of Jantzen**, 4 NCA 279 (1993). Petition of appellant for further review sustained on September 15, 1993.

No. A-92-039: **Association of Commonwealth Claimants v. Hake**, 2 Neb. App. 123 (1993). Petition of appellant for further review overruled on January 12, 1994.

No. A-92-041: **City of Omaha v. Wade**, 4 NCA 736 (1993). Petition of appellant for further review overruled on October 27, 1993.

No. S-92-043: **Stuthman v. Stuthman**, 2 Neb. App. 173 (1993). Petition of appellee for further review sustained on December 22, 1993.

No. A-92-067: **Lawrence v. Ellsworth**, 93 NCA No. 39. Petition of appellee for further review overruled on December 22, 1993.

No. S-92-092: **Knaub v. Knaub**, 4 NCA 638 (1993). Petition of appellee Michael Knaub and appellant for further review sustained on October 20, 1993.

No. A-92-116: **Venditte v. Civil Serv. Comm.**, 93 NCA No. 40. Petition of appellant for further review overruled on December 29, 1993.

No. S-92-183: **State v. Wordekemper**, 3 NCA 256 (1993). Nebraska Supreme Court order dated June 3, 1993, granting further review vacated. Further review denied by the Nebraska Supreme Court on November 10, 1993.

No. S-92-231: **State v. Mowry**, 3 NCA 811 (1993). Petition of appellant for further review sustained on August 25, 1993.

No. A-92-248: **Newquist v. Palliser Furniture Corp.**, 93 NCA No. 47. Petition of appellant for further review overruled on January 12, 1994.

No. A-92-297: **State v. Kowalski**, 4 NCA 289 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-92-376: **State v. Copeland**, 3 NCA 296 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. S-92-380: **In re Interest of White.** Petition of appellant

for further review sustained on September 9, 1993.

No. S-92-380: **In re Interest of White.** Petition of appellant for further review improvidently granted; order dated September 9, 1993, vacated and set aside on December 8, 1993.

No. S-92-463: **Dalton Buick v. Universal Underwriters Ins. Co.**, 4 NCA 433 (1993). Petition of appellant for further review sustained on November 17, 1993.

No. S-92-470: **State v. Keith**, 4 NCA 313 (1993). Petition of appellee for further review sustained on September 15, 1993.

No. S-92-475: **State v. Anderson**, 4 NCA 78 (1993). Petition of appellant for further review sustained on October 27, 1993, but review is limited to the admissibility of appellant's tape-recorded statement to police.

No. A-92-476: **State v. Bennett**, 2 Neb. App. 188 (1993). Petition of appellant for further review overruled on January 12, 1994.

No. A-92-495: **State v. Quick**, 3 NCA 523 (1993). Petition of appellee for further review overruled on August 18, 1993.

No. A-92-543: **State v. Prater**, 3 NCA 730 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-92-545: **State v. Fort**, 4 NCA 104 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-92-546: **State v. Blue**, 3 NCA 638 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. S-92-611: **State v. Hirsch**, 4 NCA 486 (1993). Petition of appellee for further review sustained on October 6, 1993.

No. S-92-634: **McGowan v. Lockwood Corp.** Petition of appellant for further review sustained on September 9, 1993.

No. A-92-642: **In re Interest of C.B.**, 4 NCA 767 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. S-92-664: **In re Applications A-17004 et al.**, 4 NCA 182 (1993). Petition of appellant for further review sustained on September 9, 1993.

No. A-92-753: **State v. Kumpula**, 4 NCA 320 (1993). Petition of appellant for further review overruled on September 9, 1993.

No. A-92-758: **Cotton v. Gering Pub. Sch.**, 4 NCA 325 (1993). Petition of appellee for further review overruled on November 24, 1993.

No. A-92-771: **State v. Peery**, 4 NCA 497 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-92-790: **McCarty v. McCarty**, 3 NCA 1022 (1993). Petition of appellant for further review overruled on August 25, 1993.

No. S-92-808: **State v. Flye**, 2 Neb. App. 96 (1993). Petition of appellee for further review sustained on December 8, 1993.

No. A-92-821: **Koterzina v. Copple Chevrolet**, 4 NCA 209 (1993). Petition of appellant for further review overruled on October 6, 1993.

No. A-92-826: **State v. White**, 2 Neb. App. 106 (1993). Petition of appellant for further review overruled on November 24, 1993.

No. A-92-861: **McFarland v. Detlefsen Oil Co.** Petition of appellant for further review overruled on October 27, 1993.

No. A-92-864: **State v. McDonald.** Petition of appellant for further review overruled on September 15, 1993.

No. A-92-866: **State v. Owen**, 2 Neb. App. 195 (1993). Petition of appellant for further review overruled on January 12, 1994.

No. A-92-869: **State v. Lyons**, 4 NCA 448 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-92-870: **State v. Matlock**, 93 NCA No. 49. Petition of appellant for further review overruled on December 29, 1993.

No. A-92-904: **In re Interest of J.L.H., J.L.H., and R.H.**, 2 Neb. App. 40 (1993). Petition of appellant for further review overruled on November 10, 1993.

No. A-92-912: **State v. Curry.** Petition of appellant for further review sustained on January 12, 1994.

No. A-92-913: **State v. Curry.** Petition of appellant for further review sustained on January 12, 1994.

No. A-92-914: **State v. Curry.** Petition of appellant for further review sustained on January 12, 1994.

No. S-92-954: **State v. Edwards**, 2 Neb. App. 149 (1993). Petition of appellee for further review sustained on January 12, 1994.

No. A-92-998: **State v. Hollie**, 93 NCA No. 46. Petition of appellant for further review overruled on January 12, 1994.

No. A-92-1043: **Herboldsheimer v. Herboldsheimer**, 4 NCA

531 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-92-1053: **State v. Liu**, 93 NCA No. 45. Petition of appellant for further review overruled on December 29, 1993.

No. A-92-1062: **State v. Williams**, 93 NCA No. 37. Petition of appellant for further review overruled on November 17, 1993.

No. A-92-1091: **State v. Sobieszczyk**, 2 Neb. App. 116 (1993). Petition of appellant for further review overruled on November 19, 1993.

No. A-92-1140: **Wiese v. Becton-Dickinson**, 4 NCA 700 (1993). Petition of appellant for further review overruled on November 10, 1993.

No. A-93-056: **State v. Ackelson.** Petition of appellant for further review overruled on October 6, 1993.

No. A-93-092: **State v. Maxwell.** Petition of appellant for further review overruled on October 20, 1993.

No. S-93-104: **132nd Street Ltd. v. Fellman.** Petition of appellant for further review sustained on October 20, 1993.

No. A-93-133: **State v. Ogden**, 93 NCA No. 43. Petition of appellant for further review overruled on January 12, 1994.

No. A-93-137: **State v. Deutsch**, 2 Neb. App. 186 (1993). Petition of appellant for further review overruled on January 12, 1994.

No. A-93-157: **State v. Jones**, 93 NCA No. 45. Petition of appellant for further review overruled on December 29, 1993.

No. S-93-196: **In re Application of Allen.** Petition of appellant for further review sustained on October 20, 1993.

No. A-93-222: **State v. Stuthman**, 2 Neb. App. 317 (1993). Petition of appellant for further review overruled on January 12, 1994.

No. A-93-307: **Cole v. Hendrickson.** Petition of appellant for further review overruled on October 20, 1993.

No. A-93-401: **State v. Rector.** Petition of appellant for further review overruled on November 10, 1993.

No. A-93-459: **State v. Martinez**, 4 NCA 718 (1993). Petition of appellant for further review overruled for lack of jurisdiction on October 20, 1993.

No. A-93-460: **State v. Martinez**, 4 NCA 718 (1993). Petition

of appellant for further review overruled for lack of jurisdiction on October 20, 1993.

No. S-93-549: **State v. Long.** Petition of appellant for further review sustained on December 29, 1993.

No. S-93-606: **Bennett v. Board of Equal. of City of Lincoln,** 2 Neb. App. 161 (1993). Petition of appellant for further review sustained on December 29, 1993.

No. A-93-661: **State v. Tipton.** Petition of appellant for further review overruled on November 8, 1993.

No. A-93-662: **State v. Tipton.** Petition of appellant for further review overruled on November 8, 1993.

No. A-93-663: **State v. Tipton.** Petition of appellant for further review overruled on November 8, 1993.

No. A-93-664: **State v. Tipton.** Petition of appellant for further review overruled on November 8, 1993.

No. A-93-665: **State v. Illig.** Petition of appellant for further review overruled on December 15, 1993.

No. A-93-839: **State v. Coleman.** Petition of appellant for further review overruled on December 29, 1993.

No. S-93-1065: **State v. McCormick.** Petition of plaintiff for further review sustained on December 8, 1993; application to docket error proceedings allowed in the Supreme Court.

No. S-93-1066: **State v. Radden.** Petition of plaintiff for further review sustained on December 8, 1993; application to docket error proceedings allowed in the Supreme Court.

No. S-93-1067: **State v. Hall.** Petition of plaintiff for further review sustained on December 8, 1993; application to docket error proceedings allowed in the Supreme Court.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

KAREN D. DUNNING, APPELLANT AND CROSS-APPELLEE, V. MARK H. TALLMAN, APPELLEE AND CROSS-APPELLANT.

504 N.W.2d 85

Filed August 13, 1993. No. S-90-1144.

1. **Contempt: Final Orders: Appeal and Error.** A final judgment or order in a contempt proceeding is reviewed in the same manner as a criminal case.
2. **Contempt: Proof.** A defendant's contempt must be established by proof beyond a reasonable doubt.
3. **Contempt: Final Orders: Appeal and Error.** An appellate court, examining a final judgment or order in a contempt proceeding, reviews for errors appearing on the record.
4. **Contempt: Appeal and Error.** A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous.
5. **Contempt.** The character, nature, or purpose of a contempt proceeding is determined by the procedure used in a trial to determine whether there is contempt and the sanction imposed.
6. _____. A civil contempt proceeding is primarily coercive because a contemnor, through compliance with a court's order, is able to avoid punishment for noncompliance with the court's order. A criminal contempt proceeding is primarily punitive because a court imposes an unconditional sentence to punish the contemnor for disrespecting the court's dignity or disobeying the court's order.
7. _____. In a civil contempt proceeding, a fine is an appropriate sanction to coerce a contemnor's compliance with a valid order, so long as the contemnor, by complying with the order, may avoid the fine.
8. _____. An unconditional fine which the contemnor is not allowed to avoid by compliance with a court's order is impermissible in a civil contempt proceeding because the fine operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.
9. **Contempt: Equity.** A civil contempt proceeding cannot be the means to afford equitable relief to a party.
10. _____: _____. In imposing a sanction for civil contempt, a court cannot use, as a requisite to purge contempt, a condition that, if fulfilled for compliance with a court's order, affords equitable relief to a party.

11. **Contempt: Costs: Attorney Fees.** In a civil contempt proceeding, costs, including a reasonable attorney fee, may be assessed against a contemnor.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed in part, and in part reversed.

Robert B. Creager, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

W. Michael Morrow and Gregory C. Damman, of Hecht, Sweet, Morrow, Poppe & Otte, P.C., for appellee.

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

SHANAHAN, J.

Karen D. Dunning appeals from the judgment of the district court for Lancaster County which found her in contempt and levied a fine for willful violation of a noncompetition provision contained in a property settlement agreement incorporated into the decree dissolving Dunning's marriage to Mark H. Tallman.

BACKGROUND

Karen Dunning and Mark Tallman were married January 9, 1982. In 1983, Tallman and others founded Data Source Media, Inc. (DSM), a retailer of computer supplies. In September 1984, Dunning left her job as a salesperson with IBM, acquired 51 percent of DSM's capital stock, and became DSM's president. As DSM's chief executive officer, Dunning operated DSM until November 1988, during which time DSM's annual sales increased from $270,000 in 1984 to about $2 million in 1987.

At Dunning's request, Tallman left DSM in February 1988. Because the pair were experiencing marital problems, Dunning filed for a divorce and, in May 1988, began living with Bruce Christensen, DSM's marketing manager.

In November 1988, Dunning and Tallman signed a property settlement agreement which provided, among other things, that Tallman would buy Dunning's shares of DSM stock for $400,000 and that Dunning would not compete with DSM for 2 years, in accordance with a noncompetition provision in the settlement agreement:

> [Dunning] agrees not to sell or supervise others selling or cooperate, encourage or in any manner be involved with any firm or person in the selling to cumtomers [sic] located in the State of Nebraska or the State of Iowa of computer and word processing supplies and other products normally and regularly sold by Data Source Media, Inc. (excluding stock paper and forms) for a period of two (2) years following the entry of the Decree.

The district court examined the terms of the property settlement agreement and, in view of relevant evidence presented to the court, found that the agreement's provisions were "reasonable, just and not unconscionable as to either of the parties." The court then approved the property settlement agreement and incorporated all the agreement's provisions into the dissolution decree entered on November 22, 1988. No appeal was taken from the dissolution decree, which, therefore, became final 6 months later. See Neb. Rev. Stat. § 42-372 (Reissue 1988).

In December 1988, Dunning began a new business venture with Christensen. As a part of this venture, Dunning formed a corporation named "Computer Products, Inc." (CP), and Christensen with another incorporated a business called Business Media, Inc. (BMI). Both CP and BMI were Nebraska corporations. The same lawyer who handled the incorporations of CP and BMI also advised Dunning and Christensen about Dunning's business activities in reference to the noncompetition provision in the dissolution decree. The lawyer told Dunning and Christensen that if any question arose regarding Dunning's activities in relation to the noncompetition agreement, Dunning should return to court for a determination whether Dunning's activity violated the noncompetition provision.

Christensen proceeded to operate BMI from an office in Lincoln, Nebraska, and sold retail computer supplies in direct competition with DSM. Meanwhile, Dunning operated CP, which did not retail computer supplies in Nebraska or Iowa, but did rent an office in Kansas for the purpose of selling retail computer supplies in that state. However, Dunning did not keep any of CP's business records at the Kansas office, and phone calls to that office were automatically forwarded to BMI's

office in Lincoln.

In large part, CP's operations consisted of shipping wholesale computer supplies from a Kansas warehouse to BMI in Lincoln, although CP, at BMI's request, shipped merchandise directly to BMI's customers in Nebraska and Iowa. On one occasion, Dunning, acting for CP, sold merchandise to Mutual of Omaha (Mutual), a customer to which Dunning had personally made sales while she was at DSM. When Tallman learned of this sale, he notified Dunning that she had breached the noncompetition agreement. Dunning canceled the Mutual sale, but directed Mutual's purchasing agent to Christensen at BMI, where Mutual purchased the merchandise.

Dunning also personally trained a salesperson for BMI. During one meeting, Dunning showed BMI's prospective salesperson a DSM sales brochure and told the trainee that the trainee salesperson would be selling BMI products identical to those described in the DSM brochure. Additionally, during a training session Dunning said that "she [Dunning] really shouldn't be doing this" because training a salesperson to compete directly with DSM was prohibited by the noncompetition agreement signed by Dunning in the proceedings for her divorce from Tallman.

On March 24, 1989, Tallman filed an "Application for an Order to Show Cause" in the district court for Lancaster County, requesting that Dunning state why she should not be held in contempt for willful violation of the noncompetition agreement. Also, Tallman requested that if Dunning was adjudged in contempt, the court "extend the term of the [noncompetition agreement] for an additional two years due to [Dunning's] failure to comply with the terms and provisions of the [noncompetition agreement]." Responding to the order to show cause, Dunning denied any violation of the noncompetition agreement.

In accordance with Tallman's motion based on the finality of the dissolution decree, the district court ruled that Dunning could not raise the question of reasonableness concerning the noncompetition provision in the settlement agreement, since the court, in its dissolution decree, had determined that the

settlement agreement and all its provisions were reasonable and incorporated the agreement into the decree. After a trial conducted under the rules of civil procedure, the district court found that Dunning was in contempt of court because she "willfully and contumaciously" violated the noncompetition agreement and fined her $20,000. However, the court set out a "purge plan" whereby Dunning could purge herself of contempt and eliminate the fine by complying with the terms of the noncompetition agreement for a period "up to and inclusive of November 21, 1991," although the noncompetition agreement, by its own terms, would expire on November 22, 1990. The court also ordered Dunning to pay the costs of the contempt proceedings, including a $5,000 attorney fee for Tallman's lawyer. Finally, the court stated that "[t]his sentence is coercive rather than punitive in nature." When Dunning notified the court that she rejected the purge plan, the court, on November 20, made the $20,000 fine an unconditional and final judgment.

ASSIGNMENTS OF ERROR

Dunning contends the district court erred (1) by finding that Dunning willfully violated the noncompetition provision in the court-approved settlement agreement; (2) by imposing a punitive fine against Dunning in a civil contempt proceeding; (3) by ordering that Dunning could purge her contempt and exonerate herself from the fine by agreeing to extend the noncompetition agreement for an additional 1 year beyond the term specified in the original agreement; (4) in striking Dunning's "public policy defense," which questioned the reasonableness of the noncompetition agreement; (5) by imposing an excessive fine; and (6) in awarding an attorney fee in a civil contempt proceeding.

On cross-appeal, Tallman argues that the district court (1) abused its discretion by awarding an inadequate attorney fee for Tallman's lawyer and (2) abused its discretion and erred, as a matter of law, by imposing a fine that was insufficient to compel Dunning's compliance with the noncompetition agreement.

JURISDICTION

"In the absence of a final judgment or final order in the court from which an appeal is taken, an appellate court acquires no jurisdiction." *Schaad v. Simms*, 240 Neb. 758, 759, 484 N.W.2d 474, 475 (1992). A final judgment or order determines a substantial right of a party to an action. See *id.* An order imposing a coercive sanction in a civil contempt proceeding is not a final order because the coercive order is "always subject to modification by the contemner's conduct." *In re Contempt of Liles*, 216 Neb. 531, 534, 344 N.W.2d 626, 629 (1984). Although Dunning's appeal arises from a proceeding initiated concerning civil contempt, Dunning has appealed from an unconditional judgment, namely, the fine of $20,000, which is a final order and is, therefore, appealable. See Neb. Rev. Stat. § 25-1902 (Reissue 1989) (definition of "final order").

DUNNING'S NONCOMPLIANCE WITH THE DIVORCE DECREE

Dunning contends that the trial court erred in finding that she willfully violated the noncompetition provision of the property settlement agreement.

According to Neb. Rev. Stat. § 25-2121 (Reissue 1989): "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of . . . (3) willful disobedience of or resistance willfully offered to any . . . order of said court . . . ." For purposes of § 25-2121, " 'willful' means the violation was committed intentionally, with knowledge that the act was in violation of the court order." *In re Contempt of Sileven*, 219 Neb. 34, 38, 361 N.W.2d 189, 192 (1985).

A final judgment or order in a contempt proceeding is reviewed in the same manner as a criminal case. See, *Curtis v. Millard School Dist. No. 17*, 217 Neb. 502, 349 N.W.2d 379 (1984); *In re Contempt of Liles*, 217 Neb. 414, 349 N.W.2d 377 (1984); *Gentle v. Pantel Realty Co.*, 120 Neb. 630, 234 N.W. 574 (1931). A defendant's contempt must be established by proof beyond a reasonable doubt. See, *State ex rel. Kandt v. North Platte Baptist Church*, 225 Neb. 657, 407 N.W.2d 747 (1987); *In re Contempt of Liles*, 217 Neb. 414, 349 N.W.2d 377

(1984).

An appellate court, examining a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. See, Neb. Rev. Stat. § 25-1911 (Cum. Supp. 1992); *Curtis v. Millard School Dist. No. 17, supra*; *In re Contempt of Liles*, 217 Neb. 414, 349 N.W.2d 377 (1984). Consequently, a trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous. See, *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990) (standard of review for a nonjury criminal case); *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

The record in Dunning's case contains evidence sufficient to sustain the district court's finding that Dunning willfully violated the noncompetition agreement, both by shipping merchandise directly to BMI's customers in Nebraska and Iowa and by training a BMI salesperson for competition with DSM. Consequently, we cannot say that the district court was clearly erroneous in its finding, beyond a reasonable doubt, that Dunning willfully violated the noncompetition agreement.

THE $20,000 FINE

Dunning maintains that the district court lacked the power to impose a $20,000 fine in a civil contempt proceeding.

In *In re Contempt of Sileven*, 219 Neb. at 37, 361 N.W.2d at 192, this court stated:

> A sentence in a prosecution for contempt, except that committed in open court, which is wholly punitive, may properly be imposed only in proceedings instituted and tried as for criminal contempt. In such proceedings the accused is entitled to due process of law and is presumed to be innocent, cannot be compelled to testify against himself or herself, and must be advised of the nature of the charges. *Cooke v. United States*, 267 U.S. 517, 45 S. Ct. 390, 86 L. Ed. 767 (1925); *Gompers v. Bucks Stove & Range Co.*[, 221 U.S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1911)]. A criminal sanction is invalid if imposed in a proceeding that is instituted and tried as a civil contempt. *Southern Railway Company v. Lanham*[, 403 F.2d 119

(5th Cir. 1968)].

The district court's characterization that the proceedings against Dunning were "coercive" for civil contempt rather than "punitive" for criminal contempt does not determine the nature of the proceedings. The character, nature, or purpose of a contempt proceeding is determined by the procedure used in a trial to determine whether there is contempt and the sanction imposed. See *State ex rel. Kandt v. North Platte Baptist Church*, 219 Neb. 694, 365 N.W.2d 813 (1985). See, also, *Shillitani v. United States*, 384 U.S. 364, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966) (a sanction imposed, rather than a trial court's characterization of the proceeding, distinguishes civil contempt from criminal contempt). A civil contempt proceeding is primarily coercive because a contemnor, through compliance with a court's order, is able to avoid punishment for noncompliance with the court's order. However, a criminal contempt proceeding is primarily punitive because a court imposes an unconditional sentence to punish the contemnor for disrespecting the court's dignity or disobeying the court's order. *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991); *State ex rel. Kandt v. North Platte Baptist Church*, 219 Neb. 694, 365 N.W.2d 813 (1985); *In re Contempt of Sileven*, 219 Neb. 34, 361 N.W.2d 189 (1985); *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984); *McFarland v. State*, 165 Neb. 487, 86 N.W.2d 182 (1957).

In a civil contempt proceeding, a fine is an appropriate sanction to coerce a contemnor's compliance with a valid order, so long as the contemnor, by complying with the order, may avoid the fine. *Hicks v. Feiock*, 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988). As the U.S. Supreme Court noted in *Penfield Co. v. S. E. C.*, 330 U.S. 585, 590, 67 S. Ct. 918, 91 L. Ed. 1117 (1947), "[o]ne who is fined, unless by a day certain he [complies with the order] has it in his power to avoid any penalty." Thus, in *Latrobe Steel Co. v. United Steelworkers, Etc.*, 545 F.2d 1336 (3d Cir. 1976), the court held that a $10,000 fine which could be avoided if the contemnors complied with the district court's order was civil in nature. See, also, *Bagwell v. International Union, UMWA*, 244 Va. 463, 423 S.E.2d 349 (1992) (a $100,000 fine for each violent violation of

injunction and $20,000 for each nonviolent violation was allowable in a civil proceeding because the fine could be avoided by compliance with the injunction); *Labor Relations Commission v. Fall River Educators' Association*, 382 Mass. 465, 416 N.E.2d 1340 (1981) (a fine imposed for each day's continued contempt is appropriate in a civil proceeding despite the fine's punitive quality because the fine's primary objective was to compel compliance with a court's order).

However, an unconditional fine which the contemnor is not allowed to avoid by compliance with a court's order is impermissible in a civil contempt proceeding because the fine " ' "operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience." ' " *In re Contempt of Sileven*, 219 Neb. at 37, 361 N.W.2d at 191 (quoting *Southern Railway Company v. Lanham*, 403 F.2d 119 (5th Cir. 1968)). See, also, *State ex rel. Collins v. Beister*, 227 Neb. 829, 420 N.W.2d 309 (1988) (unconditional $50 fine was a sanction for criminal contempt); *Penfield Co. v. S. E. C., supra* (an unconditional fine is a sanction for criminal contempt).

In the present case, the district court's imposition of a fine was not necessarily a sanction for criminal contempt because the fine could be avoided by Dunning's compliance with the judicially extended noncompetition agreement. Therefore, if we assume for the moment that the district court was empowered to extend the noncompetition agreement for an additional year, the district court's imposition of a fine was a proper sanction. Moreover, the fine, as a result of Dunning's decision not to comply with the court-extended noncompetition provision, did not necessarily transform an otherwise coercive civil sanction into a criminal penalty. As stated in *Hoffman, Etc. v. Beer Drivers & Salesmen's, Etc.*, 536 F.2d 1268, 1273 (9th Cir. 1976):

> [I]nevitably, wherever a compliance fine is assessed and an opportunity given to purge, the failure to purge will bring about a due date. The due date occurs because the actor has failed to use the key to the jail which the court provided. [Citation omitted.] The occurrence of the due date does not transform civil proceedings, whose sole aim is to secure compliance, into a criminal proceeding. Were

> it otherwise, compliance with laws or orders could never be brought about by fines in civil contempt proceedings. Always the final order requiring payment will follow the act or omission which constitutes the failure to purge.

Accord *Roe v. Operation Rescue*, 920 F.2d 213 (3d Cir. 1990) (a fine or prison sentence as a civil sanction may be conditioned on a defendant's action specifically designed to effect compliance with a court's order). Therefore, if the district court had the power to extend the noncompetition provision in the Dunning-Tallman property settlement agreement, a fine was permissible as a sanction for civil contempt.

JUDICIAL EXTENSION OF A NONCOMPETITION PROVISION

Dunning asserts that the district court erred by imposing a fine for civil contempt because she was able to purge her contempt only by compliance with the judicially extended noncompetition provision.

Courts in several jurisdictions have utilized equitable power to extend a contractual noncompetition provision for a period beyond the agreed term when a party has violated the noncompetition provision. Courts have reasoned that when one party has violated the noncompetition agreement during the prohibitory period, the other party is entitled to an extension of the agreement for a period equal to the duration of the breach so that the complying and injured party may be granted adequate equitable relief and made whole. See, *Levitt Corp. v. Levitt*, 593 F.2d 463 (2d Cir. 1979); *American Eutectic Weld. Alloys Sales Co., Inc. v. Rodriguez*, 480 F.2d 223 (1st Cir. 1973); *Premier Industrial Corp. v. Texas Industrial Fastener Co.*, 450 F.2d 444 (5th Cir. 1971); *Cherne Indus., Inc. v. Grounds & Associates*, 278 N.W.2d 81 (Minn. 1979); *Medx, Inc. v. Ranger*, 788 F. Supp. 288 (E.D. La. 1992).

In *Kasparek v. May*, 174 Neb. 732, 741, 119 N.W.2d 512, 519 (1963), this court, considering whether a trial court properly struck all allegations of damages in a civil contempt proceeding, stated:

> In some jurisdictions, a fine may be imposed for the indemnification of the person who has been damaged by

> the failure to perform. We are not in accord with these holdings, and state that indemnity for damages cannot be secured in a contempt proceeding. . . . If Kasparek suffered . . . damages, his remedy is an action at law for the subsequent damage. Civil contempt is available to enforce the decree actually rendered, not to afford a remedy for the recovery of subsequent damage.

Thus, in *Kasparek*, this court held that indemnification by an award of damages is unavailable in a contempt proceeding. In the present case, and analogous to *Kasparek*, Tallman requested and obtained a judicial extension of the term for noncompetition prescribed by the agreement incorporated into the Dunning-Tallman dissolution decree, although the term was extended as a condition for Dunning's purge of her contempt. Because an award of damages is unavailable in a civil contempt proceeding, see *Kasparek*, then, under the *Kasparek* rationale, a civil contempt proceeding cannot be the means to afford equitable relief to a party. Thus, without deciding whether an equity court is empowered to extend a noncompetition provision on breach of the provision, we hold that in imposing a sanction for civil contempt, a court cannot use, as a requisite to purge contempt, a condition that, if fulfilled for compliance with a court's order, affords equitable relief to a party.

Although Tallman may have sought some type of relief available as a remedy in a civil action, such as injunctive relief, damages, or both an injunction and damages, Tallman elected to proceed against Dunning for her contempt in violating the noncompetition provision. Because he elected to proceed against Dunning for contempt, sanctions against Dunning are restricted to the sanctions permissible in a civil contempt proceeding. However, the trial court lacked jurisdiction or power to require that Dunning comply with the judicially extended noncompetition provision as a means to avoid the $20,000 fine. Thus, as conduct required to avoid the fine for civil contempt, Dunning's compliance with the judicially extended noncompetition provision was an impermissible means to compel obedience to the dissolution decree and its incorporated noncompetition provision. When the impermissible condition to avoid the fine is removed from the

sanction imposed by the trial court, Dunning is left facing an unconditional fine for civil contempt without any means to purge herself of contempt. At that point, the imposed fine became punitive rather than coercive and, as such, was an impermissible sanction for civil contempt. If Dunning is to be punished by an unconditional fine as a penalty, proceedings are available to punish constructive contempt for disobedience of a judicial order. See, *McFarland v. State*, 172 Neb. 251, 109 N.W.2d 397 (1961); *Leeman v. Vocelka*, 149 Neb. 702, 32 N.W.2d 274 (1948); *Kopp v. State*, 124 Neb. 363, 246 N.W. 718 (1933).

In view of the foregoing, we reverse the district court's judgment which imposed a fine on Dunning for her civil contempt.

DUNNING'S PUBLIC POLICY DEFENSE

According to Dunning, the district court erred by disallowing her "public policy defense" based on Neb. Rev. Stat. § 59-801 (Reissue 1988): "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal. . . ." See, also, *Stanford Motor Co. v. Westman*, 151 Neb. 850, 39 N.W.2d 841 (1949); *Swingle & Co. v. Reynolds*, 140 Neb. 693, 1 N.W.2d 307 (1941).

In her appellate brief, Dunning makes it clear that she is complaining about the district court's decision not to reexamine the enforceability of the noncompetition agreement. As noted, the Dunning-Tallman dissolution decree had become final before the trial on the allegation of Dunning's contempt. Because the dissolution decree contains a specific adjudication that all provisions of the property settlement were fair to the parties, prior judicial determination was res judicata in reference to reasonableness of the noncompetition provision.

> The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. . . .
>
> Res judicata is founded on a policy favoring termination of an action by preclusion or prevention of

subsequent litigation on the same cause.
NC+ Hybrids v. Growers Seed Assn., 228 Neb. 306, 310-11, 422 N.W.2d 542, 545 (1988). Accord, *In re Estate of Watkins, ante* p. 583, 501 N.W.2d 292 (1993); *Ballard v. Giltner Pub. Sch.*, 241 Neb. 970, 492 N.W.2d 855 (1992).

ATTORNEY FEE AND COSTS

Dunning contends that the district court lacked authority to assess an attorney fee as part of the costs and that the district court abused its discretion concerning the attorney fee awarded.

"In Nebraska, the general rule is that an attorney fee may be recovered only when authorized by statute, or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee." *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 765, 472 N.W.2d 391, 402 (1991). Accord *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992).

Neb. Rev. Stat. § 42-370 (Reissue 1988) states: "Nothing in sections 42-347 to 42-379 shall prohibit a party from initiating contempt proceedings. Costs, including a reasonable attorney's fee, may be taxed against a party found to be in contempt." Neb. Rev. Stat. §§ 42-347 to 42-379 (Reissue 1988) pertain generally to support, alimony, and disposition of marital property. Furthermore, in *Kasparek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963), which antedates the 1972 enactment of § 42-370, this court considered assessment of costs in a civil contempt proceeding. Although the *Kasparek* court disallowed an award for damages in a contempt proceeding, the court distinguished a damages award from the question of costs and expenses in a civil contempt proceeding and held that "costs and expenses incurred by an injured party may be recovered in the contempt proceedings from the contemner." 174 Neb. at 741, 119 N.W.2d at 519. Therefore, in a civil contempt proceeding, costs, including a reasonable attorney fee, may be assessed against a contemnor.

"When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of

discretion." *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. at 9, 493 N.W.2d at 165. Because the amount of attorney fee and costs awarded by the district court is supported by sufficient evidence and was not an abuse of discretion, we affirm the district court's judgment assessing costs to Dunning, including a fee for Tallman's lawyer.

TALLMAN'S CROSS-APPEAL

In the first assignment of error asserted in his cross-appeal, Tallman complains that the district court abused its discretion concerning the attorney fee awarded as a part of the costs assessed against Dunning. As we have noted in reference to Dunning's challenge to the amount of the attorney fee, a district court's award of an attorney fee will be upheld on appeal in the absence of the district court's abuse of discretion. We find no abuse of discretion in the attorney fee awarded for Tallman's lawyer.

In his second assignment of error, Tallman asserts that the fine imposed on Dunning is inadequate to coerce her compliance with the noncompetition provision in the property settlement agreement between Dunning and Tallman. Because we have reversed the fine imposed on Dunning, we need not consider Tallman's assignment of error concerning the amount of the fine imposed.

CONCLUSION

The district court's judgment imposing a fine against Dunning in a civil contempt proceeding is reversed; however, the district court's findings and judgment of Dunning's civil contempt and its judgment for fees and costs are affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

DONNELLE GALLION, APPELLANT, V. LEONARD E. WOYTASSEK ET AL., APPELLEES.

504 N.W.2d 76

Filed August 13, 1993. No. S-91-384.

1. **Demurrer: Pleadings.** In considering 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: Words and Phrases.** 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.
3. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.
4. **Physician and Patient.** Generally, a physician's duty to exercise the required skill or standard of care must arise out of the physician-patient relationship. The relationship can be said to arise when the physician undertakes treatment of the patient.
5. **Physician and Patient: Pleadings: Proof.** The existence of a physician-patient relationship is normally a question of fact; however, the party claiming the existence of the relationship must allege some facts to show that the relationship came into existence.
6. **Physician and Patient.** It is clear that a physician-patient relationship does not arise by reason of a court-ordered examination of the physical or mental condition of a defendant.
7. **Trial: Mental Competency.** The question of whether a defendant is competent to stand trial is one of fact to be determined by the trial court, and the means employed in resolving the question are discretionary with the trial court.
8. **Negligence: Pleadings.** The longstanding rule is that to state a cause of action for negligence, one must plead facts from which it can be inferred that the defendant owed a legal duty to protect the plaintiff from injury, that the defendant failed to discharge that duty, and that damage proximately resulted from that failure.
9. **Physician and Patient: Mental Competency: Actions: Damages: Immunity.** A psychiatrist who has been directed by a court to evaluate a patient for the purposes of determining competency to stand trial is entitled to absolute immunity from a suit for damages based on that examination, made within the scope of his or her authority and while acting without willfulness, malice, or corruption.
10. **Pleadings: Demurrer.** The use of words alone, such as "maliciously," "intentionally," and "recklessly," without allegations of fact from which malice or corruption may be inferred, is insufficient to allege malice, corruption, or intentional wrongdoing in fact. Such words constitute mere legal conclusions. Where it is necessary to allege actual corruption, bad motive, or malice in order to state a cause of action, there must be an allegation of the ultimate facts from

which the conclusion may be inferred in order to withstand a demurrer.

11. **Demurrer: Pleadings.** If a demurrer be sustained, the adverse party may amend the petition, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct.
12. **Demurrer: Pleadings: Appeal and Error.** Before error can be predicated upon the refusal of the court to permit an amendment to a petition after demurrer thereto is sustained, the record must show that under the circumstances, the ruling of the court was an abuse of discretion.
13. **Demurrer: Pleadings.** If there is no reasonable possibility that a cause of action can be stated after the sustaining of a demurrer, leave to amend the pleadings need not be granted.

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

Donnelle Gallion, pro se.

Don Stenberg, Attorney General, and Lynn A. Melson for appellees Woytassek and Chung.

Douglas J. Peterson, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Stone.

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

HASTINGS, C.J.

The plaintiff, Donnelle Gallion, appeals the order of the district court sustaining the demurrers of the defendants to Gallion's first amended petition and dismissing that petition.

Gallion's consolidated assignments of error allege that the court erred in necessarily finding that his petition failed to state a cause of action and that the court had no jurisdiction of the cause of action, in finding that his petition could not be cured, and in finding that his second amended petition was a nullity and of no effect.

This action was brought pursuant to the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987 & Cum. Supp. 1990). Gallion filed an amended petition on December 20, 1990, alleging that the defendants, Leonard E. Woytassek, director of the security unit of the Lincoln Regional Center; William R. Stone, Jr., consulting clinical psychologist on contract with the State of Nebraska; and Chin S. Chung, staff psychiatrist at the Lincoln Regional Center, had negligently

diagnosed the appellant in regard to his competency to stand trial. The amended petition further alleged that Gallion had been placed in the Lincoln Regional Center for an examination to determine his ability to stand trial on charges of first degree assault and use of a weapon in the commission of a felony; that Woytassek diagnosed Gallion as suffering from a " 'delusional (paranoid) disorder of the persecutory type' " and as incompetent to stand trial without having complete and accurate information with which to formulate a diagnosis with reasonable medical certainty; that Stone, in his psychological evaluation, cited Lincoln Regional Center records "which he says indicates [sic] plaintiff had voiced the view that the judge and plaintiff's attorney 'are conspiring in some sort of plot' to keep plaintiff in jail because of some theft," that there exist no such records, and that therefore his diagnosis was negligently made on the basis of insufficient evidence; that Chung "suggested" that Gallion suffered from a psychotic paranoid disorder without having performed a full and complete psychiatric examination; and that the negligence of all the defendants was intentional or willful or done with gross carelessness or recklessness. Gallion sought money damages.

The defendants demurred on the grounds of lack of jurisdiction and failure to state facts sufficient to state a cause of action. The time within which Gallion was to submit a brief in opposition to the demurrers was extended to March 8, 1991. Gallion failed to file a brief, but did file on March 14, without obtaining leave of court, a second amended petition. On March 21, the trial court sustained the demurrers for the reasons stated therein and because it did not appear that the defects in the first amended petition could be cured by amendment, and the first amended petition was dismissed. As to the second amended petition, filed March 14, the court found that it was filed without leave of court and more than 10 days after the filing of the demurrers and that therefore, that amended petition was of no effect.

We deal first with Gallion's last assignment of error, that the court erred in finding that the second amended petition was null and void. Because that amended petition appears to be identical in all pertinent aspects to the first amended petition, a ruling on

the merits of the demurrers to the first amended petition would apply with equal force to the second amended petition. Therefore, we turn to a discussion of the merits of the demurrers.

In considering 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. *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993); *Gerken v. Hawkins Constr. Co.*, 243 Neb. 157, 498 N.W.2d 97 (1993).

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. *Hamilton v. City of Omaha, supra*; *Gerken v. Hawkins Constr. Co., supra*.

Gallion's brief seems to urge that the trial court sustained the demurrers as to Woytassek and Chung on the theory of absolute immunity and as to Stone on the absence of a professional relationship. That does not appear in the record. The district court simply sustained the demurrers "for the reasons stated in said demurrers," which were lack of personal jurisdiction as to Stone, lack of subject matter jurisdiction as to Woytassek and Chung, and the absence of facts alleged sufficient to state a cause of action as to all three defendants. An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Keithley v. Black*, 239 Neb. 685, 477 N.W.2d 806 (1991). We therefore address the claimed deficiency utilized in common by all defendants.

The ultimate claim of Gallion is that all three defendants were guilty of negligence in their diagnoses of Gallion's condition.

Generally, a physician's duty to exercise the required skill or standard of care must arise out of the physician-patient relationship. The relationship can be said to arise when the physician undertakes treatment of the patient. *Flynn v. Bausch*, 238 Neb. 61, 469 N.W.2d 125 (1991).

In *Flynn*, the court, after citing several cases from other jurisdictions supporting those principles, went on to say: "Some courts, however, have held that a physician-patient relationship is not a necessary prerequisite for sustaining an action in medical malpractice, and have grounded liability upon the traditional duty analysis for negligence. See, e.g., *Davis v. Weiskopf*, 108 Ill. App. 3d 505, 439 N.E.2d 60 (1982)." 238 Neb. at 65, 469 N.W.2d at 128.

Davis v. Weiskopf, 108 Ill. App. 3d 505, 439 N.E.2d 60 (1982), involved a claim by the plaintiff that following an x ray of his right knee that showed a giant cell lesion suggestive of a primary bone neoplasm of malignant origin, a Dr. Weiskopf was advised of the x ray and then consulted with a Dr. Hagman. The plaintiff made an appointment with Dr. Hagman as he was instructed to do, but after two unsuccessful attempts by the plaintiff to see Dr. Hagman, he was informed that Dr. Hagman would not treat him. The basis of the plaintiff's action was failure to warn the plaintiff of his condition when Dr. Hagman knew or should have known of the results of the x-ray study. The trial court determined as a matter of law that there was no physician-patient relationship between the plaintiff and Dr. Hagman and dismissed the complaint. Although citing cases in which the duties of a physician were recognized after actual treatment had occurred, the appellate court concluded: "We can see no basis for a different rule under the *unusual* circumstances of the present case and conclude that the relationship between plaintiff and defendant was sufficient to impose a duty upon defendant to conform to the requisite standard of care in such cases." (Emphasis supplied.) *Id.* at 512-13, 439 N.E.2d at 65.

In arriving at its decision, the appellate court relied on *Pelham v. Griesheimer*, 92 Ill. 2d 13, 440 N.E.2d 96 (1982), and stated that it

> appears to be dispositve [sic] of the preliminary issue presented whether a physician's duty of exercising reasonable care is solely dependent upon a physician-patient relationship with a party. There, the court considered the scope of the professional duty of a defendant attorney to plaintiff, a third party who was not

> defendant's client. The court held that privity of contract is not a prerequisite to establishing a duty of care between a nonclient and an attorney in an action for legal malpractice . . . .

Davis v. Weiskopf, 108 Ill. App. 3d at 511, 439 N.E.2d at 64. However, in *St. Mary's Church v. Tomek*, 212 Neb. 728, 325 N.W.2d 164 (1982), we held that while a lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of legal duties, ordinarily this duty does not extend to third parties. Thus, we feel that *Davis v. Weiskopf* is of little value as precedent in this jurisdiction.

In *James v. Brown*, 637 S.W.2d 914 (Tex. 1982), the court reversed the court of appeals' affirmance of a summary judgment which had been granted by the trial court in a case in which three psychiatrists were sued because of a claimed negligent misdiagnosis of the plaintiff arising out of an involuntary hospitalization proceeding under the Texas Mental Health Code. The court stated:

> A cause of action for medical malpractice is essentially a negligence action. [Citation omitted.] A psychiatrist owes a duty to his patient to exercise that degree of skill ordinarily employed under similar circumstances by similar specialists in the field. [Citation omitted.] We hold that, as a matter of law, Tex.Rev.Civ.Stat.Ann. arts. 5547-1 *et seq.* impose such a duty on psychiatrists examining patients entrusted to them under the Mental Health Code. Article 5547-18 excuses from liability only those who act in good faith, reasonably, and *without negligence*.

(Emphasis in original.) *James v. Brown*, 637 S.W.2d at 918. As is apparent, Texas has a special statute that the court interpreted to mean that a psychiatrist who fails to act in good faith and without negligence may be liable. Again, we find this of little value in supporting Gallion's position.

The existence of a physician-patient relationship is normally a question of fact; however, the party claiming the existence of the relationship must allege some facts to show that the relationship came into existence. See *Flynn v. Bausch*, 238 Neb. 61, 469 N.W.2d 125 (1991).

The appellant evidently contends that a physician-patient relationship may be inferred from a reading of paragraphs 2 and 6 of the first amended petition. The second paragraph of that petition states that he was placed at the Lincoln Regional Center "by a Douglas County District Court judge for an examination of plaintiff's ability to stand trial on charges of first degree assault and use of a weapon." However, the appellant asserts that at the second paragraph he "merely attempts to inform the court of the purpose of his initial placement at LRC." Brief for appellant at 11. In pertinent part, paragraph 6 states:

> In a psychological evaluation dated October 9, 1989 defendant William R. Stone Jr. Ph.D., Consulting Clinical Psychologist on contract with the State of Nebraska to perform psychological evaluations of persons housed at LRC, cites "LRC records" which he says indicates [sic] plaintiff had voiced the view that the judge and plaintiff's attorney "are conspiring in some sort of plot" to keep plaintiff in jail because of some theft. . . . Utilizing "records" that Stone knew or should have known to be incomplete, or, knowing or having a duty to realize he lacked records supporting his finding, Stone negligently diagnosed plaintiff as suffering from a Paranoid Delusional Disorder. Plaintiff's diagnosis was not determined with reasonable medical certainty.

The appellant further argues that at paragraph 5 of the same petition, which refers to appellee Woytassek's evaluation on November 3, 1988, "it isn't difficult to conclude that the court ordered examination was completed and plaintiff was committed for treatment to LRC nearly a year prior to Stone's examination and diagnosis." Brief for appellant at 11. Although the appellant would have the court find that a physician-patient relationship had been established through a synthesis of these separate assertions, the factual basis for such a finding is lacking. Even if the appellant was accurate in stating that he remained at the Lincoln Regional Center for the purpose of treatment, there are no factual allegations to establish what treatment, if any, Gallion received or that Stone or either of the other two defendants had undertaken to provide

that treatment. In fact, Gallion does not suggest in his argument that a physician-patient relationship existed between himself and Woytassek and Chung. Gallion cannot escape the fact that the introductory allegation in both of his amended petitions was that all acts of negligence occurred while he was a resident of the Lincoln Regional Center, where he had been placed by the court for an examination to determine his ability to stand trial or, as stated in the second amended petition, "pursuant to" Neb. Rev. Stat. § 29-1823 (Reissue 1989).

In *Davis v. Tirrell*, 110 Misc. 2d 889, 443 N.Y.S.2d 136 (1981), the court considered whether a physician-patient relationship was established between the infant plaintiff and a psychiatrist retained by a school district to examine the child and state her opinion as to whether the child should be classified as emotionally handicapped. The court found that the defendant had not been retained to treat the child or to diagnose him for the *purpose* of treatment. In holding that the action should be dismissed due to the absence of any physician-patient relationship which could form the basis for an action based on medical malpractice, the court noted that there were other and perhaps more basic reasons for dismissal, in the following relevant discussion:

> Although the plaintiffs claim that the defendant rendered medical services in the nature of diagnosis of James' condition and that such diagnosis was negligently made, the real basis of their claim for damage is the defendant's testimony as to her opinion given in a quasi-judicial proceeding before the hearing officer. The plaintiffs claim that the defendant's testimony branded James as "emotionally handicapped" and resulted in the emotional stress and mental anguish for which they seek damages.
>
> This Court has been unable to find any case in which a plaintiff has attempted to sue a witness for damages allegedly resulting from his adverse testimony. To permit such an action would make it impossible to find any expert witness willing to risk a lawsuit based on his testimony as to his opinions and conclusions before any tribunal. And such cause of action if permitted would lead to an endless

> stream of litigation wherein defeated litigants would seek to redeem loss of the main action by suing to recover damages from those witnesses whose adverse testimony might have brought about the adverse result. . . .
>
> The defendant's testimony like that of any other expert witness was given for the purpose of assisting the tribunal hearing the dispute. It was not binding on anyone and could be accepted or rejected by both the Committee on the Handicapped or the hearing officer or the Commissioner of Education.

Id. at 895-96, 443 N.Y.S.2d at 140.

In rejecting a claim of privilege asserted by a mother whose parental rights were terminated, in which she objected to testimony by a practicing psychiatrist who had examined her pursuant to court order, the court in *In Interest of Hoppe*, 289 N.W.2d 613, 617 (Iowa 1980), said: "It is clear that a physician-patient relationship does not arise by reason of a court-ordered examination of the physical or mental condition of a defendant." This is simply a refinement of the general rule, previously cited, which we adopt.

Similarly, in the instant case, the appellees' diagnoses were submitted for the purpose of assisting the court in its determination of the appellant's competency to stand trial; the court was free to accept or reject their opinions.

The question of whether a defendant is competent to stand trial is one of fact to be determined by the trial court, and the means employed in resolving the question are discretionary with the trial court. *Marteney v. State*, 210 Neb. 172, 313 N.W.2d 449 (1981); *State v. Rhodes*, 191 Neb. 131, 214 N.W.2d 259 (1974).

The appellant also asserts that as evidenced by his second amended petition, any defects in his first amended petition could have been cured. He contends that the second amended petition shows that his placement at the Lincoln Regional Center was for the purpose of treatment, pursuant to § 29-1823. Section 29-1823 provides:

> If at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district

> court by the county attorney, by the accused, or any person for the accused. The judge of the district court of the county wherein the accused is to be tried shall have the authority to determine whether or not the accused is competent to stand trial. The district judge may also cause such medical, psychiatric or psychological examination of the accused to be made as he deems warranted and hold such hearing as he deems necessary. Should he determine after a hearing that the accused is mentally incompetent to stand trial he shall order the accused to be committed to a state hospital for the mentally ill until such time as the disability may be removed. The cost of such an examination, when ordered by the court, shall be the expense of the county wherein the crime is charged. The district judge may allow any physician, psychiatrist or psychologist a reasonable fee for his services which amount, when determined by the district judge, shall be certified to the county board who shall cause payment to be made.

This section deals primarily with the determination of the accused's competence to stand trial. While it may be inferred that treatment will be provided "until such time as the disability may be removed," Gallion's placement in the Lincoln Regional Center was for the purpose of examination and diagnosis as to his ability to stand trial and was insufficient to establish that Gallion was diagnosed by Stone for the purpose of treatment, that he received treatment from Stone, or that Stone established a physician-patient relationship with him.

The longstanding rule is that to state a cause of action for negligence, one must plead facts from which it can be inferred that the defendant owed a legal duty to protect the plaintiff from injury, that the defendant failed to discharge that duty, and that damage proximately resulted from that failure. *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993); *Widga v. Sandell*, 236 Neb. 798, 464 N.W.2d 155 (1991).

In his brief, the appellant concludes that in the second amended petition, "[he] simply states that he was a resident of LRC who was placed there under section 29-1823 and that Stone examined and diagnosed him." Brief for appellant at 10.

However, in the absence of facts which would support the appellant's allegation of a physician-patient relationship, no duty has been established. This assignment of error is thus without merit.

The defendants Woytassek and Chung claim the demurrer was properly sustained on the theory that they enjoyed absolute immunity from liability because they rendered opinions for use in court by order of the court. Gallion asserts that officials acting in quasi-judicial functions enjoy only a qualified immunity and that the district court erred in finding that defendants Woytassek and Chung enjoyed absolute immunity.

As alleged in the first amended petition, on October 4, 1988, Woytassek diagnosed the appellant "as having a 'delusional (paranoid) disorder of the persecutory type.' " According to the first amended petition, Woytassek then submitted his diagnosis and finding of incompetence to the Douglas County District Court; based on this finding, the court found Gallion incompetent to stand trial and committed him to the Lincoln Regional Center. As to appellee Chung, the first amended petition asserts that Chung addressed a letter to the court, dated November 2, 1989, suggesting that Gallion suffered from a psychotic paranoid disorder. While Gallion concedes that Woytassek and Chung were acting under orders of the court when they examined him and submitted the results of their examinations, he argues that this should not permit the defendants "to knowingly, willingly and maliciously negligently diagnose" and "submit said diagnosis to the court." Brief for appellant at 9.

In finding that a county attorney enjoys quasi-judicial immunity when acting within the scope of his authority and in good faith, this court noted in *Koch v. Grimminger*, 192 Neb. 706, 223 N.W.2d 833 (1974), that the question of a public official's immunity from suit for torts committed in the course of his official duties had been considered many times by the court. The applicable principle was restated:

> " 'Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him he is sometimes called a quasi judicial officer, and when so acting he is usually given immunity from

> liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without wilfulness, malice, or corruption.' "

Id. at 709, 223 N.W.2d at 835.

In *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977), this court considered whether a county judge, public prosecutor, and sheriff were immune from liability in an action brought for the wrongful death of a minor child. The court noted that it is clearly established that judges are immune from civil actions for damages for acts performed in the course of their official functions, unless the judge has acted in the clear absence of all jurisdiction and with knowledge of such jurisdictional deficiency.

The court further found that strong policy reasons exist to extend immunity to a public prosecutor, noting that " '[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.' " *Id.* at 71, 251 N.W.2d at 869-70, quoting *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). Similar arguments were found to support a sheriff's immunity from liability for carrying out ministerial acts: "A ministerial officer, acting under a process regular and valid on its face issuing from a court or tribunal with apparent jurisdiction to issue the same, is protected in obeying it." *Koepf v. County of York*, 198 Neb. at 72, 251 N.W.2d at 870.

These policy arguments support our holding today that a psychiatrist who has been directed by a court to evaluate a patient for the purposes of determining competency to stand trial is entitled to absolute immunity from a suit for damages based on that examination, made within the scope of his or her authority and while acting without willfulness, malice, or corruption.

This issue was addressed in *Moses v. Parwatikar*, 813 F.2d 891, 892 (8th Cir. 1987), *cert. denied* 484 U.S. 832, 108 S. Ct. 108, 98 L. Ed. 2d 67, in which the court reiterated that " 'non-judicial persons who fulfill quasi-judicial functions intimately related to the judicial process have *absolute*

immunity for damage claims arising from their performance of the delegated functions.' " (Emphasis supplied.) (Quoting *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), *cert. denied* 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58.) In *Moses*, a state prisoner brought a civil rights action against a psychiatrist who had performed a competency examination prior to trial. The court found that the psychiatrist had performed a function which was essential to the judicial process and that in such a situation, two problems were likely to develop in the absence of absolute immunity:

> First, psychiatrists will be reluctant to accept court appointments. This will hurt the indigent criminal defendants who, without sound psychiatric help, may not be able to prove their mental deficiencies. Second, the threat of civil liability may taint the psychiatrist's overall opinions. The disinterested objectivity, so necessary to an accurate competency determination, will be lost. In short, only by granting absolute immunity will the paths to the truth remain open.

Moses v. Parwatikar, 813 F.2d at 892. See, also, *Burkes v. Callion*, 433 F.2d 318 (9th Cir. 1970), *cert. denied* 403 U.S. 908, 91 S. Ct. 2217, 29 L. Ed. 2d 685 (1971) (court-appointed psychiatrists immune from liability for damages); *Bartlett v. Weimer*, 268 F.2d 860 (7th Cir. 1959), *cert. denied* 361 U.S. 938, 80 S. Ct. 380, 4 L. Ed. 2d 358 (1960); *Bader v. State*, 43 Wash. App. 223, 716 P.2d 925 (1986) (psychiatrists appointed by court act as arm of court and are protected from suit by absolute judicial immunity); *Mullen v. McKnelly*, 693 S.W.2d 837 (Mo. App. 1985) (physician appointed by court to examine mental health of person enjoys same immunity extended to judges); *Siebel v. Kemble*, 63 Haw. 516, 631 P.2d 173 (1981) (court-appointed psychiatrists acting as arm of court entitled to absolute immunity).

Thus, it is evident that in the performance of a court-ordered competency evaluation, a psychiatrist is acting as a quasi-judicial officer, and we hold that he or she is entitled to absolute immunity from liability when acting in the course of those official duties. While Gallion contends that an action against a judicially immune official may be maintained when it

is shown that such official acted outside of his or her jurisdiction, the petition fails to allege facts which would establish that the defendants so acted. In *Koch v. Grimminger*, 192 Neb. 706, 223 N.W.2d 833 (1974), this court noted that quasi-judicial immunity would not protect a prosecutor who acted outside the scope of his or her authority by filing a charge with the knowledge that it was groundless in law or in fact, thus acting with a corrupt motive. While the plaintiff in that case had alleged that the defendant had acted maliciously, intentionally, and recklessly, the court stated that

> [t]he use of such words alone without allegations of fact from which malice or corruption may be inferred is insufficient to allege malice, corruption, or intentional wrongdoing in fact so as to take the acts outside the scope of his authority. The words in question constitute mere legal conclusions. Where it is necessary to allege actual corruption or bad motive or malice in order to state a cause of action, there must be an allegation of the ultimate facts from which the conclusion may be inferred in order to withstand a demurrer.

Id. at 714, 223 N.W.2d at 837.

The first amended petition fails to allege facts which would establish that appellees Woytassek and Chung acted outside the scope of their authority. Thus, as to Woytassek and Chung, the immunity afforded to quasi-judicial officials applies; the first amended petition therefore fails to state facts sufficient to constitute a cause of action, and the demurrer of Woytassek and Chung was properly sustained on that ground.

Finally, Gallion contends that the district court erred in finding that the defects in the first amended petition could not be cured.

Citing Neb. Rev. Stat. § 25-854 (Reissue 1989), we held in *Wichman v. Naylor*, 241 Neb. 249, 487 N.W.2d 291 (1992), that a court, after sustaining a demurrer, must afford the plaintiff the opportunity to replead by amending his or her petition. That section provides that "[i]f 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."

Section 25-854 does not provide an absolute right of amendment. Before error can be predicated upon the refusal of the court to permit an amendment to a petition after demurrer thereto is sustained, the record must show that under the circumstances, the ruling of the court was an abuse of discretion. *Suzuki v. Gateway Realty*, 207 Neb. 562, 299 N.W.2d 762 (1980).

The appellant erroneously argues that he has shown with his second amended petition that defects in the first amended petition could have been cured, and he has apparently attempted to cure any deficiencies with slight modifications in the language of the second amended petition. We have given Gallion the benefit of his filing of the second amended petition without discussing the merits of the trial court's ruling that it was a nullity and of no effect. As we have pointed out, it also fails to allege any facts sufficient to constitute a cause of action.

If there is no reasonable possibility that a cause of action can be stated, after the sustaining of a demurrer, leave to amend the pleadings need not be granted. *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984).

Gallion has twice alleged that he was placed in the Lincoln Regional Center for the purpose of an examination, once directly and once by inference in claiming that he was placed there pursuant to § 29-1823, which by its very terms is for the purpose of examination. It would appear that having proceeded on that theory, he cannot now be heard again to attempt to change his factual allegations to conform to the exigencies of the case. There appear to be no facts which could be pleaded to overcome the rule of absolute immunity or to prove the existence of a physician-patient relationship.

The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL H. WINDELS, APPELLANT.

503 N.W.2d 834

Filed August 13, 1993. No. S-92-137.

1. **Service of Process: Warrants: Notice.** Service of a warrant by regular mail will not support an inference that the accused had notice of a command to appear in court.
2. **Presumptions: Proof.** A presumption of receipt of mail by the addressee does not arise unless it is shown that the letter was properly addressed, stamped, and mailed.
3. **Probation and Parole: Time.** A motion or information to revoke probation may be filed during the term of probation or within a reasonable time thereafter.
4. **Probation and Parole: Due Process: Notice.** Neb. Rev. Stat. § 29-2267 (Reissue 1989) and due process of law require that a probationer have notice concerning the grounds of an alleged probation violation.
5. **Probation and Parole: Warrants: Service of Process: Time: Proof.** The prosecuting authority is required to demonstrate diligent effort in serving a warrant for violation of probation whenever there is a significant lapse of time between the end of the probationary term and the due process hearing afforded on violation of probation.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and WRIGHT, Judges, on appeal thereto from the District Court for Douglas County, THEODORE L. CARLSON, Judge, on appeal thereto from the County Court for Douglas County, JANE H. PROCHASKA, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions to dismiss.

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

PER CURIAM.

Upon a plea of guilty to first-offense driving while intoxicated, the defendant was placed on probation for 1 year beginning October 3, 1989. The defendant was ordered to abstain from the use of alcoholic beverages, to obtain

evaluation for chemical dependency from an accredited agency within 30 days, to pay any fees, to follow all recommendations, and to successfully complete any recommended programs.

On September 28, 1990, the Douglas County Court issued a warrant for the defendant's arrest for violation of probation. On October 1, 1990, an affidavit alleging the defendant's violation of probation was filed in the county court. The return on the warrant states that on October 3, 1990, notice of the warrant was mailed to the defendant's address by regular U.S. mail without return receipt requested.

Apparently, the defendant did not learn of the existence of the warrant until April 27, 1991, when he turned himself in. A hearing on the violation of probation was held on June 13, 1991. Although the defendant stipulated that he had consumed alcohol while on probation and had failed to attend 45 Alcoholics Anonymous meetings, he contended the county court should dismiss the charge because the State made no diligent effort to serve proper notice on him.

The county court found the defendant guilty of violation of probation, and he was sentenced to jail for 30 days and ordered to pay a fine of $500. The defendant's driver's license was suspended for 180 days from the date of discharge from jail or payment of the fine.

The defendant appealed to the district court, where the judgment was affirmed.

The defendant then appealed to the Nebraska Court of Appeals and assigned as error the district court's affirmance of his conviction. He argued that the district court erred in affirming the judgment because the State had failed to execute and serve the warrant in a timely fashion, which deprived the defendant of a prompt hearing as required by Neb. Rev. Stat. § 29-2267 (Reissue 1989), and because prosecution of the violation was barred by Neb. Rev. Stat. § 29-1207 (Reissue 1989).

The Court of Appeals found:

> The warrant was mailed to Windels at his last known address October 3, 1990. However, Windels did not turn himself in until April 27, 1991. As we construe the facts in favor of the State, it can be inferred that Windels knew

> about the warrant and that he caused the delay. Under the facts presented here, the procedure to revoke Windels' probation commenced prior to the end of his probationary period. After Windels turned himself in on April 27, a hearing was afforded him in a prompt and reasonable manner on June 13, 1991.

State v. Windels, 2 NCA 283, 286 (1993).

As to the defendant's argument regarding a speedy trial, the Court of Appeals found that to be without merit "because the speedy trial provisions do not apply to parole or probation proceedings," *id.*, and the defendant had "failed to allege any specific prejudice which resulted from any delay in holding his hearing," *id.* at 287.

The defendant contends that the Court of Appeals erred in finding that the defendant was properly served with a warrant on the violation of probation and that he was afforded a prompt hearing on the alleged violation of probation.

The defendant correctly points out that there is no evidence in the record to support a finding that the defendant had actual notice of the warrant prior to April 27, 1991, and that there is no evidence that the State made a diligent effort to serve a warrant on the defendant. Service of a warrant by regular mail will not support an inference that the accused had notice of a command to appear in court. See *State v. Richter*, 240 Neb. 223, 481 N.W.2d 200 (1992). Furthermore, a "presumption of receipt of mail by the addressee does not arise unless it is shown that the letter was properly addressed, stamped, and mailed." (Emphasis omitted.) *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 18, 480 N.W.2d 192, 196 (1992). In this case, there is no evidence that the envelope the warrant was mailed in was properly addressed, stamped, and mailed.

The defendant argues that since § 29-2267 requires the State to afford a probationer a prompt hearing upon the filing of a motion or information to revoke probation, the State's lack of diligence in serving the warrant forfeits the State's right to revoke probation after the probationary term has ended.

Nebraska law authorizes the filing of motions or informations to revoke probation during the term of probation and within a reasonable time thereafter. *State v. Ladehoff*, 229

Neb. 111, 425 N.W.2d 352 (1988). Section 29-2267 and due process of law require that the probationer must have notice concerning the grounds of the alleged probation violation. *State v. Kartman*, 192 Neb. 803, 224 N.W.2d 753 (1975).

In this case, the defendant related a lapse in sobriety in April 1990 to his probation officer and continued reporting regularly to his probation officer through his last scheduled appointment on September 19, 1990, 14 days before his probation was to terminate. The motion to revoke the defendant's probation was not filed until the day before the end of the defendant's probationary term, and the defendant was not personally served with the warrant on the alleged violation of probation until 6 months and 26 days after the filing of the motion to revoke probation. There is nothing in the record to indicate that the State made any effort, other than mailing the warrant to the defendant's home address, to serve the defendant with the warrant.

Other jurisdictions which permit revocation proceedings after the term of probation has ended still require the prosecuting authority to demonstrate diligent effort in serving the warrant for violation of probation whenever there is a significant lapse of time between the end of the probationary term and the due process hearing afforded on violation of probation. See, *State v. Martens*, 338 So. 2d 95 (La. 1976); *State v. Berry*, 287 Md. 491, 413 A.2d 557 (1980); *People v. Cooper*, 54 Misc. 2d 42, 280 N.Y.S.2d 920 (1967); *Commonwealth v. Smith*, 266 Pa. Super. 234, 403 A.2d 1326 (1979); *Langston v. State*, 800 S.W.2d 553 (Tex. Crim. App. 1990).

In *Langston v. State, supra*, the Texas Court of Criminal Appeals held that authorities had not exercised necessary diligence in arresting the defendant 8 months after a motion to revoke his probation had been filed and 7 1/2 months after the expiration of his probationary term when the defendant's address was known and there was no indication that the defendant was hiding.

In *Commonwealth v. Smith, supra*, the Superior Court of Pennsylvania held that the State's failure to explain the 7 1/2 months' delay between the defendant's conviction for another

crime during his probationary period and his probation revocation hearing, which took place 11 months after expiration of the defendant's probationary period, denied the defendant's right to a prompt hearing regarding revocation of probation. In evaluating the reasonableness of the delay, the court used a three-part test, considering (1) the length of the delay, (2) the reasons for the delay, and (3) the prejudice to the defendant resulting from the delay. The court concluded that in light of the State's failure to explain the delay, "the fact that the hearing did not take place until 11 months 'after the expiration of the probationary period demonstrates that appellant was prejudiced by the delay. . . .' " 266 Pa. Super. at 238, 403 A.2d at 1328-29.

The Maryland Court of Appeals has held that "in order to comply with the dictates of due process, the State must bring about the revocation hearing with due diligence or reasonable promptness so as to avoid prejudice to the defendant." *State v. Berry*, 287 Md. at 500, 413 A.2d at 562. The court went on to state that

> at a minimum, the State should make reasonable efforts to initiate the proceedings and to locate and serve the defendant with process so as to bring him to trial promptly. On the other hand, we think the trial court should consider the availability of the defendant to receive such process and the extent to which he has made his presence known in the community in which he lives. While what action is timely, diligent or reasonable will differ on a case by case basis, we do believe that inactivity and inattention by the State for an inordinate period of time, where the defendant has been available and has not concealed his whereabouts, may be sufficient to persuade a court that fundamental fairness should prevent the State from proceeding with the revocation hearing.

287 Md. at 500, 413 A.2d at 563.

In this case, the record does not show that the defendant was unavailable or concealed his whereabouts, and the State made no explanation concerning its delay in prosecuting the defendant for his probation violation. In *Commonwealth v. Ruff*, 272 Pa. Super. 50, 414 A.2d 663 (1979), the Pennsylvania

Superior Court stated that a certain amount of prejudice necessarily follows from a probation revocation which takes place after the probationary period expires and that this prejudice renders a delay in holding the probation revocation hearing unreasonable when it is conjoined with other factors such as a lack of diligence by law enforcement officials.

Since the State failed to diligently pursue the revocation of the defendant's probation and has failed to explain its delay in prosecuting the defendant on that charge, it was unreasonable to revoke his probation nearly 9 months after the expiration of the defendant's term of probation.

The judgment of the Court of Appeals is reversed, and the cause is remanded to the county court with directions to dismiss the prosecution.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BOSLAUGH, J., dissenting.

The cases are divided on the effect of a delay in notifying the defendant that he has been charged with a violation of probation. See Annot., 13 A.L.R.4th 1240 (1982). A number of cases have held that delay in notifying or apprehending the defendant does not prevent prosecution for the violation in the absence of proof of prejudice to the defendant. Ordinarily, a conviction will not be set aside unless the defendant meets his burden of showing that the claimed error created actual prejudice rather than the mere possibility of prejudice. *State v. Valdez*, 239 Neb. 453, 476 N.W.2d 814 (1991).

In this case there is no evidence of any prejudice to the defendant from the delay in executing the warrant. The evidence relating to the violation of probation is undisputed. Under these circumstances, I would not reverse the judgment.

STATE OF NEBRASKA EX REL. FIRSTIER BANK, N.A., OMAHA, RELATOR, V. HONORABLE JAMES A. BUCKLEY, JUDGE OF THE DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA, RESPONDENT. STATE OF NEBRASKA EX REL. FIRSTIER BANK, N.A., OMAHA, RELATOR, V. HONORABLE STEPHEN A. DAVIS, JUDGE OF THE DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA, RESPONDENT.

503 N.W.2d 838

Filed August 13, 1993. Nos. S-92-1082, S-92-1083.

1. **Mandamus: Words and Phrases.** Mandamus is a law action. It is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
2. **Mandamus.** To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.
3. _____. Mandamus lies only to enforce performance of a mandatory ministerial act or duty and is not available to control judicial discretion. The general rule is that an act is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
4. **Attorney and Client: Judgments.** A court deciding a motion to disqualify counsel must balance several competing considerations, including the privacy of the attorney-client relationship, the prerogative of a party to choose counsel, and the hardships that disqualification imposes on parties and the entire judicial process.
5. **Attorney and Client: Conflict of Interest.** An attorney disqualification motion, seeking to protect the use of confidences and secrets against a former client, requires the balancing of the first client's right to preserve its confidences against a second client's right to the counsel of its own choosing, but preservation of client confidences is given greater weight in that balancing.
6. _____: _____. An attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client's in the same subject matter to which the confidence relates or in matters substantially related thereto as to be, in effect, a part thereof.
7. **Attorney and Client: Conflict of Interest: Words and Phrases.** In defining "substantially related," a court must look to whether counsel may have received confidential information from the former client that could be used against it in the subsequent representation.
8. **Attorney and Client: Conflict of Interest.** An attorney must avoid the present representation of a cause against a client of a law firm with which he or she was formerly associated, and which cause involves a subject matter which is the same

as or substantially related to that handled by the former firm while the present attorney was associated with that firm.

Original action. Peremptory writ issued.

Louis A. Huber III and Daniel R. Young, of Smith, Gill, Fisher & Butts, P.C., and E. Terry Sibbernsen, P.C., for relator.

No appearance for respondents.

David S. Houghton and T. Geoffrey Lieben, of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., for amici curiae Carroll et al.

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

HASTINGS, C.J.

These consolidated cases are original actions for writs of mandamus. Relator, FirsTier Bank, N.A. (FirsTier), seeks writs from this court compelling respondents, the Honorable James A. Buckley and the Honorable Stephen A. Davis, judges of the district court for Douglas County, Nebraska, to enter orders disqualifying the Omaha, Nebraska, law firm of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C. (Lieben, Dahlk), from representing the plaintiffs Samuel C. Carroll and Joan C. Nellson in a lawsuit pending against FirsTier before Judge Buckley, and the plaintiffs Billie Pepper Trachtenbarg et al. in a lawsuit pending against FirsTier before Judge Davis. We grant the petitions.

The factual statement of these cases is taken largely from the findings of fact made by a special master appointed by this court, the pleadings in the pending cases, the proceedings before Judges Buckley and Davis on the original motions to disqualify counsel, and various exhibits which have found their way into this record. The underlying lawsuits, captioned "Samuel C. Carroll and Joan C. Nellson vs. FirsTier Financial Inc. and FirsTier Bank, N. A. Omaha," Douglas County District Court, docket 905, page 801, pending before Judge Buckley, and "Billie Pepper Trachtenbarg, Jean Pepper Horen, Linda Priesman Smith and Steven [P]riesman vs. FirsTier Financial Inc. and FirsTier Bank N. A. Omaha," Douglas

County District Court, docket 905, page 780, pending before Judge Davis, involve claims that Omaha National Bank (ONB), predecessor of FirsTier, as executor of the Anna B. Carroll estate and as trustee of the Issac Zimman Testamentary Trust, fraudulently engaged in self-dealing. It is alleged that ONB, during the year 1971, accepted tender offers by the Omaha National Corporation (ONC), ONB's holding company, to purchase shares of stock in ONC held as assets of the respective estate and trust, and transferred those shares to ONC for $20 per share; that ONB failed to notify or obtain the approval of the beneficiaries of the estate and of the trust regarding such self-dealing; and that ONB obtained approval of its final account without disclosing the self-dealing to the county court. The various plaintiffs further alleged that the self-dealing constituted a breach of trust on the part of ONB amounting to fraud and bad faith, and the plaintiffs sought rescission of the sale, recovery of earnings and dividends earned on the stock sold, and return of all executor and trustee fees paid to ONB.

Although not alleged in the petitions in these underlying actions, it otherwise appears from the record that ONB was represented as executor in the Carroll estate by the Omaha law firm of Fitzgerald, Brown, Leahy, McGill & Strom (Fitzgerald, Brown) and that these same attorneys represented ONB in a similar case involving the estate of Idella Hamlin George. As part of the services rendered by Fitzgerald, Brown, that firm obtained an order of discharge of the executor from the county court in November 1972 in the Carroll case. Fitzgerald, Brown, in representing ONB in the George estate, prepared the report and petition for approval of the annual accounting for the year 1971, which included a computer printout of the tender offer transaction.

The plaintiffs in the Carroll case, as well as the plaintiffs in the Trachtenbarg and two other similar cases, are represented by the law firm of Lieben, Dahlk. Eight attorneys moved from the Fitzgerald, Brown firm on August 31, 1988, to form with others the Lieben, Dahlk firm. At that time, there were 28 attorneys in the Fitzgerald, Brown firm. Of those attorneys leaving, only T. Geoffrey Lieben was associated with the Fitzgerald, Brown firm during the activities complained of.

Lieben was originally employed by Fitzgerald, Brown on May 24, 1971, and was made a partner on April 1, 1976. The remaining Lieben, Dahlk attorneys became associated with Fitzgerald, Brown during the period from May 1, 1974, to August 15, 1987.

In its petitions seeking mandamus, FirsTier alleges that in the Carroll estate, the services of Fitzgerald, Brown "included obtaining the Order of Discharge of the Executor from the County Court in November of 1972" and that "Plaintiffs in the underlying action now contest the validity of that Order of Discharge." Although no such allegation concerning the contested validity has been made by the plaintiffs in their petitions, that inference could be drawn. FirsTier also alleges that in the George trust, at least, it continued to inform Fitzgerald, Brown of its actions as trustee as part of filing of annual reports until 1976, when the Nebraska Probate Code made filing such reports unnecessary. FirsTier concludes by alleging that the orders of respondents denying FirsTier's motions to disqualify Lieben, Dahlk are violative of "both the letter and spirit of Cannons [sic] 4, 5 and 9 of the Code of Professional Responsibility and Neb. Rev. Stat. §7-105" and that each order

> imposes a substantial injury upon Relator in that it permits counsel who were formerly members of the firm which represented Relator from [sic] later repudiating that representation and suing the Relator on matters substantially related to the former firm's representation of Relator, all in violation of Relator's justified and protected right to freely communicate with its counsel and in return demand its counsel's loyalty.

No allegations are made as to what information Lieben, Dahlk possessed as a result of the prior relationship with Fitzgerald, Brown which would be of assistance to the plaintiffs in the underlying litigation and to the detriment of FirsTier.

T. Geoffrey Lieben, as previously stated, was the only Lieben, Dahlk attorney associated with Fitzgerald, Brown at the time of the probate of the Carroll estate or at the time during which the George annual report was prepared. Lieben testified via affidavit that he had not worked on the cases, had no

knowledge of self-dealing, had not discussed the matters with, or received information from, anyone at the Fitzgerald, Brown firm, and had not seen any of the files. In addition, Lieben had all of his timesheets from the period of December 1, 1971, through August 30, 1972, which disclosed no occasion on which he worked on any of the files involved.

All six of the transplanted Fitzgerald, Brown attorneys who remain at Lieben, Dahlk testified by affidavit, in summary, that to the best of their knowledge, they performed no legal work in connection with either the Carroll or George case, never discussed the cases with or received information about the cases from any person associated with the Fitzgerald, Brown law firm, and had not seen any of the files.

Charles Schorr testified that he was the Fitzgerald, Brown partner who represented ONB in the Carroll estate. He agreed that he could not remember if he knew at the time of the stock sale that ONC was the buyer. When asked if at any time anybody from ONB told him that ONC was going to buy or had in fact purchased the stock, he replied that he had "no recollection of any contact, seeking any advice prior to the tender as to whether it should or should not be made." Schorr also explained that in reviewing ONB's file, he saw no petition to the county court seeking the approval of the tender offer. Schorr testified that he had no recollection of whether Lieben ever worked on the Carroll file, nor did he have any records from which he could make that determination. He agreed that the timesheets, if available, would disclose that information. However, Schorr also said that under the policies and practices of Fitzgerald, Brown, if the firm were presented with the opportunity to represent the heirs of the Carroll estate in a claim against FirsTier, it could not do so.

Joseph Barmettler, who has been associated with the Fitzgerald, Brown firm since 1959 and is presently its senior partner, testified that any client of the firm, including ONB in these situations, would be considered a client of the whole firm and all the attorneys in it. He also said that except for an unusual case, all files of the firm would be available to anyone associated with the firm.

Robert Brown, who was an officer of ONB during the time

of the alleged self-dealing, testified by deposition that he did not recall any conversation with Schorr in 1970 and 1971 regarding the tender offers and that he never had any discussions with Schorr that Brown felt were confidential which he did not want disclosed to the various beneficiaries.

FirsTier has articulated the issue before this court as follows:

> Whether Nebraska law permits an attorney, having belonged to the firm which represented a client with regard to a transaction, to later prosecute a civil suit against that client with regard to the very same transaction and other substantially similar transactions, and argue, as part of the present representation, that the past representation was at best ineffective and at worst a fraud upon the Court?

Mandamus is a law action. It is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. Scoular Prop. v. Bemis*, 242 Neb. 659, 496 N.W.2d 488 (1993); *State ex rel. Pederson v. Howell*, 239 Neb. 51, 474 N.W.2d 22 (1991).

To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear. Mandamus lies only to enforce performance of a mandatory ministerial act or duty and is not available to control judicial discretion. The general rule is that an act is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990).

A court deciding a motion to disqualify counsel must balance several competing considerations, including the privacy of the attorney-client relationship, the prerogative of a party to choose counsel, and the hardships that disqualification imposes

on parties and the entire judicial process. *Lansing-Delaware Water District v. Oak Lane Park, Inc.*, 248 Kan. 563, 808 P.2d 1369 (1991). An attorney disqualification motion, seeking to protect the use of confidences and secrets against a former client, requires the balancing of the first client's right to preserve its confidences against a second client's right to the counsel of its own choosing, but preservation of client confidences is given greater weight in that balancing. *Donohoe v. Consolidated Operating & Production Corp.*, 691 F. Supp. 109 (N.D. Ill. 1988).

In *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. at 993, 458 N.W.2d at 253, this court stated:

> [W]hen an attorney who was intimately involved with the particular litigation, and who has obtained confidential information pertinent to that litigation, terminates the relationship and becomes associated with a firm which is representing an adverse party in the same litigation, there arises an irrebuttable presumption of shared confidences, and the entire firm must be disqualified from further representation. This rule is consistent with Canons 4, 5, and 9 and DR 5-105(D) of the Code of Professional Responsibility, *Baker v. Farnsworth*, 117 Neb. 504, 221 N.W. 17 (1928), and *Federal Trust Co. v. Damron*, 124 Neb. 655, 247 N.W. 589 (1933). Through this rule the court, the parties, and the public can be assured that client confidences will be secure and will not pass, intentionally or inadvertently, from one party to an opposing party in the same litigation.

This court also cited the following language:

> We also note the decision in *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983). In that case an entire law firm changed sides and, with the assistance of another firm acting as trial counsel, began to represent an adverse party in litigation which was substantially related to the former representation. The court stated at 1267: "There is an exception [to disqualification] for the case where a member or associate of a law firm (or government legal department) changes jobs, and later he or his new firm is retained by an adversary of a client in his

former firm. In such a case, even if there is a substantial relationship between the two matters, the lawyer can avoid disqualification by showing that effective measures were taken to prevent confidences from being received by whichever lawyers in the new firm are handling the new matter. [Citations omitted.] The exception is inapplicable here; the firm itself changed sides."

The court also specifically rejected the use of Chinese walls in cases where the firm switches sides: "[A] law firm is not permitted to switch sides if its former representation was substantially related to its new representation, no matter what screens it sets up." *Id.* at 1268. Cf. *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983). Additionally, the court indicated that where a firm switches sides, Canon 9 alone would be the basis for a strict rule of disqualification: "While 'appearance of impropriety' as a principle of professional ethics invites and maybe has undergone uncritical expansion because of its vague and open-ended character, in this case it has meaning and weight. For a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public—or for that matter the bench and bar—by the filing of affidavits, difficult to verify objectively, denying that improper communication has taken place or will take place between the lawyers in the firm handling the two sides. Clients will not repose confidences in lawyers whom they distrust and will not trust firms that switch sides as nimbly as Schwartz & Freeman." 708 F.2d at 1269.

State ex rel. Freezer Servs., Inc. v. Mullen, 235 Neb. at 994-95, 458 N.W.2d at 253-54.

In *Brown v. Dist. of Col. Bd. of Zoning Adj.*, 486 A.2d 37 (D.C. App. 1984), the Court of Appeals for the District of Columbia held that when a law firm has provided representation in the first of two related matters, and an individual attorney who has since left the law firm is representing a party (in *Brown*, the government) in the second matter adverse to his former firm's client in the first matter,

disqualification will be required *unless* the attorney clearly shows that while at the firm, he did not work on the case and was not otherwise in a position to gain access to confidential information related to the first matter. The "substantially related" test originated in *T. C. & Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953), *aff'd* 216 F.2d 920 (2d Cir. 1954). In defining "substantially related," the court looked at whether counsel may have received confidential information from the former client that could be used against it in the subsequent representation.

In *Berg v. Marine Trust Co., N.A.*, 141 Wis. 2d 878, 416 N.W.2d 643 (Wis. App. 1987), the Wisconsin Court of Appeals found irrelevant to its determination the fact that defendant's attorney was not involved in earlier representation of the plaintiff and that the former partner who had previously represented plaintiff was no longer with the firm. The court found generally that defendant's attorney should be disqualified due to the representations' being substantially related and that plaintiff was entitled to insist on protection of confidences. The court did, however, create a default mechanism by which an attorney could avoid disqualification by showing that effective measures were taken to prevent the former client's confidences from being shared by the attorneys in the new firm in handling the new matter.

The Kansas Supreme Court has stated, in adherence to the American Bar Association's Model Rules of Professional Conduct 1.10, that an attorney is not subject to disqualification merely because of that attorney's association with another attorney who represents a client, but, rather, that the attorney must have acquired confidential and material information before being excluded. However, once the attorney is deemed to have acquired such information, representation by other members of the attorney's firm is barred, as well as representation by the "tainted" attorney. *Lansing-Delaware Water District v. Oak Lane Park, Inc.*, 248 Kan. 563, 808 P.2d 1369 (1991).

In *Donohoe v. Consolidated Operating & Production Corp.*, 691 F. Supp. 109, 118 (N.D. Ill. 1988), the court stated:

> Both the substantial relationship test and the series of

> rebuttable presumptions that it spawns represent our Court of Appeals' attempt to balance the first client's right to preserve its confidences against the second client's right to counsel of its own choosing. [Citation omitted.] Preservation of client confidences has quite properly been given the greater weight in that balancing.

As is quite apparent, many courts have struggled with this problem. Although not specifically mentioned in the cases cited above, a very real and critical consideration is the perception that the public has of the legal profession generally. It is difficult to explain to an individual client how an attorney who was once associated with a firm can leave that firm and now bring suit against that client involving the same or substantially similar subject matter formerly handled by his or her prior firm. Resort to affidavits stating that "I didn't look at the file" or asserting the existence of Chinese walls are of little consolation to that client and do little or nothing to erase the appearance of impropriety. Although the record does not disclose what information the former members of the Fitzgerald, Brown firm possessed, nothing has been shown in the record which demonstrates that the structure of either law firm is such that it is unlikely that any attorney now or formerly associated with Fitzgerald, Brown could have had access to a client's secret. See *id.*

To avoid the necessity of agonizing over this type of decision, to aid the bar in its coping with situations such as this, to properly preserve not only the actual existence, but also the appearance, of propriety, and to eliminate as nearly as possible unnecessary and unwarranted criticism of the legal profession, we find it necessary to adopt a "bright line" rule. We now hold that an attorney must avoid the present representation of a cause against a client of a law firm with which he or she was formerly associated, and which cause involves a subject matter which is the same as or substantially related to that handled by the former firm while the present attorney was associated with that firm.

Application of this rule to the present controversy shows that the representation by Lieben, Dahlk of these causes of action against FirsTier runs head-on into the prohibition of that rule.

Accordingly, we find that the respondents had no alternative but to disqualify Lieben, Dahlk, and as their duty to do so is one imposed by law, which duty existed at the time the writ of mandamus was applied for, and their duty to act was clear, such writ must issue. Therefore, we direct that a peremptory writ of mandamus issue, directing the respondents as judges of the district court for Douglas County to disqualify Lieben, Dahlk from further representation of the plaintiffs in the litigations captioned "Samuel C. Carroll and Joan C. Nellson vs. FirsTier Financial Inc. and FirsTier Bank, N. A. Omaha," Douglas County District Court, docket 905, page 801, and "Billie Pepper Trachtenbarg, Jean Pepper Horen, Linda Priesman Smith and Steven [P]riesman vs. FirsTier Financial Inc. and FirsTier Bank N. A. Omaha," Douglas County District Court, docket 905, page 780.

PEREMPTORY WRIT ISSUED.

MIA M. VREDEVELD, APPELLANT, V. SCOTT R. CLARK, APPELLEE.

504 N.W.2d 292

Filed August 20, 1993. No. S-91-243.

1. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
2. _____. The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the judgment is made, the case may not be decided as a matter of law.
3. **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 injury, and without which the result would not have occurred.
4. **Trial: Expert Witnesses.** Triers of fact are not required to take opinions of experts as binding upon them. Determining the weight that should be given expert testimony is uniquely the province of the fact finder.
5. **Negligence: Motor Vehicles: Proximate Cause: Liability: Evidence: Damages.** Evidence that a person was not wearing a seatbelt at the time he or she was

injured shall not be admissible in regard to the issue of liability or proximate cause, but may be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery for damages by more than 5 percent.

6. **Jury Instructions: Evidence: 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.
7. **Rules of Evidence.** Admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence.
8. **Physician and Patient: Claims: Records: Waiver.** Filing a personal injury claim waives the physician-patient privilege as to all the information concerning the health and medical history relevant to the matters which plaintiff has put at issue.
9. **Physician and Patient: Claims: Records.** Medical records or information which is unrelated to the condition at issue and irrelevant to the cause of action remains privileged.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded for further proceedings.

Kent A. Schroeder, of Ross, Schroeder & Brauer, for appellant.

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

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

PER CURIAM.

This is an appeal by a plaintiff of a damages award in the district court for Hall County. Plaintiff, Mia M. Vredeveld, was a passenger in a car which was rear-ended by defendant, Scott R. Clark. The court granted plaintiff's motion for summary judgment as to liability and submitted to the jury the determination of damages proximately caused by defendant. The jury found for plaintiff in the amount of $5,000. Plaintiff appeals the damages awarded.

STATEMENT OF FACTS

On August 23, 1986, at approximately 11 p.m., plaintiff and a friend, Lana Leitschuck, after going to a movie, were driving home in plaintiff's Corvette. Leitschuck was driving and

headed south on South Locust Street in Grand Island. As she arrived at Brookline Drive, she waited for the northbound traffic to clear so that she could make a left turn onto Brookline Drive. As she waited, another vehicle pulled up behind her. Shortly thereafter, defendant, also traveling southbound, approached in his vehicle and struck the vehicle immediately behind plaintiff's, pushing it into plaintiff's vehicle. Plaintiff, who was not wearing her seatbelt, testified that in response to Leitschuck's gasp immediately prior to the collision, she reached out to the dashboard with her right hand.

After the collision, plaintiff experienced stiffness in her neck and pain in the tops of her shoulders and the middle of her back. Plaintiff drove Leitschuck to plaintiff's house, and later, early Sunday morning, plaintiff went to the St. Francis Hospital emergency room. She was x-rayed and fitted with a cervical collar.

Plaintiff consulted her family physician, Dr. Sheridan Anderson, on August 26, because of persistent pain in her neck and across the top of her shoulders. Dr. Anderson diagnosed muscle strain and spasm in her neck. He prescribed pain medication and physical therapy. However, plaintiff began to experience pain in her right shoulder joint between August 27 and September 2. On September 2, plaintiff returned to Dr. Anderson's office, complaining of a resurgence of pain after attending a dance at her parents' home. At the recommendation of Dr. Anderson, plaintiff consulted Dr. Balachandran Wariyar, a neurologist, on October 1. In a letter to Dr. Anderson, Dr. Wariyar indicated that plaintiff had increasing problems with the right side of her shoulder and her neck "with the arm popping."

Dr. Wariyar found no nerve damage. On October 21, plaintiff drove to Iowa. Plaintiff testified that her right shoulder began to hurt as she drove to Iowa and that she was unable to complete the drive home. Plaintiff's neck pain began to subside by October 1986 and was resolved by March 13, 1987. Between October 28, 1986, and approximately November 27, 1989, plaintiff had consultations with, and treatments from, a number of specialists for her right shoulder pain. Dr. Matthew Reckmeyer, an orthopedic surgeon, treated plaintiff

on several occasions beginning in October 1986. In a letter he prepared after plaintiff's visit, Dr. Reckmeyer stated that plaintiff had not recalled any specific trauma to her shoulder. His treatments included physical therapy and injections in the shoulder to relieve the pain. Dr. Reckmeyer was apparently the first to diagnose plaintiff's condition as shoulder impingement syndrome. Subsequent consultations with other doctors supported the diagnosis. In October 1987, a Dr. Miller, consulted for a second opinion, performed an arthrography. Dye was injected into the problem area to assist in the diagnosis. A myelogram and a CAT scan were also done.

Plaintiff eventually had two surgeries to relieve the shoulder impingement syndrome. On November 17, 1988, Dr. Reckmeyer performed an arthroscopic shoulder decompression, a procedure in which a tube is inserted through a puncture wound into various areas of the shoulder joint. This procedure alleviated the pain for a short time, but the pain in plaintiff's right shoulder resumed. On August 22, 1989, a Dr. Lesiak, an orthopedic surgeon who had previously seen plaintiff for the same condition, performed an open shoulder decompression. This surgery required a 3- to 4-inch incision in plaintiff's shoulder.

Plaintiff was involved in other motor vehicle accidents on June 26, 1987, and May 11 and 19, 1990. There is no indication that plaintiff suffered any injuries from the June 26 accident. Dr. Lesiak saw plaintiff on May 24, 1990, because of the May 11 accident. Dr. Lesiak found that plaintiff had a second degree acromioclavicular joint separation, a separation in her shoulder.

On April 16, 1990, plaintiff filed the present action against defendant, requesting special damages in the amount of $14,883.12 and general damages. The trial court granted summary judgment against defendant as to liability and submitted the issues of proximate cause of the injuries and the amount of damages that plaintiff suffered, if any, to the jury. At trial, plaintiff offered expert testimony from orthopedic surgeon Bruce Claussen. Dr. Claussen examined plaintiff in November 1990. In explaining the injury to her shoulder, plaintiff told Dr. Claussen she had placed her arm on the

dashboard prior to impact. Dr. Claussen testified that plaintiff's history and physical findings were consistent with the diagnosis of continuing impingement syndrome and that the accident of August 23, 1986, was the proximate cause of the shoulder injury at issue in the trial. He found that plaintiff had suffered in the past from a grade II shoulder separation, but it had healed by the time he saw plaintiff. Defendant presented the videotaped deposition of Dr. John G. Yost. Dr. Yost saw plaintiff on November 29, 1990. He stated that as of November 29, plaintiff showed no evidence of a grade II shoulder separation or of true impingement syndrome. Dr. Yost diagnosed plaintiff as suffering from frozen shoulder. On January 25, 1991, the jury found for plaintiff in the amount of $5,000.

In this appeal, plaintiff claims the trial court erred in giving the jury instructions on intervening cause and failure to wear seatbelts for mitigation of damages; in failing to receive exhibits 25A, 25B, 25C, which were not listed in the pretrial order, and exhibit 63, an instructive video on arthroscopic surgery; in receiving into evidence exhibits 66 and 67, which were pictures of the vehicles involved in the accident; in failing to sustain plaintiff's motion in limine to exclude the pictures of the vehicles, motion for directed verdict against defendant as to proximate cause, motion for a new trial, motion for judgment notwithstanding the verdict, and motion for a protective order pursuant to Neb. Ct. R. of Discovery 26(b)(4)(C) (rev. 1992); and in failing to tax costs.

DIRECTED VERDICT

After defendant rested, plaintiff moved for a directed verdict on the issue of proximate cause. If a motion for a directed verdict made at the close of all the evidence is overruled by the trial court, this court's review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Schleich v. Archbishop Bergan Mercy Hosp.*, 241 Neb. 765, 491 N.W.2d 307 (1992).

The party against whom the verdict is directed is entitled to

have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Leonard v. Wilson*, 238 Neb. 1, 468 N.W.2d 604 (1991).

"Proximate cause" is that cause which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces injury, and without which the result would not have occurred. *Belgum v. Mitsuo Kawamoto & Assoc.*, 236 Neb. 127, 459 N.W.2d 226 (1990).

In resolving the proximate cause issue, this court is guided by the following principle: A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way, but is only required to satisfy the jury, by a preponderance of the evidence, that the injury occurred in the manner claimed. *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991).

Plaintiff claimed her shoulder impingement syndrome was proximately caused by the accident involving defendant. She offered the testimony of two doctors who stated the injury to her shoulder resulted from the 1986 accident. Triers of fact are not required to take opinions of experts as binding upon them. *Keystone Ranch Co. v. Central Neb. Pub. Power & Irr. Dist.*, 237 Neb. 188, 465 N.W.2d 472 (1991). Thus, we find that plaintiff was not entitled to a directed verdict, because determining the weight that should be given expert testimony is uniquely the province of the fact finder. See *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

JURY INSTRUCTIONS

STANDARD OF REVIEW

In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991).

In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as

a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992); *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992).

EFFICIENT INTERVENING CAUSE

Plaintiff claims that the evidence was insufficient to warrant an instruction on intervening cause. Defendant asserts in his brief that the instruction on intervening cause was correct because plaintiff's shoulder injury did not manifest itself until after the trip plaintiff took to Iowa.

An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. *Belgum v. Mitsuo Kawamoto & Assoc., supra.*

After the accident, plaintiff initiated physical therapy for the strain and spasms in her neck. The physical therapy sessions consisted, in part, of upper extremity exercises. The exercises were performed on an upper body ergometer, otherwise referred to as a "bicycle for the arms." Plaintiff exercised her upper body on the ergometer on several dates throughout September. Although the duration and intensity were gradually increased, plaintiff did not complain of any pain in her shoulder during those sessions. The record reflects plaintiff did not complain of any shoulder pain during her physical therapy sessions until October 23, after the weekend trip she took to Iowa. When she sought treatment for the pain in her shoulder from Dr. Reckmeyer, she told him she could not recall any specific trauma to her shoulder. Specifically, she did not remember placing her arm on the dashboard prior to the accident with defendant, although that accident originally caused her cervical sprain.

The appearance of pain in plaintiff's right shoulder approximately 1 month after the accident, with no prior indication of injury to the shoulder, and plaintiff's own failure to remember the accident which caused severe pain in her neck and the tops of her shoulders, warranted the instruction on the intervening cause.

SEATBELT INSTRUCTIONS

Plaintiff also claims the trial court erred in instructing the jury on nonuse of seatbelts for mitigation of damages because defendant provided no evidence regarding the causal relationship between the accident and the injuries plaintiff sustained. Neb. Rev. Stat. § 39-6,103.08 (Reissue 1988) provided:

> Evidence that a person was not wearing a seat belt at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause, but may be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery for damages by more than five percent.

A number of states allow evidence of a plaintiff's failure to wear a seatbelt for mitigation of damages, but only when the defendant has demonstrated a causal connection between the plaintiff's failure to wear an available seatbelt and the damages sustained by the plaintiff. See, *Benner v. Interstate Container Corp.*, 73 F.R.D. 502 (1977) (instruction on nonuse of seatbelt for mitigation proper where expert testified plaintiff's injuries could have been avoided if she had worn seatbelt); *Law v. Superior Court of State of Ariz.*, 157 Ariz. 147, 755 P.2d 1135 (1988) (under comparative negligence statute, nonuse of seatbelt can be considered and used to reduce damages if nonuse either caused or enhanced injuries to plaintiff); *Foley v. City of West Allis*, 113 Wis. 2d 475, 335 N.W.2d 824 (1983) (failure to wear seatbelts not negligence per se, but proper to instruct jury where seatbelts are available and evidence indicates causal relationship between injuries sustained and failure to wear seatbelts). See, also, *Knapp v. Shores*, 550 So. 2d 1155 (Fla. App. 1989) (error to instruct jury on seatbelt defense in absence of evidence that seatbelts were fully operational); *Thomas v. Gottlieb*, 520 So. 2d 622 (Fla. App. 1988).

Although plaintiff testified at trial she was not wearing a seatbelt at the time of the accident, defendant presented no evidence demonstrating the injuries sustained by plaintiff which were attributable to her failure to wear the seatbelt in the rear-end collision. In *F. A. F. Motor Cars, Inc. v. Childers*, 181 Ga. App. 821, 354 S.E.2d 6 (1987), the defendants asserted that

the trial court had erred in failing to charge the jury with the requested seatbelt charge. The appellate court found it proper for the trial court to refuse to make the charge, even though the plaintiff had testified she was not wearing a seatbelt. The court reasoned that the defendants had not introduced evidence connecting the injuries of the plaintiff with her failure to wear a seatbelt.

> Thus, [defendants'] requested charge, which would have instructed the jury not to award any amount for injuries and damages sustained which were proximately caused by [plaintiff's] failure to wear a seat belt, was not adjusted to the evidence and the trial court did not err by refusing to so charge.

Id. at 822, 354 S.E.2d at 8.

Here, the instruction given to the jury on failure to wear a seatbelt for mitigation of damages required the jury to reduce damages if defendant proved that plaintiff was not wearing her seatbelt and that plaintiff's injuries would have been less if she had been wearing her seatbelt. However, no evidence was presented regarding the extent to which the injuries to plaintiff would have been diminished had she been wearing a seatbelt. 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.*, 236 Neb. 1, 459 N.W.2d 178 (1990). Since no evidence was provided indicating the causal relationship between plaintiff's failure to wear the seatbelt and the extent of injuries she sustained in the accident, the instruction was improper.

PREJUDICIAL ERROR

In *Oberhelman v. Blount*, 196 Neb. 42, 241 N.W.2d 355 (1976), we found that although the jury had found for the plaintiff, it was prejudicial error for the trial court to have instructed the jury on contributory negligence where there was insufficient evidence to sustain an affirmative finding of contributory negligence, because the instruction allowed the jury to reduce damages due the plaintiff. In the instant case, the instruction on seatbelts was also prejudicial because it allowed the jury to reduce the amount of damages due plaintiff. See *id.*

MOTION IN LIMINE

Plaintiff assigns as error the trial court's failure to exclude exhibits 66 and 67 because they were irrelevant. Exhibit 66 consists of an enlarged photograph taken of the back end of plaintiff's Corvette after the accident. Exhibit 67 is an enlarged photograph taken of the front end of the vehicle that was forced into the rear of the Corvette. The photographs depict the minor damage sustained by the vehicles during the accident.

STANDARD OF REVIEW

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence. *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992). See, also, *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). Thus, this court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion only where the Nebraska Evidence Rules permit judicial discretion in assessing admissibility. *Behm v. Northwestern Bell Tel. Co., supra.*

EXHIBITS 66 AND 67

Rule 403 of the Nebraska rules of evidence provides the trial court with the discretion to exclude evidence, although it is relevant, if it is unfairly prejudicial. Neb. Rev. Stat. § 27-403 (Reissue 1989).

Prior to trial, plaintiff filed a motion in limine to exclude any evidence of damage to plaintiff's vehicle as irrelevant and to exclude such evidence even if relevant because "its probative value is substantially outweighed by the danger of unfair prejudice." The trial court overruled the motion, and the exhibits were introduced at trial.

No abuse of discretion is evident from the record. In his amended answer, defendant denied the injuries were of the extent and nature alleged by plaintiff. The question presented, then, is whether defendant's negligence in striking plaintiff's vehicle proximately caused all the injuries of plaintiff.

A similar situation arose in *Springer v. Smith*, 182 Neb. 107,

153 N.W.2d 300 (1967). In *Springer*, the defendant's vehicle rear-ended the plaintiff's vehicle. The plaintiff initiated a lawsuit against the defendant, who admitted the accident, but denied the injuries were of the nature and extent alleged in the plaintiff's petition. At trial, photographs of the automobiles and the parties were admitted. The defendant argued that the photographs were admitted to show the force of the collision and thus were immaterial, because he had admitted negligence and that negligence was the proximate cause of the accident. This court found that because the defendant disputed the claimed injuries of the plaintiff, the photographs were relevant to show the nature and the contact of the force. The court stated, "To have refused to admit them would deny to the jury evidence helpful in resolving the issue of the injuries the plaintiff sustained and their nature and character." *Id.* at 110, 153 N.W.2d at 302.

In the case at hand, the trial court did not abuse its discretion in admitting into evidence the photographs of two of the vehicles involved in the accident. Dr. Lesiak testified that the severity of the impact to plaintiff's vehicle is significant because the amount of energy absorbed at impact determines the nature and the extent of the injury. Dr. Claussen also stated that "the younger the person is the more severe a jolt it would have to be to cause an impingement syndrome." As in *Springer*, the photographs were relevant to show force of impact, which in turn could assist the trier of fact in ascertaining the injuries plaintiff sustained.

EXHIBITS 25A, 25B, 25C, AND 63

There is no merit in plaintiff's assignment of error that the trial court erred in not admitting exhibits 25A, 25B, 25C, and 63. Plaintiff does not discuss the assignment of error in regard to exhibit 63 in her brief, and therefore, we will not discuss it. To be considered by the Supreme Court, an error must be assigned *and discussed* in the brief of one claiming that prejudicial error has occurred. *Regency Homes Assn. v. Egermayer*, 243 Neb. 286, 498 N.W.2d 783 (1993); *Carlson v. Zellaha*, 240 Neb. 432, 482 N.W.2d 281 (1992).

The first three exhibits in question consisted of three

drawings prepared by Dr. Claussen. Prior to trial the parties produced a number of exhibits which were marked and identified by stipulation of the parties. The trial judge's pretrial notes state: "If, additional exhibits or documents are discovered, the party intending to use them shall immediately exhibit them to opposing counsel, and submit them to the court to be marked for identification . . . Failure to comply, except for good cause shown, will make such exhibit inadmissible."

Exhibit 25 was listed among those exhibits to which the parties might object. Plaintiff's exhibit list described exhibit 25 in the following manner: "Dr. Bruce Claussen will use during the course of trial for purposes of medical illustration props, models, diagrams, charts and other aids." Defendant's counsel had been given exhibit 25 to examine prior to trial. By introducing additional exhibits without submitting them to defendant's counsel, plaintiff subjected herself to the penalty provided by the pretrial agreement, to wit, the exclusion of the offered exhibits.

EXPERT FEES

Plaintiff assigns as error the trial court's failure to assess the costs of the expert witnesses to defendant.

In *Hefti v. Hefti*, 166 Neb. 181, 88 N.W.2d 231 (1958), this court stated that expert witness fees could be taxed above the statutory fee where a special contract existed. In *Lockwood v. Lockwood*, 205 Neb. 818, 290 N.W.2d 636 (1980), this court upheld the taxing of expert witness fees to the husband in a divorce action. It found evidence of a contract where the expert testified he had been employed by the wife to examine certain financial documents furnished to the wife by the husband in preparation for the trial, he had testified to the value of his services, and these documents and the expert's testimony were accepted into evidence at trial. In *Hefti* and *Lockwood*, costs for expert witness fees were permitted pursuant to Neb. Rev. Stat. § 42-367 (Reissue 1988) and its predecessor, which permit a court to direct costs against either party involved in a divorce action. These cases are thus distinguishable from the present case. The court did not err in refusing to tax expert witness fees to defendant.

PROTECTIVE ORDER

The next assignment of error is that the trial court erred in denying plaintiff's motion for a protective order for her medical records retained by the offices of Dr. Wariyar. Dr. Wariyar examined plaintiff for the pain in her shoulder at the recommendation of Dr. Anderson. Plaintiff testified that she had seen Dr. Wariyar before that time. Defendant apparently filed a notice of medical records deposition, although the record only contains plaintiff's motion for a protective order concerning the medical records held by Dr. Wariyar. In the motion, plaintiff requested the court to order the defendant to take a deposition of Dr. Wariyar "to determine whether or not physician-patient communications that occurred before the injury at issue are relevant to the conditions complained of in the pending action."

Neb. Rev. Stat. § 27-504 (Cum. Supp. 1990) grants a physician-patient privilege to a person seeking medical treatment. Section 27-504(4)(c) waives the privilege in certain circumstances: "There is no privilege under this rule as to communications *relevant* to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he or she *relies upon the condition* as an element of his or her claim or defense." (Emphasis supplied.)

Courts have generally held that filing a personal injury claim waives the physician-patient privilege as to all the information concerning the health and medical history relevant to the matters which plaintiff has put at issue. See, *State ex rel. Pierson v. Griffin*, 838 S.W.2d 490 (Mo. App. 1992); *Nelson v. Lewis*, 130 N.H. 106, 534 A.2d 720 (1987); *Clark v. District Court, Second Jud. Dist.*, 668 P.2d 3 (Colo. 1983); *Trans-World Investments v. Drobny*, 554 P.2d 1148 (Alaska 1976); *State ex rel. Calley v. Olsen*, 271 Or. 369, 532 P.2d 230 (1975). But see, *State ex rel. Mapes v. District Court*, 250 Mont. 524, 822 P.2d 91 (1991) (plaintiff waives her physician-patient privilege to the extent necessary for the defendant to discover whether plaintiff's current condition is the result of some other cause). However, medical records or information which is unrelated to the condition at issue and irrelevant to the cause of action remains privileged. *Canfield v. Sandock*, 563 N.E.2d 526 (Ind.

1990); *Trans-World Investments v. Drobny, supra*; *State ex rel. Calley v. Olsen, supra*.

Defendant's motion is not within the record, and therefore, it is not possible to determine whether defendant asserted that the medical records contained evidence upon which he wished to rely for his defense or whether defendant's request for the records was reasonably calculated to lead to the discovery of admissible evidence pursuant to Neb. Ct. R. of Discovery 26(b)(1) (rev. 1992).

CONCLUSION

The trial court was correct in denying plaintiff's motion for directed verdict on the issue of proximate cause of plaintiff's injuries and in its evidentiary rulings. Plaintiff is entitled to a new trial because the seatbelt instruction was prejudicial to plaintiff. The cause is remanded to the lower court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SHANAHAN, J., not participating.

LANPHIER, J., concurring.

I do not agree with the majority's decision that a directed verdict cannot be granted when there is expert testimony offered into evidence. Furthermore, I would not have permitted the instruction on intervening cause.

DIRECTED VERDICT

I disagree with the majority decision to the extent that it holds that the testimony of an expert witness, without more, serves to preclude a directed verdict. This court has held that where there is evidence from expert testimony, a directed verdict should not be granted, because the trier of fact must weigh the evidence and resolve the contradiction. See, *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989); *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981). However, where there is uncontroverted evidence and the court determines that reasonable minds can draw but one conclusion from the evidence, the introduction of expert testimony, alone, should

not bar the court from granting a directed verdict in favor of the plaintiff. If the court can grant a directed verdict where there is uncontroverted lay testimony, there is no reason to apply a different standard to expert testimony.

A directed verdict is proper where reasonable minds can draw but one conclusion from the evidence. There is no reason to exempt cases involving expert testimony from this rule. If, in light of all the evidence, including testimony, the trial court finds that a directed verdict is warranted because reasonable minds cannot differ and can draw but one conclusion from the evidence, the fact that the evidence includes expert testimony should not bar the directed verdict.

Verdicts cannot be based solely on possibility, conjecture, or speculation. *Wessel v. City of Lincoln*, 145 Neb. 357, 16 N.W.2d 476 (1944). See, also, *Mustion v. Ealy*, 201 Neb. 139, 266 N.W.2d 730 (1978). In holding that the mere presence of expert testimony prevented a directed verdict for plaintiff, this court permits a jury to entertain defendant's theory, although it has no basis in the evidence.

EFFICIENT INTERVENING CAUSE

As to the instruction on intervening cause, I believe this is the "appropriate time" and "appropriate case," as stated in *Mundt v. Northwestern Bell Tel. Co.*, 230 Neb. 192, 197, 430 N.W.2d 530, 533 (1988), in which this court should allow the intervening cause instruction to "pass from the scene," *id.* In *Mundt*, we found that the trial court had committed error in failing to give an instruction on intervening, or superseding, cause, partly because the phrase "intervening cause" was included in the proximate cause instruction. Failure to define "intervening cause" therefore constituted error. In addition, the defendant had pled the issue of intervening cause and introduced facts which justified giving the instruction to the jury.

The proximate cause instruction given to the jury in this case does not contain the words "intervening cause." It states: "A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred." In addition, no facts were introduced which would require the instruction on intervening cause.

The Nebraska Supreme Court Committee on Civil Practice and Procedure suggests that the instruction on proximate cause, NJI2d Civ. 3.41; the instruction on concurring cause, NJI2d Civ. 3.42; and the instruction on the conduct of a nonparty third person as the sole and proximate cause, NJI2d Civ. 3.44, are sufficient instruction for the jury. NJI2d Civ. 3.43 comment. The committee recommends that the instruction on superseding or efficient intervening cause be treated as part of the plaintiff's proof of proximate cause or concurring cause.

> The plaintiff must prove that the incident under litigation was "a" proximate cause of his or her injury. When the trier of fact decides that a "superseding" cause is "the" proximate cause, it has decided that the plaintiff has not met this burden of proof, has not proved that the incident under litigation was "a" proximate cause. Approaching it from the other direction, the plaintiff has the burden of proving that the defendant's acts were a proximate cause; if the plaintiff does that, then he or she has proved that subsequent acts were not the sole proximate cause. If there was a so-called superseding cause, then the act under litigation was not a proximate cause. However you look at it, the burden is on the plaintiff.

NJI2d Civ. 3.43 comment at 185.

I agree with the committee that superseding or efficient intervening cause should be considered as part of a plaintiff's proof of proximate cause. Furthermore, the instruction on intervening cause in this case was unnecessary and prejudicial. By instructing the jury on intervening cause, the court allowed the jury to absolve defendant of his liability regarding the shoulder impingement syndrome because of defendant's totally unsubstantiated theory regarding the occurrence of an accident in October 1986.

WHITE, J., joins in this concurrence.

IN RE APPLICATION OF CITY OF LEXINGTON, NEBRASKA. CITY OF LEXINGTON, NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. DAWSON COUNTY PUBLIC POWER DISTRICT, APPELLANT AND CROSS-APPELLEE.

504 N.W.2d 532

Filed August 20, 1993. No. S-91-450.

1. **Nebraska Power Review Board: Appeal and Error.** A decision of the Nebraska Power Review Board will be affirmed on appeal if it is supported by evidence in the record and is not arbitrary, capricious, or otherwise illegal.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Statutes: Legislature: Intent: Appeal and Error.** In settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
4. **Statutes.** 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.

Appeal from the Nebraska Power Review Board. Affirmed in part, and in part reversed and remanded with directions.

Bruce Smith, of Stewart & Smith, and Steven E. Guenzel, of Barlow, Johnson, DeMars & Flodman, for appellant.

Willard Weinhold, Lexington City Attorney, for appellee.

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

HASTINGS, C.J.

The Dawson County Public Power District (Dawson) appeals from an order of the Nebraska Power Review Board (Board) which determined the total economic impact of transferring an electrical service area from Dawson to the City of Lexington (Lexington) under the provisions of Neb. Rev. Stat. § 70-1010 (Reissue 1990) and ordered the payment by Lexington to Dawson of $596,809. Lexington cross-appeals.

Neb. Rev. Stat. § 70-1016 (Reissue 1990) provided that an

appeal may be taken to the Supreme Court from any final action of the Board in the same manner as appeals are taken from decisions of the Public Service Commission.

In the case *In re Complaint of Federal Land Bank of Omaha*, 223 Neb. 897, 395 N.W.2d 488 (1986), this court held that an action of the Public Service Commission will be affirmed on appeal if it is supported by evidence in the record and is not arbitrary, capricious, or otherwise illegal; and thus, the same standard of review applies to decisions of the Board, i.e., if they are supported by the evidence and are reasonable and not arbitrary, they are to be affirmed. It is quite apparent from that rule that this court cannot set itself up as a super-administrative body and reach its own conclusion without regard to that made by the Board.

On January 22, 1990, Lexington, pursuant to Neb. Rev. Stat. § 70-1008 (Reissue 1990), filed an application with the Board to transfer newly annexed territory to its electric service area. That section provides in part that a municipally owned electric system serving such municipality at retail shall have the right upon application to and approval by the Board to serve newly annexed areas of such municipality. An annexation of a certain area has taken place, and there is no dispute as to Lexington's right to serve this annexed area.

However, the parties unsuccessfully attempted to agree, under the provisions of § 70-1010, upon the value of the annexed certified service area, distribution facilities, and customers of Dawson being transferred to Lexington.

Therefore, further application was made by Lexington to have the Board determine the total economic impact which transferring the territory would have on the area's current electric supplier, Dawson. Dawson joined in that application. The Board requested that, pursuant to § 70-1010, the parties submit information as to what costs would be incurred by Dawson if the transfer of the area in question took place.

Section 70-1010(2) provides:

> In the event of a proposed transfer of customers and facilities from one supplier to another in accordance with this section or section 70-1008 or 70-1009, the parties shall attempt to agree upon the value of the certified service

> area and distribution facilities and customers being transferred. If the parties cannot agree upon the value, then the board shall determine the total economic impact on the selling supplier and establish the price accordingly based on, but not limited to, the following guidelines: The supplier acquiring the certified service area, distribution facilities, and customers shall purchase the electric distribution facilities of the supplier located within the affected area, together with the supplier's rights to serve within such area, for cash consideration which shall consist of (a) the current reproduction cost if the facilities being acquired were new, less depreciation computed on a straight-line basis at three percent per year not to exceed seventy percent, plus (b) an amount equal to the nonbetterment cost of constructing any facilities necessary to reintegrate the system of the supplier outside the area being transferred after detaching the portion to be sold, plus (c) an amount equal to two and one-half times the annual revenue received from power sales to existing customers of electric power within the area being transferred . . . . After the board has determined the price in accordance with such guidelines, the acquiring supplier may acquire such distribution facilities and customers by payment of the established price within one year of the final order.

Lexington and Dawson entered into a stipulation agreeing on the value of two components of the above valuation. They agreed that the appropriate figure for the current reproduction cost of facilities being acquired, in accordance with § 70-1010(2)(a), was $92,423 and that the nonbetterment cost of reintegration, under subsection (2)(b) of the statute, was $21,873.

Lexington and Dawson also agreed that the annual revenue from the customers in the area to be transferred was $108,660.83, but were unable to agree upon how this figure was to be applied. At a hearing before the Board, Lexington's expert testified that multiplying the annual revenue figure by 2½, pursuant to subsection (2)(c) of § 70-1010, would produce a figure which when added to the figures determined under

§ 70-1010(2)(a) and (b) would represent the total economic impact of the acquisition of the service area by Lexington. However, Dawson adduced testimony that this figure would not provide adequate compensation.

Economist Donald Macke testified that he had considered potential growth in the area in calculating present and future net revenue losses and determined that the necessary lump-sum payment to compensate Dawson for that loss would be $653,345. In addition, Dawson's general manager, Phillip Darby, testified that a transmission line substation and feeder circuits which provided service to the area would be partly idled by the loss of the load of the annexed area, requiring compensation of $97,271. Darby also testified in regard to the increased cost of power due to the loss of the load in the annexed area, referred to as the "ratchet impact." As explained by Darby, the ratchet impact in this case results from the fact that Dawson must build and maintain a system capable of supplying electric service to more than 3,800 irrigation customers for 2 or 3 months of the year. The ratchet charge is a component of the wholesale power contract under which Dawson purchases power, requiring that a percentage of the maximum peak established during the period of high usage must be purchased for the remaining months of the year. Darby stated that because the annexed area is a winter-peaking load, the loss of that load would substantially and materially affect the ratchet cost Dawson pays, resulting in additional annual ratchet costs of $13,030, or a total of $196,679.

Following the hearing, the Board issued an order that Lexington should pay Dawson the sum of $596,809 for the service area and facilities which would be acquired. This figure included both of the stipulated valuations under § 70-1010(2)(a) and (b); the full amount claimed by Dawson for the equipment and materials rendered useless by the transfer; the reduced figure of $113,589 for the ratchet impact; and a loss of revenue figure of $271,653, determined by multiplying the transferred area's yearly revenue by 2½, as provided by § 70-1010(2)(c).

On February 1, 1991, Dawson filed with the Board a motion for rehearing, which was overruled on March 22. Dawson now

appeals to this court, contending that it should receive its submitted figure of $1,061,591 for the service area and asserting that the Board erred in (1) accepting Lexington's calculations regarding the average duration of ratchet billing of Dawson by its supplier, accepting Lexington's projections on the expected increases of the demand rate, and accepting Lexington's suggested discount rate; and (2) accepting Lexington's argument that Dawson's loss of revenue was limited to the statutory guideline of 2 1/2 times the annual revenue, instead of "following the great weight of the evidence" that due to expected growth and other influencing factors in the area of service, Dawson's loss of revenue was really $653,345.

Lexington cross-appeals, claiming that the Board should not have considered factors outside the guidelines established in § 70-1010(2) in determining the total economic impact of the transfer of the service area and that Dawson should accordingly receive $385,949. Lexington asserts that the Board erred in (1) finding that the total economic impact was in excess of the amount provided by the guidelines established by § 70-1010(2), (2) finding that compensation should be provided for "surplus property" lying outside the annexed area, (3) finding that ratchet costs should be allowed as an element of damages in addition to the factor of 2 1/2 times gross revenue, and (4) finding that the net revenue loss, calculated at an arbitrary rate of 2 1/2 times gross revenue, should be allowed as an element of damages.

As noted above, § 70-1010(2) provides generally that a supplier acquiring the rights of another shall purchase the distribution facilities of the supplier located within the area to be acquired, together with the supplier's rights to serve within the area, for a cash consideration to include current reproduction cost less depreciation, the cost to reintegrate the system of the supplier outside the area being transferred, and an amount equal to 2 1/2 times the annual revenue received from power sales to existing customers within the area being transferred.

As a preliminary issue, Lexington maintains that the Board should be bound by these statutory guidelines. Dawson contends, however, that § 70-1010(2) sets forth guidelines only,

and not an exclusive list of the items of valuation.

While a decision of the Board will be affirmed by this court if it is supported by the evidence and is reasonable and not arbitrary, this issue presents a question of statutory interpretation. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993); *Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 500 N.W.2d 811 (1993).

In settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *In re Application of City of Lincoln, supra*; *Hoesly v. State*, 243 Neb. 304, 498 N.W.2d 571 (1993).

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. *In re Application of City of Lincoln, supra*; *Hoesly v. State, supra*.

Section 70-1010(2) states that "the board shall determine the total economic impact on the selling supplier and establish the price accordingly based on, *but not limited to*," the guidelines set out in § 70-1010(2)(a), (b), and (c). (Emphasis supplied.) Thus, the plain, direct, and unambiguous language of the statute clearly authorizes the Board to consider factors other than those specifically named. The Board's construction of the statute was proper, and Lexington's argument is without merit.

TOTAL ECONOMIC IMPACT

The Board found that the total economic impact of transferring the service area from Dawson to Lexington consisted of the following:

Facilities being transferred	$ 92,423
Reintegration costs	21,873
Surplus property no longer needed	97,271
Ratchet costs	113,589
Net revenue loss	271,653
Total	$ 596,809

The parties do not dispute the first two items of the above award. In its first assignment of error, Dawson asserts that the Board erred in accepting Lexington's calculations in regard to ratchet costs, which resulted in a reduction of the ratchet impact portion of the order from $196,679 to $113,589.

General manager Darby testified that Dawson's supplier of electricity required Dawson to pay for 65 percent of its summer peak throughout the winter months, regardless of the amount of electricity actually used. He stated that Dawson has a large number of customers that purchase electricity in the summer to irrigate crops; these irrigators contribute significantly to the summer peak, but do not contribute to meeting the 65-percent requirement during the winter months. The customers Dawson stands to lose in the annexed area are winter-peaking loads, which had been beneficial in offsetting the ratchet costs.

According to a study produced by Darby, without the annexed area to offset the ratchet cost, Dawson would incur additional costs of $13,030 per year. This figure was derived from multiplying the ratchet-free load of 228 kilowatts per month by $11.43, the cost per unit, and then by 5, the average number of months ratchet charges were paid. Costs were calculated through the year 2006, which is when Dawson's current contract with its supplier will be up for renegotiation and is, thus, the first time Dawson would have an opportunity to procure an alternative supply of power. According to the testimony of Macke, the economist retained by Dawson, when adjusted to net present value, the ratchet cost attributable to the loss of this particular area through the year 2006 was estimated to be $196,679.

Lexington argues that the ratchet impact should not be included in the annual income figure of § 70-1010(2)(c) at all. However, Lexington did offer the testimony of Lar Voss, a consulting electrical engineer, to show that the ratchet impact

would be less than that claimed by Dawson. Voss, by applying a smaller annual rate increase, a smaller number of ratchet payments, and a larger discount rate, determined that the ratchet impact would total $113,589 when adjusted for present value.

The Board applied Lexington's figure, which Dawson appeals. Essentially, Dawson argues that its witnesses were more credible than Lexington's. However, the Board's decision in regard to the ratchet impact was supported by evidence in the record and was not arbitrary or unreasonable, and thus, this assignment of error is without merit.

Lexington contends on cross-appeal that the ratchet costs should not have been considered separately, but would have been covered by the figure of 2½ times the annual revenue under § 70-1010(2)(c). However, as previously discussed, § 70-1010(2) provides that the determination of the total economic impact of a transfer will be based on, but not limited to, the factors of § 70-1010(a), (b), and (c). Ratchet costs are a real factor in determining the economic impact of the loss of certain customers. The result is to require a higher rate to be paid by the remaining customers. From the face of the statute, it appears that ratchet costs may be considered separately if the Board determines that they constitute costs in excess of those covered by the statutory guidelines, and thus, the ratchet costs were properly considered by the Board.

As its next assignment of error, Dawson contends that in allowing only the statutory minimum of 2½ times annual revenue of the annexed area to replace lost revenues to Dawson, the Board disregarded much of the real economic impact which Dawson would suffer. Dawson argues that the annexed area is one with significant growth potential and that in considering only existing customers, the Board ignored the value of such growth.

Dawson offered the testimony of general manager Darby and economist Macke in regard to the growth potential of the annexed area. Darby stated, "In my opinion the annexed area will continue to grow. There is room for considerable development there. There will be spinoff industries from the Iowa Beef operation and also there is potential for other things

such as fast food services, motels, and those types of uses."

Darby testified that he was a member of the Lexington Council on Economic Development and a board member of the Greater Lexington Corporation and that the development potential for the annexed area had been discussed at length in meetings of both of those bodies. However, when further questioned, Darby was unable to name any companies which had expressed an interest in developing the annexed area and was unfamiliar with the area's zoning designations.

In regard to an assessment of the future development potential of the annexed area, Macke stated:

> Lexington, in its interchange on Interstate 80 represents a major service hub, if you will, for traffic on Interstate 80. And there has been considerable growth in the affected area as a result of growth and traffic on Interstate 80. For example, during the 1980s, traffic volume near the Lexington Interchange on Interstate 80 grew by about 4 percent a year. Consequently, we took that potential growth into consideration with the likelihood that there may be additional restaurants, gasoline stations, campgrounds, motels and the like that service traffic on Interstate 80.

Macke also testified that Dawson had considered the likely impact of the soon-to-open Iowa Beef Processing plant, as well as the fact that an industrial park existed within the boundaries of the annexed area. However, when asked on cross-examination to furnish an analysis by company name of customers who would be moving in, Macke responded that "[o]ur analysis is based on past patterns, as I mentioned before .... It's impossible for anyone at this point in time to say which restaurant or what truckstop is going to be put in place in 2000."

Dawson cites *Matter of People's Co-Op. Power Ass'n*, 470 N.W.2d 525 (Minn. App. 1991), for the proposition that in a statute similar to the one under consideration here (Minnesota uses the language " 'and other appropriate factors,' " *id.* at 529), it is proper to make an allowance for future earnings from not as yet acquired customers. The theory of the Minnesota court was that such a determination encourages rural cooperatives to make investments necessary to provide power

throughout the service territory, whether that territory is now occupied or not. To the two-judge majority opinion was added a dissent of the third member of the panel, who found the holding of the Minnesota Public Utilities Commission wholly unreasonable and concluded that there being no facilities located in the area to be annexed, the award to the supplier being supplanted should have been zero.

It must be pointed out that the statutory formula in Minnesota contained no factor of 2½ times the annual revenue. The Minnesota case is not persuasive.

Considering the speculative nature of the testimony presented by Dawson's experts regarding expansion and future customers in the acquired area, the Board's action in declining to determine loss of revenue based on that testimony was neither unreasonable nor arbitrary and did not constitute error.

Lexington also contests the Board's figure of $271,653 for net revenue lost, arguing that while this figure is 2½ times annual revenue, as provided by § 70-1010(2)(c), it should not have been adopted by the Board arbitrarily if the other economic impact factors of the transfer were determined individually. Lexington further argues that the factor contained in subsection (2)(c) was intended by the Legislature to be an arbitrary way of compensating for the economic impact, including surplus property, higher ratchet costs, and net revenue losses. Accordingly, Lexington argues that since the other figures were separately addressed, a more definite determination of Dawson's net revenue loss should be required.

While § 70-1010(2)(c) was apparently intended to compensate a utility for the loss of net revenue it would sustain from having its customers transferred to another utility, it is not clear that it was also intended to encompass all of the peripheral elements of cost making up the total economic impact. In awarding compensation for surplus property and ratchet costs, the Board apparently found that these costs were in excess of the loss of revenue which subsection (2)(c) was specifically intended to address. While Dawson argues that the loss of revenue figure should be adjusted upward, and Lexington argues that it should be reduced, neither party has provided competent evidence to establish that the Board's application of

the 2 1/2 times revenue figure was unreasonable or arbitrary.

Finally, on cross-appeal, Lexington asserts that the Board erred in finding that compensation should be provided for surplus property lying outside the annexed area in any event because that cost was subsumed in the 2 1/2 times revenue figure. We disagree. The statutory formula relates to loss of revenue due to the loss of customers. The factor of "uselessness" relates to the added cost of service to the remaining customers and refers to the fairness of those rates. However, the Board's figure of $97,271 related to this surplus property, consisting of a transmission line substation and feeder circuits which provided service to the area to be transferred. Testimony by Dawson's general manager indicated that the substation would be rendered partially idle by the loss of the load in the annexed area. Dawson submitted figures, relied upon by the Board, which indicated that $37,466 was the depreciated value of the transmission line and feeder circuits dedicated to the annexed area. Dawson also submitted a figure of $59,805 for 26 percent of the reproduction cost of the substation dedicated to the annexed area. Although the substation was built in the 1950's, this figure did not account for any depreciation. Darby testified that the value of the substation had not depreciated because almost all of the substation had been refurbished, replaced, or redone over a period of time; some of the work was completed as recently as the summer before the hearing. Darby also stated that depreciation was not in order because the figure represented the "fair market value of what's there." On cross-examination, Darby agreed that a smaller transformer, if one was available, could be substituted in this particular substation to accommodate the reduced load and that transformers are frequently changed between substations to rebalance their loads.

Robert Mullendore, an electrical engineering consultant testifying for Lexington, stated that in his opinion, the value of the substation would be less than 30 percent of its reproduction costs. Mullendore based this opinion on an inspection of the substation which indicated to him that the majority of its components were "aged." He believed that while some minor

parts such as "a few insulators, [and] a few disconnect switches" had possibly been replaced, the majority of the substation was of mid-1950's vintage.

In adopting Dawson's submitted figure of $59,805 as the dedicated value of the substation, the Board apparently failed to consider depreciation or the potential adaptation of the substation to a reduced load. The result is inconsistent with the formula contained in § 70-1010(2)(a) for determining the value of acquired facilities and appears to be erroneous.

While the parties contested three of the five findings made by the Board as to the total economic impact of the transfer of the annexed area, of these three, only the Board's assessment for surplus property is unsupported by evidence in the record and is therefore unreasonable and arbitrary.

Accordingly, the Board's decision is affirmed in all respects except that portion relating to the value of the substation and feeder lines located outside the annexed area. As to that portion of the decision, it is reversed and the cause remanded with directions to the Board to calculate the depreciated value of the substation based on the 3-percent-per-year statutory formula and to determine what share, if any, of that depreciated value is represented by equipment which has actually been rendered useless by the transfer.

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

SHANAHAN, J., not participating in the decision.

MIKE ANDREASEN ET AL., APPELLANTS, V. WILLIAM GOMES, M.D., ET AL., APPELLEES.

504 N.W.2d 539

Filed August 27, 1993. Nos. S-90-740, S-90-984.

1. **Mental Distress: Negligence: Proximate Cause.** Under appropriate circumstances, recovery may be had for the emotional distress suffered by a bystander who witnesses or gains knowledge of the death or serious injury of another proximately caused by the negligence of a defendant.

2. **Mental Distress: Liability.** A marital or familial relationship is required in order to bring bystander liability into play.
3. **Mental Distress.** To be actionable, emotional distress must be so severe that no reasonable person could be expected to endure it.
4. **Summary Judgment.** Summary judgment is appropriate when the record discloses that there exists no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the movant is entitled to judgment as a matter of law.

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

Sam Grimminger for appellants.

Mark A. Christensen, of Cline, Williams, Wright, Johnson & Oldfather, for appellees William Gomes, M.D., and Grand Island Clinic, Inc.

David A. Svoboda, of Kennedy, Holland, DeLacy & Svoboda, for appellees Gary Settje, M.D., and Family Practice of Grand Island, P.C.

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

PER CURIAM.

Mike and Tina Andreasen and their two children, Micki Lea and Amy Marie, instituted separate actions against two doctors and their respective employers for emotional injuries resulting from the stillbirth of Mike and Tina's baby. These two cases have been consolidated for purposes of briefing and argument. The petitions allege that the negligent conduct of the defendants, William Gomes, M.D.; Gary Settje, M.D.; and their respective employers, caused the stillbirth. In each instance, the trial court sustained motions for summary judgment in favor of the defendants. The plaintiffs contend that the trial court erred because the record indicates that genuine issues of material fact exist. We affirm each of the judgments.

Settje, a general practitioner, provided Tina with prenatal medical care throughout her pregnancy. After experiencing severe abdominal pains, Tina, at approximately 7 a.m. on January 3, 1989, was admitted to a hospital. She was concerned

because when she awoke that morning, she did not feel the fetus move. Although the birth was not to occur for another month, she believed she was in labor.

Settje arrived at the hospital between 8 and 8:15 a.m. An external fetal heart monitor was installed, and shortly thereafter, Settje came in. After looking at the monitor, he notified the expectant parents that the fetus might be losing some oxygen. At approximately 8:26 a.m., complications developed. Settje informed Mike and Tina that he would send a fetal monitoring strip to Omaha to Dr. Michael G. Levine, a specialist in maternal fetal medicine. Unknown to Mike and Tina, Levine, after reviewing the monitoring strip, recommended a cesarean section between 9:33 and 9:37 a.m. Outside the room, Settje also consulted with Gomes, an obstetrical gynecologist. Gomes then entered the labor room wanting to know why everyone was so "excited." Settje did not return to the room, and Mike and Tina did not see him until after the delivery.

Mike and Tina became concerned over the apparent disagreement between the doctors, but did not question their actions. According to Mike and Tina, there also appeared to be some disagreement in the interpretation of the monitor readings between Gomes and the attending nurse, Janet Spale. In order to obtain improved readings, Gomes decided to place an internal monitor on the fetus. Because of unclear readings, and after an attempt to replace a component, the internal monitor was replaced. After this was done, Gomes left, and Spale continued to monitor the readings.

After a short while, Spale stated she had to "go get" Gomes. Upon his arrival, Gomes glanced at the monitor and said, "[L]et's go." Mike stated he noticed the fetal heart monitor stop immediately prior to his wife being wheeled into the operating room. He signed the consent forms needed to perform surgery and waited in the labor room.

The cesarean section was performed at approximately 10:49 a.m., and the stillborn fetus was delivered at approximately 10:50 a.m. When Settje notified Tina of the stillbirth approximately 1 1/2 hours after the delivery, she stated she already knew because she had heard the baby's heart stop prior

to going into surgery.

Mike was notified of the stillbirth soon after the delivery. Later that evening, he went to pick up his children from the babysitter's home and told them of the stillbirth.

Approximately 6 weeks later, while on a scheduled visit with Gomes, Tina learned of Levine's recommendation. When Tina questioned Gomes about his failure to follow Levine's recommendation, Gomes responded, "[B]ut who was Mike Levine? Does he think he's God? Am I supposed to listen to everything that he says?"

Dr. Richard Fields, a specialist in obstetrics and gynecology, stated that the need for a cesarean section was identifiable by 8:10 a.m. By 9:50 a.m., when Gomes arrived, the operation should have been performed.

Haselhorst v. State, 240 Neb. 891, 485 N.W.2d 180 (1992), and *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985), permit recovery under appropriate circumstances for the emotional distress suffered by a bystander who witnesses or gains knowledge of the death or serious injury of another proximately caused by the negligence of a defendant.

The manner in which the stillbirth came about is such that a finder of fact could, if it so wished, reasonably find that the defendants were negligent. We thus direct our attention to other matters.

Turning first to the children's claim, we note that among the factors to be considered in bystander liability cases is the relationship between the party harmed and the party claiming to have been distressed by the harm. *Haselhorst, supra*; *James, supra*. We have also said that a marital or familial relationship is required in order to bring bystander liability into play. *Id.*

Although the children knew of the impending birth of a sibling, given their ages, 4 and 7, the relationship between them and the fetus was, as a matter of law, not sufficiently developed to be regarded as an intimate familial one. The children simply lacked the life experiences required to enable them to appreciate the consequences of a stillbirth.

That brings us to Mike and Tina's claim. They claim that they have suffered emotional distress manifested by headaches, nightmares, loss of sleep, and nausea, which an expert

characterized as constituting "severe emotional distress." But to be actionable, the emotional distress must have been so severe that no reasonable person could have been expected to endure it. *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (1993); *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 731, 496 N.W.2d 914 (1993); *Schleich v. Archbishop Bergan Mercy Hosp.*, 241 Neb. 765, 491 N.W.2d 307 (1992).

In *Parrish*, the plaintiff's emotional distress manifested itself in crying and headaches. We ruled that the plaintiff had failed to establish a prima facie case because there was not " 'emotional distress' sufficiently severe and medically significant to be actionable under Nebraska law" and noted that "[n]othing indicates that Eldon Parrish's death had an *extraordinary* effect, either psychological or physical, on Julie Parrish." (Emphasis supplied.) 242 Neb. at 734, 496 N.W.2d at 916.

" 'Emotional distress passes under various names such as mental suffering, mental anguish, nervous shock, and includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, embarrassment, anger, chagrin, disappointment, and worry. However, it is only when emotional distress is extreme that possible liability arises.' " *Hassing v. Wortman*, 214 Neb. 154, 160, 333 N.W.2d 765, 768 (1983).

Inasmuch as the record discloses that there exists no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the defendants are entitled to judgment as a matter of law, the summary judgments entered by the district court were correct. See *Howard v. Blue Cross Blue Shield*, 242 Neb. 150, 494 N.W.2d 99 (1993).

AFFIRMED.

HASTINGS, C.J., not participating.

WHITE, J., dissenting.

Although I believe that the Andreasens (at the very least, Mike and Tina) fall squarely within the analytical framework of *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985), and should thus be entitled to recovery, one need not even reach the application of those factors to find fault with the majority

opinion. Instead, I dissent because the majority has ignored this court's standard of review on an appeal from a summary judgment.

The decisions of this court are full of examples of the strict standard applied when we review a summary judgment. Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose *that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts* and that the moving party is entitled to judgment as a matter of law.

A party moving for summary judgment has the burden to show that no issue of material fact exists and must furnish 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.*

Moreover, we have also frequently held that "[s]ummary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt." *State Farm Fire & Cas. Co. v. Victor*, 232 Neb. 942, 943, 442 N.W.2d 880, 881 (1989). Accord *American Community Stores Corp. v. Newman*, 232 Neb. 434, 441 N.W.2d 154 (1989).

The majority's holding flies squarely in the face of the preceding rules, denying the Andreasens any chance at trial when there was *at least* one issue of material fact in controversy—the severity of the emotional distress suffered by Mike and Tina.

Before turning to Mike and Tina's causes of action, I first address the majority's treatment of the Andreasen children's causes of action. Unless it is established that the parents did not suffer the required "severe" emotional distress (a fact I do not believe has been shown), it is of no moment that the children's distress was of a lesser degree than their parents'. Although the majority determines that the children's recovery is precluded because they were not "bystanders" within the meaning of *James*, this holding seems based on a factual finding, namely that these siblings of the deceased child, especially due to their young age, could not suffer great enough loss to be "foreseeable." I see no reason why the children could not, just

as easily, be considered as within the ambit of the *James* analysis.

Contrary to the majority's assertions, I believe that familial loss and grief (even among young children) are far too delicate and subtle to be decided by this court as matters of law. The foreseeability of the children's distress is a material issue of fact in controversy. Giving the children the benefit of all reasonable inferences from the evidence, I believe that this issue was inappropriate for summary judgment.

The preceding problem is magnified in the case of Mike and Tina's causes of action. The majority, faced with a material fact in controversy, simply makes a factual determination and denies the parents the benefits of a trial.

Admitting that both Mike and Tina qualify as bystanders, the majority focuses on the severity of their emotional distress, ultimately concluding that as a matter of law Mike and Tina did not present evidence showing they suffered an emotional injury sufficiently severe to withstand a motion for summary judgment. This statement runs directly contrary to the record. Following an evaluation of the Andreasens, a psychologist with a Ph.D. concluded that Mike and Tina had suffered from "*severe emotional distress*."

The endurability of the distress suffered by a plaintiff is a question for the fact finder. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). The majority, however, disregards the evidence presented by the Andreasens, apparently feeling it appropriate to weigh, on appeal, the credibility of expert testimony.

The majority's choice of case law to bolster its holding is inappropriate. In both *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (1993), and *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 731, 496 N.W.2d 914 (1993), the two cases principally relied upon by the majority, the records contained *no* evidence of severe emotional distress. In addition, in *Parrish*, we stated: "To avoid a summary judgment in an action for emotional distress, the record must present *some* evidence establishing a factual question, i.e., . . . whether [the plaintiff's] reaction . . . is 'emotional distress' sufficiently severe and *medically significant* to be actionable under

Nebraska law." (Emphasis supplied.) 242 Neb. at 734, 496 N.W.2d at 916. The Andreasens, unlike the plaintiffs in *Sell* and *Parrish*, have made such a showing. I simply find no escape from the conclusion that at least one issue of material fact existed in this case, and thus, summary judgment was inappropriate.

Although the erroneous granting of summary judgment is sufficient to require a reversal of the district court's decision, I wish to take issue with one final point from the majority opinion, the contention that nightmares, headaches, loss of sleep, and nausea are, as a matter of law, insufficient indicators of severe or "extraordinary" emotional trauma to entitle the sufferer to recovery. If, as in this case, expert testimony corroborates the alleged severity of the distress suffered and there is evidence that the distress is a result of the defendant's negligence, it should be for the jury to decide whether the distress was so severe that no reasonable person could be expected to endure it. See, *Nichols, supra*; *Sell, supra*; *Parrish, supra*. The decision should not be made by an appellate court checking the plaintiff's symptoms against a laundry list of "sufficiently severe" manifestations of emotional trauma. A somewhat analogous point was raised by the dissent in *Sell*, in which Justice Lanphier noted that in certain limited instances, it is superfluous to require medical testimony about the depth of emotional trauma caused by an event when doing so ignores the obvious.

I reiterate my earlier point: Grief, sorrow, and emotional pain are far from predictable, uniform reactions. Thus, it should be the jury, persons not so "educated" in the antiseptic technicalities of the law, that should determine how much distress is reasonably endurable. Decisions such as *Sell* and the majority opinion in this case further remove the jury from this most important role. I fear that today's decision once again extends the rift between the decisions of this court and the realities of life.

It was this court that recognized a cause of action for emotional distress. See *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964). If the majority wished, it could simply write the tort of negligent infliction of emotional distress out of

existence. However, since it did not do so, the decision today is not in accord with our previous cases. I respectfully dissent.

SHANAHAN AND LANPHIER, JJ., join in this dissent.

LANPHIER, J., dissenting.

I join in the dissent of Justice White except to the extent that Tina Andreasen could be considered a bystander. As a mother giving birth, she was a participant and not a bystander throughout the delivery. See *Westcott v. Mikkelson*, 148 Wis. 2d 239, 434 N.W.2d 822 (Wis. App. 1988), and *Haught v. Maceluch*, 681 F.2d 291 (5th Cir. 1982), which contemplate the nature of the relationship of a mother giving birth to her child. As stated in *Haught v. Maceluch*, 681 F.2d at 299:

> Not only was appellant located near the scene of the accident, she was in some sense the scene itself. Dr. Maceluch's negligent conduct was visited upon her and upon the child within her body; no closer proximity can be imagined. . . . [A]s a mother and child in childbirth their relationship was unitary.

In *Westcott v. Mikkelson, supra*, plaintiff mother sued for negligent infliction of emotional distress sustained during the delivery of her son, who was asphyxiated as a result of a wrapped umbilical cord. The court stated that "it is difficult to imagine a more clear-cut example of [a participant] than a mother giving birth to a child in distress." *Id.* at 242, 434 N.W.2d at 823.

In the present case, Tina, as a mother giving birth to her child, was an integral part of the procedure. She should not be relegated to the position of a bystander.

WHITE, J., joins in this dissent.

JOHN LOEWENSTEIN, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF REVENUE, APPELLANT.

504 N.W.2d 800

Filed August 27, 1993. No. S-91-255.

1. **Administrative Law: Declaratory Judgments: Appeal and Error.** The standard of review on appeal from a declaratory judgment action filed under the Administrative Procedure Act in the district court prior to July 1, 1989, is de novo on the record.
2. **Appeal and Error.** When the issue in a case is a question of law, an appellate court must reach a conclusion independent from the one made by the trial court.
3. **Federal Acts: Intent: Taxation.** The congressional intent of 31 U.S.C. § 3124 (1988) is to prevent state taxes which diminish in the *slightest degree* the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit; also, § 3124 exempts from state taxation those federal obligations, and interest thereon, which are directly and *indirectly* considered in computation of the tax and has been interpreted as a "broad" and "sweeping" exemption. It is clear that a state tax on such income would diminish the market value and the investment attractiveness of federal securities, that the tax would impose a burden on the federal government's regulation of the nation's money supply, and that such tax would increase the costs to the federal government in financing the national debt. Therefore, the income received by a mutual fund shareholder from the fund's investment in federal securities using repurchase agreements is exempt from state taxation under § 3124.

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

Don Stenberg, Attorney General, and David Edward Cygan for appellant.

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

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

WHITE, J.

The Department of Revenue of the State of Nebraska (Department) appeals the decision of the district court for Lancaster County that Department of Revenue Ruling 22-85-1 violates 31 U.S.C. § 3124 (1988) and the Supremacy Clause of the U.S. Constitution.

The controversy in this case arose out of the State's taxation of income the appellee, John Loewenstein, received from

investments in mutual funds. The appellee, a Nebraska resident, owned shares in two mutual funds, the Trust for Short-Term U.S. Government Securities and the Trust for U.S. Treasury Obligations (trusts). These trusts invested exclusively in U.S. government securities either directly or through repurchase agreements. Pursuant to Revenue Ruling 22-85-1, Loewenstein was required to pay state income taxes on the interest income he received from the repurchase agreements executed by the trusts involving federal securities. Revenue Ruling 22-85-1 provides in part:

> A repurchase agreement is essentially a short-term loan, bearing interest at a specified rate, whereby an owner of government or agency securities obtains funds from a customer, a financial institution, or a broker/dealer. The loan is secured by certain Treasury Bills or other obligations of the federal government owned by the borrower. The terms of the repurchase agreement generally provide for the sale of the securities with a prompt repurchase by the owner. The party providing the funds does not receive the actual federal government obligations securing the investment, but does receive a collateral receipt identifying the securities pledged to or sold to the party providing the funds. The risk of ownership and title to the securities does not shift from the operator of a repurchase pool to the investor providing short-term funds. The interest earned on the United States government obligations remains the income of the owner who submitted the securities as collateral for the loan.
>
> The interest income received from repurchase agreements involving obligations of the United States government is income to the investor who provides the funds as a loan secured by government securities. This interest income which is received from repurchase agreements involving obligations of the United States government is subject to the Nebraska individual income tax. It is not to be subtracted from a taxpayer's federal taxable income on the Nebraska return.

In May 1988, Loewenstein filed a declaratory judgment action under the Administrative Procedure Act, in the district

court for Lancaster County, asking that Department of Revenue Ruling 22-87-4 be declared invalid pursuant to § 3124 and that the income received by Loewenstein from the trusts be declared exempt from state taxation. See Neb. Rev. Stat. § 84-911 (Reissue 1987). Thereafter, the parties jointly filed a motion to amend the pleadings to include a request for a ruling on the validity of Revenue Ruling 22-85-1. The district court found that both rulings violate § 3124 and the Supremacy Clause of the U.S. Constitution and, therefore, declared them void. The Department appeals the district court's decision, but only with respect to Revenue Ruling 22-85-1.

The Department asserts that the district court erred in determining that the income from repurchase agreements for obligations of the United States constitutes interest or a dividend received by the owner of obligations of the United States and in concluding that Revenue Ruling 22-85-1 is violative of the Supremacy Clause of the U.S. Constitution, § 3124, and Neb. Rev. Stat. § 77-2716(1)(a) (Cum. Supp. 1988). The Department's assignments of error present the following issue: whether § 3124, which provides that federal securities are exempt from state taxation, precludes Nebraska from taxing the income received by Loewenstein from the trusts' investment in federal securities using repurchase, or repo, agreements. We conclude that this income is exempt from state taxation under § 3124 and accordingly affirm the district court's judgment invalidating Revenue Ruling 22-85-1.

The standard of review on appeal from a declaratory judgment action filed under the Administrative Procedure Act in the district court prior to July 1, 1989, is de novo on the record. See Neb. Rev. Stat. § 84-918(2) (Cum. Supp. 1992). Since the issue in this case is a question of law, we must reach a conclusion independent from the one made by the trial court. *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 500 N.W.2d 566 (1993).

The facts in this case are undisputed. At trial, the parties jointly introduced into evidence two stipulations. The pertinent facts stated in the second stipulation are as follows:

> 1. The Trust[s] . . . are no-load, open-end, diversified investment companies whose primary objective is to

receive current income from ownership of U.S. Government securities and obligations, either directly or through the use of repurchase agreements.

2. The Trusts do not engage in any other business.

3. The Trusts are qualified as regulated investment companies under Internal Revenue Code Subchapter M and are established under the Investment Company Act of 1940.

. . . .

5. The Trusts make U.S. Government securities accessible to investors in much smaller denominations than sold in the marketplace and provide a distribution of the risk through a diversified portfolio of U.S. Government securities.

6. The Trusts invest in short-term securities and obligations of the U.S. Government and its agencies and instrumentalities either directly or through repurchase agreements. The Trusts hold no other securities.

. . . .

10. A standard repurchase agreement ("repo") consists of a two-part transaction.

11. The first part consists of the transfer of specified securities by the seller to the buyer, in exchange for cash.

12. The second part consists of the contemporaneous agreement by the seller to repurchase the securities at the original sale price, plus an agreed upon amount of "interest," paid on a specified future date (the "Maturity Date").

13. Actual delivery is taken of the securities through the Federal Reserve book entry system.

14. There is no separate promissory note executed in connection with the repurchase agreement.

15. The repurchase price of the government securities subject to a repo is typically less than the market value of the securities.

. . . .

18. The repurchase price of the securities is equal to the original sale price, plus the negotiated interest.

19. The interest paid by the seller upon repurchase is less

than the interest rate accruing on the purchased securities.

The first stipulation included the depositions of Stewart Brown, a financial analyst and university professor, and Peter Sternlight, executive vice president of the Federal Reserve Bank of New York. These depositions were not conducted by counsel in this case, but, rather, by counsel litigating a case, Page v. Department of Revenue, State of Florida, No. CI 87-2586, in the Circuit Court of the Ninth Judicial Circuit, Orange County, Florida. The parties in Page v. Department of Revenue, State of Florida, litigated the same issue that we must address in this case.

Sternlight's testimony stated that repurchase agreements involving federal securities are essential to the efficient functioning of the government securities markets. He stated that repo agreements are an important method for dealers to finance their inventories of federal securities and that primary dealers underwrite 35 to 75 percent of new federal securities. Sternlight testified that an impairment of the repo market would make it less attractive for dealers to underwrite federal securities, thus adding to Treasury interest costs. Sternlight characterized repurchase transactions as the purchase and sale of securities. However, Sternlight admitted on cross-examination that repurchase transactions are very similar to collateralized loans. In addition, he stated that the function of the Federal Reserve to make short-term adjustments in the nation's money supply would be more difficult without repurchase agreements and that the Federal Reserve would not be authorized by law to use repurchase agreements if they were characterized as collateralized loans.

Brown's testimony supports Revenue Ruling 22-85-1. Brown testified that the economic substance of a repurchase transaction is a secured loan. Brown also stated that the Federal Reserve could still conduct open-market operations in essentially the same way without repurchase agreements.

The Department also introduced into evidence the affidavit of Donald O. Ellingson, tax law manager in the tax policy division of the Department. In his affidavit, Ellingson provided an analysis of a typical federal securities repurchase transaction between a mutual fund and a bank, the broker-dealer, based on

a repo agreement identical to the one utilized by the trusts. Ellingson concluded that the income from the repo transaction was not exempt from state taxation. His conclusion was based on the same rationale applied in Revenue Ruling 22-85-1, that is, the characterization of the transaction as a loan rather than a sale.

Before we discuss the validity of Revenue Ruling 22-85-1 and the state tax authorized therein, it is helpful to briefly describe the state and federal statutory provisions which prohibit state taxation of income earned by Nebraska residents from investments in federal securities. Under Neb. Rev. Stat. § 77-2715(2) (Cum. Supp. 1988), a taxpayer is required to pay state income tax on his or her federal adjusted gross income as modified by § 77-2716. In accordance with § 77-2716(1)(a), a taxpayer may subtract from his or her federal adjusted gross income all interest or dividend distributions from obligations of the United States which are exempt from state income taxes under the laws of the United States. The federal law which exempts such interest distributions from state taxation is § 3124. This section provides:

> **Exemption from taxation**
>
> (a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax . . . .

Section 3124 is a revision and recodification of 31 U.S.C. § 742 (1976). In § 742, the last sentence from the quote above read as follows: "This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, *directly or indirectly*, in the computation of the tax . . . ." (Emphasis supplied.) See Act of Sept. 22, 1959, Pub. L. No. 86-346, § 105(a), 73 Stat. 621, 622. When Congress recodified § 742 as § 3124, the words "directly or indirectly" were omitted as surplus. H.R. Rep. No. 97-651, 97th Cong., 2d Sess. 94, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1895, 1988. It was the intention of Congress to reformulate § 742 without a substantive change. See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 4(a), 96 Stat. 877, 1067.

See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 4(a), 96 Stat. 877, 1067.

Since the recodification did not substantively change the statute, the U.S. Supreme Court's construction of § 742 is also binding authority in the construction of § 3124. The Court has " 'treated [§ 742] as principally a restatement of the constitutional rule [that federal government property is immune from state taxation].' " *First National Bank v. Bartow Cty. Tax Assessors*, 470 U.S. 583, 593, 105 S. Ct. 1516, 84 L. Ed. 2d 535 (1985), quoting *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 103 S. Ct. 692, 74 L. Ed. 2d 562 (1983). The Court has interpreted the exemption for federal securities provided in § 742 as a "sweeping" and "broad" exemption. See, *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 103 S. Ct. 3369, 77 L. Ed. 2d 1072 (1983); *Memphis Bank & Trust Co. v. Garner, supra*. This exemption is intended " 'to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit.' " *Memphis Bank & Trust Co. v. Garner*, 459 U.S. at 396, quoting *Smith v. Davis*, 323 U.S. 111, 65 S. Ct. 157, 89 L. Ed. 107 (1944). However, the Court has also stated that the tax exemption provided by § 742 is not a tax shelter. *First National Bank v. Bartow Cty. Tax Assessors, supra*.

The trusts invest in federal securities in two ways. In the first method, "direct purchase and sale," the trusts purchase federal securities without any restrictions on them, hold them for an indeterminate period of time, then either collect the interest from the federal government on those obligations when they mature or sell them at a later date prior to maturity. When the interest income from such a transaction is passed on to the shareholders of the trusts, it is exempt from state taxation under § 3124. See, *American Bank & Trust Co. v. Dallas County, supra*; *Memphis Bank & Trust Co. v. Garner, supra*; *Brown v. Franchise Tax Bd.*, 197 Cal. App. 3d 300, 242 Cal. Rptr. 810 (1987). The second method of investment used by the trusts is to purchase federal securities and simultaneously enter into a repurchase agreement, agreeing to resell the obligations back to the seller at a specified date and price. The dispute in this case

involves the state's taxation of the income which the trusts' shareholders receive from these repurchase transactions.

The Department argues that the trusts' repo transactions were really collateralized loans, whereby the trusts did not *own* the federal securities, but, rather, took the U.S. obligations as *security* for a short-term loan to the seller of the securities, a broker-dealer. Therefore, the income earned by the trusts (and subsequent income distributions by the trusts to their shareholders) from a repurchase transaction constituted interest payments on a loan and not interest income from the sale of federal securities. The Department further asserts that this loan was the obligation of the second party (a private party) to the repo agreement, not the obligation of the federal government. The Department concludes that since the income received by the shareholders constituted interest payments from a private party on a loan, a state tax on such income did not involve the consideration of a U.S. obligation, or the interest thereon, in computing the tax. Thus, the subject income is not tax-exempt under § 3124.

The issue in this case is one of first impression for this court. Yet, there are a few jurisdictions which have addressed this issue and have determined that the income from a repo transaction involving federal securities is not exempt from state taxation. See, *Hammond Lead Products v. Tax Com'rs*, 575 N.E.2d 998 (Ind. 1991); *Department of Revenue v. Page*, 541 So. 2d 1270 (Fla. App. 1989); *Capital Preservation v. Rev. Dept.*, 145 Wis. 2d 841, 429 N.W.2d 551 (Wis. App. 1988); *Andras v. Department of Revenue*, 154 Ill. App. 3d 37, 506 N.E.2d 439 (1987). See, also, *Union Planters Nat. Bank of Memphis v. United States*, 426 F.2d 115 (6th Cir. 1970); *American National Bank of Austin v. United States*, 421 F.2d 442 (5th Cir. 1970) (income from repo transactions involving municipal bonds not exempt from federal taxation). These courts apply a rationale similar to that proposed by the Department. That is, in a repo transaction, the seller-repurchaser (i.e., the broker-dealer) is the party who has the rights and risks associated with ownership of the securities, and as the true owner of the securities, the seller-repurchaser is the only party in the transaction who can claim the tax exemption provided by § 3124. *Hammond Lead*

Products v. Tax Com'rs, supra; *Department of Revenue v. Page, supra*; *Capital Preservation v. Rev. Dept., supra*; *Andras v. Department of Revenue, supra*. The rationale applied by these courts in determining whether a mutual fund shareholder's income from a repo transaction is exempt under § 3124 is based entirely on whether that party is deemed the true, or direct, owner of the securities.

We do not believe that direct ownership determines whether income from a repo agreement is exempt under § 3124. The U.S. Supreme Court stated that the long-established congressional intent of § 3124 is to prevent state taxes which diminish in the *slightest degree* the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit. See *Smith v. Davis, supra*. Also, because § 742 was recodified without substantive change, § 3124 still exempts from state taxation those federal obligations, and interest thereon, which are directly and *indirectly* considered in computation of the tax. Furthermore, the Court has interpreted this exemption as "broad" and "sweeping." See, *American Bank & Trust Co. v. Dallas County, supra*; *Memphis Bank & Trust Co. v. Garner, supra*. Thus, the income received by the appellee in this case, at the very least, is considered indirectly in computation of the tax. In addition, the state tax clearly imposes a burden on the market for federal securities. A review of the expert testimony of Sternlight makes it clear that a state tax on such income would diminish the market value and the investment attractiveness of federal securities, that the tax would impose a burden on the federal government's regulation of the nation's money supply, and that such tax would increase the costs to the federal government in financing the national debt.

We conclude that the rationale and decision in Revenue Ruling 22-85-1 are invalid and that the income received by the appellee from repo transactions executed by the trusts involving federal securities is exempt from state taxation under § 3124. We thus affirm the district court's judgment with respect to Revenue Ruling 22-85-1.

AFFIRMED.

HASTINGS, C.J., not participating.

CAPORALE, J., dissenting.

I dissent; for when stripped to their essence, the transactions in question are nothing more than ones in which the plaintiff-appellee, John Loewenstein, participated as a lender in loans secured by various governmental obligations. Therefore, state taxation of the income Loewenstein earned through those participations is not precluded by the Supremacy Clause of the U.S. Constitution through the provisions of 31 U.S.C. § 3124 (1988), and Nebraska Department of Revenue Ruling 22-85-1, issued by the defendant-appellant, State of Nebraska, Department of Revenue, is valid.

Loewenstein is an investor in funds operated by Massachusetts Business Trusts, a regulated investment company as defined in the Internal Revenue Code, I.R.C. § 851(a) (1988), which funds are commonly known as mutual funds. Under the "General Repurchase Agreement" which controls the transactions in question, a seller of governmental securities to the trusts is obligated to repurchase them by a fixed date, and the trusts are obligated to resell them at a fixed price. In exchange, the trusts receive a fixed rate of return which bears no relationship either to the value of the securities which make up the trusts' funds or to the income the securities produce for the seller, or more accurately, the seller-repurchaser. In short, the seller-repurchaser bears the entire market risk. Moreover, until the repurchase date, the seller-repurchaser has the right to substitute one governmental security for another. Further, the seller-repurchaser and the trusts each have remedies against the other in the event of a default in the respective obligations of either.

Nine of the 10 other appellate courts which have considered this issue have held that under such circumstances, the income to the investors is subject to state taxation: *Hammond Lead Products v. Tax Com'rs*, 575 N.E.2d 998 (Ind. 1991); *Everett v. Dept. of Revenue and Finance*, 470 N.W.2d 13 (Iowa 1991); *Comptroller v. First United Bank*, 320 Md. 352, 578 A.2d 192 (1990); *Borg v. Dept. of Rev.*, 308 Or. 34, 774 P.2d 1099 (1989); *Department of Revenue v. Page*, 541 So. 2d 1270 (Fla. App. 1989); *Massman Const. v. Director of Revenue*, 765 S.W.2d 592 (Mo. 1989); *Capital Preservation v. Rev. Dept.*, 145 Wis. 2d

841, 429 N.W.2d 551 (Wis. App. 1988); *In re Sawyer Estate*, 149 Vt. 541, 546 A.2d 784 (1987); *Andras v. Department of Revenue*, 154 Ill. App. 3d 37, 506 N.E.2d 439 (1987), *cert. denied* 485 U.S. 960, 108 S. Ct. 1223, 99 L. Ed. 2d 424 (1988). The only decision other than that of the majority holding to the contrary is that of an intermediate court of appeals in *Matz v Dep't of Treasury*, 155 Mich. App. 778, 401 N.W.2d 62 (1986). However, the *Matz* court was construing a state statute defining ownership.

While the fact that nine other courts have reached a contrary result to that reached by the majority is not, in and of itself, particularly persuasive, the reasoning illustrated by *Andras v. Department of Revenue*, 154 Ill. App. 3d at 43-44, 506 N.E.2d at 443-44, is:

> In reviewing similar transactions involving municipal bonds, Federal courts have consistently held that the Federal income tax exemption provided for income received from State or municipal obligations (26 U.S.C. sec 103(a) (1982)) is available only to the taxpayer who actually owns the securities—*i.e.*, the taxpayer who has the right to dispose of them and who bears the risk of a profit or loss. (See *American National Bank v. United States* (5th Cir. 1970), 421 F.2d 442, 451 (and cases cited therein).) Plaintiffs have cited no authority holding that section 742 requires immunizing from State taxation the income of anyone other than the owner of Federal government securities, nor have we found any authority supporting plaintiffs' position.
>
> While we recognize that section 742 is a constitutionally mandated immunization from taxation (see, *e.g.*, *Memphis Bank & Trust Co. v. Garner* (1983), 459 U.S. 392, 397, 74 L. Ed. 2d 562, 567, 103 S. Ct. 692, 695-96) rather than a legislative exemption from a particular tax, the scope of the immunity it affords is not unlimited. In *First National Bank v. Bartow County Board of Tax Assessors* (1985), 470 U.S. 583, 84 L. Ed. 2d 535, 105 S. Ct. 1516, the Supreme Court held that section 742 did not require a State to permit a bank to deduct the full value of its government securities from its gross assets. The court

recognized that, because the bank may have incurred liabilities, the interest on which was also deductible, to acquire the securities, the statute was satisfied by the State's allowing only a *pro rata* deduction from the bank's net worth for the securities. The court concluded that the bank should not be allowed to use Federal obligations to shelter otherwise taxable assets. (470 U.S. 583, 593, 84 L. Ed. 2d 535, 545, 105 S. Ct. 1516, 1523-24.) If the Trust is not the true owner of these securities, but is merely loaning the sellers the securities' purchase price and thereby earning otherwise taxable interest income, we conclude that it may not shelter that income from State taxation by allowing the borrowers to secure the loans with tax-exempt Federal securities.

In determining whether or not a repurchase transaction is actually a loan, Federal courts consider the entire transaction and look to the following specific factors, which, if present, tend to indicate that the transaction is a loan: (1) whether the seller could require the purchaser to resell the securities; (2) whether the purchaser could require the seller to repurchase them; (3) whether the agreement provides either party a specific remedy in the event that the other defaults; (4) whether the seller agreed to pay interest at a stipulated rate between the sale and resale; and (5) whether the amount advanced does not necessarily equal the fair market value of the securities sold. (See *Citizens National Bank v. United States* (Ct. Cl. 1977), 551 F.2d 832, 842.) Other indications of a loan are: (6) whether the identical securities are bought and sold, and (7) whether the purchaser may sell the securities for the seller's account in the event of a default. See I.R.S. Rev. Rul. 74-27, 1974-1 C.B. 24. See also I.R.S. Rev. Rul. 82-144, 1982-2 C.B. 34 (transaction held to be purchase where the purchaser could sell the securities at will); I.R.S. Rev. Rul. 77-59, 1977-1 C.B. 196 (transaction was found to be loan only and the purchaser's assets were found not to be the securities themselves, but the seller's obligation to repay the funds loaned).

Loewenstein argues that repurchase agreements are essential

in order to allow the Federal Reserve to adjust the nation's money supply and points to 12 C.F.R. § 32.103(a) (1993), which provides that U.S. Treasury notes subject to a repurchase agreement do not constitute a loan or the extension of credit. However, as noted in *Hammond Lead Products v. Tax Com'rs, supra*, that regulation relates to commercial banks and the general scheme of lending limits; it has no bearing on the Internal Revenue Code or the judicial interpretation of repurchase agreements.

Loewenstein also argues that repurchase agreements are necessary to increase the liquidity of mutual funds dealing in government obligations in order to satisfy those investors who wish to avoid inflexible terms in their investments. But government securities are, in and of themselves, very liquid; they can be sold readily, albeit with some short-term market risk. Also, a mutual fund could achieve even greater liquidity by borrowing against the government securities it holds. And a fund could also enhance its liquidity by diversifying the maturity dates of the government securities it acquires. The point is that there are other means to achieve liquidity without the use of repurchase agreements, which take exposure to market risks and other incidents of ownership away from the investor and give them to the seller-repurchaser.

As stated in *Everett v. Dept. of Revenue and Finance*, 470 N.W.2d 13, 15 (Iowa 1991):

> The State's tax did not consider, either directly or indirectly, the federal obligations or the interest paid on them in calculating the Everetts' tax. Instead, the tax was based on the interest paid by private seller-repurchasers pursuant to a private sector loan agreement in which federal obligations served as collateral. In such a situation, neither the federal obligations nor the interest thereon is considered in calculating the state income tax. *Borg*, 308 Or. at 38-39, 774 P.2d at 1102; *In re Thomas Sawyer Estate*, 546 A.2d at 786. We hold that neither the supremacy clause nor 31 U.S.C. section 3124(a) prevents the State from taxing the income derived from the repurchase agreements.

Accordingly, I would reverse the judgment of the district

court and remand the cause with the direction that the district court declare Revenue Ruling 22-85-1 to be valid.

GRANT, J., Retired, joins in this dissent.

WESTERN FERTILIZER AND CORDAGE COMPANY, INC., APPELLANT, V. CITY OF ALLIANCE, A MUNICIPAL CORPORATION, APPELLEE.

504 N.W.2d 808

Filed August 27, 1993. No. S-91-822.

1. **Judgments: Res Judicata.** The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. Res judicata is founded on a policy favoring termination of an action by preclusion or prevention of subsequent litigation on the same cause.
2. **Mortgages: Foreclosure: Liens: Redemption: Title.** As the result of a foreclosure sale of real estate given as security by the mortgagor, the rights of redemption of the mortgagor and junior lienholders who are joined in the action are extinguished, and upon confirmation of the sale, the purchaser obtains title to the entire interest and estate of the mortgagor and mortgagee as it existed at the date of the mortgage.
3. **Mortgages: Foreclosure: Liens.** When a senior mortgagee purchases the mortgaged real estate at a foreclosure sale, the confirmed purchase and sheriff's deed extinguish the rights of junior lienholders who were parties to the action.
4. **Mortgages: Liens: Eminent Domain.** A mortgagee's lien on real estate is an interest that may be subjected to a taking for a public purpose and, therefore, may be the subject of an eminent domain proceeding.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Scotts Bluff County, ROBERT O. HIPPE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Robert G. Simmons, Jr., of Simmons, Olsen, Ediger & Selzer, P.C., for appellant.

James R. Hancock, of Hancock & Denton, P.C., for appellee.

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

PER CURIAM.

In this inverse condemnation action, Western Fertilizer and Cordage Company, Inc. (Western), brought suit against the City of Alliance (City), seeking damages resulting from utility easements and water, sewer, and street improvements made by the City on property purchased by Western at a foreclosure sale. The trial court sustained the City's motion for summary judgment, and the Nebraska Court of Appeals affirmed. Western petitioned for further review pursuant to Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1992). We reverse the judgment of the Court of Appeals.

FACTUAL BACKGROUND

Western was the mortgagee of 79.8 acres of land sold to BRG, Inc., in 1976 for $239,400. BRG, which planned to develop the land for residential use, authorized the City to improve the property. After BRG defaulted on the mortgage, Western filed suit against BRG and the City to foreclose on the mortgage and to determine the validity and priority of certain liens and assessments claimed by the City. The City cross-petitioned, claiming lien assessments totaling over $274,000. In an appeal from that action, this court determined that "Western did not sign or consent to the dedications, and, consequently, the assessments for improvements upon the land mortgaged to Western are not valid as against Western's mortgage, and are inferior thereto." *Western Fertilizer v. BRG*, 228 Neb. 776, 787, 424 N.W.2d 588, 595 (1988) (*Western I*). Western subsequently purchased the land for $50,000 at a sheriff's sale on October 4, 1988. Western later instituted the present inverse condemnation action.

The following is a chronology of events in the present action:

May 19, 1976—BRG purchased the property from Western for development purposes, with the final payment due October 1, 1977.

April 1977—The City passed two ordinances approving the plat of Homestead First Addition which contained a dedication of the streets, alleys, and public grounds therein to the use and

benefit of the public.

August 31, 1977—Western's president, Gordon Keeley, on behalf of Western, signed one dedication for part of the property.

September 29, 1977—Restrictive covenants, including certain utility easements, were established by Western and BRG and signed by Keeley.

October 1977—BRG gave Western a promissory note secured by a mortgage on the property in question. On the same day the mortgage was executed (October 26), the parties entered into an amended sales agreement which reflected changes (partial platting) with respect to development of the real estate.

November 1978 to October 1981—BRG signed several more dedications during this time period; Western's secretary-treasurer, Max Garwood, without authority to do so, signed the same dedications on behalf of Western. In addition, the City passed several ordinances approving plats and establishing sewer, water, and street improvement districts in the property.

Early 1983—After Garwood left Western, Keeley learned that Garwood had signed the additional dedications.

August 1983—Keeley complained to the City about the unauthorized dedications and informed the City that Western did not join in or consent to those dedications signed by Garwood. He also advised the City that BRG was in default on its debt to Western and that Western might be forced to foreclose its mortgage on BRG's land.

May 1985—Western initiated foreclosure proceedings. See *Western I*.

June 17, 1988—Issuance of decision and opinion in *Western I*.

October 1988—Western acquired the property at a foreclosure sale and received a sheriff's deed for the land.

August 23, 1990—Western filed its inverse condemnation action against the City.

In its petition in the inverse condemnation action, Western alleged that the City "had taken and damaged for public use all or parts of the lands" in question without just compensation and that in the event the court found that the City had not taken

all of the property in question, Western had nonetheless suffered incidental and consequential damages to the land not taken.

Both parties moved for summary judgment. In its motion, the City asserted that (1) the statute of limitations barred Western's action; (2) Western was estopped from claiming that the City had taken Western's property because Western had taken title to the property by lot and block numbers; (3) this court, in *Western I*, had held that the easements acquired by the City were valid but subordinate to Western's mortgage; (4) Western did not acquire a cause of action for condemnation damages when it purchased the property at the foreclosure sale; and (5) Western was estopped from denying the easements it did not specifically approve because it became bound to the plan of development when it accepted Homestead Addition and Homestead First Addition.

The district court granted summary judgment to the City, ruling that "[t]he fact that the defendant's assessment and lien are void against the priority of the plaintiff's lien does not mean they have 'taken' private property of the plaintiff without just compensation." The court found that Western had purchased the property in question with "actual notice of the defendant's interest in the land" and, thus, its interest could be no greater than that of BRG, which had authorized the City's claims to the property. Furthermore, the court found that "the defendant's easements and appropriations are open, visible, recorded of public record and make plaintiff's claimed ownership a servient estate to the defendant government's exercise of dominion over, appropriation, and interest in the real estate. *Kimco Addition v. Lower Platte South N.R.D.*, 232 Neb. 289, 440 N.W.2d 456 (1989)."

Western appealed to the Nebraska Court of Appeals, which affirmed the trial court's decision in *Western Fertilizer v. City of Alliance*, 1 NCA 1517 (1992). Relying in large part on *Peterborough Savings Bank v. Pierce*, 54 Neb. 712, 75 N.W. 20 (1898), the Court of Appeals concluded that because "Western, as purchaser, had notice of the improvements on the property, [it acquired] no rights greater than BRG or Western, as mortgagee, against the City concerning these improvements." 1

NCA at 1520.

On the question of inverse condemnation, the Court of Appeals stated:

> The record shows that BRG gave permission for the City to make improvements on the property in question. BRG would not have had an action against the City for inverse condemnation because it gave the City permission to perform the improvements. Similarly, Western, as owner in lieu of BRG, does not have an action against the City for inverse condemnation.
>
> The judgment of the Nebraska Supreme Court in [*Western I*] established the priority of the interests as between Western and the City. Western, as mortgagee, had a security interest in the property and a right to protect that interest, which it did in the foreclosure action. The City's failure to acquire permission from Western, as mortgagee, for the improvements was not a "taking" of Western's interest in the property because Western did not have title or possession of the property at the time the improvements were consented to and made. Therefore, Western, as mortgagee, did not have rights against the City for inverse condemnation.

1 NCA at 1520.

Western petitioned this court for further review pursuant to § 24-1107, asserting that (1) the Court of Appeals had significantly changed Nebraska law that a purchaser at a foreclosure sale acquires every right and interest in the property of all the parties to the action and (2) the Court of Appeals' holding that the purchaser at a foreclosure sale acquires title subject to the rights of a junior lienholder who was a party to the foreclosure proceeding is contrary to both Neb. Rev. Stat. § 25-1533 (Reissue 1989) and prevailing case law.

Article I, § 21, of the Nebraska Constitution states, "The property of no person shall be taken or damaged for public use without just compensation therefor." Article I, § 21, of the Nebraska Constitution is self-executing, and therefore, a cause of action may be brought directly under that section. A litigant must simply " 'allege and prove facts constituting a cause of action' under the constitutional language." *Dishman v.*

Nebraska Pub. Power Dist., 240 Neb. 452, 453, 482 N.W.2d 580, 582 (1992) (quoting *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985)). "[W]hen a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in a statutory action for inverse condemnation, or in a constitutional action for inverse condemnation." *Dishman v. Nebraska Pub. Power Dist.*, 240 Neb. at 454, 482 N.W.2d at 582 (citing *Slusarski v. County of Platte*, 226 Neb. 889, 416 N.W.2d 213 (1987)). Therefore, the district court properly exercised jurisdiction over this inverse condemnation action.

WESTERN I

In its answer to Western's petition, the City set forth a counterclaim in which it asked the court to set aside the judgment in the foreclosure action which is the subject of *Western I*. The City alleged that although Keeley, Western's president, testified that he was never asked to sign, nor did he sign, any plat or dedication on behalf of Western other than the plat signed on August 31, 1977, he did, in fact, sign on September 29, 1977, a document entitled "Restrictive Covenants," which was a dedication of street and utility easements upon which the City relied. The City argues that this nondisclosure was material to the decision in *Western I* and that, therefore, that judgment should be set aside.

The document to which the City refers provides that anyone taking title or possession of property within Homestead First Addition waives any claim against Western or BRG arising out of construction, maintenance, repair, renewal, replacement, or operation of utility easements. It was signed by Keeley before the mortgage was executed, was offered into evidence in the foreclosure action, and presumably was considered by the court. Thus, according to Western, the issue of its lack of approval of the dedications is res judicata.

The doctrine of res judicata

> is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. . . .

> Res judicata is founded on a policy favoring termination of an action by preclusion or prevention of subsequent litigation on the same cause.

NC + Hybrids v. Growers Seed Assn., 228 Neb. 306, 310-11, 422 N.W.2d 542, 545 (1988). In addition, " 'if the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter *as to all future actions between the parties . . . .*' " (Emphasis supplied.) *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 107, 181 N.W.2d 119, 123 (1970) (quoting 46 Am. Jur. 2d *Judgments* § 422 (1969)).

Of course, a court may modify or vacate a judgment pursuant to Neb. Rev. Stat. § 25-2001 (Reissue 1989) or its equitable powers. Although a court's authority to vacate or modify a judgment under § 25-2001 is not exclusive, *Joyce v. Joyce*, 229 Neb. 831, 429 N.W.2d 355 (1988); *State ex rel. Birdine v. Fuller*, 216 Neb. 86, 341 N.W.2d 613 (1983); and *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983), a litigant seeking to proceed in equity must show that § 25-2001 is not applicable, because equitable relief does not lie where there is a remedy at law, *State ex rel. Birdine v. Fuller, supra*, and *Emry v. American Honda Motor Co., supra*. Section 25-2001(4) provides that a judgment may be modified or vacated if the judgment was the result of "fraud practiced by the successful party in obtaining the judgment or order." The City contends that Keeley's testimony in the foreclosure action regarding his supposed ignorance of the improvements being made to the property was "unbelievable" and that our decision in *Western I* was the result of Keeley's false testimony. Because the grounds on which the City asserts *Western I* should be vacated fall within § 25-2001(4), and the City failed to file a petition to vacate the judgment as required by Neb. Rev. Stat. § 25-2002 (Reissue 1989), we do not have the power to vacate the judgment in *Western I*.

The question of whether Keeley approved the dedications to the City was central to our decision in *Western I*. Therefore, under the doctrine of res judicata, we are bound by the factual findings in *Western I*, as discussed below.

THE FORECLOSURE SALE FOR WESTERN'S MORTGAGE

In *Western I*, we affirmed the district court's order foreclosing Western's mortgage and ordering the sale of the real estate. The City claimed its lien for unpaid assessments was superior to Western's mortgage. We disagreed, noting that

> " '[f]undamental to the law of real property is the rule that one may not convey or alienate a greater interest in land than he owns, and, consistently with this axiomatic principle, it is firmly established that a mortgagor cannot, without the consent of the mortgagee, make a dedication of the mortgaged premises so as to adversely affect the interest of the mortgagee.' [Citations omitted.]"

228 Neb. at 782-83, 424 N.W.2d at 593 (quoting *Metropolitan Life Ins. Co. v. SID No. 222*, 204 Neb. 350, 281 N.W.2d 922 (1979)). Thus, in *Western I*, we held that because "Western did not sign or consent to the dedications . . . the assessments for improvements upon the land mortgaged to Western are not valid as against Western's mortgage, and are inferior thereto." 228 Neb. at 787, 424 N.W.2d at 595.

Western argues that because the City was a party to the foreclosure action, Western acquired all the rights and interests of the City when Western purchased the property at the foreclosure sale.

> The purpose of a foreclosure action is to satisfy, out of the proceeds of a sale of the estate in the mortgaged property as it stood at the time the mortgage was executed, the claim of the holder of the obligation when there is a default in the performance of the act it is given to secure.

4 American Law of Property § 16.186 at 446-47 (A. James Casner ed. 1952). As the result of a foreclosure sale of real estate given as security by the mortgagor, the rights of redemption of the mortgagor and junior lienholders who are joined in the action are extinguished, and upon confirmation of the sale, the purchaser obtains title to the " 'entire interest and estate of mortgagor and mortgagee as it existed at the date of the mortgage.' " *Id.* at § 16.195 at 469 (quoting *Rector, etc., of Christ P. E. Church v. Mack et al.*, 93 N.Y. 488, 45 Am. Rep. 260 (1883)). See, also, *Nystrom v. Buckhorn Homes, Inc.*, 778

P.2d 1115 (Alaska 1989); *Valentine v. Portland Timber*, 15 Wash. App. 124, 547 P.2d 912 (1976). Cf. 3 The American Law of Real Property §§ 25.05[1] and 25.11[1] (Arthur R. Gaudio ed. 1992) (mortgagor cannot transfer greater interest in the property than he has; senior lienholder is entitled to be paid in full before junior lienholder receives anything).

Furthermore, in *Metropolitan Life Ins. Co. v. SID No. 222, supra*, we held that "in the absence of an estoppel, or the consent of the mortgagee to a dedication, a foreclosure sale revokes and nullifies an attempted dedication by a mortgagor." 204 Neb. at 355, 281 N.W.2d at 925. Western cites additional Nebraska decisions in support of the preceding proposition, including *Hart v. Beardsley*, 67 Neb. 145, 93 N.W. 423 (1903), in which this court held that the purchaser at a foreclosure sale, who had acquired the property in reliance on the law and a court decree declaring his mortgage "superior and paramount," obtained every right, title, and interest of all the parties to the foreclosure action. See, also, *Nuttelman v. Julch*, 228 Neb. 750, 424 N.W.2d 333 (1988) (because the husband's rights and interest had passed to the purchaser upon confirmation of the judicial sale, any lien asserted by his wife was not a property right in or to the property, but merely a charge or security thereon); *Butts v. Hale*, 157 Neb. 334, 59 N.W.2d 583 (1953) (every interest and right held by a mortgagor, whenever acquired, pass with the mortgage at a foreclosure sale); *Clements v. Doak*, 140 Neb. 265, 299 N.W. 505 (1941) (a purchaser at a foreclosure sale buys at his peril, but acquires every right and interest of all parties to the action); *Criswell v. McKnight*, 120 Neb. 317, 232 N.W. 586 (1930) (a mortgagee which failed to protect itself against taxes could not complain about insufficiency after mortgage was satisfied); *Arterburn v. Beard*, 86 Neb. 733, 126 N.W. 379 (1910) (although all right, title, and interest of defendants in property passed to purchaser at a foreclosure sale, because purchaser had notice of an easement, he bought subject to that easement); *Kerr v. McCreary*, 84 Neb. 315, 120 N.W. 1117 (1909) (a purchaser at a foreclosure sale acquires the title of all parties to the action, but not the rights of nonparties); *Currier v. Teske*, 84 Neb. 60, 120 N.W. 1015 (1909) (the purchaser at a

foreclosure sale acquires the title only of those who were parties to the action); *Young v. Brand*, 15 Neb. 601, 19 N.W. 494 (1884) (whatever estate or title mortgagor held was merged in the decree and extinguished by the deed thereunder).

However, the City points out that this court has also held that the purchaser of real property at a judicial sale buys at his peril, *Hitchcock County v. Cole*, 80 Neb. 375, 114 N.W. 276 (1907), and that the deed obtained at such a sale conveys only the estate which would have been conveyed by a quitclaim deed from the execution debtor to the purchaser, *Peterborough Savings Bank v. Pierce*, 54 Neb. 712, 75 N.W. 20 (1898).

Moreover, the City argues that according to § 25-1533, a deed obtained at a judicial sale

> shall be sufficient evidence of the legality of such sale and the proceedings therein until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned as was vested in the party at or after the time when such lands and tenements became liable to the satisfaction of the judgment.

According to the City's interpretation of § 25-1533, Western, as purchaser at a judicial sale, could obtain only that estate which was vested in BRG at or after the time of the foreclosure action. Although the language of § 25-1533 (the purchaser at a judicial sale takes only the interest that the owner had in the land) might appear to conflict with Nebraska case law (the purchaser at a foreclosure sale takes every right and interest of all parties to the foreclosure action), the language of § 25-1533 contemplates that only one party is "liable to the satisfaction of the judgment." In a foreclosure action in which junior lienholders are joined in the action against the mortgagor, they, in a sense, share in liability for the satisfaction of the judgment by being stripped of their interest in the property foreclosed upon. Thus, the rule providing that when a senior mortgagee purchases the mortgaged real estate at a foreclosure sale, the confirmed purchase and sheriff's deed extinguish the rights of junior lienholders who were parties to the action, does not conflict with § 25-1533. See *Valentine v. Portland Timber*, 15 Wash. App. 124, 547 P.2d 912 (1976). Cf. *Hart v. Beardsley*, 67 Neb. 145, 93 N.W. 423 (1903) (sections 499 and 853 of the Code of

Civil Procedure did not change the common-law rule that in the absence of any reservation in the decree, a foreclosure sale transfers every right, title, and interest of all parties to the suit).

Thus, in this case, the City's junior lien was extinguished when Western purchased the property at the foreclosure sale for less than the amount owed on its mortgage, see, *Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp.*, 192 Neb. 588, 223 N.W.2d 425 (1974), and *Hadley v. Schow*, 146 Neb. 163, 18 N.W.2d 923 (1945), and Western obtained on the date of the mortgage the entire estate belonging to BRG and the property described in the mortgage, less the one parcel whose dedication to the City Western had previously approved. That estate, described in "Exhibit A" of the mortgage, included the majority of "Lots 1 and 2, and the South Half of Northeast Quarter, Section 2, Township 24 North, Range 48, West of the 6th P.M." However, the sheriff's deed given to Western following the confirmation of the foreclosure sale described the property as "Lots 1 through 10 inclusive, Block 2 . . . ." Thus, although the land was described by metes and bounds in the mortgage, in the sheriff's deed the property was described by lots and blocks. Because the deed uses different terminology to describe the land than does the mortgage, and the record does not reconcile the different descriptions, a question of fact exists as to whether the two documents describe the identical estate.

TAKING WESTERN'S PROPERTY

Because we have concluded that Western should have received the entire estate as described in the mortgage documents, we must determine whether, in the absence of that occurring, Western's property has been taken. The district court held that "[t]he fact that the defendant's assessment and lien are void against the priority of the plaintiff's lien does not mean they have 'taken' private property of the plaintiff without just compensation," because any failure to secure Western's consent to the dedications was paid for by the City's loss of its claimed lien in the foreclosure action. The court also found that Western had purchased the property in question with "actual notice of the defendant's interest in the land," and thus, Western's interest could be no greater than that of BRG, which

had authorized the City's claims to the property. The court held that Western's claimed ownership was servient to the City's easements and appropriations. However, *Kimco Addition v. Lower Platte South N.R.D.*, 232 Neb. 289, 440 N.W.2d 456 (1989), which the court cited in support of its conclusion, is inapposite, because in *Kimco Addition*, the party claiming its property had been taken had no interest in the property whatsoever at the time the alleged taking occurred.

Relying in large part on *Peterborough Savings Bank v. Pierce*, 54 Neb. 712, 75 N.W. 20 (1898), the Court of Appeals affirmed the district court's decision and concluded that because "Western, as purchaser, had notice of the improvements on the property, [it acquired] no rights greater than BRG or Western, as mortgagee, against the City concerning these improvements" when it purchased the property at the foreclosure sale. *Western Fertilizer v. City of Alliance*, 1 NCA 1517, 1520 (1992).

The Court of Appeals clearly erred in concluding that no taking could have occurred when Western was mortgagee "because Western did not have title or possession of the property at the time the improvements were consented to and made." 1 NCA at 1520. In *Dodge v. O. & S. W. R. R. Co.*, 20 Neb. 276, 282, 29 N.W. 936, 939-40 (1886), this court noted that "[i]f mortgaged property can be literally destroyed . . . without notice to the mortgagee, or any compensation to him, then the [takings clause] of the constitution . . . would be without practical force, and would remain only in theory." Although no Nebraska cases discuss this precise issue, several other jurisdictions have held that a mortgagee's lien on real estate is an interest that may be subjected to a taking for a public purpose and, therefore, may be the subject of an eminent domain proceeding. See, for example, *Matter of the Petition of Dillman*, 276 Mich. 252, 258, 267 N.W. 623, 625 (1936) ("[u]nder any circumstances, a mortgagee has sufficient right to the [condemnation] award to preserve his security against evident or established impairment"); *Board of Directors v. Whiteside*, 87 F. Supp. 69, 71 (W.D. Ark. 1949) ("[i]n condemnation cases the mortgagee cannot be deprived of its lien by such proceedings without notice and, in order for the

plaintiff to acquire title to the property sought to be condemned, it was necessary that the mortgagee be made a party"); *Bourjaily v. Johnson County*, 167 N.W.2d 630, 634 (Iowa 1969) ("[i]t is clear the contract vendors and the mortgagee have interests in the property which will be directly and materially affected by the condemnation of the land in question"); *Maxey v. Redevelopment Authority of Racine*, 94 Wis. 2d 375, 400-01, 288 N.W.2d 794, 806 (1980) ("a mortgagee's lien extends to any compensation made for the condemnation of mortgaged property").

Thus, it does not matter that Western had neither title nor possession of the property at the time the alleged taking occurred if its interest in the property was adversely affected by the City's actions. Whether Western's interest in the property was affected depends upon whether the property described by the sheriff's deed received by Western at the foreclosure sale differs from the property described in the mortgage which Western obtained from BRG. If the property as described by the sheriff's deed differs from the property described in the mortgage, then the property was taken prior to Western's purchase of the land at the foreclosure sale, and the City must pay compensation, unless, as the City asserts, the statute of limitations bars this action.

STATUTE OF LIMITATIONS

Neither the district court nor the Court of Appeals addressed the City's assertion that the statute of limitations barred Western's action. The City acquired its interest in the property as a result of BRG's dedications, which granted the City easements for a variety of purposes. The City then passed ordinances levying assessments on the property. Those ordinances were matters of public record, and notices thereof were published in The Alliance Daily Times-Herald on various dates between November 1978 and October 1981. The City argues that Western's cause of action accrued when those dedications were made and the ordinances passed and that, therefore, this action is barred by the statute of limitations. Furthermore, the City asserts that because extensive development had already occurred in 1979-80, Western had

notice of any infringement of its interest in the property by 1980. Western argues that the statute of limitations did not begin to run until it received the sheriff's deed in October 1988. Western asserts that until that time, the City's use of the property was permissive.

The statute of limitations in an inverse condemnation proceeding is 10 years. Neb. Rev. Stat. § 25-202 (Reissue 1989). See, also, *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977). However, according to *Kimco Addition v. Lower Platte South N.R.D.*, 232 Neb. 289, 294, 440 N.W.2d 456, 460-61 (1989), "if the use begins as a permissive one, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate. This rule is not affected by transfer of either the licensee's or licensor's title." Moreover, "[t]he use and possession of property with the permission of the owner can never ripen into title by adverse possession without some change in the nature of the possession being brought home to the true owner." *Young v. Lacy*, 221 Neb. 511, 515, 378 N.W.2d 192, 195 (1985).

> Inverse condemnation is analogous to an action by a private landowner against another private individual or entity to recover the title to or possession of property. While the property owner cannot compel the return of the property taken, because of the eminent domain power of the condemner, he has a constitutional right, as a substitute, to just compensation for what was taken.

Krambeck v. City of Gretna, 198 Neb. at 614, 254 N.W.2d at 695. Accord *Kimco Addition v. Lower Platte South N.R.D., supra*. Therefore, if the City's use of the land began as a permissive use, it cannot now claim title under a theory of adverse possession or the analogous action of inverse condemnation. Thus, in order to determine whether the statute of limitations has run in this case, we must determine (1) whether the use began as a permissive use and (2) when Western received notice that the City claimed use as a matter of right.

In *Simacek v. York County Rural P.P. Dist.*, 220 Neb. 484, 370 N.W.2d 709 (1985), property owners sought the removal of high-voltage powerlines from property that reverted to them

after being abandoned by a railroad. The power district, which had erected the lines with the permission of the railroad which possessed a right-of-way over the land, claimed that it had obtained a prescriptive easement across the land. Although the railroad had title to the land at the time the lines were erected, the deed to the railroad, which had been granted over 70 years previously, provided that if the right-of-way was ever abandoned, it would revert to the grantor. This court found that because the railroad had possession of the land at the time it entered into the agreement with the power district and because the power district had relied on the railroad's representations that it had authority to permit the construction of the lines, the power company's use of the property was permissive until such time as the railroad abandoned the right-of-way. Therefore, the power district had not acquired a prescriptive easement across the right-of-way.

Similarly, in the present case, at the time BRG made the dedications and the City passed the ordinances, BRG was the record owner of the property and was in possession of the land. Thus, Western contends that as in *Simacek*, the City's use of the property was permissive until Western acquired the property at the sheriff's sale. However, our decision in *Simacek* was based on the premise that the power district's use of the land was " 'in complete subservience to the exclusive right of the "Railway Company" prior to the abandonment of the railroad. . . .' " 220 Neb. at 488, 370 N.W.2d at 712 (quoting *Taylor Investment Co. v. Kansas City Power & Light Co.*, 182 Kan. 511, 322 P.2d 817 (1958). That is not the case here. As reflected in the ordinances it passed, the City clearly believed that, as a result of the dedications made by BRG, the City had exclusive and permanent dominion over portions of the land in question.

The Iowa Supreme Court addressed a similar situation in *Scott v. City of Sioux City*, 432 N.W.2d 144 (Iowa 1988), when property owners sued the city for inverse condemnation following the enactment of restrictive zoning regulations. The city argued that because the ordinances had been passed more than 10 years before the action was commenced, the suit was barred by the 5-year statute of limitations. The plaintiffs contended that the ordinance was a continuing violation that

tolled the statute of limitations and that no damages could have been assessed until the plaintiffs purchased an alternate site for their shopping center. The Iowa Supreme Court held for the city, stating that "the passage of the permanent ordinance had immediate adverse economic consequences for plaintiffs. The regulation's impact on the development potential and market value of the property was immediate, and constituted a single injury." 432 N.W.2d at 148.

Similarly, BRG's dedications and passage of the city ordinances had an immediate impact on Western's interest in the property. Western seems to have recognized this, because in August 1983, after Western's president, Keeley, learned that unauthorized dedications had been made, he complained to the City about those dedications and informed the City that Western did not join in or consent to those dedications. Therefore, although the City's interest in the property was obtained with BRG's approval, it was never permissive with respect to Western.

Furthermore, Western had notice of the City's claim to the land well before it obtained the land at the sheriff's sale. In *Polanski v. Eagle Point*, 30 Wis. 2d 507, 141 N.W.2d 281 (1966), the Wisconsin Supreme Court held that a town's possession of land under a deed was adverse from the time of the execution of the deed in 1944, and not from 1964, when the heirs or benefactors of the grantor's estate demanded reconveyance of the property and were refused. Although the plaintiff argued that the town's possession was not adverse until the plaintiff had sought reconveyance of the property, the court disagreed, holding that a grantee's possession is adverse to all the world from the time of the execution of the deed and that there was "no better evidence of the town's intention to assert its claim of title against all the world than the recording of the deed." 30 Wis. 2d at 513, 141 N.W.2d at 284. Moreover, the court noted that the purpose of the statute of limitations was " 'not reward to the diligent trespasser,' " but, rather, to penalize " 'the negligent and dormant owner, who allows another for many years to exercise acts of possession over his property.' " *Id.* (quoting *McCann and others vs. Welch and another*, 106 Wis. 142, 81 N.W. 996 (1900)). Because over 10

years had passed between the execution of the deed and the plaintiff's attempt to regain the property, the statute of limitations barred the plaintiff's action.

Neb. Rev. Stat. § 17-416 (Reissue 1991) provides, in pertinent part, that when a plat is properly "executed and acknowledged, the plat shall be filed for record and recorded in the office of the register of deeds and county assessor of the proper county." Neb. Rev. Stat. § 17-417 (Reissue 1991) provides in part that "[t]he acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use." Because Nebraska law provides that a properly executed and recorded plat is equivalent to a deed, under the reasoning in *Polanski v. Eagle Point*, Western received notice of the City's claim when the plats were recorded, and not when construction of the improvements began. The record in this case is silent, however, as to if and when the plats were recorded. Furthermore, the City's ordinances, if validly passed, were matters of public record with notice thereof published in The Alliance Daily Times-Herald and provided Western with constructive, if not actual, knowledge of the City's interest in the property by 1981.

However, the fact that the City claimed an interest in the property may not be sufficient to start the statutory period running if the City did not put the property to public use. Neb. Rev. Stat. § 76-714 (Reissue 1990) provides:

> The interest in the property acquired by the condemner shall be such title, easement, right-of-way, or use as is expressly specified in or necessarily contemplated by the law granting to the condemner the right to exercise the power of eminent domain. *The condemner shall not dispossess the condemnee until the condemner is ready to devote the property to a public use, and such title or interest as the condemner seeks to acquire shall not be complete until the property is put to the public use for which taken.*

(Emphasis supplied.) Thus, under § 76-714, the City could not complete its interest until the property was put to the public use for which it was taken. This occurred when the City exercised

dominion over or appropriated an interest in the property. See *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989). Therefore, the statutory period would have started running only when the City exercised dominion over or obtained an interest in the property.

In *Village of Maxwell v. Booth*, 161 Neb. 300, 306, 73 N.W.2d 177, 182 (1955), this court noted that " 'official acceptance [of a dedication] may consist in any positive conduct of the proper public officers evincing their consent on behalf of the public.' " (Quoting 16 Am. Jur. *Dedication* § 33 (1938).) Thus, passage of an ordinance or resolution may be sufficient to indicate acceptance even when actual control over the property is not exercised at that time. However, more recent cases have indicated that something more may be required to show acceptance of a dedication. See, *County of Banner v. Young*, 184 Neb. 546, 552, 169 N.W.2d 280, 284 (1969) (in order to prove the acceptance of a dedication of land for highway purposes, the county was required to show that a road was actually opened or used: "Until it is opened or used by the public it is not finally established"); *Aro Inv. Co. v. City of Omaha*, 179 Neb. 569, 575, 139 N.W.2d 349, 352 (1966) (although no formal declaration is necessary, there is no public use until such time as there is "use or some other act" indicating the city's acceptance of the dedication and intent to use the dedicated land).

In the present case, the City passed ordinances regarding the dedications, apparently published those ordinances, and began construction of the improvements pursuant to the ordinances. However, the record is silent as to when actual construction began or was completed. Thus, we are unable to determine when the City exercised physical control over the property. Moreover, the various dedications and ordinances apply to different parts of the property in question and provide the City with easements for a variety of purposes. Because some of the dedications and ordinances occurred more than 10 years before this action was filed, even if passage of the ordinances established the City's dominion over the land, the statute of limitations has run on some portions of this action. However, some of the later dedications and ordinances may also have

effected a taking and may not be time-barred. Thus, the date of any taking is a factual question which should have been determined by the trial court.

CONCLUSION

The Court of Appeals erroneously held that no taking can occur if the mortgagee has neither title nor possession of the property at the time the mortgaged property is put to public use. In addition, because the question of when the appropriations actually occurred is a genuine issue of material fact not determined by the trial court, summary judgment was inappropriate. Therefore, we reverse the decision of the Nebraska Court of Appeals and remand this cause to the Court of Appeals with directions to reverse the district court's summary judgment for the City and to remand this cause to the district court for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

K N ENERGY, INC., APPELLEE, V. CITIES OF BROKEN BOW ET AL., APPELLANTS.
K N ENERGY, INC., APPELLEE, V. CITIES OF COZAD ET AL., APPELLANTS.
K N ENERGY, INC., APPELLEE, V. CITIES OF ARAPAHOE ET AL., APPELLANTS.
K N ENERGY, INC., APPELLEE, V. CITIES OF ALBION ET AL., APPELLANTS.

505 N.W.2d 102

Filed August 27, 1993. Nos. S-91-848, S-91-849, S-91-850, S-91-851.

1. **Injunction: Equity.** An injunction is a remedy available through an equity action.
2. **Trial: Evidence.** If admissible evidence is offered or received for a limited purpose, the evidence is admitted only for the limited purpose specified.
3. **Public Utilities: Rates: States: Due Process.** In setting rates that may be charged by a utility, a state cannot set rates which are unjust, unreasonable, and confiscatory and which, therefore, deprive the utility of property without the due process of law guaranteed by U.S. Const. amend. XIV and Neb. Const. art. I, § 3.

4. **Public Utilities: Rates.** A government-established rate for a utility is confiscatory when the rate fails to produce a return on investment equal to the return realized on investments which have risks corresponding to those of the utility.
5. **Public Utilities: Rates: Ordinances: Collateral Attack: Due Process: Proof.** In a collateral attack on a rate or rates set by an ordinance, the burden is on a utility to show that the municipally established rate is unjust, unreasonable, and confiscatory in violation of the constitutional right to due process.
6. **Public Utilities: Rates.** There is no formula for determining whether a rate is confiscatory; rather, a decision whether a rate is confiscatory is based on a consideration of all the relevant evidence.

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

Dale C. Crandall, of Clinch and Crandall, Michael L. Bacon, James D. Larson, Michael J. Shaughnessy, and, on brief, John Battershell for appellants.

M.J. Bruckner, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., B.J. Becker, and Kathryn McCoy for appellee.

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

SHANAHAN, J.

K N Energy, Inc. (K N), a retail supplier of natural gas for customers in several municipalities, filed an action in the district court for Lancaster County for an injunction to prevent numerous municipalities in eastern and central Nebraska from enforcing ordinances which set natural gas rates lower than the rates requested by K N pursuant to the Municipal Natural Gas Regulation Act, Neb. Rev. Stat. §§ 19-4601 to 19-4623 (Reissue 1987 & Supp. 1989). The district court found that the rates prescribed by the municipalities' ordinances were "arbitrary, unreasonable and confiscatory" and, consequently, resulted in a deprivation of K N's property without due process, a violation of the 14th Amendment to the U.S. Constitution. The district court then enjoined enforcement of the rate ordinances.

The Nebraska Court of Appeals held that K N failed to meet its burden of proving the cost of its service as a factor in determining an appropriate rate for K N, reversed the district court's judgment, and remanded the cause for a new trial. *K N Energy, Inc. v. Cities of Broken Bow et al.*, 1 NCA 2185 (1992). Pursuant to Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1992), we granted K N's petition for further review of the decision of the Nebraska Court of Appeals.

STANDARD OF REVIEW

"An injunction is a remedy available through an equity action." *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 750, 472 N.W.2d 391, 395 (1991). See, also, *Burton v. Annett*, 215 Neb. 788, 341 N.W.2d 318 (1983).

> In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where credible evidence is in conflict on a material issue of fact, an 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.

Chambers-Dobson, Inc. v. Squier, 238 Neb. at 750, 472 N.W.2d at 395. Accord, *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993); *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986). See, also, Neb. Rev. Stat. § 25-1925 (Cum. Supp. 1992) (appeal of an equity action; de novo review).

FACTUAL BACKGROUND

On July 1, 1990, K N filed applications for rate increases in 147 municipalities in eastern and central Nebraska. The requested increases varied from area to area and ranged from 18.02 to 24.09 percent. K N prepared a cost-of-service study to justify its requested rate increases and filed the study with its applications to each municipality. In accordance with § 19-4607, the requested increases became effective on October 1, 1990, but were subject to a partial refund if the rates, as

finally determined, were less than the interim rates that had been placed into effect.

The municipalities hired the consulting firm of Dahlen, Berg & Co. (Dahlen), which prepared a "Municipal Report" containing an analysis of K N's cost-of-service study. Dahlen made various adjustments to K N's computations and recommended significantly lower rate increases that ranged between 5.02 and 10.7 percent. K N subsequently filed a "Rebuttal Report," disputing Dahlen's adjustments of the figures contained in K N's study. After area rate hearings held pursuant to § 19-4616(4), many municipalities passed ordinances that set natural gas rates for K N at, and sometimes below, the level recommended in the Dahlen report.

In January 1991, K N filed petitions in the district court to enjoin enforcement of the ordinances which set natural gas rates at or below the level recommended in the Dahlen report. K N alleged that the rates expressed in the various ordinances were arbitrary, unreasonable, and capricious and deprived K N of its property without due process of law, a violation of U.S. Const. amend. XIV; Neb. Const. art. I, § 3; and the Municipal Natural Gas Regulation Act.

At trial, when K N sought to introduce exhibits 1 to 8, which included transcripts of the various rate hearings, rate ordinances, K N's cost-of-service study, the Dahlen report, and K N's rebuttal report, the municipalities objected on the bases of foundation, relevance, and hearsay. The following exchange occurred between counsel:

> Mr. Bruckner: Your Honor, maybe we can clear this up. What is your objection to foundation?
>
> Mr. Larson: There is probably a million numbers in there, Mr. Bruckner. We can't stipulate to the - -
>
> Mr. Bruckner: I'm not offering any of that for the truth of what is contained. I am offering it solely for the fact that it is what transpired at the hearings below. It is the evidence that was before the cities upon which they made their judgment. It is offered for that limited purpose. It is the beginning point of this lawsuit.

The court overruled the objections and received the exhibits.

The district court found that the rates adopted by the

municipalities were arbitrary, unreasonable, and confiscatory, and, consequently, the court enjoined enforcement of the rates in the ordinances passed by the municipalities.

On appeal to the Court of Appeals, the municipalities contended that because K N introduced the cost-of-service study for the limited purpose of showing what had occurred at the rate hearings and had not introduced any other evidence regarding the cost of service, K N had not met its burden of proving that the rates set by the municipalities were arbitrary, capricious, and confiscatory; hence, K N was not entitled to injunctive relief.

The Court of Appeals agreed with the municipalities, reversed the district court's judgment, and remanded the cause for a new trial.

K N'S COST-OF-SERVICE STUDY

The Court of Appeals concluded that K N had failed to prove its case because K N's cost-of-service study was merged into the rate ordinances and that the study could not be introduced at trial because

> [t]he hearing in district court cannot be a review of the legislative record of the rate hearings. . . .
>
> The district court was in error in accepting the rate area hearing records into evidence for the limited purpose of showing what transpired at the rate area hearings. That evidence served no purpose in district court because the hearing records merged into the ordinances.

K N Energy, Inc. v. Cities of Broken Bow et al., 1 NCA 2185, 2191-92 (1992).

In arriving at the foregoing conclusion, the Court of Appeals relied on *Williams v. County of Buffalo*, 181 Neb. 233, 147 N.W.2d 776 (1967), and *K N Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 447 N.W.2d 227 (1989). In *Williams*, we held that a statute authorizing an appeal from a municipality's annexation of land violated the separation of powers provision in Neb. Const. art. I, § 2, because the statute delegated legislative power to the judiciary, that is, the power to evaluate reasons for an annexation. In *Williams*, this court said: "The passage of the ordinance presumes a finding that the conditions

and limitations contained in the delegating statute exist or have been complied with. The findings of the city council thereon are legislative and are in a sense merged in the ordinance upon its passage." 181 Neb. at 236, 147 N.W.2d at 780. In *City of Scottsbluff*, to interpret the Municipal Natural Gas Regulation Act, we relied on *Williams* and held that a gas utility may maintain an injunctive collateral attack to challenge the validity of rates set by ordinance.

In its decision for the present case, the Court of Appeals seized on the language in *Williams* regarding legislative findings merged into an ordinance. The previously mentioned excerpt from *Williams* is dicta, because *Williams* merely holds that legislative power for a municipal annexation cannot be delegated to the judiciary in a review of the reasons for the annexation. Moreover, the Court of Appeals' conclusion that a district court cannot consider evidence introduced at a rate hearing conducted by the municipality is a contradiction of *City of Scottsbluff*, wherein we stated that a utility "had the right to offer any evidence which was relevant to the issue and was not limited to the evidence received at the area rate hearings." 233 Neb. at 654, 447 N.W.2d at 234. Thus, K N may offer in the district court the same relevant evidence that was presented at the rate hearings and may offer additional evidence if necessary. In offering evidence, however, K N must comply with the Nebraska Evidence Rules. See Neb. Evid. R. 1101, Neb. Rev. Stat. § 27-1101 (Cum. Supp. 1992) (applicability of Nebraska Evidence Rules). Therefore, the Court of Appeals erroneously concluded that K N's cost-of-service study was inadmissible because the study was presented at the rate hearings conducted by the various municipalities.

EVIDENCE ADMITTED FOR A LIMITED PURPOSE

As previously mentioned, K N offered exhibits 1 to 8, which included the study, not "for the truth of what is contained" in the exhibits, but "solely" to show "what transpired at the hearings below." Apparently for that reason, the Court of Appeals concluded that K N had failed to meet its burden of proof, because K N's cost-of-service study was not offered as substantive evidence concerning rates.

If admissible evidence is offered or received for a limited purpose, the evidence is admitted only for the limited purpose specified. See, *Baer v. Schaap*, 171 Neb. 347, 106 N.W.2d 468 (1960); *Kucaba v. Kucaba*, 146 Neb. 116, 18 N.W.2d 645 (1945).

In the present case, K N's cost-of-service study was not offered for the truth of its contents concerning costs affecting rates, but was offered merely to show what had occurred during the municipal hearings held before K N filed its injunctive actions in the district court. Consequently, K N's study may not be considered as proof of K N's cost of service in reference to the question whether the rates are confiscatory.

However, the trial court received into evidence numerous other exhibits, including exhibits 11 to 22, which summarized the same financial data contained in K N's cost-of-service study, showed historical operating revenues and expenses, and projected returns under both the rates set by the municipalities and those proposed by K N. Thus, exhibits 11 to 22 contain evidence of K N's cost of service. Therefore, the Court of Appeals erred by concluding that K N failed to produce evidence of its cost of service.

CONFISCATORY RATES

Although the Court of Appeals did not conduct a de novo review on the question of whether the municipalities set confiscatory rates in their ordinances, further review in this appeal requires a de novo review of K N's equity actions against the municipalities.

Section 19-4604 of the Municipal Natural Gas Regulation Act states in part: "Every rate made, demanded, or received by any utility shall be just and reasonable." Section 19-4612(1) of the act provides:

> The municipality, in the exercise of its power under the Municipal Natural Gas Regulation Act to determine just and reasonable rates for public utilities, shall give due consideration to the public need for adequate, efficient, and reasonable natural gas service and to the need of the utility for revenue sufficient to enable it to meet the cost of furnishing the service, including adequate provisions for depreciation of its utility property used and useful in

> rendering service to the public, and to earn a fair and reasonable return upon the investment in such property.

Examining a state's regulatory power in setting rates for a utility, the U.S. Supreme Court stated in *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. 679, 690, 43 S. Ct. 675, 67 L. Ed. 1176 (1923):

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary.

The Court further stated:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties . . . .

262 U.S. at 692.

Therefore, in setting rates that may be charged by a utility, a state cannot set rates which are unjust, unreasonable, and confiscatory and which, therefore, deprive the utility of property without the due process of law guaranteed by U.S. Const. amend. XIV and Neb. Const. art. I, § 3. See *Bluefield Co. v. Pub. Serv. Comm., supra*. Thus, the standard for a permissible gas rate under the Municipal Natural Gas Regulation Act is the constitutional standard required for due process. A government-established rate for a utility is confiscatory when the rate fails to produce a return on investment equal to the return realized on investments which have risks corresponding to those of the utility. See, *Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944); *Los Angeles Gas Co. v. R.R. Comm'n.*, 289 U.S. 287, 53 S. Ct. 637, 77 L. Ed. 1180 (1933); *Bluefield Co. v. Pub. Serv. Comm., supra*.

In a collateral attack on a rate or rates set by an ordinance, the burden is on a utility to show that the municipally established rate is unjust, unreasonable, and confiscatory in violation of the constitutional right to due process. See *Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 181 N.W.2d 682 (1970). See, also, *Knoxville v. Water Co.*, 212 U.S. 1, 29 S. Ct. 148, 53 L. Ed. 371 (1909) (courts may enjoin enforcement of utility rates set by an ordinance when the rates are confiscatory and, therefore, invalid under the due process guarantee of the U.S. Constitution).

There is no formula for determining whether a rate is confiscatory; rather, a decision whether a rate is confiscatory is based on a consideration of all the relevant evidence. See *Los Angeles Gas Co. v. R.R. Comm'n., supra.*

Proceeding to a de novo review based on the record before us, but disregarding exhibits 1 to 8, which were not offered as substantive evidence, we now consider the ultimate question in this case: Did K N prove that the rates municipally established by ordinance were confiscatory?

Dr. R. Charles Moyer, a professor of finance, conducted a study for K N to determine the appropriate rate of return on K N's property used for supplying natural gas to the public. According to Dr. Moyer's study and his testimony at trial, K N's shareholders were entitled to a return of between 13.6 and 14.7 percent on their investment, so that the shareholders would receive a rate of return the same as that received on other investments in similar businesses.

To arrive at the rates proposed to the municipalities, K N used the 13.6-percent return expressed in Moyer's study and contends that anything less than a 13.6-percent return is confiscatory. Exhibits other than exhibits 1 to 8 show that the rates municipally established by ordinance would allow K N a return ranging from a high of 1.92 percent to a low of .5 percent and, in one rate area, even a loss of 2.64 percent.

Although the municipalities' expert witness testified that K N's rate of return should be 12.2 percent rather than 13.6 percent, the major dispute relates to some assumptions underlying K N's projected expenses and revenues as factors for the increased rates.

One of K N's assumptions involved the sales price for products extracted from natural gas before the gas is sold to K N's retail customers. When natural gas is taken from the ground, it contains numerous heavy hydrocarbons that have value independent of the natural gas. K N operates extraction plants at Scott City, Kansas, and Casper, Wyoming, where substances such as propane, butane, natural gasoline, and helium are extracted from the natural gas and sold on the open market. The revenues from the sales of these byproducts are subtracted from K N's cost of providing natural gas to its customers, reducing K N's rates charged in retail sales of natural gas. In projecting the amount of revenues from sales of these byproducts, K N estimated a sales price of $.32 per gallon, which was based on the actual average price obtained from sales during the year ending January 31, 1990. The actual average price during the 4 calendar years preceding 1990 was a per-gallon price of $.31 in 1986, $.28 in 1987, $.27 in 1988, and $.28 in 1989. The Dahlen report suggests that the proper estimated sales price for the byproducts is $.51 per gallon, which was the average sales price of K N's byproducts in September 1990, soon after Iraq's invasion of Kuwait and a worldwide increase in fuel prices based on an anticipated shortage of petroleum products. By March 1991, after the Gulf War, the average price obtained by K N for its byproducts had dropped to $.34 per gallon. Consequently, the Dahlen report's estimate of $.51 per gallon is an inordinately high estimate of prices obtainable in future sales of byproducts. K N's price estimate for future sales of gas byproducts appears more reasonable. Moreover, use of the municipalities' unrealistic price of $.51 per gallon for K N's byproducts results in an increase of nongas revenue and a corresponding decrease in rates based on gas sales. However, when the unrealistic price for byproducts is removed from the equation, the gas rates prescribed by the municipalities cause a reduction ranging from 3.7 to 4.99 percent in the rate of return of K N's equity.

Another disputed assumption is K N's estimated revenue from transporting natural gas through its pipelines for other natural gas suppliers. In 1985, the Federal Energy Regulatory Commission (FERC) issued a series of opinions which were

designed to stimulate competition through open access to natural gas pipelines. After obtaining FERC approval, pipeline companies can charge a fee for transporting gas for other gas suppliers. The FERC allows pipeline companies to engage in market-responsive pricing and has established maximum and minimum prices that can be charged for transportation services. Within the limits set by the FERC, pipeline companies can charge different prices for transporting natural gas, depending on what the supplier-customer is willing and able to pay. Suppliers that have no alternative transportation are charged the maximum rate, while suppliers that have alternative fuels or alternative means of transportation are charged a lower or discounted rate.

K N received permission from the FERC to become an open access transporter on May 1, 1989. Based on historical data, K N estimated receipts of $8.1 million per year for transportation services during the period when K N's proposed rates would be effective. The municipalities contend that K N must calculate its rates based on the maximum rate allowed by the FERC rather than the discounted rate for transportation services. Therefore, according to the municipalities, K N's transportation revenue should be adjusted upward by $6.8 million to $14.9 million. The municipalities' argument ignores economic reality. In sales of transportation services to customers with alternative sources of fuel or alternative means of getting natural gas to a desired location, K N must offer discounts. If K N did not offer discounts to its transportation customers, K N would supply fewer transportation services and, correspondingly, would experience a decrease in transportation revenue as a factor for eventual retail gas rates. Also, if the municipalities' increase of $6.8 million in transportation revenue is used with a corresponding and necessary decrease in gas rates, elimination of the $6.8 million in transportation revenue leaves rates that cause decreases ranging from 4.69 percent to 2.76 percent on K N's equity, depending on the particular locale of a municipality. Therefore, K N's assumptions regarding transportation revenue are more reasonable than are the municipalities' assumptions.

In addition to the two disputed assumptions which we have

discussed, the municipalities take issue with numerous additional assumptions underlying K N's request for increased rates. Nevertheless, even if the municipalities had adopted rates based only on the municipalities' erroneous assumptions regarding product revenue and transportation revenue, the combined effect of the two assumptions discussed is to decrease the return on K N's equity to a level below that which investors could earn from investments in other similar businesses. Therefore, the municipalities failed to pass rate ordinances that afforded a reasonable rate of return on the value of K N's property used for public service. For that reason, the rates set by the municipalities are confiscatory and deprive K N of its property without due process of law, a violation of U.S. Const. amend. XIV and Neb. Const. art. I, § 3.

CONCLUSION

The Court of Appeals erred in its conclusion that K N failed to introduce evidence of its cost of service and, therefore, erred by reversing the district court's judgments and remanding these causes for a new trial. From our de novo review of the record, and considering the question of whether the rates municipally established by ordinance are confiscatory, we find that K N has met its burden of proving that the natural gas rates set by the municipalities in these proceedings are confiscatory. Thus, our conclusion is the same as that reached by the district court. Consequently, the Court of Appeals' judgment is reversed, and these causes are remanded to the Court of Appeals with the direction that the Court of Appeals shall reinstate the district court's judgments for K N, enjoining the enforcement of rates prescribed by the municipalities' ordinances involved in these proceedings.

REVERSED AND REMANDED WITH DIRECTION.

J. T. MILLMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHRISTOPHER T. DUNCAN, DECEASED, APPELLANT AND CROSS-APPELLEE, V. COUNTY OF BUTLER, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

504 N.W.2d 820

Filed September 3, 1993. No. S-91-341.

1. **Political Subdivisions Tort Claims Act: Limitations of Actions.** Neb. Rev. Stat. §§ 13-919 (Reissue 1991) and 25-213 (Reissue 1989) are the only statutes of limitations applicable to claims under the Political Subdivisions Tort Claims Act.
2. **Claims: Releases.** A release which is confined to certain claims or demands arising from a particular matter operates to release the particular claim or demand specified but does not necessarily release other claims or demands arising from the same matter.
3. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong.
4. **Verdicts: Appeal and Error.** When determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
5. **Political Subdivisions Tort Claims Act: Counties: Highways: Bridges.** The duty of care imposed by the Political Subdivisions Tort Claims Act upon a county is to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary caution and prudence.
6. **Counties: Bridges: Damages: Liability.** A county is liable for damages caused by insufficiency or want of repair of a county bridge.
7. **Wrongful Death: Damages: Presumptions.** In cases arising under the wrongful death act, if the next of kin are lineal kinsmen of the deceased, a presumption of pecuniary loss obtains from the relationship alone, sufficient to sustain a verdict and judgment awarding substantial damages, without proof of actual loss.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Affirmed in part, and in part reversed.

Rollin R. Bailey, of Bailey, Polsky, Cope, Wood & Knapp, for appellant.

Peter C. Bataillon and Edward F. Noethe, of Sodoro, Daly & Sodoro, for appellee.

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

BOSLAUGH, J.

This is an action for wrongful death brought under the Political Subdivisions Tort Claims Act against the defendant, County of Butler, Nebraska, by the plaintiff, J.T. Millman, personal representative of the estate of Christopher T. Duncan, deceased. In a prior appeal, we held that the action had been commenced within the time prescribed in Neb. Rev. Stat. § 13-919 (Reissue 1991) and remanded the cause for trial upon the merits. See *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990).

The record shows that on April 21, 1984, the deceased, Christopher T. Duncan, was a passenger in a truck traveling on a muddy county road near Brainard, Butler County, Nebraska. As the driver of the truck attempted to cross over a bridge, the truck slid to the left through the left railing of the bridge and then toppled over into the creek below, which was swollen because of rain that had occurred in the early part of that day. The truck's speed at the time the truck approached the bridge was approximately 10 miles per hour.

The truck landed upside down in the creek facing into the stream and began to sink as it was carried downstream. All of the passengers in the truck were able to get out of the truck through the driver's door except the deceased.

The body of the deceased became wedged in or caught in the cab of the truck, with only the upper portion of his body above the water. Although the driver of the truck attempted to pull the deceased from the vehicle, he was unable to do so, and the deceased was unable to extricate himself from the truck as it settled into the water. After a few minutes, the deceased was pulled under the water and drowned.

At the time of his death, Duncan was 17 years 11 months of age. He was a high school dropout during the 10th grade and was employed as a general laborer at minimum wage with the natural resources district in York, Nebraska.

The deceased was the biological father of Cassandra Beth Carranza, who was born out of wedlock to Leslie Mogul on

December 3, 1982. Paternity had not been adjudicated at the time of Duncan's death. At the time of his death, Duncan had provided no support for his daughter except for occasional diapers and clothes; however, he did spend considerable time with her and her mother. The deceased and Mogul were planning to be married after Mogul graduated from high school.

The trial court found that the defendant was negligent in the construction and maintenance of the road and bridge by failing to provide adequate railings on the bridge to contain the occasional or intermittent use by a passenger vehicle and by failing to post signs along the roadway on the approach to the bridge, warning of the dangers of the road and bridge. The trial court also found that the defendant's negligence was a concurrent proximate cause of the accident and the resulting death of the deceased.

The trial court found that Carranza is the next of kin of the deceased pursuant to Neb. Rev. Stat. §§ 30-2209, 30-2303(1), and 30-2309(2)(ii) (Reissue 1989); however, since the deceased was under no legal obligation to support his daughter born out of wedlock, the trial court refused to award the decedent's daughter damages for a loss of financial support.

The trial court found that the deceased experienced conscious pain and suffering prior to his death and awarded the plaintiff $15,000 in damages. This was in addition to $15,000 which the plaintiff had received from the owner and the driver of the truck in complete settlement of all claims against the driver and the owner of the truck for Duncan's death. The plaintiff testified that it was his intention that "the settlement was strictly with the insurance company."

The plaintiff has appealed and assigned as error the trial court's failure to award damages for the deceased's minor child and an adequate amount for the deceased's pain and suffering prior to his death. The defendant has cross-appealed and assigned as error that the trial court erred in not ruling that the plaintiff's claim was barred by the statute of repose as provided in Neb. Rev. Stat. § 25-223 (Reissue 1989), in not ruling that the release given by the plaintiff released the defendant, in not ruling that the defendant had complied with the applicable

maintenance standards, and in not ruling that the plaintiff failed to prove proximate cause. We consider the defendant's arguments on cross-appeal first.

The defendant contends that the plaintiff's claim for damages based upon construction of the bridge or road in question is barred by § 25-223, which provides a 10-year period of repose for "any action . . . to recover damages for an alleged breach of warranty on improvements to real property or deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property . . . ." The defendant argues that since the bridge was built in 1964, the plaintiff's cause of action is barred by the statute of repose because this cause of action was not brought until December 30, 1985.

In the prior appeal of this case, we stated that the statute of limitations for filing a claim under the Political Subdivisions Tort Claims Act is exclusively prescribed by § 13-919. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990).

Section 13-919 provides:

> (1) Every claim against a political subdivision permitted under the Political Subdivisions Tort Claims Act shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by the act shall be forever barred unless begun within two years after such claim accrued. . . .
>
> . . . .
>
> (5) This section and section 25-213 shall be the only statutes of limitations applicable to tort claims as defined in the act.

The language of this section was substantially the same at the time this action was filed.

The negligence of the defendant, if any, was of a continuing nature and continued until the date of the accident which resulted in the death of the deceased. See *Schmutte v. State*, 147 Neb. 193, 22 N.W.2d 691 (1946). Thus, the action was not barred by § 25-223.

Next, the defendant contends the release given by the plaintiff to the owner and the driver of the truck released the

defendant as well. The release stated in part:

> KNOW ALL MEN BY THESE PRESENTS that the undersigned J.T. Millman, duly appointed, qualified and acting legal Personal Representative of the Estate of Christopher T. Duncan, deceased, in consideration of the sum of $15,000.00 to him paid as such Personal Representative, receipt whereof is hereby acknowledged, hereby releases and forever discharges Francis J. Neville, Jospeh [sic] R. Meier and Economy Fire and Casualty Company, their insurer, their heirs, executors, administrators, Personal Representatives, successors and assigns, of and from all claims, demands, damages, and causes of action which the said J.T. Millman as Personal Representative of the Estate of Christopher T. Duncan, has or may have against the said Francis J. Neville, Joseph R. Meier and Economy Fire and Casualty Company, their insurer, in respect of the wrongful death of the said Christopher T. Duncan or arising or to arise from or by reason of a certain accident or wrongful death of the said Christopher T. Duncan, on or about the 21st day of April, 1984, as a result of an automobile accident which occurred in Butler County, Nebraska, on a county road when the said Joseph R. Meier ran into a bridge railing, while said deceased was a passenger in a 1973 Dodge Pickup Truck driven by the said Joseph R. Meier.

The defendant claims that the release applies to all damages sustained as a result of the wrongful death of the decedent. The defendant relies on *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 131 N.W. 612 (1911).

The *Fitzgerald* case does not stand for the proposition that a release of part of a cause of action releases the whole. *Crnkovich v. Scaletta*, 203 Neb. 22, 277 N.W.2d 416 (1979).

Fitzgerald stands for the following propositions:

> "If one of several joint wrongdoers makes *full payment of damages* caused by injury done, there can be no further recovery for the same injury.
>
> "If one of several joint wrongdoers makes settlement with the injured party and pays him damages which he agrees to receive and does receive as *full compensation* for

> all damages sustained, it will release all of the joint wrongdoers.
>
> "Settlement with one of several joint wrongdoers and payment of damages is not a defense to an action against another, unless it was agreed between the parties to the settlement that such payment was *in full of all damages* suffered."

(Emphasis supplied.) *Crnkovich*, 203 Neb. at 25, 277 N.W.2d at 418.

In this case, there is no language in the release that the consideration paid was received as full compensation for all damages sustained by the plaintiff. Furthermore, the release clearly releases only Neville, Meier, and their insurer for all claims the plaintiff had against Neville, Meier, and their insurer for the wrongful death of the decedent. "[A] release which is confined to certain claims or demands arising from a particular matter operates to release the particular claim or demand specified but does not necessarily release other claims or demands arising from the same matter . . . ." *Crnkovich*, 203 Neb. at 25-26, 277 N.W.2d at 419.

The plaintiff's release of Neville, Meier, and their insurer does not bar the plaintiff's claim against the defendant.

Next, the defendant argues that the trial court erred in finding the defendant was negligent in the construction and maintenance of the bridge. In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and

> when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in its favor, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

Steinauer v. Sarpy County, 217 Neb. 830, 835, 353 N.W.2d 715, 720 (1984).

Neb. Rev. Stat. § 13-912 (Reissue 1991) provides that the procedure for filing claims for damages caused by insufficiency or want of repair of a highway or bridge or other public

thoroughfare is the same as for other claims filed pursuant to the Political Subdivisions Tort Claims Act. Neb. Rev. Stat. § 13-913 (Reissue 1991) provides in part:

> In enacting section 13-912, it is the intent of the Legislature that the liability of all political subdivisions based on the alleged insufficiency or want of repair of any highway or bridge or other public thoroughfare shall be the same liability that previously has been imposed upon counties pursuant to section 13-912. The Legislature further declares that judicial interpretations of section 13-912 governing the liability of counties on January 1, 1970, also shall be controlling on the liability of all political subdivisions for the alleged insufficiency or want of repair of any highway or bridge or other public thoroughfare. Notwithstanding other provisions of [the act], sections 13-911 to 13-914 shall be the only sections governing determination of liability of political subdivisions for the alleged insufficiency or want of repair of highways, or bridges or other public thoroughfares.

In interpreting the above provisions, this court has stated that the duty of care imposed by the Political Subdivisions Tort Claims Act is "to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary caution and prudence." *Hendrickson v. City of Kearney*, 210 Neb. 8, 11-12, 312 N.W.2d 677, 679 (1981).

In *Hansmann v. County of Gosper*, 207 Neb. 659, 661, 300 N.W.2d 807, 808 (1981), this court stated that under § 13-912,

> a county is liable for damages caused by insufficiency or want of repair of a county bridge. We have held that a county is required to maintain bridges that are sufficient for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where the bridge is situated. . . . A person using a bridge has a right to assume that the bridge is sufficient in the absence of knowledge that it is unsafe.

(Citations omitted.)

In the instant case the trial court found that the defendant

> was negligent in the construction and maintenance of the road and bridge in question by failing to provide adequate railings on the bridge to contain the occasional or intermittent use by a passenger vehicle and by failing to post signs along the roadway on the approach to the bridge warning of the dangers of the road and bridge.

Although the evidence in this case was somewhat in conflict, there is sufficient evidence to sustain the finding of the trial court that the defendant was negligent in the construction and maintenance of the bridge. The inadequacy of the bridge's railing to contain the truck as it slid into the railing was not the only basis for a finding of negligence. The evidence shows that the defendant had notice of other problems concerning the bridge, as reflected by the inspection reports of 1979, 1982, and 1983.

The record shows that the approach to the bridge is a slight curve. Although a part of the road was surfaced with gravel, the approach to the bridge was dirt. The road was 19 feet wide, but the bridge was only 16 feet wide.

The bridge was built in 1964 and is 38 feet long. The railing appears to be constructed of angle iron and consists of a single horizontal rail with vertical posts at both ends and only two center posts. The railing was described by Richard Ronker, Butler County surveyor, as handrails.

At the time the bridge was built, there were no statutory standards regarding the design, construction, or maintenance of roads and bridges in Nebraska. However, the American Association of State Highway Officials (AASHO) published standards for, among other things, the design and construction of bridge structures.

Dr. Edward Post, who testified as an expert witness for the plaintiff, testified that at the time of the construction of the bridge, the AASHO bridge book was the "bible" in the industry and was used throughout the United States for the design of bridges such as the one involved in this case. According to Dr. Post, the AASHO standards were the only ones used by engineers in 1964.

The AASHO standards were adopted by the Nebraska Legislature in 1970. It was the intention of the Legislature that

county road systems be brought to adequate standards over a 20-year period. Neb. Rev. Stat. § 39-2101 (Reissue 1988).

Although Neb. Rev. Stat. § 13-914 (Reissue 1991) provides an exception for "minimum maintenance" roads, the road with the bridge on which the accident happened was designated as a county road at the time of the accident and was not reclassified as a minimum maintenance road until sometime later.

According to Ronker, counties set up a priority of needs to update bridges and roads to meet current standards of design so that they will be reasonably safe for travel. In 1983, the bridge in question was ranked 124th in priority for repairs on a list of 128 bridges.

Dr. Post testified that the bridge railing was deficient in height and geometry in that the spacing of the vertical posts was inadequate. According to Dr. Post, the bridge never had the structural strength to carry the loads that were prescribed by the AASHO standards. Dr. Post further testified that if the railing had been designed in accordance with the AASHO standards, it would have contained and safely restricted a vehicle at an impact speed of 44 to 48 miles per hour.

Dr. Post also testified that the angle of the road in relation to the bridge was also deficient to accommodate vehicles traveling the curve at relatively low speeds. Furthermore, the width of the bridge did not conform to AASHO standards. The bridge is 16 feet wide, while the minimum width required by AASHO standards was 18 feet.

John J. Miriovski inspected the bridge in 1979 and submitted his report to the defendant. The report lists among the bridge's deficiencies dirt on the deck, poor sign distance beyond the bridge in both directions, and roadway width. The ratings accompanying the comments were a "4" for "approaches" and a "2" describing the east railing that was down. The ratings were explained in the report, with 4 meaning "minimum adequacy to tolerate present traffic - immediate rehabilitation necessary to keep open" and 2 meaning "inadequacy to tolerate any live load - warrants closing of bridge to all traffic."

The railing was replaced with a similar one in 1979, and the bridge was again inspected in 1982 by Dennis Jeppson. The 1982 report which was filed with the defendant criticized the

"Approach Roadway Alignment" and listed the rating as 4. The roadway width was also criticized and rated as 2.

The same comments were made on the December 29, 1983, inspection; however, the rating of the approach roadway alignment was lowered to 3.

Although the defendant was aware of the bridge's deficiencies as stated in the inspection reports, the defendant failed to post signs warning of the bridge's danger, and the defendant failed to close the bridge to all traffic until the problems were corrected as recommended by the report.

Finally, the defendant contends that even if the defendant did not comply with the applicable standards concerning construction and maintenance of the bridge, the trial court erred in finding that its negligence was a proximate cause of the accident. The defendant claims the proximate cause of the accident was the speed and loss of control of the truck.

The defendant's argument is without merit. The evidence shows that the speed of the truck as it approached the bridge was approximately 10 miles per hour. If the bridge rail had been constructed according to AASHO standards, it would have been able to contain the truck at that speed, the accident would not have happened, and the decedent would not have drowned.

We conclude that as to the defendant's cross-appeal, the judgment of the trial court should be affirmed in all respects.

As to the plaintiff's assignments of error, the plaintiff asserts that the trial court erred in awarding an inadequate amount for the decedent's pain and suffering prior to his death.

The trial court found the decedent was unable to extricate himself from the pickup truck and drowned after a "few minutes." The trial court awarded the plaintiff $15,000 for the defendant's conscious pain and suffering prior to his death. On the basis of the record in this case, we cannot say that the trial court's findings and award are clearly wrong.

Last, the plaintiff argues that the trial court erred in failing to award damages for the decedent's daughter.

The trial court found that the decedent's daughter is his next of kin pursuant to §§ 30-2209, 30-2303(1), and 30-2309(2)(ii); however, the trial court refused to award damages for the decedent's daughter because the decedent's paternity had not

been adjudicated, and he had not been ordered to pay child support.

A wrongful death action is brought by the decedent's personal representative for the "exclusive benefit of the widow or widower and next of kin." Neb. Rev. Stat. § 30-810 (Reissue 1989).

In *Mabe v. Gross*, 167 Neb. 593, 597-99, 94 N.W.2d 12, 16-17 (1959), this court stated:

> It cannot be questioned that there is a legal duty of a father to support his minor child. . . . "A presumption of pecuniary loss exists in favor of one legally entitled to service or support from one killed by the wrongful or negligent act of another." . . .
>
> . . . "Where . . . it is pleaded that the next of kin sustain such a relationship to the deceased that the law imposes upon him a duty to support them and that practical ability existed to enable him to perform that duty, a pecuniary interest is pleaded. Its extent is a question for the jury."
>
> . . . .
>
> . . . "In cases arising under the Wrongful Death Act, if the next of kin are lineal kinsmen of the deceased, a presumption of pecuniary loss obtains from the relationship, alone, sufficient to sustain a verdict and judgment awarding substantial damages, without proof of actual loss."

In this case, the trial court found that the decedent's daughter is his next of kin. Accordingly, the law imposed upon the decedent a duty to support his daughter, and the trial court erred in failing to award damages for the decedent's daughter.

On remand, the trial court is required to take a perspective view of existing circumstances to determine the pecuniary loss sustained by the decedent's daughter, and "[t]he money value of such pecuniary loss cannot ordinarily be determined in dollars and cents. It is peculiarly a [factual] question to be determined from all the circumstances and evidence available." *Mabe v. Gross*, 167 Neb. at 599, 94 N.W.2d at 17.

The judgment of the trial court is affirmed as to the award of $15,000 for the decedent's pain and suffering. The judgment concerning an award for the decedent's daughter is reversed and

the cause remanded for a new trial only as to the amount to be awarded for the decedent's daughter's loss.

AFFIRMED IN PART, AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL D. SCHREIN, APPELLANT.

504 N.W.2d 827

Filed September 3, 1993. No. S-91-518.

1. **Rules of Evidence.** Because Neb. Rev. Stat. § 27-106 (Reissue 1989) is concerned with the danger of admitting a statement out of context, additional evidence is admissible only if it qualifies or explains the previous testimony.
2. **Trial: Rules of Evidence.** Under Neb. Rev. Stat. § 27-106 (Reissue 1989), when defense counsel leaves a false impression, the trial court may allow the use of otherwise inadmissible evidence to clarify or complete an issue opened up by defense counsel.
3. _____: _____. Under Neb. Rev. Stat. § 27-106 (Reissue 1989), the trial court must determine whether the additional evidence which the proponent seeks to admit is relevant to the issues in the case and the trial court need admit only that part of the evidence which qualifies or explains the evidence offered by the opponent.
4. _____: _____. In applying Neb. Rev. Stat. § 27-106 (Reissue 1989), once relevance of the additional evidence has been established, the trial court must address the second half of the test for admissibility, and should do so by asking: (1) Does it explain the admitted evidence? (2) Does it place the admitted evidence in context? (3) Will admitting it avoid misleading the trier of fact? (4) Will admitting it ensure a fair and impartial understanding of all the evidence?
5. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
6. **Trial: Rules of Evidence.** The trial court is required to weigh the danger of unfair prejudice against the probative value of the evidence only when requested to do so at trial.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Douglas County, JERRY M. GITNICK, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

J. William Gallup, of Gallup & Schaefer, for appellant.

Don Stenberg, Attorney General, James H. Spears, and Barry Waid for appellee.

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

PER CURIAM.

Daniel D. Schrein was found guilty in a jury trial of five counts of sexual assault of a child, a Class IV felony. The Nebraska Court of Appeals reversed Schrein's convictions and remanded the cause for a new trial. *State v. Schrein*, 1 NCA 1581 (1992). The State petitioned for, and this court has granted, further review pursuant to Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1992). We reverse the judgment of the Court of Appeals.

FACTUAL BACKGROUND

Schrein was a pediatrician practicing for many years in Omaha, where he also organized and coached a youth sports organization known as The Gladiators. In September 1990, Schrein was arrested on five charges of sexual assault of a child. Testimony at Schrein's trial included that of 15 young men who claimed that Schrein had molested them. In addition, expert testimony was presented which contradicted Schrein's claim that his actions were a normal part of treating his young male patients. Defense witnesses included Schrein himself, numerous former patients, members of The Gladiators and their parents, and an Omaha pediatrician who testified regarding the treatment of young males. The jury found Schrein guilty on all five counts.

Schrein appealed his conviction to the Court of Appeals. In that appeal, the principal question was the admission of a Redbook magazine article on pedophilia offered by the State to rehabilitate the testimony of one of the State's witnesses, Sgt. Kenneth Bovasso. During direct examination, Sergeant Bovasso testified that he supervised the robbery and sexual assault unit of the Omaha Police Division and had worked on the Schrein case. On cross-examination, Sergeant Bovasso testified as follows:

Q- . . . Didn't you talk to [M.M.]?

A- Yes, I said I did, yes.

Q- Wasn't there some discussion with her about pedophiles?

A- Yes.

Q- Didn't you give her literature on pedophiles?

. . . .

A- I told her that we—

Q- Just answer yes or no. Did you tell her that Dr. Schrein was a pedophile?

A- No.

. . . .

Q- Did you make that implication?

A- I— No.

Q- Why did you give her literature on pedophiles?

A- Because we were investigating a case possibly of that nature.

Q- Okay. And you were convinced and told her that Dr. Schrein was a pedophile; isn't that true?

A- I didn't tell her that Dr. Schrein was a pedophile.

On redirect, the prosecutor gave Sergeant Bovasso exhibit 60, a photostatic copy of the article regarding pedophilia published in the August 1987 issue of Redbook magazine and asked:

Q- . . . Officer, did you give that article to [M.M.]?

A- Yes.

Q- Did you give it to anybody else connected to the investigation?

A- Yes.

Q- Do you know who else or how many others?

A- Several others, but I know [another mother] got a copy of it.

Q- Is that a true and accurate copy of the article as you handed it out to [M.M.]?

A- Yes.

[Prosecutor]: I'd offer what's been marked as Exhibit 60.

[Schrein's lawyer]: I'll object. It's irrelevant. . . .

THE COURT: Just a second, please. I believe on cross-examination, if I recall correctly, . . . you asked the

officer about the materials that he gave.

[Schrein's lawyer]: I asked him if he gave [M.M.] something on pedophilia. . . .

THE COURT: With that in mind, I think the exhibit will be received. The objection, therefore, is overruled.

Exhibit 60 was a copy of a five-page article entitled "The Child Abuser: How Can You Spot Him?" which appeared in Redbook magazine in August 1987 and was coauthored by a professor of psychiatry and his wife. The lead-in paragraph, printed in large, bold letters, proclaimed:

> He's a man you trust. He's a man your children trust. He's a teacher, a coach, a Cub Scout leader—someone your family knows well. And he's much more likely to sexually abuse little boys than little girls, according to a landmark study of 403 sex offenders. In this shocking report, the doctor who headed the research team offers a profile of the typical child abuser—and tells you how to protect your children.

Gene G. Abel & Nora Harlow, *The Child Abuser: How Can You Spot Him?*, Redbook, Aug. 1987, at 98. In this article, the authors state:

> Most of us think that a child molester is a rather slimy individual—a stranger in town, sitting in his car near a schoolyard, luring children with candy. Our findings reveal that, on the contrary, the child molester is not a stranger, but is someone we know well. He often is a man we trust, a man our children trust.
>
> Many child molesters try to move themselves into positions or occupations within the community that will allow them to spend time alone with children without attracting much notice. Molesters often become youth ministers, day-care workers, Boy Scout leaders, teachers, Big Brothers and *pediatricians*.
>
> . . . And indeed, among physicians—as among youth ministers, day-care workers and teachers—there are exceedingly few men who are child molesters. But there are a few. Of the several hundred molesters I've treated in the last two years, one was a school physician, two were child psychiatrists, another was a *pediatrician*.

(Emphasis supplied.) *Id.* at 99. Finally, the article suggests that parents can spot a child molester by watching for typical operating procedures that include spending excessive amounts of time with children and arranging to take trips alone with children; seeking out positions, such as school physician or coach, that will allow them to spend time alone with children; and abusing the privileges of their positions to engage children in inappropriate activities.

Later, after exhibit 60 had been received in evidence, the exhibit was the subject of an in-chambers discussion:

> [Schrein's lawyer]: My question is: What was the purpose of the offer? What were they trying to prove with that offer? Unless they can give you some representation of relevance then it shouldn't be admissible. For example, Judge, if they offered a Playboy magazine simply because I asked the question and they offered it, you wouldn't let the Playboy in because you'd have to have something relevant to this case. And I'm saying what does that article got [sic] to do with whether Dr. Schrein's guilty of the charges?
>
> THE COURT: It has nothing to do with whether the doctor's guilty or innocent of these charges, but it has everything to do with what the officer did in his interviews with regard to [M.M.] and what he did in connection with others. And in view of the previous testimony on cross-examination with regard to what he distributed, I think it becomes relevant.

When M.M. testified as a witness for Schrein, she did not recall that Sergeant Bovasso had implied that Schrein was a "pervert." M.M. mentioned nothing about the magazine article as a part of Sergeant Bovasso's interview of M.M.

In his appeal to the Court of Appeals, Schrein contended that the magazine article was both irrelevant and unfairly prejudicial. The State argued that the article was relevant to the question of whether Sergeant Bovasso had made improper suggestions to the parents with whom he had spoken and that these suggestions were passed along to their children, thus encouraging them to testify falsely. In its brief on appeal, the State asserted: "What was this sinister material that this officer

was distributing to upset children and their parents? It was only an article from a popular women's magazine." Brief for appellee at 35-36.

A second issue on appeal involved the testimony of Schrein's nurse, Myra Langenfeld, regarding her opinion about a picture hanging in one of Schrein's examining rooms which depicted a teenager or young man in a standing position with no shirt but wearing hip-huggers, or low-cut jeans. According to Langenfeld, the boy in the picture "had his head tilted back and a smile on his face. And Dr. Schrein referred to it as a 'cocky smile.' " Schrein's lawyer did not object to Langenfeld's description of the picture. However, when Langenfeld was asked what she did not like about the picture, Schrein objected that it was "immaterial, irrelevant. It has nothing to do with this case. It's a conclusion on the part of the witness." The court overruled the objection but allowed Schrein's lawyer to ask several foundational questions. During his foundational examination, Schrein's lawyer asked Langenfeld if there was anything obscene about the picture. She replied, "I thought it looked sexy. . . . It looked suggestive to me. . . . I don't think it was appropriate." At the end of his foundational examination, Schrein's lawyer again objected to Langenfeld's testimony because she had admitted that she knew nothing about art and, therefore, her opinion of the picture was irrelevant. His objection was overruled. After the foundational examination, the State, over Schrein's relevancy objections, continued questioning Langenfeld about her opinion of the picture. She testified that she was "embarrassed" by the picture and that she had told Schrein that she did not care for the picture.

COURT OF APPEALS' DECISION

The Court of Appeals stated:

> The important fact was that Bovasso passed out literature on pedophilia. Beyond that, the exact wording of the literature had perhaps an infinitesimal impact on the credibility of Bovasso and had no material value to any issue of consequence in the case.
>
> Bovasso, his credibility, and the nature of the literature he distributed were not facts of consequence in this case.

> They were not matters in issue. They were not within the range of the litigated controversy. The testimonial evidence given at trial contained the factual evidence of consequence. Evidence concerning factual questions about the literature Bovasso passed out was irrelevant because matters related to Bovasso's distribution of literature were not material facts on which the case turned.

State v. Schrein, 1 NCA 1581, 1588-89 (1992). The Court of Appeals also stated:

> Had it been material and probative, exhibit 60 still should not have been admitted into evidence because relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, see Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), and the article's dubious probative value was dwarfed by its prejudicial effect. . . .
>
> The trial court abused its discretion and erred by admitting exhibit 60, because the article was irrelevant to any material issue of fact, and its tendency to create unfair prejudice substantially outweighed whatever probative value it may have possessed.

1 NCA at 1589-90. Concerning the picture in Schrein's examining room, the Court of Appeals held: "The tendency of the testimony about the picture to create unfair prejudice substantially outweighs any probative value it might arguably have. The court should have excluded the testimony concerning the picture." 1 NCA at 1593. Finally, the Court of Appeals concluded:

> The judgment of the district court is reversed, which reversal results, first, from the unbridled prosecutorial zeal in offering the Redbook article (with strategically placed underlining) and, second, from the failure of the trial court to intercept the magazine article, which was of dubious relevancy, but was obviously extremely prejudicial to the appellant, Schrein, and potentially highly inflammatory to the jury.

1 NCA at 1594.

ASSIGNMENTS OF ERROR

In its petition for further review, the State asserts that the Court of Appeals erred by concluding that the magazine article should not have been received into evidence and holding that testimony regarding the picture in Schrein's examining room should have been excluded.

ADMISSION OF THE MAGAZINE ARTICLE

The trial court held that although the article "has nothing to do with" whether Schrein is guilty or innocent of the charges against him, "it has everything to do with what the officer did in his interviews with regard to [M.M.] and what he did in connection with others. And in view of the previous testimony on cross-examination with regard to what he distributed, I think it becomes relevant."

Under Neb. Rev. Stat. § 27-106 (Reissue 1989):

> (1) When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.
>
> (2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time.

Because § 27-106 is concerned with the danger of admitting a statement out of context, additional evidence is admissible only if it qualifies or explains the previous testimony. See *Chirnside v. Lincoln Tel. & Tel. Co.*, 224 Neb. 784, 401 N.W.2d 489 (1987). In addition, under § 27-106, when defense counsel leaves a false impression, the trial court may allow the use of otherwise inadmissible evidence to clarify or complete an issue opened up by defense counsel. *United States v. Womochil*, 778 F.2d 1311 (8th Cir. 1985). See, also, *U.S. v. Durham*, 868 F.2d

1010 (8th Cir. 1989), *cert. denied* 493 U.S. 954, 110 S. Ct. 366, 107 L. Ed. 2d 352.

Section 27-106 is included in article 1, the "General Provisions" section, of the Nebraska Evidence Rules. As explained by the drafters' comment, the predecessor to § 27-106 was applied repeatedly to admit explaining matter that otherwise might not have been admissible as hearsay, opinion, or the like. See *Spani v. Whitney*, 172 Neb. 550, 110 N.W.2d 103 (1961). Furthermore, although § 27-106 differs from Fed. R. Evid. 106, the drafters of the Nebraska rule believed that there was no significant difference between the rules and that the Nebraska rule was simply a more accurate statement of the rule of completeness. See Rule 107 cmt. (Tentative Draft 1973). Thus, federal decisions and commentary may be helpful in determining the scope of admissibility of evidence under Nebraska's Rule 106.

Because § 27-106 applies only if part of the act, declaration, conversation, or writing has been "given in evidence," we must first determine whether Schrein introduced the Redbook article during his cross-examination of Sergeant Bovasso. In *Durham*, the defendant, on direct examination, elicited testimony from a witness that an unnamed man had been looking for the murder victim on the day of his death. During cross-examination, the government elicited testimony from the same witness that the unnamed man was in fact a landlord or Realtor who was looking to lease or sell the victim property. On appeal, Durham argued that the latter testimony was inadmissible hearsay and that it prejudiced him because it rebutted his theory that someone else had committed the murder. The Eighth Circuit held, however, that Durham's direct examination could have led the jury to believe that the unnamed man had committed the murder, and that the government must be afforded the opportunity to clear up that false impression.

In Schrein's case, during cross-examination of Sergeant Bovasso by Schrein's lawyer, Sergeant Bovasso was asked a series of questions regarding his conversation with M.M. during his investigation of Schrein, including two questions relating to the Redbook article: "Didn't you give her literature on pedophiles?" and "Why did you give her literature on

pedophiles?" Schrein's lawyer also asked if Sergeant Bovasso had implied that Schrein was a pedophile, to which Sergeant Bovasso responded, "No."

The State contends that Schrein's mention of the article served to introduce it into evidence, just as in *Durham*, the mere mention that an unnamed man had been looking for the murder victim on the day of his death was sufficient to open the door to further testimony on the subject.

However, our inquiry does not stop there. According to the advisory committee's notes, one of the purposes behind federal Rule 106 is to allow a party to correct a misleading impression created when part of a statement is taken out of context. In *U.S. v. Velasco*, 953 F.2d 1467 (7th Cir. 1992), the Seventh Circuit held that under federal Rule 106, the trial court must determine whether the additional evidence which the proponent seeks to admit is relevant to the issues in the case and, furthermore, the trial court need admit only that part of the evidence which qualifies or explains the evidence offered by the opponent. See, also, *United States v. McCorkle*, 511 F.2d 482 (7th Cir. 1975), *cert. denied* 423 U.S. 826, 96 S. Ct. 43, 46 L. Ed. 2d 43; *U.S. v. Pendas-Martinez*, 845 F.2d 938 (11th Cir. 1988). As the *Velasco* court explained, the test under federal Rule 106 is conjunctive:

> Once relevance has been established, the trial court then must address the second half of the test, and should do so by asking (1) does it explain the admitted evidence, (2) does it place the admitted evidence in context, (3) will admitting it avoid misleading the trier of fact, and (4) will admitting it insure a fair and impartial understanding of all of the evidence.

Velasco, 953 F.2d at 1475. See, also, *United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986).

The State contends that Schrein's questioning of Sergeant Bovasso left the jury with the false impression that the literature which Bovasso distributed "contained something sinister about doctors and pedophiles" which had improperly influenced witnesses. Brief for appellee in support of petition for further review at 4. Therefore, the State asserts that the article was necessary to rehabilitate the testimony of Sergeant Bovasso and was admissible under § 27-106.

In admitting the article, the trial court explained that although the article

> [had] nothing to do with whether the doctor's guilty or innocent of these charges . . . it has everything to do with what the officer did in his interviews with regard to [M.M.] and what he did in connection with others. And in view of the previous testimony on cross-examination with regard to what he distributed, I think it becomes relevant.

Thus, according to the trial court, although the article was not relevant to the ultimate issue in the case, it was necessary to explain what Sergeant Bovasso had done during his investigation of Schrein, the very subject of Schrein's cross-examination. Thus, cross-examination of Sergeant Bovasso opened the door for the magazine article. This explanation conforms with the purpose of § 27-106.

The State also complains about the finding of the Court of Appeals that the article was unfairly prejudicial to Schrein. See Neb. Rev. Stat. § 27-403 (Reissue 1989).

As Wright and Graham point out:

> The rule at common law was that the opponent was entitled to put in the whole on the same subject if it was relevant. The only limitation was that if the remainder was not only inadmissible but was prejudicial to the proponent, the judge had discretion to exclude it. . . .
>
> . . . .
>
> . . . [I]f the material sought to be required for completeness is such that prejudice to the proponent or another party or the danger of confusion of the jury outweighs the explanatory value of the material, the judge can refuse to admit it. Whether we say that this is because Rule 403 is a Rule that applies even to the completeness doctrine or because the judge applies the elements of Rule 403 in making his determination of what "fairness" requires under Rule 106 is of little moment; the important thing is that this limitation on the common law rule is preserved.

21 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5078 at 373, 378 (1977).

In the present case, however, we need not reach the issue of

whether the Redbook article was unfairly prejudicial to Schrein. An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. See *Havlicek v. State*, 101 Neb. 782, 165 N.W. 251 (1917). Thus, the trial court is required to weigh the danger of unfair prejudice against the probative value of the evidence only when requested to do so at trial. See, *State v. Raywalt*, 436 N.W.2d 234 (N.D. 1989); *State v. Mark*, 286 N.W.2d 396 (Iowa 1979); *McClelland v. State*, 84 Wis. 2d 145, 267 N.W.2d 843 (1978); *U.S. v. Amaechi*, 991 F.2d 374 (7th Cir. 1993), *cert. denied* 61 U.S.L.W. 3835 (U.S. June 14, 1993) (No. 92-8654); *U.S. v. Searing*, 984 F.2d 960 (8th Cir. 1993); *U.S. v. Boney*, 977 F.2d 624 (D.C. Cir. 1992); *U.S. v. Wilson*, 966 F.2d 243 (7th Cir. 1992); *U.S. v. Gomez-Norena*, 908 F.2d 497 (9th Cir. 1990), *cert. denied* 498 U.S. 947, 111 S. Ct. 363, 112 L. Ed. 2d 326.

Schrein objected to the admission of the Redbook article on the grounds of relevancy. The court properly overruled that objection. Had Schrein then interposed an objection on the grounds that the article was unfairly prejudicial, the trial court would have been required to determine whether the otherwise admissible evidence should have been excluded because it was unfairly prejudicial. The trial court was not asked to do so. Because Schrein did not object to the article on the grounds of unfair prejudice, see § 27-403, the trial court had no obligation to exclude it on those grounds. Therefore, although Schrein argued on appeal that the article "was devastating to the defense" and left the defendant "mortally wounded," brief for appellant at 28, 30, the issue of unfair prejudice was not reviewable on appeal.

ADMISSION OF THE PICTURE

The State also argues that the Court of Appeals erred in ruling that testimony about the picture in defendant's examining room should have been excluded.

Under Neb. Rev. Stat. § 27-402 (Reissue 1989), "[e]vidence which is not relevant is not admissible." "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without

the evidence." Neb. Rev. Stat. § 27-401 (Reissue 1989). Furthermore, as the Court of Appeals correctly noted, in order to be admissible, nonexpert opinion testimony must be " '(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of [the witness'] testimony or the determination of a fact in issue.' " *State v. Schrein*, 1 NCA 1581, 1593 (1992) (quoting Neb. Rev. Stat. § 27-701 (Reissue 1989)). Thus, only if Langenfeld's opinion was rationally based on her perception and would tend to make it more or less probable that Schrein had sexually assaulted his patients was her opinion regarding the picture relevant and admissible.

However, we need not determine the basis of Langenfeld's opinion or its probative value because, as noted above, an appellant cannot object to the receipt of evidence to which it did not so object at trial. See *Havlicek v. State, supra*. Schrein did not object to the testimony of Langenfeld in which she described the picture, nor did he object when, in response to his own question, she stated that she thought the picture was "sexy," "suggestive," and "inappropriate." Any additional testimony regarding Langenfeld's opinion of the picture elicited during direct examination was cumulative and, therefore, would constitute harmless error even if inadmissible. Thus, the Court of Appeals erred in concluding that Langenfeld's testimony about the picture should have been excluded.

CONCLUSION

For the foregoing reasons, the Court of Appeals erred in holding that the magazine article and the testimony concerning the picture were inadmissible and, therefore, erred in reversing the convictions of Schrein. Therefore, we reverse the judgment of the Court of Appeals and remand this cause to the Court of Appeals with direction to reinstate the judgments on the five convictions of Schrein.

REVERSED AND REMANDED WITH DIRECTION.

SHANAHAN, J., dissenting.

The majority misapplies Neb. Evid. R. 106, Neb. Rev. Stat. § 27-106 (Reissue 1989), in Schrein's case.

On cross-examination, Bovasso testified that during his investigation, he spoke with M.M. and mentioned something

"about pedophiles" in general, but denied that he had stated or implied to M.M. that Schrein was a pedophile. Moreover, in cross-examining Bovasso, counsel never asked about the identity or contents of any "literature" which Bovasso had given to M.M. during their conversation. However, on redirect examination of Bovasso, and over Schrein's relevance objection, a copy of the Redbook article which Bovasso had given to M.M. was received in evidence.

Nebraska's Rule 106 is a principle of completeness and is designed to prevent an act, declaration, conversation, or other writing from being presented in part when another related part of the act, declaration, conversation, or writing is necessary in fairness to supply the entire context so that the parts may be simultaneously considered together as a whole. Thus, the objective of Rule 106 is elimination of mistake or prevention of a misleading initial impression when matters are taken out of context.

For admission under Rule 106, the additional material must be related to the same subject matter and must "tend to explain, modify, qualify or otherwise shed light on the part already received." Michael H. Graham, Handbook of Federal Evidence § 106.1 at 57 (3d ed. 1991). See, also, *U.S. v. Sweiss*, 814 F.2d 1208 (7th Cir. 1987) (the part sought to be admitted must be relevant to the issues and only that part or those parts that qualify or explain the part in evidence may be admitted to avoid misleading the fact finder and ensure a fair understanding of the evidence).

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989). "To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided." *State v. Lonnecker*, 237 Neb. 207, 210, 465 N.W.2d 737, 740-41 (1991). Accord, *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991).

Validation of the State's introduction of the magazine article

under Rule 106 is not supplied by defense counsel's "opening the door." As expressed in 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 106[01] at 106-10 (1992): "[Fed. R. Evid.] 106 is designed to protect the adversary and not to provide a method to subvert other exclusionary rules." Weinstein and Berger further observe:

> The phrase "opening the door," has been used with such a lack of discrimination, that it would probably be well to eliminate it. One party's errors should not be used as an excuse to compound them. The court should not permit the trial to get out of control. Only if the evidence by one party needs to be met or explained away by the other side does its mere introduction provide independent warrant for the introduction of other evidence.

1 Weinstein & Berger, *supra* at 106-18. " 'Opening the door is one thing. But what comes through the door is another.' " *United States v. Winston*, 447 F.2d 1236, 1240 (D.C. Cir. 1971). In *U.S. v. Brown*, 921 F.2d 1304, 1307-08 (D.C. Cir. 1990), the court stated:

> "Curative admissibility" is a shield, not a sword. Although the government may prevent a defendant from using rules of evidence to select and enter pieces of evidence wholly out of context, the government may not shore up a prosecution by pushing through the open door evidence not "necessary to remove any unfair prejudice" created by defense counsel's tactics. In sum, the range of otherwise-inadmissible evidence that may be squeezed through an "open door" is limited.

Although Rule 106 may have allowed the State to elicit other parts of Bovasso's conversation with M.M., the State instead introduced a document, the magazine article, as the balance of the "same subject" of inquiry during cross-examination of Bovasso. How a document becomes the balance of a conversation is unexplained and remains a puzzlement. Moreover, since Bovasso did not mention or imply that Schrein was a pedophile, in what way did the magazine article eliminate a mistake or prevent a misleading initial impression and thereby make Bovasso's conversation with M.M. more comprehensible?

Admissibility of the Redbook article in Schrein's case is subject to the general requirement of relevance. The State suggests that admission of the magazine article was a response to defense counsel's challenge to Bovasso's credibility and rehabilitated Bovasso's testimony. Actually, in all his testimony concerning the conversation with M.M., Bovasso neither contradicted himself nor supplied any basis for impeachment and damage to his credibility. Just how the article, reciting that child molesters often become pediatricians and referring to psychiatric treatment for an unnamed pedophilic pediatrician, restored or buttressed Bovasso's credibility is unexplained, undoubtedly because the Nebraska Evidence Rules provide no legitimate explanation. Whether the article influenced anyone in Bovasso's investigation would be a conclusion premised on absolute speculation. Furthermore, the issue in Schrein's case was whether he sexually assaulted five children. The article did not tend to prove that Schrein was guilty of the charges because the article presented only general information and contained nothing related to the specific acts involved in the charges against Schrein. Additionally, the record contains no evidence establishing that the article's authors had sufficient expertise for the opinions and conclusions in the article; hence, an evidential foundation for relevance of the authors' expressed opinions and conclusions is totally absent. The magazine article, which might have been entitled "Profile of a Pedophile," stated that some pediatricians were child molesters. As a result of that characterization connecting pediatricians with pedophiles, the accusations against Schrein, a pediatrician, acquired some validity. In that manner, the Redbook article became a witness which Schrein was unable to confront and, therefore, could not cross-examine. Denial of Schrein's right to inquire into such damaging evidence violated his rights to confront and cross-examine witnesses against him.

A conviction of any crime, even sexual assault of a child, must be based on relevant evidence consistent with a defendant's constitutional rights of confrontation and cross-examination necessary for a fair trial. Although some may feel that Schrein "opened the door" for admission of the Redbook article, the door which actually opened was a

trapdoor through which fell the constitutional rights to confront and cross-examine adverse witnesses and receive a fair trial. Therefore, the judgment of the Nebraska Court of Appeals should have been affirmed.

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

CONCERNED CITIZENS OF KIMBALL COUNTY, INC., APPELLANT, V. DEPARTMENT OF ENVIRONMENTAL CONTROL OF THE STATE OF NEBRASKA AND WASTE-TECH SERVICES, INC., APPELLEES.

505 N.W.2d 654

Filed September 3, 1993. No. S-91-553.

1. **Constitutional Law: Immunity: Waiver: Legislature.** Neb. Const. art. V, § 22, concerning a waiver of sovereign immunity, is not self-executing. Legislative action is necessary to waive the state's sovereign immunity.
2. **Statutes: Immunity.** Since statutes authorizing suit against the state are in derogation of the state's sovereignty, such statutes are strictly construed.
3. **Immunity: Waiver.** Waiver of sovereign immunity will be found only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.
4. **Actions: Immunity.** For purposes of applying the doctrine of sovereign immunity, a suit against an agency of the state is the same as a suit against the state.
5. **Actions: Public Officers and Employees: Statutes: Immunity.** A declaratory or other equitable action against a state officer or agent to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by the general principles governing the immunity of the state from suit.
6. **Declaratory Judgments: Immunity: Waiver.** Nebraska's Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1989), does not waive the State of Nebraska's sovereign immunity.
7. **Declaratory Judgments: Parties.** A declaratory judgment is applicable only where all interested and necessary persons are made parties to the proceeding.
8. **Parties: Words and Phrases.** An indispensable party is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest.
9. **Declaratory Judgments: Parties: Jurisdiction: Waiver.** The presence of all necessary or indispensable parties is jurisdictional in a declaratory judgment action and cannot be waived by the parties.
10. **Demurrer: Pleadings.** 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. After the demurrer has been sustained, but where there is a reasonable possibility that the defective petition may be cured by amendment, denying the plaintiff the opportunity to replead is an abuse of discretion.

11. **Summary Judgment: Jurisdiction.** A summary judgment motion based on jurisdictional grounds is treated as and serves the same purpose as a demurrer on jurisdictional grounds.
12. **Actions: Res Judicata: Parties.** The doctrine of res judicata precludes relitigation of a claim only if the parties to the present action are the same or in privity to the parties in the former action.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Mark A. Ludwig, of Germer, Murray & Johnson, for appellant.

Don Stenberg, Attorney General, and Linda L. Willard for appellee Department.

Mark A. Christensen, of Cline, Williams, Wright, Johnson & Oldfather; Marcus L. Squarrell and Robert F. Copple, of Parcel, Mauro, Hultin & Spaanstra, P.C.; and Ruth Brammer Johnson for appellee Waste-Tech.

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

PER CURIAM.

Concerned Citizens of Kimball County, Inc., filed an action under the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1989), challenging the Nebraska Department of Environmental Control's issuance of a permit to build a hazardous waste incinerator.

On October 27, 1987, Waste-Tech Services, Inc. (Waste-Tech), filed a permit application with the Nebraska Department of Environmental Control (Department), seeking a permit to build and operate a hazardous waste incineration and storage facility in Kimball County. The application listed Waste-Tech as the operator of the facility and Thermal, Inc. (Thermal), as the owner of the real estate on which the facility was to be built. During the public comment period before

issuance of the permit, Waste-Tech requested that the final permit designate Gus Koustas and George Koustas as owners of the Kimball facility. The Koustases were the officers and sole shareholders of Thermal. On November 17, 1988, the Department issued the final permit, which listed Waste-Tech as operator and the Koustases as owners.

On November 30, 1988, Amoco Oil Holding Company (Amoco), Waste-Tech's corporate parent, purchased the Koustases' interest in the Kimball facility. Subsequently, Amoco transferred its interest to Waste-Tech, making Waste-Tech both owner and operator of the facility. In a letter dated December 6, 1988, Waste-Tech informed the Department that it had acquired title to the property.

On December 3, 1990, Concerned Citizens of Kimball County, Inc. (Concerned Citizens), filed a petition for declaratory relief in the district court for Lancaster County. In its petition, Concerned Citizens alleged that its members are Kimball County residents and landowners with interests in real estate in close proximity to the site of the proposed facility and that its members will suffer diminished real estate values and potential health hazards if the facility is built. The amended petition further contended that the Department's issuance of the permit was unlawful because the Department had no authority to issue the permit to the Koustases as owners when the application had been filed by Waste-Tech. Therefore, the petition sought a declaration that the permit was void at its inception and could not legally be transferred to Amoco or Waste-Tech and that there is currently no valid permit for the Kimball facility.

The Department filed a demurrer to Concerned Citizens' petition on the grounds that the district court had no subject matter jurisdiction and that Concerned Citizens was not a proper plaintiff. Waste-Tech filed a motion for summary judgment. The district court sustained the Department's demurrer on both grounds mentioned in the demurrer and dismissed the action against the Department. The court also granted Waste-Tech's summary judgment motion and dismissed the action with prejudice because (1) no genuine issues of material fact existed, (2) Concerned Citizens' action

was an improper collateral attack on the decision of an administrative agency, and (3) Concerned Citizens had no standing.

Concerned Citizens contends that the district court erred in (1) sustaining the Department's demurrer to Concerned Citizens' petition, (2) granting Waste-Tech's motion for summary judgment, and (3) dismissing Concerned Citizens' petition with prejudice.

Concerned Citizens contends that the district court erred in holding that the Department was immune from this declaratory judgment action because of the state's sovereign immunity. The district court sustained the Department's demurrer because the state's sovereign immunity meant that the court had no subject matter jurisdiction.

Lack of subject matter jurisdiction is a proper ground for a demurrer to a petition. Neb. Rev. Stat. § 25-806 (Reissue 1989); *Knapp v. City of Omaha*, 175 Neb. 576, 122 N.W.2d 513 (1963).

Article V, § 22, of the Nebraska Constitution provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." Article V, § 22, is not self-executing. Legislative action is necessary to waive the state's sovereign immunity. See *Gentry v. State*, 174 Neb. 515, 118 N.W.2d 643 (1962). Since statutes authorizing suit against the state are in derogation of the state's sovereignty, such statutes are strictly construed. See, *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984); *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979), *overruled on other grounds, Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988); *Gentry v. State, supra*; *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), *overruled on other grounds, Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985). Hence, "[w]aiver [of sovereign immunity] will only be found 'where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." ' " *Wiseman v. Keller*, 218 Neb. at 720, 358 N.W.2d at 770 (quoting *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)). Accord *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989).

Moreover, for purposes of applying the doctrine of sovereign immunity, a suit against an agency of the state is the same as a suit against the state. See, *Beatrice Manor v. Department of Health, supra*; *State, ex rel. Walker, v. Board of Commissioners*, 141 Neb. 172, 3 N.W.2d 196 (1942); *Anstine v. State, supra*.

However, a declaratory or other equitable action against a state officer or agent to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by the general principles governing the immunity of the state from suit. See, *Bartels v. Lutjeharms*, 236 Neb. 862, 464 N.W.2d 321 (1991); *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947), *cert. denied* 335 U.S. 814, 69 S. Ct. 31, 93 L. Ed. 369 (1948); *State, ex rel. Walker, v. Board of Commissioners, supra*. See, also, *Grinnell v. State*, 121 N.H. 823, 435 A.2d 523 (1981); *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976); *Collins v. State Board of Social Welfare*, 248 Iowa 369, 81 N.W.2d 4 (1957); *Battleship Texas Ad. Bd. v. Texas Dynamics*, 737 S.W.2d 414 (Tex. Civ. App. 1987); *Bagg v. Univ. of Texas Medical Branch*, 726 S.W.2d 582 (Tex. Civ. App. 1987); 1 Walter H. Anderson, Actions for Declaratory Judgments § 179 (2d ed. 1951). This exception to the rule of sovereign immunity exists because "acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state." *Rein v. Johnson*, 149 Neb. at 69, 30 N.W.2d at 552. Cf. *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908) (federal court may enjoin a state officer without violating the 11th Amendment to the U.S. Constitution because this does not involve an action against a state).

Concerned Citizens' petition indicates that this action was brought pursuant to the Uniform Declaratory Judgments Act, §§ 25-21,149 to 25-21,164. As the Department correctly points out, this court, in *Offutt Housing Co. v. County of Sarpy*, 160 Neb. 320, 322-23, 70 N.W.2d 382, 385 (1955), *aff'd* 351 U.S. 253, 76 S. Ct. 814, 100 L. Ed. 1151 (1956), held that the predecessor to Nebraska's Uniform Declaratory Judgments Act did not waive the state's sovereign immunity:

> "Generally, an action for a declaratory judgment cannot be maintained against the state without its consent, the state's immunity from suit being held unaffected by declaratory judgment statutes; but such an action may be maintained under statutes permitting various actions against the state." 81 C. J. S., States, § 214, p. 1304, and authorities cited.

Hence, the current version of Nebraska's Uniform Declaratory Judgments Act does not waive the State of Nebraska's sovereign immunity.

Although Concerned Citizens could have sued the director of the Department pursuant to the Uniform Declaratory Judgments Act, see *Rein v. Johnson, supra*, Concerned Citizens may not rely on the Uniform Declaratory Judgments Act as a basis for declaratory relief against the State of Nebraska or a state agency. Consequently, if Concerned Citizens is to obtain declaratory relief against the Department, it must do so in accordance with statutory authority and a procedure other than the Uniform Declaratory Judgments Act.

Concerned Citizens argues that this declaratory action is authorized by Neb. Rev. Stat. § 25-21,206 (Reissue 1989), which provides in part: "The state may be sued in the district court of the county wherein the capital is situated in any matter founded upon or growing out of a contract, express or implied, originally authorized or subsequently ratified by the Legislature, or founded upon any law of the state." Thus, by its plain terms, § 25-21,206 applies only to actions based on a contract. However, this court has held that permits or licenses are not contracts. See, *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988); *Prucha v. Department of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75 (1961); *Durfee v. Ress*, 163 Neb. 768, 81 N.W.2d 148 (1957); *Leeman v. Vocelka*, 149 Neb. 702, 32 N.W.2d 274 (1948); *Smith v. State*, 124 Neb. 587, 247 N.W. 421 (1933). See, also, 53 C.J.S. *Licenses* § 3 at 322 (1987): "In general, a license is a means of regulating and taxing privileges and occupations and the use and disposal of property . . . . A license is not a contract or obligation between the authority, federal, state, or municipal, granting it and the person to whom it is granted." Because the permit issued by the

Department to Waste-Tech is not a contract, § 25-21,206 does not provide a statutory authorization for Concerned Citizens' declaratory action against the Department.

We also consider whether Neb. Rev. Stat. § 84-911 (Reissue 1987), a part of Nebraska's Administrative Procedure Act, waives the state's sovereign immunity and authorizes the district court's jurisdiction in this suit. Section § 84-911(1) states:

> The validity of any rule or regulation may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule or regulation in question.

Neb. Rev. Stat. § 84-901 (Reissue 1987) does not include an agency permit within the definition of a "rule or regulation" which is reviewable under the Administrative Procedure Act. Because the permit issued to Waste-Tech by the Department is not a rule or regulation for purposes of the Administrative Procedure Act, § 84-911 does not waive the state's sovereign immunity so as to authorize Concerned Citizens' declaratory judgment action.

As noted above, the State of Nebraska and its agencies are immune from a declaratory judgment action unless specifically authorized by a statute. Concerned Citizens has not referred this court to any statute that authorizes this action against the state, nor has our independent research located such a statute authorizing a declaratory judgment action under the circumstances. Therefore, we hold that the district court did not err in sustaining the Department's demurrer because of lack of subject matter jurisdiction.

Concerned Citizens also contends that the district court erred in granting Waste-Tech's motion for summary judgment. However, because we have determined that the district court correctly sustained the Department's demurrer, we now hold

that the action could not continue against Waste-Tech alone because the director of the Department is a necessary party.

Section 25-21,159 provides in part: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

This court has held on numerous occasions that the statute authorizing declaratory judgments is applicable only where all interested and necessary persons are made parties to the proceeding. See, *Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd.*, 229 Neb. 740, 428 N.W.2d 895 (1988); *Shepoka v. Knopik*, 197 Neb. 651, 250 N.W.2d 619 (1977); *Baker v. A. C. Nelson Co.*, 185 Neb. 128, 174 N.W.2d 197 (1970); *Berigan Bros. v. Growers Cattle Credit Corp.*, 182 Neb. 656, 156 N.W.2d 794 (1968); *Marsh v. Marsh*, 173 Neb. 282, 113 N.W.2d 323 (1962); *Haynes v. Anderson*, 163 Neb. 50, 77 N.W.2d 674 (1956); *Redick v. Peony Park*, 151 Neb. 442, 37 N.W.2d 801 (1949). "An indispensable party is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest." *Heithoff v. Nebraska State Bd. of Ed.*, 230 Neb. 209, 214, 430 N.W.2d 681, 684 (1988). Accord, *Helter v. Williamson*, 239 Neb. 741, 478 N.W.2d 6 (1991); *Krohn v. Gardner*, 238 Neb. 460, 471 N.W.2d 391 (1991); *Koch v. Koch*, 226 Neb. 305, 411 N.W.2d 319 (1987); *Shepoka v. Knopik, supra*. The presence of all necessary or indispensable parties is jurisdictional in a declaratory judgment action and cannot be waived by the parties. See, *Shepoka v. Knopik, supra*; *Redick v. Peony Park, supra*.

Concerned Citizens challenges the validity of the permit granted Waste-Tech by the director of the Department. This challenge necessarily raises the question whether the director of the Department acted within his statutory and regulatory powers. Since the director's actions are being questioned, the director is an interested and necessary party in this declaratory judgment action. Therefore, the district court was without jurisdiction to consider the declaratory judgment action against

Waste-Tech alone and did not err in granting Waste-Tech's summary judgment motion.

Concerned Citizens maintains that the district court erred in dismissing its petition against Waste-Tech and the Department with prejudice, thereby denying Concerned Citizens the opportunity to replead and remedy any defects in its petition.

Neb. Rev. Stat. § 25-852 (Reissue 1989) states:

> The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case . . . . Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment.

Neb. Rev. Stat. § 25-854 (Reissue 1989) provides: "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."

A trial court's decision regarding amendments to the pleadings will be not be reversed on appeal absent an abuse of discretion. 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. After the demurrer has been sustained, but where there is a reasonable possibility that the defective petition may be cured by amendment, denying the plaintiff the opportunity to replead is an abuse of discretion. *Wichman v. Naylor*, 241 Neb. 249, 487 N.W.2d 291 (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).

Moreover, a summary judgment motion based on jurisdictional grounds is treated as and serves the same purpose

as a demurrer on jurisdictional grounds. See, *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990) (judgment based on matter of jurisdiction is not "on the merits" and thus has no preclusive effect); *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984) (absence of subject matter jurisdiction may be raised either by demurrer or by summary judgment motion). Therefore, a summary judgment motion based on a jurisdictional defect is treated the same as a demurrer based on a jurisdictional defect for purposes of applying the rule regarding repleading. Consequently, after a summary judgment motion on jurisdictional grounds has been granted, but where there is a reasonable possibility that the jurisdictional defect may be cured by amendment, denying the plaintiff the opportunity to replead is an abuse of discretion.

In the present case, it is necessary to determine whether there is a reasonable possibility that Concerned Citizens could amend its petition to cure the defect or defects in its petition and state a valid cause of action. Certainly, the defect relating to sovereign immunity of the state may be cured by making the director of the Department a party to the action. In addition, any defect regarding Concerned Citizens' standing to sue on behalf of its members is curable. See, *Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection*, 162 Neb. 781, 77 N.W.2d 464 (1956); *Smithberger v. Banning*, 130 Neb. 354, 265 N.W. 10 (1936) (an association which itself has no standing must plead authority to appear on behalf of its members). See, also, *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) (setting forth federal doctrine of associational standing which does not require an association to specifically allege authority to appear on behalf of its members).

Moreover, this action is not an improper collateral attack on the judgment of an administrative agency because neither Concerned Citizens nor its members were parties to the agency decision or in privity to a party to the agency action. See, *Krohn v. Gardner*, 238 Neb. 460, 471 N.W.2d 391 (1991) (the doctrine of res judicata precludes relitigation of a claim only if the parties to the present action are the same or in privity to the parties in the former action); *Martin v. Wilks*, 490 U.S. 755,

109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989) (a person who was not a party or privy to a prior judgment may challenge the propriety of that judgment without engaging in an impermissible collateral attack).

Therefore, there is a reasonable possibility that Concerned Citizens could cure the jurisdictional defects and state a valid cause of action, alleging a violation of 128 Neb. Admin. Code, ch. 16, § 009.02L3 (1988), which states in part: "The permit is not transferable to any person, except in the case of treatment and storage facilities, after notice to the Director." See, also, 40 C.F.R. § 270.40 (1988) (changes in ownership or operational control of a facility operating under a Resource Conservation and Recovery Act permit require prior written notice). Consequently, the district court abused its discretion in dismissing Concerned Citizens' petition with prejudice.

The district court's judgments sustaining the demurrer of the Department and granting Waste-Tech a summary judgment on jurisdictional grounds are affirmed. However, the court's order dismissing Concerned Citizens' petition with prejudice is reversed, and this cause is remanded to the district court for further proceedings.

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

HASTINGS, C.J., not participating.

W. DONALD GOULD AND JOHN S. GOULD, FOR THEMSELVES, AND JOHN S. GOULD, AS PARENT AND NATURAL GUARDIAN FOR DONNA LEE GOULD AND REBECCA LYNN GOULD, MINORS, APPELLANTS, V. KAY A. ORR, GOVERNOR OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

506 N.W.2d 349

Filed September 17, 1993. No. S-91-097.

1. **Actions: Pleadings: Parties: Joinder.** Causes of action involving different defendants cannot be joined unless each cause affects all the defendants and they have a joint or common liability or interest.
2. **Summary Judgment: Pleadings.** Summary judgment is not proper when the challenge involves the sufficiency of a petition to state a cause of action.
3. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and the moving party is entitled to judgment as a matter of law.
4. **Demurrer: Pleadings: Words and Phrases.** A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
5. **Demurrer: Pleadings.** Leave to amend a petition should ordinarily be granted after a demurrer is sustained. However, when it is clear that no reasonable possibility exists that plaintiff will, by amendment, be able to state a cause of action, leave to amend may be denied.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

Vard R. Johnson, of Broom, Johnson, Fahey & Clarkson, for appellants.

Don Stenberg, Attorney General, and Harold I. Mosher for appellees.

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

PER CURIAM.

The appellants, W. Donald Gould and John S. Gould, for themselves, and John, for his children Donna Lee Gould and Rebecca Lynn Gould, brought an action against Kay A. Orr as

Governor, Frank Marsh as State Treasurer, Joe E. Lutjeharms as commissioner of the State Department of Education, Deborah Thomas as director of the Department of Administrative Services, the State Department of Education, the State Board of Education, and Lancaster County School District 161, contending that Nebraska's statutory scheme for financing public schools denies appellants equal protection of the law, equal and adequate educational opportunity, and uniform and proportionate taxation. The trial court granted appellees' motion for summary judgment, finding that education is not a fundamental right subject to strict scrutiny and, further, that the enactment of 1990 Neb. Laws, L.B. 1059, so substantially altered the manner in which funding is provided as to render the appellants' claims moot.

BACKGROUND

On January 2, 1990, the appellants filed their petition in the Lancaster County District Court against the above-listed appellees, seeking (1) a declaration that the appellants were being denied due process of law, equal protection of the law, equal and adequate educational opportunity, and uniform and proportionate taxation in violation of the Constitution of the State of Nebraska; (2) a declaration that the present statutory structure for funding public schools in Nebraska is unconstitutional and inadequate; (3) an injunction permanently enjoining the appellees from implementing the unconstitutional educational funding statutes currently in effect; (4) a mandamus issued to the Governor requiring her to recommend that the Legislature enact legislation pertaining to the schools of Nebraska which will comply with the requirements of the Nebraska Constitution; (5) a ruling that the court would retain jurisdiction of the matter for purposes of enforcing its order and judgments; and (6) such other relief as the court may deem the appellants to be entitled to.

At the time of filing, appellants, John Gould and Donald Gould, and John's minor daughters Donna Lee Gould and Rebecca Lynn Gould, all resided in Saunders County, Nebraska, where Donna Lee and Rebecca Lynn were students within the Raymond Central School District. John and Donald

own 1,520 acres of farmland in Saunders County, within the political and taxing jurisdiction of Raymond Central School District, also known as Lancaster County School District 161.

Appellants' allegations follow. Nebraska's school system, at the time of appellants' petition, was funded as follows: approximately 75 percent of each school's budget was funded by local tax revenue; the remaining 25 percent was provided by the state, primarily through the School Foundation and Equalization Fund. Neb. Rev. Stat. §§ 79-1330 to 79-1344.01 (Reissue 1987) (repealed in 1990 by L.B. 1059 and 1990 Neb. Laws, L.B. 843). This system resulted in substantial disparity among districts, with the distribution from the School Foundation and Equalization Fund being insufficient to offset the local tax revenue differentials caused by local wealth disparities.

Appellants further alleged: In 1988-89, for example, the state distributed $1,202.04 per pupil of its School Foundation and Equalization Fund to the state's poorest K-12 school district, Thurston County School District 16, and $393.86 to the state's wealthiest K-12 school district, Thayer County School District 47. That same year, the total amount available for each pupil in the Thayer district was $7,119.97, while the Thurston district had only $1,313.46 available per pupil. This inequity resulted primarily from the fact that the poorer districts have materially smaller tax bases than the wealthier districts. While the 10 wealthiest school districts have tax bases valued at an average of $2,740,383 per student in their districts, the 10 poorest school districts have tax bases worth an average of only $46,814 per student. The inequity of tax bases also results in significantly higher educational tax levies being assessed against property owners in the poorer districts, with the poorest districts having the highest property tax levies in the state. The seven poorest K-12 districts had tax levies averaging $2.5473 per $100 of assessed valuation, while the wealthiest K-12 districts had tax levies averaging only $1.5296 per $100 of assessed valuation. The appellants' petition concluded that these figures and others like them epitomized the inequality, and therefore the unconstitutionality, of the school financing system.

After the filing of the petition, each of the appellees, except

Lancaster County School District 161, individually filed demurrers to the appellants' petition, alleging that several causes of action were improperly joined and that the petition failed to state facts sufficient to constitute a cause of action. The trial court denied each demurrer, finding that while the appellants' petition did contain more than one cause of action, the appellees were all affected by the several causes of action and had a joint interest therein. The court also found that even assuming that education is not a fundamental right for purposes of state equal protection, the petition did state sufficient actionable facts to withstand the demurrers.

The appellees then moved for summary judgment, and after a hearing during which both sides adduced evidence, the motion was granted by the district court. The district court found that the claims sought to be advanced by the appellants did not state a cause of action cognizable under Nebraska law and that there was no issue of material fact in dispute. The appellants timely appealed to this court.

ASSIGNMENTS OF ERROR

The appellants assign three errors, contending that the district court erred in granting appellees' motion for summary judgment because (1) there existed, at the time of the motion, genuine issues of material fact regarding the disparity of resources, wealth, tax levies, and educational opportunities throughout Nebraska which affected appellants; (2) appellants were not able to discover all data necessary to make a full and complete response to appellees' motion and, pursuant to Neb. Rev. Stat. § 25-1335 (Reissue 1989), the motion should have been denied; and (3) appellees were not entitled, as a matter of law, to summary judgment because (a) "[a]ppellants had pled and proved a cause of action for violation of their Constitutionally guaranteed rights with respect to equal protection under the law, equal educational opportunity, and uniform and proportionate taxation, as the same are applied to the structure of school finance in Nebraska," and (b) "[t]he enactment of LB 1059 and 1059A did not remedy the Constitutional inadequacies about which Appellants complained, nor mooted Appellants' case."

JOINING OF SEVERAL CAUSES OF ACTION

Before we reach the merits of the case before us, we must address a threshold challenge raised by the appellees. The appellees contend here, as they did at the trial court level, that the appellants improperly joined the parties and the several causes of action raised herein.

Neb. Rev. Stat. § 25-701 (Reissue 1989) provides that a plaintiff may "unite several causes of action in the same petition" if, so far as is relevant to the present case, the causes involve the "same transaction or transactions connected with the same subject of action." Neb. Rev. Stat. § 25-702 (Reissue 1989) limits the foregoing by providing that, but for an exception not material to the inquiry now before us, "the causes of action so united must affect all the parties to the action." Therefore, causes of action involving different defendants cannot be joined unless each cause affects all the defendants and they have a joint or common liability or interest. *S.I.D. No. 272 v. Marquardt*, 233 Neb. 39, 443 N.W.2d 877 (1989). Applying these principles, we find, as did the trial court, that each of the defendants is affected by the several causes of this action and has a joint or common liability or interest therein. The appellees' contentions otherwise are without merit. We turn, therefore, to the issue of the trial court's granting of the appellees' motion for summary judgment.

SUMMARY JUDGMENT

The appellants contend that the trial court erred in granting summary judgment when appellants were incapable of discovering data necessary to take the full measure of L.B. 1059 and 1990 Neb. Laws, L.B. 1059A. We agree with the trial court that no cause of action was stated.

While this court's consideration of a case is ordinarily limited to errors assigned and discussed in the briefs, we may, at our option, notice plain error not assigned. Neb. Ct. R. of Prac. 9D(1)d (rev. 1992). We find that the trial court should have sustained appellees' demurrers because appellants' petition did not state a cause of action and that the trial court's failure to sustain the demurrers constituted plain error.

Summary judgment is not proper when the challenge

involves the sufficiency of a petition to state a cause of action. *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991); *Workman v. Workman*, 167 Neb. 857, 95 N.W.2d 186 (1959).

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and the moving party is entitled to judgment as a matter of law. *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993).

Pursuant to Neb. Rev. Stat. § 25-806(6) (Reissue 1989), a defendant may demur to a petition, in one instance, when the petition does not state facts sufficient to constitute a cause of action. A statement of "facts sufficient to constitute a cause of action," as used in § 25-806(6), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Fulk v. McLellan*, 243 Neb. 143, 498 N.W.2d 90 (1993).

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. A petition will be sufficient if, under the facts alleged, the law entitles a plaintiff to recover. That is to say, facts are sufficient to constitute a cause of action when they are a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Northland Ins. Co. v. State*, 242 Neb. 10, 492 N.W.2d 866 (1992).

In this case, appellants failed to state facts sufficient to state a cause of action. Appellants' petition clearly claims there is disparity in funding among school districts, but does not specifically allege any assertion that such disparity in funding is inadequate and results in inadequate schooling. While appellants' petition is replete with examples of disparity among the various school districts in Nebraska, they fail to allege in

their petition how these disparities affect the quality of education the students are receiving. In other words, although appellants' petition alleges the system of funding is unequal, there is no demonstration that the education each student is receiving does not meet constitutional requirements. Thus, the proper course would have been for the trial court to sustain the demurrers.

Appellants allege, and the theory of their case is, that unequal funding equals inadequate education. We have held that leave to amend a petition should ordinarily be granted after a demurrer is sustained. However, when it is clear that no reasonable possibility exists that plaintiff will, by amendment, be able to state a cause of action, leave to amend may be denied. *Fowler v. Nat. Bank of Commerce*, 209 Neb. 861, 312 N.W.2d 269 (1981). It does not appear the defect can be cured by amendment. It would have been proper, therefore, to dismiss appellants' petition without leave to amend.

In light of our decision, we do not discuss the remaining assignments of error, as the foregoing decision disposes of the case.

CONCLUSION

The trial court properly allowed the joinder of the parties and the several causes of action. However, the appellants failed to state a cause of action, and because there appeared no reasonable possibility that the defect could be remedied, the appellants' petition should have been dismissed. The judgment of the district court is affirmed in part and in part reversed, and the cause is remanded with directions to dismiss.

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

WHITE, J., dissenting in part.

Neb. Const. art. VII, § 1, states that the Legislature shall provide for the free instruction in the common schools of the state of all persons between the ages of 5 and 21. The constitutional provision is not self-executing. *State ex rel. Shineman v. Board of Education*, 152 Neb. 644, 42 N.W.2d 168 (1950). To carry out the commands of the Constitution, the Legislature has specified the duties of the State Board of

Education, the Commissioner of Education, and the State Department of Education. Neb. Const. art. VII, §§ 2 to 4. See Neb. Rev. Stat. ch. 79 (Reissue 1987 & Cum. Supp. 1992).

From an analysis of article VII of our Constitution, certain conclusions are readily apparent. Among them: (1) The Constitution does not define what constitutes "instruction," leaving that to be defined by the Legislature; (2) the right to "free instruction" is a right that may be asserted and protected by resorting to the courts, Neb. Const. art. I, §§ 3 and 13; (3) in determining whether "free instruction" has been denied, the courts may review the action of the Legislature and decide whether the instruction provided comports with the constitutional command; and (4) the Constitution does not require that the financial burden of free instruction be borne uniformly.

Less certain, and subject to determination in an appropriate case, is whether the right to free instruction is a fundamental right, rendering any legislation affecting free instruction subject to strict scrutiny.

I agree with the majority that an unequal method of financing of a school district's instruction budget is not a per se violation of the Nebraska Constitution. However, I strongly disagree with any implication that unequal financing may not be considered in the overall determination of whether the district is supplying at least a minimum quality of instruction to its students. I, therefore, agree with that portion of the opinion which states that the trial court should have sustained the demurrers. I submit that the petition may easily be amended to state a cause of action, and, therefore, I dissent from the portion of the opinion dismissing the action.

This court has consistently held that after a demurrer is sustained, the plaintiff should be given an opportunity to amend the petition unless it is clear that there is no reasonable possibility that the plaintiff will be able to remedy the deficiency. *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992); *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990); *Fowler v. Nat. Bank of*

Commerce, 209 Neb. 861, 312 N.W.2d 269 (1981).

The pleadings do not indicate that it would be impossible for the appellants to amend the petition to include facts that demonstrate that the education being provided by the appellees is constitutionally inadequate. I therefore submit that the appellants should be granted an opportunity to amend their petition.

SHANAHAN, J., joins in this dissent.

LANPHIER, J., dissenting.

I join in the dissent of Justice White. However, when considering a demurrer, the petition is to be liberally construed. *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989). With that in mind, I believe the petition need not be amended because it includes sufficient facts which, if proved, evidence the claimed constitutional inadequacy of the education at issue. Although the plaintiffs' main focus is on the economic disparities among school districts, the effects such disparities have on the quality of the education are stated. The plaintiffs cite the lower wages paid to teachers in the poorer districts; the access to fewer resources such as libraries, updated workbooks, and counselors; and the unavailability of advanced courses in math, science, and foreign languages for students in poorer districts. These allegations alone would show the inadequacy of the education received by students within poorer districts which result from the alleged economic disparities. However, the plaintiffs go further and allege in their petition:

> Because of the lower quality of education available to them, students who graduate from high schools in poorer districts are more likely to be required to take remedial courses before entering the general college level curriculum. This requirement stigmatizes them as being poorly prepared students and, at best, retards their progress toward admission and graduation from professional schools, such as law or medicine. At worst, remedial courses will come too late, and the students' educational deficiencies will forever block their admission to professional schools, or even their graduation from college. Those students from poorer districts who are not

> subjected to remedial education at the college level are, nevertheless, handicapped in their ability to compete at the college level with students who have had the appropriate courses in many subject areas at the high school level.

The rule governing review of demurrers requires us to accept these allegations as true. See, *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992); *Hebard v. AT&T*, 228 Neb. 15, 421 N.W.2d 10 (1988); *Ames v. Hehner*, 231 Neb. 152, 435 N.W.2d 869 (1989); *S.I.D. No. 272 v. Marquardt*, 233 Neb. 39, 443 N.W.2d 877 (1989); *Moore v. Grammer*, 232 Neb. 795, 442 N.W.2d 861 (1989). See, also, *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993); *Fulk v. McLellan*, 243 Neb. 143, 498 N.W.2d 90 (1993). Accepted as true, these allegations evidence the inadequacy of education resulting from the disparity in funding of the school districts.

CAPORALE, J., concurring.

Whatever else might be said about the dissents, it seems to me that in attempting to illustrate that the petition we are reviewing is adequate, the second dissent only succeeds in making clearer that the petition fails. While the alleged educational ills in Lancaster County School District 161 are tied by the petition to the method by which education is financed, the claimed constitutional infirmity rests not on the adequacy of the education provided but on the premise that such education is different from that provided elsewhere. Neb. Const. art. VII, § 1, requires "free instruction" in the "common schools," not the same instruction in all such schools.

While the first dissent recognizes this pleading deficiency, it suggests that the petition could be modified so as to state the cause of action the dissent then proceeds to outline. In doing so, this dissent overlooks the difference between the amendment of an existing suit and the pleading of a new and different one. It is well established that while the modification of a petition so as to amplify, expand, or elaborate the original allegations does not state a new and different cause of action, *Muenchau v. Swarts*, 170 Neb. 209, 102 N.W.2d 129 (1960), a modification relying on entirely different reasons for relief does so, even if founded on

the same injury as was the original petition, *Johnson v. American Smelting & Refining Co.*, 80 Neb. 255, 116 N.W. 517 (1908).

Nor would I be comfortable in suggesting the allegations we might later be required to review.

STATE OF NEBRASKA, APPELLEE, V. DENNIS D. LOWE, APPELLANT.

505 N.W.2d 662

Filed September 17, 1993. No. S-92-788.

1. **Rules of Evidence.** All relevant evidence normally is admissible. Evidence which is not relevant is not admissible.
2. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
3. **Evidence: Words and Phrases.** There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is in issue, that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law. The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove. A fact that is of consequence is material, and evidence that affects the probability that a fact is as a party claims it to be has probative force. Such evidence often is said to have logical relevance, while evidence lacking in probative value may be condemned as remote or speculative.
4. **Trial: Evidence.** Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case.
5. **Homicide: Self-Defense: Sexual Assault: Evidence.** Evidence of a murder victim's homosexuality may be admissible as corroborative of a defendant's claim of self-defense from a homosexual assault, provided such evidence as tendered is probative of that defense.
6. **Trial: Rules of Evidence: Expert Witnesses.** Expert testimony is permitted even in areas where laymen have competence to determine the facts testified to by the expert where a trial court may feel the opinion would assist them; i.e., it would be helpful to the trier of fact.

7. _____: _____: _____. The helpfulness test subsumes a relevancy analysis. In making its determination, the court must proceed on a case-by-case basis. Its conclusions will depend on (1) the court's evaluation of the state of knowledge presently existing about the subject of the proposed expert testimony and (2) the court's appraisal of the facts of the case.
8. _____: _____: _____. Under the helpfulness standard, a court may exclude an expert's opinion which is nothing more than an expression of how the trier of fact should decide a case, and when an expert's opinion on a disputed issue is a conclusion which may be deduced equally as well by a trier of fact with sufficient evidence on the issue, the expert's opinion is superfluous and does not assist the trier in understanding the evidence or determining a factual issue.
9. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
10. **Jury Instructions: Appeal and Error.** If the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.
11. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
12. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
13. _____. In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

James Martin Davis for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

HASTINGS, C.J.

The defendant was convicted of second degree murder and use of a deadly weapon in the commission of a felony following a jury trial in the district court for Douglas County. He appeals,

assigning as error (1) the exclusion of evidence of the homosexual conduct of the victim, (2) the exclusion of testimony of an expert witness, (3) the refusal by the court of a tendered instruction, and (4) the imposition of excessive sentences. We affirm.

On the morning of January 11, 1992, the body of the male victim was discovered in an isolated area of Omaha known as Bum's Hollow. The victim's body was lying faceup on the ground next to the driver's side of his pickup truck. The victim's face was covered with blood, and it appeared that he had been beaten. The victim's body was clothed, but the zipper of his jeans was found to be completely unzipped, and it did not appear that he was wearing underwear. Later examination disclosed that his underwear was pulled down and contained within the leg area of his jeans. An autopsy revealed that the cause of death was multiple injuries to the face and head caused by approximately seven or eight blows with a blunt instrument.

The defendant had been drinking beer during the evening of January 10 at an Omaha bar. At closing time, the defendant made arrangements to attend a party in the area of 6th and Pierce Streets. However, he was unable to find the location of the party. The defendant had been drinking from a quart bottle of malt liquor, and he eventually stopped his vehicle and, after urinating, fell asleep or passed out in his truck with the radio playing. He stated that he was on the driver's side of the vehicle, leaning to the right, half lying on his side, and up against the back of the seat. The next thing the defendant remembered, according to his testimony, was a man hovering over and fondling him. The defendant stated that this man was in the process of unbuttoning the defendant's pants and reaching down into the defendant's genital area.

The defendant testified that he then "freaked, got scared," and he went on to explain, "I don't know the word you'd use; lost it mentally for a second or two." He remembered that he started swinging his flashlight that had been on the seat of his vehicle, but could not recall how many times he swung the flashlight or that he even hit the man. He stated that he could hear the man snoring, but it was dark, and he could not see the man on the ground in any detail, although he could see the

shape of the man's body. He also stated that he was confused after the man fell to the ground and that he then got into his vehicle and went home.

When the defendant arrived home, he went downstairs, took a shower, and washed off the flashlight. He encountered his father on the landing of the stairs and told him he had been in a fight. The next morning, the defendant's father awakened him and informed him that the police had found a man dead in the area of 6th or 3d and Center. The defendant testified that after he discussed the situation with his family for a couple of hours, they all agreed that it would be best if he turned himself in.

The defendant contends that during the trial, the court erred in excluding evidence that on December 14, 1987, the victim and another person were arrested for lewd conduct in the restroom of a department store; i.e., this other person was masturbating at a urinal, and the victim in this case was masturbating in a toilet stall. By means of an offer of proof, it was disclosed that this other person told the prosecution that although he was not acquainted with the victim in this case, the place where the two of them were arrested was a place where homosexuals met. This person also testified that when he went into the restroom, "someone" in the stall was tapping a foot on the floor, supposedly a common signal for homosexual activity. The court rejected the offer of proof and refused to admit the evidence. There was no evidence of any contact between the two men.

The court also sustained the State's motion in limine to prevent possible evidence that on one occasion some unknown person or persons broke into the house where the victim was living with his parents and "wrote gay or words to that effect on the wall" and that at one time the victim had a window of his pickup truck "broken out and maybe some things yelled at him about being a gay or homosexual."

The defendant contends that the victim's character trait of being homosexual was an essential element of his defense that he was the victim of a homosexual attack and that the trial court should have respected his Sixth Amendment rights and allowed him to adduce the offered testimony under Neb. Evid. R. 405(2), Neb. Rev. Stat. § 27-405(2) (Reissue 1989). However,

the trial court ruled that there was not enough similarity in the actions described to justify admission of the testimony.

Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1989), states:

> (1) Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except:
>
> . . . .
>
> (b) Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same . . . .

Rule 405 provides:

> (1) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (2) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

The first question is whether the testimony concerning a specific instance of the victim's conduct is relevant to the issue of self-defense.

All relevant evidence normally is admissible. Evidence which is not relevant is not admissible. Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989). Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989).

In *State v. Dixon*, 240 Neb. 454, 457-58, 482 N.W.2d 573, 576 (1992), this court noted:

> "There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue,

> the evidence is immaterial. What is 'in issue,' that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law. . . .
>
> "The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove. . . . A fact that is 'of consequence' is material, and evidence that affects the probability that a fact is as a party claims it to be has probative force. . . . Such evidence often is said to have 'logical relevance,' while evidence lacking in probative value may be condemned as 'remote' or 'speculative.' "

Quoting 1 McCormick on Evidence § 185 (John W. Strong 4th ed. 1992).

Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case. *State v. Dixon, supra*; *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

Other courts have examined the relevance of evidence of a victim's prior homosexual conduct when the defendant has claimed self-defense, with dissimilar results.

In *State v. Bell*, 60 Wash. App. 561, 805 P.2d 815 (1991), a defendant charged with second degree murder sought to introduce the testimony of nine lay witnesses; some of these witnesses would have testified that the victim had a reputation in the community as a homosexual, and others would have testified that they knew of specific instances in which the victim displayed homosexual conduct. The Court of Appeals of Washington found that under the applicable rules, evidence of specific instances of the victim's past homosexual behavior was inadmissible. The court further noted that while evidence of a victim's reputation may be admitted under certain circumstances to show that the victim acted in conformity with his or her character where the defendant claims that he acted in self-defense, the testimony would not be relevant in that case, reasoning:

> While evidence of [the victim's] reputation as a

> homosexual may tend to prove that he grabbed at [the defendant's] crotch and attempted to kiss him, these facts are not "of consequence to the determination of the action", because the defense of self-defense is only available to a defendant who is responding to a perceived threat of great bodily harm or to the victim's commission of a violent felony.

Id. at 564-65, 805 P.2d at 817.

In *Kagebein v. State*, 254 Ark. 904, 496 S.W.2d 435 (1973), the appellant asserted that the victim's death came about because of the appellant's resistance to the victim's homosexual advances. The appellant argued that he should have been permitted to introduce evidence which would have tended to corroborate his claim that homosexual activities preceded the killing. The Arkansas court agreed, noting that

> [o]ne reason for allowing evidence of prior sexual misconduct when the case involves similar activity is that the extremely high degree of relevancy of such evidence outweighs the prejudice that may be caused to the defendant. If permitted as an exception when a defendant's life or liberty is at stake, it would seem that "specific act" evidence of similar prior sexual behavior of a victim, where only reputation is at stake, would be a more compelling exception.

Id. at 910, 496 S.W.2d at 439.

In an Alaska case, *Williamson v. State*, 692 P.2d 965 (Alaska App. 1984), the defendant testified that he was sexually assaulted after going for a ride with the victim and accepting two or three Quaaludes from him. The defendant contended that the trial court erred in excluding the testimony of a man who would have testified to a similar encounter with the victim approximately 1 year earlier. The trial court had determined that the testimony was not probative on the issue of self-defense because it demonstrated the victim's character for seduction rather than violence, and the court had concluded that any probative value was outweighed by the prejudice to the state, confusion of the issues, and foreseeable waste of time. The appellate court found that evidence of the victim's prior conduct was highly probative and should have been admitted as

relevant character evidence. In distinguishing this type of evidence from evidence which is inadmissible under the state's rape shield statute, the court reasoned that "[c]oncern for the sensibilities of the victim deserves substantially less weight in a murder case where the issue is self-defense and where the jury must determine who was the initial aggressor." 692 P.2d at 972.

The defendant cites *Parisie v. Greer*, 671 F.2d 1011 (7th Cir. 1982), in which a Seventh Circuit panel found that the trial court committed reversible error in excluding the testimony of three witnesses who would have testified to the homosexuality of the victim. The circuit court noted that exclusion of the proffered testimony deprived the defendant of vital corroborative evidence, both as to his credibility and the deceased's homosexuality. However, on rehearing en banc, the circuit court vacated the panel's decision and affirmed the judgment of the trial court, which had denied defendant's petition for habeas corpus, although no single opinion commanded the support of a majority of the circuit court's members. *Parisie v. Greer*, 705 F.2d 882 (7th Cir. 1983), *cert. denied* 464 U.S. 918, 104 S. Ct. 284, 78 L. Ed. 2d 261, *cert. denied* 464 U.S. 950, 104 S. Ct. 366, 78 L. Ed. 2d 326. In a decision which generated six separate opinions, the opinions of Judge Posner and Judge Swygert represent the disparity in the postures with which evidence of a victim's homosexuality is viewed. Judge Posner wrote:

> I cannot agree that the appellant is entitled to a new trial so that he can introduce evidence that his murder victim was a homosexual, or even that a remand for further exploration of the question in the district court is warranted. Parisie wants the evidence admitted in order to bolster his defense of "homosexual panic," which is the idea that a latent homosexual—and manifest "homophobe"—can be so upset by a homosexual's advances to him that he becomes temporarily insane, in which state he may kill the homosexual. It is no business of mine whether the State of Illinois chooses to recognize a defense of "homosexual panic" as a subcategory of the insanity defense, but I cannot believe that the Constitution of the United States requires a state to allow defense

> counsel in a murder case to defame the murderer's victim as a homosexual without satisfying the normal prerequisite to admitting evidence of reputation—that the evidence " 'be based upon contact with the subject's neighbors and associates rather than upon the personal opinion of the witness.' "

705 F.2d at 893. In contrast, Judge Swygert wrote:

> [Parisie's] attempts to bolster his assertion that the triggering event—the homosexual advance—had occurred, however, were frustrated by the trial court's exclusion of testimony that Jackson had a reputation as and was a homosexual. Although the court acknowledged that such testimony was "very important" and "would be admissible," it granted the widow and children's motion in limine and issued an order prohibiting the mention of the victim's homosexuality. . . .
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> . . . .
>
> . . . The proof offered at the time the testimony of the three witnesses was excluded was defense counsel's statement that the witnesses would testify that they were acquainted with the deceased, knew his reputation as a homosexual, and had engaged in homosexual acts with him . . . .
>
> . . . .
>
> There is no consensus even in the medical and psychiatric communities whether homosexuality is a character trait (which would generally be provable under Illinois law only by evidence of reputation . . .) or a medical condition (which would surely be directly provable by evidence of symptoms). In either case, however, evidence of Jackson's homosexuality would be relevant under the Illinois standard of relevancy . . . (relevant evidence is that "which tend[s] to make the proposition at issue more or less probable") . . . because his homosexuality made it likelier that he made a homosexual advance toward Parisie. . . .
>
> . . . .
>
> The reason the trial court excluded all testimony concerning the victim's homosexuality despite its

acknowledged relevance appears to have been concern about its possible harmful effect on the victim's family. I assume that this decision did not constitute an abuse of discretion under applicable state law. The ultimate questions in this case are whether state law is entitled to authorize that choice, limiting the defendant's constitutional right to present a defense, and if not, whether the erroneous exclusion rendered the trial unfair.

A defendant's right to call witnesses in order to present a defense, rooted in the sixth amendment and applied to the states through the due process clause of the fourteenth amendment . . . is strong. . . . If I were deciding, as an issue of first impression, whether the state's solicitude for the victim's reputation could override this strong constitutional right, I would not hesitate to conclude that it could not. I am spared making even that decision, however, for the Supreme Court has reached the same conclusion in weighing similar interests. In *Davis v. Alaska*, 415 U.S. 308, 319-20, 94 S.Ct. 1105, 1111-12, 39 L.Ed.2d 347 (1974), it held that a state's interest in protecting the anonymity of juvenile offenders by preventing impeachment on the basis of their juvenile records could not outweigh the defendant's interest in cross-examining witnesses against him: "Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record . . . is outweighed by petitioner's right to probe into the inference of possible bias . . . .

". . . .

". . . [T]he State's desire that [the witness] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself." If anything, in *Davis* the state's interest in shielding its youth was stronger than the state interest here, because it was a generalized, statutory policy choice rather than the discretionary choice of a single judge. I conclude that the exclusion of the testimony was not warranted by a sufficiently strong state interest.

(Citations omitted.) 705 F.2d at 899-902.

Evidence of a murder victim's homosexuality may be admissible as corroborative of a defendant's claim of self-defense from a homosexual assault, provided such evidence as tendered is probative of that defense. Here, the offered evidence falls far short of being probative of that issue. There is no foundation for drawing an inference of homosexuality from the fact of masturbation. The painting of the word "gay" by unknown persons on a house or truck or the tapping of a foot by someone not even identified by the witness lacks probative value alone to establish the proposition advanced, and such evidence is remote or speculative and properly was not admitted.

The defendant next contends that the trial court erred in excluding the testimony of the defendant's expert, Dr. Beverly Mead. In its offer of proof, the defense stated that Dr. Mead would have testified that based on the defendant's level of intoxication, he would not have been able to form the necessary intent to commit the crime of second degree murder and, further, that what he did was reasonable under the circumstances he was faced with.

In regard to expert testimony, Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989), provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *State v. Reynolds*, 235 Neb. 662, 683, 457 N.W.2d 405, 418 (1990), this court stated that " '[e]xpert testimony is permitted even in areas where laymen have competence to determine the facts testified to by the expert where a trial court may feel the opinion would assist them' "; i.e., it would be helpful to the trier of fact. The court went on to discuss the "helpfulness standard" as expressed in rule 702:

> "The helpfulness test subsumes a relevancy analysis. In making its determination, the court must proceed on a case-by-case basis. Its conclusions will depend on (1) the court's evaluation of the state of knowledge presently

existing about the subject of the proposed testimony and (2) on the court's appraisal of the facts of the case."

235 Neb. at 683, 457 N.W.2d at 419, quoting 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence § 702[02] (1988). The court concluded that under this helpfulness standard, a court may exclude an expert's opinion which is nothing more than an expression of how the trier of fact should decide a case, and that when an expert's opinion on a disputed issue is a conclusion which may be deduced equally as well by a trier of fact with sufficient evidence on the issue, the expert's opinion is superfluous and does not assist the trier in understanding the evidence or determining a factual issue.

Other jurisdictions have considered the admissibility of expert testimony in regard to the effect of intoxication on a defendant's capacity to form intent. See, e.g., *Com. v. Edwards*, 521 Pa. 134, 555 A.2d 818 (1989) (psychiatrists' testimony that in their opinion defendant was not so intoxicated as to be unable to form specific intent to kill was admissible in prosecution for first degree murder and rape to rebut testimony of defendant's expert that defendant could not have formed specific intent to kill); *People v Bowers*, 126 A.D.2d 897, 511 N.Y.S.2d 177 (1987) (where defendant asserted degree of intoxication negated requisite intent, court held no abuse of discretion in excluding expert testimony, since there was ample evidence of defendant's inebriation and the jury could be presumed to be familiar with the effects of alcohol on an individual's mental state); *State v. Rivera*, 152 Ariz. 507, 733 P.2d 1090 (1987) (because effect of alcohol intoxication is a subject matter within common knowledge and experience of the jury, trial court can properly preclude expert testimony relating to the effect of alcohol upon the ability to form specific intent); *State v. Yates*, 392 N.W.2d 30 (Minn. App. 1986) (testimony of physician who would have testified about the effects of alcohol consumption intermixed with Talwin was not admissible on issue of specific intent of defendant charged with assault who had not raised insanity defense; juries are capable of evaluating effects of intoxicants on a defendant's ability to form intent); *Burnham v. State*, 497 So. 2d 904 (Fla. App. 1986) (because voluntary intoxication is a valid defense to

specific intent crimes, testimony concerning appellant's intoxication, if otherwise admissible, was relevant to appellant's defense); *State v. Barranco*, 73 N.C. App. 502, 326 S.E.2d 903 (1985) (expert witness in field of forensic psychiatry entitled to render opinion that defendant's intoxication did not mitigate his ability to form specific intent); *Turk v. State*, 662 P.2d 997 (Alaska App. 1983) (in prosecution for robbery, exclusion by trial court of testimony of defendant's expert witness regarding effect of defendant's alcohol and drug use on his ability to formulate specific intent necessary for conviction was reversible error); *People v Cronin*, 60 N.Y.2d 430, 458 N.E.2d 351, 470 N.Y.S.2d 110 (1983) (while jurors might be familiar with effects of alcohol on one's mental state, combined impact of case of beer, several marijuana cigarettes, and 5 to 10 Valium tablets on person's ability to act purposefully cannot be said as a matter of law to be within ken of typical juror). Some courts have emphasized that the need for expert testimony is greater where the defendant has been under the influence of intoxicants other than alcohol, or mixed with alcohol. See, e.g., *id.*; *State v. Betancourt*, 131 Ariz. 61, 638 P.2d 728 (Ariz. App. 1981) (refusal to allow defendant's medical expert to testify to effect of LSD on average human was error in light of fact that effect of LSD on the human mind was not necessarily within common experience and knowledge of jury); *Fouts v. State*, 374 So. 2d 22 (Fla. App. 1979), *overruled on other grounds, Parker v. State*, 408 So. 2d 1037 (Fla. 1982) (while effects of alcohol may be commonly known, assistance of expert would ordinarily be necessary for a jury to understand the effects of LSD). But see *State v. Yates, supra.*

In the instant case, the defendant testified that he drank beer while at the bar, at the rate of three to four glasses an hour, and that he had in his car a quart of malt liquor which he was drinking while he looked for the party. When questioned about what he did when he awoke and saw the victim, the defendant stated, "I don't remember from there. I just woke up from a deep sleep, and when I woke up, I was still drunk." A friend of the defendant's also testified that the defendant was drinking at the rate of two to three beers an hour and that the friend had brought two quarts of beer over to the defendant's home earlier

in the evening. There is nothing in the record which would indicate that the type or level of intoxication was such that expert testimony would be necessary to assist the jury in understanding the evidence. Thus, the trial court did not err in excluding the testimony of Dr. Mead on the issue of the effect of alcohol on the defendant's capacity to form the intent necessary to commit second degree murder; this assignment of error is therefore without merit. Similarly without merit is the defendant's assertion that Dr. Mead should have been allowed to testify to the reasonableness of the defendant's actions. The defendant did not claim to have any mental illness or defect which would have caused a response that would have been beyond the understanding of the jury. In its offer of proof, the defense stated that Dr. Mead would have testified:

> [B]ased on the fact that he was being fondled in the area that he was in, the physical circumstances and surrounding area being dark, the fact that he did not know if his assailant had a weapon, that what he did was reasonable under the circumstances based on what he was faced with, and that the fact that he did not run was reasonable.

While this combination of events may be unique to this case, these events are all factors which jurors are capable of understanding and evaluating without the assistance of an expert's conclusions.

The defendant next asserts that the court erred in refusing to substitute the term "sexual assault" for "sexual intercourse," or in failing to add "sexual contact" as a justification for the use of deadly force in its self-defense instruction. The defendant argues that the instruction was confusing because it did not make clear that the use of force can be justified in protecting oneself from a homosexual attack.

The jury instruction on self-defense, instruction No. 12, which reflected the language of Neb. Rev. Stat. § 28-1409 (Reissue 1989), stated in part:

> 2. The use of force upon or toward another person is justifiable when the actor believes such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other

> person on the present occasion.
>
> 3. The use of deadly force shall not be justifiable unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat....

While the defendant contends that the term "sexual contact" or "sexual assault" should have been included in this instruction, this addition would misstate the law, since obviously sexual contact and sexual assault encompass a range of conduct not defined by the statutory terminology of "sexual intercourse." However, in response to the defendant's concern that the jury would not interpret the term "sexual intercourse" to include homosexual behavior, the court gave instruction No. 7, which defined sexual intercourse as "sexual intercourse in its ordinary meaning, fellatio or anal intercourse" and included the definition of fellatio.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Grant*, 242 Neb. 364, 495 N.W.2d 253 (1993); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

If the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error. *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993); *State v. Beins*, 235 Neb. 648, 456 N.W.2d 759 (1990).

The defendant refers us to *People v Coleman*, 122 A.D.2d 568, 569, 504 N.Y.S.2d 949, 950 (1986), in which the appellate court found that the trial court had erred in giving jury instructions which failed to include defense against "an attempted forcible sodomy" as one of two distinct grounds for the justified use of deadly physical force. However, the defendant does not offer any explanation of how this terminology would have been preferable to what was stated in instructions Nos. 7 and 12, nor does the record reflect that this terminology was proposed to the court during the instruction

conference.

Here, the instructions, when read together, correctly stated the law of self-defense as expressed in § 28-1409, adequately defined the terminology, and were not misleading to the jury. Thus, the defendant's third assignment of error is without merit.

In his final assignment of error, the defendant asserts that the trial court erred in imposing excessive sentences. The court sentenced the defendant to life in prison on the conviction of second degree murder, with credit for 60 days served, and to 4 to 6 years in prison for use of a weapon in the commission of a felony, to run consecutively to his sentence on the first count.

A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Ellen*, 243 Neb. 522, 500 N.W.2d 818 (1993); *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993).

An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Philipps, supra*; *State v. Reynolds*, 242 Neb. 874, 496 N.W.2d 872 (1993).

In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the *amount of violence involved in the commission of the crime. State v. Ellen, supra*; *State v. Philipps, supra*.

The defendant was convicted of the offense of second degree murder, in violation of Neb. Rev. Stat. § 28-304 (Reissue 1989), a Class IB felony. The sentence for a Class IB felony ranges from a 10-year minimum to life in prison.

This was a senseless and brutal crime. According to the evidence and the opinion testimony of the pathologist, the jury could have concluded that the victim was struck a severe blow to the back of his skull, fell on his back, and then received seven or eight crushing blows to the face and front of the skull. The injuries resulting consisted of bruising, bleeding, and a fractured and terribly misshapen skull. The instrument used to

deliver these blows was a six-cell flashlight weighing slightly more than 3 pounds.

Considering the nature and seriousness of the crime, although being aware of the relatively clean record of the defendant, we cannot say the trial court abused its discretion in imposing the sentences that it did.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAMONT L. THOMPSON, APPELLANT.

505 N.W.2d 673

Filed September 17, 1993. No. S-92-928.

1. **Motions to Suppress.** At a hearing to suppress evidence, the trial court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence.
2. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on suppression of evidence, an appellate court does not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless those findings are clearly erroneous.
3. _____: _____. In deciding whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court takes into consideration that the trial court has observed the witnesses testifying regarding such motion.
4. **Search and Seizure.** In determining the reasonableness of an intrusive search, the following factors are to be considered: (1) whether the government had a clear indication that incriminating evidence would be found; (2) whether the police had a warrant or there existed exigent circumstances, such as the imminent destruction of evidence, to excuse the warrant requirement; and (3) whether the method used to extract the evidence was reasonable and performed in a reasonable manner.
5. **Criminal Law: Evidence: Police Officers and Sheriffs.** The police have a right short of outright brutality of a shocking nature to apply such reasonable force to a suspect as is fairly necessary to prevent an imminent destruction of evidence of the commission of a crime.
6. **Constitutional Law: Search and Seizure.** Although the determination must be made in light of the fundamental criteria laid down by the Fourth Amendment and in opinions of the court applying that amendment, the reasonableness of a search is a substantive determination to be made by the trial court from the facts and circumstances of the case.

7. **Criminal Law: Judgments: Appeal and Error.** While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach an independent, correct conclusion regarding questions of law.
8. **Statutes: Controlled Substances.** Unless a statute specifically provides otherwise, it matters not how much of a controlled substance one possesses; under such a circumstance, the quantity possessed is not an essential element of the crime.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

Don Stenberg, Attorney General, and David Arterburn for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

After refusing to suppress certain evidence, the trial court, then sitting as the trier of fact, adjudged the defendant, LaMont L. Thompson, guilty of the Class IV felony offense of possessing cocaine, in violation of Neb. Rev. Stat. §§ 28-405(a)(4) [Schedule II] (Reissue 1989) and 28-416(3) (Cum. Supp. 1992). Thompson asserts the trial court erred in (1) overruling his suppression motion and (2) finding the evidence sufficient to support the charge. We affirm.

II. FACTS

While in a marked cruiser at approximately 10 p.m. on February 5, 1992, two Omaha police officers, Vincent Perez and John Sears, observed Thompson standing in the parking lot of a liquor store located in the highest drug trafficking area in the city. Upon seeing the cruiser, Thompson quickly ran into the liquor store. Perez recognized Thompson as the result of some 30 to 40 previous contacts and knew from prior reports that Thompson was a street-level drug dealer who carried crack cocaine in his mouth. Perez also saw Thompson and another party with their hands extended out toward each other,

exchanging something. As the officers approached, Thompson hurried away and made a motion to his mouth with his hand.

While Sears attended to the other party, Perez ordered Thompson to open his mouth. As Thompson refused to comply, Perez shined his flashlight on Thompson's face and saw around Thompson's lips white crumbs, which Perez suspected to be crack cocaine. Perez once more ordered Thompson to open his mouth, and Thompson again refused. Perez then ordered Thompson to place his hands behind his back so that he might be secured, whereupon Thompson began swinging his hands and clawing at the officer to avoid being handcuffed.

Perez next placed Thompson in a "lateral vascular neck restraint," as the consequence of which Thompson became unconscious, thereby permitting Perez to handcuff him. Other than Thompson's characterization of the restraint as a choking maneuver, the record does not describe the restraint.

In any event, Sears joined Perez and Thompson and pulled crack-cocaine-like substances off Thompson's lips and from around his teeth. About 10 seconds later, Thompson regained consciousness, and Perez placed him in the cruiser and proceeded to the police station, where Perez swabbed Thompson's hands and had him chew on a sterile gauze.

Laboratory tests established the substances taken from and around Thompson's mouth to be cocaine, and Thompson's hands revealed the presence of cocaine. According to Perez, the substances removed from Thompson's lips were between the size of a pinhead and a pea.

III. ANALYSIS

With those facts in mind, we turn our attention to Thompson's two assignments of error.

1. Suppression Motion

In connection with his first assignment of error, Thompson argues that the evidence concerning the nature of the substances taken from and around his mouth should have been suppressed because the search was accomplished through the use of excessive force, rendering the search constitutionally unreasonable. He raises no issues concerning the propriety of

the officers' approaching or arresting him.

(a) Scope of Review

We begin our consideration of this assignment of error by noting that at a hearing to suppress evidence, the trial court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence. Moreover, in reviewing a trial court's ruling on suppression of evidence, an appellate court does not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993); *State v. Bowen*, 232 Neb. 725, 442 N.W.2d 209 (1989); *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988). In deciding whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court takes into consideration that the trial court has observed the witnesses testifying regarding such motion. *State v. Martin, supra*; *State v. Ellington*, 242 Neb. 554, 495 N.W.2d 915 (1993); *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

(b) Nature of Search

We note first of all that it is not at all clear that Perez employed the restraint at issue in order to effect a search; his testimony was that he used the restraint to control Thompson. However, for the purposes of our analysis, we assume, as Thompson has done, that the restraint was applied to effect the search.

The two most prominent decisions on the subject of intrusive searches are *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), and *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

Rochin, the only case cited by Thompson, was decided before *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), made the right of privacy guaranteed by the 4th Amendment applicable to the states through the Due Process Clause of the 14th Amendment. *Rochin* was therefore grounded on due process principles. Therein, police officers, acting upon a tip that Rochin was dealing in drugs, illegally entered his home without a warrant. The officers forced their

way into the defendant's bedroom and observed two capsules on a nightstand beside Rochin's bed. When asked about the capsules, Rochin grabbed and placed them in his mouth. The officers grappled with Rochin and unsuccessfully tried to retrieve the capsules. Rochin was then handcuffed and taken to a hospital, where, at the direction of one of the officers, a doctor forced him to ingest an emetic solution which caused him to vomit the capsules. The U.S. Supreme Court described the officers' conduct as "brutal" and "shock[ing] the conscience" and held that the method of retrieving the evidence was "too close to the rack and the screw" not to have violated due process of law. 342 U.S. at 172-74.

In *Schmerber*, police arrested the defendant at a hospital where he had been taken for treatment after an automobile accident. While at the hospital, the officer ordered a blood sample be taken from the defendant without his consent and without a warrant. The blood sample revealed the defendant was intoxicated, and the results were admitted at trial. In approving this procedure, the *Schmerber* Court remarked that the officers acted in accordance with an accepted medical procedure and that the operation was performed in a reasonable manner without trauma or pain. Noting that "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances or which are made in an improper manner," 384 U.S. at 768, the Court emphasized that a blood test was routine and that taking blood must be contrasted sharply with the practice in *Rochin*. Moreover, the Court found an "emergency" situation to exist because of the highly evanescent nature of the evidence. 384 U.S. at 770. The *Schmerber* Court set forth several criteria to be considered in determining the reasonableness of an intrusive search: (1) whether the government had a clear indication that incriminating evidence would be found; (2) whether the police had a warrant or there existed exigent circumstances, such as the imminent destruction of evidence, to excuse the warrant requirement; and (3) whether the method used to extract the evidence was reasonable and performed in a reasonable manner.

Several jurisdictions have examined the means used by police to extract evidence from a suspect's mouth. Although repeatedly affirming the reasonable use of force to retrieve evidence of a crime which has been secreted in the mouth, jurisdictions vary as to the amount of force which can be used. See, *United States v. Harrison*, 432 F.2d 1328 (D.C. Cir. 1970); *United States v. Caldera*, 421 F.2d 152 (9th Cir. 1970); *State v. Desmond*, 593 So. 2d 965 (La. App. 1992); *People v. Matherine*, 166 A.D.2d 322, 560 N.Y.S.2d 1018 (1990), *appeal denied* 76 N.Y.2d 1022, 566 N.E.2d 1178, 565 N.Y.S.2d 773.

Various federal courts have admitted evidence taken from a defendant's mouth where police officers have applied a choke hold or grabbed the defendant's throat. In *Harrison*, officers entered the defendant's dwelling in execution of a search warrant and witnessed the defendant swallowing an envelope containing heroin capsules. One of the officers grabbed the defendant's throat to prevent him from swallowing the envelope. Finding that the existence of a valid warrant distinguished the situation before it from *Rochin v. California, supra*, the *Harrison* court held the conduct to have been reasonable and necessary to prevent the destruction of evidence and ruled the grabbing of the defendant's throat not to constitute undue force or brutality. *Espinoza v. United States*, 278 F.2d 802 (5th Cir. 1960), *cert. denied* 364 U.S. 827, 81 S. Ct. 65, 5 L. Ed. 2d 55, also ruled the choking of the defendant and the placing of pressure against his nose and jaw to pry open his mouth and prevent him from swallowing evidence to be reasonably necessary to retrieve the articles the defendant attempted to swallow and not to be excessive force.

A number of states have followed suit. See, *State v. Lewis*, 115 Ariz. 530, 566 P.2d 678 (1977) (choke hold used by police officer to prevent accused from swallowing balloon of heroin while another officer slapped accused in the back to get her to open her mouth was not so excessive as to deny due process); *State v. Santos*, 101 N.J. Super. 98, 102, 243 A.2d 274, 276 (1968) (choking defendant's accomplice to prevent swallowing of narcotics did not prevent their admission into evidence. "The police have a right short of outright brutality of a shocking nature to apply such reasonable force to a suspect as is fairly

necessary to prevent an imminent destruction of evidence of the commission of crime"); *Johnson v. State*, 397 S.W.2d 441 (Tex. Crim. App. 1965) (officer's use of both hands to choke defendant to prevent him from swallowing marijuana cigarette did not affect its admissibility in prosecution for possession); *Donley v. State*, 435 S.W.2d 518 (Tex. Crim. App. 1969) (stranglehold on defendant, forcing him to spit out heroin, was not an unreasonable search and seizure); *Hernandez v. State*, 548 S.W.2d 904 (Tex. Crim. App. 1977) (action of the police officers in wrestling defendant to the ground while one officer held defendant's arm and the other choked defendant did not shock the conscience, and evidence obtained from search was admissible); *People v. Johnson*, 78 Ill. App. 2d 398, 223 N.E.2d 321 (1966), *cause remanded by* 38 Ill. 2d 399, 231 N.E.2d 447 (1967) (force reasonable where officers throttled defendant to force him to cough up heroin); *State v. Victor*, 76 Ohio App. 3d 372, 601 N.E.2d 648 (1991), *cert. denied* ____ U.S. ____, 113 S. Ct. 292, 121 L. Ed. 2d 217 (1992) (choking defendant with a hand thrust to neck was not excessive force, since search was accomplished quickly and defendant opened his mouth as soon as pressure was applied to his throat, remained standing throughout the search, and did not appear to be injured as a result of the contact).

However, the courts of California have held that choking or using a choke hold to make a defendant spit out evidence secreted in his or her mouth constitutes excessive force. *People v. Cappellia*, 208 Cal. App. 3d 1331, 256 Cal. Rptr. 695 (1989). See *People v. Sanders*, 268 Cal. App. 2d 802, 74 Cal. Rptr. 350 (1969) (evidence recovered from mouth of suspect not admissible where officer applied judo hold designed to stop the flow of blood to defendant's head). But in *Carleton v. Superior Court (People)*, 170 Cal. App. 3d 1182, 216 Cal. Rptr. 890 (1985), the court found the use of a carotid restraint not excessive where the defendant was resistive and aggressive. The defendant was charged with driving under the influence of alcohol. After his arrest, he was asked to provide a sample of blood, breath, or urine so that his blood alcohol level could be determined. The defendant aggressively resisted the test, and police applied a carotid restraint for 4 or 5 seconds, during

which the defendant became limp.

Where police place their hands on a defendant's throat or neck but do not choke the defendant, California has held the force applied in making the search is not excessive. " 'The mouth is not a "sacred orifice" and "there is no constitutional right to destroy or dispose of evidence. . . ." . . .' " *People v. Johnson*, 231 Cal. App. 3d 1, 15, 282 Cal. Rptr. 114, 122 (1991) (officer's testimony that he had defendant in control hold from behind, the crook of his arm placed in front of defendant's neck to avoid choking, while second officer used one or both of his hands at defendant's jaw or lower face in attempt to retrieve cocaine from his mouth supported trial court's finding that officers did not choke defendant to get cocaine from his mouth and, thus, that excessive force was not used). See, *People v. Fulkman*, 235 Cal. App. 3d 555, 286 Cal. Rptr. 728 (1991) (force applied by officers to retrieve balloons of heroin, which force consisted of pounding defendant on back, placing pressure on Adam's apple to prevent him from swallowing, and prying contraband out of defendant's mouth with pen, was not unreasonable); *People v. Cappellia, supra* (police did not use constitutionally impermissible force in preventing defendant from swallowing heroin bindles when they placed their hands around his throat and prevented his Adam's apple from moving up and down, but did not choke him, impair his breathing, or cause him to cry out in pain); *People v. Bass*, 214 Cal. App. 2d 742, 29 Cal. Rptr. 778 (1963) (officer's hand on defendant's neck to prevent him from swallowing evidence did not violate due process); *People v. Tahtinen*, 210 Cal. App. 2d 755, 26 Cal. Rptr. 864 (1962), *cert. denied* 375 U.S. 842, 84 S. Ct. 91, 11 L. Ed. 2d 69 (1963) (the force used by police officers reasonable where officer pressed defendant's head forward and downward to prevent him from swallowing; whether an amount of force is excessive is dependent upon the facts of each case; here, defendant bit, struck, kicked, and wrestled with officers in attempt to avoid being taken into custody with the heroin as evidence); *People v. Dickenson*, 210 Cal. App. 2d 127, 26 Cal. Rptr. 601 (1962) (holding defendant's Adam's apple to prevent him from swallowing did not violate due process where officer did not attempt to choke defendant). However, in *People v.*

Parham, 60 Cal. 2d 378, 384 P.2d 1001, 33 Cal. Rptr. 497 (1963), *reh'g denied* 379 U.S. 873, 85 S. Ct. 21, 13 L. Ed. 2d 80 (1964), the force applied by officers in striking the defendant twice on the back of the neck with a police club to extract a check which the defendant had placed in his mouth violated due process. "Choking a man to extract evidence from his mouth violates due process. [Citations omitted.] Clubbing a man to obtain evidence is equally brutal and offensive, and the check thus obtained should not have been admitted into evidence." 60 Cal. 2d at 384, 384 P.2d at 1004, 33 Cal. Rptr. at 500. The court noted that the defendant neither resisted arrest nor attempted to flee and that the officers' only objective was to extract the check from the defendant's mouth.

Washington appears to follow California's "no-choke" position. See, *State v. Williams*, 16 Wash. App. 868, 560 P.2d 1160 (1977); *State v. Young*, 15 Wash. App. 581, 550 P.2d 689 (1976), *cert. denied* 431 U.S. 931, 97 S. Ct. 2635, 53 L. Ed. 2d 246 (1977). Both *Williams* and *Young* involved the use of force to constrict the defendant's ability to swallow. In *Young*, one police officer pinched the suspect's nose while the other officer placed his hands on the suspect's throat. The court concluded that the suspect had not been choked and that the use of force was reasonable to prevent the destruction of evidence. In *Williams*, an officer pinched the defendant's nose while the other officer placed his hands around the defendant's throat, effectively preventing his Adam's apple from moving, and used a spoon to extract narcotics from the defendant's mouth. The *Williams* court distinguished *Young* because the defendant in *Williams* was actually choked for 30 to 60 seconds. The court held it was constitutionally reasonable for the police to place their hands on a suspect's neck to prevent swallowing of evidence, as long as they do not choke the suspect. The *Williams* court emphasized that the officers can place their hands on a suspect's neck to prevent the swallowing of evidence and apply even greater force when necessary to overcome active resistance. In *Williams*, the defendant did not resist beyond refusing briefly to spit out the drugs. The Washington Court of Appeals, in *State v. Taplin*, 36 Wash. App. 664, 676 P.2d 504 (1984), followed the same line of reasoning established in

Williams. One officer grabbed the suspect's nose by hooking his fingers into the nasal passage while the other detective placed his hands on the suspect's neck to stop movement of his Adam's apple and to prevent him from swallowing balloons containing narcotics. The court found the suspect was able to breathe, and therefore, the choke hold did not violate the test established in *Young* and *Williams*.

Several courts in other jurisdictions have upheld searches where force other than choking was applied to a defendant to extract evidence from his or her mouth. *State v. Strong*, 493 N.W.2d 834 (Iowa 1992) (approves warrantless pumping of stomach of defendant who ingested crack cocaine and observes that while physical evidence may not be tortured from defendant's lips, mouth is not a sacred orifice into which contraband may be placed and thereafter disposed of in a leisurely fashion); *State ex rel. Flournoy v. Wren*, 108 Ariz. 356, 498 P.2d 444 (1972) (action of officer in forcing open defendant's mouth and scraping marijuana off defendant's teeth with the cap of a ballpoint pen did not violate due process); *State v. Jacques*, 225 Kan. 38, 587 P.2d 861 (1978) (police conduct did not shock the conscience where defendant, who had been observed placing balloons in his mouth, refused to spit them out and officer placed his hand on defendant's throat to prevent him from swallowing); *State v. Desmond*, 593 So. 2d 965 (La. App. 1992) (reasonable force was used to prevent suspect from swallowing cocaine where officers grabbed suspect's throat and slammed him to the ground, possibly rendering him unconscious); *State v. Bolton*, 548 So. 2d 345 (La. App. 1989) (forcible extraction of heroin from mouth of female suspect when officer took suspect by throat was constitutionally reasonable; the court noted that struggle to retrieve the contraband was short in duration and limited in extent, and no injuries resulted); *People v Holloway*, 416 Mich. 288, 330 N.W.2d 405 (1982), *cert. denied* 461 U.S. 917, 103 S. Ct. 1900, 77 L. Ed. 2d 288 (1983) (force applied to defendant's jaws and throat did not violate Fourth Amendment where search did not last long, defendant's blood supply and air passages were not restricted or cut off, and defendant did not require hospitalization and did not appear to be injured as a

result of the conduct); *Foxall v. State*, 157 Ind. App. 19, 298 N.E.2d 470 (1973) (police did not use unreasonable force in inserting shoehorn into defendant's mouth to extract evidence after a scuffle ensued between defendant and officers; subsequent physical examination of defendant revealed three broken ribs, bruised lower lip, slight hemorrhaging of one eye, and several teeth missing from denture plate). But see, *Locke v. State*, 588 So. 2d 1082 (Fla. App. 1991) (ordinarily not proper for police officer to forcibly choke a person in order to prevent the swallowing of small amount of drugs unless attempting to save suspect's life by preventing oral ingestion of drugs; remanded to trial court to make additional findings regarding the extent to which officer's conduct threatened suspect's safety, health, and sense of personal privacy and security); *State v. Tapp*, 353 So. 2d 265 (La. 1977) (evidence inadmissible where defendant was caused to disgorge the packet from his throat after a struggle lasting 15 to 20 minutes. To retrieve the evidence from defendant's throat, five police officers beat defendant in face and head with their hands, held defendant's nose to cut off his breathing, and choked defendant to prevent him from swallowing).

Given these conflicting views, it is appropriate to analyze the conduct of Perez and Sears under the framework established in *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

Perez' observations of white crumbs on Thompson's lips and mouth and Thompson's furtive movement toward his mouth in what appeared to be an attempt to hide something gave strong indications that evidence of a crime would be found in and around Thompson's mouth. The need for speed was also apparent. Thompson appeared to be in the process of destroying the only evidence the government had to convict him of possessing cocaine. The officers were unaware of how the drug was packaged; if unpackaged, the evidence could have been metabolized before a blood test could be administered. Moreover, the evidence present in and around Thompson's mouth was easily removed; thus, the method used to obtain the evidence was reasonable and performed in a reasonable manner. Indeed, the foregoing review of cases from other

jurisdictions illustrates that far more intrusive searches than that involved here have been held constitutional.

As noted in *State v. Williams*, 16 Wash. App. 868, 560 P.2d 1160 (1977), and *Carleton v. Superior Court (People)*, 170 Cal. App. 3d 1182, 216 Cal. Rptr. 890 (1985), the use of greater force is justified where the defendant did not surrender to the police, or aggressively combated them. Under the provisions of Neb. Rev. Stat. § 28-1412 (Reissue 1989), the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest. In *Wagner v. City of Omaha*, 236 Neb. 843, 848, 464 N.W.2d 175, 180 (1991), this court, in reviewing a 15-day suspension given to a police officer for the excessive use of force in performing his duties, held that "under the provisions of § 28-1412, a police officer in making an arrest must use only reasonable force, which is that amount of force which an ordinary, prudent, and intelligent person with the knowledge and in the situation of the arresting police officer would have deemed necessary under the circumstances." See, *Wilson v. Gutschenritter*, 185 Neb. 311, 175 N.W.2d 282 (1970); *Breese v. Newman*, 179 Neb. 878, 140 N.W.2d 805 (1966).

In reviewing the amount of force used, a court must make allowance for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the force that is necessary in a particular situation. *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

The fact that Thompson's mouth was searched when he was unconscious does not, in and of itself, render the search unreasonable. In *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957), the driver of an automobile involved in an accident was unconscious when police officers ordered blood to be withdrawn. The extraction was made by a physician in a simple, medically acceptable manner. The conviction was affirmed, the Court holding that the withdrawal did not offend that " 'sense of justice.' " 352 U.S. at 437. The "absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional

right." 352 U.S. at 435.

Although the determination must be made in light of the fundamental criteria laid down by the Fourth Amendment and in opinions of the court applying that amendment, the reasonableness of a search is a substantive determination to be made by the trial court from the facts and circumstances of the case. *State v. Sharp*, 184 Neb. 411, 168 N.W.2d 267 (1969); *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963), *cert. denied* 376 U.S. 956, 84 S. Ct. 978, 11 L. Ed. 2d 975 (1964).

So far as the record shows, Thompson suffered only a momentary discomfort from the restraint and did not find it necessary to consult a physician. In view of the lack of injury and the minimal intrusion of the officers in removing the suspect substances from Thompson's mouth, we cannot say the trial court's finding that the search was reasonable is clearly wrong.

2. Sufficiency of Evidence

In his second and final assignment of error, Thompson asserts there was a failure of evidence because the corpus delicti was not proved.

(a) Scope of Review

In the analysis of this assertion, it must be recalled that while in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, *State v. Reichert*, 242 Neb. 33, 492 N.W.2d 874 (1992), an appellate court has an obligation to reach an independent, correct conclusion regarding questions of law, *State Farm Mut. Auto. Ins. Co. v. Hildebrand*, 243 Neb. 743, 502 N.W.2d 469 (1993).

(b) Nature of Evidence

Thompson argues that because the forensic chemist for the State was unable to ascribe either weight or size to the substances submitted to him for testing, the State failed to prove the corpus delicti of the crime. In so doing, he relies on two cases.

In the first, *State v. George*, 228 Neb. 774, 424 N.W.2d 350 (1988), the defendant was convicted of disturbing the peace

following an altercation in a bar. Several people were arrested. The only testimony offered against the defendant was that of the bartender, who said that her peace was disturbed. However, she conceded that the defendant interfered with her peace and quiet because he did not order a drink and was not a regular customer. She did not know who started the fight, but knew that the other three patrons of the bar who were also cited never threw a punch. In the trial held for the other patrons, the bartender stated that those three did not disturb her peace and quiet because they were regular customers who bought drinks. The court failed to find the corpus delicti proved beyond a reasonable doubt.

In the other, *State v. Rich*, 222 Neb. 394, 383 N.W.2d 801 (1986), the defendant was convicted of larceny. A store owner believed she saw the defendant place a box of pudding in his pants pocket and leave the store without paying. She testified that before the defendant left the store, she saw a bulge in his pants which appeared to have the shape of a box of pudding. The store owner called the police, who confronted the defendant and searched him but did not find the box. The evidence was held insufficient to find guilt beyond a reasonable doubt.

However, the statutes under which Thompson was convicted do not require a minimum amount of cocaine for conviction of a Class IV felony. "A person knowingly or intentionally possessing [cocaine] shall be guilty of a Class IV felony." § 28-416(3).

Indeed, we previously resolved this issue against Thompson. The cases *State v. Fletcher*, 221 Neb. 562, 378 N.W.2d 859 (1985); *State v. Jennings*, 195 Neb. 434, 238 N.W.2d 477 (1976); *State v. Brown*, 195 Neb. 321, 237 N.W.2d 861 (1976); and *State v. McElroy*, 189 Neb. 376, 202 N.W.2d 752 (1972), all stand for the proposition that unless a statute specifically provides otherwise, it matters not how much of a controlled substance one possesses; under such a circumstance, the quantity possessed is not an essential element of the crime.

Thus, as there is proof that the substances on Thompson's person were cocaine, it is immaterial that it may have been

"infinitesimal." Brief for appellant at 6. Thus, the corpus delicti was proved.

IV. JUDGMENT

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., concurring.

The majority assumes that the police used the lateral vascular neck restraint (LVNR) to effect a search of Thompson. However, the record demonstrates the LVNR was used to arrest Thompson. Thus, the majority's discussion of the reasonableness of the LVNR as a method of securing a search of a person is not appropriate.

The evidence at the suppression hearing established the following events: Officer Perez left his police car, approached Thompson, and had Thompson place his hands on the police cruiser. Perez asked Thompson to open his mouth and Thompson refused. Perez then shined a flashlight on Thompson's face and observed "white crumbs" around his mouth. At that time, Perez states, Thompson was not free to leave. Perez again asked Thompson to open his mouth and Thompson refused. Wanting to secure Thompson, Perez told Thompson to place his hands behind his back. Thompson refused, pushed away from the police car, and began to swing his arms. Perez stated that Thompson struggled with him as he attempted to handcuff Thompson. During this struggle, Perez placed Thompson in the LVNR. According to Perez, he used the LVNR to control and handcuff Thompson. After Thompson was handcuffed, Officer Sears wiped a white substance from Thompson's lips and around his teeth.

The legality of Thompson's arrest is not argued in this court. The analysis for determining the constitutionality of an arrest is separate and distinct from that used to determine the constitutionality of a search. Whether a police officer has probable cause to make an arrest and whether the officer has exceeded the scope of justified force while making the arrest requires a thorough review of the existing circumstances. See, *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987) (stating that a warrantless arrest must be based upon probable cause and that the amount of force used to effectuate the arrest must

be justified under the circumstances); Neb. Rev. Stat. § 28-1412 (Reissue 1989).

SHANAHAN and LANPHIER, JJ., join in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. PHILLIP E. BOWEN, APPELLANT.

505 N.W.2d 682

Filed September 17, 1993. No. S-92-1121.

1. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
2. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof.
3. **Venue: Juries: Proof.** In order for one to successfully move for a change of venue based on pretrial publicity, one must show that the publicity has made it impossible to secure a fair and impartial jury; a number of factors must be evaluated in determining whether that burden has been met, including the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire was drawn.
4. **Venue: Juror Qualifications.** Voir dire examination provides the best opportunity to determine whether venue should be changed.
5. **Indictments and Informations: Complaints.** An information or complaint is sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted.
6. **Indictments and Informations.** Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient.
7. **Postconviction.** A postconviction court is obligated to determine the issues and make findings of fact and conclusions of law.
8. **Postconviction: Records.** An evidentiary hearing on a motion for postconviction relief is not required if the record and the files in the case affirmatively establish that the defendant is not entitled to relief.
9. **Constitutional Law: Postconviction: Proof.** An evidentiary hearing on a postconviction motion is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights

under the Nebraska or federal Constitution.

10. **Trial: Pleadings: Evidence: Appeal and Error.** A question not presented by the pleadings or evidence in a trial will not be considered on appeal.
11. **Records: Appeal and Error.** An omission from the bill of exceptions not shown to result in prejudice presents no error upon which relief can be granted.
12. **Constitutional Law: Effectiveness of Counsel: Proof.** In order to state a claim of ineffective assistance of counsel as violative of the Sixth Amendment to the U.S. Constitution and thereby obtain reversal of a conviction, one must show that counsel's performance was deficient and such deficient performance prejudiced one's defense, that is, demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
13. **Sentences: Pleas: Self-Incrimination.** In order to prevent the possible enhancement of a sentence, one who has pled guilty but who is awaiting sentencing may invoke the privilege against self-incrimination.
14. **Criminal Law: Abandonment: Conspiracy: Time.** In order for abandonment to be effective as a defense, there must be an appreciable interval between the alleged abandonment of the criminal enterprise and the act for which responsibility is sought to be avoided; the coconspirator must have a reasonable opportunity to follow the example and refrain from further action before the act in question is committed.
15. _____: _____: _____: _____. A conspirator cannot escape responsibility for an act which is the natural result of a criminal scheme the conspirator has helped to devise and carry forward by running away at the instant when the act in question is about to be committed and the transaction which immediately begets it has actually been commenced.

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

Phillip E. Bowen, pro se.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

In the appellant convict Phillip E. Bowen's first appearance in this court, *State v. Bowen*, 232 Neb. 725, 442 N.W.2d 209 (1989) (*Bowen I*), we ruled that his claims that his confession and certain physical evidence should have been suppressed and that the evidence failed to support his convictions for first degree murder and the use of a firearm to commit a felony were

without merit. We thus affirmed the district court's adjudication of guilt on those charges. The convict responded by filing the subject motion for postconviction relief, pursuant to the provisions of Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1992). The postconviction court dismissed the motion without appointing counsel and without granting a hearing on the merits. The convict has appealed, asserting, in summary, that the postconviction court erred in failing to (1) find that the trial court erred in not changing venue, (2) find that the trial court erred in failing to inform him of the nature of the accusation against him, (3) place a proper burden of proof upon him, (4) make specific findings of fact and conclusions of law, (5) forward a complete record, and (6) find that he was denied the effective assistance of trial and appellate counsel. We affirm.

II. ANALYSIS

With that brief background, we turn our attention to the summarized assignments of error, adding such additional facts as are relevant to the resolution of each such assignment.

1. VENUE

The dispositive answer to the complaint made in the first summarized assignment of error, that the postconviction court failed to find that the trial court erred in not changing venue, is that under the law of this state, a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993). Accord, *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993); *State v. Wickline*, 241 Neb. 488, 488 N.W.2d 581 (1992) (denying appellate review on a motion for postconviction relief on claimed denial of Fifth Amendment right of confrontation, which should actually have been categorized Sixth Amendment right of confrontation); *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992); *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991), *cert. denied* 501 U.S. 1201, 111 S. Ct. 2279, 115 L. Ed. 2d 965; *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985) (denying appellate review of a motion for postconviction relief for error, including, inter alia, refusal to grant a change of venue).

Nonetheless, in the interest of completeness, we note that the convict filed a pretrial motion for change of venue due to extensive media publicity which he alleged precluded a fair and impartial trial in Douglas County. In particular, he asserted that media references tying him to the two coperpetrators, coupled with the media reports of one coperpetrator's plea of guilty, "compounded the prejudice and pre-conceived Guilt feeling of the community . . . ."

The motion was accompanied by the affidavit of a local practicing attorney who did not represent the convict, stating that in the attorney's opinion the convict would be unable to receive a fair and impartial trial in Douglas County due to prejudicial pretrial publicity.

At a hearing on the venue motion, the convict offered copies of 15 articles which appeared in a newspaper, and a videotape of three television news stories covering the robbery and murder of the victim. The trial court denied the motion, noting that any potential jurors who had made up their minds and could not be impartial would be excused for cause.

In *State v. Phelps*, 241 Neb. 707, 726-28, 490 N.W.2d 676, 690-91 (1992), we wrote:

> Section 29-1301 permits a change of venue when it appears that "a fair and impartial trial cannot be had" in the county where the offense was committed. A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. [Citations omitted.]
>
> . . . .
>
> . . . [M]ere jury exposure to news accounts of a crime does not presumptively deprive a criminal defendant of due process. Rather, to warrant a change of venue, a defendant must show the "existence of pervasive misleading pretrial publicity." *State v. Bradley*, 236 Neb. 371, 386, 461 N.W.2d 524, 536 (1990), *cert. denied* ____ U.S. ____, 112 S. Ct. 143, 116 L. Ed. 2d 109 (1991). Indeed, in order for a defendant to successfully move for a change of venue based on pretrial publicity, he or she must show that the "publicity has made it impossible to secure a fair and impartial jury." *State v. Jacobs*, 226 Neb. at 190,

410 N.W.2d at 473. Accord *State v. Heathman*, 224 Neb. 19, 395 N.W.2d 538 (1986). A number of factors must be evaluated in determining whether that burden has been met, including the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire was drawn. *State v. Williams*, [239 Neb. 985, 480 N.W.2d 390 (1992)]; *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991); *State v. Jacobs, supra*; *State v. Bird Head*, [225 Neb. 822, 408 N.W.2d 309 (1987)]; *State v. Kern*, [224 Neb. 177, 397 N.W.2d 23 (1986)]; *State v. Heathman, supra*; *State v. Fallis*, 205 Neb. 465, 288 N.W.2d 281 (1980); *State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976).

As noted in *State v. Bradley, supra*, voir dire examination provides the best opportunity to determine whether venue should be changed. A jury was able to be selected in this case in approximately 4 hours. At the conclusion of that process, each of the venirepersons seated as a juror raised his or her hand in response to Phelps' inquiry as to whether each felt that he or she "could serve on this jury and fairly try this case free of influence of anything you have heard before this day and based exclusively on what comes from this chair and the exhibits that are received, free of any sense at all of any expectation by the community or your family or neighbors or anything else[.]"

See, also, *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993).

There is no allegation that the jury impaneled was unable to be fair and impartial. Thus, the trial court did not commit error in its denial of the change of venue request which would give rise to postconviction relief.

2. NATURE OF ACCUSATION

In the second summarized assignment of error, the convict complains that the lack of clarity in the information charging him with murder violated his Sixth Amendment right "to be informed of the nature and cause of the accusation."

As originally drawn, the information alleged that the convict killed the victim "purposely and with deliberate and premeditated malice, or during the perpetration of, or attempt to perpetrate a Robbery"; however, at some juncture, the words "purposely and with deliberate and premeditated malice, or" were stricken. The convict baldly asserts that the prosecutor struck those words during the course of *Bowen I*. He also argues that while the original information charged him with "first degree murder with pre-meditated malice," the State succeeded in proving only that he "conspired with [another] to rob or burglar the candy store" and that he was thus only an "accessory to a felony." Brief for appellant at 3.

Not only could these arguments have been litigated in *Bowen I*, and thus are not properly available for consideration at this time, but the State correctly points out that this summarized assignment is nothing more than an impermissible effort to relitigate the sufficiency of the evidence by in effect claiming the evidence proved only some lesser-included offense upon which the jury was not instructed.

However, again in the interest of completeness, we point out that Neb. Rev. Stat. § 28-303 (Reissue 1989) provides that one may commit first degree murder in a variety of ways, including by killing another "purposely and with deliberate and premeditated malice" or "in the perpetration of or attempt to perpetrate" a felony such as robbery. Thus, as originally drawn, the indictment charged first degree murder by virtue of killing either with the requisite mental state—purposeful murder—or while in the course of committing a felony. The evidence at trial proved the convict to be guilty of felony murder and not of purposeful murder, but no authority is cited that charges could not be levied in the alternative.

Indeed, in considering a statute which provided that one who, with the intent to rob or steal, " 'forcibly, and by violence, or by putting in fear, takes . . . money or personal property,' "

Brown v. State; 107 Neb. 120, 123, 185 N.W. 344, 345 (1921), this court wrote:

> This section of the statute does not define two separate felonies, but defines one only, which may be committed by two methods, namely, by force and violence, or by putting in fear. It is a general rule of criminal procedure that, when under a statute an offense may be committed by several methods, the indictment or information may charge that it was committed by any or all such methods as are not inconsistent with, or repugnant to, each other. The averments in the information are not repugnant, but are perfectly consistent with each other, and therefore are not improperly joined. The principle here announced finds support in 2 Wharton, Criminal Procedure (10th ed.) sec. 1221. In *State v. Montgomery*, 109 Mo. 645, the indictment charged, as in this case, that the crime was committed by taking from the prosecuting witness by force and violence, and by putting him in fear. A similar objection was made as is made in this case. It was held: "Where a crime may be committed by several methods, the indictment may charge that it was committed by all, provided they are not inconsistent with, or repugnant to, each other." Besides, section 9050, Rev. St. 1913, provides: "No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected; * * * nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Even if it be conceded that the information was bad for duplicity, there appears no basis to believe that such defects "tend to the prejudice of the substantial rights of the defendant upon the merits."

Brown v. State, 107 Neb. at 123-24, 185 N.W. at 345.

In any event, as noted in *State v. Laymon*, 239 Neb. 80, 474 N.W.2d 458 (1991), an information or complaint is sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted. Furthermore, where an information alleges the commission of a crime using language of the statute defining that crime or

terms equivalent to such statutory definition, the charge is sufficient. *State v. Spiegel*, 239 Neb. 233, 474 N.W.2d 873 (1991).

Although here the proof at trial supports felony murder and not purposeful murder, the charge of purposeful murder would not have been inconsistent with or repugnant to a charge of felony murder. Thus, we cannot say that the information was defective, no matter what condition it was in when the case was tried.

3. Burden of Proof

With regard to the third summarized assignment of error, the convict urges that in considering a pro se motion for postconviction relief, a court must "review the records and files of the case with the same courtesy and the same respect afforded a licensed attorney and the solemnity that a counsellor is required to posess [sic] in his pleadings."

He is correct; a pro se party is held to the same standards as one who is represented by counsel. See *State v. Shepard*, 239 Neb. 639, 477 N.W.2d 567 (1991). But the convict fails to show that the postconviction court held him to any different standard than a fully trained professional lawyer would have been required to meet, nor do we find in the record any instance in which the postconviction court assigned an improper burden of proof to the convict.

4. Lack of Findings and Conclusions

The convict also asserts that when denying a postconviction motion, the court initially ruling on the motion must make specific findings of fact and conclusions of law explaining its decision.

It is true that in *State v. Costanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990), we ruled that having granted a hearing, the court was obligated to determine the issues and make findings of fact and conclusions of law. But more directly related to the convict's phrasing of the alleged error is our adjudication in *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989). Therein, Bostwick argued error in denial of a hearing and also "the court's failure to delineate issues and make findings of fact and conclusions of law in its order denying Bostwick

postconviction relief." *Id.* at 64, 443 N.W.2d at 889-90. We ruled:

> [C]oncerning Bostwick's claim that the district court should have delineated issues and expressed findings of fact and conclusions of law underlying denial of postconviction relief, we note that the court succinctly stated the only finding of fact or conclusion of law necessary for disposition of Bostwick's case, namely, Bostwick's motion for postconviction relief is without merit.

Id. at 65, 443 N.W.2d at 890.

We have also held that an evidentiary hearing on a motion for postconviction relief is not required if the record and the files in the case affirmatively establish that the defendant is not entitled to relief. *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992). As stated in *State v. Victor*, 242 Neb. 306, 309, 494 N.W.2d 565, 569 (1993):

> "An evidentiary hearing on a postconviction motion is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution." . . .
>
> Conversely, an evidentiary hearing on a motion for postconviction relief may properly be denied when the records and files of the case affirmatively establish that the defendant is not entitled to relief. . . .

Our analysis of each of the convict's assignments of error establishes the convict's motion to be without merit and that the postconviction court appropriately denied relief without a hearing on the merits. As a result, the postconviction court was not obligated to make findings of fact or conclusions of law beyond the implicit finding in its denial of such hearing that the motion was without merit.

5. Record

Although in regard to this fifth summarized assignment of error the convict complains in his brief that the record before us is deficient in that it does not contain the opening statements made to the trial jury, the bill of exceptions reveals he had asked

the postconviction court to supplement the record by including in it not the opening statements, but the voir dire proceeding.

Although the postconviction court did not grant the convict a hearing on the merits of his postconviction motion, it did grant a hearing on his request that the record be supplemented. That hearing demonstrated that no one had asked that the voir dire be reported; thus, what transpired at that portion of the trial was not preserved.

As the postconviction court noted, the record cannot be supplemented with what does not exist. Just as obviously, having asked the postconviction court to supplement the record by including the voir dire, the convict cannot now complain that the record does not contain the opening statements to the jury. *Central Nebraska Public Power and Irrigation District v. Walston*, 140 Neb. 190, 299 N.W. 609 (1941) (question not presented by pleadings or evidence in trial will not be considered on appeal).

The convict has not claimed that anything which occurred at the voir dire in any way prejudiced him. As noted in *State v. Nearhood*, 233 Neb. 767, 448 N.W.2d 399 (1989), an omission from the bill of exceptions not shown to result in prejudice presents no error upon which relief can be granted.

6. Effectiveness of Counsel

In the final summarized assignment of error, the convict asserts that the postconviction court erred in failing to find he was not provided the effective assistance of counsel. He argues that both trial counsel and appellate counsel were ineffective, claiming that trial counsel should have pursued a change of venue with greater vigor and that appellate counsel should have raised as an issue in *Bowen I* trial counsel's failure to do so, as well as trial counsel's failure to seek a continuance in order that a coperpetrator could have been available to testify.

We begin our consideration of this summarized assignment of error by noting that trial counsel had been replaced by the time *Bowen I* was filed. Under that circumstance, the alleged ineffectiveness of trial counsel could have been raised in *Bowen I*; thus, we treat the convict's claim that trial counsel's performance was deficient in failing to properly pursue a

change of venue as a claim that appellate counsel was ineffective in failing to question trial counsel's performance with respect to that issue. See *State v. Nearhood, supra*.

We next recall that in order to state a claim of ineffective assistance of counsel as violative of the Sixth Amendment to the U.S. Constitution and thereby obtain reversal of a conviction, one must show that counsel's performance was deficient and such deficient performance prejudiced one's defense, that is, demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993); *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993).

As the analysis in part II(1) above establishes that there was no trial error in the refusal to change venue, there can, of course, be no merit in the claim that appellate counsel should have asserted as error trial counsel's failure to have more vigorously pursued the matter.

Left for consideration, then, is the convict's assertion that a continuance of the trial should have been sought in order that the coperpetrator, Christopher Bazer, could have been compelled to testify that at no time did the convict have the murder weapon in his possession and, further, that the convict had attempted to stop the robbery.

Bazer had pled guilty to first degree murder prior to the convict's trial, but Bazer had not yet been sentenced. In considering various pretrial motions the convict had filed, the trial court ruled that Bazer could invoke his Fifth Amendment right and refuse to testify.

The trial court also noted that Bazer had not testified at his own trial, having pled guilty upon the impaneling of the jury. At that time, the following exchange took place between Bazer and the court:

> [Bazer]: I went down there, and I needed some money, and things got around, and a gun got pulled out. And . . .
>
> THE COURT: Who pulled the gun out?
>
> [Bazer]: I did. I pulled the gun out. And in doing that, the gun—I cocked it back, and she started running and I

grabbed her and tried pulling her back, and the gun went off.

At his trial, the convict attempted to question Bazer regarding the murder, but Bazer declined to respond, choosing instead to invoke his Fifth Amendment privilege against self-incrimination. The convict then put into evidence the foregoing exchange Bazer had had with the court when entering his plea.

Although the U.S. Supreme Court stated the principle in the context of a capital case, *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), courts in other types of cases have held that in order to prevent the possible enhancement of the sentence, one who has pled guilty but who is awaiting sentencing may invoke the privilege against self-incrimination. E.g., *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067 (6th Cir. 1990); *United States v. Zirpolo*, 704 F.2d 23 (1st Cir. 1983), *cert. denied* 464 U.S. 822, 104 S. Ct. 87, 78 L. Ed. 2d 96; *State v. Williams*, 200 Conn. 310, 511 A.2d 1000 (1986). There is also authority suggesting that under the circumstances here presented, the failure to grant a reasonable continuance to the convict would have constituted an abuse of discretion. See *Williams, supra* (while court could consider countervailing factors such as right to control docket and judicial economy, it was an abuse of discretion to deny continuance until after witness had been sentenced). Accord *Tucker v. U.S.*, 571 A.2d 797 (D.C. App. 1990).

Thus, for the purpose of our analysis, we assume that appellate counsel performed deficiently in not raising trial counsel's failure to seek a continuance as a ground for reversing the trial judgment. The question therefore becomes whether that deficient performance by appellate counsel prejudiced the convict.

The convict alleges the evidence shows that

> Bazer was the only eye witness to the [convict's] behaviour during the crime in question and could have testified on the [convict's] behalf as to the renunciation made by the [convict] attempting to stop or thwart [Bazer's] behaviour and that the [convict] never had possesion [sic] of the gun of which [the convict] is now serving 1 to 6 years

consecutive to alife [sic] sentence.

But trial evidence reveals that as early as 2 weeks before the robbery took place, the convict attempted to involve one Mack Riggs in it. The trial testimony of another accomplice, Dale Demont, also strongly implicates the convict in the robbery. According to Demont, the convict announced en route to the scene of the crime that they were going to commit a robbery, and the convict directed Demont, who was driving, where to stop and wait. After the crime, the convict said that he had gotten some change from a cash register. Not only did another witness testify that the convict did not leave the scene until after the shooting, but the convict himself testified that he did not flee the robbery until just before the shooting. In order for abandonment

> [t]o be effective as a defense, there must be an appreciable interval between the alleged abandonment of the criminal enterprise and the act for which responsibility is sought to be avoided. The coconspirator must have a reasonable opportunity to follow the example and refrain from further action before the act in question is committed. A conspirator cannot escape responsibility for an act which is the natural result of a criminal scheme he has helped to devise and carry forward by running away at the instant when the act in question is about to be committed and the transaction which immediately begets it has actually been commenced. See, People v. Nichols, 230 N. Y. 221, 129 N. E. 883, Pollack v. State, 215 Wis. 200, 253 N. W. 560.

State v. Wilson, 192 Neb. 435, 437, 222 N.W.2d 128, 130 (1974).

In light of the strength of the other evidence implicating the convict in the crime, even if Bazer were to have testified, as the convict claims he would, we cannot say that there is a reasonable probability that the result of the trial would have been any different.

III. JUDGMENT

The record failing to sustain any of the summarized assignments of error, the judgment of the postconviction court is affirmed.

AFFIRMED.

TOM MAULER AND HELEN MAULER, APPELLANTS, V. PATHFINDER IRRIGATION DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

505 N.W.2d 691

Filed September 24, 1993. No. S-91-670.

1. **Demurrer: Pleadings.** In considering 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. **Irrigation Districts: Political Subdivisions Tort Claims Act.** An irrigation district is a political subdivision and is subject to the Political Subdivisions Tort Claims Act.
3. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act provides a uniform procedure for the bringing of tort claims against all political subdivisions in Nebraska.
4. **Statutes.** A legislative act which is complete in itself and is repugnant to or in conflict with a prior law repeals the prior law by implication to the extent of the repugnancy or conflict.

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

Howard P. Olsen, Jr., and Robert G. Simmons, Jr., of Simmons, Olsen, Ediger & Selzer, P.C., for appellants.

Gary D. Denton, of Hancock & Denton, P.C., for appellee.

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

BOSLAUGH, J.

The plaintiffs, Tom Mauler and Helen Mauler, have appealed from the June 10, 1991, judgment of the trial court dismissing their second amended petition filed in this action. The plaintiffs seek damages in the amount of $25,790 from the defendant, Pathfinder Irrigation District. The plaintiffs allege that the defendant district "negligently and improperly" installed a weir gauge which resulted in the district failing to deliver an adequate volume of irrigation water to the plaintiff's land in Sioux County, Nebraska. The plaintiffs

allege the shortage of water resulted in damage to their crops.

The trial court sustained the defendant's general demurrer to the second amended petition and dismissed the second amended petition. From that judgment, the plaintiffs have appealed.

In considering 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. *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993).

The defendant's principal contention is that the action is controlled by Neb. Rev. Stat. § 46-160 (Reissue 1988), which provides as follows:

> Every irrigation district within the State of Nebraska shall be liable in damages for negligence in delivering or failure to deliver water to the users from its canal to the same extent as private persons and corporations; *Provided, however,* such districts shall not be liable as herein provided, unless the party suffering such damages by reason of such negligence or failure shall, within thirty days after such negligent acts are committed, or such districts shall fail to deliver water, serve a notice in writing on the chairman of the board of directors of such district, setting forth particularly the acts committed or the omissions of duties to be performed on the part of the district, which it is claimed to constitute such negligence or omission and that he expects to hold such district liable for whatever damages may result; *Provided further,* such action shall be brought within one year from the time the cause has accrued.

The plaintiffs contend that the action is controlled by the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1987). There is no question that the defendant is a political subdivision and is subject to the Political Subdivisions Tort Claims Act. See *Peterson v. Gering Irr. Dist.*, 219 Neb. 281, 363 N.W.2d 145 (1985). The plaintiffs

further contend that the Political Subdivisions Tort Claims Act is a statute complete in itself and that it repealed by implication § 46-160, which is in conflict with and repugnant to § 13-901 et seq. Section 13-902 provides as follows:

> The Legislature hereby declares that no political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees, and that no suit shall be maintained against such political subdivision on any tort claim except to the extent, and only to the extent, provided by sections 13-901 to 13-926, 16-727, 16-728, 23-175, 39-809, and 79-489. The Legislature further declares that it is its intent and purpose through this enactment to provide *uniform procedures* for the bringing of tort claims against *all* political subdivisions, whether engaging in governmental or proprietary functions, and that the procedures provided by sections 13-901 to 13-926, 16-727, 16-728, 23-175, 39-809, and 79-489 *shall be used to the exclusion of all others.*

(Emphasis supplied.)

Although repeals by implication are not favored, a legislative act which is complete in itself and is repugnant to or in conflict with a prior law repeals the prior law by implication to the extent of the repugnancy or conflict. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). In § 13-902, the Legislature explicitly expressed an intent to create "uniform" procedures governing "all" actions against political subdivisions. By adopting a uniform procedure, the Legislature eliminated many of the traps and pitfalls which would exist if differing procedural requirements governed actions against various political subdivisions.

The record shows that the plaintiffs complied with the procedural requirements of the Political Subdivisions Tort Claims Act. The defendant's demurrer should have been overruled. It is unnecessary to consider the plaintiffs' other assignments of error.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MID-AMERICA PIPELINE COMPANY, APPELLEE, V. JOHN M. BOEHM, NEBRASKA TAX COMMISSIONER, AND NEBRASKA DEPARTMENT OF REVENUE, APPELLANTS.

506 N.W.2d 41

Filed September 24, 1993. No. S-91-677.

1. **State Equalization Board: Taxation: Valuation.** The State Board of Equalization is the only entity with statutory authority to equalize the valuations of centrally assessed taxpayers.
2. **Taxation: Valuation.** The Nebraska Department of Revenue regulation at 316 Neb. Admin. Code, ch. 43, § 004.09 (1986), refers to the actual value of the property or the allocation of the value of the property as made by the Tax Commissioner, as distinguished from the equalized value determined by the State Board of Equalization.
3. **State Equalization Board: Taxation: Valuation.** The Tax Commissioner has no authority to revise an equalization decision made by the State Board of Equalization.
4. **Trial: Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
5. **Jurisdiction.** Subject matter jurisdiction cannot be created by waiver, estoppel, consent, or conduct of the parties.

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

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

William R. Johnson, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

BOSLAUGH, J.

The plaintiff, Mid-America Pipeline Company (MAPCO), is a public service entity as defined in Neb. Rev. Stat. § 77-801.01 (Reissue 1990). It is a centrally assessed taxpayer. In 1988, its property was valued for tax purposes by the State Tax Commissioner pursuant to Neb. Rev. Stat. § 77-802 (Reissue 1990).

As provided in Neb. Rev. Stat. § 77-505 (Reissue 1990), the State Board of Equalization and Assessment met on August 2,

1988, reviewed the Tax Commissioner's valuation of the property of MAPCO and other centrally assessed taxpayers, and equalized the valuations.

On August 12, 1988, the Tax Commissioner, by letter, notified MAPCO of the valuation of its property and the equalization of its valuation by the state board. The letter provided in part:

> Any protest of your 1988 assessment must be filed in writing with the State Tax Commissioner within 30 days from the date of receipt of this notice. The protest shall include the name of the company, identity of the property valuation in dispute, statement of all reasons why the assessment should be reconsidered, and the relief to which the petitioner considers itself entitled.

On September 12, 1988, MAPCO filed a protest with the Tax Commissioner by letter. MAPCO alleged the assessment of its personal property in Nebraska was "illegal and violative of the uniformity provisions in Article VIII of the Nebraska Constitution." MAPCO protested its valuation as an illegal assessment of personal property and requested the board to adjust its assessment.

MAPCO's protest was held in abeyance pending the resolution of *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), and *Trailblazer Pipeline Co. v. State Bd. of Equal.*, 232 Neb. 823, 442 N.W.2d 386 (1989), *cert. denied* 493 U.S. 1078, 110 S. Ct. 1130, 107 L. Ed. 2d 1036 (1990). Those cases involved review by this court pursuant to Neb. Rev. Stat. § 77-510 (Reissue 1990) of the state board's denial of equalization relief.

On January 25, 1990, after the decisions in *Northern Natural Gas Co.* and *Trailblazer Pipeline Co.* became final, the Nebraska Department of Revenue filed a motion to dismiss the protest of MAPCO on the ground that the Tax Commissioner lacked jurisdiction to hear MAPCO's claim alleging the assessment of its property was illegal and in violation of the uniformity clause of article VII, § 1, of the Nebraska Constitution.

On April 3, 1990, a hearing was held before a hearing officer

designated by the Tax Commissioner for the purpose of receiving evidence and hearing arguments on the department's motion to dismiss. At that time, a number of exhibits were offered and received into evidence, including a joint stipulation of issues and facts agreed to by counsel for the parties.

Concerning the issues sought to be raised by MAPCO before the Tax Commissioner, the joint stipulation provides:

> There is no issue about the validity of the actual value determination of the State Tax Commissioner and the State Board. The only issue here is the equalization of that value by the State Board, and its failure to equalize Mapco's property with other in Nebraska that is substantially undervalued for tax purposes.

On September 19, 1990, the Tax Commissioner made findings of fact and conclusions of law and dismissed MAPCO's protest for lack of jurisdiction. The Tax Commissioner found that the issue raised by MAPCO's protest challenged the state board's equalization of the value of MAPCO's property in relation to other property and that the Tax Commissioner lacked authority or jurisdiction to consider an equalization claim of this nature. The Tax Commissioner concluded the only remedy available to a centrally assessed taxpayer raising a claim of lack of equalization of the value of its property in relation to other property was by an appeal from the decision of the state board to the Nebraska Supreme Court as provided in § 77-510.

MAPCO subsequently filed a petition for review of the Tax Commissioner's order in the Lancaster County District Court. On May 31, 1991, the district court reversed the order of the Tax Commissioner dismissing MAPCO's protest and remanded the cause to the Tax Commissioner with directions "to take those actions necessary to afford the relief to which MAPCO is entitled. . . ."

The Tax Commissioner and the Department of Revenue have appealed from that judgment to this court. The sole assignment of error is that the district court erred in reversing the Tax Commissioner's order dismissing for lack of jurisdiction MAPCO's protest of the equalization of the valuation of its property by the state board for the 1988 tax year.

Some of the procedure for the Tax Commissioner's valuation of public service companies' property is found in the Department of Revenue's regulations. The Tax Commissioner is required, under 316 Neb. Admin. Code, ch. 43, § 004.03 (1986), to determine the "total taxable value" of each public service entity using information supplied by the public service company and from any other source available. Upon determining such value, the Tax Commissioner is required to allocate to Nebraska the total of the company's total taxable value attributable to Nebraska. 316 Neb. Admin. Code, ch. 43, § 004.04A (1986). Prior to August 1 of each year, the Department of Revenue is required to mail to each public service entity a preliminary draft of its allocated total value calculated through August 10. 316 Neb. Admin. Code, ch. 43, § 004.04B (1986). Under 316 Neb. Admin. Code, ch. 43, § 004.05 (1986), "[t]he Nebraska allocated total taxable value shall be reviewed by the State Board of Equalization and Assessment and equalized to arrive at an equalized allocated value." The Tax Commissioner then distributes the resulting equalized allocated value among the various taxing subdivisions in the state. 316 Neb. Admin. Code, ch. 43, § 004.06 (1986).

On or before August 15, the Tax Commissioner is required to notify each public service company of its total equalized allocated value and the percentage apportionment of the value to the counties and subdivisions in which the company's property is located. 316 Neb. Admin. Code, ch. 43, § 004.07 (1986). The Tax Commissioner must also certify the determinations of the board of equalization to each county assessor by August 15. *Id.*

The Department of Revenue's regulations correspond with the duties of the Tax Commissioner and the State Board of Equalization as provided in Nebraska's Constitution and statutes.

Article IV, § 28, of the Nebraska Constitution provides:

> A Tax Commissioner shall be appointed by the Governor with the advice and consent of the Senate. He shall have jurisdiction over the administration of the

> revenue laws of the state, and together with the Governor, Secretary of State, State Auditor and State Treasurer shall have power to review and equalize assessments of property for taxation within the state. He shall have such other powers and perform such other duties as the Legislature may provide. His term of office and compensation shall be as provided by law.

Neb. Rev. Stat. § 77-501 (Reissue 1990) provides that the State Board of Equalization consists of the Governor, the Secretary of State, the Auditor of Public Accounts, the State Treasurer, and the Tax Commissioner.

Neb. Rev. Stat. § 77-801 (Reissue 1990) provides that the property of centrally assessed taxpayers such as public service entities is valued by the Tax Commissioner. The value of public service entities is apportioned by the Tax Commissioner to the taxing subdivisions in Nebraska, and the Tax Commissioner certifies to the county assessors its valuation of public service entities. § 77-802.

Section 77-505 requires the State Board of Equalization to examine the valuation of centrally assessed property and equalize such valuation for tax purposes.

We have held that the State Board of Equalization is "the only entity with statutory authority to equalize the valuations of centrally assessed taxpayers." *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 815, 443 N.W.2d 249, 255 (1989), *cert. denied* 493 U.S. 1078, 110 S. Ct. 1130, 107 L. Ed. 2d 1036 (1990).

The plaintiff and the trial court appear to have relied on 316 Neb. Admin. Code, ch. 43, § 004.09 (1986), which provides:

> In the event the company shall feel aggrieved as to the value of [sic] allocation established by the Nebraska Department of Revenue, it may file within 30 days from the date the valuation is mailed, a petition for review with the State Tax Commissioner in accordance with the Practice and Procedure Regulations issued by the Nebraska Department of Revenue.

We think the proper interpretation of this regulation is that it refers to the actual value of the property or the allocation of the value of the property as made by the Tax Commissioner, as

distinguished from the equalized value determined by the State Board of Equalization.

While the Department of Revenue may provide for an administrative appeal regarding the Tax Commissioner's initial valuation and/or allocation of a public service company's property, neither the Nebraska Constitution nor the Nebraska statutes pertaining to the duties of the Tax Commissioner and the composition of the State Board of Equalization contemplate that the Tax Commissioner, acting alone, has any authority to revise an equalization decision made by the State Board of Equalization.

The equalized allocated value determined by the State Board of Equalization is the final step in the valuation process for tax purposes. Section 77-510 provides: "From any final decision of the State Board of Equalization and Assessment with respect to the valuation of any real or personal property, any person, county, or municipality affected thereby may prosecute an appeal to the Supreme Court. . . ."

The district court erred in finding that the Tax Commissioner was authorized or had jurisdiction to consider MAPCO's protest challenging the equalization of its property by the State Board of Equalization.

MAPCO argues that the Tax Commissioner is estopped from asserting that he lacked jurisdiction to decide MAPCO's protest of the equalization of its property by the State Board of Equalization because of the statements contained in the August 12, 1988, letter notifying MAPCO of the valuation and equalization of its property.

MAPCO did not raise the issue of equitable estoppel before either the Tax Commissioner or the district court. This court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *First Nat. Bank v. Rickel, Inc.*, 229 Neb. 478, 427 N.W.2d 777 (1988).

Furthermore, this court has stated:

> " ' "It is axiomatic, however, that the parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent." ' " *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 409, 476 N.W.2d 559, 563 (1991) (quoting *Black v. Sioux City Foundry Co.*, 224

Neb. 824, 401 N.W.2d 679 (1987)). We have further stated: "Subject matter jurisdiction cannot be created by waiver, estoppel, consent, or conduct of the parties." *Anthony v. Pre-Fab Transit Co.*, 239 Neb. at 409, 476 N.W.2d at 563. *JEMCO, Inc. v. Board of Equal. of Box Butte Cty.*, 242 Neb. 361, 364, 495 N.W.2d 44, 46-47 (1993). Accord *Anderson v. HMO Nebraska, post* p. 237, 505 N.W.2d 700 (1993).

The judgment of the district court is reversed and the cause remanded with directions to dismiss the plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

DOUGLAS COUNTY BANK & TRUST CO., APPELLEE, V. BRIAN B. STAMPER AND VICTORIA A. STAMPER, APPELLANTS.

505 N.W.2d 693

Filed September 24, 1993. No. S-91-680.

1. **Evidence: Stipulations: Appeal and Error.** In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
4. **Valuation: Vendor and Vendee: Words and Phrases.** "Fair market value" is generally defined as the price which a purchaser, willing but not obligated to buy, would pay an owner, willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might, in reason, be applied.
5. **Valuation: Vendor and Vendee.** In determining fair market value, a trial court may consider any competent evidence of matters which would be considered by a prospective vendor or purchaser or which tend to enhance or diminish the value of property.
6. **Secured Transactions: Trusts: Deeds: Liens: Valuation.** In determining the amount of deficiency under Neb. Rev. Stat. § 76-1013 (Reissue 1990) of the Nebraska Trust Deeds Act, it is appropriate for a trial court to consider a tax lien

in determining the fair market value of the property.

7. **Judgments: Appeal and Error.** Where the record demonstrates that a decision of a trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Thomas A. Grennan and Michael C. Schilken, of Gross & Welch, P.C., for appellants.

Eric W. Kruger and Gary F. Smolen, of Rickerson, Welch & Kruger, for appellee.

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

LANPHIER, J.

Plaintiff-appellee, Douglas County Bank & Trust Co., initiated this action for a deficiency judgment. At issue is the balance owed under a note secured by a deed of trust executed by defendants-appellants, Brian B. Stamper and Victoria A. Stamper. Pursuant to Neb. Rev. Stat. § 76-1013 (Reissue 1990), the court determined the amount of the deficiency by determining the fair market value of the property and then subtracting the value of unpaid real estate taxes which were a lien on the property. This appeal followed.

The issue presented is whether the bank was entitled to reimbursement, through deficiency proceedings, of a tax lien it satisfied after purchasing the mortgaged property. The facts have been stipulated and are summarized as follows: On May 4, 1987, the Stampers executed a promissory note in the amount of $145,000 in favor of the bank. The note was secured by a deed of trust on real property owned by the Stampers. After the Stampers defaulted on the note, the trustee, pursuant to the Nebraska Trust Deeds Act, Neb. Rev. Stat. §§ 76-1001 through 76-1018 (Reissue 1990), sold the property to the bank as the highest bidder. The bank bought the property for $124,141.

On the date of the sale of the property, its fair market value was appraised at $148,000. At the time of the sale, there was a lien on the property for real estate taxes in the amount of $12,801.38. After the sale, the bank paid these outstanding

taxes.

The bank initiated deficiency proceedings to recover the remainder of the debt under § 76-1013, which requires the court to determine the fair market value of the property sold in order to determine the amount of deficiency.

The Stampers asserted that the proper method of computation would be to reduce the total indebtedness, including the costs of the sale, which indebtedness amounted to $155,635.48, by the appraised fair market value of the property, or $148,000, resulting in a total of $7,635.48. The trial court found that the fair market value of the property was $148,000 and deducted $12,801.38, the sum the bank had paid for the outstanding real estate taxes. In doing so, the court determined that under § 76-1013, the lien for real estate taxes must be deducted from the determined fair market value to calculate the value of the interest sold for deficiency judgment purposes.

The Stampers' assignments of error combine to assert that the district court erred (1) in interpreting § 76-1013 to require a deduction for a real estate tax lien from the fair market value of the property to reach the value of the property sold for deficiency judgment purposes and (2) in finding that property taxes paid by the titleholder after a trustee's sale can be assessed against the borrower.

STANDARD OF REVIEW

In a case in which the facts are stipulated, this court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment. *Dobias v. Service Life Ins. Co.*, 238 Neb. 87, 469 N.W.2d 143 (1991).

Statutory interpretation is a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993); *Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 500 N.W.2d 811 (1993). When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *Sports*

Courts of Omaha v. Meginnis, 242 Neb. 768, 497 N.W.2d 38 (1993).

FAIR MARKET VALUE

The Nebraska Trust Deeds Act controls the use of a deed of trust in this state. Section 76-1013 provides the method by which an action may be commenced to recover the balance of the debt. Section 76-1013 states in relevant part:

> [I]n such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed and the amount for which such property was sold and the fair market value thereof at the date of sale, together with interest on such indebtedness from the date of sale, the costs and expenses of exercising the power of sale and of the sale. *Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold.* The court shall not render judgment for more than the amount by which the amount of the indebtedness with interest and the costs and expenses of sale, including trustee's fees, exceeds the fair market value of the property or interest therein sold as of the date of the sale....

(Emphasis supplied.)

The trial court properly deducted the value of the tax lien to determine the amount of deficiency. "Fair market value" is generally defined as the price which a purchaser, willing but not obliged to buy, would pay an owner, willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might, in reason, be applied. *Unruh v. Streight*, 96 Nev. 684, 615 P.2d 247 (1980). In determining fair market value, the trial court may consider any competent evidence of matters which would be considered by a prospective vendor or purchaser or which tend to enhance or diminish the value of property. *Federal Land Bank of St. Paul v. Bergquist*, 425 N.W.2d 360 (N.D. 1988); *American Fed. Sav. & Loan Ass'n, etc. v. Kass*, 320 N.W.2d 800 (S.D. 1982) (court can consider all relevant evidence in determining value of property).

Thus, it was appropriate for the trial court to consider a tax lien in determining the fair market value of the property. At the

time of the sale, the lien had not been discharged. Any prospective purchaser would consider it in making its bid for the property. The fair market value of the property encompassed the reduced value of the property, given the tax lien.

The Stampers argue that the trial court erred because it first made a determination of fair market value and then reduced the value by the amount of the tax lien. This court has held that where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993); *Staman v. Yeager & Yeager*, 238 Neb. 133, 469 N.W.2d 532 (1991). Although the trial court did not characterize the reduction as a determination of fair market value, the correct determination of the debt owed resulted, and therefore, we affirm the decision.

Since we have determined that the tax lien was correctly incorporated into the fair market value determination, it is unnecessary to consider the Stampers' remaining assignment of error.

CONCLUSION

The trial court was correct, under § 76-1013, in considering real estate taxes unpaid at the time of the sale in computing the deficiency judgment owed by the Stampers.

AFFIRMED.

CAPORALE, J., not participating.

DENNIS L. THOMTE AND ZARLEY, MCKEE, THOMTE, VOORHEES & SEASE, A PARTNERSHIP, APPELLEES, V. WILLIAM M. KRUEGER, APPELLANT.

505 N.W.2d 383

Filed September 24, 1993. No. S-91-787.

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

William M. Krueger, pro se.

Denise C. Mazour, of Zarley, McKee, Thomte, Voorhees & Sease, for appellees.

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

PER CURIAM.

This court, having conducted a de novo review of the record, affirms the decision of the district court for Douglas County.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE R. GATSON, APPELLANT.

505 N.W.2d 696

Filed September 24, 1993. No. S-91-1192.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal of an action based on a claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
2. **Jury Instructions: Appeal and Error.** In considering claimed error regarding an instruction, all instructions given must be read together and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
3. **Constitutional Law: Convictions: Due Process: Proof.** In order to comport with the Due Process Clause of the 14th Amendment, criminal convictions may be

had only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which a defendant is charged.

4. **Jury Instructions: Proof: Appeal and Error.** In review of an instruction on reasonable doubt, what is important is that the standard of proof required of the State is not lowered.
5. **Constitutional Law: Jury Instructions: Intent: Presumptions: Proof.** An instruction on intent is constitutionally valid if it makes no presumptions and accurately describes the nature of intent and how it is proved.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and WRIGHT, Judges, on appeal thereto from the District Court for Douglas County, JERRY M. GITNICK, Judge. Judgment of Court of Appeals affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

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

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

LANPHIER, J.

Defendant, Dale R. Gatson, was charged in the Douglas County District Court with second degree murder for beating Dwayne Hill to death with a bumper jack. Following a jury trial, he was convicted of manslaughter and use of a deadly weapon to commit a felony. He appealed, claiming the jury instructions on reasonable doubt and intent were improper. The Nebraska Court of Appeals found the instructions did not prejudice Gatson or adversely affect a substantial right and affirmed the conviction. We granted Gatson's petition for further review.

FACTS

On the night of March 15, 1991, Dale Gatson and his brother, Alex Gatson (Alex), presented themselves at a house in Douglas County. Earlier that evening, Alex had attempted to remove his son from the house but was turned away. Upon returning with Gatson, Alex now threatened to break into the house to get his son. Alex told Gatson he overheard the occupants say the police

had been called. Knowing there was no telephone in the house, Gatson moved to the rear of the house, where he encountered the victim, Hill, who struck Gatson in the head with a metal rod, causing Gatson to bleed. Alex came around from the front of the house carrying a bumper jack. Gatson took the bumper jack from Alex and chased Hill into a neighbor's yard, where Hill fell. An occupant of the house testified she saw Gatson strike Hill's face three times with the bumper jack while Hill was lying on the ground, face up, with his arms out.

An officer who interviewed Gatson testified that Gatson stated he had hit Hill in the head three times with the bumper jack and that he was going to make sure Hill was dead, but Alex had pulled him away. Gatson testified that he was afraid when Hill hit him in the head, but that he did not try to run away and did not think he could flee. He also stated that he believed Hill would have killed him if given the opportunity.

At trial, the instructions given to the jury included the alleged erroneous instructions on reasonable doubt and intent. Gatson was convicted of manslaughter, Neb. Rev. Stat. § 28-305 (Reissue 1989), and use of a deadly weapon to commit a felony, Neb. Rev. Stat. § 28-1205 (Reissue 1989). He was sentenced to prison terms of 5 to 10 years on the manslaughter conviction and 3 to 10 years on the weapons conviction, to be served consecutively. On appeal, the Court of Appeals found no error in the jury instructions provided by the lower court and affirmed the conviction.

STANDARD OF REVIEW

In an appeal of an action based on a claim of erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). In considering claimed error regarding an instruction, all instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992). See,

also, *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991).

REASONABLE DOUBT

Gatson asserts that the court erroneously instructed the jury on reasonable doubt. He argues that the last sentence of the reasonable doubt instruction diminishes or trivializes the constitutionally required standard of proof beyond a reasonable doubt. The complete instruction states:

> A reasonable doubt is one based upon reason and common sense after careful and impartial consideration of all the evidence. A reasonable doubt may arise from evidence adduced by either party or from a lack of evidence on the part of the State. *However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.*

(Emphasis supplied.)

In order to comport with the Due Process Clause of the 14th Amendment, criminal convictions may be had only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which a defendant is charged. *State v. Morley, supra*. See, also, *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992). When a court improperly defines reasonable doubt in its jury instructions, due process is not achieved. *Id.*

The section of the instruction Gatson objects to does not diminish the degree of proof below that required by the Due Process Clause. Gatson cites *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), where the Supreme Court reviewed an instruction which defined reasonable doubt as

> "one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*."

(Emphasis in original.) 498 U.S. at 40 (quoting *State v. Cage*,

554 So. 2d 39 (La. 1989)).

The questioned instruction in *Cage* contained a statement which is similar to the one being challenged by Gatson: "A reasonable doubt is not a mere possible doubt." However, the Court did not disapprove of the instructions on that ground.

The Court considered how the jury would have understood the instruction as a whole. The Court disapproved of that language which it found diminished the degree of proof required to convict the defendant. The Court cited those portions of the instruction which equated reasonable doubt with " 'grave uncertainty' " and an " 'actual substantial doubt' " in reference to a moral certainty, as opposed to an evidentiary certainty. 498 U.S. at 41. It found that a reasonable juror "could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* The Court concluded the instruction violated the Due Process Clause of the 14th Amendment, but no reference was made to the language at issue in this case.

Reasonable Doubt Not Mere Possible Doubt

The sentence "[a] reasonable doubt is not a mere possible doubt" immediately precedes the language the Court found constitutionally offensive: "A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.*" (Emphasis in original.) 498 U.S. at 40. Yet, the Court did not address the first sentence. The Court focused only on certain language. While the Court reviewed the instruction as a whole, it made specific reference to the language it found diminished the burden of proof necessary under the Due Process Clause. The Court did not find the sentence "[a] reasonable doubt is not a mere possible doubt" offensive to the Due Process Clause.

Proof Beyond All Possible Doubt

Subsequent to *Cage*, other courts have upheld instructions containing the language which Gatson challenges. In *U.S. v. Harris*, 974 F.2d 84 (8th Cir. 1992), the instruction at issue was used. It was taken from the manual of model criminal jury instructions for the district courts of the Eighth Circuit. Although the defendant in *Harris* attacked another section of the instruction, it included exactly the same statement Gatson

now challenges, "proof beyond a reasonable doubt does not mean proof beyond all possible doubt." *Id.* at 85. Reviewing the instructions as a whole, the court held it did not impermissibly lower the government's burden of proof. In *U.S. v. Daniels*, 986 F.2d 451, 456 (11th Cir. 1993), the court upheld the instruction although it included language which stated it was " 'not necessary that the defendant's guilt be proved beyond all possible doubt.' "

This court recently approved instructions which included similar language. In *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), decided after *Cage*, this court approved an instruction which stated in part that a reasonable doubt was an actual and substantial doubt, language rejected in *Cage*. This court reasoned that the questioned instruction did not equate a reasonable doubt with a grave doubt, as did the instruction in *Cage*. Like the courts in *Daniels* and *Harris*, this court noted that the questioned instruction merely advised that a reasonable doubt is such "as would cause a person 'to pause and hesitate' when considering one of the 'graver and more important transactions of life.' " *Morley*, 239 Neb. at 155, 474 N.W.2d at 670.

Although no such language is included in the instructions at issue in this case, we find it inconsequential. What is important is that the standard of proof required of the State is not lowered. We find the challenged instruction did not lower the standard by raising the level of doubt necessary to acquit Gatson. The questioned instructions merely informed the jurors that proof beyond a reasonable doubt did not require removal of all possible doubt.

INTENT

Gatson also objects to part of the jury instruction on intent which reads: "Intent is a mental process, and it therefore generally remains hidden within the mind where it is conceived. It is rarely, if ever, susceptible of proof by direct evidence." Gatson maintains this instruction may create a conclusive presumption in regard to intent by emphasizing the State's circumstantial evidence. This court approved this instruction in *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986). However,

one of the sentences at issue is found in the official reports, but not the unofficial reports, which apparently caused some confusion in briefing. In *Beard*, we upheld a jury instruction containing exactly the same language objected to in this case. We held that the instruction made no presumptions, but, rather, accurately described the nature of intent and how it is proved.

For reasons set forth in the foregoing discussion, we find there is no merit to Gatson's second assignment of error.

CONCLUSION

The decisions of the trial court and the Court of Appeals were correct. Viewed as a whole, the instruction on reasonable doubt does not diminish the State's burden of proof. The instruction merely advises the jury that absolute certainty is not required in order to convict Gatson. In addition, the instruction on intent does not place undue emphasis on circumstantial evidence. Therefore, the decision of the Court of Appeals is affirmed.

AFFIRMED.

CINDY ANDERSON, APPELLEE, V. HMO NEBRASKA, INC., APPELLANT.

505 N.W.2d 700

Filed September 24, 1993. No. S-92-489.

1. **Federal Acts: Insurance.** The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. (1988 & Supp. II 1990), regulates employee welfare benefit plans, including any plan, fund, or program established or maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care benefits. § 1002(1).
2. **Federal Acts: Insurance: Claims: Appeal and Error.** An ERISA plan is to include an appeal procedure to review denied claims. 29 C.F.R. § 2560.503-1(g) (1992).
3. **Federal Acts: Insurance.** ERISA plan fiduciaries are to discharge their duties in accordance with the governing plan documents and instruments solely in the interest of the participants and beneficiaries. 29 U.S.C. § 1104(a)(1) (1988 & Supp. II 1990).

4. **Federal Acts: Insurance: Actions: Courts.** A participant in or beneficiary of an ERISA-regulated plan may seek to enforce her or his benefits and rights thereunder by instituting a civil action in either the state or federal courts. 29 U.S.C. § 1132(a)(1)(B) and (e)(1) (1988).
5. **Federal Acts: Insurance: Jurisdiction.** Concurrent jurisdiction under ERISA is vested in the state courts only with respect to a civil action commenced by a participant or beneficiary seeking to recover or clarify rights to benefits under the terms of the plan, or to enforce rights under the terms of the plan.
6. **Federal Acts: Insurance: Appeal and Error.** Where an ERISA plan explicitly grants the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, the correctness of the administrator's or fiduciary's determinations is to be reviewed under an abuse of discretion standard; otherwise, the correctness of the determinations is to be reviewed de novo.
7. **Insurance.** One providing contractual health care benefits is not, by virtue of that reason alone, necessarily a fiduciary.
8. **Federal Acts: Insurance: Claims.** An insurance company, insurance service, or other similar organization providing or administering health care benefits subject to regulation under the laws of one or more states is the appropriate named fiduciary for the review of denied claims only if so named in the ERISA plan; otherwise, that responsibility goes by default, if no other entity is named, to the plan administrator.
9. **Federal Acts: Insurance: Jurisdiction.** When exercising concurrent jurisdiction in ERISA cases, Nebraska courts are to apply the federal substantive ERISA common law, but are to apply the procedural law of Nebraska.
10. **Federal Acts: Insurance: Claims: Actions: Jurisdiction: Parties: Records.** Nebraska courts shall not exercise subject matter jurisdiction in an action brought under ERISA unless (1) the plan fiduciary is named as a party, (2) the record establishes the relevant provisions of the employee welfare benefit plan under which benefits are sought, and (3) the record establishes as well that either (a) the administrative claim resolution procedures under the terms of the plan have been exhausted or (b) there exists an excuse for not exhausting such procedures.
11. **Jurisdiction.** Lack of subject matter jurisdiction may be raised sua sponte by a court; the parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and IRWIN, Judges, on appeal thereto from the District Court for Douglas County, JAMES A. BUCKLEY, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

John F. Thomas and Ronald Fleming, of McGrath, North, Mullin & Kratz, P.C., for appellant.

Terry M. Anderson and Steven M. Lathrop, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellee.

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

CAPORALE, J.

Asserting that the defendant-appellant, HMO Nebraska, Inc., a health maintenance organization (HMO), wrongfully denied benefits due her, the plaintiff-appellee, Cindy Anderson, seeks a declaration under the Uniform Declaratory Judgments Act, Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989), that the HMO must authorize and pay for the prophylactic surgical removal of her breasts and reconstructive procedures she seeks to undergo. In so doing, Anderson invokes the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. (1988 & Supp. II 1990), as well as state contract and tort theories. After first dismissing the state claims as preempted by ERISA, the district court concluded that the HMO is obligated under federal law to authorize and pay for the treatments Anderson seeks, and thus granted Anderson's prayer. The Nebraska Court of Appeals affirmed that declaration, whereupon the HMO successfully petitioned for further review. We reverse the judgment of the Court of Appeals on jurisdictional grounds, and remand with direction.

The employer of Anderson's husband offers its employees and their dependents a choice of four health care schemes, including the one the husband selected, the coverage provided by the HMO. Under each of the four schemes, the employee pays a portion of the cost of the scheme selected, and the employer pays the remainder.

The "Health Maintenance Service Contract" between the HMO and the employer generally obligates the HMO to provide for Anderson's health care needs. However, excluded from that obligation are, among other things, treatments which are not medically necessary. The HMO is empowered by the contract to determine medical necessity, which the document defines as consisting of those services, treatments, or supplies which are appropriate and consistent with the symptoms and

diagnosis or treatment of the patient's illness, are in accordance with the standards of good medical practice in this state and could not be omitted without adversely affecting the patient's condition, and are most cost effective.

Without determining how much of the evidence may be relevant to an ultimate resolution on the merits, we note for the limited purpose of setting the background for this review that there is evidence that Anderson has developed fibrous tissue in her breasts, making the uncovering of cancer more difficult; that she has an extensive family history of breast cancer; and that she is obsessively apprehensive that she will develop the disease. There is also evidence that continued surveillance to detect the development of cancer is an alternative treatment. The HMO takes the position that as Anderson does not presently suffer from the malady, the surgeries and procedures she seeks are not medically necessary.

ERISA regulates " 'employee welfare benefit plan[s],' " which are defined, insofar as is pertinent to this review, as any "plan, fund, or program . . . established or . . . maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits." § 1002(1). The plan is to include an appeal procedure to review denied claims, 29 C.F.R. § 2560.503-1(g) (1992), and the act directs plan fiduciaries to discharge their duties in accordance with the governing plan documents and instruments solely in the interest of the participants and beneficiaries, § 1104(a)(1). To help reduce the number of frivolous lawsuits, promote the consistent treatment of claims, provide a nonadversarial method of settling claims, and minimize the cost of settling claims, under most circumstances the review procedure specified in the plan must be exhausted as a precondition to the institution of suit. *Springer v. Wal-Mart Associates' Group Health Plan*, 908 F.2d 897 (11th Cir. 1990); *Zipf v. American Tel. & Tel. Co.*, 799 F.2d 889 (3d Cir. 1986); *Kross v. Western Elec. Co., Inc.*, 701 F.2d 1238 (7th Cir. 1983); *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980).

To the extent relevant to this review, the act supersedes "any and all State laws insofar as they may now or hereafter relate to

any employee benefit plan . . . ." § 1144(a). ERISA has therefore preempted state law with respect to actions brought to clarify rights to benefits or to enforce rights arising under a plan coming within the purview of ERISA. E.g., *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990) (wrongful discharge claim); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (action for bad faith denial of benefits under plan); *Memorial Hosp. System v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990) (derivative claims for benefits assigned to a health care provider asserting breach of contract and state statute); *Baxter By and Through Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989) (state common-law rules of subrogation); *Daniel v. Eaton Corp.*, 839 F.2d 263 (6th Cir. 1988), *cert. denied* 488 U.S. 826, 109 S. Ct. 76, 102 L. Ed. 2d 52 (breach of contract and promissory estoppel); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987) (breach of contract). However, not every claim touching upon employee benefits has been preempted by ERISA. See *Hospice of Metro Denver v. Group Health Ins.*, 944 F.2d 752, 756 (10th Cir. 1991) (state promissory estoppel claim by a health care provider against an insurance company providing health care coverage to an ERISA plan not preempted, since it "[did] not affect the 'relations among the principal ERISA entities, the employer, the plan, the plan fiduciaries, and the beneficiaries' as such").

A participant in or beneficiary of an ERISA-regulated plan may seek to enforce her or his benefits and rights thereunder by instituting a civil action in either the state or federal courts. § 1132(a)(1)(B) and (e)(1). The courts are to develop a federal common law of rights and obligations under ERISA-regulated plans. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989). Thus, even in ERISA claims tried in state courts, the federal substantive ERISA common law controls. See *Hammond v. Fidelity and Guar. Life Ins. Co.*, 965 F.2d 428 (7th Cir. 1992).

But "[c]oncurrent jurisdiction is vested in the state courts *only* with respect to a civil action commenced by a participant or beneficiary seeking to recover or clarify rights to benefits 'under the terms of the plan,' or to enforce rights 'under the

terms of the plan.' " (Emphasis in original.) *Duffy v. Brannen*, 148 Vt. 75, 84, 529 A.2d 643, 648 (1987).

Thus, the difficulty in reviewing this matter on the merits arises from the circumstance that although the record contains the contract between the HMO and the employer, it does not contain or otherwise establish the relevant terms of any employee welfare benefit plan. Even if we accept the notion that the existence of the health care scheme furnished through the HMO, coupled with the fact that the husband's employer contributes toward the cost of the coverage the HMO extends to the husband and his dependents, establishes that the employer provides an ERISA-regulated employee welfare benefit plan of some sort, see *Memorial Hosp. System v. Northbrook Life Ins. Co., supra*, the fact that the employer offers four health care schemes convinces us that the contract between the employer and the HMO does not represent the entire plan.

The terms of any such plan are crucially important, for without them we cannot determine if or how the denial of Anderson's claim affects the relations among the principal ERISA entities, the employer, the plan, the plan fiduciaries, and the beneficiaries of the plan. See *Hospice of Metro Denver v. Group Health Ins., supra*. More specifically, it is the terms of the plan which establish the standard by which the HMO's decision is to be judged. This is so because in the course of considering a claim for severance benefits, the U.S. Supreme Court reasoned that due to the legislative history surrounding ERISA and the many references in the act to the language and terminology of trust law, where the plan explicitly grants the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, the correctness of the administrator's or fiduciary's determinations is to be reviewed under an abuse of discretion standard; otherwise, the correctness of the determinations is to be reviewed de novo. *Firestone Tire & Rubber Co. v. Bruch, supra*. But see *Pierre v. Conn. Gen. Life Ins. Co.*, 932 F.2d 1552 (5th Cir. 1991), *cert. denied* ____ U.S. ____, 112 S. Ct. 453, 116 L. Ed. 2d 470 (holding that in contrast with interpretations of plan terms, fiduciary's factual determinations always to be reviewed under abuse of discretion standard).

We are mindful that a number of decisions hold that an insurer providing coverage for employee welfare benefits, having discretionary authority to either determine the eligibility for benefits or construe the terms of the plan, is a plan fiduciary, at least for the purpose of having its decisions reviewed under an abuse of discretion standard. E.g., *Anderson v. Blue Cross/Blue Shield of Alabama*, 907 F.2d 1072 (11th Cir. 1990); *Newell v. Prudential Ins. Co. of America*, 904 F.2d 644 (11th Cir. 1990); *Brown v. Blue Cross & Blue Shield of Alabama*, 898 F.2d 1556 (11th Cir. 1990), *cert. denied* 498 U.S. 1040, 111 S. Ct. 712, 112 L. Ed. 2d 701 (1991); *Schnitker v. Blue Cross/Blue Shield of Nebraska*, 787 F. Supp. 903 (D. Neb. 1991); *Bass v. Prudential Ins. Co. of America*, 764 F. Supp. 1436 (D. Kan. 1991); *Bucci v. Blue Cross-Blue Shield of Connecticut*, 764 F. Supp. 728 (D. Conn. 1991). But we are also aware of other decisions which hold that such insurers do not necessarily become fiduciaries merely by deciding whether to pay a claim. E.g., *Ellington v. Metropolitan Life Ins. Co.*, 696 F. Supp. 1237 (S.D. Ind. 1988); *Jordan v. Reliable Life Ins. Co.*, 694 F. Supp. 822 (N.D. Ala. 1988); *Anderson v. Alpha Portland Industries, Inc.*, 647 F. Supp. 1109 (E.D. Mo. 1986), *aff'd* 836 F.2d 1512 (8th Cir. 1988), *cert. denied* 489 U.S. 1051, 109 S. Ct. 1310, 103 L. Ed. 2d 579 (1989); *McLaughlin v. Connecticut General Life Ins. Co.*, 565 F. Supp. 434 (N.D. Cal. 1983); *Austin v. General American Life Ins. Co.*, 498 F. Supp. 844 (N.D. Ala. 1980).

As noted in *Austin*:

> General American claims in its brief, without evidence, that it is to be considered as a fiduciary of the plan within the meaning of 29 C.F.R. § 2560.5021(g)(2). Accordingly, complaints against it would be claims for breach of fiduciary duties subject to federal court jurisdiction for not only Count I, but Counts II and III as well. The cited regulation states in substance that, where benefits under an ERISA plan are provided or administered by an insurance company, the plan may specify that such company be responsible for review of decisions on denied benefit claims, in which event the insurer will be treated as an ERISA fiduciary. The language of the regulation

> demonstrates that the insurance company is not necessarily a fiduciary by reason of providing contractual benefits, but rather is to be so considered if it, in addition, is given responsibility for reviewing *denied* claims. Not every insurer is a fiduciary for the purposes of ERISA; nor is it the case that merely by deciding whether to pay claims submitted by insureds the insurer is thereby subjected to the responsibilities of a fiduciary. The regulation relied on by General American makes it clear that the status of an insurer as a fiduciary is not automatic but rather turns upon the provisions of the plan and of the agreement made by the insurer.
>
> The defendants present no evidence to the effect that General American is charged with review of denied claims or is otherwise accountable as a fiduciary under ERISA.

(Emphasis in original.) 498 F. Supp. at 846. The regulation to which the *Austin* court refers is actually § 2560.503-1(g), mentioned earlier in this opinion. It reads in part:

> *Review procedure.* (1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary, and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:
>
> (i) Request a review upon written application to the plan;
>
> (ii) Review pertinent documents; and
>
> (iii) Submit issues and comments in writing.
>
> (2) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for review of and decision upon denied claims by such company, service or organization. In such case, that company, service, or organization shall

> be the "appropriate named fiduciary" for purposes of this section. In all other cases, the "appropriate named fiduciary" for purposes of this section may be the plan administrator or any other person designated by the plan, provided that such plan administrator or other person is either named in the plan instrument or is identified pursuant to a procedure set forth in the plan as the person who reviews and makes decisions on claim denials.

The purpose of the section is to set out minimum requirements for employee benefit plans. § 2560.503-1(a).

We find the reasoning of *Austin* persuasive and thus adopt the view that one providing contractual health care benefits is not, by virtue of that reason alone, necessarily a fiduciary. Rather, an insurance company, insurance service, or other similar organization providing or administering health care benefits subject to regulation under the laws of one or more states is the "appropriate named fiduciary" for the review of denied claims only if so named in the ERISA plan; otherwise, that responsibility goes by default, if no other entity is named, to the plan administrator. § 2560.503-1(g).

Further, we note that § 1132(a)(1)(B) provides that a participant or beneficiary may file a civil suit to, among other things, recover benefits due under the terms of the plan. Section 1132(d) provides that a plan may sue or be sued as an entity and that any money judgment against a plan is enforceable against only the plan as an entity and not against any other person unless liability is established against such person in his or her individual capacity. Thus, ERISA permits suits to recover benefits against only the plan as an entity and suits for breach of a fiduciary duty against only the fiduciary. *Holland v. Bank of America*, 673 F. Supp. 1511 (S.D. Cal. 1987). See, also, *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323 (9th Cir. 1985); *Miller v. Pension Plan for Emp. of Coastal Corp.*, 780 F. Supp. 768 (D. Kan. 1991), *aff'd* 978 F.2d 622 (10th Cir. 1992), *cert. denied* ____ U.S. ____, 113 S. Ct. 1586, 123 L. Ed. 2d 152 (1993); *Jordan v. Reliable Life Ins. Co.*, 694 F. Supp. 822 (N.D. Ala. 1988).

While, as established earlier, we are obligated to apply the federal substantive ERISA common law, we are free to apply

our own procedural law.

In considering a like question in the context of the Federal Employers' Liability Act, which also grants the states concurrent jurisdiction, the U.S. Supreme Court, in *St. Louis Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 411, 105 S. Ct. 1347, 84 L. Ed. 2d 303 (1985), wrote: "As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." An application of that rule is found in *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 622, 467 N.W.2d 388, 393 (1991), wherein we wrote:

> Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by the Federal Employers' Liability Act. 45 U.S.C. § 56. In disposing of a claim controlled by the Federal Employees' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act . . . .

Accordingly, we hold that the courts of this state shall not exercise subject matter jurisdiction in an action brought under ERISA unless (1) the plan fiduciary is named as a party, (2) the record establishes the relevant provisions of the employee welfare benefit plan under which benefits are sought, and (3) the record establishes as well that either (a) the administrative claim resolution procedures under the terms of the plan have been exhausted or (b) there exists an excuse for not exhausting such procedures.

Here, the record recites that although the employer administers "employee benefits including health insurance benefits," it "does not administer any of the employee claims for health care benefits." The record also recites that upon a telephone inquiry on behalf of one of Anderson's physicians, the HMO advised that the information so communicated did not reveal a medical necessity for the surgeries and procedures sought and asked for written documentation of Anderson's condition. After receiving that information, the HMO refused to authorize the surgeries and procedures. Whatever the aforesaid recitations in the record may suggest, they fall far short of establishing that the HMO acted in any capacity other

than as a contractual provider of health care coverage determining for its own purposes the extent of its contractual obligation. In other words, the record fails to establish that the HMO either had the authority to review or did in fact review a denied claim in the sense contemplated by § 2560.503-1(g), and thus became a fiduciary.

We recognize that neither of the parties hereto has questioned the district court's jurisdiction under ERISA. But lack of subject matter jurisdiction may be raised sua sponte by a court. *Armstrong v. Higgins*, 241 Neb. 833, 491 N.W.2d 331 (1992). Furthermore, it is axiomatic that the parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent. Neither may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Mid-America Pipeline Co. v. Boehm, ante* p. 220, 506 N.W.2d 41 (1993); *JEMCO, Inc. v. Board of Equal. of Box Butte Cty.*, 242 Neb. 361, 495 N.W.2d 44 (1993).

For the foregoing reasons, the district court erroneously exercised its ERISA subject matter jurisdiction. Accordingly, we hereby reverse the judgment of the Court of Appeals and remand the cause to that court with the direction that it remand the cause to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

2301 LEAVENWORTH, INC., DOING BUSINESS AS J & B BAR, APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

505 N.W.2d 708

Filed October 1, 1993. No. S-91-463.

1. **Administrative Law: Liquor Licenses: Final Orders: Appeal and Error.** Final orders and decisions of the Nebraska Liquor Control Commission are reviewed as proceedings in error.
2. **Administrative Law: Appeal and Error.** In proceedings in error, the reviewing court determines whether the administrative agency acted within its jurisdiction

and whether there is sufficient evidence as a matter of law to support its decision.

3. _____: _____. In proceedings in error, the reviewing court considers only the record before the administrative agency and does not reweigh the evidence or make independent findings of fact.

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

Don Stenberg, Attorney General, and Marie C. Pawol for appellant.

Michael J. Lehan, of Kelley & Lehan, P.C., for appellee.

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

WHITE, J.

The Nebraska Liquor Control Commission suspended the license of 2301 Leavenworth, Inc., doing business as J & B Bar, for serving alcohol to an already intoxicated person. The district court reversed the suspension, and the commission brought this appeal. We affirm the district court's judgment.

On the evening of April 11, 1990, Officer Michael Teply of the Omaha Police Division looked through the front window of the J & B Bar and saw Brian Beeman sip a beer. Teply entered the bar and determined that Beeman was intoxicated. Teply cited the bartender for serving alcohol to an already intoxicated person, but the city prosecutor later dismissed the charge.

On June 15, the commission charged the bar with selling or dispensing "alcoholic liquors" to an intoxicated individual, in violation of 237 Neb. Admin. Code, ch. 6, § 019.01N (1989). On July 12, the commission held a hearing. On July 24, the commission found the charge to be proved and ordered the bar's license suspended for 3 days. The bar applied to the commission for rehearing, but the rehearing was denied.

The bar timely filed a petition in error with the district court for Lancaster County to review the commission's order. The district court reversed the order, holding that the rule exceeded the commission's statutory rulemaking authority and that the commission's decision was unsupported by the evidence. The commission then sought review in this court.

Final decisions and orders of the commission are reviewed as

proceedings in error. See Neb. Rev Stat. § 53-1,116(1) (Supp. 1989). In proceedings in error, the reviewing court determines whether the commission acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992). The reviewing court considers only the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Id.*

The commission found that the bar "did . . . sell or dispense alcoholic liquors" to an already intoxicated person, "in violation of 237-LCC6-019.01N of the Rules and Regulations of the Nebraska Liquor Control Commission." That rule provides in pertinent part: "No licensee or partner, principal, agent or employee of any licensee shall sell, dispose, furnish or allow possession of alcoholic beverages on the licensed premise to any person who has become intoxicated and/or incapacitated by the consumption of alcoholic beverages." § 019.01N.

The record clearly reflects, and the bar does not contest, that Beeman was intoxicated. Teply testified that Beeman's speech was slurred, that he staggered when he walked, and that he "kind of held on to the wall." When Beeman was taken outside by the officer, "he lost his balance, crashed into the side of the building, then he just slid down the side of the building and just sat there in a drunken stupor and at that time he was helped to the police car and transported home."

Beeman's condition notwithstanding, there is no evidence that the bartender sold or dispensed alcohol to him. Both Teply and the bartender, George Ost, testified before the commission. Neither one asserted that the bartender had served Beeman.

The bartender testified to the events immediately preceding Teply's entrance into the bar. According to the bartender, approximately 20 patrons were in the bar that night. One of the patrons was playing "pickles," a game of chance. The patron won $250 and ordered a round of drinks for everyone in the bar. Another patron, who had been sitting at a table, approached the bar and ordered two beers. The bartender "set up" drinks for everyone, placing the two beers at the end of the bar closest to the door. The bartender testified that Beeman was not in the

bar at this time. Three people entered the bar, but the bartender refused to serve them because they were drunk. Beeman was not one of these three people. After collecting for the round from the winning patron, the bartender noticed Beeman sitting at the end of the bar where the two beers had been placed. Beeman was talking to the patron who had ordered the two beers. The bartender testified that he did not serve Beeman and that he did not see Beeman sip the beer.

Teply testified that while on patrol, he looked through the front window of the bar and observed Beeman sitting at the bar. Teply saw Beeman drink from a beer. Teply did not see the bartender serve Beeman.

At oral argument, the commission contended that the bar also violated the rule in question by allowing Beeman to possess alcohol. The offense of "allowing possession" was not charged, was not ruled on by the commission, was not raised on appeal, and was not briefed. We therefore decline to discuss it.

The record is void of any testimony establishing that the bartender sold or dispensed alcoholic beverages to Beeman. Accordingly, we find that the decision of the commission is not supported by sufficient relevant evidence. Because the commission's case fails on the evidence, we do not reach the issue of the commission's statutory rulemaking authority.

AFFIRMED.

BRYAN RILEY, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

506 N.W.2d 45

Filed October 1, 1993. No. S-91-541.

1. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court.
2. **Constitutional Law: Legislature: States: Immunity: Waiver.** Although Neb. Const. art. V, § 22, provides that "[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought," Neb. Const. art. V, § 22, is not self-executing. Rather, Neb. Const.

art. V, § 22, requires legislative action for waiver of a state's sovereign immunity.

3. **Actions: Statutes: States: Immunity.** A statute authorizing an action against the state is strictly construed because the statute is in derogation of the state's sovereign immunity.
4. **Actions: Declaratory Judgments: Statutes: States: Immunity.** Generally, an action for a declaratory judgment cannot be maintained against the state without its consent because the state's immunity from suit is unaffected by declaratory judgment statutes, although a declaratory judgment action may be maintained under statutes permitting actions against the state.
5. **Declaratory Judgments: Immunity: Waiver.** Nebraska's Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1989 & Cum. Supp. 1992), is inoperative as a waiver of the State of Nebraska's sovereign immunity.
6. **Administrative Law: Declaratory Judgments: Statutes: Immunity: Waiver: Jurisdiction.** Neb. Rev. Stat. § 84-911 (Reissue 1987) of the Administrative Procedure Act provides a limited statutory waiver of sovereign immunity and confers subject matter jurisdiction for a declaratory judgment concerning the validity of a state agency's rule or regulation.
7. **Administrative Law.** Neb. Rev. Stat. § 84-911 (Reissue 1987) of the Administrative Procedure Act is limited to judicial determination of the validity of any rule or regulation of a state agency and does not confer jurisdiction for judicial resolution of a factual question pertaining to the merits of a controversy.
8. **Declaratory Judgments: Summary Judgment.** Summary judgment may be obtained in a declaratory judgment proceeding.
9. **Summary Judgment: Evidence.** A summary judgment involves a judicial evaluation of evidence to determine whether an issue of material fact exists and, therefore, is a factual determination resulting in a disposition of the factual merits of a controversy.
10. **Courts: Judgments: Jurisdiction.** For validity of a judgment, a court must have jurisdiction to decide a question or issue in the subject matter presented to the court and to render a particular remedy or relief appropriate to the subject matter and controversy adjudicated.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

J. Murry Shaeffer for appellant.

Don Stenberg, Attorney General, and Lisa D. Martin-Price for appellee.

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

SHANAHAN, J.

Bryan Riley brought a declaratory judgment action, see Neb.

Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1989 & Cum. Supp. 1992), concerning administrative termination of his employment as a correctional officer at the Community Corrections Center in Lincoln. The district court for Lancaster County entered judgments that the court lacked subject matter jurisdiction and that the State of Nebraska was entitled to a summary judgment. Riley appeals from those judgments.

ADMINISTRATIVE BACKGROUND

On January 22, 1990, and while employed by the Department of Correctional Services (Department) as a correctional officer, Bryan Riley was directed by written order from the Department's interim director to take a polygraph examination concerning an allegation that Riley had removed checks from within the correctional facility contrary to the Department's regulations. On January 23, Riley appeared for the polygraph, which was to be administered by a Nebraska State Patrol investigator, but refused to sign a waiver that stated that Riley's participation in the examination was voluntary.

The Department's administrative regulation § 112.32 states that Department employees may be ordered to submit to polygraph examinations "upon penalty of dismissal, if their duties involve public law enforcement." Subsection E of that same regulation further provides that when an employee submits to a polygraph examination ordered by the director of the Department,

> the employee's execution of such a waiver shall only indicate that the employee has complied with the Department's order and shall not be deemed by the Department to waive any rights that the employee may have under the terms of the Director's order. The employee's failure to submit to a polygraph examination due to a refusal to sign such a waiver shall be deemed to be a violation of the Director's order.

On January 24, a "statement of charges" was presented to Riley, charging him with

> (a) violating a written order, specifically not submitting to a polygraph examination on January 23, 1990[;]
>
> (b) carrying inmate checks and cash out of the

institution contrary to Department regulations[;]

(c) disrespectful conduct toward . . . a Department security coordinator; and

(d) committing an act on or off the job which adversely affected the employee's performance and/or the Department's performance and functions.

After an evidentiary hearing before the warden, Riley was found guilty of all charges and was discharged from his employment on February 13.

On February 27, Riley invoked the grievance procedure prescribed by article 27 of the labor contract between the State of Nebraska and the Nebraska Association of Correctional Employees/American Federation of State, County, and Municipal Employees. Riley's grievance was denied, and on March 23, in accordance with the labor contract, he filed an "Appeal to Arbitration" for a hearing by the Nebraska Department of Personnel. See Neb. Rev. Stat. § 81-1301 et seq. (Reissue 1987 & Cum. Supp. 1992). Section 81-1319 of the personnel act allows an employee's appeal from the personnel board's decision so that the employee may obtain a judicial de novo review on the record of the agency pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1987 & Cum. Supp. 1992).

JUDICIAL PROCEEDINGS

While the proceedings before the State Personnel Board were pending, Riley, on May 24, filed his petition for declaratory relief in the district court for Lancaster County. Generally, Riley asked the court to define "law enforcement officer," as used in Neb. Rev. Stat. § 81-1401(3) (Reissue 1987), and declare the rights of the parties under Neb. Rev. Stat. § 81-1901 et seq. (Reissue 1987 & Cum. Supp. 1992), the Licensing of Truth and Deception Examiner's Act. Specifically, Riley requested declarations that, notwithstanding the Department's regulations, (1) the Department's employees are not required to submit to polygraph examinations; (2) Riley is not a law enforcement officer as defined by the statutes of the State of Nebraska; and (3) if Riley is a law enforcement officer, he is not required to sign a waiver of liability for the polygraph examiner

or a statement that he was voluntarily taking the polygraph examination when he was under a departmental order to submit to the examination.

The State demurred to Riley's petition on the ground that the district court lacked subject matter jurisdiction. After the court overruled the demurrer, the State moved for summary judgment. After receipt of evidence for a summary judgment on Riley's claim, the court concluded that it lacked subject matter jurisdiction, granted summary judgment to the State, and dismissed Riley's action with prejudice.

ASSIGNMENTS OF ERROR

Riley contends that the district court erred in (1) finding that it lacked subject matter jurisdiction and (2) entering a summary judgment for the State when there was a genuine issue of material fact.

STANDARD OF REVIEW

"When a jurisdictional question does not involve a factual dispute, determination of the jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue." *Williams v. Gould, Inc.*, 232 Neb. 862, 871, 443 N.W.2d 577, 584 (1989). See, also, *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989).

Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Neb. Rev. Stat. § 25-1332 (Reissue 1989). See, also, *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988).

SUBJECT MATTER JURISDICTION

Apparently, the district court's conclusion concerning its lack of subject matter jurisdiction is based on the sovereign immunity of the State of Nebraska and the absence of a waiver of sovereign immunity.

"Jurisdiction is the inherent power or authority to decide a case." *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 365, 417 N.W.2d 757, 763 (1988). Accord, *Sports Courts of Omaha v. Meginnis, supra*; *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991); *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). "Subject matter jurisdiction is a court's power to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court." *State ex rel. Gaddis v. Gaddis*, 237 Neb. at 266-67, 465 N.W.2d at 775. Accord, *Sports Courts of Omaha v. Meginnis, supra*; *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988).

"Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent." *Coffelt v. City of Omaha*, 223 Neb. 108, 110, 388 N.W.2d 467, 469 (1986). Accord, *Marshall v. Marshall*, 240 Neb. 322, 482 N.W.2d 1 (1992); *Andrews v. City of Lincoln*, 224 Neb. 748, 401 N.W.2d 467 (1987). "When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the trial court." *State v. Miller*, 240 Neb. 297, 300, 481 N.W.2d 580, 582 (1992). Accord, *Sports Courts of Omaha v. Meginnis, supra*; *Andrews v. City of Lincoln, supra*.

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

Glup v. City of Omaha, 222 Neb. 355, 359, 383 N.W.2d 773, 777 (1986). Accord, *State v. Miller, supra*; *Coffelt v. City of Omaha, supra*.

ACTION AGAINST THE STATE

Although Neb. Const. art. V, § 22, provides that "[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought," Neb. Const. art. V, § 22, is not self-executing. Rather, Neb. Const. art. V, § 22, requires legislative action for waiver of a state's sovereign immunity. *Gentry v. State*, 174 Neb. 515, 118 N.W.2d 643 (1962). A statute authorizing an action against the state is strictly construed because the statute is in derogation of the state's sovereign immunity. *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984); *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979), *overruled on other grounds, Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988); *Gentry v. State, supra*; *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), *overruled on other grounds, Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985). "Waiver [of sovereign immunity] will only be found 'where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." ' " *Wiseman v. Keller*, 218 Neb. at 720, 358 N.W.2d at 770 (quoting *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), *overruled on other grounds, Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)). Accord *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989).

Riley commenced his action under the Uniform Declaratory Judgments Act. However, as the State points out, this court has held that a substantially similar statutory predecessor to Nebraska's current Uniform Declaratory Judgments Act did not operate as a waiver of the state's sovereign immunity. Generally, an action for a declaratory judgment cannot be maintained against the state without its consent because the state's immunity from suit is unaffected by declaratory judgment statutes, although a declaratory judgment action may be maintained under statutes permitting actions against the state. See *Offutt Housing Co. v. County of Sarpy*, 160 Neb. 320, 70 N.W.2d 382 (1955), *aff'd* 351 U.S. 253, 76 S. Ct. 814, 100 L. Ed. 1151 (1956). See, also, 26 C.J.S. *Declaratory*

Judgments § 130 a. (1956). Therefore, generally, Nebraska's Uniform Declaratory Judgments Act is inoperative as a waiver of the State of Nebraska's sovereign immunity. Since Riley seeks declaratory relief against the State, he must find authorization for such remedy outside the confines of the Uniform Declaratory Judgments Act.

Neither Riley nor the State has sought an answer to the jurisdictional issue in light of § 84-911 of the Administrative Procedure Act, which states:

> (1) The validity of any rule or regulation may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule or regulation in question.
>
> (2) The court shall declare the rule or regulation invalid if it finds that it violates constitutional provisions, exceeds the statutory authority of the agency, or was adopted without compliance with the statutory rule-making or regulation-making procedures.

The express language of § 84-911 demonstrates the Legislature's intent to waive the state's sovereign immunity regarding questions construing the validity of administrative rules and regulations.

As defined in § 84-901(2) of the Administrative Procedure Act,

> [r]ule or regulation shall mean any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure, but not including rules and regulations concerning the internal management of the agency not affecting private rights, private interests . . . .

Consequently, § 84-911 of the Administrative Procedure Act provides a limited statutory waiver of sovereign immunity and confers subject matter jurisdiction for a declaratory judgment concerning the validity of a state agency's rule or regulation. Thus, the relief authorized by § 84-911 is far more restrictive than relief otherwise available under the Uniform Declaratory Judgments Act. For instance, the Uniform Declaratory Judgments Act explicitly provides that "[f]urther relief based on a declaratory judgment may be granted whenever necessary or proper," see § 25-21,156, and that a factual issue may be tried and determined as in any other civil action, see § 25-21,157. See, also, *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985) (fact questions in a declaratory judgment action may be tried and determined as other civil actions); *Noble v. City of Lincoln*, 158 Neb. 457, 63 N.W.2d 475 (1954) (further relief may be granted to carry into effect a declaratory judgment). In contrast, § 84-911 grants no jurisdiction regarding factual issues, but, rather, authorizes only a declaration regarding "[t]he validity of any rule or regulation." Viewing the statute with the eye of strict construction, we conclude that § 84-911 of the Administrative Procedure Act is limited to judicial determination of the validity of any rule or regulation of a state agency and does not confer jurisdiction for judicial resolution of a factual question pertaining to the merits of a controversy.

Under our interpretation of § 84-911, resolution of a factual issue is initially within the jurisdiction of the state agency involved in a given contested case governed by the Nebraska Administrative Procedure Act, §§ 84-901 to 84-920, or State Personnel Board, § 81-1301 et seq. As previously noted, however, pursuant to § 81-1319, an aggrieved party may appeal from a decision by the State Personnel Board and obtain a judicial de novo review on the agency's record as provided by the Administrative Procedure Act. See § 84-917 (Cum. Supp. 1992).

Therefore, the district court had subject matter jurisdiction to determine the validity of the Department's rules or regulations involved in Riley's declaratory judgment action. However, in addition to determinations regarding validity of the Department's regulations, Riley also sought declaratory

relief concerning a judicial interpretation of certain statutes. The limited waiver of sovereign immunity granted by § 84-911 does not confer jurisdiction for declaratory relief concerning a statute. Consequently, we affirm the district court's judgment that it lacked subject matter jurisdiction for declaratory relief concerning Nebraska statutes. Inasmuch as a district court has jurisdiction for declaratory relief concerning a state agency's rules or regulations, we reverse the district court's judgment that it lacked subject matter jurisdiction for declaratory relief concerning the Department's rules or regulations.

STATE'S MOTION FOR SUMMARY JUDGMENT

Summary judgment is proper only when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." § 25-1332. "Upon a motion for summary judgment the court examines the evidence to discover if any real issue of fact exists." *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. 610, 614, 365 N.W.2d 430, 433 (1985). "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." *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 163, 425 N.W.2d 872, 875 (1988). Accord, *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *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).

" ' "A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered." ' " *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. at 617, 365 N.W.2d at 434 (quoting *Wolf v. Tastee Freez Corp.*, 172 Neb. 430, 109 N.W.2d 733 (1961)).

Summary judgment may be obtained in a declaratory judgment proceeding. See *Anderson v. Carlson*, 171 Neb. 741, 107 N.W.2d 535 (1961). See, also, Neb. Rev. Stat. § 25-1330 (Reissue 1989) (summary judgment proceedings).

However, a fundamental problem exists concerning the

summary judgment in Riley's case and the dismissal of Riley's action with prejudice. In this appeal, the summary judgment, as a factual determination regarding the merits of the action, is a perplexing conclusion in view of the absent subject matter jurisdiction. As we have construed § 84-911, the district court's subject matter jurisdiction extends only to a determination regarding the validity of a questioned administrative rule or regulation, and does not extend to a determination of underlying factual issues surrounding Riley's termination of employment. The limited jurisdiction conferred by § 84-911 does not authorize a district court's adjudication on the merits of a controversy. A summary judgment involves a judicial evaluation of evidence to determine whether an issue of material fact exists and, therefore, is a factual determination resulting in a disposition of the factual merits of a controversy. See, *Ogden Equipment Company v. Talmadge Farms, Inc. et al.*, 232 Ga. 614, 208 S.E.2d 459 (1974); *Williams v. Heykow, Inc. et al.*, 171 Ga. App. 936, 321 S.E.2d 431 (1984); *Hoke v. Retail Credit Corporation,* 521 F.2d 1079 (4th Cir. 1975), *cert. denied* 423 U.S. 1087, 96 S. Ct. 878, 47 L. Ed. 2d 98 (1976) (summary judgment on ground that report involved was not a "consumer report" constituted an adjudication on the merits); *Tuley v. Heyd*, 482 F.2d 590 (5th Cir. 1973) (summary judgment is on the merits); *Heyward v. Public Housing Administration*, 238 F.2d 689 (5th Cir. 1956) (summary judgment is an adjudication on the merits); *Keys v. Sawyer*, 353 F. Supp. 936 (S.D. Tex. 1973), *aff'd* 496 F.2d 876 (5th Cir. 1974) (summary judgment constitutes a final judgment on the merits). See, also, 10 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 2713 (1983) (generally, a summary judgment is an inappropriate procedure to raise a question concerning subject matter jurisdiction). For validity of a judgment, a court must have jurisdiction to decide a question or issue in the subject matter presented to the court and to render a particular remedy or relief appropriate to the subject matter and controversy adjudicated. See, *Hanson v. Commissioner of Transportation*, 176 Conn. 391, 408 A.2d 8 (1979); *Heckathorn v. Heckathorn*, 77 N.M. 369, 423 P.2d 410 (1967); *State ex rel. Pub. Serv. Comm. v. Johnson Cir. Ct.*, 232 Ind. 501, 112

N.E.2d 429 (1953); *McCoy v. Briegel*, 305 S.W.2d 29 (Mo. App. 1957). Consequently, the district court lacked subject matter jurisdiction for summary judgment as a remedy based on the factual merits of Riley's claim. Because the district court lacked jurisdiction under § 84-911 to grant a summary judgment in Riley's case, we set aside the summary judgment and consequent dismissal of Riley's action.

We call attention to *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985), where this court recognized the discretionary availability of declaratory judgment actions and stated that "[a] court may refuse to enter a declaratory judgment where it would not terminate or resolve the controversy." *Id.* at 146, 362 N.W.2d at 50. See § 25-21,154 (refusal to render declaratory judgment). See, also, *Millard School Dist. v. State Department of Education*, 202 Neb. 707, 277 N.W.2d 71 (1979). In the present case, a declaratory judgment concerning the validity of the Department's regulations regarding a polygraph examination would not resolve the controversy between Riley and the Department. Notwithstanding a declaratory judgment concerning the validity of the Department's regulations, factual issues apparently remain, e.g., Riley's carrying inmate checks out of the Community Corrections Center, disrespect for a departmental coordinator, and impairment of departmental functions. Under the circumstances, a district court need not become involved in a piecemeal process for disposition of the controversy between Riley and the Department. Whether the district court, in exercise of its discretion, elects to become a part of the process is a matter we leave to the district court.

Although the crisscross process for a declaratory judgment authorized by § 84-911 may produce a plethora of procedural problems and pitfalls and eventually result in a substantive snakepit, the legislation permitting the process exists and applies in Riley's case.

CONCLUSION

The district court had subject matter jurisdiction to determine the validity of the Department's rules or regulations pertinent to Riley's claim. However, the waiver of sovereign

immunity for a limited declaratory judgment in accordance with § 84-911 does not confer subject matter jurisdiction for declaratory relief concerning a statute or for a summary judgment on the merits. Therefore, we affirm the district court's judgment concerning declaratory relief regarding Nebraska statutes, but we reverse the district court's judgment that it lacked subject matter jurisdiction for declaratory relief concerning the validity of the Department's rules and regulations. Also, we set aside the summary judgment granted to the State and the dismissal of Riley's action. For the foregoing reasons, this cause is remanded to the district court for further proceedings.

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

ADAMS BANK & TRUST, APPELLANT AND CROSS-APPELLEE, V. EMPIRE FIRE AND MARINE INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

506 N.W.2d 52

Filed October 1, 1993. No. S-91-586.

1. **Judgments: Interest: Time.** Interest on judgments for the payment of money accrues from the date of rendition of the judgment.
2. **Attorney Fees.** The amount of attorney fees awarded pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1988) is a matter within the discretion of the trial court.
3. **Debtors and Creditors: Principal and Surety: Security Interests: Releases.** Ordinarily, a surety is released pro tanto for the value of any security released by the creditor.
4. **Banks and Banking: Liens: Security Interests: Motor Vehicles.** The lien of a bank under a security agreement with an automobile dealer ordinarily is not valid as to purchasers in good faith of automobiles out of inventory in the dealer's ordinary course of business.

Appeal from the District Court for Keith County: JOHN P. MURPHY, Judge. Remanded with directions.

Robert B. Reynolds and J. Blake Edwards, of McGinley, Lane, Mueller, O'Donnell & Reynolds, P.C., for appellant.

Susan C. Williams and Terrance O. Waite, of Murphy, Pederson & Waite, for appellee.

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

BOSLAUGH, J.

This is an action by the plaintiff, Adams Bank & Trust, against the defendant, Empire Fire and Marine Insurance Company, for recovery under a Nebraska motor vehicle, trailer, or motorcycle dealer's bond in which Fuller Company, Inc., doing business as Fuller Motor Company (Fuller), was the principal and the defendant was the surety. The bond was issued pursuant to Neb. Rev. Stat. § 60-1419 (Reissue 1988), which provides in part that a licensed dealer will fully indemnify any person or other dealer by reason of any loss suffered because of the dealer's misappropriation of any funds belonging to a purchaser.

Fuller is an automobile dealership located in Ogallala, Nebraska. The plaintiff provided floor plan financing for Fuller's used cars and operating expenses through an open-ended note secured by a security agreement and financing statement. As part of the floor plan arrangement, the plaintiff held the certificates of title for Fuller's inventoried vehicles.

The security agreement required Fuller, when requested, to "deliver to Bank, promptly upon receipt, all proceeds of its inventory received by Borrower (except goods), including proceeds of the accounts referred to above, in the exact form in which they are received."

Norman Fuller, the owner of Fuller, testified that he had done business exclusively with the plaintiff for 17 years and that it was routine practice for the proceeds from sales of motor vehicles to be deposited in the dealership account rather than to be paid directly to the plaintiff. The plaintiff admitted that it had permitted this course of conduct and that, occasionally, 5 to 6 weeks would pass between the time that a vehicle was sold and the time it released the title to that vehicle.

The plaintiff monitored the vehicles which it floor planned through periodic inventory inspections. In March 1985, the plaintiff suspected that Fuller had sold some vehicles "out of

trust"—a failure to pay the indebtedness on a vehicle sold—and called Fuller's line of credit, demanding payment of its debt in full. When payment was not made, the plaintiff set off Fuller's checking account in the amount of $39,695.96 on April 10, 1985.

Six vehicles which had been floor planned for $46,100 were sold out of trust in March 1985. The plaintiff did not release the titles to these vehicles until June 6, 1985.

In *Adams Bank & Trust v. Empire Fire & Marine Ins. Co.*, 235 Neb. 464, 455 N.W.2d 569 (1990) (*Adams Bank & Trust I*), this court held that the evidence established as a matter of law that there was a misapplication by Fuller of funds belonging to purchasers of vehicles, since the balance in Fuller's account at the time of the setoff was less than the floor planned value of the vehicles. The cause was remanded to the Keith County District Court for further proceedings.

After the remand to the district court, the defendant offered $8,538.72 ($6,404.04 plus $2,134.68 as an attorney fee) to settle the case pursuant to Neb. Rev. Stat. § 25-901 (Reissue 1989) on January 17, 1991. The plaintiff declined the offer.

After reviewing the bill of exceptions, the briefs of the parties, and this court's opinion in *Adams Bank & Trust I*, on February 20, 1991, the district court found that the only damages proved by the plaintiff which were covered by the bond were in the amount of $6,404.04, the difference between the amount for which the vehicles were floor planned and the amount the plaintiff realized from the setoff of Fuller's checking account. The district court also awarded the plaintiff interest from the date of judgment and costs. The district court's order was filed on February 27.

The defendant filed a motion for new trial on March 4, 1991. On April 23, the plaintiff filed a motion for attorney fees pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1988). On May 2, the defendant filed a motion for an award of costs and attorney fees pursuant to § 25-901.

In an order filed on May 10, 1991, the district court overruled the defendant's motion for new trial, awarded the plaintiff $2,000 in attorney fees, and overruled the defendant's motion for costs and attorney fees. The plaintiff has appealed

from the judgment for $6,404.04 and the award of $2,000 in attorney fees. The defendant has cross-appealed.

The plaintiff assigns as error the district court's failure to include in its award of damages $17,491.94 which was paid by the plaintiff as a result of this court's decision in *Blanchette v. Keith Cty. Bank & Trust Co.*, 231 Neb. 628, 437 N.W.2d 488 (1989); the district court's failure to award interest on the judgment from the date of April 5, 1988; and the district court's failure to award the plaintiff $5,607.43 for reasonable attorney fees.

On cross-appeal, the defendant assigns as error the district court's award of damages to the plaintiff, the district court's award of attorney fees to the plaintiff, and the district court's failure to award the defendant attorney fees pursuant to § 25-901.

In *Blanchette*, the plaintiff was the owner of a car which Fuller had sold on consignment. Blanchette brought an action against the plaintiff in this case, Adams Bank & Trust, for the conversion which resulted when the bank set off Fuller's account. Part of the funds in Fuller's account included proceeds from the sale of Blanchette's car. This court held that the bank had wrongfully applied funds belonging to Blanchette to set off against Fuller's indebtedness to the bank and ordered the bank to pay Blanchette $11,134, the amount of money in Fuller's account belonging to Blanchette, plus $6,357.94 interest. The plaintiff contends that the trial court should have included those amounts in its award of damages.

At the time the plaintiff set off Fuller's account, it contained $39,695.96. Of that amount, $11,134 belonged to Blanchette. If the plaintiff had not wrongfully refused to pay the $11,134 to Blanchette, there would have been $28,561.96 in the account at the time of the setoff. Accordingly, in this case, the plaintiff's damages would be $17,538.04, the difference between $46,100, the amount due for the vehicles floor planned and sold out of trust, and $28,561.96, the balance that would have remained in Fuller's account at the time of the setoff.

The interest paid by the plaintiff as a result of this court's decision in *Blanchette* is not a loss suffered by the plaintiff due to Fuller's misappropriation of funds belonging to purchasers

and is not recoverable under § 60-1419.

Next, the plaintiff argues that the trial court erred in failing to award interest on the judgment from April 5, 1988, the date of the trial court's order following the original trial of this case.

Neb. Rev. Stat. § 45-103.01 (Reissue 1988) provides that interest on judgments for the payment of money accrues from the date of rendition of the judgment. In this case, no damages were determined until the trial court's judgment of February 21, 1991, and the trial court did not err by not awarding interest prior to its order of February 21.

Finally, the plaintiff claims that the trial court erred because it did not award $5,607.43, the amount requested by the plaintiff in its motion for attorney fees.

The plaintiff was awarded $2,000 in attorney fees as provided by § 44-359. The amount of attorney fees awarded pursuant to § 44-359 is a matter within the discretion of the trial court. *Smith v. Union Ins. Co.*, 218 Neb. 797, 359 N.W.2d 113 (1984). The trial court did not abuse its discretion in its award of attorney fees to the plaintiff.

On cross-appeal, the defendant argues that the trial court erred in awarding damages to the plaintiff because the court did not consider the affirmative defense that the plaintiff by its conduct had waived its security interest in Fuller's inventory and proceeds; thereby, any loss the plaintiff suffered was due to its course of conduct in dealing with Fuller.

Ordinarily, a surety is released pro tanto for the value of any security released by the creditor. *First State Bank v. Peterson*, 205 Neb. 814, 290 N.W.2d 634 (1980). However, the plaintiff's lien under its security agreement with Fuller, was not valid as to the purchasers in good faith of automobiles sold out of inventory by Fuller in the ordinary course of business. See, Neb. Rev. Stat. § 60-110 (Reissue 1988); *State v. General Insurance Company of America*, 179 N.W.2d 123 (N.D. 1970).

In *Ramsey Nat. Bk. & Tr. Co. v. Subur. Sales & Serv.*, 231 N.W.2d 732 (N.D. 1975), the dealer financed its inventory through the bank, and in the course of its dealings with the dealer, the bank loaned the dealer the purchase price of a vehicle and kept the vehicle's title until the dealer paid the proceeds of the vehicle's sale. After the bank had been paid, it would

transfer the vehicle's title to the purchaser. The bank discovered that the dealer had sold 13 vehicles out of trust and was forced to release the titles to the purchasers after they brought an action against the bank. The bank then brought an action against the dealer's surety to recover its losses on the dealer's bond.

The North Dakota Supreme Court held in *Ramsey* that although the bank had an unperfected security interest in the dealer's inventory, it was entitled to recover its loss under the bond because the surety failed to show how the bank's status as an unsecured creditor affected its ability to recover under the bond.

In the present case, the defendant has failed to show how the plaintiff's course of dealing with Fuller affected its ability to recover the purchasers' funds which were misappropriated by Fuller.

It is unnecessary to consider the defendant's remaining assignments of error.

The judgment should be modified to award the plaintiff judgment in the amount of $17,538.04. The plaintiff is allowed the sum of $3,000 for the services of its attorneys in this court.

The cause is remanded with directions to modify the judgment of the district court in conformity with this opinion.

REMANDED WITH DIRECTIONS.

SHANAHAN, J., not participating.

BELL FEDERAL CREDIT UNION, APPELLANT, V. KATHLEEN CHRISTIANSON ET AL., APPELLEES.

505 N.W.2d 710

Filed October 1, 1993. No. S-91-635.

1. **Administrative Law: Pleadings: Time: Appeal and Error.** When the petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the district court de novo on the record.
2. **Administrative Law: Judgments: Final Orders: Appeal and Error.** A judgment

rendered or final order made by the district court under the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.

3. **Employment Security: Labor and Labor Relations: Proof.** An employer contesting unemployment benefits has the burden of proving that it suffered a stoppage of work because of a labor dispute.
4. **Employment Security: Labor and Labor Relations: Words and Phrases.** The phrase "stoppage of work" refers to an employer's operations, rather than the employee's labor.
5. **Employment Security: Labor and Labor Relations.** In the final analysis, the considerations relevant to the determination of a stoppage of work will depend on the unique business involved in a particular case.
6. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
7. **Records: Appeal and Error.** The party appealing has the responsibility of including within the bill of exceptions matters from the record which the party believes are material to the issues presented for review.
8. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Soren S. Jensen and J Russell Derr, of Erickson & Sederstrom, P.C., for appellant.

Thomas F. Dowd, of Dowd & Dowd, for appellees.

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

HASTINGS, C.J.

The claimants, here appellees, are employees of the appellant, Bell Federal Credit Union (Bell), and appealed from a determination by the Commissioner of Labor of the State of Nebraska dated July 14, 1989, which disqualified them from receiving unemployment benefits from June 11 through 24, 1989. The determination was based on a finding that the claimants' unemployment resulted from work stoppage due to a labor dispute within the meaning of Neb. Rev. Stat. § 48-628(d) (Reissue 1988), which stoppage began on June 12 and ended on June 23.

At the time the strike began, Bell employed 115 persons. Of these, a total of 53 employees went on strike. Of the remaining 62 employees, 23 were nonunion management and support personnel. Thirteen of the employees had been hired on a temporary basis prior to the strike, and three additional temporary employees were hired after the strike began. A net reduction of 37 employees occurred as a result of the strike.

The Nebraska Appeal Tribunal heard the claimants' appeal on August 28, 1989, and reversed the commissioner's findings. The tribunal stated that Bell's only evidence of revenue loss resulting from the labor dispute arose out of its witness' speculation that the shifting of personnel among the various departments necessarily resulted in a loss of revenue and went on to say:

> Although the evidence shows that the employer suffered a 15% reduction in teller operations, the evidence also shows that union members had been instructed to make use of automatic teller machines during the strike. Consequently, the Tribunal can only speculate as to whether or not the reduction in teller operations resulted in a loss of revenue. Although evidence was presented to show that certain areas of work, such as the processing of loans following initial applications, the working of overdrawn accounts, the processing of applications for ATM cards and the remittance of money orders and traveler's checks after their issuance, and the follow up of insufficient fund checks suffered disruptions, no evidence was offered to show a resulting financial impact on the employer's operations.
>
> The Tribunal can only speculate as to the extent or nature of any impact that this shifting of employees may have had on the employer's operations during the labor dispute. Although some transactions may have been delayed, the Tribunal is unconvinced that there was a significant loss in business or profit to the employer during the labor dispute. Speculation that a slowdown in certain operations during the period of the strike necessarily resulted in a loss of business or revenue could as easily be countered by speculation that the employer's

> operations were more profitable during the labor dispute because of decreased labor costs.
>
> . . . It should be further noted that the employer, by its own statement, was operating at a reduced, but satisfactory level on June 20, 1989. . . .

On appeal, pursuant to the Administrative Procedure Act, the district court held that the order of the tribunal finding that Bell's striking employees were eligible for unemployment benefits because Bell did not suffer a "stoppage of work," as that phrase is used in the Employment Security Law, was supported by substantial evidence and affirmed its decision. Bell made its first appeal to this court.

On March 8, 1991, as reported in *Bell Fed. Credit Union v. Christianson*, 237 Neb. 519, 466 N.W.2d 546 (1991) (*Bell Fed. Credit Union I*), this court reversed the judgment and remanded the cause for further proceedings, finding that the district court had utilized the wrong standard of review, i.e., as an error proceeding rather than de novo on the record. This court further concluded that, as a matter of law, it could not be said that a work stoppage did or did not occur.

We held that a work stoppage exists when it is proven that there has been a substantial curtailment of work produced by a labor dispute in an employing establishment.

> " 'Substantial' has been defined to mean 'material,' 'important,' 'massive,' or 'considerable in amount.' [Citation omitted.] Accordingly, it becomes difficult to fix any definitive standard by which to gauge when a stoppage of work starts or stops.
>
> "In adopting this approach, its effect was to require a case-by-case review of the particular facts and circumstances unique to each case, because we adopted a fluid test to determine when a *substantial* curtailment of work commences, and we remain convinced that this commonsense approach is both logical and reasonable and is the interpretation and application under similar statutes of other jurisdictions. [Citation omitted.]"

(Emphasis in original.) 237 Neb. at 524, 466 N.W.2d at 549-50.

This court ordered on remand that the district court determine in accordance with the new, fluid test the court had

just enunciated whether substantial curtailment of work had resulted from the labor dispute between Bell and its striking employees.

On remand, the district court reviewed the original record. The district court entered an order on May 28, 1991, affirming the decision of the appeal tribunal as follows:

> Upon a de novo review of the record, and after due consideration of the briefs of the parties, the Court finds:
>
> (a) Generally for the defendants/appellees and against the plaintiff/appellant;
>
> (b) That there was no substantial curtailment of the plaintiff's entire operations and that therefore there was no "work stoppage" because of the labor dispute which did exist;
>
> (c) That the plaintiff's operations, although multi-officed, constituted a single integrated establishment, because of the functional dependency upon the main office of the outlying offices;
>
> (d) That the decision of the Nebraska Appeal Tribunal should be affirmed.

Bell again appeals.

As its sole assignment of error, Bell asserts that the district court erred in finding that competent and substantial evidence existed to support the finding of the appeal tribunal that there was not substantial curtailment of Bell's operations and that, therefore, a work stoppage did not occur as a result of the labor dispute between Bell and the claimants. In fact, of course, the district court reached its own conclusion that a work stoppage did not exist, and therefore, we treat the alleged error as claiming that the district court erred in failing to find a substantial curtailment of Bell's operations.

When the petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the district court de novo on the record. Neb. Rev. Stat. § 84-917(6)(b) (Cum. Supp. 1992). The judgment rendered or final order made by the district court may be reversed, vacated, or modified by the Supreme Court for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1990). See,

Davis v. Wright, 243 Neb. 931, 503 N.W.2d 814 (1993); *Bell Fed. Credit Union I*.

> An individual shall be disqualified for [unemployment] benefits:
>
> . . . .
>
> (d) For any week with respect to which the commissioner finds that his or her total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he or she is or was last employed . . . .

§ 48-628.

An employer contesting unemployment benefits has the burden of proving that it suffered a stoppage of work because of a labor dispute. See, *Bell Fed. Credit Union I*; *IBP, inc. v. Aanenson*, 234 Neb. 603, 452 N.W.2d 59 (1990).

The phrase "stoppage of work" refers to an employer's operations, rather than the employee's labor. *George A. Hormel & Co. v. Hair*, 229 Neb. 284, 426 N.W.2d 281 (1988).

As we commented in *Bell Fed. Credit Union I*, "In the final analysis, the considerations relevant to the determination of a stoppage of work will depend on the unique business involved in a particular case." 237 Neb. at 524, 466 N.W.2d at 550.

An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Davis v. Wright, supra*.

A basic tenet of Nebraska law provides that the party appealing has the responsibility of including within the bill of exceptions matters from the record which the party believes are material to the issues presented for review. Neb. Rev. Stat. § 25-1140 (Cum. Supp. 1992). A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991).

Karen Buche, vice president of personnel for Bell, testified before the appeal tribunal that her duties included resource training, payroll, benefits, negotiations, labor, dispute situations, hiring, selection, and recruiting for Bell's 115

employees.

During the strike, when 53 of Bell's employees struck, two of Bell's five Omaha offices were completely shut down, as well as one of the two outstate offices, in order to efficiently redistribute employees (mostly management level) to cover the void left in the customer service operations by those striking. Bell's personnel, collection, marketing, and building maintenance departments were closed. Certain real estate loan applications were accepted but not completed. Only minimal followup on installment loans had been accomplished. Personnel were not able to either follow up on bad checks or remit traveler's checks and money orders.

Buche further testified that the best manner in which to convey the appearance of continued operations was to keep the "Instafacts" telephone account information system and the teller area open, as well as to be available to open new accounts or take any loan applications. However, Instafacts was closed at one office for 2½ days, and there were no new account representatives at any of the locations. Management personnel were attempting to process the new accounts.

Bell was unable to do any of the loan record filing at any location. Real estate loan applications were taken, but none were completed. No processing or monitoring of overdrawn checking accounts were done, nor were any invoices able to be paid. Credit card orders were not processed; that is, if someone needed a new card or an initial card on opening an account, Bell was unable to provide one. Buche went on to testify that they were able to do very little in the way of accident and health insurance sales.

Bell suffered an estimated 15-percent decrease in *teller activity* during the period of the strike. Bell instructed approximately 1,200 members affiliated with the Communication Workers of America and AFL-CIO to utilize automated teller machines, rather than teller personnel, to carry out their credit union transactions. No one who chose to attempt to make his or her deposit or withdrawal at the credit union was denied the opportunity to do so. Buche admitted that she had not looked at any statistics to determine whether there was an increase or decrease in loans made during the strike, but

assumed that when 14 loan officers normally work a location and that work force has been cut down to 2, which was the case, there would be a decrease in activity. Buche also testified that Bell could not have operated with a reduced force much longer than it did.

In order to justify a finding of a work stoppage, it was incumbent upon Bell to demonstrate this in the record. It has failed to do so. It can point only to areas in which the work force was reduced and some operations were temporarily curtailed, but nowhere, short of speculation, is there any support for a determination of a work stoppage applying the definitions with which we must work. The judgment of the district court is supported by competent and substantial evidence, is neither arbitrary nor capricious, and, therefore, is affirmed.

AFFIRMED.

WHITE, J., not participating.

GERALD MARPLE, APPELLEE, V. SEARS, ROEBUCK AND CO., A NEW YORK CORPORATION, APPELLANT.

505 N.W.2d 715

Filed October 1, 1993. No. S-91-642.

1. **Directed Verdict: Negligence: Trial: Appeal and Error.** On review of a directed verdict, the party against whom the motion was granted is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. Where reasonable minds may draw different conclusions from the evidence, the question of negligence is for determination by the jury.
2. **Appeal and Error.** An appellate court will not consider assignments of error which are not discussed in the brief.
3. **Pleadings: Appeal and Error.** The overruling of a motion in limine is not reviewable on appeal.
4. **Trial: Attorneys at Law: Records: Appeal and Error.** Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury, and it is desired to raise a question on that point for decision in an appellate court, it is necessary

that the objection be made to the trial court at the time and an adverse ruling had thereon and that the same be made a part of the record by a proper bill of exceptions.

5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

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

David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

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

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

LANPHIER, J.

Plaintiff, Gerald Marple, was injured while standing at a customer counter in a Sears, Roebuck and Co. store when a refrigerator being moved to a stockroom was pushed into him. The trial court directed a verdict on liability, and the jury awarded Marple damages. Sears appeals, claiming, among other things, that the trial court erred in directing a verdict on liability and that the trial court erred in permitting plaintiff's counsel to comment on the defense's failure to produce a witness at trial who had been listed as an expert in defendant's pretrial memorandum but later changed to a consultant after examining plaintiff. We affirm.

FACTS

On December 21, 1987, Bret Millet was working as a part-time stockroom employee at Sears. Millet was directed to move a refrigerator from the sales floor to the stockroom. He loaded the refrigerator, which he estimated to be 6 feet tall and 3 1/2 feet wide, onto a heavy-duty two-wheeled dolly and pushed it out of the appliance area into the main aisle of the store. When Millet reached the intersection of the main aisle and the aisle which leads to the storeroom, he stopped because

customers were in his way. He said, "Excuse me," but getting no response, he repeated himself louder. After the people he could see moved, he turned onto another aisle. Just after he started, he met with resistance, so he stopped. When he walked around the refrigerator he saw Gerald Marple, a customer, who stated that Millet had pushed the refrigerator into his right knee. Marple had been standing at a counter with his face turned away from Millet's direction and toward the salesperson who was assisting him. Marple stated he never saw Millet coming with the refrigerator nor heard him say, "Excuse me."

At the pretrial conference, Sears listed Kent Jayne, a vocational rehabilitation expert, as an expert witness who might be called at trial. After Jayne interviewed Marple, Sears filed a "Withdrawal of Witness," which stated that Jayne would not be called at trial. Marple then filed a "Notification of Intent to Offer Certain Evidence," which stated that he intended to offer evidence that he was interviewed by Jayne and which stated that Marple intended to comment on the fact that Sears was not going to call Jayne as a witness. Sears filed a motion in limine in opposition. The district court ruled that Jayne was an expert as defined in Neb. Ct. R. of Discovery 26(b)(4)(B) (rev. 1992). However, the court also ruled that Marple could offer evidence of the fact that Jayne had interviewed him and could comment about the fact that Jayne was not called to testify. When Marple offered evidence that Jayne had interviewed him, Sears objected. This was overruled. However, Sears did not object when Marple commented during closing arguments on Sears' failure to call Jayne.

At the close of all evidence, the court granted Marple's motion for directed verdict on the issue of liability after Sears conceded there was no evidence of contributory negligence. The issue of damages was left to the jury.

ASSIGNMENTS OF ERROR

Sears has raised four assignments of error for this court to address: whether the district court erred in (1) directing a verdict in favor of Marple on the issue of liability, (2) allowing Marple to present evidence that Sears retained an expert in preparation for trial who interviewed Marple, (3) allowing Marple's counsel

to refer in argument to Sears' failure to call an expert retained in preparation for trial who could not be called as a witness, and (4) failing to give a requested instruction regarding the failure to call a witness retained in preparation for trial who could not be called as a witness.

DIRECTED VERDICT

On review of a directed verdict, the party against whom the motion was granted is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. Where reasonable minds may draw different conclusions from the evidence, the question of negligence is for determination by the jury. *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989). See, also, *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993); *Stoco, Inc. v. Madison's, Inc.*, 235 Neb. 305, 454 N.W.2d 692 (1990); *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

Marple contends that the facts are undisputed, that those undisputed facts establish negligence as a matter of law, and that the directed verdict was therefore proper. Sears, however, argues that reasonable minds could draw more than one conclusion from the evidence presented.

In support of its position, Sears relies on a number of cases: First, Sears suggests the case at hand is similar to *Ybarra v. Wassenmiller*, 206 Neb. 164, 291 N.W.2d 725 (1980). In *Ybarra*, the defendant backed his pickup truck, which had a camper shell on top of it, into the plaintiff. The plaintiff had advised him to move his truck. The defendant testified that although he looked in his rearview mirrors and through the back window, he never saw the plaintiff. There was an issue of whether the plaintiff had moved away from a place of safety knowing the defendant was going to back up and, thus, whether there was contributory negligence. We determined that the question of whether the defendant kept a proper lookout was for the jury to decide.

Next, Sears cites *Safeway Stores v. Langdon*, 187 Colo. 425,

532 P.2d 337 (1975), in support of its position. In *Langdon*, a grocery store carryout boy, following a customer with her bags in a shopping cart, ran into the customer's ankle with the cart when the customer stopped suddenly to look at a dog food display. The Colorado Supreme Court determined that the trial court had properly denied a motion for a directed verdict on the issue of negligence and held that the issue of negligence was for the jury.

Finally, Sears relies on *Kelley v. Safeway Stores, Inc.*, 267 F.2d 683 (D.C. Cir. 1959). In *Kelley*, a grocery store's customer was injured after she fell while avoiding a train of shopping carts being pushed past a blind corner of the store by a store employee. The trial court had directed a verdict for the defendant, holding that there was not sufficient evidence of the defendant's negligence and that the plaintiff was guilty of contributory negligence as a matter of law. The D.C. circuit court vacated the judgment and remanded the cause for further proceedings.

Sears' reliance on the foregoing cases is misplaced. The uncontroverted evidence of record, when viewed in the light most favorable to Sears, the nonmoving party, establishes that Millet's vision was so obstructed that he was unable to see Marple or anyone else behind the refrigerator. Marple had no idea of the refrigerator's approach. This distinguishes this case from any of those cited by Sears.

In *Ybarra*, the defendant never saw the plaintiff, whom he backed into, but the plaintiff knew that the defendant was backing, and there was an issue of contributory negligence, which Sears concedes is not at issue in this case.

It is true that in *Kelley*, the defendant did not see the plaintiff. However, nothing else about the facts or law of that case is applicable to this case.

Langdon is also factually distinguishable. In *Langdon*, the defendant's employee was pushing a shopping cart and bumped into the customer when she stopped. Both the plaintiff and the defendant knew of the existence of the other. That is not factually similar to this case.

Sears has been unable to cite any fact at issue, relative to liability, which a jury should have decided. The trial judge

correctly determined that Millet's "[e]xcuse me" could not be considered a warning.

The evidence being uncontroverted, and of such a character that reasonable minds could not draw different conclusions from it, the trial court correctly directed a verdict on the issue of liability.

EVIDENCE OF THE EXPERT WITNESS

Sears next contends that the district court erred in allowing Marple to adduce evidence that Sears, in preparation for trial, retained an expert, Jayne, who interviewed Marple. When the evidence was presented, Sears objected that it was irrelevant and that it violated the Nebraska rules of discovery.

In its brief, however, Sears did not discuss the relevance of the evidence. This court will not consider assignments of error which are not discussed in the brief. *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990). See, also, *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993); *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 235 Neb. 207, 454 N.W.2d 671 (1990).

Sears also objected that eliciting evidence about Jayne's interview of Marple violated the Nebraska rules of discovery. Specifically at issue is whether adducing evidence of the existence of an opponent's expert, retained pursuant to rule 26(b)(4)(B), violates that rule.

In support of its position, Sears cites a number of cases, all of which concern the propriety of allowing discovery, and none of which concern adducing evidence. However, Sears recognizes this. Sears argues that it is the underlying rationale of these cases and of rule 26(b)(4)(B) which supports its position. In its brief, Sears says that the rule is based on the concept of fairness and that the rule was designed to prevent a party from taking advantage of another party's trial preparation.

However, we fail to see how Marple took advantage of Sears' trial preparation. Sears had Jayne interview Marple at a time when Jayne was not a rule 26(b)(4)(B) expert. Sears could have made Jayne a rule 26(b)(4)(B) expert prior to the interview. Any harm Sears may have suffered resulted from its decision to change Jayne's designation after the interview of Marple.

Furthermore, subsequently changing Jayne's designation did not change the fact that Jayne had become a percipient witness.

We are not persuaded to create a rule barring evidence of the existence of a rule 26(b)(4)(B) expert under the facts of this case. Although Sears has contended that the court erred in allowing Marple's counsel, during his closing argument, to comment on the fact that Sears did not call Jayne as a witness, that issue is not properly before us. Sears filed a motion in limine in which it sought to have Marple's counsel prohibited from making such comments during closing arguments, but the motion was overruled in that regard. The overruling of a motion in limine is not reviewable on appeal. See *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990). The record fails to show that Sears objected to the comments when made. Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury, and it is desired to raise a question on that point for decision in an appellate court, it is necessary that the objection be made to the trial court at the time and an adverse ruling had thereon and that the same be made a part of the record by a proper bill of exceptions. *Sandomierski v. Fixemer*, 163 Neb. 716, 81 N.W.2d 142 (1957).

Sears also assigned as error the court's refusal to give its offered instruction concerning such an expert. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993). As our earlier discussion illustrates, the tendered instruction is not warranted by the evidence.

The decision of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., not participating.

NORMAN DECKER, APPELLANT, V. COMBINED INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLEE.

505 N.W.2d 719

Filed October 1, 1993. No. S-91-718.

1. **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.
2. **Contracts.** Whether wording in a document is ambiguous is a question of law initially determined by a trial court.
3. **Insurance: Contracts: Words and Phrases.** Regarding words in an insurance policy, the language should be considered not in accordance with what the insurer intended the words to mean but according to what a reasonable person in the position of the insured would have understood them to mean.
4. _____: _____: _____. When an insurance policy contains uncertainties or ambiguities fairly susceptible of two different constructions, the construction favorable to the insured will prevail and thereby afford coverage.

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

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

Michael K. High, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

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

SHANAHAN, J.

The district court for Lancaster County granted summary judgment to Combined Insurance Company of America concerning payments under Combined Insurance's disability policy issued to Norman Decker.

FACTUAL BACKGROUND

In 1986, Norman Decker was employed at Kawasaki Manufacturing Corporation in Lincoln. As a fringe benefit of his employment, Decker was covered by a group disability insurance policy issued by Combined Insurance. In March 1986, Decker suffered a brain aneurysm which left him totally and permanently disabled. Before his disability, Decker worked

full time, and therefore, he was entitled to disability payments of $1,135.91 per month under the policy. Combined Insurance began paying Decker in June 1986 and by April 13, 1988, had paid him $22,614.53.

In April 1988, Decker received notice that he was entitled to federal Social Security disability payments of $530.30 per month retroactively commencing in September 1986. Combined Insurance's policy provided for an offset against payments under its policy if the insured was entitled to payments from the federal Social Security program, that is: "The Monthly Indemnity will be reduced by . . . . (C) Disability and retirement benefits to which you and your dependents are entitled from the Federal Social Security Program . . . ." As a result of the policy provision, Decker's monthly insurance payments of $1,135.91 should have been reduced by $530.30, the amount of the Social Security payments, which would have left Decker with monthly disability payments of $605.61 from Combined Insurance. As of April 13, 1988, and in view of the reduction on account of the Social Security payments, Decker was entitled to $14,172.10 under the policy, whereas he had actually been paid $22,614.53, or an overpayment of $8,442.43. After an allowance of $1,612.50 as a fee for Decker's lawyer in obtaining the Social Security payments, the net overpayment from Combined Insurance to Decker was $6,829.93. Decker authorized Combined Insurance to withhold $530.30 from his monthly disability payments until the net overpayment was repaid.

Under a decree dissolving the marriage between Norman Decker and Connie Decker, custody of the Deckers' minor son, Norman Decker, Jr., was granted to Connie Decker. After the divorce, Norman Decker did not claim his son as a dependent on his income tax return. On July 12, 1988, Connie Decker obtained Social Security payments of $265.10 per month, commencing in September 1986, for Norman Decker, Jr. The Social Security Act deems a child to be a dependent of his or her parent or adoptive parent without regard to where the child is living or whether the child receives parental support. 42 U.S.C. § 402(d)(3) (1988). Combined Insurance's policy does not define "dependent." However, Combined Insurance offset the

monthly Social Security payments of $265.10 for Norman Decker, Jr., against the monthly disability payments of $605.61 to Norman Decker and thereby reduced Norman Decker's payments to $340.51 per month. The reduction resulting from the offset for the child's Social Security payments produced an overpayment of $10,942.38 by Combined Insurance as of April 13, 1988. Combined Insurance unilaterally began to recoup the overpayment at the rate of $340.51 per month withheld from disability payments under Norman Decker's policy.

Norman Decker demanded that Combined Insurance cease offsetting the Social Security payments for Norman Decker, Jr., but Combined Insurance refused. Norman Decker then sued Combined Insurance for the amount of disability payments withheld on the basis of the Social Security payments to Norman Decker, Jr. After a hearing on cross-motions for summary judgment on stipulated facts, the district court determined that there was no genuine issue of material fact and that Combined Insurance was entitled, as a matter of law, to offset the Social Security payments to Norman Decker, Jr., the "dependent" son of Norman Decker, who appeals.

ASSIGNMENTS OF ERROR

Decker asserts that the district court erred by (1) failing to find that the term "dependents" is ambiguous in Combined Insurance's policy and (2) finding that Decker's minor son was his dependent within the meaning of the disability policy.

STANDARD OF REVIEW

"Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). Accord, *Albee v. Maverick Media, Inc.*, 239 Neb. 60, 474 N.W.2d 238 (1991); *Wurst v. Blue River Bank*, 235 Neb. 197, 454 N.W.2d 665 (1990); *Polenz v. Farm Bureau Ins. Co.*, 227 Neb. 703, 419 N.W.2d 677 (1988).

THE DISABILITY POLICY

Decker contends that "dependents," an undefined term used in the disability policy, is ambiguous and argues that

"dependent" means one who is " 'financially dependent' " on another. Brief for appellant at 12. Combined Insurance counters that "dependents," as used in its policy, is defined by the federal Social Security Act. Consequently, to answer the question in Decker's appeal, we must examine the language in Combined Insurance's policy.

"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." *Knox v. Cook*, 233 Neb. 387, 391, 446 N.W.2d 1, 4 (1989). Accord, *Albee v. Maverick Media, Inc., supra*; *Frenzen v. Taylor*, 232 Neb. 41, 439 N.W.2d 473 (1989); *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 334 N.W.2d 463 (1983).

Whether wording in a document is ambiguous is a question of law initially determined by a trial court. *Wurst v. Blue River Bank, supra*; *Knox v. Cook, supra*.

"An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. [Citation omitted.] Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning." *Malerbi v. Central Reserve Life*, 225 Neb. 543, 550, 407 N.W.2d 157, 162 (1987). See *Waylett v. United Servs. Auto. Assn.*, 224 Neb. 741, 401 N.W.2d 160 (1987). "While for the purpose of judicial decision dictionary definitions often are not controlling, they are at least persuasive that meanings which they do not embrace are not common." 2 George J. Couch et al., Cyclopedia of Insurance Law § 15:18 at 194 (rev. 2d ed. 1984). Regarding words in an insurance policy, " '[t]he language should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean. . . .' " *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 25, 317 N.W.2d 745, 748 (1982).

> An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract. A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally

> construed in favor of the insured. Neal v. St. Paul Fire & Marine Ins. Co., 197 Neb. 718, 250 N. W. 2d 648.

Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co., 200 Neb. 46, 49, 262 N.W.2d 183, 186 (1978). See 2 Couch et al., *supra*, § 15:16. "[T]he natural and obvious meaning of the provisions in a policy is to be adopted in preference to a fanciful, curious, or hidden meaning." *Id.* at 175.

In construing insurance contracts, it should be remembered that

> " 'the parties to an insurance contract may make the contract in any legal form they desire, and in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.' "

Safeco Ins. Co. of America v. Husker Aviation, Inc., 211 Neb. at 26, 317 N.W.2d at 748-49 (quoting *Lonsdale v. Union Ins. Co.*, 167 Neb. 56, 91 N.W.2d 245 (1958)). See *Waylett v. United Servs. Auto. Assn., supra.*

The pertinent language of the disputed clause states: "The Monthly Indemnity will be reduced by . . . . (C) Disability and retirement benefits to which *you and your dependents are entitled from the Federal Social Security Program . . . .*" (Emphasis supplied.)

Combined Insurance asserts that the meaning of "dependents" is clear and argues that "dependents," when read in context, should be given the definition employed in § 402(d)(3), the statute which defines when a child is a "dependent" for Social Security purposes. Section 402(d)(3) in pertinent part states:

> A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother . . . unless . . . such individual was not living with or contributing to the support of such child *and*—
>
> (A) such child is neither the legitimate nor adopted child of such individual, or

> (B) such child has been adopted by some other individual.

(Emphasis supplied.) Regarding the conjunction "and" in the preceding statute, Combined Insurance maintains that "dependent" means that a child is a dependent without regard to where the child lives and without regard to whether a parent contributes to the child's support.

Despite Combined Insurance's argument to the contrary, the meaning of "dependents" is ambiguous inasmuch as "dependents" is susceptible of at least two plausible interpretations, namely, the federally legislated definition in the Social Security Act and Decker's suggested definition based on financial dependence or support.

When "an insurance policy contains uncertainties or ambiguities fairly susceptible of two different constructions, the construction favorable to the insured will prevail and thereby afford coverage." *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 497, 334 N.W.2d 463, 465 (1983).

In *Denis*, we said: "Insurance companies in drafting their policies formulate language which may either prevent or create ambiguity. In such draftsmanship, precision provides certainty, while the absence of articulation accounts for ambiguity." 214 Neb. at 498, 334 N.W.2d at 465. We noted in *Denis* that the insured receives the benefit of an insurance contract's doubtful phrasing:

> "It is consistent with both reason and justice that any fair doubt as to the meaning of the words of a policy should be resolved against the one who prepares it, for if the terms of a policy are capable of two meanings, that is, where the true meaning is doubtful, the law favors such construction as will protect the insured, and not avoid the policy."

Id. (quoting *Peony Park v. Security Ins. Co.*, 137 Neb. 504, 289 N.W. 848 (1940)).

Examining Combined Insurance's policy through the eyes of a reasonable person, the objective standard to determine the meaning of language in an insurance policy, see *Safeco Ins. Co. of America v. Husker Aviation, Inc., supra*, "dependent" has a rather ordinary meaning: "one that depends or is dependent; *esp* : one relying on another for support." Webster's Third New

International Dictionary, Unabridged 604 (1981). Combined Insurance's policy does not alert a reader, especially an insured, to an out-of-the-ordinary definition of "dependent" or some esoteric meaning lurking in federal statutes governing Social Security payments. Nowhere does Combined Insurance's policy caution the insured that the definition of "dependent," located in the United States Code, differs from a "plain and ordinary" definition of "dependent" expressed in a standard dictionary. Rather, the policy merely states: "The Monthly Indemnity will be reduced by . . . . (C) Disability and retirement benefits to which *you and your dependents are entitled from the Federal Social Security Program* . . . ." (Emphasis supplied.) Thus, the policy fails to define "dependents" beyond a cryptic connection with the Social Security Act. Ascertaining the definition advanced by Combined Insurance requires that an insured locate and digest a copy of the United States Code pertaining to dependents entitled to Social Security payments. We believe that such a requirement places an unreasonable burden on an insured. Reading Combined Insurance's policy from the insured's point of view, we adopt the "natural and obvious meaning of the provisions in a policy . . . in preference to [the] hidden meaning" suggested by Combined Insurance. 2 Couch et al., *supra*, § 15:16 at 175. Therefore, for the purpose of Combined Insurance's disability policy, "dependents" means those who depend or rely on another for financial support.

Combined Insurance directs us to two decisions concerning offset provisions and the definition of "dependents" in disability policies. In both decisions, the plaintiffs asserted the offset provision was ambiguous, and in both decisions, the courts found no ambiguity. In *Sweet v. Travelers Ins. Co.*, 492 So. 2d 240 (La. App. 1986), which was decided on facts similar to the case here, the group disability policy allowed an offset of benefits paid from sources other than the insurance company which issued the policy. The pertinent provision defined "Other Income Benefits" as benefits available under the "Federal Social Security Act" and stated: " 'Other Income Benefits . . . *shall . . . be deemed to include such Benefits available to or for any and all dependents* (as therein defined) [defined in the federal Social Security Act] of the Employee on account of the

Employee's disability or retirement.' " (Emphasis in *Sweet*.) 492 So. 2d at 241. Unlike the policy at issue in Decker's case, the disability policy in *Sweet* clearly informed the insured that the definition of "dependents" had a special meaning expressed in the federal Social Security Act and, therefore, had a meaning quite different from the standard meaning of "dependents."

In *Porter v. Continental Cas. Co.*, 156 Ariz. 488, 489, 753 P.2d 178, 179 (Ariz. App. 1988), the policy in question stated: " 'Any monthly indemnity payable hereunder shall be reduced by any amount paid or payable under the disability or retirement provision of the Social Security Act (including any payments for eligible dependents) . . . .' " In *Porter*, the court reasoned that even though the word "dependents" was not defined in the policy, the phrase "eligible dependents" related to the Social Security Act. While *Porter* provides some insight into Arizona law, Nebraska law requires us to view the policy language from the perspective of a reasonable person in the position of an insured. Consequently, we find *Porter* to be unpersuasive under the circumstances.

CONCLUSION

The word "dependents" in Combined Insurance's disability policy is ambiguous and, therefore, must be given the meaning or interpretation favorable to the insured, Norman Decker. However, the record does not contain the divorce decree and does not reveal whether Norman Decker was obligated under the decree to provide child support for his son. Also, the record does not reflect what contribution, if any, Norman Decker made to the maintenance and financial support of his son. Under the definition of "dependents," that is, those who depend or rely on another for financial support, the question remains whether Norman Decker, Jr., depends or relies on his father for financial support. Because a question of material fact exists, summary judgment was improper. For that reason, the district court's judgment is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. VIRGIL S. HARRIS, APPELLANT.

505 N.W.2d 724

Filed October 1, 1993. No. S-92-789.

1. **Motions to Suppress: Appeal and Error.** When examining 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. _____: _____. In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion.
3. **Search and Seizure: Standing.** One has a reasonable or legitimate expectation of privacy in his or her body and has standing to contest the search of his or her person.
4. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution does not prohibit all intrusive body searches, only those that are unjustified or performed in an improper manner.
5. **Search and Seizure.** Factors to be considered in deciding whether an intrusive body search is permissible are (1) the government or police must have a clear indication that, in fact, incriminating evidence will be found; (2) the police must obtain a warrant or, in the alternative, exigent circumstances must exist, such as the imminent destruction of evidence; and (3) the police must extract the evidence using a reasonable method and a reasonable manner.
6. **Police Officers and Sheriffs.** Whether police action is reasonable must be determined under the totality of the circumstances.
7. **Search and Seizure.** The reasonableness of a search is a substantive determination to be made by the trial court from the facts and circumstances of the case.

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

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

Don Stenberg, Attorney General, and James A. Elworth for appellee.

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

FAHRNBRUCH, J.

Claiming the trial court erred in receiving into evidence crack cocaine that police officers forced him to expel from his mouth and throat, Virgil S. Harris appeals his conviction for unlawful

possession of a controlled substance with intent to deliver.

Harris claims police officers obtained the crack cocaine as a result of an illegal search and, therefore, the district court for Douglas County should have sustained his motion to suppress that evidence. We disagree and affirm Harris' conviction.

STANDARD OF REVIEW

When examining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly erroneous. *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993); *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992); *State v. Masat*, 239 Neb. 849, 479 N.W.2d 131 (1992). In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *Martin, supra*; *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992).

FACTS

At a pretrial suppression hearing, Sgt. Mark Sundermeier of the Omaha Police Division testified that at about 10 p.m. on November 25, 1991, in the vicinity of 30th and Spencer Streets in Omaha, he observed a brown 1975 Chevrolet Malibu sedan back out of a liquor store parking lot, proceed north on 30th Street a short distance, and then pull up to a pay telephone in the same parking lot. It appeared to the officer that the driver of the Malibu was attempting to avoid him, which the officer thought was suspicious. By radio, Sundermeier ran a license-plate check with police headquarters and was advised the license plate on the Malibu, although expired, was registered to a white Datsun 280ZX.

At the pay telephone, Sundermeier contacted the driver of the Chevrolet, the defendant, Harris. A radio check on Harris revealed that he had "sort of dangerous tendencies." In talking with Harris, the officer found that Harris possessed papers indicating that he owned the Malibu. The officer issued Harris citations for expired "in transit" and fictitious license plates.

During the traffic stop, police officers Joseph Baudler and Suzanne Caldwell arrived to provide Sundermeier backup

assistance. Upon reaching Harris' automobile, while Sundermeier was handing Harris the two traffic citations, Baudler flashed a light inside the car. He saw a package of Zig-Zag cigarette papers lying on the floor. He advised Sundermeier of this fact. Sundermeier then asked Harris and his passenger, "If you have any dope in the car, would you just hand it over?" Harris and his passenger glanced at each other. The passenger gave the officers a baggie of marijuana which he had in his pocket. The passenger was then placed under arrest. A search of the front-seat area of Harris' vehicle produced an additional baggie of marijuana located in a cassette-tape case which the passenger claimed was his. Sundermeier testified that an electronic beeper of the type commonly used by drug dealers to keep in touch with one another was also found on the front seat. A battery-powered digital gram scale of a type used in drug dealing was found under the driver's seat, according to Sundermeier. From these events and discoveries, at least one of the officers suspected that somebody was dealing drugs from Harris' vehicle.

The evidence reflects, and the trial court found, that by an affirmative nod of his head and a sweeping gesture of his hand, Harris voluntarily gave Sundermeier permission to search the trunk of his car. Before the search was made, Harris volunteered, "I've got a gun in there." When Sundermeier asked him whether the gun was registered, Harris shook his head negatively. This question and the response by Harris were suppressed by the trial court. Sundermeier opened the trunk, saw a gun, arrested Harris for a weapon violation, and handcuffed him. Police confiscated a loaded 9-mm pistol and a one-shot .38 derringer from the trunk of Harris' vehicle. It was later determined that the 9-mm pistol had been reported as stolen. The trial court found that whether the pistol was registered or stolen would inevitably have been discovered through data under the control of the Omaha Police Division. See, *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984); *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992). Harris was taken to central police headquarters and placed in an interview-detention room. Subsequently, he was booked for having an unregistered firearm, possession of crack

cocaine with intent to deliver, and theft by receiving stolen property, $200 to $300. Harris was ultimately tried for possession of a controlled substance with intent to deliver and with the use or possession of a firearm during the commission of a felony. He was convicted on the controlled substance charge, and the firearm charge was dismissed by the trial court for insufficient evidence.

In this appeal, Harris does not challenge the trial court's rulings regarding the traffic stop or the searches conducted at the scene of Harris' arrest. The defendant claims only that the trial court erred when it refused to suppress evidence (cocaine) derived from the search and seizure of Harris' person at Central Police Station following his arrest for possession of an unregistered firearm. This search and the seizure of crack cocaine occurred after Harris was placed in an interview-detention room at the police station.

THE SEARCH AND SEIZURE

Officer Caldwell testified at the suppression hearing that while she was sitting with Harris in the interview-detention room, she noticed that he was chewing something. She said she asked Harris to open his mouth. He balled up his tongue so she could not see what he had in his mouth. The trial court found that Harris again began chewing. Caldwell testified, and the court found, that the officer grabbed Harris' throat and ordered him to "spit it out." Harris did not heed the order. The record reflects, and the trial court found, that other officers and jail personnel came into the room and that a struggle ensued for approximately 2 minutes. There was evidence that when another officer first joined Caldwell, Harris stood up from where he was seated and "started to try and push us away from him, so we started to struggle with him at that point." The two officers and Harris fell to the floor.

The trial court found that when Harris did not heed Caldwell's order, external pressure was placed on the defendant to eject whatever was in his mouth and throat. There was evidence that Harris sustained a small cut to his mouth and that a small amount of blood was on the floor and on an officer's clothing following the struggle. Harris testified that he spit up

blood when he vomited the baggie and that his throat hurt for 3 or 4 days after the struggle. However, there was other testimony that Harris apparently suffered no injuries other than the cut to his mouth. At the time Harris was being booked at the jail, he told the booking officer that he had not swallowed anything and that he was all right. The trial court found that immediately after an ejection from his mouth and throat, a baggie, soggy and wet with saliva, was found in Harris' right hand. The baggie appeared to contain cocaine, according to the trial court.

The trial court found that a lateral vascular neck restraint was placed on the defendant to force him to comply with the demand to spit out what was in his mouth and throat and that a Heimlich-type maneuver was also utilized to aid in the ejection of the material. A witness testified that a lateral vascular neck restraint is a self-defense technique used by police officers to gain compliance from suspects. To execute the restraint, an officer places his arm around the suspect's neck from behind the suspect and applies pressure to the sides of the suspect's neck. In this way, the officer keeps the V of his elbow at the front of the suspect's throat, protecting the suspect's larynx and Adam's apple from injury. The restraint can be applied in three phases of escalating intensity and can cause unconsciousness after 3 to 7 seconds. Omaha police are instructed that, if a suspect who has been rendered unconscious fails to revive after 20 seconds, they are to administer emergency cardiopulmonary resuscitation (CPR). The record fails to reflect which of the three intensity phases was used upon Harris. The evidence is in conflict as to whether Harris gagged, choked, or vomited while expelling the cocaine or whether he simply spit it out. Several police officers and jail personnel testified that Harris never lost consciousness. Harris testified that he felt himself "going into a daze or a dream" for a moment and then vomited into his hand. He gave some indication that he may have passed out. A fact finder could have found that he did or did not lose consciousness. Here, the fact finder determined Harris suffered only temporary discomfort, which was minimal, and that the force used was reasonable. Officer Caldwell testified that after the struggle with Harris, she collected crack cocaine mixed with

saliva from the floor, Harris' clothing, his hands, and the baggie found in Harris' hand. The record reflects that, in all, approximately 4 grams of crack cocaine was seized.

In regard to the suppression hearing, the district court found:

> Pressure point force was used to subdue the defendant and force compliance. The force used was not deadly force. The defendant [Harris] was not permanently injured, and his discomfort was temporary. There was no intrusion into the body of the defendant to obtain the baggie and alleged drugs. The force used was reasonable. The expected harm and actual discomfort to the defendant was minimal. To allow the defendant to swallow the plastic baggie containing alleged cocaine could certainly present a health hazard to the defendant. Society has a stake in maintaining the health of its citizens in such circumstances, either voluntarily or involuntarily. And society certainly has a concern in law enforcement retrieving contraband if it can be done so in a reasonable manner without substantial injury to the defendant and according the defendant his rights of dignity and privacy to the extent reasonable and possible under the circumstances.
>
> . . . .
>
> The force used by the Omaha Police Department to have the defendant expel the alleged contraband was not excessive, and the methods used were reasonable under all the facts and circumstances of the case.

Following a stipulated bench trial, Harris was found guilty of unlawful possession of a controlled substance with intent to deliver. He was sentenced to 2 years' imprisonment, with credit for 1 day served. Harris assigns as error the district court's refusal to grant his motion to suppress.

ANALYSIS

Harris claims that the district court should have granted his motion to suppress because in extracting crack cocaine from his mouth and throat, Omaha police used excessive force in violation of his Fourth Amendment rights. Because it is

elementary that one has a reasonable or legitimate expectation of privacy in his or her body, there is no question that a defendant has standing to contest the search of his or her person. *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993).

An examination of whether Harris' rights were violated begins with the seminal case *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952). The U.S. Supreme Court decided *Rochin* before *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). In *Mapp*, the U.S. Supreme Court held that the 4th Amendment to the U.S. Constitution is applicable to the states through the 14th Amendment's Due Process Clause. However, *Rochin* remains instructive in regard to intrusive body searches.

The *Rochin* Court established that police conduct crosses the line between constitutional and unconstitutional when it shocks the conscience. In that case, three police officers, acting on a tip that Rochin was dealing narcotics, entered Rochin's home without a warrant. The officers entered through an open door and then forced open the door to Rochin's bedroom. When the officers saw Rochin put two capsules in his mouth, the three officers " 'jumped upon him,' " 342 U.S. at 166, and unsuccessfully tried to extract the capsules from his mouth. Rochin was taken to a hospital and, at the direction of the officers, given an emetic solution to induce vomiting. Rochin vomited the capsules, which contained morphine. The U.S. Supreme Court characterized the police conduct as shocking to the conscience and held that it was "too close to the rack and the screw" not to have violated Rochin's constitutional rights. *Id.* at 172.

The unconscionable conduct of the police in *Rochin* was based upon the entire course of police conduct beginning with the unlawful entry of Rochin's home, rather than the specific acts of forcibly pumping Rochin's stomach or attempting to prevent Rochin from swallowing the capsules. See, *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957); *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957); *People v Holloway*, 416 Mich. 288, 330 N.W.2d 405 (1982); *Foxall v. State*, 157 Ind. App. 19, 298 N.E.2d 470 (1973).

Although *Rochin* is the starting point for determining the

constitutionality of intrusive body searches, two other U.S. Supreme Court cases, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), and *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985), have set the standard for evaluating the reasonableness of an invasive body search under the Fourth Amendment.

In *Schmerber*, the police took a nonconsensual blood sample from the defendant while he was at a hospital being treated for injuries he suffered during an automobile collision. The sample, which established the defendant's blood alcohol level, was admitted during the defendant's trial on charges of driving while under the influence of alcohol. In determining that the taking of the blood sample did not violate the defendant's Fourth Amendment rights, the U.S. Supreme Court stated that the Fourth Amendment does not prohibit all intrusive body searches, only those that are unjustified or performed in an improper manner. Factors to be considered in deciding whether an intrusive body search is permissible are (1) the government or police must have a "clear indication that in fact such [incriminating] evidence will be found," 384 U.S. at 770; (2) the police must obtain a warrant or, in the alternative, exigent circumstances must exist, such as the imminent destruction of evidence; and (3) the police must extract the evidence using a reasonable method and a reasonable manner.

In *Lee*, the U.S. Supreme Court elaborated on the third criterion listed in *Schmerber*. The Court described a balancing test to be used in evaluating the reasonableness of intrusive searches. On one side of the equation, a court must consider the "extent to which the procedure may threaten the safety or health of the individual" and the extent to which the procedure intrudes on "the individual's dignitary interests in personal privacy and bodily integrity." 470 U.S. at 761. On the other side of the equation, a court must consider the community's interests in "fairly and accurately determining guilt or innocence." *Id.* at 762. In *Lee*, the issue was whether the state could compel the defendant to undergo surgery under general anesthesia to remove a bullet lodged in his chest.

With regard to the issue in this case, the forced expulsion of evidence from a suspect's mouth and throat, we note first that

this court considered a similar issue in *State v. Thompson, ante* p. 189, 505 N.W.2d 673 (1993). In *Thompson*, we upheld the district court's refusal to suppress evidence obtained from the defendant's mouth after police applied a lateral vascular neck restraint that rendered the defendant unconscious.

As discussed in *Thompson*, the weight of federal and state authority supports a determination that police officers may use a considerable amount of force to prevent a suspect from swallowing evidence before such force will be considered unreasonable. For example, in *Foxall v. State*, 157 Ind. App. 19, 298 N.E.2d 470 (1973), police officers executing a valid search warrant had placed the defendant under arrest, when they saw him put something in his mouth. The officers struggled with the defendant, finally forcing the defendant's mouth open with a plastic shoehorn after the defendant bit the fingers of two officers. The police recovered several packets of heroin. During the struggle, the defendant suffered three broken ribs, a bruised lower lip, hemorrhaging of one eye, and several missing teeth. The Indiana Court of Appeals found that the police did not use unreasonable force and did not violate the defendant's due process rights.

The Indiana court distinguished *Rochin* by noting that the search of Rochin was executed after police illegally entered his home without a warrant. The search of Foxall followed an arrest that had occurred during the execution of a valid search warrant. In addition, the court noted that the narcotics recovered from Rochin were recovered from his stomach, whereas the police in *Foxall* recovered the heroin packets from Foxall before he ingested them. See, also, *United States v. Harrison*, 432 F.2d 1328 (D.C. Cir. 1970) (finding that the police acted reasonably in grabbing a suspect by the throat to prevent him from swallowing an envelope which contained heroin capsules); *Jones v. U.S.*, 620 A.2d 249 (D.C. App. 1993) (holding that counsel's failure to file a motion to suppress evidence recovered from defendant through use of Heimlich maneuver was not unreasonable in that the maneuver involved no direct invasion or exposure of body); *State v. Desmond*, 593 So. 2d 965, 971 (La. App. 1992) (holding that police used reasonable force even if they grabbed defendant by the throat

to prevent him from swallowing, and "slammed him to the ground, possibly rendering him unconscious"); *People v Holloway*, 416 Mich. 288, 330 N.W.2d 405 (1982) (holding that police acted reasonably in applying pressure on defendant's jaw and placing fingers in defendant's mouth to recover tinfoil packets containing heroin and cocaine); *Hernandez v. State*, 548 S.W.2d 904 (Tex. Crim. App. 1977) (holding that police were justified in choking defendant until he spit out four balloons containing heroin); *State v. Lewis*, 115 Ariz. 530, 566 P.2d 678 (1977) (holding that police used no more force than necessary when they applied a choke hold on defendant and slapped her back to prevent her from swallowing a balloon containing heroin); *State v. Young*, 15 Wash. App. 581, 550 P.2d 689 (1976) (holding that police used reasonable force when they grabbed the defendant's throat and pinched his nose in an attempt to prevent him from swallowing narcotics); *State v. Santos*, 101 N.J. Super. 98, 243 A.2d 274 (1968) (holding that police used reasonable force when they grabbed suspect's throat and pried open his mouth to prevent him from swallowing narcotics).

Whether police action is reasonable must be determined under the totality of the circumstances, and not all attempts to prevent evidence from being swallowed have been found reasonable. In *State v. Tapp*, 353 So. 2d 265 (La. 1977), the Louisiana Supreme Court determined that New Orleans police officers had used unreasonable force in violation of the defendant's due process and Fourth Amendment rights. In *Tapp*, the defendant entered a house at which police officers were executing a search warrant. When the defendant saw the police, he put a small tinfoil object into his mouth, and five officers fought with him to force the packet out of his mouth. During the struggle, which lasted 15 to 20 minutes, one officer choked the defendant's throat and the others "pummelled defendant in the face and head with their fists." *Id.* at 267. One officer eventually held the defendant's nose to cut off breathing and succeeded in dislodging the packet. The court found the police actions unreasonable in light of the length and brutality of the fight with the defendant. The court called the intrusion a "grievous, dangerous, painful and unjustifiable assault upon a

human being." *Id.* at 269.

California and Washington courts have veered from the views of the majority of courts on the amount and type of force considered permissible. Courts in California and Washington have held that it violates due process for police to choke a person to prevent the swallowing of evidence. In *People v. Sanders*, 268 Cal. App. 2d 802, 803, 74 Cal. Rptr. 350 (1969), the court held that the use of a judo " 'choking technique' " violated the defendant's due process rights, even though the hold might have been a legitimate technique used in judo competition. The court stated that any application of force to a person's neck or throat designed to, and which does, cut off the flow of blood to the brain *so that the person passes out* constitutes choking or its equivalent. See, also, *People v. Jones*, 209 Cal. App. 3d 725, 257 Cal. Rptr. 500 (1989) (holding that where trial court found that police had applied a choke hold, the search was unlawful); *State v. Taplin*, 36 Wash. App. 664, 676 P.2d 504 (1984) (stating that whether a choke hold is excessive depends on whether the hold completely obstructs the defendant's breathing).

However, even in California, courts have held that it is not per se excessive force for police officers to exert pressure on a defendant's throat to prevent evidence from being swallowed. California courts have acknowledged that "the mouth is not a sacred orifice and there is no constitutional right to destroy or dispose of evidence." *People v. Bracamonte*, 15 Cal. 3d 394, 405 n.6, 540 P.2d 624, 632 n.6, 124 Cal. Rptr. 528, 536 n.6 (1975). Accord *People v. Jones, supra*. Consistent with this view, the California courts have held that the application of some force on the throat may be reasonable, particularly where the defendant could be harmed if allowed to swallow the narcotics. In *People v. Fulkman*, 235 Cal. App. 3d 555, 286 Cal. Rptr. 728 (1991), the court found that the police had not used an impermissible choke hold or unreasonable force where the evidence indicated that the officers applied pressure to the defendant's throat near the Adam's apple to prevent swallowing, but that the defendant was not gasping for air. See, also, *People v. Cappellia*, 208 Cal. App. 3d 1331, 256 Cal. Rptr. 695 (1989) (holding that police officers did not use excessive

force when they grabbed defendant around the lower part of his neck near the Adam's apple without putting pressure on the carotid artery or impairing the defendant's breathing); *People v. Miller*, 248 Cal. App. 2d 731, 56 Cal. Rptr. 865 (1967) (holding that evidence supported a finding that no choke hold was applied when the police held the defendant below his chin to prevent him from swallowing, but did not prevent him from breathing).

In light of these cases and the standards enunciated by the U.S. Supreme Court, we continue to consider the search of Harris by the Omaha police officers. The actions of the Omaha police officers in preventing Harris from swallowing the cocaine in his mouth can be distinguished from the actions of the police in *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952). Unlike in *Rochin*, Harris was not searched pursuant to an illegal entry into his home. Nor was his stomach pumped after a sequence of offensive actions, as Rochin's was. On appeal, Harris does not claim that he was illegally in custody at the police station when he attempted to swallow the crack cocaine.

Furthermore, the search of Harris satisfied the Fourth Amendment criteria enunciated in *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), and *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985). First, the police officers had a clear indication that Harris was attempting to swallow narcotics. Harris had been arrested for a weapons violation, and police found Zig-Zag cigarette papers, sometimes used to smoke marijuana; an electronic pager; and a digital gram scale in his car. The officers also had confiscated marijuana from the passenger in Harris' car. At least one officer at the scene suspected that someone was dealing drugs from Harris' car. Harris was waiting to be strip-searched when Officer Caldwell saw him chewing something. Harris refused to let Caldwell see what was in his mouth and refused to spit the crack cocaine out upon the officer's order. Based upon these facts and her experience as a police officer, Caldwell had a clear indication that she would find incriminating evidence in Harris' mouth.

Second, the Omaha police officers were presented with

exigent circumstances. There was no time to obtain a search warrant. Under the exigent circumstances existing, the officers did not need to obtain a warrant to search Harris. Caldwell and the other officers had no way of knowing whether the suspected narcotic in Harris' mouth could be retrieved later or whether it would be destroyed when Harris ingested it. If the crack cocaine was unpackaged, the narcotic could have been metabolized before the police could obtain a blood sample or induce vomiting. The possibility existed that the evidence would be destroyed if the officers did not act immediately to prevent Harris from swallowing it. Moreover, as the district court found, Harris' health and physical safety could have been endangered had the police officers allowed Harris to swallow the suspected narcotic. This too was an exigent circumstance.

The trial court was not clearly wrong in determining that the police officers used reasonable force in extracting crack cocaine from Harris' mouth and throat. Although the determination must be made in light of the fundamental criteria laid down by the Fourth Amendment and court opinions interpreting that amendment, the reasonableness of a search is a substantive determination to be made by the trial court from the facts and circumstances of the case. See, *State v. Sharp*, 184 Neb. 411, 168 N.W.2d 267 (1969); *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963), *cert. denied* 376 U.S. 956, 84 S. Ct. 978, 11 L. Ed. 2d 975 (1964).

In Harris' case, the district court did not explicitly state whether Harris had been "choked" or whether he lost consciousness, but the court did determine that Harris' physical health and safety were not seriously jeopardized. Witnesses in this case testified that Harris did not lose consciousness and that he suffered only a small cut on his lip. The testimony was conflicting as to whether Harris vomited. Unlike the California cases where the courts found that the choking had cut off the suspects' air or blood supply, the district court in Harris' case found that the pressure-point force the police officers "used was not deadly force." The trial court found that "[t]he defendant was not permanently injured, and his discomfort was temporary. . . . The force used was reasonable. The expected harm and actual discomfort to the defendant was

minimal." In fact, the trial court found that Harris' health might have been endangered more by allowing him to ingest the cocaine than by forcing him to expel it from his mouth.

The district court also determined that there "was no intrusion into the body of the defendant to obtain the baggie and alleged drugs." The police used only external pressure to force Harris to comply with their demands. The intrusions upon Harris' individual interests were minimal when weighed against the community's interests in "fairly and accurately determining guilt or innocence." *Winston v. Lee*, 470 U.S. 753, 762, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985).

The district court's finding that the Omaha police officers used reasonable force in obtaining the crack cocaine from Harris was not clearly erroneous, nor was the trial court's denial of Harris' motion to suppress clearly wrong.

AFFIRMED.

WHITE, J., dissenting.

The district court found that the police used a variety of methods to extract evidence they believed the defendant, Harris, was attempting to swallow. Among those various methods, the court found that the police applied a lateral vascular neck restraint (LVNR) to Harris. Because of the life-threatening nature of the LVNR, I cannot agree with the majority's decision and would suggest that the use of the LVNR as a method of securing evidence is unreasonable.

The U.S. Constitution and the Nebraska Constitution provide that persons have a right to be secure in their persons against unreasonable searches and seizures. U.S. Const. amend. IV; Neb. Const. art. I, § 7. In addressing whether a search is reasonable, it is imperative that we recognize that a method and manner of search and seizure may implicate a person's "expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' *even if likely to produce evidence*." (Emphasis supplied.) *Winston v. Lee*, 470 U.S. 753, 759, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985). The need to collect and preserve evidence is a compelling state interest, but the Fourth Amendment and our state's counterpart serve as a constraint against unjustified intrusions or intrusions made in an improper manner. See *People v*

Holloway, 416 Mich. 288, 330 N.W.2d 405 (1982), *cert. denied* 461 U.S. 917, 103 S. Ct. 1900, 77 L. Ed. 2d 288 (1983).

The constitutional constraint on police action is "reasonableness." I submit that the majority's opinion impermissibly broadens the scope of "reasonableness." From the decision announced today, the majority sends the message that the police may act with unfettered discretion in the pursuit of evidence.

The U.S. Supreme Court, in *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), expressed a three-part analysis to apply when an individual has challenged the reasonableness of a search under the Fourth Amendment to the U.S. Constitution. First, the police must have a clear indication that the evidence sought will be found in the place to be searched; second, the police must have a warrant or there must exist exigent circumstances to justify the warrantless search; and third, the method used and the manner in which the search is conducted must be reasonable. See, *Winston v. Lee, supra*; *People v. Holloway, supra*.

In *Schmerber*, the Court addressed the reasonableness of a nonconsensual blood sample taken by medical personnel, at the direction of a police officer, from a person who was under arrest for driving while intoxicated. In applying the three-part analysis, the Court concluded that the blood sample was a reasonable means of securing evidence. First, the Court stated that the strong odor of alcohol on the defendant's breath after the accident gave the police a clear indication that if tested, the defendant would have a high blood alcohol level. Second, the Court found that the evidence the police were seeking was capable of disappearing over a period of time and that time had already elapsed while transporting the defendant to the hospital. Finally, the Court found that the method and manner of collecting the evidence was reasonable because a blood test is the best method to secure this type of evidence, the test was administered by medically trained personnel while at the hospital, and taking blood tests is a routine medical procedure which usually involves little risk of harm, trauma, or pain. The Court cautioned that this procedure was a minimal intrusion that was administered under "stringently limited conditions"

and that its opinion does not permit more "substantial intrusions, or intrusions under other conditions." 384 U.S. at 772.

Subsequently, the Court, in *Winston*, held that surgery to remove a bullet from the defendant was an unreasonable method of collecting evidence. The Court reiterated that the Fourth Amendment represents a constraint on searches and seizures and that a search must be justified and the method and manner employed must be reasonable. The Court stated that although there was a clear indication that the bullet was there, the method of extracting the bullet created a substantial threat to the defendant's health and safety. In reaching that conclusion, the Court compared the procedure and risks associated with taking a blood sample to those associated with general surgery. The Court stated that unlike taking a blood sample, surgery is not a routine medical procedure, and surgery necessarily involves a risk of harm, trauma, and pain to the patient. See *Jones v. U.S.*, 620 A.2d 249 (D.C. App. 1993) (stating that the use of the Heimlich maneuver to force the defendant to expel evidence he was attempting to swallow was reasonable because the Heimlich is a commonly used procedure that does not involve any risk of serious harm).

The method employed to effect a search is a distinct consideration from the manner in which it is employed. A method may be reasonable or unreasonable, and a reasonable method may be executed in a reasonable or an unreasonable manner.

Without commenting on the reasonableness of the other maneuvers employed by the Omaha police in an effort to recover evidence from Harris, I would hold that the LVNR is an unreasonable method to search for evidence. The LVNR constitutes a substantial threat to an individual's health and safety, and such a threat is not outweighed by the State's interest in collecting evidence.

The district court found that the LVNR was applied to Harris during the struggle to retrieve evidence that the police believed Harris was attempting to swallow. At the suppression hearing, Lieutenant Dunning, a training officer with the Omaha Police Division, testified that there are three levels of the LVNR and

that any of those three levels can cause unconsciousness within 3 to 7 seconds. Further, Lieutenant Dunning stated that because unconsciousness is a likely result, the officers are trained in CPR so they may revive a person who does not revive on his own after the LVNR has been applied.

Additional evidence regarding the LVNR was not admitted into evidence because the district court sustained the State's relevancy objection. However, defendant's counsel made an extended offer of proof on the LVNR. This offer of proof particularly illuminates the issue of whether the LVNR should ever be a permissible method of recovering evidence. According to the offer of proof, the LVNR is a special maneuver that the police are regularly trained and retrained on how to use. The intended purpose of the LVNR is to render the subject unconscious, and this result occurs within 3 to 7 seconds of continuous application. The subject is expected to revive, but if not, the police are trained in CPR so they may revive the subject.

The offer of proof also includes a description of four physiological factors that are involved when the LVNR is applied. Those four factors are venous compression, Valsalva's maneuver, carotid compression, and vagus stimulation. All four factors restrict or cut off the flow of blood to and from the brain, or relax certain nerves, which causes the heart to stop beating.

The severity of applying the LVNR is emphasized by the testimony given by the Omaha chief of police, James Skinner. Skinner testified that the LVNR is approved for defensive use only. The police chief stated that the LVNR is to be used as a defense maneuver against an "individual who is engaged in an active assault or attempted assault on the officer." During a redirect examination of the police chief, the following was recorded: "[Defense counsel:] Is the lateral vascular neck restraint an approved procedure in keeping a suspect from swallowing evidence? A. No, it is not." This testimony is corroborated by the police training manual. Regarding the LVNR, the manual states:

> WHEN:
>
> The lateral vascular neck restraint shall be applied only to those suspects who are actively resisting a police officer. This active resistance should be of such a degree that the officer would fear injury to himself/herself or others if the officer did not apply the restraint.
>
> . . . .
>
> DEFENSIVE USE ONLY:
>
> The lateral vascular neck restraint shall be considered a defensive hold and shall be used for no other purpose.

(Emphasis in original.)

There is little evidence to support an argument that Harris was engaged in any aggressive behavior. According to the testimony of Officer Caldwell, who initially grabbed Harris by the throat to retrieve the evidence, she was never in fear for her safety. The only testimony indicating that safety was an issue was that of an Officer Atkinson, who stated that he always fears for his safety when a suspect is not complying with a direct order. Neither the officers involved in the struggle nor the detention technician who observed the struggle saw Harris attempt to strike, hit, or attack any of the officers.

The LVNR is designed and intended to restrict or cut off the flow of blood and to disturb the normal beating of the heart. Its use should be justified only when the police are confronted with force or threat of force of equal magnitude. Common sense dictates that an act designed to restrict the flow of blood and interrupt a normal heartbeat is an act that constitutes a substantial threat to an individual's health and safety. Such a procedure is not a routine occurrence. The retrieval of evidence does not justify the use of the LVNR.

The majority opinion notes that the district court did not "explicitly" state whether Harris lost consciousness and implies that the officers did not cut off Harris' blood or air supply because the district court found the force applied to Harris was not "deadly." The fact that Harris remained conscious does not make the use of the LVNR reasonable, and the district court's finding that the force applied to Harris was not "deadly" does not necessarily lead to the conclusion that

the use of the LVNR was reasonable.

Several courts have held that application of force to a person's throat and mouth area is a reasonable method of preventing a person from swallowing evidence. Significantly, these cases also noted that the air or blood supply of the particular defendant had not been affected by the methods employed by the police officers. See, *People v. Cappellia*, 208 Cal. App. 3d 1331, 256 Cal. Rptr. 695 (1989) (finding that police actions were reasonable when the officer placed his hands at the defendant's throat to prevent swallowing, and stating that the defendant's breathing was not impaired); *People v Holloway*, 416 Mich. 288, 330 N.W.2d 405 (1982), *cert. denied* 461 U.S. 917, 103 S. Ct. 1900, 77 L. Ed. 2d 288 (1983) (stating that it was reasonable to apply pressure to the defendant's jaw and throat and force his mouth open while another officer used his fingers to get the evidence out of the defendant's mouth, and noting that these actions did not restrict or cut off the defendant's air or blood supply); *State v. Taplin*, 36 Wash. App. 664, 676 P.2d 504 (1984) (stating that the police actions were reasonable and did not obstruct the defendant's breathing); *State v. Williams*, 16 Wash. App. 868, 560 P.2d 1160 (1977) (stating that although it is reasonable for police to place their hands around an individual's neck and mouth area to prevent the swallowing of evidence, the police may not cut off an individual's breathing or obstruct the blood flow in an effort to retrieve evidence). The normal flow of air and blood is an important consideration when determining whether a search was unreasonable. In most of these cases, the courts have examined whether the result of the police actions was the restriction of blood and air.

In *People v. Sanders*, 268 Cal. App. 2d 802, 74 Cal. Rptr. 350 (1969), the court held that the police officer violated the defendant's due process rights when he executed a judo choking technique to force the defendant to expel what was in his mouth. The court discussed a variety of things that may be done to a person to prevent him from swallowing evidence, but drew the line at choking. The judo technique applied to the defendant was particularly offensive to the court because it involved applying pressure to both the front and back of the

neck area, specifically the carotid artery. The court found that such a procedure eventually stops the flow of blood and causes the person to pass out. The court stated that any "application of force to one's neck or throat calculated to, and which does, as stated by the officer, stop 'the blood flow to the head, and then he passes out' constitutes choking or its equivalent." 268 Cal. App. 2d at 805, 74 Cal. Rptr. at 351-52. (Contrary to the majority's implication, it does not appear that this defendant was rendered unconscious by the application of the judo choke hold.) In California, the courts have uniformly held that use of a choke hold to retrieve evidence is unreasonable. See, *id.*; *People v. Jones*, 209 Cal. App. 3d 725, 731, 257 Cal. Rptr. 500, 504 (1989) (stating that the police used unreasonable force when they applied a "chokehold," as described in *Sanders, supra*, even though the defendant did not suffer a loss of air or blood flow).

In this case, the particular method employed by the police officers is designed and intended to restrict the flow of blood and to interrupt the normal beating of the heart. As with the proposed surgery in *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985), and the choke holds discussed in *Sanders* and *People v. Jones*, the Omaha police used a particular method that involves a substantial threat of serious injury to the defendant and is therefore unreasonable. The substances obtained thereby should not have been received in evidence.

SHANAHAN and LANPHIER, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ASCENCION ARRENDONDO ESQUIVEL, APPELLANT.

505 N.W.2d 736

Filed October 1, 1993. No. S-93-333.

Criminal Law: Sentences. In a criminal case, a judge in sentencing is required to separately determine, state, and grant the amount of credit on the defendant's

sentence to which the defendant is entitled under Neb. Rev. Stat. § 83-1,106(1) (Cum. Supp. 1992).

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded with directions.

Mark D. Albin for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

PER CURIAM.

Following a plea of guilty to possession of marijuana with intent to deliver, a Class III felony, Ascencion Arrendondo Esquivel was sentenced to prison for not less than 1 nor more than 3 years. A Class III felony carries a penalty of not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1989).

After his sentencing, Esquivel filed a motion seeking 27 days' credit on his sentence for time spent in presentence confinement. At the hearing on the motion, it was the impression of the trial judge that such credit was mandatory only when a maximum sentence was given. In overruling Esquivel's motion for credit, the trial judge stated, "I took the time served into consideration when I sentenced [Esquivel]."

Esquivel timely appealed his conviction and sentence to the Nebraska Court of Appeals. We granted the State's petition to bypass the Court of Appeals.

On appeal, Esquivel's single assignment of error is that the district court failed to grant him credit for his presentence confinement of 27 days.

Formerly, Neb. Rev. Stat. § 83-1,106(1) (Reissue 1987) provided:

> Credit against the maximum term and any minimum term *may* be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall

> not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services.

(Emphasis supplied.)

In 1988, long before Esquivel was sentenced, § 83-1,106(1) was amended by substituting the word "shall" for the word "may." See § 83-1,106(1) (Cum. Supp. 1992). Due to the amendment and due to § 83-1,106(5)(a), in a criminal case, a judge in sentencing is required to separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled under § 83-1,106(1).

We reverse the district court's denial to Esquivel of credit for his presentence confinement time and remand the matter to the district court with directions to grant Esquivel credit on his sentence pursuant to § 83-1,106(1) and (5).

REVERSED AND REMANDED WITH DIRECTIONS.

MIRIAM (DOSENOVICH) JARRETT, APPELLEE, V. DELORES S. EICHLER AND EICHLER EQUIPMENT COMPANY, A CORPORATION, APPELLANTS.

506 N.W.2d 682

Filed October 15, 1993. No. S-91-110.

1. **Motions for New Trial: Final Orders: Appeal and Error.** The filing of a motion for new trial and its subsequent overruling do not convert an otherwise unappealable order into an appealable order. Similarly, the failure to file a motion for new trial does not preclude a party from appealing a final order.
2. **Final Orders: Appeal and Error.** There are three types of final and appealable orders. Neb. Rev. Stat. §§ 25-1902 (Reissue 1989) and 25-1911 (Cum. Supp. 1992). The three types are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
3. **Final Orders.** An order affecting a substantial right made during a special proceeding is a final and appealable order.
4. **Motions to Vacate.** An order to vacate a prior decision is a special proceeding

within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1989).

5. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.
6. **Motions to Vacate: Courts: Time.** The district court has the inherent authority to vacate or modify its decisions within the same term that the initial decision was rendered. If the court has entertained a motion to vacate and retains the authority to rule on such a motion within term, the court has continuing authority to enter an order vacating the prior order even though the term has subsequently expired.
7. **Motions to Vacate: Appeal and Error.** A decision to vacate will be reversed if it is shown that the district court abused its discretion.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and WRIGHT, Judges, on appeal thereto from the District Court for Douglas County, ROBERT V. BURKHARD, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jerry W. Katskee and David A. Castello, of Katskee & Henatsch, for appellants.

John E. Lynch for appellee.

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

WHITE, J.

Delores S. Eichler and Eichler Equipment Company petitioned this court for further review of the decision of the Nebraska Court of Appeals which dismissed their appeal from the Douglas County District Court's order vacating its dismissal of appellee's case for lack of prosecution. The Court of Appeals held that the district court's order was not final and appealable and that, therefore, the Court of Appeals lacked jurisdiction to review the case. *Jarrett v. Eichler*, 2 NCA 621 (1993). We reverse the Court of Appeals' decision and remand the cause to the Court of Appeals with directions to affirm the district court's order vacating the dismissal.

On February 8, 1988, appellee, Miriam (Dosenovich) Jarrett, filed against appellants a negligence action arising from an automobile accident that occurred on February 9, 1984. On

March 7, 1989, the district court dismissed appellee's petition for lack of prosecution. By agreement of the parties, the district court vacated that dismissal on March 15 and reinstated the case for trial. The case was again dismissed for lack of prosecution on June 7 and again reinstated by agreement of the parties on June 8.

The case was dismissed for lack of prosecution for a third time on February 2, 1990. On December 3, appellee filed a motion to vacate that dismissal order, and a hearing was held on December 26. At that hearing, appellee argued that the delay in prosecuting the case was caused by appellee's pregnancy and the fact that appellee had moved to Minneapolis. According to appellee's counsel, appellee's pregnancy delayed medical examinations which were needed to complete discovery in the case. On January 22, 1991, the district court entered an order vacating the dismissal. That order is the subject of the present action.

At the onset, we are compelled to correct errors made by the Court of Appeals regarding motions for new trial. First, the filing of a motion for new trial and its subsequent overruling do not convert an otherwise unappealable order into an appealable order. Similarly, the failure to file a motion for new trial does not preclude a party from appealing a final order. Neb. Rev. Stat. § 25-1912.01 (Reissue 1989) (a motion for new trial is generally *not* a prerequisite for appellate review). Second, even though a court grants a motion for new trial, it does not necessarily follow that what has been granted is a "new trial" within the meaning of Neb. Rev. Stat. § 25-1315.03 (Cum. Supp. 1992). Section 25-1315.03 permits a party to appeal from an order granting or denying a new trial. However, unless the proceedings leading up to the motion for new trial constitute a trial, the order granting a new trial does not afford a right to appeal. *Otteman v. Interstate Fire & Cas. Co., Inc.*, 171 Neb. 148, 105 N.W.2d 583 (1960) (holding that vacating a summary judgment and granting a new trial do not fall within the meaning of "new trial" pursuant to § 25-1315.03 because the summary judgment proceeding itself is not an examination of the law and facts of the case).

The Court of Appeals held that it lacked jurisdiction to

review the merits of the appeal because the order vacating the dismissal was not a final and appealable order. We find, to the contrary, that an order vacating a dismissal made within the same term in which the dismissal was granted is a final and appealable order.

There are three types of final orders which may be reviewed on appeal. Neb. Rev. Stat. §§ 25-1902 (Reissue 1989) and 25-1911 (Cum. Supp. 1992). The three types are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. § 25-1902; *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

Unfortunately, this court has issued opinions regarding final and appealable orders that have not specifically identified which of the three types of appealable orders the court may have been addressing. As a result, we may have contributed to the erroneous assumption that an order is not final until it resolves all of the substantive issues between the parties. See, *In re Interest of R.G., supra*; *Rehn v. Bingaman*, 157 Neb. 467, 59 N.W.2d 614 (1953) (Boslaugh, J., concurring) (discussing the misconception that finality requires that the order from which a party is appealing has determined the action).

Whether an order is final and appealable does not depend upon whether that order completely disposes of the action. For example, an order affecting a substantial right made during a special proceeding is a final and appealable order. A special proceeding which affects a substantial right is, by definition, not part of an action. Rather, a special proceeding includes " 'every special statutory remedy which is not in itself an action.' " *In re Interest of R.G.*, 238 Neb. at 413, 470 N.W.2d at 787 (quoting *Turpin v. Coates*, 12 Neb. 321, 11 N.W. 300 (1882)). Accord *Western Smelting & Refining Co. v. First Nat. Bank*, 150 Neb. 477, 35 N.W.2d 116 (1948).

In this case, the order to vacate arose within the context of a special proceeding. A "special proceeding" occurs when the law has conferred a right and has authorized an application to the court to enforce that right. *Sullivan v. Storz*, 156 Neb. 177, 55

N.W.2d 499 (1952). Further, this court has construed the phrase "special proceeding" to mean every civil statutory remedy which is not encompassed in chapter 25 of the Nebraska Revised Statutes. *In re Interest of R.G., supra*. The district court's authority to vacate its prior decisions within term does not derive from chapter 25; rather, it is an inherent authority and is derived from common law. It is a remedial proceeding that is not itself an action because it does not involve the prosecuting of alleged rights between the parties, and the proceeding does not end in final judgment.

The fact that the order arose during a special proceeding does not end our inquiry. To be final and appealable, the order must affect a substantial right. A substantial right is an essential legal right, not a mere technical right. *Rehn v. Bingaman, supra*; *Sullivan v. Storz, supra*; *Egan v. Bunner*, 155 Neb. 611, 52 N.W.2d 820 (1952). A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *Rehn v. Bingaman, supra*.

In the instant case, the order vacating the dismissal does affect a substantial right of appellants. The order dismissing appellee's action was a final disposition of the case made in favor of appellants. The order vacating that dismissal prevents appellants from asserting a defense against appellee's negligence action. In this state, a negligence cause of action is subject to a 4-year statute of limitations. Neb. Rev. Stat. § 25-207 (Reissue 1989). Appellee's negligence action arose from an accident that occurred on February 9, 1984, and the district court dismissed the action for a lack of prosecution on February 2, 1990. After appellee's action was dismissed, appellee could not maintain a successful negligence action against appellant because appellant could have prevailed on a statute of limitations defense. The order vacating the dismissal destroyed that defense which was previously available to appellant. Thus, the order affects a substantial right. See, *Gutchewsky v. Ready Mixed Concrete Co.*, 219 Neb. 803, 366 N.W.2d 751 (1985) (reviewing an order vacating a motion to dismiss); *A. Hirsh, Inc. v. National Hair Co.*, 210 Neb. 397,

315 N.W.2d 236 (1982) (reviewing an order vacating a motion to dismiss).

The order vacating the dismissal constitutes a final and appealable order, and therefore, this court has jurisdiction to address the merits of the appeal.

The district court has the inherent authority to vacate or modify its decisions within the same term that the initial decision was rendered. If the court has entertained a motion to vacate and retains the authority to rule on such a motion within term, the court has continuing authority to enter an order vacating the prior order even though the term has subsequently expired. *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983); *A. Hirsh, Inc. v. National Hair Co., supra*; *Moackler v. Finley*, 207 Neb. 353, 299 N.W.2d 166 (1980); Neb. Rev. Stat. § 24-310 (Reissue 1989). In this case, the district court had the authority to issue the vacating order even though the term had expired because the court entertained appellee's motion within the same term and retained authority to rule on that motion after the expiration of the term.

The decision to vacate an order is within the discretion of the court. The decision to vacate will be reversed if it is shown that the district court abused its discretion. *Gutchewsky v. Ready Mixed Concrete Co., supra*; *A. Hirsh, Inc. v. National Hair Co., supra*. A court has abused its discretion if its decision is based upon reasons that are " ' "untenable or unreasonable" ' " or if its action is " ' "clearly against justice or conscience, reason and evidence." ' " *Gutchewsky v. Ready Mixed Concrete Co.*, 219 Neb. at 805, 366 N.W.2d at 752-53 (quoting *Pettegrew v. Pettegrew*, 128 Neb. 783, 260 N.W.2d 287 (1935)).

In *Gutchewsky*, this court was provided with a bill of exceptions containing information presented to the district court before it vacated a dismissal order. That information indicated that the plaintiff was making progress in completing discovery and that if the dismissal were not vacated, the statute of limitations would bar the plaintiff from bringing another action. Consequently, the court affirmed the district court's decision to vacate the dismissal. In *A. Hirsh, Inc.*, this court was not provided with a bill of exceptions. As a result, the only

information this court could review to determine whether the district court had abused its discretion was the pleadings and docket entries. On that basis, this court held that the district court had abused its discretion because there was nothing in the record to indicate why the plaintiff's motion to vacate should have been granted.

In the instant case, we have before us the bill of exceptions, including the entire court file, which was entered into evidence during the hearing on appellee's motion to vacate. The record indicates that the delay in prosecuting the case was caused by a delay in the discovery process, which was in turn caused by appellee's pregnancy. After appellee's pregnancy, and within the same term of the court, appellee filed a motion to vacate the dismissal.

Based on the information provided to the district court, and given the circumstances surrounding the delay, this court cannot say that the district court abused its discretion in vacating the dismissal and reinstating the case for trial. Therefore, we reverse the Court of Appeals' decision and remand the cause to the Court of Appeals with directions to affirm the district court's order vacating the dismissal.

REVERSED AND REMANDED WITH DIRECTIONS.

LANPHIER, J., not participating.

ARIZONA MOTOR SPEEDWAY, INC., AN ARIZONA CORPORATION, APPELLANT, V. WARD F. HOPPE, TRUSTEE, AND DONALD CHADD, APPELLEES.

506 N.W.2d 699

Filed October 15, 1993. No. S-91-590.

1. **Statutes: Legislature: Intent: Appeal and Error.** When asked to interpret a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
2. **Statutes: Legislature: Intent.** As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.

3. **Security Interests: Trusts: Deeds: Fees: Words and Phrases.** Under Neb. Rev. Stat. § 76-1011 (Reissue 1990) of the Nebraska Trust Deeds Act, a fee "actually incurred" means a fee that is based on services rendered.
4. **Security Interests: Trusts: Deeds: Liens.** Under the provisions of Neb. Rev. Stat. § 76-1011 (Reissue 1990) of the Nebraska Trust Deeds Act, a trustee has a duty to disburse proceeds to junior lienholders according to priority and, therefore, holds sale proceeds in trust for distribution to lienholders whose interests are junior to the interest of the beneficiary designated in the deed of trust.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded for further proceedings.

Timothy C. Phillips, of Hecht, Sweet, Morrow, Poppe & Otte, P.C., for appellant.

Daniel E. Wherry, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellees.

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

SHANAHAN, J.

Arizona Motor Speedway, Inc. (Speedway), brought an action for a declaratory judgment, see Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989 & Cum. Supp. 1992), and requested an accounting of proceeds obtained from a sale pursuant to the Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 1990 & Cum. Supp. 1992). The district court for Lancaster County granted Ward F. Hoppe, trustee, summary judgment on the basis that the trustee's distribution of funds, including the trustee's claimed fee, was correct as a matter of law so that an accounting was unnecessary. Speedway appeals.

STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Neb. Rev. Stat. § 25-1332 (Reissue 1989). See, also, *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *Anderson v. Service Merchandise Co.*,

240 Neb. 873, 485 N.W.2d 170 (1992); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988).

"Interpreting a statute presents a question of law for judicial determination." *Sports Courts of Omaha v. Meginnis*, 242 Neb. at 770, 497 N.W.2d at 40. Accord *Quality Equip. Co. v. Transamerica Ins. Co.*, 243 Neb. 786, 502 N.W.2d 488 (1993). "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). Accord, *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992); *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

BACKGROUND

Hoppe is the trustee and Cornhusker Bank is the beneficiary under three trust deeds recorded in Cass County on three parcels of real estate. The trust deed for parcel 1 was recorded on September 10, 1985, and the trust deed for parcel 2 was recorded on September 16. Each of those trust deeds on the two parcels was dated September 9 and secured the "payment of the debt to the Beneficiary evidenced by the Trustor's noted [sic] of this same date in the principal sum of $115,000.00 together with interest . . . ." On January 31, 1986, Speedway filed its mortgage on parcel 1. The trust deed for parcel 3 was dated April 27, 1987, was recorded on April 29, and stated that the deed secured "payment of the debt to the Beneficiary evidenced by the Trustor's note of this same date in the principal sum of $20,000.00 together with interest . . . ." Donald Chadd obtained a judgment lien in the amount of $60,971 on June 12, 1987, against parcels 2 and 3.

Each of the three recorded deeds of trust contained a provision concerning a trustee's fee in the event of a trustee's sale after the trustor's default: "Trustee's fees hereunder shall be deemed reasonable if they are the greater of either the actual costs incurred by the Trustee or 5% of the balance of the original amount secured hereby."

After the trustor's default on payment of the notes secured by the deeds of trust, the three parcels were sold collectively to the

highest bidder for $145,000 at the trustee's sale on June 24, 1988. Hoppe, as trustee, delivered to Speedway and Chadd a "Trustee's Disbursement Statement" reflecting distribution of the $145,000 realized from the sales under the deeds of trust. According to the trustee's disbursement statement, the trustee's fee for the sale of parcels 1 and 2 was $5,750, with sale costs of $129.25. The trustee's fee for parcel 3 was $381.47, with costs of $68.20. Consequently, the trustee's fees and costs for the sales were $6,328.92. Principal and interest due Cornhusker Bank, as beneficiary, regarding the debt secured by parcels 1 and 2 was $129,307.52. The principal and interest regarding the debt secured by parcel 3 was $7,629.47. Consequently, the total due on the indebtedness to Cornhusker Bank was $136,936.99. After deduction of the trustee's fees, costs, and the indebtedness to the bank, there remained $1,734.09 for distribution to "Secondary Lien Holders," which included Speedway and Chadd. At that point, the balance of the trustor's mortgage-debt to Speedway was $84,750.

Speedway filed its declaratory judgment action to determine "the rights of defendant, Ward F. Hoppe, as trustee and the rights of [Speedway] and defendant, Donald Chadd" concerning the proceeds of the sale under the Nebraska Trust Deeds Act. Speedway also requested an accounting "as to all moneys and properties received and held by [the trustee] in connection with the discharge of his duties required pursuant to the Nebraska Trust Deeds Act" concerning the sale of the three parcels.

Hoppe moved for summary judgment concerning the trustee's fees and costs reflected in the trustee's disbursement statement. The district court determined that the "beneficiary and the trustee had an agreement regarding the fees to be paid to the trustee for services as a trustee" concerning sales of the real estate described in the deeds of trust, and it further determined that the trustee's fees of $5,750 for the sales of parcels 1 and 2 and $381.47 for parcel 3 "did not exceed 5% of the balance of the original amount secured by the three Trust Deeds." In view of the fee arrangement between the trustee and beneficiary, the district court ruled that $6,328.92 was the amount due the trustee as the "fees actually incurred [that is]

those fees agreed upon between the trustee and beneficiary." Consequently, the trustee's fee and costs of $6,328.92, as a matter of law, was the correct amount due the trustee; hence, an accounting was unnecessary. The court then dismissed Speedway's action.

ASSIGNMENTS OF ERROR

Speedway contends that the district court erroneously granted summary judgment to Hoppe because (1) § 76-1011 of the Nebraska Trust Deeds Act allows compensation to a trustee only for the "fees actually incurred," that is, for the "trustee's services necessary after the trustor's default" and "not exceeding the amount provided in the trust deed," and (2) the court refused to order an accounting by the trustee.

NEBRASKA TRUST DEEDS ACT

This appeal presents a question of first impression regarding a trustee's fee allowable under § 76-1011 of the Nebraska Trust Deeds Act, which states:

> The trustee shall apply the proceeds of the trustee's sale, first, to the costs and expenses of exercising the power of sale and of the sale, including the payment of the trustee's fees actually incurred not to exceed the amount which may be provided for in the trust deed, second, to payment of the obligation secured by the trust deed, third, to the payment of junior trust deeds, mortgages, or other lienholders, and the balance, if any, to the person or persons legally entitled thereto.

Hoppe contends that § 76-1011 contains no "mandate or prohibition regarding type, kind, quality, or quantity of fees that may be charged for acting as Trustee except as the same may be limited by the terms set forth in the Trust Deed." Brief for appellee at 3-4. Hoppe then argues that because "there was a limitation set forth within the Trust Deed to five percent (5%) of the original amount secured by the Deed of Trust," the amount of the fee "would have been for the first and second Trust Deeds, each $5,750.00; for the third Trust Deed, $1,000.00." Brief for appellee at 4. In contrast, Speedway contends that an "actually incurred" fee must necessarily be calculated according to the trustee's services actually rendered,

and, therefore, is unascertainable before completion of the trustee's duties. Speedway argues that § 76-1011 imposes a limit on a trustee's fees, namely, a trustee's fee cannot "exceed the amount which may be provided for in the trust deed."

When asked to interpret a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. A court has a duty to discover, if possible, legislative intent from the statute itself. *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985); *Adkisson v. City of Columbus*, 214 Neb. 129, 333 N.W.2d 661 (1983). "When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning." *State v. Crowdell*, 234 Neb. 469, 473-74, 451 N.W.2d 695, 699 (1990). Accord, *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992). "As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible." *Wounded Shield v. Gunter*, 225 Neb. 327, 333, 405 N.W.2d 9, 13 (1987). Accord, *Maack v. School Dist. of Lincoln, supra*; *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.2d 459 (1987).

> [An appellate court], in construing a statute, looks to the objects to be accomplished, the evils and mischief sought to be remedied, or the purposes to be served, and places upon the statute a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. [Citation omitted.] Further, effect must be given, if possible, to all the several parts of a statute. No sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. It is not within the province of this court to read meaning into a

> statute that is not warranted by legislative language; neither is it within the province of the court to read anything plain, direct, and unambiguous out of a statute.

NC+ Hybrids v. Growers Seed Assn., 219 Neb. at 299, 363 N.W.2d at 365.

In *Blair Co. v. American Savings Co.*, 184 Neb. 557, 558-59, 169 N.W.2d 292, 293-94 (1969), this court stated:

> The Nebraska Trust Deeds Act was enacted by the 1965 Legislature. Laws 1965, c. 451, p. 1423. It authorizes the use of trust deeds to secure the performance of obligations and prescribes, generally, the procedures for their execution and enforcement. The act provides that a trust deed may confer a power of sale upon the trustee. In the event of a default, the trust property may be sold by the trustee to satisfy the obligation secured. The act also provides for the substitution of trustees, reinstatement after default, and the procedure for the sale and conveyance of the trust property by the trustee.
>
> . . . .
>
> The Nebraska Trust Deeds Act authorizes the use of a security device which was not available prior to its enactment. The act permits the use of an instrument which may be foreclosed by sale without the necessity of judicial proceedings. It authorizes and permits a method of financing which was not formerly available, since trust deeds have been considered to be subject to the same rules and restrictions as mortgages.

Our first inquiry concerns the meaning of the phrase "actually incurred" as used in § 76-1011, since neither the statute nor any other part of the Nebraska Trust Deeds Act supplies a definition of "actually incurred." However, "actual" is defined in Webster's Third New International Dictionary, Unabridged 22 (1981) as "existing in act . . . : EXISTENT — contrasted with *potential* and *possible* . . . existing in fact or reality : really acted or acting or carried out — contrasted with *ideal* and *hypothetical*." "Actually" means "in act or in fact : REALLY." *Id.*

Hoppe asserts that the deed of trust, as a contract between Cornhusker Bank and Hoppe, established the fee to be paid to

the trustee. According to Hoppe, inasmuch as the deed of trust stated the trustee's fees would be deemed reasonable " 'if they [were] the greater of either the actual costs incurred by the Trustee or 5% of the balance of the original amount secured hereby,' " brief for appellee at 1, the predetermined trustee's fee was "actually incurred" on completion of the trustee's required duties.

Section 76-1005 of the Nebraska Trust Deeds Act provides that "[a] power of sale may be conferred upon the trustee which the trustee may exercise and under which the trust property may be sold . . . after a breach of an obligation for which the trust property is conveyed as security . . . ." Under § 76-1011, the proceeds from the sale of the trust property apply "first, to the costs and expenses of exercising the power of sale and of the sale, including the payment of the trustee's fees." Based on the foregoing statutory provisions, a trustee's fee is an expense engendered by the sale of real estate that is security under a trust deed. Although a trust deed may confer the power of sale, this authority for a sale is not activated without a trustor's default on the secured obligation. Thus, a trustee's services, as a basis for compensation related to a deed of trust, do not arise before a trustor's default, and, indeed, will never materialize in the absence of a trustor's default. Consequently, a trustee's fee cannot be "actually incurred" before a trustor's default and, therefore, cannot be ascertained at the time the deed of trust is signed.

Considering the Nebraska Trust Deeds Act as a whole and giving the words of § 76-1011 their ordinary meaning, a fee "actually incurred" means a fee that is based on services rendered. Because the duty to perform services arises only on a trustor's default, a trustee's fees cannot be fixed at the time the trust deed is executed. Therefore, the contract between Hoppe and Cornhusker Bank could not establish the fee due Hoppe as trustee.

We must also examine the language of § 76-1011 which provides that proceeds from a sale are applied to fees actually incurred "not to exceed the amount which may be provided for in the trust deed." Hoppe argues that this language "implies that any fee which does not exceed that amount set forth in the

trust deed would be allowed." Brief for appellee at 3. As we interpret § 76-1011, the statute clearly authorizes a contractual limit on a trustee's fee. Nevertheless, a trustee's fee is governed by § 76-1011 and must be "actually incurred."

A hypothetical example may illustrate the situation contemplated by the Nebraska Trust Deeds Act. Assume a deed of trust secures a promissory note in the original principal amount of $100,000. Under the deed of trust, a trustee has the power of sale in accordance with § 76-1005, but the deed provides that the trustee's fee shall not exceed 5 percent of the original principal amount of the secured note. The trustor defaults, and the trustee, pursuant to the Nebraska Trust Deeds Act, sells the security. Assume further that the trustee's services warrant a fee of $3,000 based on reasonable time and labor expended. This $3,000 fee is "actually incurred" under § 76-1011, and, consequently, the trustee is entitled to receive payment of the $3,000 fee as a cost and expense of the trustee's sale. However, in our illustration, if the trustee's services warrant a fee of $6,000 based on reasonable time and labor expended, the limiting provision in the trust deed serves as a cap on the fee which the trustee may receive, and, for that reason, the trustee would be paid only $5,000, 5 percent of the original principal amount secured by the deed of trust.

The trust deeds in this action stated that the trustee's fees would be reasonable "if they [were] the greater of either the actual costs incurred by the Trustee or 5% of the balance of the original amount secured hereby." In view of § 76-1011, the language of the trust deeds imposes a limit of 5 percent on the trustee's fee for services actually rendered. We note that even if we were to accept the interpretation which Hoppe urges, Hoppe is still required to substantiate his services because a trustee would be required to show his or her actual services as the basis for a fee versus a percentage fee, to establish which is greater.

SPEEDWAY'S REQUEST FOR AN ACCOUNTING

Speedway requested, but the district court refused to order, an accounting regarding Hoppe's actions as a trustee.

> "An action for accounting may, under one set of circumstances, find its remedy in an action at law and,

> under another, find it within the jurisdiction of equity. Where . . . the intimate relationships of the parties are involved, an adequate remedy [is] available only within the equitable jurisdiction of the court."

American Sec. Servs. v. Vodra, 222 Neb. 480, 492, 385 N.W.2d 73, 81 (1986) (quoting *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982)).

> Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to show a fiduciary or trust relationship between the parties, or a complicated series of accounts, making the remedy at law inadequate. [Citations omitted.] In an accounting action the burden is upon the plaintiff to establish his right to the accounting.

American Sec. Servs. v. Vodra, 222 Neb. at 492, 385 N.W.2d at 81. As stated by one author:

> The relations between the trustor and trustee under a deed of trust would seem to be the same as those between a mortgagor and mortgagee, that is, to be of a business character and not of a fiduciary nature.
>
> . . . .
>
> When one considers the relationship between the trustee under the trust deed and the creditors secured, the elements necessary for a true trust are present, namely, identified property held for others in a fiduciary relation.

George G. Bogert, The Law of Trusts and Trustees § 29 at 374-75 (rev. 2d ed. 1984).

We hold that the Nebraska Trust Deeds Act results in a fiduciary relationship between the trustee and the creditors secured by a deed of trust. Also, under the provisions of § 76-1011 of the act, a trustee has a duty to disburse proceeds to junior lienholders according to priority and, therefore, holds sale proceeds in trust for distribution to lienholders whose interests are junior to the interest of the beneficiary designated in the deed of trust. Therefore, Speedway, although not a party to the deed of trust, became a statutory beneficiary by virtue of Cornhusker Bank's invocation of the Nebraska Trust Deeds Act.

The evidence in this case established that proceeds from the trustee's sale remain for distribution to junior lienholders after

sales proceeds were applied to the trustor's debt to Cornhusker Bank. Therefore, in the case at hand, as a statutory beneficiary, Speedway became a beneficiary in fact when a surplus remained for distribution after application of the sales proceeds to the trustor's debt owed to Cornhusker Bank.

> "The dealings of a trustee with the trust property are narrowly scrutinized by courts of equity. If impugned, they cannot stand unless characterized by the utmost good faith and candor. And the burden is upon the trustee to show their entire fairness." Where the duty of the trustee or agent requires it, he must keep true, regular and accurate accounts of all his transactions, both of receipts and disbursements, and should render a full and complete statement, supported by proper vouchers.

Red Bud Realty Company v. South, 96 Ark. 281, 299, 131 S.W. 340, 348 (1910) (quoting *McNeil v. Gates*, 41 Ark. 264 (1883)). Accord *A & P's Hole-in-One, Inc. v. Moskop*, 38 Ark. App. 234, 832 S.W.2d 860 (1992).

In the present case, Hoppe's disbursement statement did not specify whether the trustee's fee was based on the 5-percent provision in the deeds of trust or on services actually rendered. Thus, viewed in a most liberal and favorable light, the trustee's disbursement statement submitted by Hoppe reflects printing costs incurred for the sales, but fails to supply any information concerning the trustee's services performed, time expended, or the basis on which the trustee's fees were computed. Therefore, Hoppe's disbursement statement falls short of a full and complete accounting required from a fiduciary under the circumstances. Because the trustee's disbursement statement does not suffice as an accounting, Speedway is entitled to an equitable accounting of Hoppe's actions as trustee in connection with the exercise of the power of sale pursuant to the Nebraska Trust Deeds Act.

SUMMARY JUDGMENT

Summary judgment is proper only where there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." § 25-1332. "Upon a motion for summary judgment the court examines the evidence

to discover if any real issue of fact exists." *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. 610, 614, 365 N.W.2d 430, 433 (1985). "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." *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 163, 425 N.W.2d 872, 875 (1988). Accord, *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989). " ' "A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered." ' " *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. at 617, 365 N.W.2d at 434 (quoting *Wolf v. Tastee Freez Corp.*, 172 Neb. 430, 109 N.W.2d 733 (1961)).

Since we have determined that Hoppe must render an accounting concerning fees actually incurred, see § 76-1011, a genuine issue of material fact remains regarding the time and labor involved in the sale of the trust property, the skill required, the responsibility assumed, the care and diligence exhibited, and the customary charges for similar services, as well as any other factors which might bear upon an appropriate trustee's fee under the circumstances. Given these unresolved factual issues, the district court's order granting summary judgment is incorrect.

Therefore, the district court's order granting summary judgment is reversed, and this cause is remanded for reinstatement of Speedway's action and for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

NEBRASKA PUBLIC EMPLOYEES LOCAL NO. 251, AMERICAN FEDERATION OF STATE AND COUNTY MUNICIPAL EMPLOYEES, AFL-CIO, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

506 N.W.2d 686

Filed October 15, 1993. No. S-91-634.

1. **Pleadings.** An affirmative defense raises new matter which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a claim asserted in the petition.
2. **Pleadings: Appeal and Error.** An affirmative defense must be pleaded to be considered in the trial court and on appeal.
3. _____: _____. An affirmative defense not raised or litigated in the trial court cannot be urged for the first time on appeal.
4. **Contracts: Pleadings.** Matters which seek to avoid a valid contract are affirmative defenses.
5. _____: _____. An affirmative defense must be pleaded in a contract action, and a general denial is not sufficient to raise any affirmative defense.
6. **Attorney Fees: Words and Phrases.** As used in Neb. Rev. Stat. § 25-824(2) (Reissue 1989) concerning allowance of an attorney fee, "frivolous" means a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit.

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

Herbert M. Fitle, Omaha City Attorney, Kent N. Whinnery, Wendy E. Hahn, and Mary M. Elliston for appellant.

Thomas F. Dowd, of Dowd & Dowd, for appellee.

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

SHANAHAN, J.

This contract action between the Nebraska Public Employees Local No. 251 (Union) and the City of Omaha (City) concerns the contractual right of female jail detention technicians to bid for work shifts based on seniority under the Collective Bargaining Agreement (CBA) between the City and the Union. The district court found the City had violated the CBA, permanently enjoined the City from assigning work shifts based on its unilateral policy, and ordered that the work shifts for female detention technicians be rebid according to

provisions of the CBA.

STANDARD OF REVIEW

"An injunction is a remedy available through an equity action." *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 750, 472 N.W.2d 391, 395 (1991). Accord, *K N Energy, Inc. v. Cities of Broken Bow et al., ante* p. 113, 505 N.W.2d 102 (1993); *Burton v. Annett*, 215 Neb. 788, 341 N.W.2d 318 (1983).

> In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where credible evidence is in conflict on a material issue of fact, an 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.

Chambers-Dobson, Inc. v. Squier, 238 Neb. at 750, 472 N.W.2d at 395. Accord, *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987). See Neb. Rev. Stat. § 25-1925 (Cum. Supp. 1992).

BACKGROUND

Since 1983, detention technicians I and II working in the City's jail facility have been classified as employees within the bargaining unit covered by the CBA between the Union and the City. The City's jail facility houses both female and male detainees. The duties of detention technicians include booking and searching prisoners and observing prisoners in their cells.

Since 1983, the CBA's provisions for shift-bidding and seniority rights have not been modified by negotiations between the Union and the City. The CBA was admitted into evidence without objection and details how employees covered by the CBA select, or bid for, work shifts based on seniority. The CBA provides in relevant part:

> When the work day is divided into more than one shift on the first regularly scheduled working day in January of each year, the CITY shall post a notice designating the hours of shifts and the number of employees required for

> each shift. Employees shall have fifteen days in which to submit their bids in writing to the Labor Relations Office for the shift they desire. Effective on the first regularly scheduled working day in February, employees shall be assigned said shifts on the basis of their bids by exercising their seniority right under Article 8, Section 1.

The CBA further states that "[s]eniority is hereby defined as the employee's length of continuous service in the bargaining unit except as otherwise provided herein."

Thomas Marfisi, director of labor relations for the City, testified that the CBA entitled classified employees to bid for shifts based on the employee's seniority. He further testified that the language of the contract provided "no exceptions to that rule." Marfisi also testified that while detention technicians were only a small percentage "of the group represented by that labor contract," technicians were still "entitled to the benefit of that agreement."

John Foster, the Union's vice president, testified that in January 1991, the City unilaterally adopted a policy limiting the shift-bidding rights of female detention technicians. The City's new policy for bidding was expressed in a memorandum entitled "Inter-Office Communication" which was dated January 25 and informed "All Detention Section Personnel" that 1991 watch schedules had been determined and detention technicians I could bid for days off based on seniority. The Union complained about the memo's statement, "Note: Any schedule choice wich [sic] does not ensure at least one female Detention Technician is assigned to be on duty each day will not be an available choice."

The City based its policy on Neb. Rev. Stat. § 47-111 (Reissue 1988) and the "Nebraska Jail Standards Regulations" promulgated pursuant to the statute. See Standards for Jail Facilities, 81 Neb. Admin. Code, ch. 2, § 003.02A (1984). Section 47-111 and its accompanying regulation require that every county jail have a "matron" on duty 24 hours a day to supervise female prisoners.

In January 1991, the staff for the City's jail consisted of six female and nine male detention technicians I and four female and one male detention technicians II. Therefore, the City's jail

had a staff of 20 detention technicians I and II, 10 of whom were females.

Detention manager Frederick Power, when asked whether the City required a particular classification of a female detention technician to satisfy its policy, answered that the interoffice policy memo was "addressed to Detention Technicians I to insure that one—that one of those would always be available." According to Power, the policy required that a female detention technician I always be on duty even if a female detention technician II was available and even though having a female detention technician II on duty would satisfy the requirements of the Nebraska Jail Standards Regulations.

In January 1991, Brenda Rocha, a detention technician I with adequate seniority, bid on the C shift, from 3 to 11 p.m. However, the City assigned Rocha to work the B shift, from 7 a.m. to 3 p.m.

The Union filed suit on January 31, 1991, and requested injunctive relief against the City's policy affecting employees' rights under the CBA. The City filed no answer in the lawsuit. During trial, the City presented evidence that the CBA had remained essentially the same from 1983 until the Union brought suit. After a hearing on the Union's request for temporary and permanent injunctive relief, the district court found the City's policy violated the CBA and resulted in a denial of bargaining unit employees' contractual rights. The district court permanently enjoined the City from assigning work shifts on the basis of its policy and ordered the City to have the work shifts rebid and assigned according to the CBA's provisions.

ASSIGNMENTS OF ERROR

As its first assignment of error, the City contends that the district court erred in determining that the CBA applied to the detention technicians at the City's jail facility. In its second, third, and fourth assignments of error, the City maintains the district court erred in not finding a conflict between the City's obligations under the CBA and its duty to abide by § 47-111 and the Nebraska Jail Standards Regulations. In essence, the City argues that compliance with the CBA's provisions on shift-bidding and state law requiring that female jail guards be

on duty 24 hours a day is impossible and that state law supersedes the CBA adopted as a City ordinance. In its fifth assignment of error, the City asserts that the district court erred in not dismissing the action because of the statute of limitations or laches.

AFFIRMATIVE DEFENSES

As one of the statutory provisions for pleadings in civil cases, Neb. Rev. Stat. § 25-811 (Reissue 1989) provides that "[t]he answer shall contain (1) a general or specific denial of each material allegation of the petition controverted by the defendant; and (2) a statement of any new matter constituting a defense, counterclaim or setoff, in ordinary and concise language, and without repetition." Neb. Rev. Stat. § 25-812 (Reissue 1989) authorizes a defendant to plead an affirmative defense. "An affirmative defense raises new matter which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a claim asserted in the petition." *Hogan v. State Farm Auto. Ins. Co.*, 607 So. 2d 747, 751 (La. App. 1992). "The essence of affirmative defenses is to concede that while the plaintiff otherwise may have a good cause of action, the cause of action no longer exists because some statute or rule permits defendant to avoid liability for the acts alleged." *Brown v. Ehlert*, 250 Mont. 140, 146, 841 P.2d 510, 514 (1992). "An affirmative defense generally admits the matters alleged in a complaint but brings up some other reason why the plaintiff has no right to recovery. It thus introduces arguments not raised by a simple denial." *Van Schouwen v. Connaught Corp.*, 782 F. Supp. 1240, 1246 (N.D. Ill. 1991).

An affirmative defense must be pleaded to be considered in the trial court and on appeal. See, *Lease Northwest v. Davis*, 224 Neb. 617, 400 N.W.2d 220 (1987); *Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co.*, 195 Neb. 658, 240 N.W.2d 28 (1976). An affirmative defense not raised or litigated in the trial court cannot be urged for the first time on appeal. See *Guaranteed Foods v. Rison*, 207 Neb. 400, 299 N.W.2d 507 (1980). See, also, *Lease Northwest v. Davis, supra*; *Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co., supra*.

> The rationale for requiring the defendant to plead a specific defense is to set forth the defense so that the plaintiff may be advised of the exact defense he or she will be required to meet and the trial court may be informed as to the exact issues to be determined.

Plock v. Crossroads Joint Venture, 239 Neb. 211, 226-227, 475 N.W.2d 105, 116 (1991). Accord *Timmerman v. Hertz*, 195 Neb. 237, 238 N.W.2d 220 (1976). "The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone." *First Nat. Bank v. Benedict Consol. Indus.*, 224 Neb. 860, 865, 402 N.W.2d 259, 262 (1987). See, also, *Center Bank v. Mid-Continent Meats, Inc.*, 194 Neb. 665, 234 N.W.2d 902 (1975).

"[M]atters which seek to avoid a valid contract are affirmative defenses." *Lease Northwest v. Davis*, 224 Neb. at 623, 400 N.W.2d at 224 (citing *Honey v. Barnes Hosp.*, 708 S.W.2d 686 (Mo. App. 1986)). "An affirmative defense must be pleaded in a contract action, and a general denial is not sufficient to raise any affirmative defense." *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 310, 338 N.W.2d 601, 607 (1983). "[I]f a petition, on its face, does not disclose that an action is barred by a statute of limitations, a defendant must plead the statute of limitations as an affirmative defense and has the burden to prove that affirmative defense." *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 272, 481 N.W.2d 416, 421 (1992). Accord, *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989); *Vielehr v. Malone*, 158 Neb. 436, 63 N.W.2d 497 (1954). Laches is also an affirmative defense. See, *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C. Cir. 1987), *reh'g denied* 844 F.2d 889 (D.C. Cir. 1988); *Cieszko v. Clark*, 92 N.C. App. 290, 374 S.E.2d 456 (1988).

The City does not dispute that in 1991, when the labor disagreement arose, detention technicians at the City's jail facility were covered by the CBA. However, the City now attempts to excuse its nonperformance of the CBA by asserting impossibility of performance. In that posture, the City is attempting to use an affirmative defense which was not raised

at the trial level. See *Lease Northwest v. Davis, supra*. Also, the City urges us to consider the defenses of the statute of limitations and laches for reversal of the district court's decision. The statute of limitations for commencement of an action for breach of contract is 5 years. See Neb. Rev. Stat. § 25-205 (Reissue 1989). We note that the Union's petition alleged that the City adopted a unilateral policy in January 1991 concerning a bidding procedure which was not authorized by the CBA. If somehow the 5-year statute of limitations or laches afforded the City a defense to the Union's action, the City was required to plead the statute of limitations and laches as affirmative defenses. Because the City has failed to file an answer and affirmatively plead the defenses of impossibility of performance, the statute of limitations, and laches, we will not consider any of the City's assignments of error based on those affirmative defenses which were not raised in the trial court. Therefore, the City's assignments of error, based on affirmative defenses, are rejected under the circumstances.

From our de novo review on the record, we reach the same factual conclusion as that reached by the trial court: The CBA's existence and validity are undeniable and, for that matter, appear to have been admitted by the City in the course of trial and in this appeal, as reflected by the City's statement that the CBA "remained essentially the same from 1983 through the date of these proceedings in 1991." Brief for appellant at 5. Also, we find, as did the district court, that the City has breached its contractual duty under the valid bargaining agreement with the Union when the City denied Rocha her right to shift-bidding based on her seniority as a detention technician. The City's failure to raise any affirmative defense in its answer leaves no excuse for the City's failure to perform the collective bargaining agreement. Consequently, we affirm the district court's judgment ordering that the detention technicians' jobs be rebid and assigned in conformity with the CBA and permanently enjoining the City from assigning work shifts under its unilateral policy in violation of the collective bargaining agreement concerning shift-bidding based on seniority.

ATTORNEY FEE

The Union requests an attorney fee and costs as the result of our affirmance of the district court's judgment. The Union contends that allowance of an attorney fee in this appeal is proper because the City's appeal is frivolous.

"In Nebraska, the general rule is that an attorney fee may be recovered only when authorized by statute, or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee." *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 765, 472 N.W.2d 391, 402 (1991). In *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 810, 429 N.W.2d 347, 352 (1988), we said:

> Neb. Rev. Stat. § 25-824(2) . . . authorizes and requires that the court in which an action is commenced or an appellate court "shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith."

Neb. Rev. Stat. § 25-824(5) (Reissue 1989) provides that "[n]o attorney's fees or costs shall be assessed if a claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state. . . ."

> In determining the amount of a cost or an attorney's fee award pursuant to subsection (2) of section 25-824, the court shall exercise its sound discretion. When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award and shall, in determining whether to assess attorney's fees and costs and the amount to be assessed against offending attorneys and parties, consider the following factors, including, but not limited to: [the statute continues listing a number of factors for the court to consider].

Neb. Rev. Stat. § 25-824.01 (Reissue 1989).

In *Lutheran Medical Center v. City of Omaha*, 229 Neb. at 814, 429 N.W.2d at 354, we defined "frivolous" as "a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's

position in the lawsuit." Accord, *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *Shanks v. Johnson Abstract & Title*, 225 Neb. 649, 407 N.W.2d 743 (1987). A "frivolous" legal position "connotes an improper motive or a legal position so wholly without merit as to be ridiculous." *Behrens v. American Stores Packing Co.*, 236 Neb. 279, 288, 460 N.W.2d 671, 677 (1990). See, *Peterson v. Don Peterson & Assoc. Ins. Agency*, 234 Neb. 651, 452 N.W.2d 517 (1990); *Lutheran Medical Center v. City of Omaha, supra*. "Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question." *Sports Courts of Omaha v. Meginnis*, 242 Neb. at 777, 497 N.W.2d at 44.

Here, even if we were to give the City the benefit of a general denial which was never pled, inasmuch as the City failed to file an answer in the trial court, nevertheless, the fact remains that the CBA is conclusively established and even admitted by the City without any pleaded excuse or justification for nonperformance. Since the City is without rational argument based on law to support its position, see *Lutheran Medical Center v. City of Omaha, supra*, the City's appeal is frivolous. For that reason, the Union is entitled to have an attorney fee assessed as a part of the costs recoverable from the City.

However, the Union has yet to comply with Neb. Ct. R. of Prac. 9F (rev. 1992), which requires a party claiming an attorney fee to file a motion for allowance of a fee and to file a supporting affidavit which justifies the amount of the fee requested for services in an appellate court.

The Union asks us to "remand" this cause to the district court for a determination of an attorney fee for legal services in the district court proceedings. The record does not disclose that the district court has made any determination regarding an attorney fee. Therefore, this appeal presents nothing for us to review concerning an attorney fee allowable in the district court. Of course, after issuance of the mandate in this proceeding, the Union may ask the district court to consider allowance of an attorney fee. In light of our decision and § 25-824 concerning allowance of an attorney fee, the district court, after issuance of the mandate in this cause and on

appropriate request, may consider whether an attorney fee should be awarded to the Union's lawyer for services in the district court.

AFFIRMED.

RICHARD WOLFE AND PATSY WOLFE, HUSBAND AND WIFE, APPELLEES, V. BOBBY ABRAHAM, M.D., AND SURGICAL ARTS, P.C., APPELLANTS.

506 N.W.2d 692

Filed October 15, 1993. No. S-91-728.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Verdicts: Appeal and Error.** Where a party has sustained the burden and expense of trial and has succeeded in securing a verdict on the facts in issue, that party has the right to keep the benefit of the verdict unless there is prejudicial error in the proceedings by which it was secured.
3. **Motions for New Trial: Appeal and Error.** A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
4. **Motions for New Trial.** A motion for new trial is to be entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of its own neglect in order to defeat an adverse verdict, and, further, to prevent fraud and imposition which defeated parties may be tempted to practice to escape the consequences of an adverse verdict.
5. _____. The discretion of a trial court in ruling on a motion for new trial is only the power to apply the statutes and legal principles to all facts of the case; a new trial may be granted only where legal cause exists.
6. _____. A trial court may not grant a new trial merely because it would reach a different result than did the jury.
7. **Trial: Juries.** Appeals to local sentiment in closing arguments are highly improper and are not to be countenanced; cases are to be argued on their facts without playing to a jury's prejudice.
8. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable verdict, and, upon obtaining an unfavorable result, assert the previously waived error.
9. **Trial: Appeal and Error.** In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to the improper remarks no later than at the conclusion of the argument.

10. **Motions for Mistrial: Time.** An aggrieved party wishing a mistrial because of an opponent's misconduct during argument is required to move for such before the cause is submitted.
11. **Motions for New Trial: Evidence: Proof.** In order to warrant the granting of a new trial because of newly discovered evidence, the movant must establish that the evidence at issue could not have been discovered through the exercise of reasonable diligence by either the litigant or counsel, that the evidence is not merely cumulative, and that the evidence is competent, relevant, and material and of such a character as to reasonably justify a belief that its admission would bring about a different result if a new trial were granted.

Appeal from the District Court for Red Willow County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded with direction.

Stephen W. Kay, of Kay & Kay, for appellants.

James J. Paloucek and Royce E. Norman, of Kelley, Scritsmier & Byrne, P.C., for appellees.

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

CAPORALE, J.

I. STATEMENT OF CASE

This is a case of alleged medical malpractice in which a verdict was returned in favor of the defendants-appellants, Bobby Abraham, M.D., and Surgical Arts, P.C. The district court thereafter sustained the motion for new trial filed by the plaintiff-appellee patient, Richard Wolfe, and his wife, the plaintiff-appellee Patsy Wolfe. The defendants challenge that ruling by asserting that the district court erred in determining that a new trial was required because of (1) the defendants' improper closing argument and (2) the existence of newly discovered evidence. We reverse, and remand with direction.

II. SCOPE OF REVIEW

Our scope of review is defined by the rule that a motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Loving v. Baker's Supermarkets*, 238 Neb 727, 472 N.W.2d 695 (1991); *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990).

It is well established, however, that where a party has sustained the burden and expense of trial and has succeeded in securing a verdict on the facts in issue, that party has the right to keep the benefit of the verdict unless there is prejudicial error in the proceedings by which it was secured. Thus, a motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Kumar v. Douglas County, supra*; *Bentz v. Nebraska P.P. Dist.*, 211 Neb. 844, 320 N.W.2d 763 (1982); *Bodzek v. Callahan*, 211 Neb. 600, 319 N.W.2d 721 (1982); *Law v. Gilmore*, 171 Neb. 112, 105 N.W.2d 595 (1960). We have also observed that a motion for new trial is to be entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of its own neglect in order to defeat an adverse verdict, and, further, to prevent fraud and imposition which defeated parties may be tempted to practice to escape the consequences of an adverse verdict. *Ipock v. Union Ins. Co.*, 242 Neb. 448, 495 N.W.2d 905 (1993); *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989); *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988); *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982).

Consequently, the discretion of a trial court in ruling on a motion for new trial is only the power to apply the statutes and legal principles to all facts of the case; a new trial may be granted only where legal cause exists. A trial court may not grant a new trial merely because it would reach a different result than did the jury. *Bentz v. Nebraska P.P. Dist., supra.*

III. FACTS

The patient saw John L. Batty, M.D., because of upper abdominal pain. Batty suggested a gastroscopy, a procedure whereby a flexible tube with a light source is inserted through the mouth into the stomach, allowing the examiner to look for ulcers or other abnormalities. Batty then contacted Abraham, a solo practitioner practicing under the corporate name Surgical Arts, P.C., who attempted to perform the procedure at a hospital in McCook, Nebraska, where Abraham was the chief of surgery.

During the attempt, Abraham, over a period of approximately 20 minutes, administered 65 milligrams of Valium in four doses. Despite administration of the drug, the patient did not get sleepy as was expected, and he pushed the tube away with his hand whenever Abraham attempted to insert it into the patient's mouth. Abraham terminated the attempt sometime after 9:20 a.m., and a nurse then took the patient to the recovery room for observation. She released him to his wife at 11:30 a.m.

According to the wife, when the patient was brought to her, he was ashen gray and he did not look at her, but just stared straight ahead. Moreover, he could neither step up onto the curb nor get into the vehicle which was waiting for him outside the hospital without her help.

In reply to the plaintiffs' interrogatories, Abraham stated that the patient did not sustain any neurological or psychological damage on the day of the attempted procedure, but Abraham believed that the patient had some preexisting abnormalities.

The evidence at trial is irreconcilably in conflict. On the one hand, there is expert testimony from Colorado physicians that Abraham administered an excessive amount of Valium and that as a result, the patient suffered brain damage. There is also lay testimony that since the attempted procedure, the patient has experienced a reduction of intellectual capacity and physical ability. In addition, the plaintiffs established that physicians refer for guidance in administering drugs to a publication known as the Physicians' Desk Reference, which states that 10 milligrams of Valium or less are generally adequate and that up to 20 milligrams may be given. On the other hand, there is expert testimony from Nebraska physicians that in administering the amount of Valium he did, Abraham met the appropriate standard of care or skill, and, further, that the patient suffered no undesirable effects as a result of the attempted gastroscopy.

In the course of their closing argument, the defendants told the jury:

> [W]hat you have here, you have a couple of plaintiffs who are coming in here and saying that your local hospital and

a former local doctor violated the standard of care in the treatment of [the patient]. And that's going to be one of the decisions that you're going to have to make up your mind on.

. . . .

And that's all they have. Two doctors from Colorado. They didn't come up with anybody from around here, did they? They didn't come up with anybody from Nebraska. They have to go to Denver to get two doctors, and they have one that testifies to the standard of care and the other one testifies as to causation.

And I don't want to give you the idea that I'm belittling these doctors or anything like that. But if you think — [plaintiffs' counsel] stands up and tells you about that PDR, this drug book, and 65 milligrams. If this was so horrible, don't you think that he could have got some doctors in this area or around this area, in Nebraska, that could come in here and say . . . Abraham was wrong in giving 65 milligrams of Valium; . . . Abraham caused this problem, that this brain injury — alleged brain injury was caused by the Valium?

And you know why he didn't bring somebody in? He couldn't find one. He had to go to Denver and get somebody that charged $300 an hour — you heard that, $300 an hour — that sat here I don't know how long, but practically a whole full day. You saw that. $300 an hour, to tell you that your local hospital, who I think has an excellent reputation, and . . . Abraham, who's a board certified surgeon, who has an excellent reputation, is negligent.

The defendants also reminded the jury that the expert witnesses testifying on their behalf were from Nebraska. As to the defendants' expert who had recently left McCook to practice in Kearney, the defendants said: "I don't know if any of you know him, I don't know if any of you went to him when he was here, but I can tell you this: You lost a real fine man, a real intelligent doctor."

Near the end of their argument, the defendants urged: "[S]end a message, send a message that these people cannot

come into Red Willow County in this type of a situation, on the evidence they presented in this case, and [attack] your local hospital and [attack] your local doctor, on this kind of evidence." The plaintiffs did not object to the comments made by the defendants, nor did they move for a mistrial.

With respect to their claim that there is newly discovered evidence, the plaintiffs, in support of their motion for new trial, submitted an affidavit in which the wife attested that after the verdict had been returned, Abraham told her that he believed the patient "had slight problems before" the attempted procedure, that the procedure had "pushed him over the edge," and that he had earlier told the administrator of the hospital that he "hoped the jury would return a verdict for the plaintiffs."

Although Abraham admits having a conversation with the wife and further declares that he said "six years had gone by from the time [he] saw [the patient] and very valuable time had been lost," he denies making the statements she attributes to him.

IV. ANALYSIS

With those pertinent facts in mind, we turn to the defendants' assignments of error.

1. Claim of Improper Closing Argument

In the first of these, the defendants urge that the district court mistakenly ruled that the defendants' closing argument improperly exploited the jury's bias in favor of local physicians and was so prejudicial that the plaintiffs' failure to object to the argument should be excused.

We agree with the plaintiffs' position that appeals to local sentiment in closing arguments are highly improper and are not to be countenanced; cases are to be argued on their facts without playing to a jury's prejudice. *Pederson v. Dumouchel*, 72 Wash. 2d 73, 431 P.2d 973 (1967). And it is true, as the plaintiffs note, that some jurisdictions suggest that in extreme situations in which the sinister effects of grossly improper remarks cannot be corrected by either retraction or rebuke by the trial court, the failure to object is excused. E.g., *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835 (Tex. 1979); *Pederson v.*

Dumouchel, supra; *Nelson v. Martinson*, 52 Wash. 2d 684, 328 P.2d 703 (1958); *Colquett v. Williams*, 264 Ala. 214, 86 So. 2d 381 (1956); *Hilliard v. A.H. Robins Co.*, 148 Cal. App. 3d 374, 196 Cal. Rptr. 117 (1983); *Terracina v. Castelli*, 80 Ill. App. 3d 475, 400 N.E.2d 27 (1979); *Carlton v. Johns*, 194 So. 2d 670 (Fla. App. 1967); *Griffith v. Casteel*, 313 S.W.2d 149 (Tex. Civ. App. 1958).

However, in this jurisdiction the controlling principle is that one may not waive an error, gamble on a favorable verdict, and, upon obtaining an unfavorable result, assert the previously waived error. *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989). Accordingly, we have consistently held that in order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to the improper remarks no later than at the conclusion of the argument. *Marple v. Sears, Roebuck & Co., ante* p. 274, 505 N.W.2d 715 (1993); *Sandomierski v. Fixemer*, 163 Neb. 716, 81 N.W.2d 142 (1957), *superseded on other grounds, Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986).

Plaintiffs' suggestion that we have heretofore carved out exceptions to the foregoing rule is unfounded. While it is true that in *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991), the trial court, in overruling a motion for mistrial because of an improper argument, stated that the issue could be raised postverdict, we held only that an antecedent objection to an improper argument is not required in order to move for a mistrial on that ground. The motion for mistrial in *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984), related not to an improper argument, but to the adduction of evidence; in that context, we ruled that as a mistrial motion could not be used as a substitute for a timely objection to the evidence, a mistrial could not be sought for the improper receipt of evidence to which no prior objection had been made. *Hall v. Rice*, 117 Neb. 813, 223 N.W. 4 (1929), holds only that when an objection has been sustained to an improper remark made during the course of the opening statement, the objection need not be repeated to a like comment made during the closing argument.

In point of fact, we do not permit a party to gamble on a favorable result and later complain of a waived error even where the misconduct spews from the mouth of the trial judge. *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984).

It also is to be noted that an aggrieved party wishing a mistrial because of an opponent's misconduct during argument is now required to move for such before the cause is submitted; at the time of the trial at hand, however, such a motion could have been made at any time before the verdict was returned. See *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991).

2. CLAIM OF NEWLY DISCOVERED EVIDENCE

In the second assignment of error, the defendants argue that the district court incorrectly concluded that there exists newly discovered evidence which requires a new trial.

The plaintiffs, on the other hand, argue that Abraham's postverdict statements to the wife establish that he held an opinion favorable to the plaintiffs, but that they were unable to discover that fact because of Abraham's denial in answer to their interrogatories of any neurological or psychological damage on the day of the attempted procedure and his refusal to answer, when being deposed, whether the patient then demonstrated a neurological deficit.

It is appropriate to recall at this point that in order to warrant the granting of a new trial because of newly discovered evidence, the movant must establish that the evidence at issue could not have been discovered through the exercise of reasonable diligence by either the litigant or counsel, that the evidence is not merely cumulative, and that the evidence is competent, relevant, and material and of such a character as to reasonably justify a belief that its admission would bring about a different result if a new trial were granted. See, *Ipock v. Union Ins. Co.*, 242 Neb. 448, 495 N.W.2d 905 (1993); *Federal Dep. Ins. Corp. v. Swanson*, 231 Neb. 148, 435 N.W.2d 659 (1989), *overruled on other grounds, Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992).

The plaintiffs suggest that Abraham's observation that 6 years have passed since he last saw the patient and that as a

result valuable time has been lost somehow establishes an admission of negligence on Abraham's part. The notion is untenable. If the statement means anything, it is nothing more than a recognition that the patient's condition, whatever it is, is now of long standing.

Neither do the statements the wife ascribes to Abraham provide a basis for depriving the defendants of the benefit of the verdict. Whatever Abraham's alleged remark that he hoped a verdict would be returned for the plaintiffs may have been intended to convey, it does not rise to the level of a postverdict admission of preverdict negligence. See *Tamper v. Schaper*, 748 S.W.2d 183 (Mo. App. 1988) (as statements in malpractice action did not clearly constitute admission, trial court did not abuse discretion in refusing to receive into evidence physician's statements he personally liked claimant and did not care if she got money).

While it is true that the other comment attributed to Abraham, that the administration of the Valium pushed the patient's preexisting neurological and psychological abnormalities over the edge, can be understood to contradict Abraham's answer to the plaintiffs' pretrial interrogatories that the patient sustained no damage on the day of the attempted procedure and is, to that extent, new information, it nonetheless does not constitute an admission that in Abraham's opinion, the amount of Valium he administered violated the requisite standard of care. In the absence of such an admission, the statement that the Valium pushed the patient over the edge has no legal relevance. See, *Sutton v. Calhoun*, 593 F.2d 127 (10th Cir. 1979) (trial court properly refused to instruct that surgeon's statement he had made mistake in cutting duct was admission of negligence); *Phillips v. Powell*, 210 Cal. 39, 290 P. 441 (1930) (physician's statements that it was his fault in using particular knife during surgical operation and that he had a slight accident and had broken a knife in the operation, but in spite of bungling job thought boy was going to pull through, and his failure to reply to mother's statements that she felt boy's injuries were fault of physicians held not to constitute admissions that physicians did not possess and use requisite degree of skill); *Donahoo v. Lovas*, 105 Cal. App. 705, 288 P.

698 (1930) (admission that alcohol should not have been injected held to be expression based on results of injection and of no value in showing whether ordinary skill used); *Markart v. Zeimer*, 67 Cal. App. 363, 227 P. 683 (1924) (physician's statements that "misoperation" and "wrong operation" resulted in further injury held to be admission that operation was not properly performed, but not sufficient to establish liability, as did not admit negligence); *Smith v. Karen S. Reisig, M.D., Inc.*, 686 P.2d 285 (Okla. 1984) (physician's characterization of injury in medical records as "inadvertent injury of bladder" merely described result and was not admission that care was substandard).

V. JUDGMENT

For the foregoing reasons, the district court abused its discretion in granting a new trial. We thus reverse the district court's judgment and remand the cause with the direction that the district court enter judgment in accordance with the verdict.

REVERSED AND REMANDED WITH DIRECTION.

GABLES CVF, INC., APPELLANT, V. BAHR, VERMEER & HAECKER ARCHITECT, LTD., ET AL., APPELLEES.

506 N.W.2d 706

Filed October 15, 1993. No. S-91-758.

1. **Summary Judgment.** A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law.
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. **Contracts: Architects.** An architect's duties are determined by the contract for the architect's employment.
4. _____: _____. Implicit in every contract for architectural services is the duty of the architect to exercise skill and care which are commensurate with requirements of the profession.

5. **Contracts.** If the contents of a document are not ambiguous, the document is not subject to interpretation and will be enforced according to its terms.
6. **Contracts: Appeal and Error.** Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision.
7. **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.
8. **Contracts: Intent.** When a document is ambiguous, it is for the trier of fact to determine the intent of the parties from all the facts and circumstances.
9. **Partnerships: Estoppel: Evidence: Proof.** In order to prove a partnership by estoppel, there must be evidence that one party held itself out as a partner, or permitted itself to be so held out, and that the other party relied on that misrepresentation to its detriment.
10. **Records: Appeal and Error.** A party's brief may not expand the evidentiary record.
11. **Warranty.** The existence of an implied warranty of merchantability does not depend upon privity.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for further proceedings.

William J. Brennan and Thomas M. White, of Fitzgerald, Schorr, Barmettler & Brennan, for appellant.

Thomas J. Guilfoyle, of Frost, Meyers, Guilfoyle & Govier, for appellee Bahr, Vermeer & Haecker Architect, Ltd.

Susan E. Norris, of Gross & Welch, P.C., for appellee The Chicago Lumber Company of Omaha.

Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellee Sol Lewis Engineering Co.

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

BOSLAUGH, J.

The appellant, Gables CVF, Inc., is a defendant and the third-party plaintiff in this action which was originally brought by The Gables Association, Inc., a Nebraska condominium association. The condominium association brought the suit on behalf of the individual owners of condominium units at an Omaha condominium development known as The Gables. The

suit sought to recover $270,251.80 for the repair of alleged defects in the construction of the condominium units. These condominium units were developed by a joint venture partnership in which the appellant and Goldman-Kasin Development Company (Goldman-Kasin) were partners. Goldman-Kasin acted as the general contractor in developing The Gables condominiums. According to the district court's July 24, 1991, journal entry, Goldman-Kasin "is insolvent and in default in this action."

In addition to Goldman-Kasin and Gables CVF, also named as defendants in the condominium association's original action were Champlain Valley Federal Savings and Loan Association (Champlain Valley) and C.V. Thrift Services, Inc. (C.V. Thrift). According to the brief filed by Gables CVF, both Champlain Valley and C.V. Thrift are parent companies of Gables CVF. The condominium association's petition also named Gables Joint Venture, CVF, Inc., as a defendant. We deduce from the record, however, that Gables Joint Venture is not a separate corporate entity, but is instead simply the joint venture partnership which Goldman-Kasin and the appellant formed in order to develop The Gables condominiums.

Following the condominium association's filing of its petition, the appellant filed its third-party petition seeking contribution and/or indemnification for any claims stemming from the condominium association's original action. The third-party petition named as defendants Bahr, Vermeer & Haecker Architect, Ltd. (BVH); The Chicago Lumber Company of Omaha (Chicago Lumber); Sol Lewis Engineering Co.; and Rite-Way Construction Co., Inc.

The record indicates that a default judgment has been entered against third-party defendant Rite-Way Construction Co. The district court granted summary judgment in favor of each of the other three third-party defendants. Gables CVF then appealed from those summary judgments. This court subsequently dismissed the appeal as to Sol Lewis Engineering Co. Thus, this appeal involves only the appellant's assertion that the district court erred in granting summary judgment in favor of BVH and Chicago Lumber. The original petitioner, i.e., the condominium association, is not involved in this

appeal.

A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law. *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993). 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.* Mindful of this standard of review, we first consider the facts and issues with respect to BVH.

The joint venture partnership contracted with BVH for architectural services. The contract is detailed in the 1977 edition of the American Institute of Architects (AIA) Document B141 which is entitled "Standard Form of Agreement Between Owner and Architect." This standard form outlines a complete battery of services which an architect would provide to a property owner, who would then contract with a general contractor to build a project in accordance with the architect's specifications. However, since BVH was providing services directly to an owner who was also the general contractor, many provisions for services in the standard form were deleted, and the fees for such services were accordingly eliminated.

Under the contract, BVH provided design drawings and other documents to be used in the construction of the condominium project. According to BVH vice president Gary Goldstein, BVH provided a set of "builders plans" to Goldman-Kasin. These plans were an abbreviated set of drawings and specifications regarding the condominium project. BVH and the joint venture partnership contracted for this more abbreviated set of plans because BVH could provide such plans at less cost than a complete set of plans and because the joint venture partnership did not require a complete set of drawings and specifications in light of the fact that one of the joint venture partners, Goldman-Kasin, was serving as the

general contractor.

The contract between BVH and the partnership deleted certain standard form provisions for the architect's inspection and oversight of construction. However, the parties added a provision that BVH would be paid "$125 per trip" plus mileage for "Observation of Construction" of the condominiums. After such observations, BVH provided reports to Goldman-Kasin indicating the percentage of completion of the condominium project. On at least two occasions following observation of the construction project, BVH reported problems existing with respect to the construction of the condominiums. BVH reported such construction problems to Goldman-Kasin president Sandy Kasin; the problems included cracking in a brick retaining wall and buckling of exterior siding. Subsequently, on June 4, 1984, BVH project architect Ronald Mercer wrote a letter to Sandy Kasin of Goldman-Kasin stating: "At your request, a visual inspection was made on the above project on 1 June 1984. A copy of this report is enclosed for your review. The project was found to be substantially complete, and generally in accordance with the intent of the drawings and specifications."

Despite the language in the letter quoted above, the record indicates that there were some deviations from the architect's plans. The most notable deviations seem to be: (1) The decks or balconies of the condominium units were constructed of brick or cement rather than spaced wooden boards, resulting in drainage problems; (2) a waterproof membrane was not installed in a portion of the foundation; and (3) studs on outer walls were spaced 24, rather than 16, inches apart.

In this appeal, BVH argues that its contractual duty to observe the construction of The Gables merely obligated it to determine the degree of completion of the project, but did not require it to discover and report deviations from the architect's building plans. Contrarily, the appellant argues that the contract did require BVH to report deviations from the building plans. The apellant further argues that it was damaged in the following manner: BVH failed to properly report deviations from the architect's plans; as a result of BVH's failure, funds held in escrow were released to Goldman-Kasin;

and if BVH had properly reported the deviations from the architect's plans, Gables CVF would not have released escrowed funds and, therefore, could have used those funds to employ another contractor to properly complete The Gables condominium project.

An architect's duties are determined by the contract for the architect's employment. *Getzschman v. Miller Chemical Co.*, 232 Neb. 885, 443 N.W.2d 260 (1989). Implicit in every contract for architectural services is the duty of the architect to exercise skill and care which are commensurate with requirements of the profession. *Id.*

In arguing that it cannot be held liable for damages resulting from unreported deviations from the architect's building plans, the appellant relies, in part, upon paragraph 1.5.5 of the AIA contract. That paragraph states:

> The Architect shall not have control or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, for the acts or omissions of the Contractor, Subcontractors or any other persons performing any of the Work, or for the failure of any of them to carry out the Work in accordance with the Contract Documents.

We do not believe that this clause in the contract, by itself, absolves BVH of any potential liability in this instance. Addressing similar language, a Texas court has stated:

> We conclude that the language said to be exculpatory constitutes nothing other than an agreement that the architect is not the insurer or guarantor of the general contractor's obligation to carry out the work in accordance with the contract documents. We reach this conclusion because the [contract] impose[s] nonconstruction responsibility upon the architect; to wit: to visit, to familiarize, to determine, to inform and to endeavor to guard. In short, to provide information, not to make improvements upon the job site.

Hunt v. Ellisor & Tanner, Inc., 739 S.W.2d 933, 937 (Tex. Civ. App. 1987). Thus, the exculpatory language provides that the architect is not the insurer or guarantor of work completed by

the contractor. However, such language does not absolve the architect from liability for a breach of the architect's contractual duty, if one exists, to inform the owner of deviations from the building plans when the architect has agreed to make periodic observations. The continuing question, then, is whether or not BVH had a duty to report deviations from the architect's plans.

The contractual language quoted above, i.e., paragraph 1.5.5, is contained within § 1.5 of the AIA contract; the section is entitled "Construction Phase—Administration of the Construction Contract." Section 1.5 of the contract contains provisions for an architect's administration of a separate contract for the construction of a building. Such a separate contract for construction (a contract which was not present in this instance) would typically be between the *owner* of real estate and a general contractor who would be responsible for construction in conformance with building plans provided by the architect. In this instance, however, the AIA contract was between BVH and the joint venture partnership, and as previously noted, one of the joint venture partners, Goldman-Kasin, served as the general contractor in the construction of the condominium development. Consequently, with the exception of paragraph 1.5.5, the joint venture partnership and BVH deleted all of section 1.5 of the AIA contract.

Certain deleted paragraphs of section 1.5 of the AIA contract contain provisions for onsite observation of the construction work by the architect. Despite deleting such provisions from their contract, the joint venture partnership and BVH nevertheless added the typewritten statement that BVH would be compensated at the rate of "$125 per trip" plus mileage for "Observation of Construction."

In their contract, the joint venture partnership and BVH do not define "Observation of Construction." However, paragraph 11.2 of the contract does reference another document which, viewing the evidence in a light most favorable to the appellant, helps to define that phrase. Paragraph 11.2 states: "Terms in this Agreement shall have the same meaning as those in AIA Document 201, General Conditions of the Contract for Construction . . . ."

The index to the 1976 edition of AIA Document 201 lists paragraphs 2.2.3, 7.7.1, 7.7.4, and 9.4.2 under the heading "Observations, Architects On-Site." Paragraph 2.2.3 of AIA Document 201 states:

> The Architect will visit the site at intervals appropriate to the stage of construction to familiarize himself generally with the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of his on-site observations as an architect, he . . . will endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor.

The contract documents which are referred to in the above-quoted paragraph include the drawings and specifications provided by the architect.

In addition, the appellant's expert witness, Harold Robertson, provided testimony indicating that "observation of construction" in the architectural industry includes an obligation to detect and report deviations from the architect's plans and specifications. It is also noteworthy that BVH was the party responsible for drafting its contract with the joint venture partnership.

If the contents of a document are not ambiguous, the document is not subject to interpretation and will be enforced according to its terms. *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993). Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision. *Id.*

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. *Hensman v. Parsons*, 235 Neb. 872, 458 N.W.2d 199 (1990). When a document is ambiguous, it is for the trier of fact to determine the intent of the parties from all the facts and circumstances. *Id.*

In this case, the contract, drafted by BVH, noted BVH's $125 fee for "observation of construction"; however, the contract does not define the precise nature of such duties. We find that the contract is ambiguous as to what is meant by "observation of construction." Given that ambiguity, and viewing the evidence in a light most favorable to the appellant, we must conclude that BVH was not entitled to summary judgment. That is, a factual question exists regarding the nature of the contractual obligation which BVH undertook when it agreed to observe construction of the condominium units. It is up to the trier of fact, if this action reaches that stage, to determine the scope of that obligation, and then to determine whether BVH exercised the requisite skill and care commensurate with requirements of its profession in meeting that obligation.

While BVH may be liable for damages which it may have caused by its possible failure to fulfill any contractual duty which it may have had to report deviations from the building plans, we also hold that BVH cannot be held accountable as a partner in the joint venture partnership. The record shows that in contracting for architectural services, a flat fee was initially proposed, but the parties eventually agreed upon a fee which would have been less than the flat fee if the project had been abandoned, and greater than the flat fee if the project was completed. In the course of the fee negotiations, BVH vice president Gary Goldstein wrote to Goldman-Kasin explaining the proposed dual fee structure and describing BVH as a "risk-taking 'partner.' " Based upon this correspondence, the appellant argues that BVH was a partner in the joint venture partnership. However, despite such phraseology, there is no evidence in the record to support a finding that BVH was a partner in the joint venture partnership. BVH did not become a partner simply by negotiating a greater fee if the project was developed and a lesser fee if the project was abandoned.

The assertion advanced by the appellant here is, in essence, one of partnership by estoppel. In order to prove a partnership by estoppel, there must be evidence that one party held itself out as a partner, or permitted itself to be so held out, and that the other party relied on that misrepresentation to its detriment. See *South Sioux City Star v. Edwards*, 218 Neb. 487, 357

N.W.2d 178 (1984). Even when viewed in a light most favorable to the appellant, the record fails to support such a finding.

Finally with respect to BVH, we address an argument advanced by BVH in its brief stating:

> Since Goldman-Kasin was the general partner of the joint venture and was the general contractor responsible for construction of the project all knowledge or information possessed by Goldman-Kasin was also, by law, known to the other members of the joint venture. Goldman-Kasin was aware of all deviations from the plans and specifications. . . . Since the Appellant had notice of all defects, by virtue of its agent, it cannot now complain that [it] was damaged [by BVH's] failure to provide it with appropriate notice.

Brief for appellee BVH at 43. BVH's argument is accurate to a certain extent. Neb. Rev. Stat. § 67-312 (Reissue 1990) states:

> Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

The problem with BVH's argument is that we are aware of no authority for the proposition that a general contractor is, as a matter of law, assumed to be aware of deviations from building plans, and BVH fails to cite anything in the record to show that Goldman-Kasin actually had knowledge of the deviations from the building plans. See Neb. Ct. R. of Prac. 9D(2)d (rev. 1992). A party's brief may not expand the evidentiary record. See *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993).

It is impossible to say in the present state of the record that, as a matter of law on a motion for summary judgment, Goldman-Kasin was aware of all deviations from the building plans and was not relying upon BVH to inform it of subcontractors' deviations from the architect's plans. However,

on remand, in the absence of fraud, if it is established that Goldman-Kasin was aware of the deviations from the building plans, then that knowledge must be imputed to its partner, Gables CVF, and Gables CVF would then be unable to complain that it was damaged by the failure of BVH to provide it with appropriate notice of deviations from the building plans.

We now turn to the appellant's contention that the district court erred in granting summary judgment in favor of Chicago Lumber. Chicago Lumber supplied lap siding which was used in the construction of the condominium units, and the siding buckled after it had been installed. The instructions which allegedly accompanied the siding advise the installer to maintain "moderate contact at the joints—never force fit." Thus, the instructions called for abutting the joints rather than spacing the joints. These instructions also indicate that the siding "may be applied directly to studs or over sheathing, with studs spaced 16 [inches] on center."

As noted previously, the studs on the outer walls of the condominium units were spaced 24 inches on center rather than 16 inches on center as originally designed. Consequently, contrary to the installation instructions, the siding was applied to studs spaced 24 inches on center. The appellant's expert witness, Harold Robertson, testified that the spacing of the studs may have caused the buckling of the siding. Robertson also testified that the improper placement of insulation in the outer wall may have caused condensation, leading to the buckling of the siding.

The original plaintiff's expert witness, Michael Siedschlag, viewed the cause of the buckling somewhat differently. Siedschlag testified that the buckling resulted from the absence of spacing between the siding sections. The record also shows that BVH project architect Ronald Mercer believed that the buckling was caused, in part, by inadequate spacing of the vertical joints.

Thus, conflicting evidence is presented as to the cause of the buckling of the siding. However, when viewed in a light most favorable to the appellant, the record shows that Chicago Lumber supplied siding with accompanying installation instructions which were used in the condominium project and

that because the siding was installed with abutting joints in accordance with the installation instructions, the siding buckled. Such evidence is sufficient to establish a breach of the implied warranty of merchantability with respect to Chicago Lumber's sale of the siding. See Neb. U.C.C. § 2-314 (Reissue 1992). See, also, *Laird v. Scribner Coop*, 237 Neb. 532, 466 N.W.2d 798 (1991). Thus, the district court erred in granting summary judgment in favor of Chicago Lumber.

Chicago Lumber argues that because there was no privity between itself and the joint venture partnership, no implied warranty of merchantability was applicable in this instance. Chicago Lumber bases this argument on the fact that the purchaser of the siding was Goldman-Kasin Company rather than Goldman-Kasin Development Company (i.e., Goldman-Kasin), the partner in the joint venture. Goldman-Kasin Company did purchase the siding from Chicago Lumber, and although the record is not clear on the issue, apparently Goldman-Kasin Company then sold the siding to the joint venture partnership for use in the condominium development. However, the existence of an implied warranty of merchantability does not depend upon privity between Chicago Lumber and the joint venture partnership. See *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984) (a product placed in the chain of distribution carries an implied warranty of merchantability which protects the ultimate purchaser, and privity is not required for recovery on a claim for breach of an implied warranty of merchantability.)

Finally, we also note that Goldman-Kasin Company (but not the joint venture partner, Goldman-Kasin) executed a release and indemnity agreement releasing Chicago Lumber from any claims arising out of the use of the siding in the condominium project. However, we find no evidence in the record to show that Goldman-Kasin Company was acting on behalf of the joint venture partnership when the release was executed, nor is there evidence or any allegation that Goldman-Kasin Company was the alter ego of joint venture partner Goldman-Kasin. See *Carpenter Paper Co. v. Lakin Meat Processors*, 231 Neb. 93, 435 N.W.2d 179 (1989). Consequently, based upon the record before us, we find the release does not, by itself, absolve

Chicago Lumber from liability to the appellant.

Because genuine issues of material fact remain to be decided by the fact finder, summary judgment was not appropriate, and the cause must be remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. STEPHEN GREENBERG, RESPONDENT.

506 N.W.2d 355

Filed October 15, 1993. No. S-93-867.

Original action. Judgment of disbarment.

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

PER CURIAM.

Following his felony conviction, Stephen Greenberg voluntarily surrendered his license and consented to disbarment. We accept Greenberg's surrender and order him disbarred.

In 1971, Greenberg was admitted to the practice of law in Nebraska. In March 1993, Greenberg was charged with first degree sexual assault and felony pandering. Greenberg's case was tried to a jury in the district court for Douglas County, Nebraska. In September 1993, the jury found Greenberg guilty of first degree sexual assault on a child.

Following the verdict, the Nebraska State Bar Association applied for a temporary suspension of Greenberg's license until the final disposition of pending disciplinary proceedings. On October 4, 1993, Greenberg voluntarily surrendered his license. Greenberg admitted that he had violated the Code of Professional Responsibility, as adopted by this court, and his oath of office by engaging in conduct that adversely reflected

on his fitness to practice law.

We find Greenberg's conduct reprehensible and indicative of gross moral turpitude. We thus order Greenberg disbarred from the practice of law in Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

ALICE R. COCKRELL, APPELLEE, V. RICHARD C. GARTON, APPELLANT, AND CYNTHIA GARTON, APPELLEE.

507 N.W.2d 38

Filed October 22, 1993. No. S-91-381.

1. **Trial: Evidence: Appeal and Error.** One may not on appeal assert a different ground for excluding evidence than was urged in the objection made to the trial court.
2. _____: _____: _____. Error may not be predicated upon a ruling excluding evidence unless the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.
3. **Rules of Evidence: Appeal and Error.** Since all relevant evidence is admissible except as otherwise provided in the Nebraska Evidence Rules, a proponent of evidence which was excluded is not limited on appellate review to reliance upon the bases for admission argued at trial.
4. **Pretrial Procedure.** The purpose of a pretrial conference is to simplify the issues, to amend pleadings when necessary, and to avoid unnecessary proof of facts at trial; to that end, litigants must adhere to the spirit of the procedure and are bound by the pretrial order to which no exception has been taken.
5. **Pretrial Procedure: Evidence.** In relation to evidence, the pretrial conference is designed for and primarily used to restrict evidence to the issues formulated, secure admissions or stipulations, and avoid unduly cumulative evidence and the necessity of proving foundation in clearly competent evidence; it is neither designed for nor intended to arbitrarily exclude noncumulative evidence pertinent to the issues simply because it was not mentioned at the pretrial hearing.
6. **Pretrial Procedure.** The district court exercises broad discretion in regard to the amendment of pretrial orders.

7. **Pretrial Procedure: Stipulations: Evidence.** One who does not join in a pretrial stipulation to waive foundational evidence with respect to an exhibit is not bound thereby.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and IRWIN, Judges, on appeal thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge. Judgment of Court of Appeals affirmed.

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

James L. Haszard, of McHenry & Flowers, for appellee Cockrell.

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

CAPORALE, J.

The district court entered judgment in favor of the plaintiff-appellee, Alice R. Cockrell, on promissory notes executed by the defendant-appellant, Richard C. Garton, Cockrell's former son-in-law, and the defendant-appellee, Cynthia Garton, Cockrell's daughter. The son-in-law asserts that the district court erred in refusing to receive a certain exhibit into evidence and successfully petitioned this court for further review of the Nebraska Court of Appeals' rejection of that assignment of error and consequent affirmance of the judgment of the district court. We now affirm the judgment of the Court of Appeals.

In 1987, the daughter and son-in-law executed two promissory notes totaling the principal amount of $40,000, payable to Cockrell upon demand. In late 1989, Cockrell demanded full payment of both notes. This suit followed.

The district court's pretrial conference resulted in a memorandum by Cockrell in which she lists as a trial exhibit the documents in question, which she characterizes as her "Financial Records." The son-in-law makes no mention of Cockrell's financial records in his pretrial conference memorandum. The district court's pretrial conference order provides: "As to witnesses and exhibits, those not listed may

not be used at trial, except solely for impeachment or rebuttal. Each side may use those listed by the other."

At trial, Cockrell testified that she had received interest payments through the end of 1990, but that the principal amount of each note remained unpaid.

In an apparent effort to challenge that testimony, the son-in-law had the subject exhibit marked for identification and questioned Cockrell regarding it. Cockrell claimed that she had never seen the records before, but acknowledged that she and the daughter reviewed the amounts which had been paid at the end of each year and that the records might have been created by the daughter to show the payments which had been made on the notes. Cockrell was unsure, however, whether the records were in the daughter's handwriting. Cockrell further denied that she relied on the daughter to keep records of the payments made, stating, rather, that she kept her own records, the nature and level of formality of which were not made clear.

The son-in-law then offered the subject exhibit into evidence, stating:

> Well, I'm going to offer [the subject exhibit] and I'd like to make a record that [the subject exhibit] is the documents that were presented to me by [Cockrell's counsel] after the pretrial conference, that were represented to me as being what was listed as [the subject exhibit] on his Pretrial Conference Memorandum, which were designated as financial records of [Cockrell]; and, therefore, I'm going to offer [the subject exhibit] as a judicial admission against [Cockrell's] interest in this case because it does show payments made on these particular notes.

Cockrell objected to its receipt, stating:

> The fact that I list an exhibit on a Pretrial Conference Memorandum as being something I may want to offer into evidence, I don't believe puts any requirement on me to either offer it or to agree to its admission at the actual trial. I would object on the basis of foundation.

The district court sustained Cockrell's objection to receipt of the evidence and her objection to the son-in-law's offer of proof as to the contents of the subject exhibit.

The Court of Appeals rested its decision on the premise that

as the son-in-law had offered the subject exhibit on the basis that it constituted a judicial admission by Cockrell, he could not on appeal urge that it should have been admitted on the basis that Cockrell had waived any foundational objection to its receipt.

But as the foregoing recitation of the record demonstrates, the son-in-law urged at trial not only that the documents comprising the subject exhibit constituted judicial admissions on the part of Cockrell, but also that the documents were presented to him with the representation that they constituted Cockrell's financial records; in other words, that by identifying the documents as her own, Cockrell waived any foundational or other objection to their receipt into evidence. Thus, it cannot be said that the son-in-law urged a different ground of admission upon appeal than he did at trial.

Moreover, the situation is controlled by Neb. Evid. R. 103(1)(b), Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1989), which provides that error may not be predicated upon a ruling excluding evidence unless "the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked," and not by rule 103(1)(a), which declares that error may not be predicated upon an evidential ruling admitting evidence in the absence of a timely objection stating the specific ground thereof, unless such was apparent from the context. Accordingly, while on rulings admitting evidence the focus is on the ground for exclusion urged at trial, on rulings excluding evidence, the focus is on whether the substance of the evidence was made known at trial.

Thus, the rule that one may not on appeal assert a different ground for excluding improperly admitted evidence than was urged in the objection made to the trial court, *State v. Bray*, 243 Neb. 886, 503 N.W.2d 221 (1993), does not come into play when dealing with evidence which was improperly excluded. Since under our rules all relevant evidence is admissible except as otherwise provided in those rules, Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989), a proponent of evidence which was excluded is not limited on appellate review to reliance upon the bases argued at trial.

We recognize that pursuant to a rule of Connecticut appellate

procedure, *Thaw v. Fairfield*, 132 Conn. 173, 43 A.2d 65 (1945), limited the assignments of error for the exclusion of evidence on appeal to the bases asserted at trial. But the Connecticut rule is at variance with our rule 103, which is modeled upon its federal counterpart, Fed. R. Evid. 103, and which came into existence 30 years after *Thaw* was decided.

No foundation having been laid for the receipt into evidence of the subject exhibit, the controlling question is whether Cockrell's pretrial conference memorandum, read together with the pretrial conference order, obviated the need for such.

> The purpose of a pretrial conference is to simplify the issues, to amend pleadings when necessary, and to avoid unnecessary proof of facts at trial. To that end litigants must adhere to the spirit of the procedure and are bound by the pretrial order to which no exception has been taken.

Hasenauer v. Durbin, 216 Neb. 714, 719, 346 N.W.2d 695, 698 (1984).

In *Mousel v. ten Bensel*, 195 Neb. 456, 459, 238 N.W.2d 632, 634 (1976), we stated: "In relation to evidence [the pretrial conference] is designed for and primarily used to restrict evidence to the issues formulated, secure admissions or stipulations, avoid unduly cumulative evidence and the necessity of proving foundation in regard to clearly competent evidence." However, "[i]t is neither designed nor intended to arbitrarily exclude noncumulative evidence pertinent to the issues simply because it was not mentioned at the pretrial hearing. The District Court has a broad discretion in regard to the amendment of pretrial orders." *Id.*

Most cases concern themselves with the extent to which pretrial orders control the issues to be litigated. We have on numerous occasions affirmed the limiting of the issues at trial to those specified in the pretrial order and limiting the admission of evidence to the issues thus established. E.g., *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986); *Olson v. England*, 206 Neb. 256, 292 N.W.2d 48 (1980); *Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc.*, 179 Neb. 858, 140 N.W.2d 813 (1966); *Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965), *overruled on other grounds, Royal Ind. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229

N.W.2d 183 (1975); *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 89 N.W.2d 245 (1958). But see *Zavoral v. Pacific Intermountain Express*, 181 Neb. 40, 146 N.W.2d 796 (1966) (notwithstanding the pretrial order and the plaintiff's failure to move for its vacation and modification, the trial court was obliged to instruct on the issues raised by the pleadings and the evidence, as to do otherwise would do violence to the issues raised by petition).

In arguing that by listing the subject exhibit in her pretrial memorandum Cockrell waived any objection to its introduction, the son-in-law relies upon *Powell v. Farmers State Bank*, 164 Neb. 180, 82 N.W.2d 260 (1957), and *O'Shea v. O'Shea*, 191 Neb. 217, 214 N.W.2d 486 (1974). The trial court in *Powell* concluded that the action was time barred. Although this court affirmed that determination, it rejected the appellee's argument that as there was no bill of exceptions, the only issue was whether the pleadings supported the judgment. In doing so, the *Powell* court observed that the pretrial order recited the controlling date as a stipulated and agreed-upon fact. It also noted that the relevant rule provided that unless modified at trial to avoid a manifest injustice, the pretrial order controlled the subsequent course of action. It then continued:

> As we construe such rule, the admissions, stipulations, and agreements of the parties, when finally determined and included in a pre-trial report and order rendered, certified, and filed by the trial court after a pre-trial hearing without objections appropriately taken thereto, are judicial admissions which need not be offered in evidence in order to be considered by the trial court or included in a bill of exceptions in order to be considered by this court upon appeal.

Powell, 164 Neb. at 183, 82 N.W.2d at 262. In *O'Shea*, the date on which a spendthrift trust terminated was largely decisive of the issues involved. Recognizing the decisiveness of the date, the pretrial stipulation declared that the trust continued until the beneficiary's death. Two months after trial, the trustee moved for the first time to correct the pretrial order to reflect that the trust had in fact terminated at the end of the 20-year period specified in the trust deed rather than upon the death of

the beneficiary. The *O'Shea* court held that the trial court did not abuse its discretion in denying the untimely motion to amend and that under the procedural facts of the case, the trial court's finding that the trust terminated on the beneficiary's death was correct.

However, we are here concerned not with factual assertions such as were involved in *Powell* and *O'Shea*, but with the admissibility of records described in the most general of terms and residing in Cockrell's possession. The description of items as being one's financial records does not, in and of itself, mean that one vouches for their authenticity or accuracy; after all, one's financial records may well include material prepared and supplied by others.

Had Cockrell not listed the subject exhibit, she would have been precluded under the terms of the pretrial order from offering it into evidence for other than impeachment or rebuttal purposes. By listing the documents, she prudently put herself in the position of having them available to offer into evidence, but the listing did not relieve her of the obligation to lay a proper foundation for their admission.

Nor can it be said that listing the documents waived any objections she might have had to their introduction by others; listing them merely identified the documents as potential evidence. The recitation in the pretrial order that "[e]ach side" might use the exhibits listed "by the other" means nothing more than that the exhibits in the possession of one party were available to the other parties, not that everything listed as an exhibit by any one party was automatically admissible if offered by any other party. Indeed, if merely listing an exhibit did away with the need to establish a proper foundation, there would have been no reason to recite in the pretrial order which parties waived foundation as to what exhibits. It is also worthy of note that the son-in-law did not waive in his pretrial memorandum any objection to the receipt of the subject exhibit into evidence and, thus, preserved his own right to object thereto. Cockrell had no lesser right.

It is of no consequence that the daughter listed as exhibits in her pretrial memorandum "[a]ll of [Cockrell's] exhibits" and that Cockrell waived foundation as to all of the daughter's

exhibits, for those agreements in no way bound nor benefited the son-in-law, for one who does not join in a pretrial stipulation to waive foundational evidence with respect to an exhibit is not bound thereby. See, *Bryant Heating v. United States Nat. Bank*, 216 Neb. 107, 342 N.W.2d 191 (1983) (one not party to stipulation of judgment not bound by it); *Omaha Grain Exchange v. National Surety Co.*, 103 Neb. 820, 174 N.W. 426 (1919) (surety not bound by stipulation in suit to which it was not a party); *Gregory v. Edgerly*, 17 Neb. 374, 22 N.W. 703 (1885) (stipulation by judgment creditor to admit discharge in bankruptcy did not relieve plaintiff from need to prove discharge as to other defendants). The same applies to the daughter's waiver of foundation to her financial records listed as an exhibit in the son-in-law's pretrial memorandum; not only were the daughter's financial records not shown to be the same as Cockrell's financial records, but Cockrell was not bound by an agreement to which she was not a party.

The Court of Appeals thus correctly affirmed the judgment of the district court. Accordingly, we affirm the judgment of the Court of Appeals.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSE LUIS COVARRUBIAS, APPELLANT.

507 N.W.2d 248

Filed October 22, 1993. No. S-92-500.

1. **Criminal Law: Equal Protection: Juries: Discrimination.** The Equal Protection Clause guarantees criminal defendants that members of their race will not be excluded from juries by the State on account of their race.
2. **Records: Appeal and Error.** When reviewing the decision of a lower court, an appellate court may consider only evidence included within the record.
3. **Criminal Law: Juries: Discrimination: Prosecuting Attorneys: Proof.** In order to make a prima facie case under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3)

the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race.

4. **Juries: Discrimination.** An objection to a juror based on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), must be made on the record before the jury is sworn.
5. **Convictions: Circumstantial Evidence.** A reasonable inference from circumstantial evidence is to be taken most favorably to the accused when circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and IRWIN, Judges, on appeal thereto from the District Court for Hall County, WILLIAM H. RILEY, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jerry J. Fogarty, Deputy Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and MORAN, D.J., Retired.

BOSLAUGH, J.

The defendant, Jose Luis Covarrubias, was convicted by a jury of attempted first degree sexual assault and driving while under the influence of alcohol, third offense. The defendant was sentenced to 12 to 18 months' imprisonment for the attempted sexual assault conviction and to 3 months' imprisonment for the driving while under the influence conviction, with a 15-year driver's license revocation. The sentences are to be served consecutively, and the defendant was given credit for time previously served.

The defendant appealed to the Nebraska Court of Appeals, assigning as error the State's improper use of a peremptory challenge to strike a Hispanic juror and the insufficiency of the evidence to convict on the attempted first degree sexual assault charge.

In *State v. Covarrubias*, 2 NCA 993 (1993), the Court of Appeals found that since there was no explanation in the record for the State's strike of the only Hispanic juror on the panel, the cause should be remanded for a determination of whether the prosecutor had race-neutral explanations for striking the Hispanic juror from the venire. The Court of Appeals also reversed and dismissed the defendant's conviction for attempted first degree sexual assault because it found the evidence was insufficient as a matter of law to convict the defendant on that charge.

The State petitioned for, and this court granted, further review pursuant to Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1992).

The record shows that a juror named "Garcia" was struck from the venire. Garcia said that he spoke Spanish, but he indicated that if selected, he would use the interpreter's translation as the evidence. Garcia answered affirmatively when the trial court asked the potential jurors if members of their families had been involved in similar crimes. Neither the prosecution nor the defense inquired further of Garcia as to the specifics of his family's involvement in either type of crime.

Using one of its peremptory challenges, the State struck Garcia from the jury. After all peremptory challenges had been exercised, an unrecorded side-bar conference occurred.

Immediately following the side-bar conference, the jurors who had been selected were sworn, and the other jurors were excused. The defendant's attorney then made a formal objection on the record based on the decision of the U.S. Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), which held that the Equal Protection Clause guarantees criminal defendants that members of their race will not be excluded from juries by the State on account of their race. The objection in this case was made out of the presence of the jury and after a joint stipulation had been made that the defendant and Garcia were both Hispanic.

The trial court found, without comment, that the defense had not made out a prima facie case under *Batson*. The prosecution was not required to provide race-neutral

explanations for the peremptory strike of Garcia, and it did not volunteer any explanation.

The evidence shows that on May 19, 1991, the victim, K.J., age 19, went to a dance at the Latin Club in Grand Island. The defendant was present at the dance.

K.J. knew the defendant from their employment at IBP, and the defendant lived in the same trailer court as she did.

K.J. danced with the defendant twice after he asked her. She asked him twice for a ride back to Lexington when the dance ended at 12 or 12:30 a.m.

The defendant testified that he initially did not want to drive back to Lexington because he had been drinking heavily that evening. He suggested that K.J. drive his truck while he rode as a passenger, but she was unable to manage the gearshift.

The defendant agreed to drive, and they began their trip back to Lexington via Interstate 80. Near Wood River, the defendant claimed that the truck was overheating, making it necessary to leave the Interstate near the truckstop at the Wood River interchange. Rather than stop at the truckstop, the defendant chose to drive on to his cousin's house. En route to his cousin's house, the defendant claimed that his truck stopped and would not start again. K.J. testified that she thought the defendant had made his truck stall and was not putting in the clutch to enable it to start.

After the defendant's truck stopped and would not start again, he moved closer to K.J. and said, " 'Come on; let's do it,' " and " 'This wouldn't be your first time.' " At that point, according to K.J., the defendant's hands were "[e]verywhere." She further stated that the defendant "put his hands on my breasts and he would put his hand on my crotch. . . . He just kept saying, 'Come on, come on,' and then he'd say something in Spanish that I didn't understand."

K.J. testified that the defendant somehow had hold of her legs and her left arm. When she tried to get out of the truck, the defendant locked the door. K.J. testified that when she was able to get out of the truck, she slipped out of her sweatshirt, since the defendant was holding onto the shirt.

When the defendant followed K.J. outside the truck, he grabbed her, and then she hit the defendant in the stomach,

knocking him down, and ran to the truckstop.

K.J. and a Hall County deputy sheriff later returned to the area where the defendant's truck had been. She told him that the defendant had moved the truck and that it looked like he tried to turn the truck around and got stuck.

The defendant was found asleep in the truck, lying on his right side with his legs and waist still under the steering wheel and the sweatshirt on the passenger side of the cab. The results of an Intoxilyzer test showed that the defendant had ".194 of a gram of alcohol per 210 liters of breath."

The State contends the Court of Appeals erred in creating a new procedural rule concerning the timing of a *Batson* objection; considering an assignment of error that was not properly raised, preserved, and assigned as error; "attempting to resolve prior rulings of this Court which the Court of Appeals deems 'irreconcilable and inconsistent' "; drawing the conclusions it did regarding the *Batson* objection; and determining that the evidence was insufficient as a matter of law to support the defendant's conviction for attempted first degree sexual assault.

In its analysis of the defendant's assignment of error regarding his *Batson* challenge, the Court of Appeals announced a new procedural rule as to when a *Batson* objection must be made. The Court of Appeals stated the rule as follows:

> The rule we adopt today . . . should give the trial courts as much flexibility as possible to deal with the situation which would arise should a trial court conclude that a prosecution's peremptory strike of a juror having racial identity with the defendant was not race neutral. To preserve that flexibility, the *Batson* objection should be made, out of the venire's hearing, immediately upon the completion of the peremptory strikes but before the strikes are announced to the venire and before the jury is sworn and the balance of the venire excused.

State v. Covarrubias, 2 NCA 993, 999 (1993).

Although the record reflects that the defendant's *Batson* objection came after the jury had been sworn and the balance of the venire, including Garcia, excused, the Court of Appeals held that the objection had not been waived, apparently

because defense counsel claimed at oral argument that an initial *Batson* objection was made at the unrecorded side-bar conference which occurred after the peremptory challenges had been exercised.

It was unnecessary for the Court of Appeals to create a rule concerning the timing of a *Batson* objection because Nebraska statutes provide when an objection pertaining to a failure to comply with the *Batson* requirements should be made. In Neb. Rev. Stat. § 25-1601.03(4) (Reissue 1989), the Legislature provided that one of the purposes of Chapter 25, article 16, is to ensure that no citizen is excluded from jury duty because of discrimination based upon race, color, religion, sex, national origin, or economic status. Neb. Rev. Stat. § 25-1637(1) (Reissue 1989) provides that a motion for relief based on the ground of substantial failure to comply with Chapter 25, article 16, must be made before the jury is sworn to try the case.

Accordingly, the defendant's *Batson* objection should have been made prior to the swearing of the jury. Since the record does not indicate that the defendant made his *Batson* objection prior to the jury being sworn, the Court of Appeals erred in finding that the defendant had not waived his objection. When reviewing the decision of a lower court, an appellate court may consider only evidence included within the record. *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993).

The State claims that the Court of Appeals erred in considering an error that was not properly raised, preserved, and assigned as error. This assignment is frivolous and without merit. The error referred to by the State is the defendant's assignment concerning the sufficiency of the evidence to convict him on the charge of attempted first degree sexual assault. The brief filed by the defendant in the Court of Appeals reflects that the assignment was properly before the Court of Appeals and was thoroughly discussed in the brief.

Next, the State contends that the Court of Appeals erred in retaining jurisdiction of the defendant's appeal because it found prior rulings of this court to be inconsistent and that the issue regarding the defendant's *Batson* objection was one of first impression for this state. The State argues that Neb. Rev. Stat.

§ 24-1106 (Cum. Supp. 1992) required the Court of Appeals to recommend removal of this case to the Supreme Court because of the alleged inconsistency it found between *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992), and *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992), and because it considered the issue concerning the defendant's *Batson* objection to be one of first impression.

Section 24-1106(3) provides that the Court of Appeals may, on its own motion, recommend removal of a case from its docket to the Supreme Court at any time before a final decision on the case has been made by the Court of Appeals. However, nothing in the statute mandates the Court of Appeals to recommend removal of a case from its docket to the Supreme Court, and it was not error for the Court of Appeals to retain jurisdiction of the defendant's appeal.

The State argues that the Court of Appeals erred in finding that the defendant had made a prima facie case under the *Batson* decision. We agree.

In order to make a prima facie case under *Batson*:

> [A] criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race.

State v. Rowe, 228 Neb. 663, 668, 423 N.W.2d 782, 786 (1988).

In the present case, the State stipulated to the first two elements. The third element may be supported or refuted by "the prosecutor's questions and statements during *voir dire* examination." *Batson v. Kentucky*, 476 U.S. 79, 97, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

The Court of Appeals found that the prosecutor's failure to make any inquiry of Garcia after his affirmative answer to the trial court's question about familial involvement in crimes similar to those with which the defendant was charged justified an inference that the prosecutor used his peremptory challenge of Garcia to exclude him because of his race.

In *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987),

the defendant assigned as error the trial court's failure to find that he had made a prima facie showing under *Batson*. This court stated that the standard of review in that case was whether the trial court's decision was clearly erroneous.

In support of his assignment of error, the defendant in *Alvarado* argued that the prosecutor's lack of questioning of the juror he peremptorily challenged was a circumstance which, combined with the first two *Batson* elements, raised an inference of purposeful discrimination. This court determined that the prosecutor's lack of questioning did not raise an inference of discrimination. We went on to state that even if the prosecutor's lack of questioning had been sufficient to raise an inference of purposeful discrimination, he provided a neutral explanation for his strike.

In the case at bar, the trial court's determination that the defendant had failed to make a prima facie case was not clearly erroneous. The State's failure to question Garcia after the trial court's question concerning familial involvement in similar crimes did not support an inference that the State struck Garcia because of his race. Garcia's affirmative response to the trial court's question tends to refute a discriminatory purpose on the part of the State.

The Court of Appeals found that the defendant had made a prima facie *Batson* showing, and it remanded the cause for further proceedings because the State gave no explanation for its peremptory challenge of Garcia. Since in this case the defendant failed to make a prima facie showing of purposeful discrimination under *Batson*, the State was not required to provide a neutral explanation for its challenge of Garcia. See *Alvarado, supra*.

Finally, the State contends the Court of Appeals erred in reversing and dismissing the charge of attempted first degree sexual assault because it found that the evidence was insufficient as a matter of law to support the defendant's conviction on that charge.

The Court of Appeals correctly applied the standard of review set forth in *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992), but also commented that the standard of review in *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992), is

irreconcilable and inconsistent with *Sexton* because "*LaFreniere* requires reasonable inferences from circumstantial evidence to be taken most favorably to the accused upon appellate review of sufficiency of the evidence and *Sexton* requires that an appellate court take the view of the circumstantial evidence which is most favorable to the State." *State v. Covarrubias*, 2 NCA 993, 1006 (1993).

Sexton holds that 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. *LaFreniere* holds that 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. *LaFreniere* requires a reasonable inference from circumstantial evidence to be taken most favorably to the accused when circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other. See, also, *State v. Ruiz*, 241 Neb. 693, 489 N.W.2d 865 (1992); *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992).

The evidence in this case supporting the defendant's conviction of attempted first degree sexual assault is primarily direct, consisting of the testimony of the victim. The Court of Appeals erred in finding the evidence insufficient as a matter of law to convict the defendant of attempted first degree sexual assault.

In order to convict the defendant of attempted first degree sexual assault, the jury had to find that the defendant took a substantial step to sexually penetrate the victim after overcoming her by force or threat of force, express or implied; coercion; or deception.

The evidence, when viewed in favor of the State, shows that the defendant, after dancing twice with K.J. at the Latin Club, agreed to drive her home. On the way home, the defendant claimed he was having car trouble and left the Interstate,

heading toward his cousin's house. The defendant pretended his vehicle would not start. The defendant began to grab K.J.'s crotch and her breasts, saying " 'Come on; let's do it,' " and " 'This wouldn't be your first time.' " When K.J. attempted to leave the truck, the defendant locked the door and held onto K.J.'s leg, arm, and sweatshirt. K.J. escaped by slipping off her sweatshirt. When she was outside the vehicle, the defendant grabbed K.J., prompting her to hit him in the stomach. K.J. then ran to a truckstop and returned with the deputy sheriff to find that the truck had been moved and that the defendant was asleep with K.J.'s sweatshirt in the cab. The evidence and the reasonable inferences that could be drawn from it were sufficient to support the jury's conviction of the defendant for attempted first degree sexual assault.

The judgment of the Court of Appeals is reversed, and the cause remanded with directions to reinstate the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. FRANCES L. THOMPSON, APPELLANT.

507 N.W.2d 253

Filed October 22, 1993. No. S-92-891.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, 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 trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence.
3. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she

acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

4. **Trial: Evidence.** All relevant evidence normally is admissible. Evidence which is not relevant is not admissible.
5. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
6. **Rules of Evidence.** Admission of evidence under Neb. Evid. R. 106, Neb. Rev. Stat. § 27-106 (Reissue 1989), the rule of completeness, is not automatic. Even under rule 106, the evidence sought to be admitted must be relevant to the issues in the case.
7. **Motions for New Trial: Time.** An application for new trial shall, except for the cause of newly discovered evidence material for the party applying, which he or she could not with reasonable diligence have discovered and produced at the trial, be filed within 10 days after the verdict was rendered unless unavoidably prevented.
8. **Motions for New Trial: Time: Appeal and Error.** A motion for new trial not filed in conformity with the statutory requirements as to time may not be considered by an appellate court on review.
9. **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. Moreover, on a claim of insufficient 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.
10. **Convictions: Juries: Circumstantial Evidence.** In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom.
11. **Circumstantial Evidence: Words and Phrases.** Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists.
12. _____: _____. Circumstantial evidence is evidence of one or more facts from which another fact can logically be inferred.
13. **Homicide: Intent: Words and Phrases.** A person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice.
14. _____: _____: _____. "Purposely," as an element of first degree murder, means intentionally.
15. **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 the conduct.
16. **Homicide: Intent: Circumstantial Evidence.** Malice, like intent, concerns the state of mind of the slayer and may also be inferred from the words and acts of

the defendant, the circumstances surrounding his or her conduct, and the evidence relating to the circumstances of the criminal act.

17. **Intent: Words and Phrases.** Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.
18. **Homicide: Intent: Words and Phrases.** Deliberate malice and premeditated malice are separate and distinct elements of the crime of murder in the first degree.
19. _____: _____: _____. "Deliberate" means not suddenly, not rashly; but deliberation requires that the defendant considered the probable consequences of his or her act before doing the act. A person kills with deliberate malice when he or she, without just cause or excuse, kills another not suddenly or rashly, but after considering the probable consequences of doing the act.
20. _____: _____: _____. "Premeditated" means to have formed a design to commit an act before it is done. A person kills with premeditated malice if before the act causing the death occurs, he or she has formed the intent or determined to kill the victim without legal justification.
21. **Homicide: Intent: Evidence.** The length of time it takes to kill another is evidence from which the intent of the killer may be inferred.
22. **Intent: Evidence: Weapons.** Malice may be inferred from the shooting of another person with a deadly weapon.
23. **Homicide: Intent: Evidence.** The location, nature, and number of wounds inflicted are circumstances from which a jury may draw the inference that a killing was done with deliberate and premeditated malice.
24. **Self-Defense.** The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself or herself against the use of unlawful force by such other person on the present occasion.
25. **Self-Defense: Death.** The use of deadly force shall not be justifiable under Neb. Rev. Stat. § 28-1409 (Reissue 1989) unless the actor believes that such force is necessary to protect himself or herself against death.
26. **Self-Defense.** A person employing protective force may estimate the necessity thereof under the circumstances as he or she believes them to be when the force is used.
27. _____. A defendant asserting self-defense as justification for the use of force must have a reasonable and good faith belief in the necessity of such force.
28. _____. Human life should not be made to depend upon conditions so unreliable and hazardous as the bare belief of any person that he or she is in danger of death or bodily harm.
29. _____. A defendant's claim of self-defense is a question of fact for the jury.
30. **Trial: Juries.** Except when there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine a venireperson out of the presence of all other venirepersons.

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

Andrew Reid and Bruce Ellison for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, FAHRNBRUCH, and LANPHIER, JJ., and RONIN, D.J., Retired.

FAHRNBRUCH, J.

Frances L. Thompson appeals her jury convictions for first degree murder and for use of a firearm to commit a felony in the August 18, 1991, killing of Dean Frank. Thompson admits she shot and killed Frank, but claims the killing was done in self-defense. We affirm the jury's verdicts.

STANDARD OF REVIEW

In reviewing a criminal conviction, 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 trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993); *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993).

FACTS

Viewed most favorably to the State, the facts of this case are as follows:

At the time Frances L. Thompson killed Dean Frank on August 18, 1991, she was a 41-year-old widow. She had just completed her third year of full-time study at the University of Nebraska at Lincoln, where she had been almost a straight-A student. Thompson hoped eventually to attend law school and pursue a career in environmental law.

During her attendance at the university, Thompson maintained an apartment in Lincoln. When not at the university, she resided in rural Knox County on an 850-acre farm near Verdigre, Nebraska. The farm was owned by Thompson's mother, and Thompson hoped to inherit the farm someday. At the time Frank was killed, Thompson's 22-year-old

son, Steven, was stationed in Great Lakes, Illinois, with the U.S. Navy.

Thompson met Frank shortly after moving onto the Knox County farm in 1985. Frank did odd jobs around the farm and was paid by Thompson's mother. Frank also helped Thompson with various tasks such as moving heavy objects and helping to care for her pet pig. In exchange, Thompson did mending and typing for Frank.

Frank lived in Atkinson, Nebraska, and early in their relationship, Thompson and Frank saw each other infrequently. Thompson described her relationship with Frank as one of friendship. She testified that Frank was a "perfect gentleman" to her during the 6 years preceding the killing. She had rebuffed his one "pass" at her soon after they became acquainted. Frank sometimes spent the night at Thompson's house when he did jobs for her that required more than 1 day to complete. He slept in a spare upstairs bedroom.

The nature of the relationship between Thompson and Frank changed dramatically during the summer of 1991. On June 16, 1991, Thompson spent the night at Frank's trailer. According to Thompson's testimony, Frank suggested that night in a "business like way" that the two marry and that he take over the running of Thompson's farm so they could pursue organic farming. Thompson was interested in working her mother's farm rather than leasing it out, but had no farming skills, and Frank was a farmer without a farm.

Thompson denied that she was interested in marriage or sex with Frank. Nonetheless, Thompson and Frank apparently contemplated a sexual relationship of some sort. On Tuesday, June 25, Thompson wrote Frank, informing him that the cost of a Certificate of Sexual Health from the University Health Center would be about $103.28 and that "this project" could cost him over $200. In that letter, Thompson stated:

> Whew! I was hopin' to do this all w/ blood outta my arm, but they INSIST they have to make ya take yer clothes off & spread yer legs. AAUUGGGHH!!!
>
> Makes me SICK! I'm tellin' ya, if I do this YOU'RE gonna do it, TOO. Ick, ick, ICK!! (*I know, that was the idea, to make you do it, too.* But I mean YOU hafta take

all the same tests I do!!)

(Emphasis supplied.)

Thompson questioned whether Frank might rather keep his freedom after having time to reconsider. Continuing the letter the following day, she stated:

> I just reread what I wrote yesterday, and I bet I know how you're reacting to it.
>
> Betcha you're thinking something paranoid like, "Gee, sounds like she wants to back out." Uh-uh, dammit. I am quite nicely giving you every opportunity to back out.
>
> . . . [*Y*]*ou don't have to look for double meanings in what I write*.

(Second emphasis supplied.)

Nonetheless, Thompson explained at trial what she really was trying to tell Frank:

> I was trying to give him a chance to back out, *hoping he would take it, because I didn't want to get married*. I didn't want to get involved in any sexual relationship.
>
> . . . .
>
> . . . *I didn't want him to think, and figure out what I was really thinking. I didn't want him to know, and I had never told him, that I just wasn't interested in him sexually*. I did come out and tell him that I was giving him an opportunity to back out, but I didn't tell him why I wanted him to take it.

(Emphasis supplied.)

Thompson informed Frank in the letter that she had changed her mind about going to summer school all summer and had dropped two classes so that she would be at home from mid-July to late August. She invited him to join her in Lincoln for the Fourth of July.

On July 3 or 4, 1991, Frank went to Lincoln and stayed with Thompson at her duplex until July 9, when both Frank and Thompson left Lincoln and went to Verdigre. That same day, the two went to a physician in Verdigre and had blood tests done for acquired immune deficiency syndrome and syphilis. At trial, Thompson described this as a "first step" in considering a serious relationship with Frank. Thompson was concerned

about sexually transmitted disease because she knew that Frank had engaged in sexual activity with other women.

Thompson called the physician's office for the results of the tests, which were negative, and drove to Atkinson to give Frank the results. Thompson testified that she was in Atkinson from July 12 through July 15 and that she stayed at Frank's trailer while she was there.

On Tuesday, July 16, Thompson started a letter to Frank inviting him to accompany her to Chicago for her son's graduation from basic training. She wrote, "I KNOW you don't particularly want to see Kid graduate. But, think about it! YES, you do! If he DOES graduate, he'll LEAVE ME ALONE for 4 WHOLE YEARS. You'll be so HAPPY FOR ME!!" She also wrote, "I put WAY too much energy into agonizing over letting sex back into my life. Guess it ain't for you - but for ME it was the biggest change in lifestyle imaginable."

Thompson told Frank she had "something a little more fun" to write about, but that it was "too personal to put in a letter." She informed Frank that she had learned about something that "could be called Selfish Sex" at a California sex clinic and that she thought it was "neat." She promised to tell Frank all about it on Saturday, presumably July 20. Thompson signed the letter "Huggs & . . . stuff."

Thompson was in Atkinson again on July 22. Around this time, Thompson told Frank she wanted to meet his ex-wife and his children. According to Thompson, Frank became "very angry and upset" at this request and said he did not want Thompson meeting them, which made her suspicious.

Thompson also testified that Frank began throwing out strange comments about other women. She believed he was trying to bait her into being jealous because she was not reacting to him sexually as he wanted her to. Thompson responded by writing two versions of a letter to Frank, apparently on July 22. She left one version of the letter at Frank's trailer, where it was found after Frank's death. The other version was found at Thompson's farmhouse. In the version left at Frank's trailer, Thompson accused Frank of "jacking w/ [her]," bringing up issues that raised questions in her mind, and refusing to answer her questions in regard to other women.

In the letter, Thompson referred several times to her "jealousy" and informed Frank that his behavior hurt her and "goad[ed her] into more jealousy." Nonetheless, Thompson testified that she was not at all jealous of Frank because she did not want him and did not care who did. She claimed that she was "guilty of playing a game" with Frank when she said she was jealous, in the hope that by "feeding his ego," "head-patting," and "suck[ing]-up," he would be "complimented" and would "straighten up and be more honest" with her. Thompson further testified that she "was using the word jealousy for the word disgust. But telling somebody you're disgusted with them really doesn't get you anywhere, and [she] was hoping the word jealousy would."

Thompson wrote Frank that he had "slapped [her] up side the head w/ another woman" and then refused to answer her questions about the other woman and that "nothing could be more viciously calculated" to make her worry. Later in the letter, Thompson alluded to yet another woman Frank had apparently mentioned:

> And that remark last night about some woman's "stuff all over." That was doing it again, too. Why do you want to do that to me? Now I have to wonder, what woman? what stuff? where? here? He told me he had a live-in here. What did she look like? Was she prettier than I? Was she younger? What kind of competition is she?
>
> When you make me wonder, I wonder. BIG-time.
>
> . . . .
>
> I ~~told~~ asked you not to talk about other women to me. But there is something more cruel than that, even. It is bringing them up, & making me wonder. And worry.
>
> . . . .
>
> . . . I love you. I want to keep you.

In the other version of the letter, Thompson also accused Frank of lying to her and of being sly and evasive.

Frank's telephone records show that on Tuesday, July 23, he made two long-distance calls to Thompson's number and talked for 38 minutes one time and 37 minutes the other time. Thompson testified that Frank had told her he did not think about the letter she had left in his trailer the previous day and

that he had just thrown it in a drawer.

A letter which the defendant testified that she wrote on July 23 was found in Frank's trailer after his death. It contained four paragraphs which, according to the letter, were added after Thompson talked to Frank on that night:

> So I tried to communicate with you & you "threw it in a drawer." That's what I'm worth to you. Guess I was ready for that; I had this written yesterday.
>
> Like I said, minimum of hard feelings. I don't need you for an enemy.
>
> Sure sorry I . . . ruined our friendship. . . .
>
> You left shit here. I don't think you'll worry too much about it. Seems you told me you left stuff at bitch's [sic] places ALL OVER the country, I'm just another one now.

The following day, July 24, Thompson began a letter to her son, informing him that she had a "Fatal Fight" with Frank. Discussing this "Fatal Fight," Thompson stated:

> What was our Fatal Fight, do you wonder? Oh, it's a LONG story, Kid, I mean *things have been HAPPENING since you left. Mommy was naughty, & Mommy is payin' now.* Come to find out that not only VERY RICH OLD LADIES like Grandma . . . need to worry about men romancing them for their money. Dean was trying to romance ME for the money & farm he THOUGHT I'd have soon.

(Emphasis supplied.)

In the letter, Thompson speculated at length that Frank was going to give her trouble and that he might harm her pet pig, break in, or suggest to others that Thompson should be robbed. She commented numerous times about how worried and scared she was, although she admitted that she often got "overexcited about everything & often overreact[ed]."

Thompson also referred in the letter to a previous relationship: "I remember Ron. I remember lots of violence & threats & evil behavior, and how . . . STUPID I can be, & I DO expect real problems now from Dean, too."

Thompson stated that she was a fool and that her ego was crushed flat. However, she concluded by reassuring her son, "[D]on't worry about me, now. . . . Remember, I may whine &

cry, but *I is a TOUGH old lady, and a damn good shot, too.*" (Emphasis supplied.)

On July 25, Thompson was in Jedlicka's Hardware Hank store in Verdigre. At that time she purchased .357 shells and inquired about the type of hardware needed to hold a 2- by 4-inch board against a door to secure it. The owner of the hardware store testified that he did not have the type of brace requested by Thompson, and he referred her to a welder. Thompson testified that she had brackets made for an entry doorway sometime in July or August. Those brackets and a 2- by 4-inch board were found in place on one of Thompson's doors the day Frank was killed.

On Sunday, July 28, Thompson went with Frank to a state park. A state conservation officer visited briefly with them as they were leaving, and he testified that Thompson was sitting in the middle of the front seat of the car next to Frank.

That same day, Frank gave Thompson $300 for her upcoming trip to Chicago. Thompson testified that Frank was being pushy that day on the issue of marriage and that she told him she would not marry him. Thompson claimed that she could not remember Frank's words in response to her rejection of him, but that his statement reminded her of an old saying of her mother's to the effect that "if I can't have you, nobody else will. Meaning if you don't marry me, I will kill you."

On August 1, Thompson flew to Chicago to see her son graduate from Navy boot camp. Telephone records indicate that Thompson called Frank collect five times during her 4-day stay in the Chicago area, the conversations each lasting between 9 and 26 minutes.

Thompson returned from Chicago on August 4. On the way home, Thompson stopped and telephoned Frank's ex-wife, Betty Frank. Betty Frank testified that Thompson informed her that she and Frank were planning on getting married, and that Thompson said she wanted to get better acquainted and to discuss with her visitation rights with the children.

However, Thompson testified that she no longer wanted to discuss visitation rights at the time she called and that the real purpose of the call was to gather information to find out if Frank meant his threat to kill her made the previous week. Betty

Frank refused to meet with Thompson and hung up.

When she returned to her farm, Thompson called Frank and talked to him for over one-half hour.

The following day, August 5, Thompson contacted Delores Fischer, a former girl friend of Frank's who lived in Atkinson, and arranged to meet her that day. Thompson testified that Fischer told her that once, when he was drunk, Frank had threatened to slit Fischer's throat. Thompson testified that after her conversation with Fischer, she decided that Frank was dangerous and that there was no longer a possibility of a relationship with Frank. When Frank called Thompson that night, she called him a dirty name and hung up on him.

The evening of August 5, Thompson wrote to her son explaining that she had not been "flirting" with Frank when she had called him from Chicago, but that she was merely "postponing," because if she could keep Frank hoping, he would not harm her home or her pet pig.

Thompson stated that she would not allow Frank to come over and fix her pig's irrigation pipe, even though he was willing to do so. She wrote to her son that she might have "blown [her] front" by refusing to see Frank that evening, but that she could not bear to have Frank drooling and weeping on her. Moreover, she wrote, Frank had "a face like a drowning rat . . . who could stand it w/o vomiting?"

Thompson admitted to her son that she did "kiss [Frank] & stuff." She reiterated her belief that Frank was interested in the money she might inherit from her mother, rather than "want[ing her] body" as she had originally thought. Thompson was pleased that she, "the Honor Student," had figured this out before Frank "took" her for anything, even though it had taken her a month to do so. To the contrary, Thompson wrote in reference to Frank, "I took HIM! He's been spending a lot of money on me this last month. Serves him right. My single BIGGEST take was the $300 he gave me to fly to Chicago. Sucker!"

Thompson told her son that the reason she was afraid of Frank was because Frank would be "pissed" when he figured out that he was getting nothing from Thompson. She thought he might be able to figure things out "w/ his half a brain."

However, Thompson concluded, "He's a liar, a user, AND a fool, and I ain't THAT scared of him. I'll just sleep w/ my .357 tonight . . . (grin)."

On August 6, Thompson returned to Jedlicka's Hardware Hank store and exchanged a box of ".357 Max" shells suitable for a rifle for a box of .357 Magnum cartridges for use in a revolver.

Also on August 6, Thompson wrote a letter to a friend in Omaha discussing Fischer. Thompson wrote that she had concluded, after meeting and talking to Fischer, that Fischer still cared about Frank and still wanted "to do him." This made her "dislike" Fischer, Thompson wrote to her friend, but she could see Fischer's weakness and loneliness and have pity.

In the same letter, Thompson referred to Frank as "a classic sociopath." She wrote that "[Frank's] MISTAKE was in being a FALSE FRIEND to an INTELLIGENT & non-desperate lady."

On August 7, Frank wrote Thompson a letter which stated in part:

> You went downtown got in a good argument with people and got Slaped arround [sic]! to [sic] Bad you got beat up!
>
> . . . .
>
> I TOLD YOU MY PAST IS DEAD! NOW IT IS GONE TOO!
>
> YOU ARE REALLY INTO THE WRONG WORLD IF YOU BELIEVE OTHERS!
>
> I TOLD YOU THE TRUTH!
>
> LOVE!
>
> /s/ Dean

On August 8, Thompson wrote Fischer a letter in which she admitted spending the night with Frank on Sunday, June 16, but denied that she "took any of [her] clothes off." Thompson was aware that Fischer had spent the night with Frank in his trailer on a Saturday night in June, perhaps the night previous to Thompson's visit. She made the following comments about her relationship with Frank:

> You see, what happened, Dean started telling me after that he loved me so much that he hadn't been screwing anyone else at all for months. And I was stupid enough to

> believe that!
>
> So I didn't know he was seeing you then or I sure wouldn't have let him waste my time, and backstab you, by putting that snow job on me.
>
> . . . .
>
> When I want a Houseboy I'll hire one, I won't have someone pretending to be my friend come sucking up to me and lying to me to get my money.

Frank's telephone bill indicates that on August 10 he called Thompson at 6:40 p.m. and talked for 213 minutes. Thompson testified that she did not remember the conversation very well, but that she simply gave Frank the opportunity to talk.

On August 11, Frank was at Thompson's farm, where he fixed the pig's irrigation pipe and moved a refrigerator. Thompson testified that she told Frank on that day never to come back to her farm and that Frank wrote out a piece of paper giving Thompson all his property which he had stored on her farm, including a 1973 Ford pickup. That document and the title to the pickup were found in Thompson's kitchen after Frank was killed.

On Monday, August 12, Thompson wrote to her son that she "took a chance" by letting Frank come over to help her. She was willing to take such a chance because she "[knew] male psychology. Men are too STUPID to ever GIVE UP."

Having been rebuffed by Betty Frank when she attempted to talk to her on August 4, Thompson wrote her a letter dated August 13. In that letter, Thompson again said that her original purpose in contacting Betty Frank had been to meet her because Thompson and Frank had planned to be married. However, Thompson stated, "Amazing how quickly things can change! The engagement is off." Thompson informed Betty Frank that Frank had been lying to her a lot, and she questioned her about what might happen next.

> How violent is he? He threatened to kill me if I wouldn't marry him, but I think that's a standard threat. Please tell me if I should, and how much, worry about retaliation from him? No-one would know about that better than you, I think. At least you are still alive, and that's encouraging.

On Saturday, August 17, the day before she shot Frank, Thompson wrote a final letter to her son, in which she stated that Frank had been calling her all week, but that she had not told him what she really thought of him. Thompson stated:

> This girlfriend of his that I met in Atkinson told me that he got all drunk before and threatened to slit her throat, and Mrs. Boham told me a few days ago . . . that he used to beat his wife all the time when they lived out here.
>
> I don't want that psycho AROUND. I bought a new box of .357 shells & I'm gonna load up and PRACTICE some this afternoon! I bought a new box of .25 shells a while back, and if I can find it I'll give the little guy some exercise, too.

A resident of a farm about one-quarter mile from Thompson's testified that he heard shots which sounded like someone target practicing in the Thompson yard area on Saturday afternoon, August 17. It sounded to him as if two different calibers of guns were being used because one group of shots was louder than another group of shots.

That evening, Frank called Thompson at 7:06 p.m. and talked for 51 minutes. He called again at 10:12 p.m. and talked for 16 minutes. At 10:43 p.m., Thompson called the Knox County sheriff's office and reported to Don Henery, the chief investigator for the sheriff's office, a threatening phone call that she had received. Henery testified that Thompson reported that she and Frank had argued earlier in the week and that Frank had just called and threatened to send the "Gatz boys" out to her place.

Thompson also told Henery that Frank was angry because she refused to marry him and that Frank had previously threatened her. Henery testified that Thompson was very calm and matter-of-fact on the telephone, that she did not request that he come out, and that he advised her to tape-record future threatening conversations.

Frank's telephone records show that he called Thompson at 1:05 a.m. on August 18 and talked for 13 minutes. Thompson testified that Frank screamed things at her, threatening to slit her throat for checking up on him, shoot her truck full of holes with her in it, burn her house, and butcher her pig. However,

Thompson testified that she did not believe Frank was an immediate threat, because he sounded "drunk out of his mind," and she believed he was in Atkinson, at least 2 hours away.

Frank called Thompson again at 7:08 a.m. Thompson claims he repeated his threats, this time in a calm and quiet voice. Frank's telephone records indicate that this call lasted 2 minutes, although Thompson testified that it seemed like Frank had said nasty things to her for a long time. The Knox County sheriff's log shows that more than 5 hours later, at 12:26 p.m., Thompson called the sheriff's office and reported Frank's threatening phone calls to Deputy Lee Waterman.

Thompson kept notes about Frank and the events of August 17 and 18 on her computer. The computer disk containing those notes, as well as disks containing Thompson's correspondence with Steven and with other people, was seized by the sheriff, printed out, and entered into evidence at trial. The file name for Thompson's notes of August 17 and 18 was "Assault Report."

On August 18, Thompson wrote, "I called Deputy Waterman at 12:22 (noon). . . . I called Dean a 'dangerous psycho' and told Deputy Waterman how scared of him I am." Deputy Waterman instructed Thompson on how to obtain a restraining order and advised her to do so on Monday, the following day.

At 3:12 p.m., Frank again called Thompson, and they talked for 32 minutes. Thompson testified that Frank did not threaten her at that time. She wrote in her computer notes that Frank "sounded calmer, but like he were going to burst into tears any second." She testified at trial that Frank "sounded like his normal self and he talked about normal stuff." Before he hung up, Frank told Thompson he was going to put clothes into the dryer and go grocery shopping. Thompson testified that she did not invite Frank to her house, nor did he give her any indication that he was coming over.

A few minutes later, Delores Fischer called and told Thompson that Frank had been at her place from 12:30 to 2 p.m. and had seemed all right. Fischer testified that Frank had watched TV, napped, and had two cans of beer during that time. Fischer also informed Thompson that she had talked to Bea

Gatz, the mother of the Gatz boys, and that Bea had reassured her that the boys were harmless.

Thompson testified that, later, as she was sitting in the dining room at her computer writing about Frank's threats to her, she heard a car door slam. Thompson claims she went into the adjacent storage room, saw Frank's car from the window, and became frightened because she had not thought he would actually come to her house and attack her. She testified that she thought she should get back to where her gun was, on a chair next to where she had been sitting working on the computer, and quickly went back to the computer. As she returned to her chair, she saw Frank in the doorway between the kitchen and the dining room.

Frank told Thompson he had brought groceries, and she instructed him to put them in the refrigerator. Thompson testified that Frank walked toward the refrigerator, then suddenly whirled toward her, screaming, " 'I'm [unintelligible two-syllable word] kill you.' " Although she did not actually hear the words, Thompson was sure that Frank had said, "I'm going to kill you," because it fit the situation. Knox County Sheriff Wes Eisenbeiss testified that in his conversations with Thompson after the shooting, she did not mention anything Frank had said to her before she shot him. She only told him that Frank had "made a noise."

Thompson testified that Frank then "lunged" toward her and that she grabbed her .357 Magnum from the chair, pointed it at Frank with both hands, and said, "[H]uh-uh." She said that when Frank did not stop moving toward her, she rapid-fired all six rounds in her handgun. She testified that although the shots stopped Frank, she "couldn't stop pulling the trigger," so she aimed the last shots down and away from him.

The sheriff's log indicates that Thompson called at 5:35 p.m. to report the shooting. Deputies arrived at Thompson's farm at 6:25 p.m. and were admitted to the house by Thompson.

The deputies found Frank lying on the floor of the computer room and a pool of blood on the floor. To the left of Frank's head were words written in blood on the floor which appeared to say "self defense," although the second word was difficult to make out. There was testimony at trial that Frank was right

handed. No blood was found on Frank's right hand, but there was blood noted on his left hand. Deputies also found a note in an open suitcase nearby with the words "I love Fran," "self defense," and "Dean" each written twice and the words "Fran I love you" written once.

When a deputy asked Thompson what Frank had been shot with, she handed him a loaded Colt Python .357 Magnum gun. She testified that she had reloaded the weapon while calling the sheriff's office to report the shooting.

After determining that Frank was still alive, the deputies requested assistance from the rescue squad. When squad members entered the house, Thompson was sitting on the arm of a chair beside Frank, smoking a cigarette. In response to questioning, Thompson stated that she did not know where she had shot Frank, or how many times.

Rescue squad members testified that Frank was lying on the floor on his left side in a fetal position, his knees drawn up to his chest. He was biting on a pillow and moaning. A bag containing a package of lunchmeat was found underneath his side. In response to questioning, Frank replied, "Just leave me alone and let me die." Frank's condition then deteriorated rapidly, and he was unable to respond verbally thereafter. A preliminary examination by squad members revealed two abdominal wounds and a back wound. One of the abdominal wounds was bleeding profusely.

By 6:30 p.m., Frank had no discernible blood pressure, pulse, or respirations and was totally unresponsive. Efforts at cardiopulmonary resuscitation proved unsuccessful, and Frank was pronounced dead by a local physician at 7 p.m., 4 minutes after the rescue squad arrived in Verdigre.

Thompson was taken into custody that evening as a material witness. She commented several times to a deputy that "it did not turn out like TV." Sheriff Eisenbeiss testified that when he inquired how Thompson was standing up under the events of the day, she responded that it was self-defense, that Frank was going to kill her, that Frank had made threats to her, and that he was going to get the Gatz boys after her. Thompson also told Sheriff Eisenbeiss, "Maybe he wouldn't have done anything to me, but I have read where women waited too long to defend or

protect themselves."

Thompson expressed hope that the sheriff could test her hands for the presence of blood "so they don't think I wrote the note in blood." She informed the sheriff that Frank had written the note in blood. Sheriff Eisenbeiss testified that he did not observe blood on Thompson's hands at the time.

An autopsy performed on Frank's body revealed a wound from a bullet which entered his left abdomen and exited his back. Two other bullets entered from the back. One entered Frank's right hip, shattering his hip bone and lodging in the bone. The other entered his right back, passed through his liver and right lung, and exited through his lower chest, striking his right elbow area.

During the course of their investigation, deputies found three bullet holes in Thompson's dining room floor next to where Frank had been lying. The path of the bullets was reconstructed by placing rods through the dining room floor in order to determine the angle from which the bullets were fired. Those three bullets appeared to have been fired from an area in the dining room in front of the doors to Thompson's storage room. Thompson claimed that she was standing next to her computer when she shot Frank.

No blood was found anywhere in the house except in the immediate area where Frank was lying when law enforcement officials arrived, even though Thompson testified that Frank moved around quite a bit after being shot.

Thompson admitted that there was an ashtray full of cigarette butts which could have been hers on top of a refrigerator in the storage room. That room was one from which Thompson could see to the front of the house.

Sheriff Eisenbeiss testified that Thompson told him she *heard* Frank open the kitchen refrigerator door, and she thought he took off his boots in the kitchen. Photographs taken from the area of the computer demonstrate clearly that the kitchen area, including the refrigerator, could easily be *seen* by a person at the computer.

Deputies found two cans of Mace in Thompson's bedroom. A loaded .25-caliber semiautomatic handgun was found under her pillow.

On September 12, 1991, Thompson was charged by information with first degree murder and use of a firearm to commit a felony in the killing of Frank. She was subsequently convicted by a jury of both charges. Thompson was sentenced to life imprisonment for first degree murder and to 10 years' imprisonment for the firearm charge, the sentences to run consecutively. She now appeals her convictions to this court.

ASSIGNMENTS OF ERROR

The defendant claims that the trial court erred in (1) refusing to admit evidence of the physical abuse which she allegedly suffered at the hands of a former boyfriend as evidence in support of her claim of self-defense, and because the State introduced a letter written by Thompson alluding to that abuse during its case in chief; (2) failing to grant her motion for new trial due to insufficiency of the evidence to support the verdict; and (3) failing to permit limited, sequestered, and individual voir dire of the jury.

ADMISSIBILITY OF PRIOR ABUSE

The defendant contends that the district court erred in refusing to admit evidence of the physical abuse she allegedly had suffered in 1983 at the hands of a former boyfriend, Ron Thompson. Although the defendant was never married to Ron Thompson, she apparently lived with him from 1980 to 1983 and had her and her son's last names legally changed to Thompson during that time period.

Thompson sought to testify on the witness stand about the alleged abusive and threatening relationship she had with Ron Thompson, but was prevented from doing so upon a relevance objection by the State. The court sustained the objection on the basis that what had happened 8 years previously with another man was not relevant to Thompson's response to threats made by Frank. Without making an immediate offer of proof following the trial court's ruling, the defendant continued to answer questions on her direct examination.

Later that day, the defense submitted as an offer of proof an 11-page report Thompson herself had written and filed with the Washington County sheriff's office on March 20, 1983. That report detailed a bizarre 2-day episode on March 16 and 17,

1983, in which Ron Thompson allegedly raped the defendant, held her captive, and repeatedly threatened her with surgical mutilation and death.

Based on the offer of proof, the trial court again found the proffered testimony to be irrelevant because it involved a third party rather than the victim and because the abuse had occurred over 8 years prior to the time the defendant killed Frank. The court also found that the evidence should be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), because of the danger that the acts of Ron Thompson might be imputed by the jury to Frank, thus creating unfair prejudice, confusing the issues, or misleading the jury. The court stated that the issue in the case was Thompson's state of mind toward the victim, not her state of mind toward Ron Thompson.

The defendant argues that the evidence should have been admitted to show that she acted in a reasonable fashion in defending herself against Frank. She further maintains that such evidence was necessary to explain her reference to Ron Thompson in the letter to her son dated July 24, which was introduced by the State as part of its case in chief.

"[I]n all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence . . . ." *State v. Messersmith*, 238 Neb. 924, 936, 473 N.W.2d 83, 92 (1991). Accord, *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993); *State v. Peterson*, 242 Neb. 286, 494 N.W.2d 551 (1993).

Initially, we address Thompson's claim that the evidence of her abuse by "a person," Ron Thompson, was admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1989), to show that Frank's actions made Thompson angry, frustrated, and frightened, because the actions of the two men were directly related in Thompson's mind. This is a misapplication of rule 404(2), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of *a person* in order to show that *he or she* acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

> opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Emphasis supplied.)

Although the statute does not expressly state that the "other crimes, wrongs, or acts" must be those of the accused and not of a third party, it is obviously implied, and we have previously held that to be the case. In *State v. Timmerman*, 240 Neb. 74, 87, 480 N.W.2d 411, 419 (1992), we stated that "[u]nder rule 404(2), evidence of other crimes is not admissible unless there is sufficient evidence that the crimes were actually committed *and that the defendant* committed them . . . ." (Emphasis supplied.)

We based our holding on *Huddleston v. United States*, 485 U.S. 681, 689, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988), in which the U.S. Supreme Court held that "[e]vidence is admissible under Rule 404(b) *only if it is relevant*. . . . In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred *and that the defendant* was the actor." (Emphasis supplied.)

Because Thompson was attempting to introduce evidence of the acts of a third party to show that she acted reasonably in defending herself against Frank, that evidence is irrelevant and therefore inadmissible in the context of rule 404(2).

Even though evidence of Ron Thompson's abuse of the defendant is not admissible as an other act, that does not mean it is inadmissible for any purpose. All relevant evidence normally is admissible. Evidence which is not relevant is not admissible. See Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989). Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989).

Our research has found no cases, nor have we been cited to any, in which a defendant has been permitted to introduce evidence of one episode of abuse by one individual to support the defendant's claim of self-defense in killing a second individual many years later. Moreover, we have found no cases in which a defendant has been permitted to introduce evidence of prior abuse to support the killing in self-defense of a victim

who has always behaved as a "perfect gentleman" and who has concededly never laid a hand on the defendant. Finally, we have found no cases in which evidence of prior abuse has been used to support the self-defense killing of a victim whose alleged "abuse" of a defendant consisted of three or four threats, all but one of which was by telephone from many miles away.

We therefore conclude that the evidence of Ron Thompson's alleged abuse of the defendant is irrelevant, because it fails to make the existence of any fact that is of consequence to the determination of the defendant's claim of self-defense more or less probable than it would otherwise be, without such evidence. The trial court did not commit error in excluding the evidence for lack of relevance. Because we have determined that the evidence was not relevant, we need not consider whether it was properly excluded under rule 403.

The defendant also appears to argue that evidence of the defendant's prior abuse is admissible under Neb. Evid. R. 106, Neb. Rev. Stat. § 27-106 (Reissue 1989), although she does not cite that statute. The State had introduced into evidence in its case in chief a letter to the defendant's son in which she referred to Ron Thompson. However, admission of evidence under rule 106, the rule of completeness, is not automatic. Even under rule 106, the evidence sought to be admitted must be relevant to the issues in the case. See *State v. Schrein, ante* p. 136, 504 N.W.2d 827 (1993).

Having determined that evidence of Ron Thompson's prior abuse of the defendant is not relevant for any purpose, we find that this assignment of error is without merit.

MOTION FOR NEW TRIAL

Next, we turn to Thompson's claim that the district court erred in overruling her motion for new trial due to insufficiency of the evidence to support the verdict, pursuant to Neb. Rev. Stat. § 29-2101 (Reissue 1989). Although the district court apparently overruled the motion on its merits, the State argues that this assignment of error is not properly before this court because the motion for new trial was not timely filed.

Neb. Rev. Stat. § 29-2103 (Reissue 1989) provides in relevant part that "[an application for new trial] shall, *except for the*

cause of newly discovered evidence material for the party applying, which he [or she] could not with reasonable diligence have discovered and produced at the trial, be filed *within ten days after the verdict was rendered unless unavoidably prevented*." (Emphasis supplied.)

On August 19, 1992, jury verdicts were rendered against Thompson for first degree murder and for the use of a firearm in the commission of a felony. Her motion for new trial was filed on September 2. Because August 29, the 10th day after August 19, fell on a Saturday, the latest date the motion could have been filed in compliance with the statute was Monday, August 31. See Neb. Rev. Stat. § 25-2221 (Reissue 1989). Therefore, the filing of Thompson's motion on Wednesday, September 2, was 2 days late unless it fell within one of the two statutory exceptions to the 10-day requirement.

Section 29-2103 makes exceptions to that requirement for newly discovered evidence material for the party applying, which he or she could not with reasonable diligence have discovered and produced at trial, and in situations where a party is "unavoidably prevented" from filing on time. The defendant's motion for new trial alleges neither. Rather, it alleges that there was irregularity in the proceedings of the trial court, that the verdict was not sustained by sufficient evidence, and that errors of law occurred at trial.

The defendant's attorney did file in this court on April 22, 1993, an "Application for Leave to Supplement Record" and an "Affidavit of Counsel." In his affidavit, defense counsel gives a variety of reasons he was unavoidably prevented from filing Thompson's motion for new trial on time. He further alleges that the Knox County Attorney waived the timely filing of the motion.

However, our holding in *Taylor Dairy Products Co. v. Owen*, 139 Neb. 603, 298 N.W. 332 (1941), prevents us from considering defense counsel's affidavit. In that case, a party attempted to file an appeal bond on the last day permitted by statute, but found the county judge gone and the courthouse closed for Lincoln's Birthday, although it was not a legal court holiday. The appeal bond was filed on the following day. On appeal to this court, the party urged, apparently by means of

affidavit, that he had attempted a timely filing. We held:

> Even if this situation warranted the filing of the bond on the eleventh day, it is of no avail here because *it is not shown by the record*. . . . The record is barren of evidence or findings of any default on the part of the county judge which prevented a timely appeal. The record imports absolute verity, and when a party attempts to escape the effect of a plain provision of statute by proof of special circumstances, bringing the matter within a recognized exception, *it must appear from the record that such an issue was before the district court. The filing of affidavits in this court is not a proper way to present such an issue here.*

(Emphasis supplied.) *Taylor Dairy Products Co. v. Owen*, 139 Neb. at 605, 298 N.W. at 333.

It does not appear from the record in this case that the issue of the timeliness of the defendant's motion for new trial was ever before the district court. Therefore, she has not brought herself within either of the recognized exceptions to the requirement that a motion for new trial be filed within 10 days. Nor does defense counsel's affidavit in this court properly raise the issue.

Moreover, this court has long held that § 29-2103 by its terms is mandatory. See, *Parker v. State*, 164 Neb. 614, 83 N.W.2d 347 (1957); *McCoy v. State*, 110 Neb. 360, 193 N.W. 716 (1923). A motion for new trial not filed in conformity with the statutory requirements as to time may not be considered by an appellate court on review. See *Parker v. State, supra*.

Although the State is correct that the defendant's motion for new trial is not properly before this court, we note that a motion for new trial is not a prerequisite to obtaining appellate review for insufficiency of evidence to support a judgment. See Neb. Rev. Stat. § 25-1912.01(2) (Reissue 1989). Because of the seriousness of the offenses of which the defendant has been convicted, we exercise our option to review the record for plain error as to whether the evidence is sufficient to support the defendant's conviction for first degree murder. See Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1992).

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. Moreover, on such a claim, 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. Connely, 243 Neb. 319, 333, 499 N.W.2d 65, 75 (1993).

In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom. *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989), *disapproved on other grounds, State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989). Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists. *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993). Circumstantial evidence is evidence of one or more facts from which another fact can logically be inferred. *Id.*

A person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice. Neb. Rev. Stat. § 28-303(1) (Reissue 1989). "Purposely," as an element of first degree murder, means intentionally. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). 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 the conduct. *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993).

"Malice," like intent, concerns the state of mind of the slayer and may be inferred from the words and acts of the defendant, the circumstances surrounding his or her conduct, and the evidence relating to the circumstances of the criminal act. See *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991). Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993).

> "Deliberate malice" and "premeditated malice" are separate and distinct elements of the crime of murder in

> the first degree. . . .
>
> "Deliberate" means not suddenly, not rashly; but deliberation requires that the defendant considered the probable consequences of his or her act before doing the act. . . . A person kills with "deliberate malice" when he or she, without just cause or excuse, kills another not suddenly or rashly, but after considering the probable consequences of doing the act.
>
> "Premeditated" means to have formed a design to commit an act before it is done. . . . A person kills with "premeditated malice" if before the act causing the death occurs, he or she has formed the intent or determined to kill the victim without legal justification.

(Citations omitted.) *State v. Batiste*, 231 Neb. at 491, 437 N.W.2d at 132.

One way in which a jury could infer the malice the defendant felt toward Frank is from the defendant's words in her correspondence with others. The tone of her letters in discussing Frank was contemptuous. Among other things, she referred to him as a fool, a sucker, and a houseboy. On several occasions, she ridiculed his physical appearance. The defendant belittled Frank's intellect, while referring frequently to her own superior intelligence and status as a Mensa member and an honor student.

A jury could also infer from the defendant's acts in the days preceding the killing, as well as on the day of the killing, that the defendant killed Frank intentionally and with malice. The day after she had written to her son about a "Fatal Fight" with Frank, the defendant purchased ammunition for her .357 Magnum handgun. Later, she wrote to her son that she was not that scared of Frank and that she would just sleep with her .357 Magnum. The following day, the defendant exchanged the ammunition she had erroneously purchased for the kind that would fit her .357 Magnum handgun.

The day before she shot and killed Frank, the defendant wrote to her son that she did not want "that psycho" around, that she had purchased new ammunition, and that she was going to "load up and PRACTICE" that afternoon with her two handguns. A neighbor of the defendant's heard what

appeared to be target practicing in the direction of the defendant's farm that afternoon.

When Frank arrived at the defendant's farmhouse the following afternoon, she had her loaded .357 Magnum handgun at her side. Although the defendant had two cans of Mace available, she had armed herself with a lethal weapon. She also chose to use her .357 Magnum rather than her smaller, .25-caliber semiautomatic handgun. The .357 Magnum was loaded with hollow point bullets, a type of ammunition designed to mushroom upon impact and thereby increase the wounding power of the bullet.

A jury could conclude from the evidence of an ashtray full of cigarette butts on top of a refrigerator in the defendant's storage room that she may have expected Frank and was in fact watching for him in that room. It was a room from which the defendant could see to the front of the house. A jury could also find that the trajectory of the three bullets which were fired into the floor was consistent with those shots being fired from an area in front of the door to the storage room, and not from behind the computer table as the defendant claimed.

The length of time it takes to kill another is evidence from which the intent of the killer may be inferred. See *State v. Batiste, supra*. The forensic pathologist who performed the autopsy on Frank, Dr. Brad Randall, testified that the gunshot to Frank's right back shattered the right lobe of his liver and that such an injury would cause an individual to lose a large amount of blood very quickly. In his opinion, an individual would only live 10 to 15 minutes after suffering a gunshot such as Frank received to his right lung and liver and would probably lose consciousness within 5 to 10 minutes after sustaining such a wound. Frank was still breathing when sheriff's deputies and rescue personnel arrived 50 minutes after the defendant reported the shooting. However, only 5 minutes later, Frank had become unresponsive to any type of stimulus and had no discernible blood pressure, pulse, or respirations.

There was evidence from the appearance of the wound to Frank's upper left abdomen that Frank had survived for some period of time after that wound was sustained. The two wounds to Frank's back did not have this characteristic appearance.

Additionally, Dr. Randall concluded from the nature of the exit wound in Frank's right chest and the injury to his right elbow that Frank's right arm was against or near to his body as that bullet passed through and that this could have occurred if Frank had been lying on the floor with his arm under him when that shot was fired.

These findings led Dr. Randall to believe that the three gunshot wounds were not all inflicted at the same time in "rapid fire" sequence as the defendant claimed and that the shot to Frank's right back was possibly fired shortly before law enforcement and rescue squad personnel arrived.

Two high school boys hitting golf balls at a neighboring farm testified that they heard two to three shots. One of the boys placed the time of the shots at about 5:20 to 5:30 p.m. This was a few minutes after the other boy had seen a car turn into Thompson's driveway. The boys continued hitting golf balls until 6 p.m., but neither heard any other shots.

From these facts, as well as from the fact that Frank was apparently able to write a note in blood on the floor as well as a note on a piece of paper sometime during the course of events, a jury could properly find that the defendant inflicted the three gunshots upon Frank over a period of time, and not in rapid succession as she claimed.

Malice may be inferred from the shooting of another person with a deadly weapon. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). The defendant was trained in the use of firearms as a security guard, owned several weapons of various types, and target-practiced with regularity. She considered herself a good shot, and her son testified that this was true. Although she had chemical Mace and a small-caliber handgun readily available to her, she chose a large-caliber handgun loaded with a very damaging type of bullet as a weapon of first resort.

Mark Bohaty, a Nebraska State Patrol firearms examiner, testified that the defendant's weapon was a double-action revolver which required 12 pounds of force on the trigger to fire. It was not a semiautomatic or automatic weapon and therefore required that much force to fire each bullet. The weapon could also be operated single-action by cocking the

hammer back and applying 3 to 3¼ pounds of pressure to the trigger each time the weapon was fired.

The location, nature, and number of wounds inflicted are circumstances from which a jury may draw the inference that a killing was done with deliberate and premeditated malice. *State v. Nielsen, supra.* The defendant fired all six rounds in her revolver, striking Frank in the torso once in the front and twice in his back and striking the floor three times.

Based upon all the direct and circumstantial evidence in this case, the jury could have found beyond a reasonable doubt that the defendant's words and conduct in the days and hours before the shooting, as well as the circumstances surrounding the shooting itself, were sufficient to prove that the defendant intended to kill Frank and that she did so with deliberate and premeditated malice after incapacitating Frank and exacting two exculpatory notes from him, one written in his own blood.

The evidence was also sufficient to reject the defendant's claim of self-defense. Because the defendant claims that she shot Frank in self-defense, the State was required to prove beyond a reasonable doubt not only that the defendant committed murder in the first degree, but that she killed Frank without justification.

Neb. Rev. Stat. § 28-1409 (Reissue 1989) provides:

> (1) . . . [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself [or herself] against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself [or herself] against death . . . .
>
> . . . .
>
> (5) . . . [A] person employing protective force may estimate the necessity thereof under the circumstances as he [or she] believes them to be when the force is used . . . .

This court has long held that a defendant asserting self-defense as justification for the use of force must have a reasonable and good faith belief in the necessity of such force.

See, *State v. Stueben*, 240 Neb. 170, 481 N.W.2d 178 (1992); *Housh v. State*, 43 Neb. 163, 61 N.W. 571 (1895). The principle which underlies the rule is that human life should not be made to depend upon conditions so unreliable and hazardous as the bare belief of any person that he or she is in danger of death or bodily harm. *State v. Stueben, supra*; *State v. Archbold*, 178 Neb. 433, 133 N.W.2d 601 (1965); *Housh v. State, supra*. A defendant's claim of self-defense is a question of fact for the jury. See *State v. Stewart*, 205 Neb. 626, 288 N.W.2d 751 (1980).

The facts of this case are more than sufficient for a jury to conclude beyond a reasonable doubt that the defendant did not have a reasonable and good faith belief in the necessity to use deadly force against Frank and that the defendant was in fact the aggressor. She appeared to be making plans for some type of hostile encounter with Frank for several weeks prior to the shooting. The defendant had even started a computer file on August 17 titled "Assault Report," even though she had been assaulted by no one.

Thompson admitted that Frank had been a "perfect gentleman" for 6 years and had never abused her. Thompson claimed that Sharon Boham had told her of multiple incidents of Frank beating his ex-wife. However, Boham testified that she had told Thompson that she had heard of one incident, which she referred to as "hearsay," in which Frank had shoved his ex-wife.

Frank's ex-wife denied at trial that Frank had ever physically abused her, as did Delores Fischer, Frank's former girl friend. Both testified that Frank became verbally abusive and threatening only when he had been drinking. Frank's blood alcohol content upon autopsy was .000. The pathologist testified that there would have been very little decrease in blood alcohol content from the time Frank died until the time of autopsy.

Thompson could not even remember the words of the one threat which she claimed Frank made to her in person, and she admitted at trial that she did not understand what he said to her just before she shot him. She wrote to her son that she was not that scared of Frank. No one else testified to being aware of any threats made by Frank against the defendant.

Although the defendant claimed she was frightened of Frank and what he might do to her, she was in an unlocked house when Frank arrived at her farm. She admitted at trial that although one of her doors could not be locked from the inside, it could be secured from the outside, and one could then enter the house and secure the second door from the inside. However, she claimed that this never occurred to her.

The defendant had available nonlethal means to repel Frank's alleged attack, but declined to use them. She shot a man a total of three times, twice in the back, while he was carrying "something," which later proved to be a sack of lunchmeat.

Although Frank lay bleeding on her floor for almost an hour before help arrived, Thompson did not know where or how many times she had shot him. The only assistance she had rendered was to put a pillow under Frank's head and to give him a glass of water.

Finally, the defendant herself stated to the sheriff, "*Maybe he wouldn't have done anything to me*, but I have read where women waited too long to defend or protect themselves." (Emphasis supplied.) Such a statement does not reflect even a bare belief by the defendant that she was in danger of death or bodily harm. At most, it indicates that the defendant *did not know* whether Frank would hurt her or not, and it falls far short of the requirement that one must have a reasonable and good faith belief in the necessity to use deadly force for self-defense.

It is obvious that in this case the jury found that Thompson's claim of self-defense in the killing of Frank was not credible or reasonable.

The evidence is more than sufficient to support the jury's verdicts on both the first degree murder charge and the firearm charge. We find no plain error in this regard.

SEQUESTERED, INDIVIDUAL VOIR DIRE

Finally, Thompson claims that the district court erred in failing to permit limited, sequestered voir dire of the venire. Prior to trial, Thompson moved for limited, sequestered, and individual voir dire of prospective jurors on the issues of knowledge of the case, knowledge of the defendant, knowledge of the decedent, and opinions about guilt or innocence,

necessitated by inflammatory and highly prejudicial pretrial publicity and the widespread community discussion of the killing.

In support of her motion, Thompson presented copies of numerous newspaper articles from towns in Knox County and the surrounding area. These articles were factual in nature. One article, in listing Frank's survivors, made reference to his "dear mother, Mrs. Mamie Frank." Another article consisted of a letter to the editor commenting on two recent killings in the community, and the editor's response, neither of which mentioned Thompson or Frank by name. The letter commended the editor for covering the story about "a man . . . killed by a woman near Verdigre" in an impersonal and appropriate way. The editor responded in part:

> We report what we know are facts. The emotions in that case are: We are very sorry for the mother of the deceased. She is a true gem - a very, very outstanding, sincere, and honest person who doesn't deserve to be a part of this tragedy, either. That's our emotions. The facts will come out during the trial which has been postponed until June.

These sympathetic references to an elderly woman in the community do not strike us as being inflammatory or prejudicial to the defendant.

Thompson also submitted affidavits from local residents that there were strong opinions held in the case and opining that the selection of a fair and impartial jury would be difficult. A jury selection expert hired by Thompson submitted an affidavit, based on an attitudinal survey of 36 randomly selected potential jurors in Knox County, that there was a significant subset of potential jurors who could not fairly decide the case because they had knowledge of the case through community discussion and had already formed opinions about the case. She conceded, however, that a fair and impartial jury could be found in Knox County.

Thompson argues that the lack of sequestered, individual voir dire prevented her from ascertaining the true extent of pertinent knowledge and opinions of potential jurors and that she was prejudiced thereby. The record reflects that the trial court conducted a thorough examination of prospective jurors

as to their knowledge of the case, whether they had formed an opinion about Thompson's guilt or innocence, and whether they could set aside any preconceived opinions and decide the case solely on the evidence. Only 3 individuals from a venire of 42 indicated that they did not feel they could set aside their previously formed opinions and render a verdict based solely upon the facts of the case, and those 3 individuals were excused for cause. This is inconsistent with the notion that a biased jury was seated. See *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993).

Except when there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine a venireperson out of the presence of all other venirepersons. *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990), *cert. denied* ____ U.S. ____, 112 S. Ct. 143, 116 L. Ed. 2d 109 (1991).

The defendant has failed to show that a biased jury was seated or that she was prejudiced in any way by the district court's refusal to grant her motion for sequestered, individual voir dire. Her own jury selection expert conceded that it was possible to select a fair and impartial jury in Knox County. No error has been demonstrated by the trial court's refusal to grant sequestered, individual voir dire of each person called to sit as a juror in this case.

CONCLUSION

This court having found no merit to any of the defendant's assignments of error, her convictions and sentences are affirmed.

AFFIRMED.

CAPORALE, J., not participating.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLANT, V. TOUCHE ROSS & COMPANY, NOW KNOWN AS DELOITTE & TOUCHE, AND DELOITTE & TOUCHE, APPELLEES.

507 N.W.2d 275

Filed October 29, 1993. No. S-91-258.

1. **Demurrer: Pleadings.** In considering a demurrer to a petition, a court must assume that the pleaded facts, as distinguished from any pleaded legal conclusions, are true as alleged and must give the petition the benefit of any reasonable inference arising 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: Words and Phrases.** A narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff constitutes a statement of facts sufficient to state a cause of action.
3. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be construed liberally; if as so construed it states a cause of action, the demurrer is to be overruled.
4. _____: _____. A general demurrer, that is, one grounded on the failure to state a cause of action, will not lie if from the facts stated in the petition it appears that the plaintiff is entitled to any relief.
5. **Limitations of Actions: Pleadings.** If a petition facially shows that a cause of action is barred by the statute of limitations, the plaintiff must allege facts sufficient to avoid the bar of the statute of limitations.
6. **Limitations of Actions.** The point at which the statute of limitations commences to run must be determined from the facts of each case; the cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit, even though such party may be ignorant of the existence of the cause of action.
7. **Accountants: Negligence: Liability.** Even in the absence of fraud, there exist circumstances under which an accountant who negligently performs a service for the accountant's client may become liable to a third party.
8. **Limitations of Actions: Accountants: Negligence.** The 2-year period of limitations specified in Neb. Rev. Stat. § 25-222 (Reissue 1989) applies to accountants alleged to have been negligent in the preparation of audits.
9. **Limitations of Actions: Pleadings.** For limitations purposes, an amended pleading in the same cause of action ordinarily relates back to the original pleading.
10. **Limitations of Actions: Torts.** A statute of limitations begins to run as soon as the action accrues, and a cause of action in tort accrues as soon as the act or omission occurs.
11. **Limitations of Actions: Pretrial Procedure.** Discovery, as applied to the statute of limitations, occurs when one knows of the existence of an injury or damage and not when he or she has a legal right to seek redress in court.
12. _____: _____. Under the discovery principle, discovery occurs when there has

been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.

13. **Limitations of Actions: Fraud: Malpractice.** A single professional relationship will not be separated into various parts for the purpose of applying to one part of that relationship the fraud period of limitations found in Neb. Rev. Stat. § 25-207 (Reissue 1989) and to another part the malpractice period of limitations found in Neb. Rev. Stat. § 25-208 (Reissue 1989).
14. **Actions.** A cause of action consists of the fact or facts which give one a right to judicial relief against another.
15. _____. A theory of recovery is not itself a cause of action.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

William H. Selde, P. Shawn McCann, and Clark J. Vanskiver, of Sodoro, Daly & Sodoro, for appellant.

John E. North and Thomas C. McGowan, of McGrath, North, Mullin & Kratz, P.C., and John T. Behrendt, Jamie E. Stern, and Mary P. Donlevy, of Gibson, Dunn & Crutcher, for appellees.

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

CAPORALE, J.

I. STATEMENT OF CASE

The defendants-appellees, Touche Ross & Company, now known as Deloitte & Touche, and Deloitte & Touche, hereinafter collectively referred to as Touche, successfully demurred to the operative petition filed against it by the plaintiff-appellant, St. Paul Fire & Marine Insurance Company, on the grounds that no cause of action had been stated and, further, that any cause of action which might have existed is time-barred. Following St. Paul's refusal to amend, the district court dismissed the lawsuit. St. Paul asserts, in summary, that in so ruling, the district court erroneously found (1) that the operative petition failed to plead facts imposing upon Touche a duty to exercise due care toward St. Paul and (2) that St. Paul had not seasonably pled fraud as a basis of recovery. We affirm in part, and in part reverse and remand for

further proceedings.

II. SCOPE OF REVIEW

The scope of our review is established by the rule that in considering a demurrer to a petition, a court must assume that the pleaded facts, as distinguished from any pleaded legal conclusions, are true as alleged and must give the petition the benefit of any reasonable inference arising 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. See, *Gallion v. Woytassek, ante* p. 15, 504 N.W.2d 76 (1993); *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993); *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992).

The foregoing standard of review is implemented through a series of other rules, beginning with the prescript that a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff constitutes a statement of facts sufficient to state a cause of action. See, *Gallion v. Woytassek, supra*; *Hamilton v. City of Omaha, supra*; *Gerken v. Hawkins Constr. Co.*, 243 Neb. 157, 498 N.W.2d 97 (1993).

Moreover, in ruling on a demurrer, the petition is to be construed liberally; if as so construed it states a cause of action, the demurrer is to be overruled. *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991); *Widga v. Sandell*, 236 Neb. 798, 464 N.W.2d 155 (1991). A general demurrer, that is, one grounded on the failure to state a cause of action, will not lie if from the facts stated in the petition it appears that the plaintiff is entitled to any relief. See *Central Nebraska Public Power and Irrigation District v. Walston*, 140 Neb. 190, 299 N.W. 609 (1941).

On the other hand, if a petition facially shows that a cause of action is barred by the statute of limitations, the plaintiff must allege facts sufficient to avoid the bar of the statute of limitations. *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992); *LaPan v. Myers, supra*. The point at which the statute of limitations commences to run must be determined from the facts of each case; the cause of action accrues and the

statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit, even though such party may be ignorant of the existence of the cause of action. *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983).

III. FACTS AS ALLEGED

The issues raised require that we review both St. Paul's original and its operative petitions.

1. ORIGINAL PETITION

St. Paul filed its original petition on July 14, 1987, and alleged therein that it would suffer damages in the future as the consequence of the audits and related documents Touche negligently produced for its client, Commonwealth Company, Inc., covering the fiscal years ending March 31, 1982, 1983, 1984, and 1985. The pleading further asserted, in summary, that Touche produced these inaccurate and misleading documents to assist its client in obtaining various types of credit and bonds from St. Paul and that St. Paul relied upon them, as was intended that it should, in extending credit and issuing bonds to Commonwealth.

Touche demurred, averring that the petition did not state facts sufficient to constitute a cause of action. The district court agreed, sustained the demurrer, and dismissed St. Paul's petition.

St. Paul appealed, and we, in *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990), determined that because it did not allege that it had been damaged, St. Paul had indeed failed to state a cause of action, but that it should have been granted leave to amend its pleading. We therefore remanded the cause to the district court.

2. OPERATIVE PETITION

Subsequently, and after a prior unsuccessful effort at amending its original petition, St. Paul, on August 17, 1990, filed the operative petition which asserts that St. Paul suffered damages because Touche negligently examined and reported on the financial condition of Commonwealth and its subsidiaries for the fiscal year ending March 31, 1981, and the fiscal years it

had specified in its original petition, i.e., 1982, 1983, 1984, and 1985; claims that the various documents Touche prepared were inaccurate and misleading such as to constitute a negligent misrepresentation that Commonwealth was solvent in a significant degree; and avers that Touche made misrepresentations about Commonwealth's financial statements and condition which Touche knew were false when made or were made recklessly without knowledge of their truth, upon which St. Paul reasonably relied.

More specifically, St. Paul avers that the documents Touche produced were represented and certified to have been prepared and examined in accordance with generally accepted auditing standards or accounting principles, when in fact they were not so prepared; that the documents overrecognized the margins from contracts in progress and grossly overstated the net worth position and the net quick position of Commonwealth and its subsidiaries.

St. Paul also alleges that it is the usual standard and customary practice of public accountancy firms dealing with construction contractors such as Commonwealth to prepare audit reports and provide opinions and certificates for obtaining bonds and sureties; that not only did Touche not restrict Commonwealth's ability to distribute such documents, but that Touche met with and communicated directly with St. Paul in providing to Commonwealth on a continuing basis the documents it prepared for the intended purpose of making them available to St. Paul in the underwriting of bonds and extending surety and other credit; that Touche should have known Commonwealth and St. Paul were engaged together in certain bonded and unbonded projects; that Touche was employed by Commonwealth in part to assist it in obtaining surety credit; and that Touche delivered its audit opinions to St. Paul 3 or 4 months after the end of each fiscal year.

St. Paul further asserts that it did not know and could not have known of the inaccurate and misleading nature of the documents until it received the report of another firm of accountants on or about July 15, 1986.

IV. ANALYSIS

With those allegations in mind, we turn to each of St. Paul's summarized assignments of error.

1. NEGLIGENCE ASPECT OF CAUSE

In its first such assignment of error, St. Paul asserts the district court incorrectly determined that as Touche was not in privity with St. Paul, the latter was under no duty to act with due care toward the former.

(a) Duty

Any analysis of the law regarding an accountant's duty to act with due care toward a nonclient must begin with an examination of *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931), which held that because of the lack of privity, a lender relying to its detriment upon inaccurate financial statements did not, in the absence of fraud or reckless misstatement, have a cause of action against the public accounting firm which had prepared them. In declining to relax the requirement of privity, even in the face of evidence that the accounting firm knew its client's balance sheet would be shown to banks, creditors, and stockholders, the *Ultramares Corp.* court observed:

> If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.

Id. at 179-80, 174 N.E. at 444.

In so holding, the court distinguished the earlier *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922), decision, which held that a public weigher was liable to the buyer of beans for the amount the buyer overpaid the seller in reliance on the weigher's erroneous certificate of weight. The *Ultramares Corp.* court noted that unlike the situation then before it, the service rendered by the weigher in *Glanzer* was performed primarily for the benefit of the third-party buyer and only

incidentally for the seller; in fact, the seller had directed the weigher to provide a copy of its certificate to the buyer.

Some courts continue to hold that in the absence of fraud, the lack of privity between a third party and an accountant precludes the imposition of liability on the accountant. See, *Stephens Industries, Inc. v. Haskins and Sells*, 438 F.2d 357 (10th Cir. 1971); *MacNerland v. Barnes*, 129 Ga. App. 367, 199 S.E.2d 564 (1973); *State Street Trust Co. v. Ernst*, 278 N.Y. 104, 15 N.E.2d 416 (1938), *reh'g denied* 278 N.Y. 704, 16 N.E.2d 851.

Other courts, however, have found an accountant liable to third parties in the absence of privity under the circumstances described in the Restatement (Second) of Torts § 552 (1977). The Restatement makes an accountant liable if the third party suffering the loss is a "person or one of a limited group of persons for whose benefit and guidance [the accountant] intends to supply the information or knows that the recipient intends to supply it," *id.* at 127, and the third party does rely "upon it in a transaction that [the accountant] intends the information to influence or knows that the recipient so intends or in a substantially similar transaction," *id.* Cases adopting this standard include *Spherex, Inc. v. Alexander Grant & Co.*, 122 N.H. 898, 451 A.2d 1308 (1982), and *Inv. Co. v. C. & L.*, 70 Ohio St. 2d 154, 436 N.E.2d 212 (1982).

Still other courts have extended an accountant's liability for negligence to those who might reasonably have been foreseen as relying upon the accountant's work product. *Touche Ross v. Commercial Union Ins.*, 514 So. 2d 315 (Miss. 1987); *Rosenblum v. Adler*, 93 N.J. 324, 461 A.2d 138 (1983); *Citizens State Bank v. Timm, Schmidt & Co.*, 113 Wis. 2d 376, 335 N.W.2d 361 (1983).

And at least one court has ruled that an accountant's liability to third persons is determined by the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of

preventing future harm. *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958).

We recently and for the first time confronted the issue in *Citizens Nat. Bank of Wisner v. Kennedy & Coe*, 232 Neb. 477, 441 N.W.2d 180 (1989). Therein, the defendant certified public accountants had prepared financial statements for a mutual customer of the three plaintiff banks. After reviewing the statements, the banks participated in making a loan to the customer. After the customer defaulted, the banks sued the accountants, claiming not only that the accountants had been negligent, but that they had made fraudulent misrepresentations as well. Concluding that the trial court had assigned to the banks an improper burden of proof on their fraud theory, we reversed the judgment which had been entered in favor of the accountants and remanded the cause for a new trial. In the course of doing so, we extruded from the prescript that a lawyer's duty to his or her client "does not extend to third parties absent facts establishing a duty to them" the rule that "an accountant's duty of reasonable care is to his [or her] client and generally does not extend to third parties absent fraud or other facts establishing a duty to them." *Id.* at 480, 441 N.W.2d at 182. Thus, *Kennedy & Coe* establishes that even in the absence of fraud, there exist circumstances under which an accountant who negligently performs a service for the accountant's client may become liable to a third party.

What the limits of those circumstances may prove to be will necessarily be established on a case-by-case basis. It is sufficient to note that the allegations at hand state a negligence cause of action in favor of St. Paul against Touche under the theories that Touche negligently performed its services and made negligent misrepresentations. Particularly significant are the allegations that despite its representation to the contrary, Touche did not perform in accordance with generally accepted accounting standards, that Touche met and communicated directly with St. Paul and made Touche's products available to the former for its use in dealing with Commonwealth, and that Touche intended that St. Paul rely on the documents Touche prepared for Commonwealth.

As held by the Florida Supreme Court in *First Fla. Bank v.*

Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990), when an accountant fails to exercise reasonable and ordinary care in preparing financial statements for its client and personally delivers and presents those statements to a third party to induce the third party to loan to or invest in the client, the accountant is liable to the third party in negligence. That is to say, a duty arises by virtue of a contract implied from the conduct of the parties. See *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991).

(b) Timeliness of Negligence Theory

The question at this point, then, is whether St. Paul seasonably pled its negligence allegations. Neb. Rev. Stat. § 25-222 (Reissue 1989) provides, in pertinent part:

> Any action to recover damages based on alleged professional negligence . . . shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. . . .

In *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983), we held that the 2-year period of limitations specified in § 25-222 applied to a firm of accountants which were alleged to have been negligent in the preparation of certain audits.

The task thus becomes one of resolving whether the negligence allegations became effective when St. Paul first pled them in its operative petition, which was filed on August 17, 1990, or when St. Paul filed its original petition on July 14, 1987.

The general rule is that for limitations purposes, an amended pleading in the same cause of action ordinarily relates back to the original pleading. See, *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988); *Abbott v. Abbott*, 185

Neb. 177, 174 N.W.2d 335 (1970), *appeal after remand* 188 Neb. 61, 195 N.W.2d 204 (1972).

While traditionally a statute of limitations begins to run as soon as the action accrues, and a cause of action in tort accrues as soon as the act or omission occurs, *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984), § 25-222 permits commencement of the action within 1 year from discovery if discovery could not reasonably have occurred sooner.

Discovery, as applied to the statute of limitations, occurs when one knows of the existence of an injury or damage and not when he or she has a legal right to seek redress in court. *Norfolk Iron & Metal v. Behnke*, 230 Neb. 414, 432 N.W.2d 18 (1988); *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988). Under the discovery principle, discovery occurs when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. *Board of Regents v. Lueder Constr. Co.*, 230 Neb. 686, 433 N.W.2d 485 (1988); *Norfolk Iron & Metal v. Behnke, supra*.

In this regard Touche contends, in essence, that St. Paul, in alleging it did not know and could not have known of Commonwealth's true condition until it received another accounting firm's report, had pled a mere conclusion rather than facts excusing its failure to discover the true situation despite the exercise of diligence. But the cases it cites in support of that position are factually dissimilar from the situation before us. See, *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985) (record replete with facts negating plaintiff's assertion that statute of limitations should be tolled because he lacked knowledge or transactions were fraudulently concealed); *Mangan v. Landen*, 219 Neb. 643, 365 N.W.2d 453 (1985) (indemnitee's cause of action against indemnitor on basis of allegation that indemnity agreement should have included indemnity provision accrued as of date of execution; statute of limitations not tolled where indemnitee could have discovered at once upon reading that contract did not include indemnity provision); *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d

753 (1984) (legal malpractice action against attorney for failure to file annexation certificate for certain real estate owned by plaintiff barred by statute of limitations because petition did not show excuse for failure to commence action for 17 years); *George P. Rose Sodding & Grading Co. v. Dennis*, 195 Neb. 221, 237 N.W.2d 418 (1976) (statute of limitations not tolled by plaintiff's allegations it submitted bills for partial payment to defendant governmental subdivision and was advised there were no funds in treasury for payment but would later be tax levy and assessment to raise such funds).

In *Lee v. Brodbeck*, 196 Neb. 393, 243 N.W.2d 331 (1976), the plaintiffs alleged that at the time they were considering the purchase of a farm through the defendant broker, the defendant promised and assured them there would be no difficulty in selling their own farm for $63,000. The plaintiffs then brought an action against the defendant for fraud after the statute of limitations had run when their farm sold for $34,000. The court held that the plaintiffs' allegation that the fraud was not discovered until the sale of the farm was confirmed by a court was sufficient to toll the statute of limitations, subject to later proof at trial.

Here, in addition to alleging that it did not and could not have earlier known of Commonwealth's true condition, St. Paul also alleges that Touche prepared documents other than in accordance with generally accepted auditing standards, that Touche overrecognized the margins from contracts in progress, that Touche grossly overstated the net worth and net quick positions of Commonwealth, and that St. Paul accepted Touche's false certifications that Commonwealth's financial statements were prepared in accordance with generally accepted auditing standards and accounting principles and that the statements fairly and accurately represented Commonwealth's financial condition. Under those circumstances, it was reasonable for St. Paul not to have discovered Touche's alleged negligence until the former received the other accounting firm's report.

It therefore follows that except as to the fiscal year ending March 31, 1981, about which no mention was made until the filing of the operative petition, the issue of discovery was

properly pled and is to be determined by whatever facts may be established by the evidence.

2. FRAUD ASPECT OF CAUSE

In its second summarized assignment of error, St. Paul avers that the district court mistakenly determined that the fraud claim was not timely pled.

(a) Applicable Period of Limitations

St. Paul argues that the period of limitations applicable to its fraud theory is found in Neb. Rev. Stat. § 25-207 (Reissue 1989), which reads, in pertinent part: "The following actions can only be brought within four years: . . . an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud . . . ." But as we have already noted in part IV(1)(b) above, § 25-222 sets a discovery-modified 2-year period of limitations for actions based on professional negligence (and for professional breach of warranty). A third statute, Neb. Rev. Stat. § 25-208 (Reissue 1989), provides, in relevant part: "The following actions can only be brought within the periods herein stated: . . . within two years, an action for malpractice which is not otherwise specifically limited by statute."

It appears that to date we have used the word "malpractice" and the concept of "professional negligence" interchangeably. See, *Staman v. Yeager & Yeager*, 238 Neb. 133, 469 N.W.2d 532 (1991) (to recover against attorney in professional malpractice action, plaintiff must prove attorney's employment and neglect of reasonable duty and that duty was proximate cause of loss to client); *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991) (it is necessary to establish that attorney-client relationship existed with respect to act or omission upon which legal malpractice claim based); *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983).

With the exception of *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d 753 (1984), which applied both §§ 25-208 and 25-222 to a lawyer failing to seasonably file an annexation document, § 25-208 has been applied only to medical doctors.

Olsen v. Richards, 232 Neb. 298, 440 N.W.2d 463 (1989); *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976); *Toman v. Creighton Memorial St. Josephs Hosp., Inc.*, 191 Neb. 751, 217 N.W.2d 484 (1974); *Acker v. Sorensen*, 183 Neb. 866, 165 N.W.2d 74 (1969); *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964); *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962).

But on further thought, it seems relatively clear that by referring to "an action for malpractice which is not otherwise specifically limited by statute," § 25-208 contemplates a broader meaning of the term "malpractice" than does the concept of "professional negligence" contemplated by § 25-222. Thus, because we are here concerned with fraud, not negligence or breach of warranty, the governing period of limitations must be as set forth in either § 25-207 (fraud) or § 25-208 (malpractice).

Based on the differences in proof and evidence, some courts distinguish between negligence and fraud causes of action for purposes of the statutes of limitations. See, *Simcuski v Saeli*, 44 N.Y.2d 442, 377 N.E.2d 713, 406 N.Y.S.2d 259 (1978) (intentional tort separate from malpractice claim, and plaintiff entitled to bring action within 6-year statute of limitations for fraud actions); *Brownell v Garber*, 199 Mich. App. 519, 503 N.W.2d 81 (1993) (fraud distinct from malpractice); *Umphrey v. Sprinkel*, 106 Idaho 700, 682 P.2d 1247 (1983) (gist of malpractice action is negligence); *Stackhouse v. Emerson*, 611 So. 2d 1365 (Fla. App. 1993) (not every wrongful act committed by health care provider amounts to medical malpractice); *Hoover v. Gregory*, 835 S.W.2d 668 (Tex. App. 1992) (appellant's fraud cause of action governed by different statute of limitations than cause of action for malpractice); *Krause v. Farber*, 379 N.W.2d 93 (Minn. App. 1985) (intentional misrepresentation by physician governed by statute of limitations for intentional torts); *Gumm v. Owen*, 815 S.W.2d 259 (Tex. App. 1991) (action for fraud governed by separate statute for malpractice). Contra, *Benefield v. F. Hood Craddock Clinic*, 456 So. 2d 52 (Ala. 1984) (form of action not decisive test in actions against physicians, surgeons, and dentists for malpractice; decisive test is substance of action);

Hibbett v. Cincinnati, 4 Ohio App. 3d 128, 446 N.E.2d 832 (1982) (applicable statute of limitations determined not from form of pleading but from gist of complaint).

Nonetheless, in *Stacey v. Pantano, supra*, this court rejected an attempt to separate the physician's fraudulent concealment of the cause and nature of his patient's condition from the physician's negligence and held that both claims were governed by the 2-year malpractice limitation set forth in § 25-208. In so ruling, the *Stacey* court reasoned that as the physician's statements were a necessary part of his treatment and consultation with the patient, the false statements were not severable from his negligence.

This court has refused to separate various aspects of a professional relationship for limitations purposes in other cases as well. See, *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989) (in applying 2-year malpractice statute of limitations instead of 4-year statute for ordinary negligence, court pointed to physician-patient relationship which existed between parties and which was stimulus for examination alleged to be negligently performed); *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987) (issue of informed consent governed by 2-year statute of limitations for malpractice and not 1-year battery statute of limitations); *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982) (allegation by patient that physician affirmatively misrepresented effect of x-ray treatment did not take case out of professional negligence period of limitations).

We thus decline St. Paul's invitation to now change the long-settled law of this state by separating a single professional relationship into various parts and applying to one part of that relationship the general fraud period of limitations found in § 25-207 and to another part the malpractice period of limitations found in § 25-208. See, also, *Stumpf v. Albracht*, 982 F.2d 275 (8th Cir. 1992), which, relying on *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964), held that a claim of fraud against a debtor's former attorney for allegedly advising debtors to conceal assets belonging to the bankruptcy estate was governed by the 2-year periods of limitations found in §§ 25-208 and 25-222.

While § 25-208 does not by its terms provide for a period of

discovery, in *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962), we held that a cause of action for malpractice against a physician who failed to remove a foreign object did not accrue until the patient discovered, or in the exercise of reasonable diligence should have discovered, the presence of the object. Thus, the discovery doctrine discussed with regard to § 25-222 in part IV(1)(b) of this opinion applies as well to the period of limitations set forth in § 25-208.

(b) Timeliness of Fraud Theory

Nonetheless, Touche urges that the fraud theory of recovery was not seasonably pled because it was raised for the first time in the operative petition, which was filed more than 4 years after St. Paul's discovery of the alleged fraud. The question thus is whether St. Paul's fraud allegations relate back to the original petition.

In arguing that they do not relate back, Touche in essence argues that fraud is a different cause of action from negligence. But a cause of action consists of the fact or facts which give one a right to judicial relief against another. Holding that a theory of recovery is not itself a cause of action, this court, in *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971), determined that a claim for recovery under a theory of strict liability was not a cause of action different from claims of recovery under theories of res ipsa loquitur or breach of express or implied warranty. Therefore, the amendment adding the strict liability theory related back to the original pleading for limitations purposes. The *Kohler* court noted that the "general facts upon which the right to recover was based are the same." *Id.* at 432, 191 N.W.2d at 605. See, also, *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988) (alternative theories of recovery on same general set of facts not ordinarily separate causes of action for purposes of running of statute of limitations); *Knoell Constr. Co., Inc. v. Hanson*, 210 Neb. 628, 316 N.W.2d 321 (1982).

In *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986), we held that fraud alleged for the first time in an amended petition related back to the original petition where the alleged misrepresentations were nearly identical to

those alleged in the original petition. Therein, the plaintiff in his initial petition alleged securities violations, breach of contract, and fraud violations against a company called SMC, asserting that the two defendants had made misrepresentations to him. In his amended petition the plaintiff omitted the securities and breach of contract violations and alleged solely that the misrepresentations made by the defendants who acted " 'in the guise of [SMC]' " induced the plaintiff to rely on their representations. *Id.* at 147, 396 N.W.2d at 277. The *Forker Solar, Inc.* court ruled that although the plaintiff had modified its theory of recovery, it did not state a new and independent cause of action. The court pointed out the nearly identical misrepresentations alleged by the plaintiff and that both petitions alleged that these misrepresentations induced the plaintiff to enter into the first agreement. See, also, *Abbott v. Abbott*, 185 Neb. 177, 174 N.W.2d 335 (1970), *appeal after remand* 188 Neb. 61, 195 N.W.2d 204 (1972) (stepson's second amended petition filed more than 4 years after the distribution of father's estate alleging promissory fraud and undue influence related back to petition and first amended petition in which he alleged the will, family settlement, oral promises by member of the family, and subsequent nonperformance of those promises entitled him to distribution).

Touche's reliance on two of our cases for its proposition that a cause of action for fraud does not relate back to one for negligence is misplaced. In *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985), and *Streight v. First Trust Co.*, 133 Neb. 340, 275 N.W. 278 (1937), we wrote that facts incorporated into a petition by way of amendment constitute a cause of action separate and independent from that stated in the original petition, and the statute of limitations against the cause of action pled in the amendment runs until the filing of such amended petition. However, in both cases, the amended petition alleged new facts which, in and of themselves, constituted a separate cause of action.

In *League*, the plaintiff had asserted that the corporate president-majority shareholder breached his fiduciary duty with respect to certain corporate transactions, including a claim that the corporation had paid excessive compensation to the

corporate president during a period of 2 years. In his subsequent amended petition, the plaintiff added a third year, during which, he alleged, the corporation overpaid the corporate president. Obviously, the addition of the third year could not relate back to the earlier pleading, for to that extent the amended pleading relied on entirely different reasons for relief. *Muenchau v. Swarts*, 170 Neb. 209, 102 N.W.2d 129 (1960). Similarly in *Streight*, claims by a first mortgage bond purchaser against a trust company that the trust company took title to and preserved the mortgaged property for the benefit of its stockholders did not relate back to earlier claims of negligence and fraud asserted in the plaintiff's first two petitions against the trust company for permitting assessed taxes to become delinquent and permitting the mortgage to default on an interest payment. However, there existed enough continuity of the other claims made by the plaintiff in her prior petitions as to relate back to the earlier pleadings and thus to toll the statute of limitations raised by the trust company.

Therefore, except as to the fiscal year 1981, which was not mentioned in the original petition, St. Paul's fraud allegations relate back to July 14, 1987, the date it filed its original petition.

V. JUDGMENT

The record sustaining St. Paul's first summarized assignment of error and, in part, sustaining St. Paul's second summarized assignment of error, the judgment of the district court is affirmed in part and in part reversed, and the cause remanded for further proceedings consistent with this opinion.

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

CLARA MALZAHN AND LEE MALZAHN, APPELLANTS, V. THE TRANSIT AUTHORITY OF THE CITY OF OMAHA, DOING BUSINESS AS METRO AREA TRANSIT, APPELLEE.

507 N.W.2d 289

Filed October 29, 1993. No. S-91-712.

1. **Demurrer: Pleadings.** In considering 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. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent correct conclusion irrespective of the determination made by the court below.
3. **Statutes: Words and Phrases.** Generally, "may" used in a statute will be given its ordinary permissive and discretionary meaning unless it would manifestly defeat the statutory objective.
4. **Statutes.** 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.
5. **Political Subdivisions Tort Claims Act: Notice.** Substantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice to a political subdivision in accordance with Neb. Rev. Stat. § 13-905 (Reissue 1987), when the lack of compliance has caused no prejudice to the political subdivision.
6. **Political Subdivisions Tort Claims Act: Pleadings: Notice.** Absent any consideration of the statute of limitations, the filing of a petition is substantial compliance with the terms of Neb. Rev. Stat. § 13-906 (Reissue 1987) as to the withdrawal of a claim from consideration.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for further proceedings.

John J. Higgins for appellants.

Timothy M. Kenny and Sandra L. Maass, of Abrahams, Kaslow & Cassman, for appellee.

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

HASTINGS, C.J.

This action was filed pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1987), to recover damages for personal injuries and loss of consortium alleged to have been suffered by reason of the alleged negligence of defendant. On June 11, 1991, the district court sustained defendant's demurrer to the second amended petition for failure to state facts sufficient to constitute a cause of action, based on plaintiffs' failure to comply with the procedural requirements of § 13-906. Upon plaintiffs' failure to amend their petition within the time provided by the court, the action was dismissed. Plaintiffs appeal; we reverse, and remand for further proceedings.

In considering 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. *Gallion v. Woytassek, ante* p. 15, 504 N.W.2d 76 (1993); *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993).

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent correct conclusion irrespective of the determination made by the court below. *In re Application of City of Lexington, ante* p. 62, 504 N.W.2d 532 (1993); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

According to plaintiffs' petition, Clara Malzahn suffered personal injuries while attempting to exit a Metro Area Transit bus on February 13, 1989. Various allegations of negligence on the part of defendant were made.

On January 25, 1990, Clara and Lee Malzahn filed a claim with the board of directors of Metro Area Transit, pursuant to § 13-905 of the Political Subdivisions Tort Claims Act. On February 4, 1991, plaintiffs filed a petition in the district court for Douglas County against Metro Area Transit. On February 12, plaintiffs filed an amended petition, joining The Transit

Authority of the City of Omaha as an "additional" defendant. A second amended petition was filed on April 17 against The Transit Authority of the City of Omaha, doing business as Metro Area Transit. Defendant demurred to that petition, stating:

> Plaintiffs' petition does not state facts sufficient to constitute a cause of action for the reason that plaintiffs fail to allege compliance with the procedural requirements of the Nebraska Political Subdivision's [sic] Tort Claims Act, Neb. Rev. Stat. §13-901 et seq. (Reissue 1987) for their failure to allege written notice of their withdrawal of their claims as required by Neb. Rev. Stat. §13-906 (Reissue 1987).....

Following a hearing, the court sustained the demurrer and gave plaintiffs 2 weeks to further amend their petition, and on their failure to do so, the court dismissed the action on June 27, 1991.

On appeal, plaintiffs assign as error the sustaining of the demurrer and the dismissal of the action.

In their second amended petition, plaintiffs alleged, in pertinent part:

> 2. That on or about January 25, 1990, Plaintiffs filed a written claim for injuries with the Transit Authority of the City of Omaha, d/b/a Metro Area Transit, for personal injuries, medical expenses, pain and suffering, past and future loss of earning capacity, together with a claim by Lee Malzahn, for loss of society, companionship, and consortium....
>
> 3. That Plaintiffs further allege that more than six (6) months have elasped [sic] since the filing of the aforesaid claim, but no action has been taken by Defendant to provide compensation to Plaintiff[s] for the injuries as hereinafter alleged.
>
> 4. Plaintiffs further allege that the failure to take any action on Plaintiffs' claim for a period of more than one year after the filing of the same operates as a denial of the claim, by operation of law, and Plaintiffs have therefore filed the aforesaid action against Defendant Transit Authority of the City of Omaha, d/b/a Metro Area

Transit.

Thus, the question is whether the giving of specific or separate written notice to a political subdivision by a claimant of the latter's withdrawal of his or her claim from consideration by the political subdivision is a prerequisite to the commencement of a suit under the Political Subdivisions Tort Claims Act.

Plaintiffs alleged in their petition that the failure of defendant to act on the claim was a denial of the claim by operation of law. However, on appeal plaintiffs argue that the filing of their petition constituted written notice of withdrawal of their claim.

In arguing that the district court erred in sustaining defendant's demurrer, plaintiffs first contend that the language of § 13-906 is vague and ambiguous. That section states:

> *No suit shall be permitted* under this act unless the governing body of the political subdivision has made final disposition of the claim, *except that* if the governing body does not make final disposition of a claim within six months after it is filed, the claimant *may*, by notice in writing, withdraw the claim from consideration of the governing body and begin suit under this act.

(Emphasis supplied.) Plaintiffs assert that the word "may" indicates that claimants have some type of choice, and that it is not easily discernible from the statute what that choice involves.

Generally, "may" used in a statute will be given its ordinary permissive and discretionary meaning unless it would manifestly defeat the statutory objective. *Peterson v. Minden Beef Co.*, 231 Neb. 18, 434 N.W.2d 681 (1989).

Plaintiffs here suggest that the choice could be between making a telephone call or sending written notice. However, the plain meaning of the statute indicates that if the governing body does not make final disposition of the claim within 6 months, the claimants' choice is that they *may* withdraw the claim and begin suit or that they *may* not withdraw the claim and begin suit; the modifying phrase "by notice in writing" simply directs claimants on how to withdraw the claim, should they desire to do so and begin suit.

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. *In re Application of City of Lexington, ante* p. 62, 504 N.W.2d 532 (1993); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

However, plaintiffs further contend that even if written notice must be provided, the statute is ambiguous because it does not specify what *type* of written notice will suffice. Accordingly, arguing that notice requirements of the act are to be construed liberally, they assert that a petition and service of summons will satisfy the requirements of the statute.

In *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988), we examined the issue of compliance with the notice requirements of Neb. Rev. Stat. § 23-2404 (Reissue 1983), the predecessor of § 13-905, which provides that all claims presented to a governing body must be in writing and must state the time and place of the occurrence giving rise to the claim. We found:

> The purpose of § 23-2404 [now § 13-905] is not to require a statement of fact to the extent that the governmental subdivision's absolute liability is verbally demonstrated in the documentary or written claim. Rather, the written claim required by § 23-2404 notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made. . . .
>
> We hold, therefore, that the notice requirements for a claim filed pursuant to the Political Subdivisions Tort Claims Act are liberally construed so that one with a meritorious claim may not be denied relief as the result of some technical noncompliance with the formal prescriptions of the act. . . . Therefore, substantial compliance with the statutory provisions pertaining to a

> claim's content supplies the requisite and sufficient notice to a political subdivision in accordance with § 23-2404, when the lack of compliance has caused no prejudice to the political subdivision.

(Citations omitted.) 227 Neb. at 368-69, 417 N.W.2d at 765-66.

While in *Chicago Lumber Co.* we dealt with the content of notice required by the predecessor of § 13-905, the fact that in this case we are dealing with the form of notice under § 13-906 should make no difference. We can perceive no notable distinction between an objection to the content of a notice and one to the nature of a notice of withdrawal. The objective of the statute has been reached in this case. Defendant had notice of the claim for approximately 1 year and had ample time to "investigate and obtain information about its allegedly tortious conduct, [so as to enable] the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made." No clearer expression of the intent of a claimant to withdraw his or her claim and to begin suit can be manifested than the actual filing of the petition.

Absent any consideration of the statute of limitations, we hold that the filing of a petition is substantial compliance with the terms of § 13-906 as to the withdrawal of a claim from consideration. See, also, *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990).

We reverse the judgments of the district court sustaining defendant's demurrer and dismissing the petition and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SHANAHAN, J., not participating.

WHITE, J., concurring.

"[N]o political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees, and . . . *no suit shall be maintained against such political subdivision on any tort claim except to the extent, and only to the extent, provided by* [*statute*]." (Emphasis supplied.) Neb. Rev. Stat. § 13-902 (Reissue 1987) (outlining the legislative purpose and extent of the Political Subdivisions Tort Claims Act).

In *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990), this court overruled precedent and subjected a political subdivision to liability beyond the strict terms of the act. See *id.* (Fahrnbruch, J., dissenting). While I continue to adhere to the reasoning of the dissent, for the sake of establishing unanimity of the court's holdings in tort claim litigation, I concur in the result only.

FAHRNBRUCH, J., joins in this concurrence.

SANDRA BEAMAN, APPELLANT, V. COOK FAMILY FOODS, LTD., APPELLEE.

507 N.W.2d 462

Filed October 29, 1993. No. S-92-190.

1. **Due Process: Time: Notice: Final Orders.** Due process requires reasonable notice and fair opportunity to be heard at some stage of the proceedings prior to a final determination.
2. **Workers' Compensation: Evidence: Time: Notice: Intent: Final Orders.** Under the former practice of receiving posthearing evidence in workers' compensation cases, the compensation court's failure to provide a deadline for the reception of posthearing evidence placed upon the court the duty to provide the employee with notice of its intention to make a final determination.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and WRIGHT, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed.

Stephen Speicher for appellant.

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

LANPHIER, J.

This appeal arose from a decision issued by the Nebraska

Workers' Compensation Court awarding plaintiff-appellant, Sandra Beaman, permanent partial and temporary total disability benefits. The parties' attorneys had stated at the hearing that they would submit certain depositions later, and the compensation court had authorized this procedure. The case was decided without the evidence and without notice to the attorneys. Plaintiff appealed, claiming the compensation court exceeded its authority in deciding the case without considering posthearing deposition evidence. The Nebraska Court of Appeals vacated the judgment and remanded the cause. We granted further review. We affirm.

FACTS

On September 7, 1988, plaintiff began working for defendant, Cook Family Foods, Ltd., as a meat trimmer. Approximately a week later, on September 13, plaintiff experienced pain in her back and neck and found that she could not hold or handle the trimming knife. Her petition stated that she had developed a cumulative trauma from the repetitive use of her hands, wrists, and forearms. She testified that she had experienced pain in her hands and arms from September 1983 through the months preceding her employment with defendant.

Although plaintiff received medical attention, and retained her employment with defendant, she did not return to the same position as a meat trimmer, and eventually, the employment relationship was terminated on November 3, 1988. In January 1989, plaintiff underwent a right carpal tunnel release. By November 6, 1989, a letter from plaintiff's physician, Dr. Dennis Bozarth, stated that plaintiff had a rating of 4-percent permanent impairment to each hand and a rating of 2- to 3-percent impairment to each arm. The letter also stated that plaintiff could return to work with "functional limitations."

From November 1989 through March 1990, Dr. Bozarth completed forms which described possible jobs for plaintiff. Claiming the pain was completely debilitating, plaintiff never returned to work after her last day with defendant on November 3, 1988.

Plaintiff's original petition was dismissed, but a rehearing was granted, and a hearing date of May 3, 1991, was agreed

upon. On April 16, plaintiff motioned for a dismissal without prejudice, which motion the compensation court denied. The hearing was rescheduled for September 13. At the hearing, the compensation court denied plaintiff's motion for a continuance, but permitted plaintiff to submit posthearing depositions.

Five months passed after the hearing without any communication between the court and the parties. On February 12, 1992, without having reviewed the posthearing depositions, the compensation court found that plaintiff was entitled to benefits for injuries resulting from her employment with defendant and awarded her a combination of permanent partial and temporary total disability benefits. The posthearing depositions had been taken as scheduled on October 15 and 17, 1991, but were not placed into evidence until several weeks after the compensation court's decision. Also not completed before the compensation court's decision were the depositions of the vocational specialists. Plaintiff appealed, asserting that the compensation court erred in deciding the claim prior to receipt of the posthearing depositions.

STANDARD OF REVIEW

Beaman claims the Nebraska Workers' Compensation Court acted in excess of its powers.

Neb. Rev. Stat. § 48-185 (Cum. Supp. 1992) provides:

> A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award.

ANALYSIS

The Court of Appeals vacated the judgment of the compensation court, finding that the compensation court exceeded its powers by deciding the case without establishing a deadline for the submission of the evidence it had agreed to

receive after the hearing. We agree with the Court of Appeals that the judgment should be vacated. However, we also find that the compensation court exceeded its powers by not notifying Beaman of its intention to make a final determination of the case. This deprived Beaman of the due process provided under the Nebraska Workers' Compensation Act.

The Workers' Compensation Act governs claims made by an employee who is injured in the performance of his or her work. See Neb. Rev. Stat. §§ 48-101 to 48-1,110 (Reissue 1988 & Cum. Supp. 1992). The act provides for a hearing before the Workers' Compensation Court. § 48-164. The procedure followed by the Workers' Compensation Court at the time this action was commenced permitted the court to receive posthearing depositions which would assist the court in making its determinations. We find that under that procedure, Beaman should have been notified by the compensation court of its intention to make a final determination on her claim in order to give her a fair opportunity to submit the posthearing depositions the court had agreed to receive. Due process requires reasonable notice and fair opportunity to be heard at some stage of the proceedings prior to a final determination. *Rhodes v. Houston*, 202 F. Supp. 624 (D. Neb. 1962), *aff'd* 309 F.2d 959 (8th Cir.), *cert. denied* 372 U.S. 909, 83 S. Ct. 724, 9 L. Ed. 2d 719 (1963). Procedural due process requires notice and an opportunity to be heard. *Koepp v. Jensen*, 230 Neb. 489, 432 N.W.2d 237 (1988). The compensation court's failure to provide notice to Beaman deprived her of a full and fair hearing of her claim. There is evidence that when the compensation court granted Beaman leave to submit the posthearing deposition evidence, there was an expectation that the evidence would be submitted soon thereafter. However, the record reflects that no definite or certain date was enunciated.

> THE COURT: Tell me now the names of the people you're going to depose and when I can expect the depositions.
>
> MR. SPEICHER: We have a date set with Dr. Bobenhouse, October 15; with Dr. Bozarth, October 17. I have forgotten Mr. Beaty's first name.
>
> MR. HOFFERT: John, I believe.

MR. SPEICHER: John, John Beaty.

MR. HOFFERT: That's a good name.

MR. SPEICHER: Beaty, I think. He's the physical capacities assessment person from July. His deposition has begun. We are partway through the cross-examination. We hope to be able to complete that within the next two weeks. The same would be true for Michael McKeeman, who is a vocational expert testifying at the Social Security hearing. We have not discussed a date for Ms. Determan's deposition, but I wouldn't imagine it would —

MR. HOFFERT: It will be likely after I get your experts' opinions and we do the depositions.

MR. SPEICHER: I would think shortly after we've done the doctors' depositions in mid-October we'd be able to submit our written positions, if that's agreeable.

MR. HOFFERT: That's fine.

THE COURT: Mr. Hoffert, do you wish to take Ms. Determan's deposition after the depositions that Mr. Speicher —

MR. HOFFERT: That would be my preference, yes, Your Honor.

THE COURT: So you're talking something after October 17; right?

MR. HOFFERT: I'm not sure when we'll be doing Mr. McKeeman or —

THE COURT: Bozarth was the last one he mentioned.

MR. HOFFERT: Right. That's fine. It will be after that, within a week, assuming Ms. Determan is available. She looks available for depositions. Excuse me. I'm sorry.

THE COURT: And we would expect those depositions to be filed as soon as —

MR. SPEICHER: Right.

MR. HOFFERT: Yes. And we will instruct the court reporter —

THE COURT: And as soon as Ms. Determan's deposition has been taken, we'll give you ten days thereafter to submit your written briefs.

MR. HOFFERT: All right, Judge.

MR. SPEICHER: I think Mr. Hoffert has a good point that the vocational people should be deposed after the medical depositions, and I think we should, therefore, do Mr. McKeeman's after those as well. We could probably do those doctors maybe even on the same day.

THE COURT: All right. You and Mr. Hoffert can work that out.

MR. HOFFERT: We'll work it out, and we'll do it as quickly as we can.

MR. SPEICHER: Right.

A significant amount of time had transpired between the date of the hearing and the date of the final decision. Nevertheless, the compensation court's act of making a final determination without giving Beaman the opportunity to submit the evidence was unwarranted. The compensation court's failure to provide a specific deadline for the reception of evidence placed upon it the duty, prior to rendering the opinion, to apprise Beaman of its intention to make a final decision. Thus, the compensation court acted in excess of its powers in deciding the case without giving Beaman notice and a deadline to submit the evidence before making its final determination.

CONCLUSION

We therefore affirm the decision of the Court of Appeals which vacated the judgment of February 12, 1992, and remanded the cause to the compensation court with directions to consider the posthearing evidence which the compensation court agreed to receive.

AFFIRMED.

SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. LEROY JAMES HAND, ALSO KNOWN AS JIM HAND, APPELLANT.

507 N.W.2d 285

Filed October 29, 1993. No. S-93-186.

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.
3. _____: _____. In a bench trial of a criminal case, the trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous.
4. **Kidnapping: Sentences.** Neb. Rev. Stat. § 28-313 (Reissue 1989) creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim. The factors which determine which of the two penalties is to be imposed are not elements of the offense of kidnapping, but are simply mitigating factors which may reduce the sentence of those charged under this section, and their existence or nonexistence should properly be determined by the trial judge.
5. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Leo J. Eskey for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and MORAN, D.J., Retired.

HASTINGS, C.J.

The defendant, Leroy James Hand, was charged with kidnapping, attempted murder, and use of a firearm to commit a felony. As part of a plea agreement, the State dismissed the attempted murder and weapon charges, and the defendant entered a plea of no contest to the charge of kidnapping. The plea was accepted by the district court, and the defendant was found guilty. Following a sentence classification hearing, the court determined that although the defendant released the

victim alive and in a safe place, he was nevertheless guilty of a Class IA felony under the provisions of Neb. Rev. Stat. § 28-313 (Reissue 1989) because the victim suffered serious bodily injuries at his hands. The court sentenced the defendant to a term of life imprisonment. The defendant appeals. We affirm.

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. Crowdell*, 241 Neb. 216, 487 N.W.2d 273 (1992); *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990).

On the evening of March 26, 1991, Beth Hand, the victim, arranged for her three young children to visit with their father while she went to work for a few hours. The children's father is her estranged husband, the defendant. She brought the children to her sister-in-law's home, where Hand was then living, at approximately 5:45 p.m. Because of threats to her life, the victim had previously obtained a restraining order against her husband. However, Hand was unusually nice that night when the victim returned to pick up her children at about 8:30.

As the victim was leaving the house, Hand came up the basement stairs carrying a pair of roller skates. The victim, who was placing her two youngest children in the backseat of her car, stood up, and apparently, Hand gave her the skates. According to the testimony of the victim, her oldest child, Nick, was giving her husband a hug, and "as he came down from the hug," Hand pulled a .22-caliber pistol from his pocket and shot the victim in the lower abdomen. After she fell to the ground, he shot her a second time, in her right buttock. Hand's sister, Patti Delaney, had come out the back door, and he turned to her, stood up, pointed the gun at her, and told her to back off. Patti Delaney's husband, Jerome, heard the shots and came to the door. When Hand saw Jerome Delaney at the door, he turned and pointed

the gun at him. Jerome Delaney turned and pushed his own two children back inside the house, ran down the basement stairs to the nearest phone, and attempted to call the police, but the phone would not work.

The victim testified that she could not walk and that Hand dragged and carried her to the backseat of his car, which was across the street. The victim was not cooperating and was trying to get out of the car as Hand shoved her into the backseat and hit her hard on the thigh about three times, before finally slamming the door. Nine-year-old Nick was screaming and trying to open the car doors, and he was still running around the car when Hand put the car in reverse and "floored it."

Hand recalled telling his wife that he had to get her to a hospital. He stated that his car was parked across the street from his sister's house, pointed east, and that he backed out because there were people playing in the street to the east. Hand testified that it was not the normal route he took to the hospital and that he must have "missed the highway." He stated that "the next thing I know it was dark and I was lost."

The victim testified that her husband was driving very fast and heading west into the country. Hand spoke of shooting himself and said that she would have to watch. The victim began to talk to him softly and told him to think of their children. She also told him that she was in a lot of pain and did not think she would "make it" if she did not get help. The victim stated that Hand's attitude changed all of a sudden, and he finally pulled over at a farmhouse to get help. Eventually, a rescue squad arrived, and the victim was taken to the hospital, where her postoperative diagnosis was stated as "gunshot wound to the abdomen with multiple perforations of distal small bowel, perforation of the right ovary, laceration of the right uterine artery and possible perforation of the lower rectum." She was hospitalized for 11 days for treatment of her injuries. Approximately 3 months later, the victim was hospitalized again for 10 or 11 days for additional surgery necessitated by those injuries. Her medical bills totaled $27,242.30.

Hand was arrested and later charged with kidnapping, attempted murder, and use of a firearm to commit a felony. The

State dismissed the attempted murder and weapon charges in return for the defendant's plea of no contest to the charge of kidnapping, pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). However, with respect to the kidnapping charge, the defendant asserted that any serious injury the victim suffered was not inflicted during the course of the abduction and that the sentence should be for a Class II felony, as opposed to a Class IA felony as set forth in the information.

The parties agreed to submit evidence for a determination by the court as to the serious bodily injury requirement of the kidnapping charge, for the purpose of sentencing. In its order of February 2, 1993, the court found "that the victim herein was either voluntarily released or liberated alive by the abductor in a safe place; however, that the victim had suffered serious bodily injury; and that, therefore, the Court determines that this is a Class IA felony." The defendant was sentenced to life imprisonment and asserts on appeal that the district court "erred in finding the Appellant guilty of kidnapping as a Class 1A [sic] Felony as the record clearly indicated that the Appellant voluntarily released his wife alive in a safe place."

Section 28-313 provides in pertinent part:

> (2) Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.
>
> (3) If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.

Section 28-313 creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim. The factors which determine which of the two penalties is to be imposed are not elements of the offense of kidnapping, but are simply mitigating factors which may reduce the sentence of those charged under this section, and their existence or nonexistence should properly be determined by the trial judge. *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981).

The parties agree, and the record reflects, that the victim was

released alive in a safe place. However, while the defendant does not dispute the fact that he shot his wife, he contends that the shooting was a separate act from the kidnapping and that therefore the victim did not suffer serious bodily harm in the course of the kidnapping.

The act of shooting the victim was not remote in time or place from the act of kidnapping, and there is ample support in the record for finding that the victim's injuries were suffered during the abduction.

The evidence supports the conclusion that the defendant had preplanned some sort of abduction. He had taped down the door locks, wedged the door handles, and removed the window cranks for the back windows of his car. He testified at the sentencing hearing that he did this in order to take his children away for the weekend, an idea which he later abandoned. However, when he was questioned the morning after the arrest about the condition of the car, he told a police officer,

> I just didn't want her jumpin out or try anything crazy, just cause she last time when we started talkin, she finally flipped out and, and it was drivin her crazy and I thought, oh . . . probably it could kinda help her to relieve some tension and that's why I kinda made the doors so she couldn't jump out or hurt herself . . . .

He also admitted that before the incident occurred, he had cut the phone wires in his sister's house because he wanted some time, and he stated, "I didn't want everybody to freak and call the cops here, down and make a big scene . . . I didn't plan on this to be a big production."

The victim told the police that after she was shot her legs were numb and that when she could not get in the car, her husband took her legs and made her do a backflip into the car. She also stated that when her husband started to get in the driver's side of the car, she opened the door and was going to get out when her husband "hopped around and hit me in the face three times and he stuffed me back in." The defendant stated that the victim "had a hard time gettin in there or didn't want to go really" and that he remembered "pushing her in" and "that's how she got hurt in the face."

On the evening before this incident occurred, the defendant wrote a letter in which he stated: "Now it's my turn to do the

damage. To [sic] bad I can't torture her more. I'll never have time. They'll never take me alive. To [sic] bad for the children." Patti Delaney also told police that the defendant had threatened to kill his wife in the past. She stated that the defendant spoke of "making it as painful as he possibly can . . . he's talked about taking her up in their attic, just to find a way of doin it and cuttin her up and leaving her there."

The defendant testified that he intended to take his wife to the hospital, and he argues in his brief that his actions were designed to help, not harm, his wife. Yet, it is noteworthy that he did not put her in her own car or his brother-in-law's vehicle, which were parked in the driveway, but, instead, carried and dragged her across the street to his own car. He also threatened his sister and brother-in-law so they would not interfere. Although the defendant is a licensed emergency medical technician, he did not offer his wife any immediate medical assistance. Finally, although he had been employed at Memorial Hospital in Fremont for 8 years and left his sister's home in the same town to drive his wife to the hospital, he stated that he got lost.

The evidence supports a finding beyond a reasonable doubt that the victim suffered serious bodily injury in the course of a kidnapping. Thus, the district court did not err in finding that the kidnapping should be classified as a Class IA felony for the purposes of sentencing, and the defendant's assignment of error is without merit.

Similarly without merit is the defendant's contention that he should be resentenced. Neb. Rev. Stat. § 28-105 (Reissue 1989) provides that the penalty for a Class IA felony is life imprisonment. A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Ellen*, 243 Neb. 522, 500 N.W.2d 818 (1993); *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993). Section 28-105 does not grant discretion in the sentencing of a Class IA felony, and therefore, it was not an abuse of discretion to impose the statutorily required sentence of life imprisonment.

The judgment of the district court is affirmed.

AFFIRMED.

SHANAHAN, J., not participating.

NANCY HOCH, APPELLANT AND CROSS-APPELLEE, V. ROBERT J. PROKOP, APPELLEE AND CROSS-APPELLANT.

507 N.W.2d 626

Filed November 5, 1993. No. S-91-221.

1. **Appeal and Error.** While an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
2. _____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
3. **Constitutional Law: Libel and Slander.** In a libel action, two primary considerations under the First Amendment are the status of the plaintiff and the nature of the speech.
4. **Libel and Slander: Pleadings: Proof.** When the plaintiff in a libel action is a public figure and the speech is a matter of public concern, the plaintiff must plead and prove actual malice.
5. **Libel and Slander: Words and Phrases.** Actual malice means knowledge of falsity or reckless disregard for the truth.
6. _____: _____. Reckless disregard for the truth means that the defendant in fact entertained serious doubts as to the truth of his publication.
7. **Libel and Slander: Proof.** When the plaintiff in a libel action is a public figure and the speech is a matter of public concern, the plaintiff must establish actual malice by clear and convincing evidence.
8. **Libel and Slander: Pleadings: Proof.** When the plaintiff in a libel action is a public figure and the speech is a matter of public concern, the plaintiff must plead and prove that the allegedly libelous statement is false.
9. **Libel and Slander: Proof.** When the plaintiff in a libel action is a public figure and the speech is a matter of public concern, the plaintiff must establish falsity by clear and convincing evidence.
10. **Constitutional Law: Libel and Slander.** Candidates for public office are public figures for purposes of the First Amendment.
11. _____: _____. A candidate's official conduct and qualifications for office are matters of public concern for purposes of the First Amendment.
12. **Summary Judgment: Pleadings.** Summary judgment is improper when the challenge involves the sufficiency of a petition to state a cause of action.
13. **Trial: Pleadings: Pretrial Procedure: Summary Judgment.** When it is asserted in a motion for summary judgment that an opposing party has failed to state a cause of action, then the motion may be treated, as to that issue, as one for judgment on the pleadings.
14. **Trial: Pleadings: Pretrial Procedure.** In a motion for judgment on the pleadings, the moving party admits the truth of the well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom. However, a court cannot assume the existence of facts not alleged.
15. **Demurrer: Pleadings.** When a court sustains a demurrer, the losing party is entitled to amend the pleadings unless there is no reasonable possibility that

amendment will remedy the deficiency.

16. **Trial: Pleadings: Pretrial Procedure.** When a party challenges the sufficiency of a petition to state a cause of action, a motion for judgment on the pleadings should be sustained only when an amendment cannot cure the defect.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Michael M. O'Brien, of Cannon, Goodman, O'Brien & Grant, for appellant.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellee.

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

WHITE, J.

Nancy Hoch appeals from a summary judgment dismissing her libel action against Robert J. Prokop. We reverse, and remand with directions.

In 1988, Hoch and Prokop were opposing candidates for the elected position of University of Nebraska regent. During the campaign, Prokop wrote a four-page flier criticizing Hoch's record. Prokop mailed the flier to approximately 40,000 households.

Hoch mailed a retraction request to Prokop via registered mail. When Prokop failed to retract the statements, Hoch filed suit in district court, alleging that the flier contained 13 separate instances of libel. Prokop answered, among other things, that Hoch had failed to state a cause of action and that his statements were made about a public figure and were made without malice. Prokop then moved for summary judgment.

The district court granted summary judgment for Prokop as to 12 of the 13 allegations of libel. The district court first addressed each of the 12 allegations individually. The district court then summarized its holding as follows:

> The evidence raises no issue as to any disputed facts concerning plaintiff's specifications [of libel]. Most of the innuendos alleged by the plaintiff from reading the publication . . . are merely expressions of opinions by the defendant made in a political situation and are protected

> speech. Those that get by such protection are not libel per se. In no case, has any attempt been made by plaintiff to allege or prove special damages or to prove a false statement of fact.

As to the 13th allegation of libel, the district court ordered the case to proceed to trial. Hoch withdrew the 13th allegation, making the case reviewable by this court.

Distilled, Hoch's assignments of error allege that the district court erred in finding that the statements did not constitute libel per se and in granting Prokop's motion for summary judgment. We find that the district court committed plain error by not recognizing that the petition fails to state a cause of action.

While an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Gould v. Orr, ante* p. 163, 506 N.W.2d 349 (1993); Neb. Ct. R. of Prac. 9D(1)d (rev. 1992). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993); *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992).

The parties do not dispute that Hoch's cause of action is grounded in libel. The U.S. Supreme Court has described two forces which shape the libel landscape to conform to the First Amendment. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986). The first force is the status of the plaintiff: "whether the plaintiff is a public official or figure, or is instead a private figure." *Id.*, 475 U.S. at 775. The second force is the nature of the speech: "whether the speech at issue is of public concern." *Id.* When the plaintiff is a public official or public figure and the speech is a matter of public concern—a combination of plaintiff and speech which we will denominate "public libel"—the First Amendment requires the plaintiff to surmount higher barriers than those raised by common-law libel. See *Hepps, supra.*

Under the First Amendment, a public-libel plaintiff must demonstrate "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (public officials); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.

Ct. 1975, 18 L. Ed. 2d 1094 (1967) (public figures). See, also, Bruce W. Sanford, Libel and Privacy § 7.1 (2d ed. 1991). Actual malice means knowledge of falsity or reckless disregard for the truth. *New York Times Co., supra.* To establish recklessness, a plaintiff must present "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968).

In public-libel cases, actual malice is an element of the plaintiff's prima facie case. Rodney A. Smolla, Law of Defamation § 3.06 (1993). Thus, the petition must contain facts which would support the conclusion that the defendant acted with knowledge of falsity or reckless disregard for the truth. Furthermore, the plaintiff must establish actual malice by clear and convincing evidence. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

Under the First Amendment, a public-libel plaintiff must also demonstrate that the allegedly libelous statement is false. See *Hepps, supra* (if the speech at issue is a matter of public concern, then both public-figure and private-figure plaintiffs must show falsity). As with actual malice, falsity is an element of the prima facie case and must be properly pled in the petition. As with actual malice, a public-libel plaintiff must establish falsity by clear and convincing evidence. See *Deaver v. Hinel*, 223 Neb. 529, 391 N.W.2d 128 (1986).

Hoch's petition presents a case which falls squarely within the confines of public libel. Hoch is clearly a public figure. Hoch's petition states that at the time of the allegedly libelous statements, she and Prokop were opposing candidates for the "nonpartisan elective position of University of Nebraska Regent." Candidates for public office are public figures for purposes of the First Amendment. Smolla, *supra*, § 2.23[2]. In addition, the allegedly libelous statements are matters of public concern, because the statements discussed Hoch's conduct as a regent and her qualifications for that office. "Public discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule." *Ocala Star-Banner*

Co. v. Damron, 401 U.S. 295, 300-01, 91 S. Ct. 628, 28 L. Ed. 2d 57 (1971).

We find that the district court committed plain error by dismissing this case on summary judgment when the face of the petition clearly failed to state a cause of action.

Summary judgment is improper when the challenge involves the sufficiency of a petition to state a cause of action. *Gould v. Orr, ante* p. 163, 506 N.W.2d 349 (1993); *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991). When it is asserted in a motion for summary judgment that an opposing party has failed to state a cause of action, then the motion may be treated, as to that issue, as one for judgment on the pleadings. *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993); *Ruwe, supra.*

Treating the motion as one for judgment on the pleadings, we find that Hoch's petition fails to state a cause of action. Hoch's petition lacks the allegations required by the First Amendment. Because Hoch is a public figure and the allegedly libelous statements are matters of public concern, Hoch must plead the elements of falsity and malice. Hoch's petition alleges that Prokop's publication was libelous and caused damage. Hoch's petition does not allege either falsity or malice and does not allege facts which would even raise an issue of falsity or malice.

In a motion for judgment on the pleadings, the moving party admits the truth of the well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom. *Ruwe, supra.* However, a court cannot assume the existence of facts not alleged. Cf. *Northland Ins. Co. v. State*, 242 Neb. 10, 492 N.W.2d 866 (1992) (principle applies when ruling on a demurrer). Because Hoch's petition fails to reveal crucial facts—which of Prokop's statements were false and how Prokop might have acted with actual malice—the petition fails to state a cause of action.

Given that Hoch has failed to state a cause of action, it is clear that the case cannot proceed in its current state. Dismissing the case, however, would create a manifestly inequitable situation because the defects in the pleading appear to be amendable.

The inequity arises from Nebraska procedures regarding

amendments to pleadings. When a court grants judgment on the pleadings and dismisses a case, the losing party does not have the right to amend the pleadings. In contrast, when a court sustains a demurrer, the losing party is entitled to amend the pleadings unless there is no reasonable possibility that amendment will remedy the deficiency. *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992); *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990). In other words, under our present system, a defendant can move for judgment on the pleadings, rather than demur, and thereby extinguish the plaintiff's right to amend.

State courts facing this inequity have acted to prevent parties from circumventing the right to amend pleadings; in effect, parties may not move for judgment on the pleadings when demurrer would be appropriate. See, *MacIsaac v. Pozzo*, 26 Cal. 2d 809, 161 P.2d 449 (1945); *Virginia G. v. ABC Unified School Dist.*, 15 Cal. App. 4th 1848, 19 Cal. Rptr. 2d 671 (1993); *Jones v. Ceres Co.*, 60 Colo. 562, 154 P. 745 (1916); *Strack v. Federal Land Bank*, 124 Mont. 19, 218 P.2d 1052 (1950); *Atchison, Topeka and Santa Fe Railway Co. v. Coulson*, 371 P.2d 914 (Okla. 1962); *C & L Service Co. v. Northern Equipment Co.*, 525 P.2d 1260 (Okla. App. 1974); *Scott & Payne v. Potomac Ins.*, 217 Or. 323, 341 P.2d 1083 (1959); *Lehner v. Montgomery*, 180 Pa. Super. 493, 119 A.2d 626 (1956); *Wolf v. S. H. Wintman Co.*, 92 R.I. 470, 169 A.2d 903 (1961). In accord with these cases, we hold that when a party challenges the sufficiency of a petition to state a cause of action, a motion for judgment on the pleadings should be sustained only when an amendment cannot cure the defect.

Before we apply this rule to the present case, it will be useful to summarize the relevant procedural steps that have already been taken. Prokop's answer asserted that the petition failed to state a cause of action. Prokop did not demur but, rather, moved for summary judgment. Because of the allegations in the answer, the motion for summary judgment included a challenge to the sufficiency of the petition. Because the motion for summary judgment challenged the sufficiency of the

petition, we treated the motion, as to that issue, as one for judgment on the pleadings. Treating the motion as one for judgment on the pleadings, we found that under applicable First Amendment law, Hoch failed to state a cause of action. However, we will not grant judgment on the pleadings and dismiss the case if an amendment could cure the defect.

We find that a proper amendment could cure the defect. The facts which Hoch has alleged begin to establish a libel cause of action. Constitutionally, Hoch must allege facts to demonstrate falsity and malice. Nothing on the face of the pleadings would suggest that she cannot allege such facts. Thus, there is a reasonable possibility that Hoch could cure the defects, and Hoch is entitled to amend her petition.

The trial court committed plain error by not treating the summary judgment as a demurrer, by not ruling that Hoch had failed to state a cause of action, and by not allowing Hoch to amend her petition. In view of this result, it is unnecessary to consider Prokop's cross-appeal. The judgment of the district court dismissing the action is reversed, and the cause is remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

DELICIOUS FOODS COMPANY, INC., A NEBRASKA CORPORATION, AND CHEF FRANCISCO FOODS, INC., A CALIFORNIA CORPORATION, APPELLEES, V. MILLARD WAREHOUSE, INC., A NEBRASKA CORPORATION, APPELLEE, AND L & B CORPORATION, A NEBRASKA CORPORATION, APPELLANT.

507 N.W.2d 631

Filed November 5, 1993. No. S-91-390.

1. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
2. _____. A motion for directed verdict must be treated as an admission of the

truth of all competent evidence submitted on behalf of the party against whom the motion is directed.

3. _____. The party against whom a motion for directed verdict is sought is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
4. **Independent Contractor: Agents.** The factors to be considered in distinguishing an agent and independent contractor are (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, the tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is a part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.
5. **Agency.** Whether an agency exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship.
6. **Independent Contractor: Liability.** An independent contractor is not liable for injuries to third parties after the contractor has completed his work and turned the project over to the owner or employer and it has been accepted by him unless the parties were dealing with inherently dangerous elements or the defect at issue was latent and could not have been discovered by the owner or employer.
7. **Rules of Evidence.** In proceedings governed by the Nebraska Evidence Rules, the admission and exclusion of evidence is controlled by those rules; judicial discretion comes into play only when the rules make discretion a factor.
8. **Contracts: Intent.** If the language used in a document is unambiguous, the intent of the parties must be gathered from the contents of the document alone.
9. **Contracts: Parties.** In order for those not named as parties to a contract to recover thereunder as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and provision was made for them.
10. **Rules of Evidence: Insurance.** Even when evidence of the existence of liability insurance is otherwise admissible, it may be excluded under the provisions of Neb. Rev. Stat. § 27-403 (Reissue 1989) if the probative value of the evidence is substantially outweighed by, among other things, the danger of unfair prejudice.
11. **Rules of Evidence.** What constitutes unfair prejudice is a matter the Nebraska Evidence Rules entrusts to the discretion of the trial judge.
12. _____. Neb. Rev. Stat. § 27-408 (Reissue 1989) excludes evidence that any party to a litigation has settled a claim with a third party concerning the same transaction or subject matter involved in litigation where such evidence is offered.
13. **Jury Instructions.** A trial court has the duty of instructing the jury on the issues

presented by the pleadings and evidence, regardless of whether the court is requested to do so; this principle applies to theories of defense as well as those upon which the plaintiff's cause of action is founded, and the failure to so instruct constitutes prejudicial error.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded for a new trial.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Rex A. Rezac, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., and James T. Ferrini, Thomas A. McDonald, George C. Ellison, and Susan Condon, of Clausen, Miller, Gorman, Caffrey & Witous, P.C., for appellees Delicious Foods and Chef Francisco Foods.

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

PER CURIAM.

This negligence action appeal arises from the district court's $2,192,733.37 judgment on the verdict in favor of the plaintiff-appellee Delicious Foods Company, Inc., and its $7,132.94 judgment on the verdict in favor of the plaintiff-appellee Chef Francisco Foods, Inc., against the defendant-appellant, L & B Corporation, for damages suffered as the result of a refrigeration system ammonia leak.

We note at the outset that the record does not disclose the reason Millard Warehouse, Inc., is named a party defendant, nor does it disclose the relationship, if any, of Chef Francisco Foods to either L & B or Delicious Foods. However, because the parties have treated the matter as if Chef Francisco's fate rises or falls with Delicious Foods', we do the same.

One Larry Larsen is engaged in the refrigerated storage business and is the president and sole shareholder of L & B. Larsen had built a warehouse in Lincoln, Nebraska, in which Delicious Foods subsequently leased storage space from L & B. Delicious Foods later expressed an interest in leasing cold storage space in Grand Island, Nebraska. Larsen then formed a partnership named Millard Warehouse, Grand Island, of which

he owns a majority interest, for the purpose of building a warehouse there.

Delicious Foods subsequently entered into an agreement with the partnership, which agreement provided that the partnership would obtain a suitable site and build a warehouse in Grand Island which Delicious Foods agreed to, and did, lease.

The lease requires, in relevant part, that the partnership maintain and keep in good repair all portions of the warehouse, including, without limitation, all of the mechanical equipment. The lease further contains a waiver provision, which reads:

> Lessor and Lessee agree that neither shall be liable to the other for damages to the premises or to any of the contents of the premises, whether owned by Lessee or Lessor, by perils insured against by the party owning such damaged or destroyed property; the Lessor hereby waives any and all rights of recovery from the Lessee for loss caused by the perils of fire and other perils included in the definition of extended coverage, and the Lessee hereby waives any and all right of recovery from the Lessor for loss caused by the perils of fire and other perils included in the definition of extended coverage. Each party hereto shall provide the other party with documentary evidence of the concurrence of their respective insurance carriers with the provisions of this clause.

Delicious Foods did insure itself against the loss occasioned by the ammonia leak.

The partnership also entered into an "Administrative Service Agreement" with L & B whereunder L & B agreed to provide accounting, administrative, marketing, and engineering services to the partnership. In exchange, the partnership pays L & B a fixed monthly fee per square foot of warehouse space.

Roger Kirschenman is L & B's corporate engineer and, through administrative service agreements, provides engineering services to all of the 18 warehouses in which Larsen has an interest. Kirschenman is not a registered engineer, and his experience in refrigeration prior to employment with L & B in 1971 was limited to the repair of refrigeration systems on semi-trailers while employed as a diesel engine mechanic for

9½ months. His formal training consisted of a 1-week workshop in refrigeration systems.

Kirschenman is responsible for engineering the refrigeration systems and has ultimate responsibility for their operation. He supervised the construction of the ammonia refrigeration system for the partnership's warehouse, and interviewed and hired Richard Christianson as the plant engineer of the partnership's warehouse. While the partnership's plant manager was Christianson's immediate supervisor and Christianson addressed routine refrigeration questions to the plant manager, Kirschenman responded to Christianson's questions regarding problems with the system. Although Christianson's paycheck was issued by L & B, the partnership was charged for those wages under the terms of its administrative service agreement with L & B.

Christianson had graduated from an 18-month program in refrigeration, air conditioning, and heating at a trade school in the Omaha area in 1980, which is typical of the training possessed by those hired as refrigeration mechanics by Millard Warehouse and in the industry. He had worked since 1978 servicing refrigeration units while employed by a packinghouse, and continued his employment there until 1984, when the plant closed.

According to Delicious Foods' expert, although one can become qualified as a refrigeration mechanic without a college education, it is the custom and practice of the refrigeration industry that a refrigeration mechanic undergo a 6-month apprenticeship under the supervision of someone engaged in operating a plant as an operating engineer of an ammonia refrigeration unit. However, Christianson did not undergo such an apprenticeship; rather, Kirschenman provided him with operating manuals for the compressors but did not review those manuals with him.

Shortly before the ammonia leak, Christianson noticed that five of the valves were "chattering," which meant that too much gas was passing through the valves because the opening on the bottom of each valve was too big. Kirschenman decided to change the plungers in the defrost valves in order to change the size of the orifices.

After Christianson installed the new plungers, he notified Kirschenman that he was having continuing problems with the valves. Kirschenman told Christianson to see if he could achieve defrosting. As the system defrosted, neither Kirschenman nor Christianson was concerned enough to shut the system down. Although Kirschenman was at the partnership's warehouse following that conversation with Christianson and before the mishap described below, the two had no further discussions about the problem.

It was later discovered that in adjusting the defrost regulator valve which had given him problems, Christianson had improperly adjusted it to the fully closed position. Closing the regulator valve caused a sudden stoppage of the flow of liquid ammonia in the pipe. The liquid ammonia then collected in one of the two blast freezer coils. If the valve had been functioning properly, some of the liquid would have been relieved back to the suction line. Instead, when the main suction valve opened at the end of the defrost cycle, the ammonia moved down the pipe at a high velocity and passed through two elbows. A "liquid hammer" was created when the high-velocity ammonia hit the perpendicular surface of a T installed on the line. The plate blew off, dispensing ammonia throughout the warehouse.

The plan Kirschenman used for the refrigeration system called for the use of an elbow where the line burst, rather than a T. According to Kirschenman, however, that drawing was not a detailed plan which was intended to be followed. The various experts are in disagreement as to whether the use of an elbow would have prevented the bursting of the pipe; one expert theorized that debris in the line could have clogged the valve, thereby causing the pipe to burst, and several experts were of the opinion that the pressure was so elevated that a break somewhere was inevitable.

At the time of the ammonia leak, Delicious Foods had frozen and other food products with a net market value of $2,020,428.12 stored in the warehouse. Some of Delicious Foods' products were directly saturated with liquid ammonia and were discarded immediately. After the remaining product was tested by Delicious Foods' quality control department for taste, odor, and color, the balance of the food was discarded

because it had turned an unacceptable color and released an ammonia smell when heated. It cost $172,305.30 to remove and discard the damaged food.

The county health department also inspected and tested the damaged food, finding that the frozen food had a noticeable odor of ammonia both before and during cooking. Two salvage experts testified that the damaged food which was not hit directly with ammonia could have been sold as salvage for which, according to one expert, Delicious Foods would have netted between $545,515 and $727,334.

L & B urges 17 grounds for reversal, which, as argued, merge to claim that the district court erred (1) in failing to direct a verdict in L & B's favor, (2) in certain of its evidential rulings, and (3) in certain of its instructions to the jury.

We begin by noting that the correctness of the district court's ruling on a motion for directed verdict is to be tested by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. However, in reviewing the action of a trial court, we must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993). Accord *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (1993).

L & B argues that it had no duty toward Delicious Foods and that, in any event, nothing L & B did or failed to do was the proximate cause of the ammonia leak.

In claiming that it owed no duty to Delicious Foods, L & B argues that as a matter of law, L & B served as the partnership's agent in maintaining the refrigeration system and was thus protected by the waiver provision of the lease between its principal (the partnership) and Delicious Foods, a third party to the agency relationship between L & B and the partnership.

One acting on behalf of another may do so either as an agent or an independent contractor. The factors to be considered in distinguishing between the two are

> (1) the extent of control which, by the agreement, the employer may exercise over the details of the work, (2) whether the one employed is engaged in a distinct occupation or business, (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision, (4) the skill required in the particular occupation, (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work, (6) the length of time for which the one employed is engaged, (7) the method of payment, whether by the time or by the job, (8) whether the work is a part of the regular business of the employer, (9) whether the parties believe they are creating an agency relationship, and (10) whether the employer is or is not in business. *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). Although the control or right of control is the chief factor to be considered, *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983), no one factor is conclusive, *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984).

Herman v. Bonanza Bldgs., Inc., 223 Neb. 474, 479-80, 390 N.W.2d 536, 541 (1986). Accord, *Smith v. Butler Manuf. Co.*, 230 Neb. 734, 433 N.W.2d 493 (1988); *Equilease Corp. v. Neff Towing Serv.*, 227 Neb. 523, 418 N.W.2d 754 (1988).

"Whether an agency exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship." *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 827, 458 N.W.2d 443, 451 (1990).

In *Curry v. Bruns*, 136 Neb. 74, 76-77, 285 N.W. 88, 89-90 (1939), this court held:

> Under these circumstances we are unable to say, as a matter of law, that [the third party] was the agent or servant of the plaintiff. Whether he was an independent contractor, or an agent or servant, is a question of fact

> which must be determined after a consideration of all the evidence in the case. We conclude that the trial court was in error when it instructed the jury that [the third party] was the agent of plaintiff as a matter of law and that the negligence of [the third party], if any, was imputable to the plaintiff. The following rules of law control the decision of the case.
>
> . . . .
>
> The right of control, or the want of it, is determinative of the relationship; for one who has no right of control over another ought not be required to answer for his acts, and, on the other hand, if one has such right of control he should be answerable. Whether or not the right of control exists is ordinarily a question of fact for the jury, and is usually arrived at by inference from the terms of the contract, the character of the employment, and all the relevant facts and circumstances. When the facts are in dispute, or more than one inference can be drawn therefrom, the question is for the jury. *Andres v. Cox*, 223 Mo. App. 1139, 23 S. W.(2d) 1066.

And in *Ginn v. Lamp*, 234 Neb. 198, 450 N.W.2d 388 (1990), this court held that the district court erred in directing a verdict in favor of the defendant in the face of circumstantial evidence that the defendant exercised control over the premises; such evidence was ruled to establish a prima facie case that the defendant was the agent for the landlord and subject to the same duties as the landlord.

However, there are circumstances under which the determination is to be made as a matter of law. For example, in *Smith v. Butler Manuf. Co., supra*, this court determined that as a matter of law, no agency existed between the manufacturer of building components and one who purchased components from it and erected a building for another, and affirmed the trial court's directed verdict for the defendant manufacturer. Likewise, in *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984), we held that the trial court erred in submitting the question of agency to a jury and failing to find as a matter of law that the defendant trucker who made deliveries for a number of customers was an independent contractor. In

Herman v. Bonanza Bldgs., Inc., supra, we held that in the absence of evidence that the erector of a building was acting primarily for the benefit of the manufacturer, the erector was an independent contractor as a matter of law.

The record here also presents a situation in which the question of the nature of L & B's relationship to the partnership is to be resolved as a matter of law. The uncontroverted evidence is that L & B is generally engaged in the business of installing refrigeration equipment in and providing various services to the various Larsen warehouses; that the partnership exerted no general control over L & B either in the construction of the partnership's refrigeration system or in the replacement of the defective defrost valves; and that L & B has superior refrigeration knowledge. Under these circumstances, L & B was, as a matter of law, not an agent of the partnership, but, rather, acted on behalf of the partnership as an independent contractor.

In reliance upon *Stover v. Ed Miller & Sons, Inc.*, 194 Neb. 422, 231 N.W.2d 700 (1975), L & B next argues that even as an independent contractor, it can have no duty to Delicious Foods because L & B had no contractual relationship with the latter and the party with whom L & B did have such a relationship, the partnership, had accepted L & B's work.

In *Stover*, the plaintiff employee of a general contractor was injured when an excavation dug by the defendant subcontractor collapsed after the excavation had been accepted by the general contractor. In affirming the lower court's grant of summary judgment, this court wrote:

> "A construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner." In Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710, this court stated: "But we have said of such private contractors that when there is an actual acceptance of the work this relieved him (subcontractor) from any further duty."

Stover v. Ed Miller & Sons, Inc., 194 Neb. at 425-26, 231 N.W.2d at 703.

In *Erickson v. Monarch Indus.*, 216 Neb. 875, 881-82, 347 N.W.2d 99, 106 (1984), we, after quoting from the general rule as set forth in *Stover*, noted:

> The exception to this rule was described in *Florida Freight Terminals, Inc. v. Cabanas*, 354 So. 2d 1222, 1225 (Fla. App. 1978): "An independent contractor is not liable for injuries to third parties after the contractor has completed his work and turned the project over to the owner or employer and it has been accepted by him *unless* the parties were dealing with inherently dangerous elements or the defect at issue was latent and could not have been discovered by the owner or employer."
>
> In *Simmons v. Owens*, 363 So. 2d 142, 143 (Fla. App. 1978), the court said: "The general rule . . . is subject to the exception that a contractor is not relieved of liability where he creates a dangerous condition or unreasonable risk which is latent and not discoverable by reasonable inspection."

Here, no design or construction defect can be said to have been latent: Both the end cap and the T are in plain view and could have been seen. Nor is an ammonia refrigeration system, albeit subject under certain circumstances to damaging leaks, dangerous. As the warehouses had been turned over to and accepted by the partnership, L & B cannot be held liable for any damages occasioned as the result of the design and construction of the refrigeration system.

That determination does not mean, however, that L & B was entitled to a directed verdict, for the evidence is such that the jury could have found that the ammonia leak was not the result of a design or construction defect, but, rather, was the consequence of L & B's failure to have hired a qualified plant engineer for the partnership; to have properly instructed, trained, or supervised Christianson; or to have properly maintained the system.

In the second assignment of error, L & B asserts that the district court mistakenly excluded evidence that Delicious Foods and the partnership intended to be bound by the waiver

provision and that but for its insurance coverage, Delicious Foods would not have discarded everything stored in the partnership's warehouse.

In proceedings governed by the Nebraska Evidence Rules, the admission and exclusion of evidence is controlled by those rules; judicial discretion comes into play only when the rules make discretion a factor. See, *Cockrell v. Garton, ante* p. 359, 507 N.W.2d 38 (1993); *State v. Thompson, ante* p. 189, 505 N.W.2d 673 (1993); *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993); *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992).

L & B unsuccessfully sought to adduce extrinsic evidence, including that the earlier Lincoln lease between it and Delicious Foods contained a waiver provision very much like the one in question and further recited that if L & B were to build a warehouse at Grand Island, Delicious Foods would have the option of transferring its leased space to the Grand Island warehouse "with all terms to remain the same." It also unsuccessfully sought to prove that Delicious Foods wanted to do business with Larsen and did not care through what Larsen entity that was accomplished and that the two intended that each would look only to its own insurer for any property loss.

The legal reality is, however, that the partnership is a separate and distinct entity from L & B, and both are separate and distinct entities from Larsen. In addition, the lease between the partnership and Delicious Foods is a different contract than the Lincoln lease.

As noted in *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993), if the language used in a document is unambiguous, the intent of the parties must be gathered from the contents of the document alone. Accord, *Watmore v. Ford*, 229 Neb. 121, 425 N.W.2d 612 (1988), *overruled on other grounds, Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989); *Washington Heights Co. v. Frazier*, 226 Neb. 127, 409 N.W.2d 612 (1987). See, also, *Rowe v. Allely, post* p. 484, 507 N.W.2d 293 (1993) (although parol evidence rule does not apply to prior agreement separate and distinct from written agreement, rule does apply to prior or contemporaneous oral agreement which adds to, alters, varies, or contradicts terms of

fully integrated written document purporting to express terms of agreement).

Not only is there nothing ambiguous in the language of the lease between the partnership and Delicious Foods, but L & B is not a party to that document. Nor is L & B a third-party beneficiary of that contract. As explained in *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 470, 495 N.W.2d 483, 488 (1993):

> In order for those not named as parties to a contract to recover thereunder as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and provision was made for them. *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992). We have stated that " ' "[a] third-party beneficiary's rights depend upon, and are measured by, the terms of the contract between the promisor and promisee. The right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, which must affirmatively appear from the language of the instrument when properly interpreted or construed; and the liability so appearing cannot be extended or enlarged on the ground alone that the situation and circumstances of the parties justify or demand further or other liability. . . ." ' " *Osmond State Bank v. Uecker Grain*, 227 Neb. 636, 639, 419 N.W.2d 518, 520 (1988).

There is nothing in the lease to show that L & B's rights were contemplated, and no provision was made in the lease for L & B. L & B is therefore not a third-party beneficiary of the lease between the partnership and Delicious Foods. See, also, *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983) (although because of ambiguities in agreement, court relied upon extrinsic evidence to determine that stock purchase option survived death of beneficiary, court did not rely upon extrinsic evidence to establish rights which survived).

L & B also contends that it should have been allowed to show the exact extent of Delicious Foods' insurance coverage to show that the latter had no motive to, and did not, properly salvage

its products.

We agree with L & B's position that as it is not liability insurance which is involved, the provisions of Neb. Rev. Stat. § 27-411 (Reissue 1989) do not apply. That statute reads:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

But that does not mean the principle announced with regard to liability insurance in *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984), does not apply as well to evidence of the existence of other types of insurance. In *Kresha*, we ruled that even when evidence of the existence of liability insurance is otherwise admissible, it may be excluded under the provisions of Neb. Rev. Stat. § 27-403 (Reissue 1989) if the probative value of the evidence is substantially outweighed by, among other things, the danger of unfair prejudice.

What constitutes unfair prejudice is one of those matters the Nebraska Evidence Rules entrusts to the discretion of the trial judge. Here, there was substantial risk that if the jury were to learn that Delicious Foods' loss was virtually fully insured, the jury would decide the issue of L & B's liability on the improper basis that Delicious Foods itself suffered no great damage. *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992) (evidence suggesting decisions on improper basis unfairly prejudicial). Thus, the district court did not abuse its discretion in excluding the proffered evidence.

Relying on *Lund v. Holbrook*, 153 Neb. 706, 46 N.W.2d 130 (1951), *overruled on other grounds, Chlopek v. Small*, 224 Neb. 78, 396 N.W.2d 103 (1986), L & B further claims that it was incorrectly precluded from adducing evidence that Delicious Foods settled with its insurer for $1,694,653, an amount less than it sought in this suit. It is true that in *Lund*, we held that the lower court erred in rejecting evidence that the plaintiff settled with his insurer for an amount less than he sought at trial for the value of his truck. The difference,

however, is that in its offer of proof, the defendant in *Lund* expected "to elicit on further cross-examination that the plaintiff in a proof of loss to an insurance company on this accident declared the value of his truck to be very much different from his testimony on the witness stand." *Lund v. Holbrook*, 153 Neb. at 719, 46 N.W.2d at 139. Thus, *Lund* turns not on the fact that the defendant should have been permitted to show the amount of the insurance settlement, but that he should have been able to show that at one time the plaintiff ascribed a different value to the truck than he did at trial. See, also, *Rozark Farms, Inc. v. Ozark Border Elec. Co-op.*, 849 F.2d 306 (8th Cir. 1988).

Here, the evidence in question was directed solely at showing the amount at which Delicious Foods settled with its insurer, not that at one time Delicious Foods represented the value of its damaged and discarded products to be less than it was claiming in the suit or for which it obtained judgment.

The matter is controlled by Neb. Rev. Stat. § 27-408 (Reissue 1989), which provides, in relevant part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

Recognizing that settlements have always been looked upon with favor and that courts have deemed it against public policy to subject one who has compromised a claim to the hazard of having a settlement proved in a subsequent lawsuit arising out of the same transaction, we, in *Baker v. Blue Ridge Ins. Co.*, 215 Neb. 111, 337 N.W.2d 411 (1983), held that § 27-408 excludes evidence of a farmer's settlement of his crop damage claim with another insurer. The district court thus correctly applied the *Baker* rule, that § 27-408 excludes evidence that any party to the litigation has settled a claim with a third party concerning the same transaction or subject matter involved in litigation where such evidence is offered.

In the third and last summarized assignment of error, L & B complains that in some instances the district court refused to

instruct the jury in the manner L & B requested, and in another instance improperly instructed the jury in a manner to which L & B had objected.

With respect to the first aspect of this matter, L & B's criticisms that the district court refused to instruct as to L & B's status as an agent of the partnership and as a third-party beneficiary of the lease between the partnership and Delicious Foods were resolved adversely to L & B earlier in this opinion, and for that reason require no further comment. While L & B also complains that the district court refused to advise the jury as to the elements of what constitutes negligence in hiring or supervising another, it does not argue the complaint, and for that reason we do not concern ourselves with it. See, *Lange Indus. v. Hallam Grain Co., post* p. 465, 507 N.W.2d 465 (1993); *Abdullah v. Gunter*, 242 Neb. 854, 497 N.W.2d 12 (1993); Neb. Ct. R. of Prac. 9D(1)d (rev. 1992).

Neither, with respect to the second aspect of this assignment of error, does L & B argue its claim that the district court erred in instructing the jury as to the issues and burden of proof in the case. However, the rule is that a trial court has the duty of instructing the jury on the issues presented by the pleadings and evidence, regardless of whether the court is requested to do so. *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989); *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988). This principle applies to theories of defense as well as those upon which a plaintiff's cause of action is founded, and the failure to so instruct constitutes prejudicial error. *Herman v. Midland Ag Service, Inc.*, 200 Neb. 356, 264 N.W.2d 161 (1978).

In failing to recognize L & B's status as an independent contractor, the district court neglected to instruct the jury that if it were to find that a design or construction defect caused the ammonia leak, then, because the warehouse had been accepted by the partnership, L & B would have no liability to Delicious Foods.

For that reason, the judgments of the district court are reversed and the cause remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

LANGE INDUSTRIES, INC., FORMERLY KNOWN AS LANGE BUILDING AND FARM SUPPLY, INC., APPELLEE AND CROSS-APPELLANT, V. HALLAM GRAIN CO., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, AND FIRSTIER BANK OMAHA, FORMERLY KNOWN AS FIRST NATIONAL BANK OF OMAHA, A NATIONAL BANKING ASSOCIATION, APPELLEE.

507 N.W.2d 465

Filed November 5, 1993. No. S-91-548.

1. **Mechanics' Liens: Foreclosure: Equity.** An action to foreclose a construction lien is one grounded in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
4. **Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous.
5. **Construction Contracts: Acceptance of Work: Waiver.** An express or implied acceptance of work as in compliance with a building contract operates as a waiver of defective performance, but this rule is inapplicable where the acceptance was under protest or induced by fraud, or where the defects were latent and unknown to the owner.
6. **Breach of Contract: Damages.** When there has been a breach of a contract by one party resulting in a loss to the other, it is the duty of such other party to take all reasonable steps to reduce the amount of his damages.
7. **Construction Contracts: Mechanics' Liens.** A contractor cannot assert a mechanic's lien upon property where there has been only part performance or lack of substantial performance of the contract.
8. **Construction Contracts: Substantial Performance.** In a building contract, substantial performance is shown when all the essential elements necessary for the full accomplishment of the purposes of the contract have been performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract.
9. _____: _____. To establish substantial performance, any deviations from the contract must be relatively minor and unimportant.
10. **Construction Contracts.** In building and construction contracts, in the absence of an express agreement to the contrary, the law implies that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose.
11. **Contracts.** When an instrument consists partly of written (or typewritten) and

partly of printed form, the former controls the latter, where the two are inconsistent.

12. **Breach of Contract: Damages: Evidence.** Damages are recoverable for losses caused by breach of contract only to the extent that the evidence affords a sufficient basis of ascertaining their amount in money with reasonable certainty.
13. **Breach of Contract: Damages: Proximate Cause: Proof.** It is a basic concept that in any damage action for breach of contract the claimant must prove that the breach of contract complained of was the proximate cause of the alleged damages. There must be a causal relationship between the damages asserted and the breach relied upon. Proof which leaves this issue in the realm of speculation and conjecture is insufficient to support a judgment.
14. **Actions: Negligence: Proximate Cause: Damages.** The elements of a negligence action are duty, breach, proximate cause, and damages.
15. **Prejudgment Interest: Mechanics' Liens: Foreclosure: Claims.** Prejudgment interest is recoverable upon the foreclosure of a mechanic's lien. However, such interest is only recoverable when the claim is liquidated, that is, when there is no reasonable controversy as to either plaintiff's right to recover or as to the amount of such recovery.
16. **Prejudgment Interest: Claims: Evidence.** The amount of a claim is liquidated only when the evidence furnishes a basis to compute an exact amount determinable without opinion or discretion inherent in the factfinding process.
17. **Constitutional Law: Appeal and Error.** An appellate court will not consider a constitutional question unless it has been properly presented to the trial court for disposition.
18. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.

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

Robert B. Creager, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Siegfried H. Brauer III, of Ross, Schroeder, Brauer & Romatzke, and John W. Ballew, Jr., of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Lange Industries.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, FAHRNBRUCH, and LANPHIER, JJ., and RONIN, D.J., Retired.

FAHRNBRUCH, J.

Hallam Grain Co. (Hallam) appeals the entry of a construction lien foreclosure in favor of Lange Industries, Inc. (Lange), based upon the district court's finding that Lange had substantially performed its agreement to build a $510,000

four-bin grain elevator facility for Hallam. The grain company had filed six counterclaims at law.

After taking into account various credits and charges, the district court for Lancaster County found that Hallam owed Lange a net balance of $56,203.25 in its foreclosure action, but reduced that amount by $1,464.30 for repairs and modifications to a dump pit because Lange had not properly designed it. Counterclaims or, in the alternative, setoffs, except one for repairs and modifications of the dump pit, requested by Hallam were dismissed.

I. ASSIGNMENTS OF ERROR

In its assignments of error, Hallam claims that the district court erred in (1) improperly allocating the burden of proof on the issue of "substantial performance," (2) finding that Lange had substantially performed the construction contract, (3) finding that Hallam was liable for "site preparation" and for repair and replacement of a conveyor belt, (4) failing to admit Hallam's evidence of damages regarding its counterclaim, (5) failing to award Hallam setoffs for repairs it made to the facility, (6) failing to award Hallam damages for damaged grain, and (7) considering Lange's "manufacturer's warranty defense" and evidence of a design defect in the failed bins.

In its cross-appeal, Lange claims that the trial court erred in denying it prejudgment interest and in awarding Hallam $1,464.30 on its counterclaim for modifications to the dump pit.

We affirm the judgment of the district court for Lancaster County.

II. STANDARD OF REVIEW

An action to foreclose a construction lien is one grounded in equity. *Mid-America Maintenance v. Bill Morris Ford*, 232 Neb. 920, 442 N.W.2d 869 (1989). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts

rather than another. *Mid-America Maintenance, supra*; *O'Keefe Elevator v. Second Ave. Properties*, 216 Neb. 170, 343 N.W.2d 54 (1984).

A suit for damages arising from breach of a contract presents an action at law. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992); *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992). As pled, Hallam's counterclaims or, in the alternative, requests for setoffs are claims for damages arising from the alleged breach of a contract.

Therefore, this court must review Lange's foreclosure suit de novo and Hallam's counterclaims under the "clearly erroneous" standard.

III. FACTS

On June 21, 1986, Hallam entered into a written agreement, consisting of three purchase orders, with Lange for Lange to construct a $510,000 four-bin grain elevator facility for Hallam. A change order, dated October 6, 1986, provided some relatively minor changes at a cost of $4,500.

Lange agreed to provide and erect (1) two Blount/MFS 48-foot-diameter bins and two Blount/MFS 60-foot-diameter bins with aeration fans and temperature cables in each bin, (2) a custom-built dump pit and boot pit with a 7,000-bushels-per-hour (b.p.h.) drag conveyor, (3) a leg support tower with platforms, (4) a swivel loadout spout with support tower, (5) a gravity 7,000-b.p.h. grain cleaner, (6) a Blount/York model 36-70 elevator leg 7,000 b.p.h., (7) 7,000-b.p.h. drag unloading conveyors, and (8) two 7,000-b.p.h. drag conveyors mounted on catwalks. Most of the parts were manufactured by MFS Blount/York (Blount), which company provided "working drawings" to Lange for the construction of the facility. Blount was not a party to the contract or a party to this litigation.

In addition to the list of parts, the purchase orders included typewritten provisions stating that a "clean level site is to be

provided by the buyer" and "electrical hook-up beyond the Main disconnect is included." Stricken from each purchase order was a preprinted provision stating, "Concrete, Electrical Wiring, Gas Hook-up, Fill Sand and Level Site to be furnished by the Buyer [Hallam]."

William Lange, president of Lange, testified that he and Melvin Holsing, president of Hallam, verbally agreed that to avoid water draining into the grain facility, the *floor* of the grain bins should be 1 foot above the top of the railroad tracks which were located to the west of the construction site. Holsing testified that he wanted "*nothing* below 12 inches above the tracks." (Emphasis supplied.)

Apparently, there was a general understanding that Lange would attempt to have the bins ready to receive grain by the fall of 1986. Construction began in late June or early July 1986. Excavation of the site uncovered some concrete rubble and foundations. The rubble was removed by Lange and Beatrice Concrete, a company that had previously owned the site. By late September, Lange had constructed two 48-foot-diameter bins on the west side of Hallam's property, and Hallam began loading them with grain.

While loading the first bins, Holsing and his employees noticed that grain was "boiling over" in places and plugging the system. They found that various mechanisms in the system, including the leg, the boot pit shroud, and the upper spouts, were not operating properly. As a result, several adjustments were made to the system. Holsing testified he tested the system and determined that it was moving approximately 4,000 b.p.h. Holsing notified a Lange foreman, and a Blount representative was called. Blount's representative testified that he inspected the facility and found that "it was functioning as it was designed for." He said he attempted to test the system's capacity, but could not do so because of dirt collecting in the spouts of the distributor. He was to return later to conduct a capacity test, but never did.

Hallam claims that the capacity problem occurred because of Lange's poor workmanship in constructing the system. Henry Hollman, a local grain bin contractor, testified for Hallam as an expert witness. In his opinion, the spouts had not been angled

steeply enough to prevent the accumulation of grain and dust. William Lange testified that dirt and dust from the grain prevented the manufacturer's representative from conducting a capacity test. Lange also testified that he and his workers angled the spouts in accordance with the manufacturer's recommendations. Lange said that based on these instructions, he constructed the spouts steeply enough for the grain to flow but "not so steep that it would cause excessive grain damage." The manufacturer's instructions did not address how many bushels per hour would flow through the spouts at the recommended angles.

Lange eventually completed the two 60-foot-diameter bins, and Hallam also filled them with grain. Lange left the construction site December 22 or 23, 1986. Lange filed a construction lien on January 19, 1987, and then brought this action to foreclose.

William Lange acknowledged that when his crew left the Hallam site, several items had yet to be completed. Lange deducted the $1,985 cost of completing these items from the amount it claimed was due under the lien.

Hallam claims it owed Lange no further payments because Lange failed to substantially perform the contract between the parties. Hallam also counterclaimed against Lange, alleging six separate causes of action. Hallam's counterclaims (or, in the alternative, claims for setoffs) are based on problems that developed before and after Lange left the construction site. In addition to the bushels per hour "capacity" problem, Hallam's main complaints include:

(1) The unload augers from the two west bins were located less than 12 inches above the railroad tracks at the point where the augers entered the leg pit through a pipe. (Holsing testified that by the spring of 1986, water would leak through the pipe where the unload augers came into the pit, causing the operation to shut down.)

(2) The aeration fan motors were not timely connected to an electrical supply. (Holsing testified that he had to hire his own electrician, who connected the fan for bin No. 4 sometime around October 26 or 27, 1986. The electrician hired by Holsing testified that after he connected the fan for bin No. 4, someone

told him that he should leave because "they had their own contractor or own electrician." Holsing testified that some time in December, the fans for bins Nos. 1 and 2 became operational.)

(3) Upon unloading bin No. 4 in the fall of 1987, heat sensor cables manufactured by Rolfes broke off and became caught in the conveyor systems. (Heat sensor cables hang down into the bin at various locations and monitor the temperature of the stored grain. Holsing testified that each time the cables broke off, the system had to be shut down and the cables cut out. The same problem occurred when bin No. 3 was unloaded during March 1990. Holsing testified that cables broke off in bins Nos. 3 and 4 a total of 42 times.)

(4) Side draws supplied and installed by Lange malfunctioned after Lange left the Hallam construction site in December 1986. (A side draw is a valve that allows grain to be obtained from the side of the bin without elevating the grain through the auger system. Holsing testified that the cables on all the side draws fell off, so that the valves could not close to control the amount of grain that flowed out.)

(5) Bin No. 4 broke open at its seam about $1\frac{1}{8}$ inches during the fall of 1988, and the bottom seam of bin No. 3 ruptured, spilling grain out of the bin's door. (Holsing testified that several other seams popped open and that a sheet of metal began to rip.)

IV. ANALYSIS

1. Lien Foreclosure

(a) Acceptance of Performance as Waiver

Lange argues that because Hallam used the elevator facility from September 1986 through the time of trial in early 1991, Hallam cannot avoid its obligations on the basis of defective or insubstantial performance. Lange argues that one of the conditions preprinted on the back of its purchase orders states: "(14) Occupancy or use of the building by purchaser before completion will constitute acceptance of the building and payment in full required at that time."

In *City of Gering v. Smith Co.*, 215 Neb. 174, 337 N.W.2d

747 (1983), we held that an express or implied acceptance of work as in compliance with a building contract operates as a waiver of defective performance, but this rule is inapplicable where the acceptance was under protest or induced by fraud, or where the defects were latent and unknown to the owner.

Hallam began elevating grain into the facility in late September 1986, before Lange completed construction of the facility. Holsing testified that he used the four grain bins and elevator system continuously from late September 1986 through the time of trial in early 1991. Under the rule in *City of Gering, supra*, this use of the facility does not necessarily constitute an "express or implied acceptance of work as in compliance with a building contract."

Holsing testified that Lange was told of the initial problems moving grain as soon as the problems arose. Holsing also said he talked repeatedly with a Lange foreman about the aeration fans' needing to be wired to the electrical supply. William Lange acknowledged that Holsing "was always wanting something done" and that Holsing complained primarily about "not getting bushel capacity out of the elevator." In light of these ongoing complaints and communications, Hallam's use of the facility did not imply that it had accepted the facility as being in compliance with the agreement so as to preclude an assertion of insubstantial performance. See, *Lofton v. Don J. Trahan, Inc.*, 399 So. 2d 818 (La. App. 1981); *O. W. Grun Roofing & Const. Co. v. Cope*, 529 S.W.2d 258 (Tex. Civ. App. 1975).

There was evidence that the facility suffered from latent defects, which surfaced only after Hallam began using the facility and after Lange had left the construction site in December 1986. Evidence of the cause of the defects, a material issue of fact, is in conflict. Holsing testified that it was after Lange left the construction site that water first began entering the leg pit, that the temperature cables broke, that the side draws malfunctioned, and that the bins ruptured. Even if Hallam did "accept" Lange's performance when it started elevating grain in September 1986 or when it continued using the facility after Lange left the site, Hallam is not precluded from claiming insubstantial performance as to these latent defects. See *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445

(1982).

Moreover, Hallam's continued use of the facility after it became aware of the above-cited problems does not preclude Hallam from asserting insubstantial performance of the construction contract because of Hallam's duty to mitigate its damages. When there has been a breach of a contract by one party resulting in a loss to the other, it is the duty of such other party to take all reasonable steps to reduce the amount of his damages. *Erftmier, supra*. Holsing testified that prior to negotiating for construction of the bins, Hallam contracted to store about 640,000 bushels of milo for local farmers in anticipation of the increased storage space the facility would provide.

(b) Substantial Performance

Because Hallam's first three assignments of error regard the trial court's rulings on Lange's foreclosure petition, these issues will be reviewed de novo, provided, where credible evidence is in conflict on a material issue of fact, we will consider and give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

A contractor cannot assert a mechanic's lien upon property where there has been only part performance or lack of substantial performance of the contract. *Reeves v. Watkins*, 208 Neb. 804, 305 N.W.2d 815 (1981). And as both parties acknowledge, Lange has the burden of establishing that it substantially performed.

Hallam first assigns as error that the trial court failed to properly allocate to Lange the burden of proving that Lange substantially performed the contract involved here. Hallam points out that the trial court did not discuss specifically the grain facility's various defects or their causes in relation to its finding of substantial performance. Instead, the trial court stated generally that Lange had "substantially completed the contract and that any defects attributable to the acts of Lange or the uncompleted work [were] of minor consequence when compared to the total project." In the absence of a specific request by a party, a trial court is not required to make detailed

findings of fact. See Neb. Rev. Stat. § 25-1127 (Reissue 1989). Hallam did not direct our attention to any request by Hallam for such findings. The trial court, however, did address individual defects as they related to Hallam's counterclaims and alternative requests for setoffs. The trial court's decision to organize its order in this way does not establish that it failed to properly allocate to Lange the burden of proving substantial performance.

After viewing all the evidence presented by Lange as part of its foreclosure action and by Hallam as part of its counterclaims, the trial court determined that Lange had met its burden of showing substantial performance. The trial court was not required to discuss its consideration of each aspect of Lange's performance but could state generally that, viewing the project as a whole, Lange had substantially performed.

In a building contract, substantial performance is shown when all the essential elements necessary for the full accomplishment of the purposes of the contract have been performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract. *Eliker v. Chief Indus.*, 243 Neb. 275, 498 N.W.2d 564 (1993); *Pioneer Enterprises v. Edens*, 216 Neb. 672, 345 N.W.2d 16 (1984); *Lange Bldg. & Farm Supply v. Open Circle "R"*, 216 Neb. 1, 342 N.W.2d 360 (1983). Thus, to establish substantial performance, any deviations from the contract must be relatively minor and unimportant.

The relevant terms of the contract between Hallam and Lange consist of those items outlined in the facts above. In building and construction contracts, in the absence of an express agreement to the contrary, the law implies that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose. *Henggeler v. Jindra*, 191 Neb. 317, 214 N.W.2d 925 (1974).

With these rules in mind, we review whether Lange performed in a workmanlike manner, so that Hallam received an approximation of what the agreement required. We have examined seven of Hallam's main alleged defects in the facility: (1) late completion, (2) inadequate site elevation, (3) failure to wire aeration fan motors, (4) broken heat sensor cables, (5)

malfunctioning side draws, (6) two ruptured bins, and (7) the facility's failure to move grain at 7,000 b.p.h. There is sufficient evidence that Lange substantially performed its construction agreement with Hallam in a workmanlike manner.

The evidence fails to show that Lange breached any requirements as to the date of completion, elevation of the site, or wiring of the aeration fan motors. The agreement between William Lange and Holsing that the bins would be ready to receive grain by the fall of 1986 was vague at best. No specific date was mentioned. In any event, all the bins were in fact in use by mid-October.

The evidence is in conflict as to whether Lange breached any elevation requirement. William Lange's and Holsing's testimony is in conflict as to whether the floors of the bins or all of the construction was to be 12 inches above the railroad tracks. Lange constructed the floors of the bins and most of the other aspects of the facility above the 12-inch mark. The evidence is unclear whether Lange's placement of the unload augers below that level caused a drainage problem. There is evidence that some of the drainage problems may have been caused, at least in part, by subsequent grading of the site done by Hallam. We agree with the trial court that there is a lack of credible evidence with respect to issues relating to drainage or the proper height or elevation of any portion of the facility.

The agreement between Lange and Hallam specified no particular time when the aeration fan motors had to be connected. Hallam began using the facility before Lange had completed its construction. Hallam concedes that Lange had the aeration fans connected at least by the time it left the Hallam site in December. Lange's failure to connect the fans at some earlier time does not itself establish a breach of its performance under the agreement.

The evidence reflects that Lange installed heat sensor cables and side draws as prefabricated units according to manufacturers' instructions. The evidence reflects that the heat sensor cables failed either because of a design defect or improper installation. The evidence also reflects that the side draw pulleys did not fail because of Lange's installation, but failed because of a design defect.

With regard to its construction of the two ruptured bins, Lange produced evidence from an expert witness that the cause of the bins' failure was a defect in the manufacturer's design, not Lange's construction of the bins. Although Hallam's expert witness offered testimony that Lange's installation of the bolts contributed to the bins' rupture, he also testified that the ruptures were due, at least in part, to a design defect.

As to the facility's capacity, Lange produced evidence that it constructed the facility in accordance with the manufacturers' instruction manuals and in accordance with the terms of the agreement between Lange and Hallam. Lange delivered equipment designed to move 7,000 b.p.h. and constructed the facility intending that it move 7,000 b.p.h. Factors other than Lange's workmanship, such as Hallam's moving the grain before its grain cleaner became operational, may well have been the cause of the facility's failure to move 7,000 b.p.h.

Given the conflicting evidence on material issues of fact in this case, we are compelled to consider and give weight to the fact that the trial judge heard and observed the witnesses and accepted Lange's version of the facts rather than the version of the facts supplied by Hallam. We agree with the trial court's finding that Lange substantially performed its obligations under the Lange-Hallam agreement in a workmanlike manner.

(c) Hallam's Liabilities

Hallam also claims that the trial court erred in finding Hallam liable for the removal of concrete from the construction site and for the repair of a conveyor belt. The trial court found that Hallam owed Lange for performing these services because they were not included in the parties' agreement.

William Lange testified that after concrete foundations were discovered under the site, Holsing agreed to pay for removing the concrete and backfilling the site. Holsing denied agreeing to pay for the cost of removing the concrete obstructions. Holsing argues that Hallam is not responsible for the site preparation because the agreement's preprinted provisions, which stated "Concrete, Electrical Wiring, Gas Hook-up, Fill Sand and Level Site to be furnished by the Buyer," had been stricken by interlineation and initialed by both parties on each purchase

order. However, the agreement also included a typewritten insertion located above the stricken clause, which required Hallam to provide a "clean level site."

The agreement does not appear to be ambiguous. The printed provision was stricken. The typewritten terms control. "When an instrument consists partly of written [or typewritten] and partly of printed form, the former controls the latter, where the two are inconsistent." Neb. Rev. Stat. § 25-1216 (Reissue 1989). Accord *Niedbalski v. Board of Ed. of Sch. Dist. No. 24*, 227 Neb. 516, 418 N.W.2d 565 (1988). For purposes of § 25-1216, typewriting is writing. *Mack Investment Co. v. Dominy*, 140 Neb. 709, 1 N.W.2d 295 (1941). Therefore, Hallam was properly held liable for $2,205 in site preparation costs.

With regard to replacement of the broken conveyor belt, William Lange testified that sometime before his company left the Hallam site, one of Hallam's employees "failed to turn on a top conveyor when the spout was running into it and it burnt the elevator conveyor belt in two." William Lange testified that his company repaired the belt at Holsing's request. Holsing testified that he did not remember that the belt broke because of a conveyor not being turned on. He stated that he did not pay the bill from Lange for repairing the conveyor belt because the leg was defective and he considered the bill "a little bit high." Given that credible evidence is in conflict on this assigned error, we again give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

We hold that the trial court did not err in finding that Hallam owed Lange $1,407.92 for the replacement of the broken conveyor belt.

2. Appeals Arising From Counterclaim

(a) Admission of Evidence and Allowance of Setoffs

Hallam claims that the trial court erred in failing to admit evidence relating to damages on its counterclaim and in failing to properly award setoffs against Lange.

Hallam's brief refers to evidence related to work that Wall Construction Company (Wall) performed on unload augers.

Wall drafted a proposal for Hallam which consisted of a $13,400 bid to perform 12 repair projects at the grain facility. Wall generated no invoices for the work outlined in the proposal, but Dale Wall, the company's president, testified that his business records reflected that Wall performed various work projects at the facility. Dale Wall could not specifically itemize the work recorded in his business records so that it corresponded with the work listed in the proposal. For some items listed in the proposal, Dale Wall had no records reflecting whether the proposed work was done. The trial court admitted into evidence the proposal from Wall, but stated with regard to Hallam's claim for damages to the unload augers, "There is absolutely a total lack of showing and lack of evidence to indicate . . . that the work was done or if it was done to differentiate between the charges made and whether they were necessary and any facts that gave rise to it."

Hallam later made an offer of proof that its expert witness, Henry Hollman, if permitted, would testify that $4,400 was a fair and reasonable cost of making the repairs that Wall testified his company made to the unload augers. However, the court ruled that Hollman's testimony would be irrelevant on the issue of proving Hallam's actual damages.

Without objection, Hollman testified that the repairs Wall made were temporary and that Hollman had been hired to permanently repair the unload augers. Over objection, Hollman testified that the fair and reasonable cost of making the permanent repairs would be $13,871.52. Also admitted into evidence was a bill from an electrician who wired the augers after Wall made its temporary modifications. The trial court did not award Hallam damages for any of these repairs.

Hallam's claim that the trial court erred in refusing to admit or consider evidence related to the repair of the unload augers is without merit. Damages are recoverable for losses caused by breach of contract only to the extent that the evidence affords a sufficient basis of ascertaining their amount in money with reasonable certainty. *LeRoy Weyant & Sons, Inc. v. Harvey and Classic Lanes*, 212 Neb. 65, 321 N.W.2d 429 (1982). It is a basic concept that in any damage action for breach of contract, the claimant must prove that the breach of contract complained of

was the proximate cause of the alleged damages. There must be a causal relationship between the damages asserted and the breach relied upon. Proof which leaves this issue in the realm of speculation and conjecture is insufficient to support a judgment. *Omaha P. P. Dist. v. Darin & Armstrong, Inc.*, 205 Neb. 484, 288 N.W.2d 467 (1980); *Olson v. Pedersen*, 194 Neb. 159, 231 N.W.2d 310 (1975).

In its order, the trial court found that although it was inclined to believe that the placement of the unload augers probably was defective, Hallam failed to produce credible evidence of the reasonable cost and necessity for repairs. The trial court stated, "[O]ne might find that some modification was necessary but the persons making the actual repairs or modifications should be available in order for this court to determine whether the work done was all necessary to cure the particular defect and was reasonable in amount." Without such credible evidence, the trial court declined to speculate as to the amount of damages. Hollman did not perform any work on the unload augers, and Wall could not itemize the costs for the work it did perform. Similarly, Hallam did not establish that the permanent repairs by Hollman or the electrical wiring were necessary or due to any defects caused by Lange's workmanship. The trial court was not clearly wrong in refusing to speculate as to (1) what repair work Wall did, (2) whether temporary or permanent repairs were related to improper construction by Lange, (3) the reasonable cost of any repairs, or (4) the necessity of any repairs.

Hallam also claims that the trial court erred in not awarding setoffs or damages for the costs Hallam incurred in repairing the two ruptured bins, the augers damaged because of the broken temperature cables, and the malfunctioning side draws. The trial court denied these damages because Hallam failed to produce evidence that Lange's construction or installation caused these failures. The trial court's finding of insufficient evidence to prove that Lange caused these damages was not clearly erroneous.

(b) Manufacturer's Warranty

Hallam next claims that the trial court erred in "considering

Lange's 'manufacturer's warranty' defense and evidence of a design defect in the failed bins." The trial court correctly noted in its order that except for Hallam's second cause of action in its counterclaim, no issues related to warranties of any kind were raised in this case. Hallam's second cause of action claimed that Lange had given Hallam a "warranty" that the facility would move 7,000 b.p.h. and that Lange had breached that warranty. Hallam's second cause of action had nothing to do with a warranty extended by Lange from the manufacturer on the bins that ruptured.

Nowhere in the pleadings did Lange raise a "manufacturer's warranty" defense. Moreover, Lange presented at trial an expert witness who testified that the two bins ruptured because of defects in their design. Hallam's assignment of error misstates what Lange argued and what the trial court actually considered regarding the cause of the bins' rupturing. In defending against Hallam's counterclaim that Lange constructed the two bins improperly, it was appropriate for Lange to present and for the trial court to consider evidence that something other than Lange's workmanship caused the bins to rupture.

(c) Damaged Grain Allowance

Finally, Hallam claims that the trial court erred in failing to award Hallam damages for grain damage allegedly caused by Lange's negligence in not connecting the aeration fan motors to an electrical supply. The elements of a negligence action are duty, breach, proximate cause, and damages. *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992).

Hallam argues that once Lange knew Hallam had stored grain in the bins, Lange had a duty to promptly hook up the fan motors. Hallam claims that Lange breached this duty by failing to have its own electrician promptly connect the fan motors and by preventing the electrician Hallam hired from connecting the fan motors.

Even if we assume that Lange breached this duty, Hallam produced insufficient evidence to prove either causation or damages. The trial court found that Hallam did not produce credible evidence of the quality of the grain prior to its damage.

Without such evidence, Hallam could not establish the proximate cause of Hallam's grain spoilage or how much damage, if any, was attributable to the absence of the fans.

Holsing testified that bin No. 1 contained grade 1 or 2 milo, and bin No. 2 contained mostly grade 1 or 2 milo. Grade 1 means that the grain contains 13 percent moisture and 4 percent foreign material. Grade 2 means the grain contains 14 percent moisture and 8 percent foreign material.

The trial court concluded:

> The testimony and other evidence with respect to the allegedly spoiled grain is so disjointed and confusing as to be almost incomprehensible. In addition, the testimony of Mr. Holsing with respect to the grades of milo and its moisture content is not supported by his own records; these show moisture content above fourteen percent and the presence of bugs in a sizeable portion of this grain.

Lange produced evidence that the grain was of poor quality when it was loaded into the bins and that any spoilage of the grain could have been due to factors other than the absence of the aeration fans. Gerald Bodman, a University of Nebraska professor, testified that more than 50 percent of the grain was of poor quality due to bugs or moisture content greater than 14 percent and that the grain damage could not have been prevented even if the fans had been operational from the time the bins were filled.

Hallam failed to prove the amount of its alleged losses with any degree of certainty. Holsing claimed that the difference in market value of the grain in bins Nos. 1 and 2 was $76,800. Holsing also testified that he had blended the damaged grain with higher quality grain, but he failed to produce evidence of how much grain was sold at a reduced price because of any damage caused by heat. Therefore, the trial court determined that Hallam may not have suffered any actual monetary loss.

Given the lack of evidence as to the cause or amount of damaged grain, the trial court was not clearly wrong in refusing to award Hallam damages for spoiled grain in bins Nos. 1 and 2.

3. Lange's Cross-Appeal

(a) Prejudgment Interest

The district court denied Lange prejudgment interest on amounts due under the construction contract because "there was a reasonable controversy with respect to the amount the plaintiff was entitled to recover." Lange argues that the interest should be granted because the amount due could be computed with exactness. In its answer to Lange's cross-appeal, Hallam argues that the district court did not err in denying the interest because (1) the case was one in equity, not law; (2) a sufficient dispute existed as to the amount due; and (3) Lange did not properly claim prejudgment interest as required under Neb. Rev. Stat. § 45-103.02 (Reissue 1988). In its reply brief to Hallam's answer brief, Lange again argued that the claim was liquidated and also argued that it would be unconstitutional to apply § 45-103.02 to Lange's claim.

Prejudgment interest is recoverable upon the foreclosure of a mechanic's lien. *O'Keefe Elevator v. Second Ave. Properties*, 216 Neb. 170, 343 N.W.2d 54 (1984). See, also, *Walker v. Collins Construction Co.*, 121 Neb. 157, 236 N.W. 334 (1931). However, such interest is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to either plaintiff's right to recover or the amount of such recovery. *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985); *O'Keefe Elevator, supra*. A two-pronged inquiry is required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both. *Atokad Ag. & Racing v. Governors of Knts. of Ak-Sar-Ben*, 237 Neb. 317, 466 N.W.2d 73 (1991), *overruled on other grounds, Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992).

The primary issue throughout this case has been whether Lange substantially performed so that it could foreclose its construction lien and recover the balance due. Thus, a reasonable controversy exists as to Lange's right to recover. Even if Lange had an undisputed right to recover, a reasonable controversy exists as to the amount owed. The amount of a claim is liquidated only when the evidence furnishes a basis to compute an exact amount determinable without opinion or

discretion inherent in the factfinding process. *Pugh v. Great Plains Ins. Co.*, 239 Neb. 171, 474 N.W.2d 677 (1991). The numerous disputes between the parties as to Lange's performance required the trial court to calculate the amount due Lange only after exercising its opinion and discretion in the factfinding process. See, *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988); *Langel Chevrolet-Cadillac v. Midwest Bridge*, 213 Neb. 283, 329 N.W.2d 97 (1983).

The trial court did not err in finding that Lange's claim was unliquidated and in refusing to award Lange prejudgment interest.

Because Lange's claim is unliquidated, we need not address the applicability or the constitutionality of § 45-103.02. Moreover, the constitutionality of the statute was never raised at the district court level. An appellate court will not consider a constitutional question unless it has been properly presented to the trial court for disposition. *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993).

(b) Counterclaim Award for Dump Pit

Lange's second assignment of error on cross-appeal is that the trial court erred in awarding Hallam $1,464.30 on its counterclaim for modifications to the dump pit. Lange did not include any discussion or arguments of this assigned error in its briefs. To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992). Therefore, we will not consider Lange's second assignment of error, and the trial court's award of $1,464.30 to Hallam for repairs to the dump pit should be affirmed.

V. CONCLUSION

Both parties' assigned errors are without merit. The judgment of the trial court was correct in all respects and is affirmed.

AFFIRMED.

CAPORALE, J., not participating.