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REPORTS OF CASES

DECIDED BETWEEN

MAY 27, 1994 and DECEMBER 8, 1994

IN THE

Supreme Court of Nebraska

VOLUME CCXLVI

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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DAVID J. LANPHIER, Associate Justice
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JOHN F. IRWIN, Associate Judge
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WESLEY C. MUES, Associate Judge

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LANET ASMUSSEN ..... Clerk
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[1]Retired August 31, 1994

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Number of District	Counties in District	Judges in District	City
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		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
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		James M. Murphy	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence J. Corrigan	Omaha
		Theodore L. Carlson	Omaha
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		Richard J. Spethman	Omaha
		Mary G. Likes	Omaha
		Gerald E. Moran	Omaha
		Michael W. Amdor	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 Darvid D. Quist Maurice Redmond	Fremont Blair Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard P. Garden Robert B. Ensz	Norfolk Wayne
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	William Cassel Ronald D. Olberding	Ainsworth Burwell
Ninth	Buffalo and Hall	John P. Icenogle James Livingston Teresa K. Luther	Kearney Grand Island Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Bernard Sprague Stephen Illingworth	Red Cloud Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Grant, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell John P. Murphy Donald E. Rowlands II	McCook North Platte North Platte
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JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
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		Steven Bruce Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Larry F. Fugit	Papillion
		Robert C. Wester	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
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		Richard M. Jones	Omaha
		W. Mark Ashford	Omaha
		Edna R. Atkins	Omaha
		Lawrence Barrett	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
		Frank J. Skorupa	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
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		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
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		Gary G. Washburn	Burwell
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Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Harry C. Haverly	Hastings
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Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Lloyd G. Kaufman	Lexington
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		Kent E. Florom	North Platte
		Cloyd Clark	McCook
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Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
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Lancaster	Toni G. Thorson	Lincoln
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TABLE OF CASES REPORTED

Abbott v. Department of Motor Vehicles 685
Abdullah v. Nebraska Dept. of Corr. Servs. 109
Adam; Hitzemann v. 201
Adkins & Wondra, P.C.; Earth Science Labs. v. 798
Ancona Bros. Co.; Upah v. 585
Ancona Bros. Co.; Upah v. 608
Anderson v. Matthis 215
Anderson v. Nashua Corp. 420
Ashland State Bank v. Elkhorn Racquetball, Inc. 411
Association of Commonwealth Claimants v. Moylan 88

B.A.T., State on behalf of v. S.K.D. 616
Bakody Homes & Dev. v. City of Omaha 1
Balka; Trailblazer Pipeline Co. v. 221
Barta v. Kindschuh 208
Bartunek v. Gentrup 18
Becton, Dickinson & Co.; Rains v. 746
Beermann; State ex rel. Wieland v. 808
Bendorf; Carpender v. 77
Blackstone; State ex rel. NSBA v. 220
Bloomquist; In re Guardianship & Conservatorship of 711
Bowers; Norwest Bank Neb. v. 83
Boyles v. Hausmann 181
Bradley v. Hopkins 646
Brodersen v. Traders Ins. Co. 688

CAE Vanguard, Inc. v. Newman 334
Canada Transport, Inc.; Sindelar v. 559
Cannon; Mason v. 14
Carpender v. Bendorf 77
Carper; State ex rel. NSBA v. 407
Carter; State v. 953
Christensen; Records v. 912
Citicorp Mortgage, Inc.; Gibb v. 355
City of Omaha; Bakody Homes & Dev. v. 1
City of Omaha; Imperial Empire Trading Co. v. 919
Conrad; Wollenburg v. 666
Countryside of Hastings; Thomas v. 907
Crawford v. Department of Motor Vehicles 319
Cutler; S.I. v. 739

Dalition v. Langemeier 993

Dawn; State v. 384
Dean; State v. 869
DeMoor v. DeMoor 765
Department of Motor Vehicles; Abbott v. 685
Department of Motor Vehicles; Crawford v. 319
Department of Motor Vehicles; Gausman v. 677
Dewey; Schendt v. 573
Dickie v. Flamme Bros. 66
Douglas Racing Corp.; State ex rel. Stenberg v. 901
Duff; Terry v. 11
Duff; Terry v. 524

Earth Science Labs. v. Adkins & Wondra, P.C. 798
Egan; State ex rel. NSBA v. 583
Elkhorn Racquetball, Inc.; Ashland State Bank v. 411
Engelhardt; Evans v. 323
Erichsen v. No-Frills Supermarkets 238
Estate of Hannan, In re 828
Estate of Holt, In re 50
Estate of Wagner, In re 625
Evans v. Engelhardt 323

Fahlk; State v. 834
Fay; Storjohn v. 454
First Nat. Bank in Morrill v. Union Ins. Co. 636
First United Bank of Bellevue; Young v. 43
Fitzpatrick v. U S West, Inc. 225
Flamme Bros.; Dickie v. 66
Ford Life Ins. Co.; Horton v. 171

Gausman v. Department of Motor Vehicles 677
Gentrup; Bartunek v. 18
Gibb v. Citicorp Mortgage, Inc. 355
Goff v. Weeks 163
Grady v. Visiting Nurse Assn. 1013
Grand Island Pub. Sch. Dist. No. 2; Kropp v. 138
Grimes; State v. 473
Guy Dean's Lake Shore Marina v. Ramey 258

Hacker; Long v. 547
Hall, McCormick and; State v. 271
Hall, State v. 890
Hamersky v. Nicholson Supply Co. 156
Hannan, In re Estate of 828
Harder v. Harder 945
Harvey; James v. 329
Harvey v. Metropolitan Utilities Dist. 780
Hausmann; Boyles v. 181

Henry v. Rockey 398
Hitzemann v. Adam 201
Hoffman; State v. 265
Holman v. Papio-Missouri River Nat. Resources Dist. 787
Holt, In re Estate of 50
Hopkins; Bradley v. 646
Horton v. Ford Life Ins. Co. 171
Horvath v. M.S.P. Resources, Inc. 67

ITT Commercial Finance v. MT-KAT Distributing 533
Imperial Empire Trading Co. v. City of Omaha 919
In re Estate of Hannan 828
In re Estate of Holt 50
In re Estate of Wagner 625
In re Guardianship & Conservatorship of Bloomquist 711

Jacobsen; Schlake v. 921
James v. Harvey 329
Jandebeur; Lone Cedar Ranches v. 769
Jones; State v. 673
Joubert; State v. 287

Kelly v. Kelly 55
Kight; Woodmen of the World Life Ins. Soc. v. 619
Kindschuh; Barta v. 208
Klausen; State ex rel. NSBA v. 1034
Koch; Nebraska Irrigation, Inc. v. 856
Kropp v. Grand Island Pub. Sch. Dist. No. 2 138

LaBenz Trucking v. Snyder 468
Ladig; State v. 542
Langemeier; Dalition v. 993
Laschanzky v. Laschanzky 705
Lindsay Mfg. Co. v. Universal Surety Co. 495
Lindsay; State v. 101
Lingenfelter; Rosberg v. 85
Lone Cedar Ranches v. Jandebeur 769
Long v. Hacker 547

M.S.P. Resources, Inc.; Horvath v. 67
MT-KAT Distributing; ITT Commercial Finance v. 533
Madsen; Robison v. 22
Maloley v. Shearson Lehman Hutton, Inc. 701
Manske v. Manske 314
Manzer; State v. 536
Martin; State v. 896
Mason v. Cannon 14
Masters; State v. 1018

Matthis; Anderson v. 215
McCormick and Hall; State v. 271
McCormick; State v. 890
McDonald v. Miller 144
McDowell; State v. 692
Mehmken; State ex rel. NSBA v. 1029
Merrick v. Thomas 658
Metropolitan Utilities Dist.; Harvey v. 780
Miller; McDonald v. 144
Moylan; Association of Commonwealth Claimants v. 88

NSBA, State ex rel. v. Blackstone 220
NSBA, State ex rel. v. Carper 407
NSBA, State ex rel. v. Egan 583
NSBA, State ex rel. v. Klausen 1034
NSBA, State ex rel. v. Mehmken 1029
NSBA, State ex rel. v. Steier 584
Nash; State v. 1030
Nashua Corp.; Anderson v. 420
National Acct. Sys. of Lincoln v. Vergith 604
Nebraska Dept. of Corr. Servs.; Abdullah v. 109
Neb. Dept. of Soc. Servs.; Sunrise Country Manor v. 726
Nebraska Irrigation, Inc. v. Koch 856
Nebraska Liq. Control Comm.; No Frills Supermarket v. 822
Newman; CAE Vanguard, Inc. v. 334
Nicholson Supply Co.; Hamersky v. 156
No-Frills Supermarkets; Erichsen v. 238
No Frills Supermarket v. Nebraska Liq. Control Comm. 822
Norwest Bank Neb. v. Bowers 83

Omaha, City of; Bakody Homes & Dev. v. 1
Omaha, City of; Imperial Empire Trading Co. v. 919
Omega Chemical Co. v. Rogers 935
Otey; State v. 309

Packett; State v. 888
Palmer; State v. 305
Papio-Missouri River Nat. Resources Dist.; Holman v. 787
Philipps; State v. 610

Radden; State v. 286
Radden; State v. 890
Rains v. Becton, Dickinson & Co. 746
Ramey; Guy Dean's Lake Shore Marina v. 258
Rath v. Selection Research, Inc. 340
Records v. Christensen 912
Reichert v. Reichert 31
Reynolds; State v. 802

Robison v. Madsen 22
Roche, Inc.; State v. 568
Rockey; Henry v. 398
Rogers; Omega Chemical Co. v. 935
Rollins; Ryder Truck Rental v. 250
Rosberg v. Lingenfelter 85
Ryder Truck Rental v. Rollins 250

S.I. v. Cutler 739
S.K.D.; State on behalf of B.A.T. v. 616
Schendt v. Dewey 573
Schlake v. Jacobsen 921
Secret; State v. 1002
Selection Research, Inc.; Rath v. 340
Share Health Plan of Neb.; Steineke v. 374
Shearson Lehman Hutton, Inc.; Maloley v. 701
Sindelar v. Canada Transport, Inc. 559
Smith v. Smith 193
Snyder; LaBenz Trucking v. 468
State ex rel. NSBA v. Blackstone 220
State ex rel. NSBA v. Carper 407
State ex rel. NSBA v. Egan 583
State ex rel. NSBA v. Klausen 1034
State ex rel. NSBA v. Mehmken 1029
State ex rel. NSBA v. Steier 584
State ex rel. Stenberg v. Douglas Racing Corp. 901
State ex rel. Wieland v. Beermann 808
State on behalf of B.A.T. v. S.K.D. 616
State v. Carter 953
State v. Dawn 384
State v. Dean 869
State v. Fahlk 834
State v. Grimes 473
State v. Hall 890
State v. Hoffman 265
State v. Jones 673
State v. Joubert 287
State v. Ladig 542
State v. Lindsay 101
State v. Manzer 536
State v. Martin 896
State v. Masters 1018
State v. McCormick 890
State v. McCormick and Hall 271
State v. McDowell 692
State v. Nash 1030
State v. Otey 309

State v. Packett 888
State v. Palmer 305
State v. Philipps 610
State v. Radden 286
State v. Radden 890
State v. Reynolds 802
State v. Roche, Inc. 568
State v. Secret 1002
State v. Thompson 752
State v. Walton 893
State v. White 346
State v. Wragge 864
State; Ventura v. 116
Steier; State ex rel. NSBA v. 584
Steineke v. Share Health Plan of Neb. 374
Stenberg, State ex rel. v. Douglas Racing Corp. 901
Storjohn v. Fay 454
Styskal v. Wright 513
Sunrise Country Manor v. Neb. Dept. of Soc. Servs. 726

Terry v. Duff 11
Terry v. Duff 524
Thomas; Merrick v. 658
Thomas v. Countryside of Hastings 907
Thompson; State v. 752
Traders Ins. Co.; Brodersen v. 688
Trailblazer Pipeline Co. v. Balka 221

U S West, Inc.; Fitzpatrick v. 225
Union Ins. Co.; First Nat. Bank in Morrill v. 636
Universal Surety Co.; Lindsay Mfg. Co. v. 495
Upah v. Ancona Bros. Co. 585
Upah v. Ancona Bros. Co. 608

Ventura v. State 116
Vergith; National Acct. Sys. of Lincoln v. 604
Visiting Nurse Assn.; Grady v. 1013
Vogel; Wicker v. 601

Wagner, In re Estate of 625
Walton; State v. 893
Weeks; Goff v. 163
Welch v. Welch 435
White; State v. 346
Wicker v. Vogel 601
Wieland, State ex rel. v. Beermann 808
Wollenburg v. Conrad 666
Woodmen of the World Life Ins. Soc. v. Kight 619

Wragge; State v. 864
Wright; Styskal v. 513

Young v. First United Bank of Bellevue 43

LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-42235: **State v. Williams.** Motion of appellee to set execution date sustained. Per Curiam.

No. S-88-982: **State v. Victor.** Motion of appellee to set execution date sustained. Per Curiam.

No. S-92-885: **Leslie v. Leslie.** Affirmed as modified. Hastings, C.J.

No. S-92-931: **FirsTier Leasing Co. v. Cimino.** Reversed and remanded with directions. Hastings, C.J.

No. S-92-1009: **Inserra v. McMurray.** Affirmed. Hastings, C.J.

No. S-92-1109: **Hillhouse v. Hillhouse.** Affirmed as modified. Hastings, C.J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-34-940002: **In re Application of Hong.** Application for waiver of requirement that Multistate Bar Examination be retaken considered and denied.

No. S-90-627: **FirsTier Bank v. Joosten.** Appeal dismissed for want of prosecution.

No. S-91-696: **State ex rel. NSBA v. Gilroy.** Amended motion for reinstatement sustained.

No. S-91-901: **Old Omaha Assn. v. City of Omaha.** Stipulation allowed; appeal dismissed.

No. S-93-169: **Vitols v. Personnel Bd. of City of Omaha.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. S-93-445: **Wilson v. 49th Street Corp.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-93-590: **Shea v. Department of Motor Vehicles.** Stipulation allowed; appeal dismissed.

No. S-93-605: **Saucerman v. Department of Motor Vehicles.** Stipulation allowed; appeal dismissed.

No. S-94-006: **State v. Hogue.** By order of the court, appeal dismissed for failure to file briefs.

No. S-94-098: **Edwards Subcorp. v. Nebraska Dept. of Revenue.** Stipulation allowed; appeal dismissed.

No. S-94-295: **State v. Tlamka.** Cause having not been shown, judgment of the district court is affirmed.

No. S-94-325: **Hoit v. Hoit.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-94-339: **Woodworth v. Nagengast.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. S-94-364: **State v. Nelson.** Motion of appellant to dismiss appeal sustained, the presentence report having been available to appellant through his counsel who has not been permitted to withdraw; appeal dismissed.

No. S-94-454: **Credit Bureau of Hastings v. Stice.** Cause having not been shown, motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. S-94-522: **State v. Schmailzl.** Appeal dismissed. See Rule 7A(2).

No. S-94-522: **State v. Schmailzl.** Nebraska Court of Appeals withdraws and vacates its order of dismissal entered August 23, 1994.

No. S-94-1028: **State ex rel. NSBA v. Jacobsen.** By order of the court, respondent suspended from the practice of law in Nebraska until further order of the court.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-33-940007: **State v. Martinez** (not previously docketed). Petition of appellant for further review overruled on May 18, 1994, for want of jurisdiction.

No. A-33-940008: **State v. Martinez** (not previously docketed). Petition of appellant for further review overruled on May 18, 1994, for want of jurisdiction.

No. S-91-901: **Old Omaha Assn. v. City of Omaha**, 2 Neb. App. 618 (1994). Petition of amicus curiae First National Bank for further review overruled on July 20, 1994.

No. S-91-901: **Old Omaha Assn. v. City of Omaha**, 2 Neb. App. 618 (1994). Petition of appellant for further review sustained on July 20, 1994.

No. A-92-224: **Moxham v. Moxham**, 94 NCA No. 8. Petition of appellee for further review overruled on June 2, 1994.

No. A-92-238: **Weatherly v. Blue Cross Blue Shield**, 2 Neb. App. 669 (1994). Petition of appellant for further review overruled on June 2, 1994.

No. A-92-346: **Newman v. Hinky Dinky**, 2 Neb. App. 555 (1994). Petition of appellee for further review overruled on July 7, 1994.

No. A-92-359: **Beverly Enter. - Nebraska v. Columbus Health Care**, 2 Neb. App. 410 (1993). Petition of appellant for further review overruled on May 25, 1994.

No. A-92-366: **Finney v. Loma, Inc.**, 94 NCA No. 25. Petition of appellant for further review overruled on September 14, 1994.

No. A-92-366: **Finney v. Loma, Inc.**, 94 NCA No. 25. Petition of appellee for further review overruled on September 14, 1994.

No. S-92-392: **Freeman v. Central States Health & Life Co.**, 2 Neb. App. 803 (1994). Petition of appellee for further review sustained on June 15, 1994.

No. S-92-393: **Schmidt v. Central States Health & Life Co.**, 2 Neb. App. 803 (1994). Petition of appellee for further review sustained on June 15, 1994.

No. A-92-407: **Hennek v. Lexington State Bank**, 94 NCA No. 30. Petition of appellant for further review overruled on September 21, 1994.

No. A-92-483: **Gramercy Hill Enters. v. Westmark Fin. Corp.**, 94 NCA No. 4. Petition of appellee for further review overruled on June 2, 1994.

No. A-92-521: **Whetstone v. Cornhusker Cas. Co.**, 94 NCA No. 17. Petition of appellant for further review overruled on July 20, 1994.

No. A-92-524: **Thies v. City of Norfolk**, 94 NCA No. 14. Petition of appellant for further review overruled on May 18, 1994.

No. A-92-542: **Dowd v. City of Omaha**, 2 Neb. App. 958 (1994). Petition of appellee for further review denied on August 24, 1994.

Nos. S-92-647, S-92-648, S-92-649: **Thomas v. Countryside of Hastings**, 2 Neb. App. 590 (1994). Petitions of appellants for further review sustained on June 15, 1994.

No. A-92-684: **Alvis v. Alvis**, 94 NCA No. 15. Petition of appellant for further review overruled on June 15, 1994.

No. S-92-694: **New Light Co. v. Wells Fargo Alarm Servs.**, 2 Neb. App. 828 (1994). Petition of appellant for further review sustained on July 20, 1994.

No. S-92-704: **Coppi v. West Am. Ins. Co.**, 2 Neb. App. 834 (1994). Petition of appellee for further review sustained on July 20, 1994.

No. A-92-706: **In re Estate of Baright**, 94 NCA No. 15. Petition of appellant for further review overruled on June 2, 1994.

No. S-92-708: **Simon v. Wilkinson Agency**, 2 Neb. App. 877 (1994). Petition of appellants for further review sustained on August 24, 1994.

No. A-92-712: **Hibberd v. City of Lincoln**, 94 NCA No. 12. Petition of appellant for further review overruled on May 18, 1994.

No. S-92-752: **In re Guardianship & Conservatorship of Bloomquist**, 2 Neb. App. 756 (1994). Petition of appellant for further review sustained on May 18, 1994.

No. S-92-772: **In re Estate of Marsh**, 2 Neb. App. 649 (1994). Petition of appellee Buckles for further review sustained on June 15, 1994.

No. S-92-772: **In re Estate of Marsh**, 2 Neb. App. 649 (1994). Petition of appellee Kenner for further review sustained on June 15, 1994.

No. A-92-794: **Hagerbaumer v. Hagerbaumer**, 94 NCA No. 17. Petition of appellant for further review overruled on June 23, 1994.

No. S-92-811: **Thiltges v. Thiltges**, 94 NCA No. 24. Petition of appellant for further review sustained on August 24, 1994.

No. A-92-822: **Brosius Cattle Co. v. Philadelphia Life Ins. Co.**, 94 NCA No. 18. Petition of appellant for further review overruled on July 27, 1994.

No. S-92-825: **Centamore v. Cocanougher**, 2 Neb. App. 756 (1994). Petition of appellant for further review sustained on May 18, 1994.

No. A-92-828: **State v. Atkinson.** Petition of appellant for further review overruled on June 15, 1994.

No. A-92-857: **In re Guardianship & Conservatorship of Piller**, 94 NCA No. 17. Petition of appellant for further review overruled on August 31, 1994.

No. A-92-858: **Gage v. Hodge**, 94 NCA No. 29. Petition of appellant for further review overruled on September 14, 1994.

No. S-92-951: **Eggers v. Rittscher**, 94 NCA No. 20. Petition of appellant for further review sustained on September 28, 1994.

No. A-92-964: **Federal Deposit Ins. Corp. v. Slangal.** Petition of appellant for further review overruled on August 24, 1994.

No. S-92-975: **Ruch v. Conrad**, 94 NCA No. 25. Petition of appellant for further review sustained on October 13, 1994.

No. A-92-990: **In re Conservatorship of Kerrey**, 94 NCA No. 35. Petition of appellant for further review overruled on October 13, 1994.

Nos. A-92-1020, A-92-1021: **Reader v. Hoffman**, 94 NCA No. 36. Petition of appellant for further review overruled on October 26, 1994.

No. A-92-1064: **Carman v. Ravenna Bank**, 94 NCA No. 26. Petition of appellant for further review overruled on August 31, 1994.

No. A-92-1071: **In re Estate of Ziegenbein**, 2 Neb. App. 923 (1994). Petition of appellant for further review overruled on November 16, 1994.

No. A-92-1073: **American Economy Ins. Co. v. Modern Eye Wear**, 94 NCA No. 26. Petition of appellant for further review overruled on September 28, 1994.

No. A-92-1092: **Sostad v. Batie**, 94 NCA No. 34. Petition of appellant for further review overruled on November 9, 1994.

No. A-92-1128: **Hansen v. Hammer**, 94 NCA No. 23. Petition of appellee for further review overruled on July 27, 1994.

No. A-92-1182: **Glebe v. City of Omaha**, 94 NCA No. 32. Petition of appellant for further review overruled on September 21, 1994.

No. S-93-031: **Toulousaine de Distrib. v. Tri-State Seed & Grain**, 2 Neb. App. 937 (1994). Petition of appellee for further review sustained on September 1, 1994.

No. A-93-070: **Sudik v. City of Wahoo**. Petition of appellant for further review overruled on July 27, 1994.

No. A-93-078: **Wear v. American Fire & Cas. Co.**, 94 NCA No. 26. Petition of appellant for further review overruled on August 24, 1994.

No. S-93-129: **State ex rel. Scherer v. Madison Cty. Comrs.**, 94 NCA No. 27. Petition of appellants for further review sustained on August 31, 1994.

No. A-93-149: **State on behalf of Yankton v. Cummings**, 2 Neb. App. 820 (1994). Petition of appellant for further review overruled on July 7, 1994.

No. A-93-199: **Chalupa v. Chalupa**, 94 NCA No. 31. Petition of appellees for further review overruled on October 13, 1994.

No. A-93-266: **State v. Maisch**, 94 NCA No. 9. Petition of appellant for further review overruled on May 18, 1994.

No. A-93-282: **In re Estate of Dudek**, 94 NCA No. 30. Petition of appellant for further review overruled on September 14, 1994.

No. A-93-292: **Ballard v. Nebraska Dept. of Soc. Servs.**, 2 Neb. App. 809 (1994). Petition of appellant for further review overruled on July 7, 1994.

No. A-93-349: **Kroese v. Ferret Exploration of Neb.**, 94 NCA No. 31. Petition of appellant for further review overruled on September 21, 1994.

No. A-93-355: **In re Interest of Joshua B. et al.**, 94 NCA No. 14. Petition of appellee and guardian ad litem for further review overruled on May 18, 1994.

No. S-93-364: **State v. Null**, 94 NCA No. 20. Petition of appellant for further review sustained on June 30, 1994.

No. A-93-379: **Herald v. Blue Cross Blue Shield of Neb.**, 94 NCA No. 33. Petition of appellee for further review overruled on October 13, 1994.

No. A-93-382: **In re Interest of Robert D. et al.**, 94 NCA No. 26. Petition of appellants for further review overruled on August 24, 1994.

No. A-93-388: **State v. McMurray**. Petition of appellant for further review overruled on September 21, 1994.

No. S-93-404: **Twiss v. Trautwein**. Petition of appellant for further review sustained on October 26, 1994.

No. A-93-430: **Bridgeport Irr. Dist. v. Department of Water Res.**, 94 NCA No. 17. Petition of appellant for further review overruled on June 30, 1994.

No. A-93-432: **Stevens v. Luick**, 94 NCA No. 14. Petition of appellant for further review overruled on May 25, 1994.

No. S-93-454: **State ex rel. Grape v. Zach**, 94 NCA No. 13. Petition of appellee for further review sustained on June 15, 1994.

Nos. A-93-455 through A-93-458: **State v. Daniels**. Petition of appellant for further review overruled on October 13, 1994.

No. S-93-487: **Jirkovsky v. Jirkovsky**, 94 NCA No. 22. Petition of appellant for further review sustained on July 20, 1994.

No. A-93-562: **State v. Doremus**, 2 Neb. App. 784 (1994). Petition of appellee for further review overruled on June 15, 1994.

No. A-93-574: **State v. Schumacher**, 94 NCA No. 14. Petition of appellant for further review overruled on June 15, 1994.

No. A-93-578: **In re Interest of Maurice S.**, 94 NCA No. 17. Petition of appellant for further review overruled on June 15, 1994.

No. A-93-580: **State v. Nauslar**, 94 NCA No. 24. Petition of appellant for further review overruled on August 31, 1994.

No. S-93-592: **State v. Skalberg**, 94 NCA No. 11. Petition of appellee for further review sustained on May 18, 1994.

No. A-93-598: **State v. Swanson**, 94 NCA No. 14. Petition of appellee for further review overruled on June 15, 1994.

No. A-93-602: **State v. Barfield**, 94 NCA No. 18. Petition of appellant for further review overruled on July 20, 1994.

No. A-93-604: **Evans v. City of Gering**. Petition of appellant for further review overruled on November 9, 1994.

No. A-93-626: **Richardson v. Clarke**, 2 Neb. App. 575 (1994). Petition of appellant for further review overruled on June 2, 1994.

No. A-93-627: **Sterling v. Clarke**, 2 Neb. App. 575 (1994). Petition of appellant for further review overruled on June 2, 1994.

No. A-93-631: **State v. White**, 94 NCA No. 15. Petition of appellant for further review overruled on May 18, 1994.

No. A-93-636: **State v. Cariker**, 94 NCA No. 21. Petition of appellant for further review overruled on July 7, 1994.

No. A-93-639: **State v. Perez**, 94 NCA No. 15. Petition of appellant for further review overruled on June 2, 1994.

No. A-93-657: **Fordham v. West Lumber Co.**, 2 Neb. App. 716 (1994). Petition of appellant for further review overruled on May 18, 1994.

No. A-93-674: **Paris v. Crawford State Bank**, 94 NCA No. 23. Petitions of appellants for further review overruled on August 24, 1994.

No. A-93-700: **Ostergaard v. Clarkson Hospital**, 94 NCA No. 20. Petition of appellee for further review overruled on July 20, 1994.

No. A-93-702: **In re Interest of Eva W.**, 94 NCA No. 20. Petition of appellant for further review overruled on July 20, 1994.

No. A-93-706: **State v. Vavra**. Petition of appellant for further review overruled on July 20, 1994.

No. A-93-713: **State v. Rodriguez**, 94 NCA No. 23. Petition of appellant for further review overruled on August 31, 1994.

No. S-93-714: **Harder v. Harder**. Petition of appellant for further review sustained on May 18, 1994.

No. A-93-717: **State v. Ziemba**, 94 NCA No. 21. Petition of appellant for further review overruled on September 14, 1994.

No. A-93-720: **In re Interest of Krystal K. et al.**, 94 NCA No. 21. Petition of appellant for further review overruled on June 23, 1994.

No. S-93-728: **Shade v. Ayars & Ayars, Inc.**, 2 Neb. App. 730 (1994). Petition of appellant for further review sustained on June 15, 1994.

No. A-93-739: **World Radio Lab. v. Coopers & Lybrand**, 2 Neb. App. 747 (1994). Petition of appellant for further review overruled on July 20, 1994.

No. A-93-740: **In re Interest of Bringleson**. Petition of appellant for further review overruled on November 9, 1994.

No. A-93-746: **State v. Anderson**, 94 NCA No. 16. Petition of appellant for further review overruled on August 31, 1994.

No. S-93-755: **State v. Sorenson**, 2 Neb. App. 998 (1994). Petition of appellant for further review sustained on October 13, 1994.

No. A-93-770: **Filbert v. Globe Cleaners**, 94 NCA No. 17. Petition of appellant for further review overruled on June 23, 1994.

No. A-93-774: **State v. Rosales**, 3 Neb. App. 26 (1994). Petition of appellant for further review overruled on October 26, 1994.

Nos. A-93-811, A-93-812: **State v. Kizzire**. Petition of appellant for further review overruled on June 23, 1994.

No. A-93-830: **Chism v. Charles Vrana & Son Constr. Co.**, 94 NCA No. 19. Petition of appellant for further review overruled on July 27, 1994.

No. A-93-838: **State v. Reynolds**, 94 NCA No. 20. Petition of appellant for further review overruled on July 20, 1994.

No. A-93-840: **State v. Eadie**. Petition of appellant for further review overruled on September 28, 1994.

No. A-93-853: **State v. Vann**, 2 Neb. App. 946 (1994). Petition of appellant for further review overruled on August 24, 1994.

No. A-93-862: **State v. Rayes**, 94 NCA No. 24. Petition of appellant for further review overruled on August 24, 1994.

No. S-93-887: **Hull v. Aetna Ins. Co.**, 94 NCA No. 32. Petition of appellant for further review sustained on November 9, 1994.

No. S-93-887: **Hull v. Aetna Ins. Co.**, 94 NCA No. 32. Petition of appellee Hull for further review sustained on November 9, 1994.

No. S-93-897: **State v. Wragge**, 94 NCA No. 23. Petition of appellant for further review sustained on July 27, 1994.

No. A-93-912: **State v. Ziemba**, 94 NCA No. 17. Petition of appellee for further review overruled on June 23, 1994.

No. A-93-915: **State v. Burnett**. Petition of appellant for further review overruled on June 2, 1994.

No. A-93-916: **In re Interest of Mark B.**, 94 NCA No. 22. Petition of appellant for further review overruled on August 31, 1994.

No. A-93-961: **State v. Walton**. Petition of appellant for further review overruled on May 18, 1994.

No. A-93-974: **In re Interest of Crystal W.H.**, 94 NCA No. 38. Petition of appellee guardian ad litem for further review overruled on November 16, 1994.

No. A-93-975: **State v. Scott**, 94 NCA No. 29. Petition of appellee for further review overruled on September 14, 1994.

No. A-93-985: **In re Interest of Amanda M.**, 94 NCA No. 25. Petition of appellant for further review overruled on August 24, 1994.

No. A-93-1013: **State v. Estrada**, 94 NCA No. 27. Petition of appellant for further review overruled on August 24, 1994.

No. A-93-1053: **State v. Aldana**, 94 NCA No. 33. Petition of appellee for further review overruled on October 13, 1994.

No. S-93-1096: **State v. Lee**. Petition of appellant for further review sustained on September 21, 1994.

No. A-93-1097: **State v. Eberly**, 94 NCA No. 38. Petition of appellant for further review overruled on November 9, 1994.

No. A-93-1098: **State v. Mite**. Petition of appellant for further review overruled on May 25, 1994.

No. A-93-1099: **In re Interest of Tiffany M.**, 94 NCA No. 29. Petition of appellee for further review overruled on September 28, 1994.

No. S-93-1101: **State v. Dake**, 94 NCA No. 35. Petition of appellant for further review sustained on October 26, 1994.

No. A-93-1109: **Spiegel v. St. Paul Fire & Marine Ins. Co.**, 94 NCA No. 35. Petition of appellee Second Injury Fund for further review overruled on October 26, 1994.

No. A-93-1126: **Russell v. Department of Corr. Servs.** Petition of appellant for further review overruled on July 20, 1994.

No. A-94-012: **State v. Adams**, 94 NCA No. 29. Petition of appellant for further review overruled on September 21, 1994.

No. A-94-036: **Haney v. Aaron Ferer & Sons**, 3 Neb. App. 14 (1994). Petition of appellant for further review overruled on October 26, 1994.

No. A-94-119: **State v. Reineke**. Petition of appellant for further review overruled on November 9, 1994.

Nos. A-94-121, A-94-129, A-94-130: **State v. Meis**. Petition of appellant for further review overruled on August 31, 1994.

No. A-94-146: **State v. Malcom**. Petition of appellant for further review overruled on May 18, 1994.

No. S-94-228: **State v. Groff**, 94 NCA No. 35. Petition of appellee for further review sustained on November 23, 1994.

No. A-94-259: **State v. Henderson**, 94 NCA No. 38. Petition of appellant for further review overruled on October 26, 1994.

No. A-94-269: **Workman v. Nebraska Dept. of Banking & Finance**. Petition of appellant for further review dismissed on August 24, 1994, for lack of jurisdiction.

No. A-94-294: **State v. Eisenberg**. Petition of appellant for further review overruled on October 13, 1994.

No. A-94-317: **Nwachukwu v. Nwachukwu**. Petition of appellant for further review dismissed on August 24, 1994, for lack of jurisdiction.

No. S-94-336: **State v. Matthies**. Petition of appellant for further review sustained on September 14, 1994.

No. S-94-364: **State v. Nelson**. Petition of appellant for further review overruled on October 11, 1994.

No. A-94-470: **State v. Carrera**. Petition of appellant for further review overruled on October 25, 1994.

No. A-94-562: **State v. Dillon**. Petition of appellant for further review overruled on November 16, 1994.

No. A-94-569: **United Nebraska Bank v. Burnett**. Petition of appellant for further review overruled on August 24, 1994.

No. A-94-622: **Brown v. Butler Holdings**. Petition of appellant for further review overruled on November 9, 1994.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

BAKODY HOMES AND DEVELOPMENT, INC., A NEBRASKA CORPORATION, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

516 N.W.2d 244

Filed May 27, 1994. No. S-92-418.

1. **Directed Verdict: Appeal and Error.** In order to sustain a motion for directed verdict, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence. 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.
2. **Pleadings.** Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet.
3. **Trial: Appeal and Error.** An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration upon appeal.
4. **Presumptions.** Everyone is presumed to know the law.
5. **Negligence.** One cannot be negligent in failing to perform an act which one did not in the first instance have a duty or obligation to perform.
6. **Actions: Negligence: Proof: Damages.** As an element of a negligence cause of action, a plaintiff must prove damages with reasonable certainty. The nature and amount of damages cannot be sustained by evidence which is speculative and conjectural.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

John M. DiMari and Duane M. Katz for appellant.

Herbert M. Fitle, Omaha City Attorney, and Charles K. Bunger for appellees City of Omaha, Joseph Rogers, and Martin Shukert.

Don Stenberg, Attorney General, Charles E. Lowe, and Gary R. Welch for appellee State of Nebraska.

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

FAHRNBRUCH, J.

Bakody Homes and Development, Inc. (Bakody), sued the City of Omaha (City) and the State of Nebraska (State), alleging that each governmental unit had negligently failed to inform Bakody of the existence of a state corridor protection plan on property Bakody was developing as a townhome subdivision.

Following a bench trial, the district court for Douglas County entered a directed verdict in favor of both the City and the State. We affirm.

FACTS

In early 1982, the State's Department of Roads (Department) established corridor protection from 120th Street to west of 156th Street along West Dodge Road in Omaha. A corridor map, showing a corridor extending 300 feet either side of the centerline of West Dodge Road, was prepared by the Department and transmitted to city officials and the Douglas County clerk's office on April 28, 1982.

On December 15, 1982, Bakody entered into a purchase agreement for approximately 6 acres of land south of West Dodge Road at 153d Street, upon which Bakody planned to build 28 duplex townhomes on 2 culs-de-sac. The subdivision, known as Oakmount Townhomes, provided for a homeowner association and areas of common ground.

Frank Bakody, a homebuilder and president of Bakody Homes and Development, Inc., checked with the City's planning department in late 1982 or early 1983 regarding the feasibility of rezoning the property to permit the building of townhomes. He also consulted William Dorner, a licensed land surveyor and a principal of Thompson, Dreessen & Dorner, a land surveying and engineering company. Dorner was hired to (1) develop a preliminary plat of the subject property, (2) develop an estimated cost of improvements to the land, and (3)

assist in having the property rezoned.

On February 9, 1983, Bakody filed a preliminary application for subdivision plat with the City requesting the City's approval. On February 17, the City's development review committee suggested that Bakody check with the Department about the widening of West Dodge Road. Dorner, on behalf of Bakody, called the Department to determine whether additional right-of-way would be required by the State. The Department sent Dorner three drawings of the State's right-of-way plans for West Dodge Road in the area of the proposed subdivision as well as an aerial photograph of the area. Nothing on the drawings indicated a corridor plan.

Upon a second call to the Department, made because Dorner believed that the maps indicated a possible increase in the State's right-of-way in the area, Dorner was advised that although the State might need some of the platted common area for a grading easement, there would be no permanent taking of property. Dorner testified that he did not ask about a corridor plan and had no actual knowledge of the existence of a corridor plan at the time of the conversations with the Department.

On May 17, Bakody's final application for subdivision plat was approved by the City's development review committee. On August 30, 1983, Bakody purchased the subject property for $227,383. Subsequently, Bakody applied for, and was issued, several building permits by the City's permits and inspection division. Two townhomes were completed and sold, and townhome construction had started on four other lots when the City issued a work stoppage order on December 14, 1984, because the subdivision was located in the State's corridor plan. The stoppage order of that date included Lots 2 through 6 and 9 through 13. The order did not include Lots 1, 7, 8, and 14.

On March 22, 1985, the State advised Bakody that it was releasing Lots 2, 6, 9, 10, and 13 from the stoppage order. Frank Bakody testified at trial that he received a copy of a letter from the State to the City dated November 14, 1985, advising that Lots 3, 4, 5, 11, and 12 were released for construction.

Frank Bakody testified that, by the time all lots were released for construction, he considered the project to be "tainted" and unsalvageable because of the period of uncertainty and that he

had already begun negotiations for sale of the property to a neighboring church. On February 6, 1986, Bakody sold the improved property, minus Lot 5, to the church for $462,416.

Bakody then sued the City, pursuant to the Political Subdivisions Tort Claims Act, and the Department, pursuant to the State Tort Claims Act. Bakody also named Joseph Rogers (director of city permits and inspection) and Martin Shukert (director of the City's planning department) as additional defendants.

Bakody alleged that the City, Rogers, and Shukert were negligent in (1) approving the plat when they knew of the corridor plan; (2) issuing a building permit even though Rogers had received a copy of the corridor map; (3) failing to give the Department notice of Bakody's filing a request for a building permit, in violation of Neb. Rev. Stat. § 39-1311.01 (Reissue 1988); (4) failing to reasonably perform ministerial duties in refusing to issue the building permit to Bakody pursuant to the City's master plan; and (5) failing to properly maintain the master plan as required by the Omaha city code.

Bakody alleged that the State was negligent in failing to notify and accurately advise Bakody of the corridor, in providing Bakody with an incorrect map which did not reflect the proposed corridor, and in failing to ensure that no building permits were issued for construction in the corridor area.

In its directed verdict order entered at the conclusion of all the evidence, the court held (1) that the State had violated no duty to Bakody, (2) that the City had breached its duty to Bakody by failing to give the Department notice of the filing of Bakody's applications for building permits as required by Neb. Rev. Stat. § 39-1311.03 (Reissue 1989), (3) that there had been no "taking" of Bakody's land, (4) that Bakody had not presented a correct measure of damages, and (5) that evidence of Bakody's damages was speculative.

The court found that it had erred in overruling each defendant's motion for directed verdict at the close of all the evidence and entered an order sustaining those motions. Rogers and Shukert had been dismissed from the case as defendants in their individual capacities upon motion of the City at the close of Bakody's case in chief. Bakody timely appealed to the

Nebraska Court of Appeals, and under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

ASSIGNMENTS OF ERROR

In its appeal, Bakody claims that the district court erred in finding and holding that (1) the State violated no duty to the plaintiff, (2) the actions of the City and the State were not a taking in the sense contemplated by the Constitution of Nebraska, (3) Bakody had not presented evidence on the proper measure of damages, (4) Bakody's damage evidence was speculative and conjectural, and (5) each defendant's motion for a directed verdict should be sustained.

Because our determinations of some of the issues raised by Bakody are dispositive of this appeal, it is not necessary to discuss the remaining issues raised by Bakody's assignments of error.

STANDARD OF REVIEW

In order to sustain a motion for directed verdict, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence. *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994). 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. *Marple v. Sears, Roebuck & Co.*, 244 Neb. 274, 505 N.W.2d 715 (1993).

ANALYSIS

STATE'S DUTY TO BAKODY

First we turn to the issue of whether the State violated any duty to Bakody. In its brief, Bakody argues that the State violated its duty to the appellant in two ways: (1) by failing to maintain the maps required by Neb. Rev. Stat. § 39-1311(1) (Reissue 1988) and (2) by furnishing an inaccurate map to Bakody's representative, Dorner.

Bakody's first argument is confusing at best because it is inconsistent with its pleadings in its amended petition and because it appears to be based upon a misunderstanding of § 39-1311(1).

In its amended petition, Bakody alleged that

> the Defendant State and its agencies, *had a statutory duty to establish and maintain an accurate corridor map* and that the State and its agencies *were negligent in failing to notify and accurately advise* [*Bakody*] *and its representatives of the corridor and in providing* [*Bakody*] *with an incorrect map which did not reflect the proposed corridor*, and [in failing] to insure that no building permits were issued for construction in the corridor area.

(Emphasis supplied.) Although Bakody alleged in its amended pleading that the State had a *duty* to maintain an accurate corridor map, Bakody neither pled nor proved that the State *breached* its duty to maintain such a map.

Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet. *Diefenbaugh v. Rachow*, 244 Neb. 631, 508 N.W.2d 575 (1993). See, also, Neb. Rev. Stat. § 25-1101 et seq. (Reissue 1989). An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration upon appeal. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994); *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993). Thus, the issue of whether the State failed to maintain the corridor map that Bakody claims it was required to maintain is not properly before this court.

Next we examine Bakody's argument that the State was negligent because the Department furnished "inaccurate" maps to Dorner. Bakody contends that, by virtue of Dorner's inquiry about State right-of-way plans, the Department was on notice that Bakody contemplated building within the corridor and that the State was negligent for failing to advise Dorner of the existence of the corridor. The State counters that it had no duty to furnish corridor plans to Bakody, because neither Bakody nor its representative, Dorner, ever requested information about the West Dodge Road corridor plan.

The statutory corridor protection plan as it existed at all

times material to this case became effective July 12, 1974. 1974 Neb. Laws, L.B. 805. It is axiomatic, and this court has held, that everyone is presumed to know the law. See, e.g., *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991); *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 102 N.W.2d 599 (1960); *Beltner v. Carlson*, 153 Neb. 797, 46 N.W.2d 153 (1951).

Bakody's representative, Dorner, a licensed surveyor retained by Bakody to assist in the platting and zoning of the Oakmount Townhome subdivision, testified that he did not know if he was aware of Nebraska's corridor protection law at that time and that he was unaware of the corridor protection plan for West Dodge Road until sometime after this incident occurred. Dorner admitted that, although he made two separate inquiries of the Department, both of those inquiries requested information about the State's need for additional *right-of-way* which would affect the plat of the subdivision. He testified that he is sure he did not ask anyone at the Department about the *corridor protection plan*.

We are unaware of any authority, nor have we been cited to any, which would hold the State liable for the Department's failing to provide *corridor maps* to Dorner when he specifically inquired about *right-of-way plans* for West Dodge Road. One cannot be negligent in failing to perform an act which one did not in the first instance have a duty or obligation to perform. *Travelers Indemnity Co. v. Center Bank*, 202 Neb. 294, 275 N.W.2d 73 (1979).

It is uncontroverted that the Department furnished Dorner with the exact information he requested on behalf of Bakody, that is, the right-of-way plans for West Dodge Road. It defies logic to impose a duty on the Department to somehow read the minds of its callers and furnish them with information accordingly.

Bakody and its agent, Dorner, are charged with knowledge of the corridor law, and Dorner's admitted unfamiliarity with the law may not be made the basis for imposing liability upon the State. The record fails to reveal any evidence whatever that the Department breached any duty in providing information that Dorner in fact requested. Thus it was not error for the trial court to hold as a matter of law that the State had not breached

any duty to Bakody and to enter a directed verdict in favor of the State.

DAMAGES

We now turn to the issue of whether the trial court erred in holding that Bakody's damages were speculative and conjectural.

Richard See, a licensed real estate appraiser called to testify by Bakody, provided expert testimony as to the alleged damages sustained by Bakody. A review of the record shows that the only actual costs used by See in his calculation of Bakody's damages were Bakody's cost to acquire the unimproved 6-acre tract of land, upon which Bakody planned to develop the Oakmount Townhome subdivision, and the sale price of the same tract of land, which at the time of sale to a neighboring church included improvements but did not include Lot 5.

See estimated most of the other costs and expenses related to the project by using the Marshall Valuation Service. See made his own estimate of $12,000 for legal expenses in connection with the project. Profit on the project was projected to be 16 percent, discounted to 12 percent to reflect a 3 1/2-year sell-out period, for an estimated profit of $178,140.

On cross-examination, See explained that he took his cost estimates from the Marshall Valuation Service rather than getting costs from Bakody because he was trying to look at the property as a buyer would look at it. He stated that his opinion was based on the market data he could find and that "Bakodys' actual building expenses were another question. I don't know . . . what they were in total. I never saw complete documents on any of that." See further testified:

> I saw some numbers that [plaintiff's attorney] had provided to me from his file; but . . . it was my determination that you couldn't identify specifically what items went to what costs. It appeared as though other projects had been combined into the accounting. Sometimes invoices would be for one address at Oakmont [sic] and include an address someplace else that he was bidding, and without being an accountant, I couldn't do an audit or wasn't going to do an audit of his accounting statements.

Frank Bakody testified that "some" of the documents in which he kept track of the subdivision costs had been lost and that he was unable to produce the documents at the time of trial. Barbara Bakody, Frank's wife and the only other shareholder of the Bakody corporation, testified that she was in charge of most of the financial records for the corporation. She further testified that "some" of the financial records for the project were lost or misplaced during several moves subsequent to the sale of the Oakmount Townhome property, although she stated that she had "some" of them.

As an element of a negligence cause of action, a plaintiff must prove damages with reasonable certainty. *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991). The nature and amount of damages cannot be sustained by evidence which is speculative and conjectural. *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989).

As a matter of law, in the absence of evidence as to the actual costs of the Oakmount Townhome project, See's estimated costs of the project as well as an estimated profit margin resulted in a damage estimate that was speculative and conjectural.

It is evident, based upon See's testimony, that some of the cost records for the project were in the possession of Bakody's attorney. The record fails to reflect that any attempt was made to separate the costs of the Oakmount Townhome subdivision from the costs of Bakody's other building projects for the purpose of the present litigation.

Moreover, it could be inferred from the record that at least some of the actual cost records, such as for engineering and legal services, could have been obtained from the firms who did the work. As previously noted, Dorner, a member of the engineering firm which did the preliminary cost estimates of improvements to the subject property, testified for Bakody at trial. The Thompson firm's preliminary estimate of costs for constructing the improvements was entered into evidence. However, Dorner did not testify as to the actual engineering costs of the project, nor could he recall whether the actual costs of the project were consistent with the projected costs.

We note further that Thompson's preliminary estimate,

which included an estimate of its own engineering fees, projected the total costs of improvements to the property to be $96,685. See, using the Marshall Valuation Service figures, arrived at an estimated cost of $168,010 for improvements and $13,642 for engineering, for a total of $181,652, or nearly *twice* Thompson's preliminary cost estimate.

Thompson, in the same estimate, advised Bakody that "[t]ypically a subdivision can be graded for $350 to $400 per lot." Using the $400 per lot figure, the projected cost for grading 14 lots would have been $5,600. See, on the other hand, estimated the grading costs of the subdivision to be $33,977, again using the Marshall Valuation Service. This is more than *six times* the cost projected by Thompson.

Assuming but not deciding that the trial court correctly determined that the City breached its duty to Bakody and that the breach was the proximate cause of Bakody initiating construction on the project, the record is more than adequate to support the trial court's conclusion that reasonable minds could not differ that Bakody's evidence of its damages was based on speculation and conjecture and that Bakody had failed to adduce evidence of any damages with reasonable certainty. Therefore, the City was entitled to a directed verdict as a matter of law. Bakody's assignment of error to the contrary is without merit.

We further note that, although we do not find it necessary to analyze Bakody's other assignments of error, reasonable minds likewise could not differ that Bakody failed to adduce evidence of its damages with reasonable certainty as to the State, either on a negligence theory or a taking theory. Thus, Bakody's evidence of damages, as a matter of law, is also too speculative and conjectural to support an award of damages from the State.

CONCLUSION

Having fully considered Bakody's other assignments of error, and having found the above issues dispositive of the case, we affirm the trial court's entering of directed verdicts in favor of both the City and the State.

AFFIRMED.

CHARLES L. TERRY, APPELLANT, V. WALLACE E. DUFF, M.D., APPELLEE.

516 N.W.2d 591

Filed May 27, 1994. No. S-92-698.

1. **Rules of the Supreme Court: Records.** A bill of exceptions is required to have a court reporter's certificate immediately following the index in the first volume of the bill of exceptions.
2. _____: _____. If a bill of exceptions cannot be prepared and certified by a court reporter, it must be prepared under the direction of, and certified by, the trial judge.
3. _____: _____. The certified copy of the bill of exceptions must then be filed with the clerk of the district court.
4. _____: _____. Upon such filing with the clerk of the district court, the bill of exceptions then becomes the official bill of exceptions.
5. **Rules of the Supreme Court: Records: Time.** Once a bill of exceptions has been properly filed with the clerk of a district court, it is the duty of that clerk to file the bill of exceptions in the office of the Clerk of the Supreme Court within 5 days after a case has been placed on the Supreme Court's proposed call for argument, or at such earlier time as the Clerk of the Supreme Court may request.
6. **Records: Costs: New Trial: Appeal and Error.** It being the unquestionable duty of the clerk of a district court to present a bill of exceptions to the clerk of an appellate court, it is mandatory that the clerk maintain an accurate record of when a bill of exceptions is checked out and checked back in, and by whom. In this way, it can be determined who should pay the cost of a new trial when the bill of exceptions is missing through the fault of one of the parties.
7. **Records: Costs: New Trial: Evidence: Appeal and Error.** An appellate court should rely upon the record kept by the clerk of the district court in determining who pays new trial costs unless there is clear and convincing evidence that the clerk's record is in error.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Judgment vacated, and cause remanded for a new trial.

Michael J. Lehan, of Kelley & Lehan, P.C., and Ivory Griggs for appellant.

David D. Ernst, of Gaines, Mullen, Pansing & Hogan, for appellee.

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

FAHRNBRUCH, J.

Charles L. Terry appeals a jury verdict that disallowed his

medical malpractice claim against Wallace E. Duff, M.D. In his lawsuit, Terry alleged that Duff negligently performed sinus surgery upon him. The surgery was intended to relieve Terry's breathing difficulty.

We vacate the judgment of the district court for Douglas County and remand the cause for a new trial.

FACTS

In his March 7, 1990, petition, Terry alleged that, as a result of Duff's surgery, he suffers from (1) a total loss of smell, taste, and ability to blow his nose and clear his sinus; (2) headaches, nausea, diarrhea, inability to sleep, and work deterioration; and (3) total unemployability.

Duff answered, generally denying Terry's allegations of negligence. Following a trial and in accordance with the verdict of the jury, the trial court dismissed Terry's petition. Terry timely appealed to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

ASSIGNMENTS OF ERROR

On appeal, Terry alleges that the trial court erred in (1) allowing the jury to receive expert medical opinions based upon documents which were created by Duff and which did not have any of the traditional indicia of reliability accorded medical records; (2) giving a jury instruction which required the jury to find Duff negligent on all allegations before returning a verdict for Terry, and failing to give NJI2d Civ. 2.01 as requested; and (3) overruling Terry's motion for new trial.

ANALYSIS

We note at the outset that a proper bill of exceptions has never been filed with the Clerk of this court. The original bill of exceptions apparently was lost at some point after both appellant's counsel and appellee's counsel used it in preparation of their briefs.

The records of the clerk of the district court indicate that the record was checked out to appellant's counsel. However, it is agreed by both parties that appellant's counsel then transferred the record to appellee's counsel rather than checking the record

back into the clerk's office. Counsel for the appellee has now filed an affidavit in this court stating that an employee of that counsel's law firm believes he checked the record in to the clerk of the district court. The clerk of the district court has advised that, after a diligent search, the record cannot be found.

The parties have filed with the Clerk of this court a substituted "bill of exceptions" consisting of seven volumes of trial testimony and three volumes of duplicate exhibits. The duplicate bill has not been certified, nor has it been filed with the clerk of the district court. Moreover, the bill is incomplete because 11 of the original exhibits are missing. According to the parties, those 11 exhibits either cannot be located or cannot be duplicated.

A bill of exceptions is required to have a court reporter's certificate immediately following the index in the first volume of the bill of exceptions. See Neb. Ct. R. of Prac. 5F(2) (rev. 1992). If a bill of exceptions cannot be prepared and certified by a court reporter, it must be prepared under the direction of, and certified by, the trial judge. See Neb. Ct. R. of Prac. 5C(3) (rev. 1992). The certified copy of the bill of exceptions must then be filed with the clerk of the district court. See rule 5C(2). Upon such filing with the clerk of the district court, the bill of exceptions then becomes the official bill of exceptions. See rule 5C(4).

We have neither an official nor a complete bill of exceptions before this court. Because we are unable to determine with certainty whether it was through the fault of the office of the district court or one of the parties that a complete and proper bill of exceptions, including all exhibits, is unavailable to this court, we vacate the judgment of the district court and remand the cause to that court for a new trial.

We take this opportunity to remind all clerks of the district courts that once a bill of exceptions has been properly filed with the clerk of a district court, it is the duty of that clerk to "file the bill of exceptions in the office of the Clerk of the Supreme Court within 5 days after a case has been placed on the Supreme Court's proposed call for argument, or at such earlier time as the Clerk of the Supreme Court may request." Rule 5C(4).

It being the unquestionable duty of the clerk of a district

court to present a bill of exceptions to the clerk of an appellate court, it is mandatory that the clerk maintain an accurate record of when a bill of exceptions is checked out and checked back in, and by whom. In this way, it can be determined who should pay the cost of a new trial when the bill of exceptions is missing through the fault of one of the parties. An appellate court should rely upon the record kept by the clerk of the district court in determining who pays new trial costs unless there is clear and convincing evidence that the clerk's record is in error.

CONCLUSION

There being no official and complete bill of exceptions before this court, we vacate the judgment of the district court and remand this cause to the district court for a new trial.

JUDGMENT VACATED, AND CAUSE REMANDED FOR A NEW TRIAL.

SANDRA MASON, APPELLANT, V. MARTIN A. CANNON, APPELLEE.

516 N.W.2d 250

Filed May 27, 1994. No. S-92-840.

1. **Jurisdiction: Appeal and Error.** It is not only within the power but the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it.
2. **Motions for New Trial: Time: Appeal and Error.** The time for filing an appeal cannot be extended by successive filings of motions for new trial.
3. **Motions to Vacate: Motions for New Trial: Time.** A motion to vacate filed within 10 days of the order of dismissal is the equivalent of the filing of a motion for new trial.
4. **Jurisdiction: Final Orders: Motions for New Trial: Time: Appeal and Error.** In order to vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial.

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

Robert Wm. Chapin, Jr., for appellant.

Kile W. Johnson, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske, for appellee.

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

WRIGHT, J.

Sandra Mason commenced a legal malpractice action in 1988. The case was dismissed after the district court issued a third order to show cause why the case should not be dismissed for want of prosecution.

FACTS

On September 26, 1988, Mason filed a petition in the district court for Lancaster County, alleging a cause of action for legal malpractice against Martin A. Cannon. On November 21, 1989, the court ordered that cause be shown by affidavit on or before December 21 why the case should not be dismissed for want of prosecution. On May 28, 1991, the court again ordered that cause be shown by affidavit why the case should not be dismissed for want of prosecution, and on June 28, the case was dismissed for the first time for want of prosecution. A motion to reinstate was granted, and on October 4, the court ordered that trial notice be filed within 120 days.

On May 19, 1992, the court entered an order to show cause by affidavit on or before June 18 why the case should not be dismissed for want of prosecution. The court dismissed the case on June 3. The docket entry stated: "Trial notice has not been filed. Case is dismissed for want of prosecution." In response, Mason filed a pleading captioned "Motion to Vacate Dismissal Order of June 3, 1992." A docket entry shows that the motion to vacate was overruled on June 22.

On June 26, 1992, Mason filed a "Motion for New Trial/Removal from Dismissal Docket," requesting that the court set aside and vacate the order entered on June 22 or, in the alternative, remove the matter from the dismissal docket. On August 21, the court overruled the motion for new trial, and on September 21, Mason filed a notice of appeal from the August 21 order.

ANALYSIS

"[I]t is not only within the power but the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it." *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 868, 509 N.W.2d 618, 623 (1994). Accord, *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993); *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). The time for filing an appeal cannot be extended by successive filings of motions for new trial. *Abboud v. Cutler*, 238 Neb. 177, 469 N.W.2d 763 (1991).

The problem in this case is that Mason did not file a timely notice of appeal. On June 3, 1992, trial notice had not been filed, and the court ordered the case dismissed for want of prosecution. Mason did not appeal from this order. Instead, on June 5, she filed a motion to set the matter for trial and a motion to vacate the order of dismissal. A motion to vacate filed within 10 days of the order of dismissal is the equivalent of the filing of a motion for new trial. See *id.* The motion to vacate was overruled on June 22.

Pursuant to Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1992), a notice of appeal must be filed within 30 days after the rendition of the judgment, decree, or final order. Thus, the order overruling the motion to vacate, which is a final order, would require the filing of a notice of appeal within 30 days of June 22, 1992. Instead, Mason filed another motion for new trial, dated June 26, 1992. Because the time for filing an appeal cannot be extended by successive motions for new trial, Mason's notice of appeal was not timely. See *Abboud, supra.*

The June 3, 1992, order of dismissal was a final, appealable order. It was an order which affected a substantial right, determined the action, and prevented a judgment. See *Rohde, supra.* In order to vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a timely filed motion for new trial. *In re Interest of C.M.H. and M.S.H.*, 227 Neb. 446, 418 N.W.2d 226 (1988).

Mason's "Motion for New Trial/Removal from Dismissal Docket," filed June 26, 1992, requested that the court set aside and vacate its order entered June 22 or, in the alternative,

remove the matter from the dismissal docket for the following reasons:

> 1. Irregularity in the proceedings of the court . . . by which [Mason] was prevented from having a fair trial.
>
> 2. . . . [T]he verdict . . . is not sustained by sufficient evidence . . . .
>
> 3. . . . [E]rror of law occurr[ed] at the trial . . . .
>
> 4. Error of the Court by not recognizing that the delays . . . were cause[d] by [Cannon].
>
> 5. Error of the Court by not recognizing that [Mason] attempted to set this matter for trial in October and that [Cannon] requested additional time to conduct discovery.
>
> 6. Error by the Court in not taking judicial notice of the Court record which indicated that [Mason] was complying with the Court's earlier Order to allow [Cannon] to take the deposition of [Mason's] expert witness . . . .

The June 26, 1992, motion did not toll the time for filing an appeal within 30 days of the June 22 order overruling Mason's motion to vacate. The June 26 motion requested that the court vacate the June 22 order. Even if the court had vacated the June 22 order, the case was still dismissed by the June 3 order, which dismissed the case for want of prosecution. The request to vacate the June 22 order was not a motion for new trial because the June 22 order simply overruled the motion to vacate filed by Mason on June 5.

Even if the June 26, 1992, motion was considered as a motion for a new trial, the time for filing an appeal cannot be extended by successive filings of motions for new trial. See *Abboud, supra*. An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal. *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992). The filing of a motion for new trial and its subsequent overruling do not convert an otherwise unappealable order into an appealable order. *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). The August 21 order which overruled the June 26 motion was not an appealable order.

The June 3, 1992, order dismissed the case for want of

prosecution. Mason's motion to vacate, filed on June 5, was overruled on June 22, and Mason did not appeal from such order within 30 days.

The appeal is dismissed for lack of jurisdiction.

APPEAL DISMISSED.

BOSLAUGH, J., participating on briefs.

RANDY L. BARTUNEK, APPELLANT, V. MICHAEL J. GENTRUP, APPELLEE.

516 N.W.2d 253

Filed May 27, 1994. No. S-92-875.

1. **Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **Costs.** The costs of litigation and expenses incident to litigation may not be recovered unless provided for by a statute or a uniform course of procedure.
3. **Expert Witnesses: Fees.** A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a contract for those services, entitled only to the statutory witness fee.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed.

William G. Line, of Kerrigan & Line, for appellant.

Thomas J. Culhane and Ruth W. Beyerhelm, of Erickson & Sederstrom, P.C., for appellee.

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

WRIGHT, J.

Randy L. Bartunek obtained a judgment against Michael J. Gentrup for injuries Bartunek suffered as the result of a motor vehicle accident. The jury returned a verdict in favor of Bartunek in the amount of $45,000. Bartunek moved for taxation of costs and expenses against Gentrup in the amount of $6,138. The trial court allowed only a portion of the costs, and Bartunek appeals.

SCOPE OF REVIEW

Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

FACTS

On January 12, 1991, Bartunek was a passenger in a vehicle which collided with a vehicle driven by Gentrup. Bartunek sustained injuries including a dislocated and fractured shoulder, a punctured lung, a torn ear, and a fractured foot. He sought compensation for medical bills in the amount of $13,706, lost earnings in the amount of $7,305, and loss of personal property in the amount of $675. The jury returned a verdict in favor of Bartunek in the amount of $45,000, and the trial court entered judgment for that amount. The trial court ordered that the amount of costs would be determined on Bartunek's motion for taxation of costs.

For his assignments of error, Bartunek has enumerated each of the following costs, and he assigns as error the trial court's refusal to tax such costs:

Copy of Bartunek's deposition taken by Gentrup	$ 76.70
Copies of depositions of a Dr. McKnight and Bartunek's wife, Nancy Bartunek, both taken by Gentrup	108.80
Copy of deposition of Dr. Harold Smith taken by Gentrup	46.80
Copy of video deposition of Dr. Timothy Fitzgibbons, Gentrup's expert, taken by Gentrup	15.00
Copy of transcript of Dr. Fitzgibbons' deposition	64.10
Expert witness fee of Dr. Jerome Sherman for projection of Bartunek's economic loss, including trial testimony and mileage	1,030.00
James Rogers, Midlands Rehabilitation Consultants, Bartunek's expert for testimony	

concerning jobs that Bartunek could and could not perform	1,067.65
Karen Brown, Working Back Institute, Bartunek's expert on work capacity evaluation	680.00
Dr. Richard Bergstrom trial testimony as Bartunek's expert	1,800.00
Deposition of Dr. Donald Gammel, Gentrup's expert, taken by Bartunek	300.00
TOTAL COSTS	$5,189.05

ANALYSIS

As a general rule, the costs of litigation and expenses incident to litigation may not be recovered unless provided for by a statute or a uniform course of procedure. *Kliment v. National Farms, Inc.*, 245 Neb. 596, 514 N.W.2d 315 (1994); *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988).

We first dispose of assignments of error Nos. 1 through 5, which deal with the costs for copies of depositions taken by Gentrup. Bartunek has not cited or referred to a statute or a uniform course of procedure which would support his claim for these costs. See *id.* Assignments of error Nos. 1 through 5 are without merit.

Assignments of error Nos. 6 through 9 deal with expert witness fees charged by Bartunek's witnesses. Dr. Jerome Sherman testified concerning a projection of the economic loss suffered by Bartunek. Dr. Sherman relied upon a report by James Rogers, a rehabilitation specialist, who provided a vocational evaluation. Rogers had referred Bartunek to Karen Brown for an evaluation of Bartunek's lifting ability and other physical capabilities. Dr. Richard Bergstrom detailed Bartunek's injuries, which are described above.

Bartunek relies upon *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes*, 207 Neb. 44, 295 N.W.2d 711 (1980). In that case, we affirmed an award of costs to the plaintiff which included an expert witness fee in the amount of $1,000. The plaintiff requested costs in excess of $83,000. Since

Rhodes, we have adhered to the policy that the costs of litigation and expenses incident to litigation may not be recovered unless provided for by a statute or a uniform course of procedure. *Kliment, supra*; *Gottsch Feeding Corp., supra*.

In *Hefti v. Hefti*, 166 Neb. 181, 88 N.W.2d 231 (1958), we stated that expert witness fees could be taxed above the statutory fee where a special contract existed. In *Lockwood v. Lockwood*, 205 Neb. 818, 821, 290 N.W.2d 636, 639 (1980), we held that "a witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a contract for those services, entitled only to the statutory witness fee." In *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993), a tort action for damages, we held that the court did not err in refusing to tax expert witness fees to the defendant. We distinguished *Hefti* and *Lockwood*, which were actions for dissolution of marriage. In *Hefti* and *Lockwood*, costs for expert witness fees were allowed pursuant to Neb. Rev. Stat. § 42-367 (Reissue 1988) and its predecessor, which permitted a court to direct costs against either party involved in a divorce action.

Were we to tax as costs the expert witness fees charged by a defendant's experts, the result would create a chilling effect on a plaintiff's right to seek relief for injury or wrong because of the possibility that all expert witness fees of the defendant would be taxed against the plaintiff, should the defendant prevail. The same result could occur with a defendant who would be required to pay the plaintiff's expert witness fees, which could be greatly in excess of the monetary relief sought by the plaintiff. The costs of litigation and the expenses incident to litigation may not be recovered unless provided for by a statute or a uniform course of procedure. *Kliment, supra*; *Gottsch Feeding Corp., supra*. Bartunek's assignments of error Nos. 6 through 9 are without merit.

Bartunek's final assignment of error is that the court erred in failing to allow as a cost the $300 fee charged to Bartunek for the deposition of Dr. Donald Gammel which was taken by Bartunek's counsel. Neb. Ct. R. of Discovery 26(b)(4)(C)(i) and (ii) (rev. 1992) require the plaintiff to pay the defendant's expert a reasonable fee for the time spent responding to

discovery. Dr. Gammel, director of occupational medicine for Immanuel Medical Center in Omaha, testified as a defense witness on disability evaluation.

We have not previously decided whether a fee required to be paid pursuant to rule 26 should be taxed as costs. Cases cited by Bartunek address the costs of taking the deposition of a witness. The taxing of Gammel's fee as a cost is not provided for by statute or a uniform course of procedure. This assignment of error is without merit.

The trial court did not abuse its discretion in awarding costs. The judgment of the trial court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

RICHARD ROBISON, DOING BUSINESS AS ROBISON CONSTRUCTION, APPELLANT, V. ROLAND CRAIG MADSEN AND THERESA ANN MADSEN, HUSBAND AND WIFE, AND NORWEST BANK NEBRASKA, APPELLEES.

516 N.W.2d 594

Filed May 27, 1994. No. S-92-948.

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. **Equity: Motions to Dismiss.** When a defendant in an equity action moves to dismiss the plaintiff's action at the close of the plaintiff's evidence, the defendant, for the purposes of considering the defendant's motion, admits the truth of the plaintiff's evidence and testimony, together with every inference which may fairly and reasonably be drawn therefrom. The court must then determine, as a question of law, whether the plaintiff's evidence has made a prima facie case.
4. **Motions for New Trial: Appeal and Error.** A district court's denial of a motion for new trial will be affirmed when the court's decision is neither erroneously

prejudicial nor an abuse of discretion.

5. **Trial: Appeal and Error.** An issue not presented to or passed upon by the trial court generally is not appropriate for consideration on appeal.
6. **Pleadings: Appeal and Error.** An appellate court is obliged to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried.
7. **Mechanics' Liens: Contracts.** Under contracts designed as "cost plus" agreements, the amount owing the builder should be computed on the basis of the amount actually spent for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors.
8. **Mechanics' Liens: Proof.** The burden of proof is upon one claiming a mechanic's or construction lien to show that the material furnished by him was used in the construction of the building.
9. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
10. **Pleadings.** An admission in an answer does not extend beyond the intendment of the admission as clearly disclosed by its context.
11. **Trial.** A trial judge has broad discretion over the conduct of a trial.

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

Terrance A. Poppe and Joel G. Lonowski, of Hecht, Sweet, Morrow, Poppe & Otte, P.C., for appellant.

William J. Morris and Jim R. Titus, of Nelson Morris Holdeman & Titus, for appellees Madsen.

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

PER CURIAM.

After Richard Robison, doing business as Robison Construction, presented evidence and rested in his residential construction lien foreclosure action, the trial court, on motion of the residence's owners, dismissed Robison's case because he had failed to prove the amount of his lien.

We affirm the dismissal by the district court for Lancaster County.

ASSIGNMENTS OF ERROR

Robison claims that the trial court erred in (1) sustaining the

owners' motion to dismiss on grounds of insufficient evidence of the actual cost of constructing a residence for its owners and (2) overruling Robison's motion for new trial.

STANDARD OF REVIEW

An action to foreclose a construction lien is one grounded in equity. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993). 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. *Id.*

When a defendant in an equity action moves to dismiss the plaintiff's action at the close of the plaintiff's evidence, the defendant, for the purposes of considering the defendant's motion, admits the truth of the plaintiff's evidence and testimony, together with every inference which may fairly and reasonably be drawn therefrom. The court must then determine, as a question of law, whether the plaintiff's evidence has made a prima facie case. *Schall v. Anderson's Implement*, 240 Neb. 658, 484 N.W.2d 86 (1992).

A district court's denial of a motion for new trial will be affirmed when the court's decision is neither erroneously prejudicial nor an abuse of discretion. See *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994).

FACTS

On May 8, 1990, Roland Craig Madsen and Theresa Ann Madsen, by written contract, agreed to pay Robison the actual direct cost of the construction of a residence in the city of Lincoln's subdivision of Williamsburg Village, plus 10 percent for overhead and profit. The contract set forth an *estimated* total cost of $191,966, but established the contract price as "the sum of actual direct construction cost plus ten percent for overhead and profit for the construction to be performed by Contractor [Robison]."

When the Madsens failed to pay the unpaid balance of what

Robison claimed was due him, Robison filed a construction lien and subsequently filed this action in the district court for Lancaster County.

The contract defined direct construction cost as "all costs to complete the Project in accordance with the plans and specifications." Attached to the contract was an 11-page, detailed list of specifications, which both Robison and Roland Madsen signed. Also entered into evidence were copies of plans for the construction of the Madsens' residence, which Robison testified were the plans referred to in the contract.

Robison began construction of the home in May 1990. As work progressed, Robison prepared and sent to the Madsens monthly statements showing his calculations of the construction costs incurred to the date of each statement. Robison testified that he based these calculations on invoices sent to him by subcontractors and the costs of labor performed by his own employees.

Robison testified that after the residence was substantially completed in late September 1990, he and Roland Madsen walked through the house and made a "punch list" of the items Madsen thought should be corrected. Robison testified that he corrected most of the items on that list in October.

Up to that time, the Madsens apparently had paid the monthly statements Robison sent them. Robison testified that in mid-October, Roland Madsen paid him $16,478 on the September bill but refused to pay the remaining balance. Robison testified that he then stopped working on the residence. He subsequently filed a construction lien against the property to secure the unpaid balance, which Robison claimed was $61,101.22 at that time. On March 5, 1991, Robison filed a petition to foreclose the construction lien in the district court for Lancaster County.

In their answer, the Madsens admitted that they had entered into the contract dated May 8, 1990. They also asserted as affirmative defenses that they had been induced to enter into the contract by fraudulent misrepresentations and that Robison had failed to construct the house in a good and workmanlike manner.

At trial, Robison claimed that the Madsens owed him

$61,101.22, plus subsequent finance charges for a total of $71,756.21. At the close of Robison's case, the district court granted the Madsens' motion to dismiss Robison's petition on grounds of insufficient evidence of the actual cost of constructing the Madsens' residence. Robison then filed a motion for new trial, which the district court overruled. Robison appealed to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

ANALYSIS

To dispose of this appeal, we need only address Robison's first assignment of error that the district court erred in dismissing Robison's petition on the ground of insufficient evidence of the actual direct construction cost. In connection therewith, we must also address Robison's claim that a statement contained in the Madsens' answer was a judicial admission.

In their answer, the Madsens alleged for their first affirmative defense that Robison had quoted the Madsens various estimates of construction costs, that Robison had made material representations of fact that were false or made with reckless disregard for their truth or falsity, and that the Madsens had relied on these representations in entering into the contract. As part of this allegation, the Madsens also stated:

> [T]he amount set forth in the April 30, 1990 estimate was in the amount of $186,798 and *the contracted amount was in the amount of $191,966*; and the variance between said sums arose because of the failure of the Plaintiff to include certain items in preparing said amount and the Defendants were aware of this variance and asserted [sic] to the variance by executing the contract.

(Emphasis supplied.)

Robison claimed, at the hearing on his motion for new trial and on appeal, that by making this assertion in their answer, the Madsens made a judicial admission that the contract established a *minimum* price of $191,966. Robison argues that because the Madsens admitted a minimum contract price in their answer, he did not have to produce evidence of the

contract price at trial. Therefore, he argues that he is entitled to at least $34,287.13, which is the difference between Robison's alleged minimum price of $191,966 and the amount the Madsens paid, $157,678.87.

Robison did not advance this theory of a minimum contract price in his pleadings or at trial. His petition alleges that the amount due under the contract was $61,101.22 and that this amount represented the actual direct construction cost, plus 10 percent for overhead and profit, less the amount paid by the Madsens. He did not claim in his petition that he was owed any minimum amount.

The record fails to reflect that Robison claimed at trial that the contract established a minimum price. Throughout Robison's testimony at trial, he consistently characterized the contract price as the actual direct cost of constructing the residence plus 10 percent, regardless of whether that amount turned out to be more or less than the estimate of $191,966 set forth in the contract.

Robison raised this argument only after the district court determined that Robison had failed to produce sufficient evidence of the actual direct construction cost and dismissed Robison's case. The time to have raised this theory of a minimum price was not on a motion for new trial or in this court on appeal. See *Ford v. County of Perkins*, 190 Neb. 304, 207 N.W.2d 694 (1973).

An issue not presented to or passed upon by the trial court generally is not appropriate for consideration on appeal. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994). An appellate court is obliged to dispose of a case on the basis of the theory presented by the pleadings on which the case was tried. *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993). Cases are determined in an appellate court on the theory upon which they were tried. *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992).

Upon a de novo review of this cause on the theory upon which it was tried, we find that the district court did not err in dismissing Robison's petition for lack of sufficient evidence.

Under contracts designed as "cost plus" agreements, the amount owing the builder should be computed on the basis of

the amount actually spent for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors. *LaPuzza v. Prom Town House Motor Inn, Inc.*, 191 Neb. 687, 217 N.W.2d 472 (1974). The burden of proof is upon one claiming a mechanic's or construction lien to show that the material furnished by him was used in the construction of the building. See *Lofholm v. Stoltenberg*, 178 Neb. 318, 133 N.W.2d 387 (1965).

In this case, the contract defined actual direct construction costs as those costs incurred in completing the Madsens' house according to plans and specifications. To prove the actual direct construction cost, Robison offered statements that he compiled from his subcontractors' invoices and his own employees' labor charges. With regard to the invoices, Robison testified that neither he nor his employees verified that the items on the invoices had been installed in the Madsens' residence or that the work on the invoices had been performed. Robison testified that he had reviewed the invoices generally for accuracy, but that it was possible he had billed the Madsens for items they did not receive. Given this testimony, we find that Robison failed to meet his burden of proving that the material and labor for which he charged the Madsens went into, and became a part of, the finished structure, and therefore, Robison failed to provide sufficient evidence of the actual direct construction costs for completing the house according to plans and specifications.

Even if Robison had advanced his theory of a minimum contract price at trial, his argument would fail because the allegation at issue in the Madsens' answer was not a judicial admission.

A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true. See, *Lange Building & Farm Supply, Inc. v. Open Circle "R", Inc.*, 210 Neb. 201, 313 N.W.2d 645 (1981); *Sempek v. Sempek*, 198 Neb. 300, 252 N.W.2d 284 (1977).

Judicial admissions must be unequivocal. See *Modern*

Plumbing & Heating, Inc. v. Journey West Campground, Inc., 193 Neb. 781, 229 N.W.2d 192 (1975). See, also, *Field v. Aim Management Group, Inc.*, 845 S.W.2d 469 (Tex. Civ. App. 1993) (judicial admission must be deliberate, clear, and unequivocal); *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 589 N.E.2d 640 (1992) (judicial admission is any admission contained in original verified pleading which is not the product of mistake or inadvertence). This court has further stated that an admission in an answer does not extend beyond the intendment of the admission *as clearly disclosed by its context*. See, *O'Neal v. First Trust Co.*, 160 Neb. 469, 70 N.W.2d 466 (1955); *Barry v. Barry*, 147 Neb. 1067, 26 N.W.2d 1 (1947).

The statement at issue in the Madsens' answer appears in the context of allegations regarding the various *estimates* proffered by Robison. The specific reference to $191,966 clearly refers to the estimated cost set forth on the first page of the written contract. The intent of this statement, as clearly disclosed by its context, was not to admit that the contract established a minimum price, but simply to allege what the parties had agreed to as the estimated cost in the written contract. The statement in the Madsens' answer is not an unequivocal admission that the contract established a minimum price of $191,966. This is particularly true because the contract itself states in plain language that the contract price is the actual direct construction cost plus 10 percent.

Furthermore, even if the Madsens had unequivocally admitted in their answer that the contract established a minimum price, Robison could not bind the Madsens to it when Robison never relied on the admission and, in fact, produced evidence to the contrary. See, *Collision Center Paint & Body v. Campbell*, 773 S.W.2d 354 (Tex. Civ. App. 1989) (a party waives the right to rely on opponent's admission unless objection is made to the introduction of evidence contrary to those admissions); *Jenni v. Gamel*, 602 S.W.2d 696 (Mo. App. 1980) (admission in pleading is not binding upon party where opponent does not rely upon the admission, but, rather, introduces evidence to the contrary). See, also, 31A C.J.S. *Evidence* § 381 c. (1964).

As already noted, Robison testified throughout the trial that

the contract obligated the Madsens to pay, not a minimum price, but the actual direct construction costs plus 10 percent. He also introduced the contract into evidence to establish, at least in part, that the contract was a "cost plus" contract. Therefore, Robison could not bind the Madsens to an admission he never relied upon and, in fact, contradicted during trial.

Finally, we must comment upon the trial court's use of stopwatches to keep track of each party's allotted time. The court apparently allowed each party 10½ hours to present his or their case, including cross-examination and arguments on objections, and used stopwatches to monitor the amount of time that had been used by each side. It is undisputed that a trial judge has broad discretion over the conduct of a trial. *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991). In this case, the parties have not suggested, nor have we found, that the district court abused its discretion by unduly limiting the parties' presentation of evidence with the use of stopwatches. However, we caution trial courts against the use of stopwatches or other similar limitations on time. Such methods of controlling the course of trial might well overly restrict the presentation of evidence and could prejudice a party's right to fully present that party's case.

CONCLUSION

Upon de novo review of the record, we find no merit to Robison's argument that the Madsens made a judicial admission as to a minimum contract price of $191,966. Treating as admitted the truth of all relevant evidence favorable to Robison and giving Robison the benefit of all permissible inferences deducible from the properly admitted evidence, we further find from our de novo review of the record that Robison failed to produce sufficient evidence to establish a prima facie case of the amount owed him. The district court's denial of Robison's motion for new trial was neither erroneously prejudicial nor an abuse of discretion. Therefore, the decision of the district court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

JEAN-DANIELE REICHERT, APPELLEE, V. RICKEY MURL REICHERT, APPELLANT.

516 N.W.2d 600

Filed May 27, 1994. No. S-92-979.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Evidence: Appeal and Error.** In conducting de novo review, when evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Property Division.** The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties.
4. _____. With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance.
5. **Property Division: Pensions.** Military pensions are included in the marital estate.
6. _____: _____. The marital estate includes only that portion of a pension which is earned during the marriage.
7. **Property Division.** Though generally a division of one-third to one-half of the marital estate is appropriate, property divisions are not subject to any rigid mathematical formula.
8. _____. In determining the appropriateness of a division of marital property, the ultimate test is one of reasonableness.
9. **Property Division: Alimony.** In dividing property upon a dissolution of marriage and in determining alimony, a court should consider four factors: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.
10. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
11. _____. In determining whether alimony should be awarded, a court should consider what effect, if any, the marriage had on the ability of the wife to secure gainful employment in the future and the earning capacity of the husband.
12. **Property Division: Alimony.** As with a division of property, the ultimate test for an award of alimony is one of reasonableness.
13. **Alimony.** When a spouse sacrifices seniority for the sake of a marriage, a court may consider that loss of seniority as favoring an award of alimony.

14. **Divorce: Attorney Fees.** In dissolution proceedings, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed as modified.

Carl I. Klekers for appellant.

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

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

PER CURIAM.

Rickey Murl Reichert (husband) appeals from a decree of dissolution. We affirm as modified.

In 1972, the parties were married in Gibraltar. In 1992, Jean-Daniele Reichert (wife) filed a petition for dissolution of the marriage. No children were born of the marriage.

After a trial, the district court entered its decree of dissolution. By way of property division, the court awarded to husband a pickup truck and other personal property. The court awarded to wife a Jeep, other personal property, and the marital residence. In addition, the court awarded wife $335 per month from husband's military pension and $1,000 in insurance proceeds to repair the garage roof. The court evenly divided the savings account used by husband, 43 savings bonds, and husband's thrift savings account. As alimony, the court awarded wife $300 per month for 120 months. As attorney fees, the court awarded wife $500, in addition to the $250 attorney fees it had awarded in an earlier temporary order.

Husband appealed, and under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court. Husband alleges that the district court erred in awarding wife (1) an inequitable amount of the property, (2) alimony, and (3) attorney fees.

In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.

Pendleton v. Pendleton, 242 Neb. 675, 496 N.W.2d 499 (1993); *McWha v. McWha*, 241 Neb. 355, 488 N.W.2d 357 (1992); *Stover v. Stover*, 240 Neb. 391, 482 N.W.2d 244 (1992). In conducting such de novo review, when evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *McWha, supra*; *Stover, supra*. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. See, *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992) (property division, attorney fees); *Larimore v. Larimore*, 240 Neb. 13, 480 N.W.2d 192 (1992) (property division); *Ziebarth v. Ziebarth*, 238 Neb. 545, 471 N.W.2d 450 (1991) (alimony, attorney fees); *Murrell v. Murrell*, 232 Neb. 247, 440 N.W.2d 237 (1989) (alimony).

Husband first asserts that the trial court inequitably divided the property. Specifically, husband argues that the trial court erred in awarding wife one-half of his savings account, the $1,000 insurance check, and one-half of the 43 savings bonds because, he claims, those items do not exist.

There being no settlement agreement between the parties, the trial court was obliged to order an equitable division of the marital estate. Neb. Rev. Stat. § 42-366(8) (Reissue 1988). The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties. See, *Grummert v. Grummert*, 195 Neb. 148, 237 N.W.2d 126 (1975); *Tavlin v. Tavlin*, 194 Neb. 98, 230 N.W.2d 108 (1975); *Jablonski v. Jablonski*, 173 Neb. 544, 114 N.W.2d 1 (1962). With some exceptions not relevant here, the marital estate does not include property acquired by one of the parties through gift or inheritance. See, *Preston, supra*; *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988); *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986).

In the present action, the marital estate indisputably includes the family residence, a pickup truck, a Jeep, a thrift savings account, husband's military pension, and assorted items of tangible personal property. The disputed items are a savings account, an insurance check, and some savings bonds. Husband's argument regarding these disputed items amounts to

a claim that the marital estate does not include these items. We address each disputed item in turn, reserving for the moment the question of whether the items were equitably divided.

The trial court awarded wife "one-half of the savings account used by [husband], which one-half equals $300.00." There is no evidence of such an account. The trial court erred in considering such a savings account as part of the marital estate and awarding a portion thereof to wife. The decree should be modified by striking out this award.

The trial court awarded wife "the $1,000.00 insurance check . . . but if the same is not in existence, [husband] shall pay to [wife] the sum of $1,000.00." Wife testified that the garage roof was damaged 2 years ago, that the damage was covered by insurance, and that the insurance company sent a check for approximately $1,000, which husband appropriated. Wife further testified that the damage has not been repaired. Husband did not dispute the existence of the check. Husband instead testified that he had repaired the garage roof several times and that he thought it no longer leaked.

The trial court clearly determined that the insurance check existed and was kept by the husband. The check was a part of the marital estate because it was property accumulated during the marriage through the parties' joint ownership of the house. The court did not err in considering the insurance check a part of the marital estate.

The trial court awarded wife "one-half of the value of the 43 savings bonds owned by the parties." Wife testified that, for 20 years, she and her husband regularly purchased savings bonds. On the list of assets which she entered into evidence, wife claimed 43 savings bonds with a total value of $4,300. When asked why she had listed 43 bonds, wife testified that those were the only ones she could find and that to her knowledge, they still exist. Husband testified that after he had been served with notice of the dissolution action, he had used a number of savings bonds to license and register the pickup truck; according to husband, there were only six or seven bonds left. Husband also testified that the type of bonds he purchased could not be cashed for 6 months, that their prematurity cash value was $50, and that their value upon maturity was $100.

The trial court clearly determined that 43 savings bonds existed. Because the testimony of husband and wife directly conflicted on this point, we choose to give weight to the fact that the trial court observed the witnesses and believed one version of the facts rather than another. Accordingly, the trial court did not err in including the 43 savings bonds as part of the marital estate. However, the trial court made no finding as to the value of the bonds. Because there was no evidence that any of the bonds had matured, we find that the bonds each had a value of $50. The decree should be modified to reflect this valuation.

Finally, husband's military pension remains to be addressed. It is undisputed that the military pension is included in the marital estate. See § 42-366(8). See, also, *Ray v. Ray*, 222 Neb. 324, 383 N.W.2d 752 (1986); *Rockwood v. Rockwood*, 219 Neb. 21, 360 N.W.2d 497 (1985); *Taylor v. Taylor*, 217 Neb. 409, 348 N.W.2d 887 (1984). The question is how much of the pension plan should be included. We have addressed this question only obliquely in *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991).

In *Hildebrand*, the parties were married to each other twice. The first marriage was dissolved in Alaska. The second marriage was dissolved in Nebraska. During the second dissolution, the wife argued that she had a right to her husband's pension based on the total years of marriage. Rejecting this argument, we held that the wife's rights extended only to the portion of the pension earned during the second marriage. This holding was based on the fact that under Alaska law, which did not recognize military pensions as marital property, the portion of the pension earned during the first marriage became the sole property of the husband at the time of the first divorce.

Implicit in and consistent with the *Hildebrand* opinion is the notion that the marital estate includes only that portion of the pension which is earned during the marriage. A number of other courts have adopted this rule. See, e.g., *In re Marriage of Gallo*, 752 P.2d 47 (Colo. 1988); *In re Marriage of Parker*, 252 Ill. App. 3d 1015, 625 N.E.2d 237 (1993); *Urbick v. Urbick*, 474 N.W.2d 452 (Minn. App. 1991); *Olivo v. Olivo*, 82 N.Y.2d 202,

624 N.E.2d 151, 604 N.Y.S.2d 23 (1993); *Randol v. Randol*, 849 P.2d 1118 (Okla. App. 1993); *Noll v. Noll*, 297 S.C. 190, 375 S.E.2d 338 (S.C. App. 1988); *Banagan v. Banagan*, 437 S.E.2d 229 (Va. App. 1993); *Butcher v. Butcher*, 178 W. Va. 33, 357 S.E.2d 226 (1987). On consideration, we adopt the rule that the marital estate includes only that portion of a pension which is earned during the marriage.

Husband was in the military for 24 years. Husband and wife were married for 13 of those years. The marital estate thus includes thirteen twenty-fourths of husband's military pension.

Because the trial court chose to award wife a portion of husband's monthly pension income, rather than a lump sum, we must also calculate the portion of husband's monthly pension income which should be included in the marital estate. Husband's retiree account statement reflects that his gross monthly pension income is $1,259 and that after a deduction for federal income tax, three additional deductions are taken from this amount.

The first deduction is "VA Compensation." In explanation, husband testified that he is a disabled veteran, that the deducted amount is sent by the Veterans' Administration, and that the deducted amount is not taxable. Husband's explanation is less than complete. However, it appears that neither husband nor wife has any rights in the money represented by this deduction. The deducted amount, therefore, is not a part of the marital estate.

The second deduction is a "Survivor Benefit Plan Cost" of $81.84. Husband testified that this amount pays for a pension to be paid to his survivors upon his death. Husband also testified that he would stop paying for this benefit unless ordered to pay by the court. As such, we will not consider survivor benefit plan cost as a true deduction.

The third deduction is an "Allotment" of $75.44. Husband testified that this allotment pays for term life insurance on both himself and wife. Although we recognize that life insurance may be a worthwhile expense, the allotment constitutes no more than a direct payment from husband's pension account into his life insurance account. Accordingly, we will not consider the allotment as a true deduction.

Husband's gross pension income, less his federal income tax withholding and VA compensation payment, equals $1,086.88. The marital estate includes thirteen twenty-fourths of this amount, or $588.73. The decree awarded wife $335 per month from this pension—57 percent of the marital estate portion of the pension.

Having determined the contents of the marital estate, we must now examine the property awarded to each party and the value of that property. Although the parties' briefs present very different assessments of the total value of the property awarded to each, the record reflects that the parties did not dispute the value of any property other than the residence. We begin by outlining the property awarded to each party and the value of that property.

The trial court ordered the parties to equally divide the savings bonds and the thrift savings account. As discussed previously, the savings bonds are valued at $50 each, $2,150 total. The thrift account is valued at $24,893.63.

The trial court awarded husband the pickup truck and other personal property. Husband estimated the truck's value at $18,500, of which $2,000 is equity and $16,500 is debt. The court ordered that husband alone would be liable for this debt. Not all of the personal property awarded to husband was assigned a value. Those items for which values were assigned, including the items he took from the residence, some of the items specifically awarded him, and his guns, total $5,930. Those items for which no value was assigned include tools, sporting equipment, a gun cabinet, a Shop-Vac, a self-propelled lawnmower, garden tools, a collection of wine pitchers, cookbooks and technical books, animal skull mounts and tanned skins, luggage, and a potbellied stove.

The trial court awarded wife the Jeep, other personal property, $1,000 in insurance proceeds, a portion of husband's pension, and the marital residence. Wife estimated the Jeep's value at $8,900, of which $4,721.08 is equity and $4,178.92 is debt. The court ordered that wife alone would be responsible for this debt. Not all of the personal property awarded to wife was assigned a value. Those items for which a value was assigned, including the items which wife listed as remaining in

the residence and the additional items which husband listed as remaining in the residence, total $9,275. Items for which no value was given include ladders, kitchen utensils, and bronze cookware.

We now turn to the marital residence. Husband prepared an exhibit entitled "Major Assets and Liabilities of the Parties." That exhibit lists the value of the home as $55,000. The exhibit also lists $47,000 in encumbrances on the home. Wife prepared similar exhibits listing the parties' assets and liabilities. Wife listed the value of the home as $50,000. Wife testified that the house would have a value of $55,000 if the garage roof was repaired and the kitchen repainted. Wife listed $47,549 in encumbrances on the home.

The trial court made no findings regarding the value of the home or the extent of the encumbrances thereon. Since we find neither party's testimony more credible than the other, we have decided to split the difference. We find that the value of the home is $52,500, of which $5,225.50 is equity and $47,274.50 is debt. The trial court ordered that wife alone would be liable for this debt.

In summary, the parties' assets, not counting the pension, equal $54,195.22, and the parties' liabilities equal $67,953.42. The trial court's division of the property award wife 60 percent of the assets and 76 percent of the liabilities, husband 40 percent of the assets and 24 percent of the liabilities. Additionally, the trial court awarded wife 57 percent of the marital estate portion of husband's monthly pension.

Having outlined the property division, we may now address husband's contention that the property was inequitably divided. Though generally a division of one-third to one-half of the marital estate is appropriate, property divisions are not subject to any rigid mathematical formula. *Blaser v. Blaser*, 225 Neb. 104, 402 N.W.2d 875 (1987); *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986). In determining the appropriateness of a division of marital property, the ultimate test is one of reasonableness. *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992); *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991); *Mellor v. Mellor*, 235 Neb. 361, 455 N.W.2d 546 (1990). See Neb. Rev. Stat. § 42-365 (Reissue

1988).

Husband cites *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988), for the proposition that when both parties to a dissolution have worked throughout the marriage and no children are involved, the property should be divided equally. In *Ritz*, the trial court awarded the husband a higher percentage of the marital estate than the wife. In calculating the amount awarded to each party, we were careful to use *net* values—the total assets awarded to each less the total liabilities awarded to each. We held that the trial court had divided the property—largely a working farm—in the only feasible manner. We required the husband to make a cash payment to the wife in order to equalize the property division.

In the present action, the property division left husband with more assets than debts, but left wife with more debts than assets. Husband received approximately $21,500 in assets and $16,500 in debts, for a net surplus of $5,000. Wife received approximately $33,700 in assets and $51,500 in debts, for a net deficiency of $17,800. If we were to strictly follow *Ritz*, as husband suggests, husband would be ordered to make a cash payment to wife, not vice versa. Rather than order a lump-sum payment, the trial court ordered husband to pay wife a portion of his pension each month. This order fulfills the requirements of, and does not conflict with, *Ritz*.

In dividing property upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. § 42-365.

The first factor we consider is the circumstances of the parties. At the time of trial, husband was 48 years old and wife was 46 years old. Husband testified that his health was "not great"; that he suffered from high blood pressure, diabetes, and gout; and that his teeth "are in bad shape." Wife testified that her health was "okay."

The next three factors we consider are the duration of the marriage, the contributions to the marriage, and the parties' ability to obtain gainful employment. We will consider these factors together.

In the present action, neither party brought significant assets to the marriage. Both parties were gainfully employed throughout the 20-year marriage and contributed their earnings to the marriage. Husband first served in the military and now is employed, in a civilian capacity, as a meteorologist at Offutt Air Force Base. Wife is a visual merchandiser—she decorates department stores—and is currently employed by Dillard's department stores.

Considering the factors outlined above, the division of the marital estate was reasonable. Both parties are approximately the same age, though husband is in somewhat poorer health. Both parties worked throughout the marriage and contributed their earnings to the marriage. The parties' net marital estate, not including the pension, is in the red. Wife received the lion's share of this deficiency. To compensate, she received a higher share of the marital estate portion of the pension than husband. We find that the trial court did not abuse its discretion in dividing the marital estate.

Husband next asserts that the trial court erred in awarding wife alimony of $300 per month for 10 years.

"The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances . . . make it appropriate." § 42-365. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992); *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988).

In determining whether alimony should be awarded, a court should consider the same four factors used in determining a division of property. In addition to these four factors, a court determining alimony should also consider what effect, if any, the marriage had on the ability of the wife to secure gainful employment in the future and the earning capacity of the husband. See, *Preston, supra*; *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991); *Kimbrough, supra*. As with a

division of property, the ultimate test is one of reasonableness. *Preston, supra*; *Stuczynski, supra*. See § 42-365.

We first consider the marriage's effect on wife's employability. Although wife is gainfully employed in her chosen field, the marriage has nonetheless affected her earning capacity. During the marriage, wife's career was often interrupted by the frequent moves necessitated by husband's service in the military. Wife lived first in Spain, then in Michigan, then in Switzerland, then in Illinois, then in Spain again, then in Germany, and then finally in Nebraska. Wife testified that these moves prevented her from building up any significant seniority.

Wife interrupted her career to follow her husband in his career. These interruptions caused wife to lose seniority. When a spouse sacrifices seniority for the sake of a marriage, a court may consider that loss of seniority as favoring an award of alimony. See, *Kennedy v. Kennedy*, 622 So. 2d 1033 (Fla. App. 1993) (Diamantis, J., dissenting); *Brook v. Brook*, 289 So. 2d 766 (Fla. App. 1974); *In re Marriage of Beeh*, 214 N.W.2d 170 (Iowa 1974); *In re Marriage of Brown*, 462 N.W.2d 683 (Iowa App. 1990); *LaValle v. LaValle*, 430 N.W.2d 224 (Minn. App. 1988); *In re Marriage of Tibbles*, 63 Or. App. 774, 665 P.2d 1267 (1983); *Carty v. Carty*, 87 Wis. 2d 759, 275 N.W.2d 888 (1979). Accord *Prosser v. Prosser*, 156 Neb. 629, 57 N.W.2d 173 (1953).

We next consider husband's ability to pay. According to husband's 1991 W-2 form, his monthly wages, after taxes, are $1,835.75. Husband's monthly pension income, after deducting for taxes, his VA payment, and his court-ordered payment to wife, is $751.88. Husband's stated monthly expenses are $2,121 plus $75.44 automatically deducted from his pension for life insurance. In all, husband's income outstrips his expenses by $391.19 per month.

We also note wife's need for support. According to her 1991 W-2 form, her monthly wages, after taxes, are $1,367. Her monthly income from husband's pension is $335. Wife's stated expenses are $2,254.73 plus $104.39 automatically deducted from her paycheck for health insurance. Husband argues that wife's housing expenses are too high because she has retained

the marital residence and must pay both the mortgage and the home improvement loan, which total $781.52 per month. Husband suggests that we replace this expense with a $400 expense for an "average rental expense" and order the house sold. We are constrained to point out that, at trial, wife requested the marital residence and husband stated that he had no objection to this request. Additionally, husband failed to present any evidence of the cost of an average monthly rental. In all, wife's expenses outstrip her income by $657.12 per month.

In light of husband's positive monthly balance, wife's negative monthly balance, and wife's 20 years of lost seniority, we find that the trial court did not abuse its discretion in awarding wife $300 per month for 10 years.

Husband next asserts that the trial court erred in awarding wife $250 in temporary attorney fees as part of the court's temporary order and $500 in attorney fees as part of the dissolution decree. In dissolution proceedings, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992); *Smith v. Smith*, 222 Neb. 752, 386 N.W.2d 873 (1986). The property division in the present action resulted in wife receiving a net deficiency of $17,800 and husband receiving a net surplus of $5,000. This discrepancy is somewhat remedied by the monthly payments that wife will receive from husband. Those monthly payments, however, do not compensate wife so completely as to justify a reversal of the trial court's award of attorney fees. We find that the trial court did not abuse its discretion in awarding attorney fees.

The judgment of the trial court is affirmed as modified herein.

AFFIRMED AS MODIFIED.

WHITE, J., participating on briefs.

JOHN R. YOUNG, JR., APPELLANT, V. FIRST UNITED BANK OF BELLEVUE, A NEBRASKA BANKING CORPORATION, ET AL., APPELLEES.

516 N.W.2d 256

Filed May 27, 1994. No. S-92-1001.

1. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
2. _____: _____. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
3. **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.
4. **Libel and Slander.** Whether a qualified privilege exists is a matter of law.
5. _____. In the law of libel and slander, a communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information.
6. **Libel and Slander: Proof.** The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication.
7. **Libel and Slander: Words and Phrases.** Malice has been defined as hate, spite, or ill will.
8. _____: _____. Defamation is language the nature and obvious meaning of which is to impute to a person the commission of a crime or to subject him to public ridicule, ignominy, or disgrace.
9. **Affidavits.** Supporting and opposing affidavits (1) shall be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein.
10. _____. Statements in affidavits as to opinion, belief, or conclusions of law are of no effect.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Thomas J. Walsh and Larry A. Jobeun, of Walsh, Fullenkamp & Doyle, for appellees.

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

BOSLAUGH, J.

The plaintiff, John R. Young, Jr., appeals from the judgment of the district court for Douglas County, which granted the defendants' motion for summary judgment. Young had sought damages for alleged libel, but the trial court found that the communication in issue was true, qualifiedly privileged, and made without malice. Young assigns as error the granting of the motion, claiming that the issues of qualified privilege, malice, and the truth of the statements in the letter are questions of fact for the jury.

The defendants in this action are Crown Bancshares, Inc. (Crown), First United Bank of Bellevue (FUB), and Charles R. Clatterbuck. Crown is a holding company for FUB. Both Crown and FUB are Nebraska corporations. Clatterbuck is FUB's current chairman of the board and is Crown's acting chairman of the board.

Young was employed as the president and chief executive officer of FUB from its inception in December 1985 until his resignation in March 1988. During the term of his employment, Young had the authority to make loans of up to $200,000. The board of directors of FUB had the right to approve or disapprove the loans that Young made. FUB made a significant number of bad loans between its inception and the time of Young's resignation. The parties dispute the actual amount of control exercised by each other over the loans that FUB made. A resolution of this dispute is not necessary to the analysis of this case.

Clatterbuck and Robert Doyle, an FUB board member, asked Young to resign in March 1988. He resigned, accepting an offer to act as a consultant to FUB for $3,000 per month over the next 6 months. The board of FUB made three payments and discontinued the payments, alleging that Young had misled the board in his operation of FUB. Young successfully sued FUB for nonpayment. Clatterbuck stated during a deposition taken for the trial that he questioned Young's integrity. Following the lawsuit, Doyle was quoted in The Bellevue Leader newspaper as

saying that the ruling of the trial court did not clear Young of any wrongdoing because "Young did not take the stand to rebut anything."

On June 29, 1990, Clatterbuck, as the chairman of Crown, sent the letter which is the subject of this suit to Crown's shareholders. In pertinent part, the letter stated:

> Most of you are aware that First United Bank has been plagued with severe problems stemming from decisions made while the bank was being managed by Mr. John Young and Tom Edwards [vice-president of FUB during Young's tenure]. As a result, your company lost over $1.1 million dollars, mostly attributed to poor loan decisions and excessive overhead expense.

Young filed this action in the district court for Douglas County. He sought special and general damages for libel, alleging that the June 29 letter was defamatory and made with malice. He further alleged that within 20 days, he had sent a demand for correction pursuant to Neb. Rev. Stat. § 25-840.01 (Reissue 1989). In answer, the defendants alleged that the statements in the letter were true, qualifiedly privileged, and made without malice.

The defendants moved for summary judgment. The district court found that the statements were true and qualifiedly privileged, but stated that the truth of the statements and the qualified privilege of the communication did not dispose of the case. The district court found that damages would be available regardless of truth or privilege if the communication had been made with actual malice. The court reviewed the allegations made by Young and held that the actions of the defendants did not constitute actual malice. Accordingly, the district court granted summary judgment for the defendants. Young appealed.

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence

showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Id.* 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.*

Young claims that three issues of material fact exist that preclude summary judgment: (1) whether the statements in the June 29 letter were true, (2) whether the letter is qualifiedly privileged, and (3) whether the statements were made with malice. We will address each of these matters separately.

The district court found that the statements about Young's decisions were true. Young claims that the statements were false because the board, not Young, managed FUB and approved each loan. Young claims that the board made all the major decisions and that he was not responsible for the condition of FUB. The record shows that the board appointed a "loan committee" to review loans made by Young and Edwards after most of the bad loans were made. The vast majority of the bad loans which resulted in the losses to FUB were made when Young was the president of FUB and before the loan committee came into existence. Young admits that he had authority to make loans on behalf of FUB. No evidence was presented that showed that his authority was hindered before the formation of the loan committee. He admits that he alone was in charge of the day-to-day operations of FUB. The trial court correctly found that the truth of the statements was not in issue; FUB's losses were attributable to the decisions that were made while Young was its manager.

The district court also found that the letter was a qualifiedly privileged communication. Whether a qualified privilege exists is a matter of law. *Molever v. Levenson*, 539 F.2d 996 (4th Cir. 1976). The trial court quoted *Turner v. Welliver*, 226 Neb. 275, 287, 411 N.W.2d 298, 307 (1987), for the following proposition of law:

> A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a

reasonable duty, or is proper, for the writer to give the information.

A remarkably similar situation was addressed by the U.S. Court of Appeals for the Fourth Circuit in *Molever v. Levenson, supra*. In *Molever*, a former bank president filed actions for libel and slander against several of the bank's board members who had been critical of his performance during a board meeting. The board members allegedly made statements that the former president had been " 'grossly incompetent in his position as president of the Bank' " and that the former president had " 'wrecked this bank and is responsible for its present financial crisis.' " 539 F.2d at 1004. The jury returned a verdict for the former president, and the trial court entered a judgment notwithstanding the verdict for the board members, which was upheld by the circuit court.

In this case, the trial court noted that no evidence was presented which showed that the June 29 letter was sent to anyone other than the shareholders. The June 29 letter was a communication between the chairman of a corporation and the shareholders of the corporation. Other courts have held that communications between a director of a corporation and the shareholders of the corporation are qualifiedly privileged. See, e.g., *Kainz v. Lussier*, 4 Haw. App. 400, 667 P.2d 797 (1983); *World Oil Co. v. Hicks*, 46 S.W.2d 394 (Tex. Civ. App. 1932); *Lind v. Lynch*, 665 P.2d 1276 (Utah 1983).

In *Turner v. Welliver, supra*, this court held that a qualified privilege existed between an insurer and an insured because the parties share a common interest. The director of a corporation and the shareholders of the corporation share an interest that is at least as compelling as that shared by parties to an insurance contract. This court agrees with the finding of the trial court that the June 29 letter enjoyed a qualified privilege as a matter of law and that no issue of material fact existed which precluded summary judgment.

Since this court has resolved the questions regarding truth and qualified privilege, the only assigned error yet unresolved concerns the trial court's finding that insufficient evidence of malice existed for the case to go forward. Young must prove actual malice to prevail at trial. See *Whitcomb v. Nebraska*

State Education Assn., 184 Neb. 31, 165 N.W.2d 99 (1969). "Where a qualified privilege exists, there can be no recovery without proof of malice." *Turner v. Welliver*, 226 Neb. at 287, 411 N.W.2d at 307. "The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication." Neb. Rev. Stat. § 25-840 (Reissue 1989).

Malice has been defined as hate, spite, or ill will. *Turner v. Welliver, supra*. Young cites as proof of malice the statement of Doyle to The Bellevue Leader that the ruling in favor of Young in the contract case did not clear Young of any wrongdoing. Young also cites as proof of malice the statement by Clatterbuck in his deposition that Clatterbuck questioned Young's integrity. Young cites *Fitzgerald v. Young*, 89 Neb. 693, 132 N.W. 127 (1911), for the proposition that defamation that is not pled may be introduced to prove malice, but not damages, when malice is in fact an issue. However, neither of these statements is defamatory. Defamation is language the nature and obvious meaning of which is to impute to a person the commission of a crime or to subject him to public ridicule, ignominy, or disgrace. *Treutler v. Meredith Corporation*, 455 F.2d 255 (8th Cir. 1972). Young offers no proof that the statements made by the defendant are defamatory, and the trial court was correct in finding that the statements were not evidence of actual malice.

Young claims that the timing of the letter is further proof of malice; the letter was sent more than 2 years after Young had left FUB. The defendants contend that the letter was sent to Crown's shareholders in 1990 only after Crown was aware of its financial status and was directed to inform its shareholders by the FDIC. Young offered neither proof that the alleged delay was malicious nor reasons why a jury might find the delay malicious. The trial court properly ruled that the alleged delay in the dissemination of the letter was not evidence of malice.

Finally, Young claims that paragraph 17 of his affidavit is sufficient to deny summary judgment. That paragraph states: "In Affiant's opinion, the letter which is the subject of this litigation was not made in good faith, was done with malice,

and with no reasonable or probable grounds for the allegations contained therein to be true." The trial court found that the affidavit was not sufficient to resist a motion for summary judgment. We agree. "The rule in Nebraska regarding . . . affidavits requires that '[s]upporting and opposing affidavits [1] shall be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein.' " *White v. Ardan, Inc.*, 230 Neb. 11, 21, 430 N.W.2d 27, 33 (1988) (quoting Neb. Rev. Stat. § 25-1334 (Reissue 1989)). " '[S]tatements in affidavits as to opinion, belief, or conclusions of law are of no effect. . . .' " *Eden v. Klaas*, 165 Neb. 323, 328, 85 N.W.2d 643, 646 (1957). The statements made in paragraph 17 of Young's affidavit are conclusory and, therefore, of no effect.

Because we find that the trial court correctly determined that the statements in the June 29 letter were true, qualifiedly privileged, and made without actual malice, we hold that the granting of the defendants' motion for summary judgment was proper. The trial court's judgment is affirmed.

AFFIRMED.

WHITE, J., dissenting.

I agree with majority that Clatterbuck's letter was qualifiedly privileged. However, I would find that Young has at least raised an issue of fact as to whether Clatterbuck acted with malice. I would therefore hold that summary judgment is inappropriate. Accordingly, I respectfully dissent.

A defendant to a libel action may establish that the allegedly libelous communication was qualifiedly privileged. The plaintiff can overcome this privilege by establishing that the communication was made with actual malice. *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987). In the context of a qualified privilege, actual malice means hate, spite, or ill will. *Id.*

The majority states that defamatory statements which have not been pled may be introduced as evidence of malice. True enough. But a statement need not be defamatory to be evidence of malice. "I wrote that letter with hate, spite, and ill will" is not a defamatory statement, but is clearly evidence of malice.

Virtually any admissible statement may be introduced as evidence of malice. The real question, on a motion for summary judgment, is whether the statement which has been introduced raises an issue of fact as to malice.

In deposition, Clatterbuck testified that he questioned Young's integrity. The testimony raises the possibility that Clatterbuck bore Young ill will, which in turn raises the possibility that Clatterbuck's letter was written with actual malice. Young has presented a genuine issue of material fact as to malice, and he should be able to try this issue to a jury.

IN RE ESTATE OF DEMPSEY DAVID HOLT, DECEASED.
ALAN J. MACKIEWICZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF DEMPSEY DAVID HOLT, DECEASED, APPELLANT, V. DOUGLAS COUNTY, NEBRASKA, APPELLEE.

516 N.W.2d 608

Filed May 27, 1994. No. S-92-1067.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
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.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
4. **Attorney Fees: Costs.** No attorney 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.

Appeal from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge, on appeal thereto from the County Court for Douglas County, JANE H. PROCHASKA, Judge. Judgment of District Court reversed, and cause remanded with direction.

Alan J. Mackiewicz, of Lich, Herold & Mackiewicz, for appellant.

James S. Jansen, Douglas County Attorney, Renne Edmunds, and Edwin T. Lowndes for appellee.

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

FAHRNBRUCH, J.

The issue here is whether intangible personal property located in Nebraska is subject to inheritance tax in this state when a decedent's estate is probated here and the testator was a Texas resident at the time of his death.

The Douglas County Court held that under Neb. Rev. Stat. § 77-2007.01 (Reissue 1990) of the Uniform Reciprocal Transfer Tax Act, such intangible personal property is not subject to this state's inheritance tax. The district court for Douglas County reversed the county court and held that such intangible property is taxable in Nebraska.

The personal representative timely appealed the district court's ruling to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

We reverse the decision of the district court and remand this cause to that court with direction to reinstate and affirm the judgment of the Douglas County Court.

ASSIGNMENT OF ERROR

Summarized and restated, the personal representative of the decedent's estate, Alan J. Mackiewicz, claims that the district court erred in holding that the decedent's intangible personal property located in Nebraska is subject to Nebraska's inheritance tax.

STANDARD OF REVIEW

An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993); *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993).

FACTS

The decedent, Dempsey David Holt, a resident of Tarpley, Bandera County, Texas, died testate in Texas on December 17, 1990. Mackiewicz was designated personal representative of Holt's estate. Mackiewicz initiated probate proceedings in the Douglas County Court and later filed a petition for determination of inheritance tax in that court. The property of the decedent's estate relevant to this appeal consists of intangible personal property having an actual situs at Norwest Bank Nebraska, N.A., in Omaha: two checking accounts, four certificates of deposit, and an individual retirement account.

The appellee, Douglas County, claims that Holt's intangible personal property in Nebraska is subject to Nebraska's inheritance tax. The appellant claims that the property is exempt from Nebraska's inheritance tax pursuant to § 77-2007.01, which generally exempts from Nebraska's inheritance tax a nonresident decedent's intangible personal property located in Nebraska if the decedent's resident state, here Texas, grants a similar exemption to residents of Nebraska. The parties submitted the issue to the county court on stipulated facts.

The county court found that under § 77-2007.01, Holt's intangible personal property in Nebraska is not subject to Nebraska's inheritance tax even though that property was in Nebraska and the probate proceedings were in Nebraska.

On appeal, the district court for Douglas County found that Nebraska's inheritance tax should be imposed on Holt's intangible personal property in Nebraska. Although recognizing that Nebraska law permitted the appellant to probate Holt's estate in Nebraska, the district court stated that (1) the proper state to tax the transfer of Holt's intangible property should have been Texas and (2) if the appellant had probated Holt's estate in Texas, that state would have imposed a death tax on Holt's intangible personal property in Nebraska. The district court then determined that the intent of Nebraska's reciprocal exemption law is to prevent double or multiple death taxation by different states on the same transfer of property, not to avoid taxation. Therefore, the district court held that Nebraska's inheritance tax should be imposed upon Holt's

intangible personal property in Nebraska. The district court reversed the county court and remanded the cause to that court for further proceedings.

The personal representative appealed to the Nebraska Court of Appeals. Under our authority to regulate the caseload of the appellate courts of this state, we removed the matter to this court.

ANALYSIS

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. *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994). In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *Id.*

Section 77-2007.01 states:

> The tax imposed by Chapter 77, article 20, in respect of personal property (except tangible personal property having an actual situs in this state) shall not be payable (1) if the decedent is a resident of a state . . . which at the time of the transfer did not impose a transfer tax or death tax of any character in respect of personal property of residents of this state (except tangible personal property having an actual situs in such state . . .), or (2) if the laws of the state . . . of residence of the decedent at the time of the transfer contained a reciprocal provision under which nonresidents were exempted from transfer taxes or death taxes of every character in respect of personal property (except tangible personal property having an actual situs therein) provided the state . . . of residence of such nonresidents allowed a similar exemption to residents of the state . . . of residence of such decedent.

We find no ambiguity in the words of § 77-2007.01. Giving the words of § 77-2007.01 a plain reading, we find that Holt's intangible personal property in Nebraska is not subject to Nebraska's inheritance tax if, at the time of the transfer of the

property, Texas did not impose a transfer or death tax on the intangible personal property of Nebraska residents.

At the time of the transfer, Texas law contained the following provision:

> (a) A tax is imposed on the transfer at death of the property located in Texas of every nonresident.
>
> . . . .
>
> (c) Property located in Texas of a nonresident includes real property having an actual situs in this state . . . and tangible personal property having an actual situs in this state, but *intangibles that have acquired an actual situs in this state are not taxable.*

(Emphasis supplied.) Tex. Tax Code Ann. § 211.052 (West 1992).

Under the plain language of the Texas statute, a Nebraska resident's intangible personal property having an actual situs in Texas is not taxed by Texas. Therefore, § 77-2007.01 dictates that Nebraska's inheritance tax on personal property is not payable on Holt's intangible personal property in Nebraska.

It may be true, as the district court found, that in general the intent of reciprocal exemption laws is not to avoid taxation altogether, but to avoid double or multiple taxation. To prevent nonresidents from avoiding taxation completely, at least one state has limited the exemption provided for in its reciprocal transfer tax law to cases in which the decedent's resident state has imposed a tax on the transfer of the property exempted. See Wis. Stat. Ann. § 72.11 (West 1989). Nebraska's version of the Uniform Reciprocal Transfer Tax Act contains no such language, and we will not impose such a limitation when Nebraska's Legislature has not seen fit to do so.

We have considered the appellee's interpretations of both the Texas law and § 77-2007.01 of this state's law and find these interpretations to be without merit. Therefore, under a plain reading of the relevant Nebraska and Texas statutes, we find that Nebraska's inheritance tax is not payable as to Holt's intangible personal property having an actual situs in Nebraska.

Finally, we address the appellant's motion in this court for an award of attorney fees pursuant to Neb. Rev. Stat. § 25-824 et

seq. (Reissue 1989). The appellant argues that an award of attorney fees is warranted because the appellee's appeal from the county court to the district court was frivolous.

Section 25-824(5) states: "No 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 . . . ." We find that in appealing the county court's decision, the appellee made a good faith attempt to establish a new theory of law that § 77-2007.01 does not exempt from Nebraska's inheritance tax a nonresident's intangible personal property which has an actual situs in Nebraska. As this is a case of first impression on this theory, no attorney fees will be assessed.

CONCLUSION

We hold that no Nebraska inheritance tax is payable as to Holt's intangible personal property having an actual situs in Nebraska. We, therefore, find no error appearing on the record of the county court. We reverse the district court's decision with direction for that court to reinstate and affirm the judgment of the Douglas County Court.

REVERSED AND REMANDED WITH DIRECTION.

PHILIP M. KELLY, APPELLEE AND CROSS-APPELLANT, V. LINDA F. KELLY, APPELLANT AND CROSS-APPELLEE.

516 N.W.2d 612

Filed May 27, 1994. No. S-93-114.

1. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
2. _____. An appellate decision is not authority for any point not required to be decided in the case then before the court.
3. **Divorce: Child Custody: Appeal and Error.** Although in dissolution proceedings determinations as to custody are reviewed on appeal de novo on the record, such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion; 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.

4. **Alimony.** In awarding alimony, a court should consider, in addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 1988), the income and earning capacity of each party as well as the general equities of each situation.
5. **Alimony: Appeal and Error.** The ultimate test for determining correctness in the amount of alimony is reasonableness, and the trial court's determination will normally be affirmed in the absence of an abuse of discretion.
6. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
7. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and IRWIN, Judges, on appeal thereto from the District Court for Scotts Bluff County, RONALD D. OLBERDING, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Samuel W. Segrist, of Meister & Segrist, for appellant.

Richard A. Douglas, of Nichols, Douglas, Kelly, and Meade, P.C., for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

In this action the district court dissolved the marriage of the parties and, among other things, awarded custody of their three minor boys to the petitioner-appellee husband, Philip M. Kelly, and alimony to the respondent-appellant wife, Linda F. Kelly. The wife thereafter appealed to the Nebraska Court of Appeals, and the husband cross-appealed. That court reduced the amount of alimony, but otherwise affirmed the decree of the district court. *Kelly v. Kelly*, 2 Neb. App. 399, 510 N.W.2d 90 (1993). As a consequence, the wife petitioned this court for further review. Although she had assigned a number of other

errors to the district court, in her petition for further review she complains only, in summary, that the Court of Appeals erred in (1) leaving custody of the children with the husband and (2) modifying the district court's alimony award. We granted the petition and now, finding merit in one of the errors assigned to the Court of Appeals, reverse the judgment of that court and direct that it affirm the decree of the district court.

II. FACTS

The parties met while both were attending college and married on June 23, 1973.

The husband had graduated a year before their marriage, whereupon he entered the Army as an officer, serving on active duty until late 1974. The wife completed 3 years of college and thereafter embarked on a 1-year course of study in Colorado, preparing to be a cytotechnologist, one who examines body fluids for the purpose of diagnosing diseases. In order to help her meet expenses, the husband sent her money each month both before and during the marriage until she graduated in December 1973.

Following his departure from the Army, the husband, in August 1974, entered law school. During this time, he received approximately $300 per month under a federal program and worked part time from May 1975 until he graduated in 1977, earning approximately $300 per month. The wife worked full time from November 1974 until April 1977, earning approximately $600 per month, when the parties adopted the first of three boys, each of whom was adopted within a week of birth. The boys are Brian, born April 13, 1977; Kevin, born February 25, 1979; and Adam, born December 4, 1981.

In August 1977, the parties moved to Gering, Scotts Bluff County, Nebraska, and the husband has practiced law in the area since that time. His annual salary as a partner of a law firm at the time of trial in late 1992 was $70,000; however, his total income from his law practice, after the inclusion of bonuses in recent years, was as follows: 1991, $119,505; 1990, $106,154; 1989, $105,601.

The wife worked part time as a cytologist from 1978 until 1989, taking time off and reducing her hours when the second

and third sons were adopted. At the time of the decree, the wife was in the process of relocating and was looking for employment in her field. She had received one offer of employment to commence at approximately $38,000 per year, with an increase to $40,000 per year once she was reacquainted with the work. It appears that she subsequently accepted a different job sometime between the entry of the October 1992 decree and a subsequent hearing on the issue of child support. That job paid $16.75 per hour, or approximately $34,800 per year.

By the time of trial, the parties had accumulated assets having a net value of $141,073, which the court divided such that the husband received $85,184 net worth of assets and the wife $55,889. In addition, the district court awarded the wife $14,648, half of the $29,295 difference in their respective shares of the net marital estate, to be paid in 60 equal monthly installments, and further ordered the husband to pay the wife alimony in the amount of $1,500 per month for 120 months, commencing November 1, 1992.

As to the custody issue, the husband testified that he actively assisted in all facets of caring for the boys. When they were infants, he sterilized bottles, fixed formula, mixed other food and vegetables, bathed them, changed diapers, and cleaned up after them. He took them to the doctor when they were ill, sometimes by himself and at other times with his wife, and would often leave work so that he could go with the boys to the doctor.

The husband coached the boys' little league baseball teams, sometimes coaching two teams during the same season. He took time off work to attend school activities and sporting events.

He prepared many of the boys' meals, including breakfast, lunch, and supper. For the last 2 or 3 years prior to the parties' separation, he got the boys up, fed them breakfast, and the majority of the time got them ready for school. Sometimes the wife would wake up and join them, and sometimes she would not. He helped the boys with their homework.

The husband emphasized church attendance by the family and would insist that they attend church, while the wife would

make comments that they should skip church and Sunday School, saying, "It is dumb, they don't get anything out of this." Often he accompanied the boys to church meetings without the wife.

He discussed his perceptions of the boys' traits and personalities and their individual needs. He described the wife as one who is very negative in her approach and who says things that are very hurtful to the boys. He, on the other hand, tries to be positive and encouraging, talking to them on a regular basis about what is going on. He seeks to refrain from destroying their spirit when he is angry with them or their behavior.

The husband attempted to act as an emotional buffer between the wife and the boys. He does not feel that the wife can handle the boys' emotional needs. He believes she is physically and verbally abusive to the boys.

As a result, he tried not to wake up the wife in the mornings because, when awakened, she would become upset and get the other family members upset. On two occasions since the parties separated, the wife and one of the boys were involved in physical altercations, hitting each other.

When asked why he did not think the wife could handle rearing the boys, the husband replied:

> There is a basic difference in our approach and our emotional makeup. My job is to nurture the children. My job is to look out for them, and to protect them from harm, and to watch out for their emotions as best as I can. Her emotional makeup is, that she needs the children to nurture her. She is dependent upon the children for her emotional needs, and I am not.

In explaining why he feels she is a negative person, he referred to her negative talk about church and explained that she made comments that the schools are bad, that the teachers are dumb, and that Scottsbluff is a dull place. He considers this to be a bad influence on the boys; in his view, they need to have a positive outlook.

The husband stated that if he were granted custody, he would be able to adapt his work schedule to meet the boys' needs.

Predictably, the wife has a different perspective. She testified that she has been actively involved in raising the boys.

According to her, it is she who has been responsible for their day-to-day needs, since the husband was gone a great deal because of his work schedule. In her view, she was more involved in the discipline of the boys than the husband.

The wife acknowledged, however, that the husband was involved in the boys' activities, including church, swimming, baseball camp, and the like, and was actively involved in caring for them. Prior to the separation, he spent his time involved in family activities when not at work. She believed that his work required him to be gone more than a couple of evenings a month. She admitted that he had stopped participating in an evening golf league after she asked him to do so because one of the boys voiced concerns about it.

She also confirmed that for the 2 years prior to the separation, the husband sometimes fixed breakfast for the boys but denied that he fixed their breakfast and got them ready for school while she stayed in bed each day. She recognized that he had been called twice since their separation to resolve arguments between one of the boys and her.

The husband called as a witness a woman who had been primarily a friend of the wife. The friend lives about eight blocks from the Kelly home, has known the family for approximately 8 years, and typically saw the wife a couple of times a week.

This witness observed the husband in several activities with the children, including attending events with the boys at the swimming pool where she teaches, helping one of the boys who was a substitute on a paper route, showing the boys his trains in the basement, and being with the boys many times when she visited the Kelly home. In her opinion he is a very good, affectionate, supportive, and positive father.

According to her, the wife treated the children as one of her friends and "depends on the kids. Instead of mothering she depends on them, she is their friend." She witnessed a lot of arguing between the wife and the boys and fighting among the boys. She feels that the wife does not have a normal parent-child relationship with the boys because of her yelling at them and the state of turmoil in the home with the yelling among them, which seemed to be constant. But the friend did

say that the yelling in the household also occurred when the husband was around. She never observed either of the parents discipline the boys.

The husband also called a psychotherapist nurse as a witness, who also was of the view that the husband had the better emotional capacity to serve as a parent.

When asked with whom they preferred to live, Brian picked his father, while Kevin and Adam said they would prefer to live with their mother. They all thought their mother was serious about moving away from Scottsbluff. Brian wanted to stay in Scottsbluff; Kevin did not know how he felt about moving; and Adam said, "I want to live with my mom most."

III. ANALYSIS

With that recitation of the portion of the record which relates to the issues presented by the summarized errors assigned to the Court of Appeals, we turn our attention to the analysis of those matters.

1. CUSTODY

In the first summarized assignment of error, the wife attacks the Court of Appeals' affirmance of the district court's custody ruling by complaining that it failed to consider the admissibility of the nurse's testimony. Rather, the Court of Appeals chose to handle her attack on the admissibility of that evidence by observing that it need not address the issue, for even if it were to be that some or all of the nurse's testimony should have been excluded and the Court of Appeals were accordingly to refuse to consider the evidence, the record would nonetheless continue to support the district court's decree in that regard.

Contrary to the wife's contention, the Court of Appeals acted quite properly in that regard, for an appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. Indeed, an appellate decision is not authority for any point not required to be decided in the case then before the court. See *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994). It was entirely appropriate for the Court of Appeals to assume without deciding that the nurse's testimony was improperly admitted and to resolve the case based on the remainder of the

record. See, *In re Interest of L.H. et al.*, 241 Neb. 232, 487 N.W.2d 279 (1992) (appellate court in trial de novo on record disregards evidence which should not have been admitted and determines whether remaining evidence justifies termination of parental rights); *In re Interest of Aufenkamp*, 214 Neb. 297, 333 N.W.2d 681 (1983).

Although in dissolution proceedings determinations as to custody are reviewed on appeal de novo on the record, such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion. 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. *Hansen v. Hansen*, 240 Neb. 31, 480 N.W.2d 204 (1992).

Without giving any consideration to the nurse's testimony, our de novo review of the remainder of the record causes us to independently conclude that the district court did not abuse its discretion in ruling as it did in the matter of custody. While the record does not establish that the wife is an unfit parent, it does demonstrate that the district court could well conclude that the husband, because of his greater patience and ability to relate to the boys, was the better parent and that the boys' interests would be best served by placing their custody in and with him.

In so saying, we are not unmindful that the two younger boys expressed a preference to live with the wife, but such desires are in no sense controlling. See *Dennis v. Smith*, 217 Neb. 147, 347 N.W.2d 873 (1984).

2. Alimony

In the remaining summarized error assigned to the Court of Appeals, the wife complains of the reduction of the district court's $180,000 alimony award ($1,500 per month for 120 months) to $72,000 ($1,500 per month for 24 months plus $1,000 per month for the next 36 months).

Neb. Rev. Stat. § 42-365 (Reissue 1988) provides, in relevant part:

> When dissolution of a marriage is decreed, the court

> may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .
>
> While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

The Court of Appeals' decision places undue focus on only a few of the many factors to be considered in awarding alimony, improvidently writing:

> " 'The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances . . . make it appropriate.' " Neb. Rev. Stat. § 42-365 (Reissue 1988). Among the factors to be considered in an award of alimony is " 'the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.' " *Id.* Alimony is not to be used simply to equalize the income of the parties, but to assist the economically disadvantaged party during a period of unavailability for employment or training for employment. See *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992). Nebraska statutes and case law clearly indicate that alimony is a means of helping the economically disadvantaged party get through the period of transition after the divorce, until that party becomes self-sufficient, remarries, or dies.

Kelly v. Kelly, 2 Neb. App. 399, 408-09, 510 N.W.2d 90, 96 (1993).

It is true that under the circumstances presented in *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992), we held that alimony was not warranted. However, the obligor's monthly expenses therein exceeded his gross monthly income. While that was also the obligee's situation, her shortfall was far less than was that of the obligor. The record also demonstrated that the obligor's income was unlikely to increase greatly. Thus, *Preston* provides no guidance to the proper adjudication of the present case.

Section 42-365 does not define the purpose of alimony to be as narrow as the Court of Appeals concluded. Rather, the final paragraph of the statute indicates that alimony is to provide for the maintenance of one party by another when the relative economic circumstances and other criteria enumerated above make it appropriate. For good reason, neither the statutes nor our decisions have ever enumerated a baseline of income or level of employment potential which would preclude the need for maintenance. As an equitable matter, such a determination must be made on the facts of each case. Indeed, we have noted that in awarding alimony, a court should consider, in addition to the specific criteria listed in § 42-365, the income and earning capacity of each party as well as the general equities of each situation. *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986).

Here, the parties were married for 19 years. The wife made substantial contributions to the marriage and enabled the husband to pursue his studies while they were married and raising a son. Although she reduced her work outside the home after the husband entered the practice of law, she continued to work part time in addition to caring for the children and managing the household until 1989, when they were fairly well established financially. Furthermore, she interrupted the full-time pursuit of her career in cytology in order to care for the children and manage the household.

The ultimate test for determining correctness in the amount of alimony is reasonableness, and the trial court's determination will normally be affirmed in the absence of an

abuse of discretion. *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994); *Helms v. Helms*, 234 Neb. 630, 452 N.W.2d 269 (1990); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994); *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993); *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993).

Thus, in reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.

It is important to recognize that although the wife is fortunate enough to be able to reenter her career, her income potential is approximately a third of that of the husband. The district court's alimony award tends to even out that disparity and provides the wife with the means to partially recapture the standard of living that she and the husband jointly put together during their 19 years of marriage. Under the circumstances, the district court's award cannot be said to have constituted an abuse of discretion.

IV. JUDGMENT

Thus, as first mentioned in part I, the judgment of the Court of Appeals is reversed and the cause remanded with the direction that it affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

BOSLAUGH, J., participating on briefs.

WRIGHT, J., not participating.

VELMA DICKIE, APPELLEE, V. FLAMME BROTHERS, INC., APPELLANT.

516 N.W.2d 618

Filed June 3, 1994. No. S-92-141.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded.

Richard Register for appellant.

James A. Gallant for appellee.

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

PER CURIAM.

This matter was submitted to the court after Donald Flamme, a stockholder of Flamme Brothers, Inc., appealed from an order of the district court approving the "Final Report of Receiver" of that corporation in a proceeding filed by plaintiff, Velma Dickie, seeking involuntary dissolution of defendant corporation under Neb. Rev. Stat. § 21-2096 (Reissue 1991).

Examination of the transcript, the bill of exceptions, and the briefs of the parties shows that those documents do not furnish enough information, or explanation, to enable the court to determine whether the district court's order approving the final report should be affirmed.

Accordingly, the cause is remanded to the district court for Dodge County, Nebraska, for further proceedings. The district court shall require the appointed receiver to file, within 30 days, an inventory, which the receiver was ordered to conduct within 30 days of his appointment on September 22, 1987. The inventory shall list all real and personal property owned by the corporation as of the date of the receiver's appointment, together with the value of the assets listed and a statement of all mortgages and security interests in the items of property. The inventory shall be submitted under oath and positively verified by the receiver.

The district court shall then require the receiver to file an amended final report identifying the source of money received

and the property for which the money was paid and also identifying the reason for the payments made. The final report shall be in such form that the trial court and any reviewing court can readily understand what had occurred in connection with the corporation's property up to the date of the filing of the report. The report shall be submitted under oath, positively verified by the receiver.

In this connection, the record shows that the receiver has received $18,000 for 83.75 hours of work, or approximately $215 per hour. It shall be ordered by the district court that the inventory and amended final report be prepared and filed by the receiver without further cost to Flamme Brothers or other parties to the action.

The district court shall conduct a hearing, after notice, to determine if the amended final report should be approved, and, if so, the receiver's bond should be exonerated and Flamme Brothers dissolved.

REVERSED AND REMANDED.

ANTON J. HORVATH, APPELLANT, V. M.S.P. RESOURCES, INC., AND CONAGRA, INC., DOING BUSINESS AS NORTHERN STATES BEEF, APPELLEES.

517 N.W.2d 89

Filed June 3, 1994. No. S-92-344.

1. **Pleadings.** Neb. Rev. Stat. § 25-811 (Reissue 1989) requires that a defendant's answer "shall contain . . . a statement of any new matter constituting a defense."
2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In appellate review of a summary

judgment, the appellate court reviews 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.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded for further proceedings.

Michael J. Haller, Jr., and Patricia McCormack, of O'Connor & Associates, for appellant.

John F. Thomas and Ronald G. Fleming, of McGrath, North, Mullin & Kratz, P.C., for appellee ConAgra.

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

GRANT, J., Retired.

Appellant, Anton J. Horvath, sued M.S.P. Resources, Inc. (MSP), and ConAgra, Inc., doing business as Northern States Beef (ConAgra), for injuries appellant received while working as an employee of MSP in a building owned by ConAgra. MSP was made a party solely under the provisions of Neb. Rev. Stat. § 48-118 (Reissue 1988) and has not filed an appellate brief.

Appellant's amended petition alleged that the building owned by ConAgra was "used as a meat packing and processing plant." Appellant further alleged that there was a "rail" in ConAgra's building "used to transfer large carcasses of beef within the building," that ConAgra "negligently allowed the 'rail' to become unsafe," that "the 'rail' had become unsafe due to the construction of said 'rail,' " and that this condition was known by ConAgra or should have been known. Appellant then alleged that on January 23, 1990, he was an employee of MSP and was injured when the rail collapsed and carcasses of beef and the rail fell on appellant. Appellant alleged that ConAgra was negligent as follows:

> a. In failing to maintain the "rail" in a reasonably safe condition for the use of the employees of M.S.P. Resources, Inc.;
>
> b. In permitting the bolts that hold the "rail" to become and remain loosened and detached for a long period of time, thereby creating a dangerous and hazardous

condition for Plaintiff and other persons lawfully within the building;

c. In failing to inspect the "rail" to determine whether it was safe for use, and, on inspection, in failing to warn Plaintiff and others lawfully using the "rail" of the dangerous condition thereon;

d. In failing to repair the "rail" when for a long period of time Defendant knew or, with the exercise of due care should have known of the dangerous condition of the "rail".

e. In otherwise failing to observe that care and caution required of a reasonably prudent person under the circumstances.

ConAgra's answer admitted that appellant was an employee of MSP, that ConAgra owned the building where the accident occurred, and that the building was used as a meatpacking and processing plant, but denied appellant's other allegations, except those that constituted admissions against interest.

ConAgra also alleged that the proximate cause of appellant's injuries was appellant's own contributory negligence, that appellant "knew and assumed the risk of working in the packing house and using this rail," and that the petition failed to state a cause of action. No other defenses were pled in the answer.

On January 13, 1992, ConAgra filed a motion for summary judgment "for the reason that the pleadings and other matters filed herein show that there is no genuine issue on [appellant's] claims and [ConAgra] is entitled to judgment as a matter of law."

This motion concluded, "In support of this motion for summary judgment, [ConAgra] submits its brief and the affidavit of Henry Wallace."

Hearing was held on the motion on February 6, 1992. At that hearing, ConAgra submitted the affidavit of Henry Wallace, referred to in ConAgra's motion, and also submitted a copy of an agreement between ConAgra and MSP dated June 26, 1989, and two additional affidavits, each dated February 5, 1992. It appears that the three exhibits submitted at the summary judgment hearing were not timely served on appellant as

required by Neb. Rev. Stat. § 25-1332 (Reissue 1989). There is no indication in the record as to the time of serving of the ConAgra-MSP agreement on appellant. The other two affidavits were executed on the day before the hearing. Appellant, however, did not object to any of the documents submitted, and the court, on appellant's request to "leave the record open for about ten days," gave appellant 10 days to submit counteraffidavits. No such affidavits were filed. While we do not approve of such a procedural approach, we determine that, under the circumstances, ConAgra's motion for summary judgment was before the trial court.

We also note, at this point, that the trial court's order sustaining ConAgra's motion for summary judgment states that the case is controlled by the law set out in *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), and that "the plaintiff is barred by the exclusivity of the [Workers'] Compensation Act." *Plock* also discusses the fact that, in that case, the defendant had not pled the exclusivity defense in its answer. There is no mention in ConAgra's answer in this case as to any such affirmative defense, nor is that concept mentioned in ConAgra's motion for summary judgment or in the submitting of the motion to the trial court. Apparently, ConAgra's position was disclosed in its brief to the trial court. Appellant, however, has not objected or raised any question as to the requirements of Neb. Rev. Stat. § 25-811 (Reissue 1989) that a defendant's answer "shall contain . . . a statement of any new matter constituting a defense." Since the case is to be reversed for the reasons hereinafter set out, it might be well that the case be properly pled and properly submitted.

The trial court found that there was no material fact to be decided and that ConAgra was entitled to judgment as a matter of law and, therefore, sustained the motion for summary judgment. Appellant timely appealed to the Nebraska Court of Appeals, and we, under the authority of Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992), removed the case to this court in order to regulate the caseloads of the Nebraska appellate courts. We reverse the judgment and remand the cause for further proceedings.

We first note that the bill of exceptions contains a fifth

exhibit, appropriately marked exhibit 5. It is dated April 1, 1992, which was the day appellant's motion for new trial was denied. A "Reporter's Note," following the index of the bill, states, "Exhibit 5 was marked, offered and ruled on on April 1, 1992, without a record; please find the same received into evidence located on page 10." Exhibit 5 is a document reflecting a single-judge award in the Nebraska Workers' Compensation Court in a case between appellant and MSP. It is dated February 12, 1992, 6 days after the hearing in this case. There is no record concerning this exhibit as to what party offered it or if the other party objected. The record does not show if it is a final award or, indeed, if it is an award. It was untimely filed. The exhibit will not be considered on this appeal.

Our scope of review is clear. We have held that summary judgment is proper when the pleadings, depositions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994); *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993). In appellate review of a summary judgment, the appellate court reviews 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. *Bauers v. City of Lincoln, supra*; *Rowe v. Allely, supra*.

The affidavits before the trial court do not address, in any way, the question of appellant's alleged contributory negligence, or appellant's alleged assumption of risks. As stated above, neither ConAgra's answer or other pleadings, nor the record as to the submitting of the motion to the trial court, suggests any affirmative defense. Appellant, however, states in his brief on appeal:

> ConAgra moved for summary judgment on the basis that the Plaintiff's employer, [MSP], entered into a contract with ConAgra assuming responsibility for maintenance and repair of the premises. ConAgra contends that any liability they may incur is derived solely from the actions of its independent contractor/agent, [MSP] and that because [MSP] is relieved of common law

> liability under the Workers Compensation Act, so too, is ConAgra.

Brief for appellant at 1.

Similarly, ConAgra, in its brief, states:

> [ConAgra] moved for Summary Judgment on the basis that [MSP] entered into a contract with [ConAgra] whereby MSP was to act as the independent contractor/agent of [ConAgra]. (T12). MSP assumed responsibility for maintenance and repair of the premises. (E1,1:5,6). The issue before the Court was whether Plaintiff was barred from pursuing a negligence action against [ConAgra] based on the exclusivity of the Workers Compensation Act due to its relationship with its independent contractor/agent MSP (Plaintiff's employer).

Brief for appellee at 1.

The transcript before us, at page 12 or elsewhere, does not contain any reference to a contract. Nonetheless, it appears that both parties were operating on some sort of "notice pleading," and we will consider the case on the basis the parties have briefed it on appeal.

In its order sustaining ConAgra's motion for summary judgment, the trial court stated that the controlling law in this matter is set forth in *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991). ConAgra agrees with this statement and contends that the judgment must be affirmed. Appellant contends that there are differences between the facts in *Plock* and in this case. We agree with appellant on this issue.

In *Plock*, the defendant, Crossroads Joint Venture (CJV), entered into a contract with MS Management Associates, Inc. (MSM), a company which employed the injured plaintiff. The opinion states:

> CJV entered into a management agreement with MSM . . . pursuant to which MSM assumed the responsibility for the management, control, and maintenance of the shopping center.
>
> . . . .
>
> Under the terms of the management agreement . . . MSM was responsible for . . . maintaining and repairing

> the premises through independent contractors or its own employees . . . .

239 Neb. at 214, 475 N.W.2d at 109-10.

In the instant case, the agreement between MSP and ConAgra provided in part:

> RECITALS
>
> 1. Whereas, MSP is in the business of supplying contract labor (production and maintenance workers) to slaughter/fabrication processing operations, among other operations; and,
>
> 2. Whereas, [ConAgra] requires such contract labor at its plant located at 3435 Gomez Street, Omaha, Nebraska; and,
>
> 3. Whereas, MSP desires to provide the said contract labor to [ConAgra] at the said location.
>
> NOW THEREFORE, THE PARTIES HERETO AGREE AS FOLLOWS:
>
> 1. Services. (a) MSP shall provide the production and maintenance labor as required by [ConAgra] to operate the beef slaughtering facility located at 3435 Gomez Street, Omaha, Nebraska. As sole compensation therefor, [ConAgra] shall pay to MSP its actual costs, including agreed upon payroll charges, plus the sum of $725.00 per week. . . .
>
> (b) It is understood and agreed that MSP shall be responsible to communicate to the production and maintenance labor provided hereunder, a hazardous communication program with respect to the specific location to which that labor is assigned. In connection herewith, [ConAgra] agrees to cooperate fully with MSP in providing an appropriate hazard communication program, including applicable material data sheets.
>
> (c) Finally, MSP shall provide all of the services referred to hereinabove to the highest industry standards.

The agreement goes on to provide that MSP is an independent contractor, that MSP must procure workers' compensation insurance and liability insurance, and that MSP must indemnify ConAgra for all claims made against ConAgra. The final paragraph provides, "This Agreement represents the

whole and entire Agreement between the parties. No other agreements or representations, oral or written, have been made by either party. This Agreement may not be altered, modified or amended except in writing properly executed by the parties hereto."

The basic difference between *Plock v. Crossroads Joint Venture, supra*, and this case is that in *Plock*, the plaintiff's employer contracted to maintain and repair the premises, while in the case before us, appellant's employer agreed to "provide the production and maintenance labor as required . . . to operate the slaughtering facility." The agreement between ConAgra and MSP stated that MSP's business was "supplying contract labor" and that ConAgra "requires such labor."

In its brief, ConAgra contends that "MSP assumed responsibility for the maintenance and repair of the premises. (E1,1:5,6)." Brief for appellee at 1. Exhibit 1 is the three-page agreement and was the first exhibit received at the hearing on ConAgra's motion. "1:5,6" is a reference whose meaning cannot be deciphered. Paragraph 1(c) of the agreement provides that "MSP shall provide all of the services referred to hereinabove to the highest industry standards." Paragraph 3 of the agreement, "Hiring," provides that the services to be performed by MSP shall be performed by qualified employees. Paragraph 5(c) of the agreement, "Insurance and Indemnification," states that MSP will indemnify ConAgra from all costs arising out of the work to be performed by MSP. The fact remains that the work to be performed and the services to be performed are not described or set out in the contract, except as a service to furnish "contract labor."

The three affidavits do not shed much light on the question of MSP's contractual duties. All three express conclusions as to MSP's duties under the contract. The affidavit of Wallace, the operations manager at ConAgra's plant, states that he is familiar with the agreement and that "MSP is responsible for maintenance and repair at the [ConAgra] plant."

The other two affidavits are those of MSP employees. The two affidavits are identical. Each states that the affiant is an MSP employee and that the affiant's "maintenance duties included checking the plant and its machinery and fixtures for

proper and safe operation by both the M.S.P. employees in the slaughter operation and the [ConAgra] employees in the fabrication operation" and the "inspection of the entire facility, including the rails upon which the hanging cattle are transported from the cooler to the [ConAgra] fabrication operation, including the rails which allegedly broke and injured Anton Horvath."

The agreement between MSP and ConAgra puts MSP in the category of an employment agency. The record does not disclose any contractual agreement on the part of MSP to repair or maintain anything. The record does not show any contractual obligation for responsibility or supervisory duty in connection with any service, beyond the requirement that MSP furnish qualified employees. It may be that extrinsic evidence might show some industry standard, or conduct of the parties, which might be construed to show that the furnishing of maintenance laborers means the furnishing party also agrees to maintain something. There is nothing, however, in the words of exhibit 1 that shows that MSP has promised to do any maintenance.

We recognize that summary judgment is proper when the pleadings, depositions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994). We also recognize that after the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Flynn v. Bausch*, 238 Neb. 61, 469 N.W.2d 125 (1991).

Appellant has presented no evidence, but ConAgra has not shown facts entitling it to judgment as a matter of law. ConAgra's position is premised on the holding in *Rowley v. City of Baltimore*, 305 Md. 456, 474, 505 A.2d 494, 503 (1986) (cited in *Plock*):

> We hold that where, as here, the independent contractor has assumed responsibility for maintenance and repairs, and the harm has occurred to the contractor or his

> employee as a result of a defect arising from the failure of the contractor to make those repairs, nothing in §§ 416-429 [Restatement (Second) of Torts (1965)] operates to impose liability upon the person who hired the contractor.

In the case before us, the truncated record shows no contractual assumption of responsibility for repairs. There are no pleadings, depositions, stipulations, or affidavits before us which show that there is no genuine issue of material fact and that ConAgra, as the moving party, is entitled to judgment as a matter of law.

We further point out that ConAgra's statement in its brief, that "Plaintiff's allegations that the condition of the rail was a 'latent defect' is [sic] brought up upon appeal for the first time and should be disregarded by this court," is not correct. Brief for appellee at 17. Appellant's amended petition alleged in paragraph 5 that "[t]he 'rail' had become unsafe due to the construction of said 'rail'. This condition was known to [ConAgra] or would have been known, had [ConAgra] exercised reasonable care and diligence." This allegation was not the subject of any motion to make more definite, but was generally denied. Appellant has said there is a defect caused by improper construction of a rail. Such a defect is latent. ConAgra generally denied this allegation. Without any evidence on the issue, it is not possible to say there is no defect, as a matter of law.

In its present posture, this case did not warrant summary judgment in favor of ConAgra. The summary judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ANNETTE CARPENDER AND JACK CARPENDER, APPELLANTS, V. RICHARD BENDORF, APPELLEE.

516 N.W.2d 619

Filed June 3, 1994. No. S-92-375.

1. **Summary Judgment.** Summary judgment, pursuant to Neb. Rev. Stat. § 25-1330 et seq. (Reissue 1989), is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from these facts and that the moving party is entitled to judgment as a matter of law.
2. _____. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all inferences which may reasonably be drawn from the evidence.
3. **Motor Vehicles: Pedestrians: Highways: Right-of-Way.** Neb. Rev. Stat. § 39-643(1) (Reissue 1988) provides: "Every pedestrian who crosses a roadway at any point other than within a marked crosswalk, or within an unmarked crosswalk at an intersection, shall yield the right-of-way to all vehicles upon the roadway."
4. **Negligence: Proof.** Contributory negligence is an affirmative defense which must be proved by the party asserting such defense.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded.

John M. DiMari, of Law Office of John M. DiMari, and Thomas K. Harmon, of Respeliers and Harmon, P.C., for appellants.

Larry E. Welch and Susan E. Norris, of Gross & Welch, P.C., for appellee.

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

GRANT, J., Retired.

This case arose out of an automobile-pedestrian accident which occurred in Omaha, Nebraska, on May 27, 1987. Plaintiff Annette Carpender (plaintiff) sued Peony Park, Inc., and Richard Bendorf (defendant) for injuries and damages she received as a result of the accident. Her husband, Jack Carpender, joined in the petition.

After answer, Peony Park filed its motion for summary

judgment, which was granted. The Carpenders did not appeal from that judgment, and Peony Park will not be further considered.

Defendant answered, generally denying the Carpenders' allegations as to how the accident happened and alleging that the proximate cause was the contributory negligence of plaintiff. Defendant then filed a motion for summary judgment, which was granted. The Carpenders timely appealed to the Nebraska Court of Appeals. Pursuant to Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992), we removed the appeal to this court to regulate the caseloads of the Nebraska appellate courts.

On appeal, plaintiff, in summary, assigns a single error: that the trial court erred in granting summary judgment in favor of defendant on the basis of determining that plaintiff was guilty, as a matter of law, of contributory negligence to such a degree as to bar recovery. We reverse and remand.

We first note that summary judgment, pursuant to Neb. Rev. Stat. § 25-1330 et seq. (Reissue 1989), is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from these facts and that the moving party is entitled to judgment as a matter of law. *Double K, Inc. v. Scottsdale Ins. Co.*, 245 Neb. 712, 515 N.W.2d 416 (1994).

In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all inferences which may reasonably be drawn from the evidence. *Hines v. Pollock*, 229 Neb. 614, 428 N.W.2d 207 (1988).

Defendant's motion for summary judgment was submitted to the trial court on the depositions of plaintiff and defendant and four photographs of the intersection of Cass Street and 83d Street in Omaha where the accident occurred.

The photographs show that Cass Street, which runs east and west, consists of five lanes. Two lanes run east, two lanes run west, and one lane is in the middle and is referred to as a "storage" lane or left-turn lane. The storage lane was marked

with a solid yellow line on each side, with a broken yellow line within the southernmost solid yellow line. Each of the five lanes appears approximately the same width. The yellow lines run from the east to a point opposite a double yellow line running north on 83d Street, which is a two-lane street that extends north from Cass Street and widens to three lanes where 83d Street enters Cass Street at a slight northwest-southeast angle. To the west of the double yellow line on 83d Street, there are two lanes—one unmarked lane, apparently permitting right-turn or straight-ahead traffic (into the entrance to a parking lot where plaintiff parked) and the other, a left-turn lane that feeds into the eastbound lanes on Cass Street. The T-intersection is controlled by a stop sign on 83d Street. There are no marked pedestrian crosswalks at the intersection of Cass Street and 83d Street.

Plaintiff's deposition shows that she had parked her car in a parking lot that adjoins Cass Street on the south and lies just east of the intersection. Plaintiff approached Cass Street and stood on the south side of the street on the sidewalk at a point slightly east of a line representing a projection of the east line of 83d Street. She stated that she never crossed Cass Street east of where she stood on the day of the accident and that where she stood "always appeared to be a corner there to me, I mean, the corner." She waited for approximately 5 minutes for automobile traffic to clear. Traffic was heavy in both directions.

She saw defendant's pickup truck stopped on 83d Street, pointing south. At the time she did not realize that the lane in which defendant was stopped was the left-turn lane. Plaintiff stated that she saw no turn signal flashing on defendant's vehicle. Plaintiff testified she saw defendant's vehicle after she had been waiting about 2 minutes and that she started to cross Cass Street about 3 minutes later. She stated that as she stepped off the curb, she looked both east and west and saw that defendant's vehicle was still sitting at the stop sign. She did not see the vehicle moving before she was struck by the front end of defendant's vehicle at a point "about two foot inside the yellow line of the turning lane."

Defendant's deposition showed that defendant was on 83d

Street at the intersection and was waiting at the stop sign for "two to three minutes" for Cass Street traffic to clear. He stated he looked to the west, then "to the east till I crossed the westbound traffic lanes, and then I took a quick glance back over my shoulder to the west to see what was headed east, made sure nobody pulled out of any parking lot or driveways along the way." As he waited he did not see anyone on the south side of Cass and did not see plaintiff at any time before the impact and had no idea where she came from. He stated his left turn signal was on. He also stated that when he first saw her, plaintiff was "five to eight feet off the painted line that was there that was the center line." He then stated that there was not a centerline, but two lines that "have a distance between them, what would be like an island. I guess, painted." Defendant also said that the impact between his truck and plaintiff left a dent approximately in the center of the hood of the truck.

Neb. Rev. Stat. § 25-21,185 (Cum. Supp. 1992) provides, in pertinent part:

> In all actions accruing before February 8, 1992, brought to recover damages for injuries to a person or property caused by the negligence . . . of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence . . . of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff, and all questions of negligence . . . and contributory negligence shall be for the jury.

The immediate predecessor of this statute was § 25-1151, as transferred to § 25-21,185 in 1979. In *C. C. Natvig's Sons, Inc. v. Summers*, 198 Neb. 741, 747-48, 255 N.W.2d 272, 277 (1977), we said:

> "It should be noted here that the final provision of the comparative negligence statute requires that 'all questions of negligence and contributory negligence shall be for the jury.' While that language obviously does not affect the

> court's right to decide a case as a matter of law, it does emphasize the fact that the determination of questions of negligence and contributory negligence and the comparative measuring of them are basically factual issues which are generally for determination by the jury."

(Emphasis omitted.) See *Koerner v. Perrella*, 213 Neb. 189, 328 N.W.2d 473 (1982) (quoting *C. C. Natvig's Sons, Inc., supra*, with approval).

In his brief, defendant cites only one statute as applicable—Neb. Rev. Stat. § 39-643(1) (Reissue 1988). That statute provides: "Every pedestrian who crosses a roadway at any point other than within a marked crosswalk, or within an unmarked crosswalk at an intersection, shall yield the right-of-way to all vehicles upon the roadway." Throughout his brief defendant states, as a fact, that plaintiff attempted to cross Cass Street between intersections, and he cites many cases concerning pedestrians crossing streets between intersections. For the purposes of the application of the summary judgment rule, defendant's position is not convincing. The record shows that plaintiff was crossing Cass Street in the proximity of 83d Street and Cass Street. The convergence of 83d Street and Cass Street is an "intersection," as that term is defined in Neb. Rev. Stat. § 39-602(37) (Cum. Supp. 1986), albeit a T-intersection.

It is true that plaintiff stated there was not a crosswalk where she crossed Cass Street. It is also true there was not a marked crosswalk. Plaintiff's conclusion was not based on any foundation shown in the record. The definition of an unmarked "crosswalk" is set out in Neb. Rev. Stat. § 39-602(13)(a) (Cum. Supp. 1986). The legal or factual applicability of the unmarked pedestrian crosswalk concept is not discussed in the briefs before us, nor in the record of the proceedings.

Defendant, in his answer, pled the contributory negligence of plaintiff. The trial court found that "the plaintiff was contributorily negligent in a degree more than slight as a matter of law." Contributory negligence is an affirmative defense which must be proved by the party asserting such defense. *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987); *Foland v. Malander*, 222 Neb. 1, 381 N.W.2d 914

(1986). There is nothing in the record as to whether plaintiff was in an unmarked crosswalk.

In addition, whether plaintiff's conduct as a pedestrian is appraised as requiring the application of the "pedestrian in a crosswalk" rule or not, other factual questions, militating against the application of summary judgment, exist. The record shows that before she started to cross Cass Street, plaintiff saw defendant's truck, and that as she stepped into Cass Street, she saw defendant's truck—motionless at the stop sign at 83d Street. Plaintiff stated defendant's left turn signal was not on.

In spite of the obvious fact that defendant saw clearly to the south, he did not see plaintiff waiting to cross Cass Street, did not see plaintiff enter Cass Street, did not see plaintiff cross the two eastbound lanes of Cass Street, and did not see plaintiff reach a point inside the two yellow lines delineating the left-turn lane in the middle of Cass Street. Defendant did not see plaintiff until "she was right there in front of me." The front of defendant's vehicle struck plaintiff, leaving a dent approximately in the middle of the vehicle's hood.

Neb. Rev. Stat. § 39-644 (Reissue 1988) provides: "Notwithstanding the other provisions of sections 39-601 to 39-6,122, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give an audible signal when necessary . . . ."

Plaintiff's testimony in the record before us, which must be accepted as factual in the present posture of the case, precludes the issuance of summary judgment. According to plaintiff's testimony, when she was struck she was in a position inside painted yellow lines, outlining what defendant called a "painted island." Another vehicle standing in that lane would be legally protected from a collision caused by defendant. The trial court was in error, in this controverted factual situation, to grant summary judgment to defendant.

REVERSED AND REMANDED.

NORWEST BANK NEBRASKA, N.A., A FEDERAL BANKING INSTITUTION, APPELLEE, V. BILL R. BOWERS AND ILENE SUE BOWERS, APPELLANTS.

516 N.W.2d 623

Filed June 3, 1994. No. S-92-718.

1. **Conveyances: Statutes: Time.** Statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes.
2. **Appeal and Error.** A party cannot complain of error which he has invited the court to commit.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Jerome J. Ortman for appellants.

Thomas M. Locher and Kevin J. Dostal, of Hansen, Engles & Locher, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and WRIGHT, JJ.

PER CURIAM.

Following a bench trial, the district court for Douglas County entered judgment in favor of Norwest Bank Nebraska, N.A. (Norwest Bank). Norwest Bank had sued Ilene Sue Bowers and her husband, Bill R. Bowers, to have certain conveyances by Henry and Eleanor Greenberg to their daughter, Ilene, set aside as fraudulent. The Bowerses now seek review of the district court's order overruling their motion for new trial.

We affirm the order of the district court.

FACTS

On March 18, 1992, Norwest Bank filed a second amended petition in a consolidated lawsuit against Ilene Sue Bowers and her husband, Bill R. Bowers, pursuant to the Uniform Fraudulent Conveyance Act (UFCA), Neb. Rev. Stat. § 36-601 et seq. (Reissue 1988). The UFCA was repealed by the Legislature in 1989 and was replaced with the Uniform Fraudulent Transfer Act, Neb. Rev. Stat. § 36-701 et seq. (Cum. Supp. 1992). In this case, Norwest Bank's cause of action against the Bowerses accrued in 1987. Statutes covering

substantive matters in effect at the time of the transaction govern, not later enacted statutes. *Schall v. Anderson's Implement*, 240 Neb. 658, 484 N.W.2d 86 (1992); *Holthaus v. Parsons*, 238 Neb. 223, 469 N.W.2d 536 (1991).

The petition alleged that in 1987 Norwest Bank's judgment debtor, Henry Greenberg, and his now-deceased wife, Eleanor Greenberg, fraudulently conveyed interests in three parcels of real estate, an automobile, a computer, and $68,869 in cash to their daughter, Ilene Sue Bowers.

Following a bench trial, the district court, on July 27, 1992, found that the transfers were made when Henry Greenberg was insolvent and that the transfers were made to hinder, delay, and defraud creditors, and it entered judgment for Norwest Bank. On July 30, the Bowerses filed a document entitled "Defendants' Motion for Judgment Notwithstanding the Verdict, in the Alternative for a New Trial, or, in the Alternative, for an Order of Remittitur and Notice of Hearing."

At a hearing on August 17, 1992, the Bowerses' counsel twice expressed his intent to file an appeal that same day and twice requested that the trial court overrule the Bowerses' motion for new trial. The trial court then overruled the motion for new trial.

On that same day, presumably subsequent to the trial court's overruling of their motion for new trial, the Bowerses filed a notice of intent to appeal which stated in relevant part:

> COME NOW the Defendants, and hereby give notice of their intent to appeal to the Nebraska Court of Appeals *from the overruling of Defendants' Motion for New Trial* entered herein by the Hon. Joseph S. Troia, District Court of Douglas County, Nebraska, dated August 17, 1992[,] for the reason that same is not supported by the evidence and it is contrary to law.

(Emphasis supplied.)

The Bowerses then proceeded with their appeal, raising several assignments of error. The case was removed from the Nebraska Court of Appeals to this court pursuant to our authority to regulate the caseloads of the appellate courts of this state.

ANALYSIS

It has long been the rule in this state that a party cannot complain of error which he has invited the court to commit. See, e.g., *Missouri P. R. Co. v. Fox*, 60 Neb. 531, 83 N.W. 744 (1900); *Campbell v. Crone*, 10 Neb. 571, 7 N.W. 334 (1880). Accord, *Schaneman v. Wright*, 238 Neb. 309, 470 N.W.2d 566 (1991); *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987); *Fuel Exploration, Inc. v. Novotny*, 221 Neb. 17, 374 N.W.2d 838 (1985).

The Bowerses' counsel, not once, but twice, requested that the trial court overrule the Bowerses' motion for new trial. The trial court complied with this request. Assuming but not deciding that it was error for the trial court to overrule the Bowerses' motion for new trial, this court finds that it was error invited by the Bowerses themselves. Therefore, the Bowerses will not now be heard to complain of the trial court's overruling their motion for new trial.

Because the Bowerses have appealed from only the overruling of their motion for new trial, there are no other issues before the court on appeal.

CONCLUSION

The order of the district court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.
LANPHIER, J., not participating.
WHITE, J., dissents.

PAUL A. ROSBERG ET AL., APPELLANTS, V. NANCI L. LINGENFELTER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RAYMOND M. LINGENFELTER, DECEASED, APPELLEE.

516 N.W.2d 625

Filed June 3, 1994. No. S-92-791.

1. **Pleadings.** An affirmative defense must be specifically pled to be considered.
2. **Pleadings: Limitations of Actions.** When it is not apparent from the face of the

petition that the action is barred by the statute of limitations, the affirmative defense of the statute of limitations must be raised in the answer.

3. **Jury Instructions: Appeal and Error.** It is error to submit to the jury an issue which is not pleaded in the case.

Appeal from the District Court for Pierce County: DEWAYNE WOLF, Judge. Reversed and remanded for a new trial.

Paul A. Rosberg, pro se.

Stephen C. Wade, of Curtiss & Wade, P.C., for appellee.

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

PER CURIAM.

The plaintiffs, Paul A. Rosberg and his children, filed this action in replevin against the defendant, Nanci L. Lingenfelter, individually and as personal representative of the estate of Raymond M. Lingenfelter, for the recovery of a grain bin. The plaintiffs also claimed damages for detention, loss of use, and costs of moving the bin. The case was tried to a jury, which returned a verdict in favor of the defendant.

The plaintiffs have appealed to this court. Among other things, the plaintiffs assign as error the trial court's instructing the jury on the statute of limitations.

Rosberg purchased a parcel of farmland from Raymond and Dora Goeres on contract. Rosberg defaulted on this contract, and in 1984, the Goereses filed a foreclosure action against Rosberg. Following a judgment for the Goereses, the farmland was sold in a sheriff's sale to the Small Business Administration. The sheriff's sale was confirmed on July 12, 1985.

The bin in question was purchased and put on the farmland in 1983. In March 1985, Betty Rosberg, the purchaser of the bin, executed a financing statement in favor of Spencer Rosberg, Paul Rosberg's father. The financing statement granted Spencer Rosberg a security interest in the bin among other items. In March 1990, Spencer Rosberg filed a continuation of the financing statement and at the same time assigned his interest in the bin to Paul Rosberg and his children.

In July 1986, Glen Kumm purchased the farmland from the

SBA along with all fixtures attached thereto. Kumm took possession of the farmland in the same month. Throughout the remainder of 1986 and 1987 Paul and Betty Rosberg wrote several letters to Kumm attempting to get various items of property which they had left on the farmland when they vacated; included among these items was the grain bin.

In 1989, Kumm cleaned the grain bin and removed it from the farmland. He made several improvements to the bin and sold it to the defendant and her family.

The plaintiffs filed this suit against the defendant in April 1991. Although none of the defendant's pleadings raise the issue of the statute of limitations, the trial court, over the plaintiffs' objections, gave the jury an instruction on the defense.

An affirmative defense must be specifically pled to be considered. *Diefenbaugh v. Rachow*, 244 Neb. 631, 508 N.W.2d 575 (1993); *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993). "When it is not apparent from the face of the petition that the action is barred by the statute of limitations, the affirmative defense of the statute of limitations must be raised in the answer." *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 244, 440 N.W.2d 664, 665 (1989).

In this case, the plaintiffs' petition is not barred by the statute of limitations on its face. The defendant did not attempt to plead the statute of limitations as a defense, did not request any such instruction, and on appeal does not contend that the pleadings support the statute of limitations defense.

It is error to submit to the jury an issue which is not pleaded in the case. *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986); *Simon v. Christie*, 210 Neb. 600, 316 N.W.2d 303 (1982). "It is more than mere probability that an instruction on a matter not an issue in litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial." *Bump v. Firemens Ins. Co.*, 221 Neb. at 690, 380 N.W.2d at 277.

The instruction on the statute of limitations was prejudicial error. The remaining assigned errors in the plaintiffs' brief are without merit.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., participating on briefs.

ASSOCIATION OF COMMONWEALTH CLAIMANTS, AN UNINCORPORATED ASSOCIATION, APPELLANT, V. JAMES MOYLAN ET AL., APPELLEES.

517 N.W.2d 94

Filed June 3, 1994. No. S-92-835.

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 facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Actions: Judicial Notice: Demurrer.** When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Matters so judicially noticed are properly considered when determining the questions presented by a demurrer.
3. **Limitations of Actions: Time: Damages.** An action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages.
4. **Statutes: Appeal and Error.** Statutory interpretation involves questions of law in connection with which an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the trial court.
5. **Statutes: Legislature: Intent: Appeal and Error.** In ascertaining the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as demonstrated by the entire language of the statute.
6. **Statutes.** In the absence of anything 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 construction is necessary or will be indulged to ascertain their meaning.
7. **Statutes: Legislature: Intent: Appeal and Error.** In determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection

of statutes which pertain to a certain subject matter to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.

8. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant to the plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that amendments will correct the defect.
9. **Limitations of Actions: Pretrial Procedure.** In the application of statutes of limitations, discovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action.

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

Robert R. Gibson for appellant.

Rodney M. Confer and Trev E. Peterson, of Knudsen, Berkheimer, Richardson & Endacott; William D. Kuester, of Crosby, Guenzel, Davis, Kessner & Kuester; Thomas L. Kimer, of Faegre & Benson; Paul M. Schudel, of Woods & Aitken; Gerald Laughlin and Jill Robb Ackerman, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim; Gregory Perry, of Perry, Guthery, Haase & Gessford, P.C.; and David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellees Moylan et al.

James B. Cavanagh, of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., for appellees First National Bank and Dennis O'Neal.

BOSLAUGH, WHITE, FAHRNBRUCH, and LANPHIER, JJ., and CONNOLLY, HANNON, and IRWIN, Judges.

WHITE, J.

Association of Commonwealth Claimants appeals from the order of the district court sustaining appellees' demurrer and dismissing appellant's action. The district court held that appellant's action was barred by the 4-year statute of limitations set forth in Neb. Rev. Stat. § 25-207(3) and (4) (Reissue 1989). We affirm.

This is one of several cases related to the failure of Commonwealth Savings Company (Commonwealth). See, *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991);

Weimer v. Amen, 235 Neb. 287, 455 N.W.2d 145 (1990); *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 507 N.W.2d 665 (1993). Appellant is an association consisting of persons who suffered losses because of the failure of Commonwealth. One of the purposes for which appellant was formed is to represent the interests of those persons who may have causes of action related to the failure of Commonwealth. Appellees are directors of the former Nebraska Depository Institution Guaranty Corporation (NDIGC) who also served as employees of other state financial institutions. Appellees also include other individuals who allegedly engaged in wrongful conduct which caused the failure of NDIGC in 1985. The actions asserted by appellant in this case are intended to remedy the injuries caused by the failure of NDIGC.

This appeal concerns the date on which appellant's actions accrued and whether such actions are barred by the applicable statute of limitations. Appellant contends that the actions accrued on or after January 4, 1985—the date on which NDIGC closed. Appellees contend that the actions accrued on or before November 8, 1983—the date on which Commonwealth was declared insolvent and a receiver was appointed. Appellant filed its petition on December 5, 1988. The causes of action alleged by appellant are governed by the 4-year statute of limitations set forth in § 25-207(3) and (4).

Commonwealth was an industrial loan and investment company in Lincoln, Nebraska, in which appellant's members were depositors. On November 1, 1983, the Nebraska Department of Banking and Finance declared Commonwealth insolvent. On November 8, the department was appointed receiver and liquidating agent for Commonwealth.

At the time of its insolvency, Commonwealth was a member institution of NDIGC. NDIGC was a corporation formed in accordance with the Nebraska Depository Institution Guaranty Corporation Act, Neb. Rev. Stat. §§ 21-17,127 to 21-17,145 (Reissue 1991). NDIGC was formed to protect and guarantee deposits, savings, and shareholdings held by member institutions such as Commonwealth. (We will refer to these various interests as deposits, and the owners of these interests as

depositors.) Pursuant to the NDIGC plan, each Commonwealth deposit was guaranteed for losses up to $30,000. On January 4, 1985, NDIGC closed without having satisfied its obligations owed to the Commonwealth depositors.

On December 5, 1988, appellant filed its petition against appellees. In its petition, appellant contends that the wrongful acts of appellees contributed to the collapse of NDIGC and that because of the collapse of NDIGC, NDIGC was unable to reorganize Commonwealth and Commonwealth depositors were unable to collect on the guaranties. Appellant asserts several theories as a basis for its action, as well as a claim for injuries to the rights of appellant's members.

Appellees filed a demurrer arguing, in part, that appellant's actions are barred by the statute of limitations. The district court granted appellees' demurrer because it found that the actions were time barred. The district court further found that this defect could not be cured by amendment.

Appellant contends that the district court erred in (1) finding that the action was barred, (2) "implicitly" finding that the petition did not on its face negate a statute of limitations defense, and (3) holding that the defect cannot be cured by amendment.

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 facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994); *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993).

In an effort to thoroughly address the issues raised in this appeal, we find it necessary to take judicial notice of the court records of a case previously considered by this court. When

> cases are interwoven and interdependent and the controversy involved has already been considered and

> determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Matters so judicially noticed are properly considered when determining the questions presented by a demurrer.

Rhodes v. Yates, 210 Neb. 14, 15, 312 N.W.2d 680, 681 (1981). Accord, *Fowler v. Nat. Bank of Commerce*, 209 Neb. 861, 312 N.W.2d 269 (1981); *Knapp v. City of Omaha*, 175 Neb. 576, 122 N.W.2d 513 (1963). We take judicial notice of the records from the former proceedings in *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990). Those proceedings, in which appellant was a plaintiff, involved actions for relief of injuries caused by the failure of Commonwealth and included allegations of wrongful conduct substantially similar to that alleged in the petition in this case. Additionally, in considering appellees' demurrer, the Lancaster County District Court took judicial notice of its prior related proceeding in In the Matter of the State Tort Claim of the Department of Banking and Finance of the State of Nebraska, Receiver of Commonwealth Savings Company, docket 380, page 10 (In the Matter of the State Tort Claim). As that record has been included as part of the record in the case at bar, this court need not take judicial notice of that prior proceeding, but we may consider its contents as it relates to our analysis. See *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992) (considering the record of a prior proceeding of which the lower court had taken judicial notice).

Before considering the statute of limitations issue, we must determine whether appellant acquired its causes of actions by assignment from the receiver. Both parties have addressed the issues raised in this case as if the causes of action were assigned by the receiver to appellant. It appears that this presumption arises from our decision in *Weimer, supra*, which also involved actions related to the failure of Commonwealth. In *Weimer*, the plaintiffs, which included appellant, alleged that the defendants, which included many of the appellees in the case at bar, allegedly caused the failure of Commonwealth thereby injuring the plaintiffs.

On appeal, this court considered whether the plaintiffs were

the proper parties to bring those actions. This court stated that wrongs committed by a banking institution's officers and directors are wrongs against the institution itself and thus constitute a liability which is an asset of the bank. This court stated that a receiver has a duty to secure all the assets of the insolvent institution for the benefit of the institution and its creditors. We explained that the damage to the depositors was indirect and that generally, depositors do not have an individual right of action against such wrongdoers. Accordingly, we held that the receiver was the only party authorized to assert those actions. *Id.*

In the present case, appellant emphasizes in its brief that the causes of action asserted in the instant case—inability to satisfy the guaranties—are not based on injuries for which recovery was sought in prior Commonwealth actions. On this point, we agree with appellant, and we also find that the alleged wrongs committed by appellees do not create a liability which is an asset of Commonwealth.

Based on our understanding of the act, the causes of action asserted by appellant in this case arise from the inability of NDIGC to satisfy the guaranties which NDIGC owed directly to depositors of Commonwealth. Unlike the actions asserted in *Weimer, supra*, the actions in the present case are based on obligations owed to a depositor, and the failure of NDIGC to fulfill those obligations does not constitute a wrong committed against Commonwealth. Thus, any actions based on these obligations are not assets of Commonwealth. See, *Bliss v. Bryan*, 123 Neb. 461, 243 N.W. 625 (1932) (discussing the purpose of an earlier Nebraska deposit-guaranty fund and stating that the fund was established for the benefit of the depositors of insolvent banking institutions); *State, ex rel. Spillman, v. First State Bank*, 117 Neb. 370, 220 N.W. 579 (1928) (addressing a depositor's claim for recovery from a guaranty fund); *State, ex rel. Spillman, v. Citizens State Bank*, 115 Neb. 593, 214 N.W. 6 (1927); *State, ex rel. Spillman, v. Farmers State Bank of Dix*, 115 Neb. 574, 214 N.W. 4 (1927); *State, ex rel. Spillman, v. Farmers State Bank*, 115 Neb. 46, 211 N.W. 178 (1926); *United Wire v. Bd. of Savings & Loan*, 316 Md. 236, 558 A.2d 379 (1989) (assuming but not deciding that

the obligations owed by a private insurer of failed savings and loan institution may run directly to the depositors); *Tafflin v. Levitt*, 92 Md. App. 375, 608 A.2d 817 (1992) (finding that the guaranties owed by the depository insurer were not assets of the banking institution). See, generally, 10 Am. Jur. 2d *Banks* §§ 424 and 425 (1963) (discussing the purpose for deposit guaranty funds and what parties are entitled to the protection of such funds); 1A Michie on Banks and Banking ch. 1, § 18 (1993) (stating the purpose of state depository guaranty funds); 66 Am. Jur. 2d *Receivers* § 450 (1973) and 65 Am. Jur. 2d *Receivers* § 139 (1972) (describing what causes of action a receiver is authorized to enforce on behalf of depositors); 1A Michie, *supra*, ch. 1, §§ 27 and 32 (generally discussing what parties constitute "depositors" of an insolvent bank such that those parties are entitled to collect on the deposit guaranty).

If the causes of action in the present case are not assets of the bank, but, rather, individual actions of the depositors, then appellant's ability to assert those actions is not dependent on an assignment from the receiver. Although appellant secured an assignment from the receiver of any remaining causes of action which the receiver may have held, we nonetheless find that a determination of this appeal is not dependent on that assignment.

As stated above, the central issue with which we are presented is whether appellant's actions are barred by the 4-year statute of limitations. Neither party disputes that the actions are controlled by § 25-207, which provides that actions for injuries to the rights of the plaintiff and actions for relief on the ground of fraud can only be brought within 4 years from the date on which such actions accrued. We therefore must determine when the actions accrued.

An action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages. *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992); *L.J. Vontz Constr.*

Co. v. Department of Roads, 232 Neb. 241, 440 N.W.2d 664 (1989); *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987); *Lake v. Piper, Jaffray & Hopwood Inc.*, 219 Neb. 731, 365 N.W.2d 838 (1985).

According to its petition, appellant's six causes of action arise from acts which occurred prior to November 1983. Appellant contends, however, that the actions did not accrue against appellees until the depositors were injured. Specifically, appellant contends that Commonwealth depositors were not injured until NDIGC was obligated to satisfy the guaranties or until the date on which NDIGC closed and became unable to satisfy such obligations. Appellant argues that NDIGC did not have an obligation to pay on the guaranties until liquidation of Commonwealth was complete and it was finally determined that the depositors would not be paid in full from the assets of Commonwealth. Appellant contends that when NDIGC closed on January 4, 1985, liquidation of Commonwealth was still not complete.

Appellees, on the other hand, argue that NDIGC became obligated on its guaranties when Commonwealth was declared insolvent and the receiver was appointed to liquidate its assets. It is undisputed that Commonwealth was declared insolvent on November 1, 1983, and that a receiver was appointed on November 8.

The basis of the parties' opposing theories regarding when appellant was injured rests on the interpretation of the statutes governing the obligations of NDIGC. Statutory interpretation involves questions of law in connection with which an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the trial court. *Malzahn v. Transit Authority*, 244 Neb. 425, 507 N.W.2d 289 (1993); *In re Application of City of Lexington*, 244 Neb. 62, 504 N.W.2d 532 (1993); *Calvert v. Roberts Dairy Co.*, 242 Neb. 664, 496 N.W.2d 491 (1993).

In ascertaining the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as demonstrated by the entire language of the statute. *In re Application of City of Lexington, supra*; *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183

(1993). In the absence of anything 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 construction is necessary or will be indulged to ascertain their meaning. *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994); *Malzahn, supra*; *Arizona Motor Speedway v. Hoppe*, 244 Neb. 316, 506 N.W.2d 699 (1993); *In re Application of City of Lexington, supra*; *In re Application of City of Lincoln, supra*.

In determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993); *Metropolitan Life Ins. Co. v. Kissinger Farms*, 244 Neb. 620, 508 N.W.2d 568 (1993); *Arizona Motor Speedway, supra*; *In re Application of City of Lincoln, supra*.

The obligations of NDIGC are governed by the Nebraska Depository Institution Guaranty Corporation Act, under which NDIGC was incorporated and governed. See §§ 21-17,127 to 21-17,145. The Legislature has directed that the statutes within the act are to be liberally construed to effectuate the purposes set forth in § 21-17,128 and that those purposes shall provide a guide for the interpretation of the act. § 21-17,130.

The provisions of the act relevant to our discussion refer to the "member depository institution," the "corporation," and the "department." In the present case, Commonwealth is the member depository institution, NDIGC is the corporation, and Nebraska Department of Banking and Finance is the department. See § 21-17,131(6), (3), and (4). The guaranty provided by the NDIGC plan for each Commonwealth deposit was for losses up to $30,000.

A primary purpose of the act is to

> provide a mechanism whereby the shareholdings, savings, and deposits of any member or depositor of a member depository institution shall be protected or guaranteed up to amounts which are established by the corporation and

> to avoid excessive delay in payment of such shareholdings, savings, and deposits and to avoid financial loss to members or depositors of depository institutions because of the insolvency or liquidation of a member depository institution[.]

§ 21-17,128(1).

As stated above, we are concerned with the date on which the obligations of NDIGC to depositors arose. According to the act, corporations are

> obligated to the extent of the *covered claims* existing as of the date that a member depository institution becomes insolvent and goes into voluntary liquidation, or as of the date of the determination of liquidation by order of the department, but such obligation shall include only that amount of each covered claim which is less than or equal to the maximum amount established by the corporation.

(Emphasis supplied.) § 21-17,135(1)(a).

To determine when appellant's actions accrued, we must determine when a "covered claim" arose and when NDIGC became obligated to satisfy that claim. The act defines "covered claim" as

> any unpaid shareholdings, savings, or deposits of a member or depositor of a member depository institution and which is not in excess of the applicable amounts to which sections 21-17,127 to 21-17,145 apply as established by the plan of operation of the corporation, if such depository institution becomes insolvent and goes into voluntary liquidation or is placed in involuntary liquidation....

§ 21-17,131(5).

Finally, the act provides that "any claimant recovering under sections 21-17,127 to 21-17,145 shall be deemed to have assigned all of his rights or interest in his shareholdings, savings, or deposits with the insolvent member depository institution to the corporation to the extent of his recovery from the corporation." § 21-17,138.

The Legislature directs us to liberally construe the language of the act in light of the objectives of the Legislature, which includes the intent to provide a mechanism whereby creditors of

insolvent institutions may recover their losses without excessive delay. § 21-17,128. The plain language of the act contemplates claims for the guaranties arising when liquidation commences. This is illustrated by the language used to define a "covered claim" and to describe the obligations of NDIGC to satisfy the guaranties. Specifically, § 21-17,131(5) indicates that a covered claim arises when an institution "becomes insolvent and *goes into* voluntary liquidation or *is placed* in involuntary liquidation by order of the department." (Emphasis supplied.) Section 21-17,135(1)(a) also employs the language "goes into" liquidation regarding the obligations of NDIGC. This language conveys the intent that completion of the liquidation process is not a condition precedent to the existence of a covered claim and the corresponding obligation of NDIGC to pay that claim.

This reading of the act is consistent with the actual bylaws adopted by NDIGC regarding the processing of "covered claims." In the Matter of the State Tort Claim, *supra* (exhibit C, "Index, Transcript of Testimony and Exhibits Presented at May 25, 1984, State Claims Board Meeting" at exhibit 8). Article XVI of the NDIGC bylaws provides that the depositors must make claims for the insurance within 18 months of the appointment of a liquidating receiver. If a depositor fails to file a claim within 18 months, the bylaws provide that all rights the depositor may have against NDIGC are barred. Similar to the language employed in the act, the bylaws define claims from the date on which a liquidating agent is appointed, which occurs at the beginning of the liquidation process, rather than from the date of final liquidation.

We therefore find that the plain language of the relevant statutes, when read together in a consistent and sensible manner, means that a covered claim arises when the institution is declared insolvent and is placed in liquidation or voluntarily goes into liquidation. The act does not require that the depositor wait until liquidation is completed before the depositor may claim the guaranty. On the contrary, we find that by the plain language of the act, the Legislature intended to provide depositors with an immediate remedy for the deposits which are held by the receiver during the liquidation process. Compare *United Wire v. Bd. of Savings & Loan*, 316 Md. 236,

558 A.2d 379 (1989), and *United Wire v. State Deposit Ins. Fund*, 307 Md. 148, 512 A.2d 1047 (1986) (discussing two cases arising from the Maryland savings and loan crisis and implicitly stating that the statutory language, "[u]pon final liquidation . . . the Fund Director shall . . . determine the amount of insurable loss" and provide "for the payment or assumption of an insurable loss to each depositor," Md. Fin. Inst. Code Ann. § 110.1(a) (1992), provided that insurance guaranty obligations did *not* arise until liquidation was complete. See Md. Fin. Inst. Code Ann., §§ 10-110.1(c)(2) and 10-110(a)(2)(iii) (1992)).

The issue then becomes when Commonwealth was declared insolvent and when Commonwealth was placed into liquidation. According to the petition, the department declared Commonwealth insolvent on November 1, 1983, and on November 8, the department was appointed receiver. Although the petition fails to state when Commonwealth went into liquidation, our records in *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 147 (1990), state that on November 8, 1983, the Lancaster County District Court issued an order declaring Commonwealth insolvent and appointing the department as the receiver and liquidating agent of Commonwealth. See, also, *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 125, 507 N.W.2d 665 (1993).

When Commonwealth was declared insolvent and was placed into liquidation on November 8, 1983, the depositors' covered claims arose. Once there was a covered claim, NDIGC became obligated to satisfy the guaranty pursuant to § 21-17,135(a)(1). Once the obligations existed, appellant's causes of action accrued. Appellant's causes of action, therefore, accrued on November 8, 1983. The fact that appellant or its members did not attempt to enforce those obligations until 1988 did not prevent the running of the statute of limitations.

Appellant filed its petition on December 5, 1988. Appellant has not alleged facts sufficient to avoid the application of the 4-year statute of limitations. We therefore find that appellant's actions are barred.

The final issue we must address is whether the district court should have granted appellant leave to amend the petition.

When a demurrer to a petition is sustained, a court must grant to the plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that amendments will correct the defect. *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994); *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994).

Upon a review of the petition, we find that as to appellant's actions for injury to appellant's rights, there is no reasonable possibility that appellant could amend the petition to remedy the defect. With regard to appellant's actions based on fraud, we recognize that although appellant's petition does not address when it discovered the fraudulent acts, § 25-207 provides that such actions are not deemed to have accrued until discovery of the fraud. As discussed above, the alleged fraudulent acts occurred prior to November 1983, and the obligations of NDIGC on which appellant rests its theory of recovery arose on November 8, 1983. The only means by which appellant's actions could survive the application of the statute of limitations would be if appellant can amend the petition and allege that appellant did not discover the fraud until after December 5, 1984.

In the application of statutes of limitations, discovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993); *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992); *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985).

After a thorough review of the petition and consideration of the prior action between these parties, we find that there is no reasonable possibility that appellant could amend its petition to allege facts which would establish that appellant did not discover or could not have reasonably discovered the fraud until such a time that its petition would not be barred by the statute of limitations. The record in *Weimer, supra*, reflects that the allegations of fraud attributed to the appellees in the instant case were asserted by approximately 150 Commonwealth depositors in an action filed on June 29, 1984, against the State

of Nebraska. Moreover, the record in *Weimer* shows those plaintiffs acknowledged that at the time they filed their petition, NDIGC was unable to satisfy the guaranties on the Commonwealth deposits. The *Weimer* record also includes various claims filed by the Commonwealth receiver in early 1984 against the State of Nebraska. Although made against the State, these claims involved alleged fraudulent acts which are substantially related to the alleged wrongful acts that appellant relies upon in the present case. Specifically, those claims included allegations that the State had conspired with NDIGC directors to commit fraudulent acts, and these claims requested that the State be held liable for the guaranty amount on each of the Commonwealth deposits. The court records in *Weimer, supra*, indicate that public notice was provided on numerous occasions regarding these claims and also for the public hearings which were conducted on the proposed settlements of those claims. Considering such circumstances, appellant cannot realistically contend that it did not discover or could not have reasonably discovered the alleged fraud until such a time that its actions would not be barred by the statute of limitations.

We therefore find that the actions are barred by the statute of limitations and that the district court properly denied appellant leave to amend its petition. The decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES LINDSAY, APPELLANT.

517 N.W.2d 102

Filed June 3, 1994. No. S-92-1049.

1. **Postconviction: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.
2. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.

3. **Postconviction.** Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed.
4. **Appeal and Error.** To be considered by an appellate court, a claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party.
5. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure the review of issues which were or could have been litigated on direct appeal.
6. **Effectiveness of Counsel: Evidence: Appeal and Error.** Some types of attack upon effectiveness of counsel cannot be reached upon a direct appeal because the evidence which may bear upon such a determination is not shown in the trial record.
7. **Effectiveness of Counsel.** A pro se party is held to the same standards as one who is represented by counsel.
8. **Constitutional Law: Effectiveness of Counsel: Proof.** 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, a defendant must show that his or her counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
9. **Effectiveness of Counsel: Proof.** The standard for determining the propriety of a defendant's claim that his or her counsel's performance was deficient is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law area.
10. **Trial: Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
11. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel.
12. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

John P. Steichen, of Fellman, Moylan, Natvig & Steichen, for appellant.

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

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

FAHRNBRUCH, J.

Claiming he received ineffective assistance of counsel at his trial for unlawful possession of a controlled substance with intent to deliver, James Lindsay seeks a reversal of the district court order denying his motion for postconviction relief.

We affirm the district court for Douglas County's order in all respects.

FACTS

At about 8 a.m. on June 7, 1991, Omaha police executed a search warrant at an Omaha residence where the appellant Lindsay and a woman named "Ronette Johnson" were found sleeping in the master bedroom.

The evidence seized by police during the search included (1) a rock of crack cocaine valued at between $50 and $100, found on the headboard of the waterbed in which Lindsay and Johnson were sleeping; (2) a bag of marijuana, found on the headboard; (3) a glass cigar tube, which tested positive for cocaine residue, found in the kitchen; (4) $1,200 cash in $100 bundles, found under the mattress of the bed; (5) a notepad with a list of six names, various dollar amounts next to each name, and the crossed-out words "coke" and "cola," found on a shelf on the east wall of the residence; (6) a digital pager, found in the master bedroom; (7) a plastic gram scale, which tested positive for cocaine residue, found in the living room; and (8) two cellular telephones, found in the master bedroom. Police officers testified at trial that each of these items was commonly used by drug dealers or related to drug dealing or drug usage.

The police also found several items indicating Lindsay's connection with the residence. They included (1) a billfold containing Lindsay's identification card and numerous scraps of paper with names and phone numbers, at least one of which matched a name on the seized notepad, found on the headboard; (2) a card addressed to Lindsay at the residence, with a postmark cancellation date of January 12, 1991, found in the master bedroom; (3) two vehicles in the backyard, which a police officer testified were registered in Lindsay's name; (4)

various articles of men's clothing, found in the master bedroom closet; (5) money order receipts showing payments to Lindsay, found on the headboard; and (6) an envelope of various papers relating to Lindsay's parole, found on the headboard.

Lindsay and Johnson, each represented by separate counsel, were tried as codefendants before a jury in the district court for Douglas County. Neither Lindsay nor Johnson testified at the trial. On December 9, 1991, the jury found Lindsay guilty of unlawful possession of a controlled substance with intent to deliver.

After the guilty verdict, Lindsay obtained new counsel and filed a motion for new trial, claiming he had newly discovered evidence. At the hearing on this motion, Johnson testified that at about 1:30 on the morning of the search, she and a girl friend had purchased the crack cocaine later seized by the police. Johnson testified that at about 4 a.m. she called Lindsay and asked him to come to her house. Johnson also testified that Lindsay had no knowledge that she had purchased the crack or that the crack was on the headboard of her bed. At the hearing, the State adduced evidence that Lindsay and his former trial counsel knew of Johnson's exculpatory statements before Lindsay's jury trial.

Finding that the evidence of Johnson's testimony was not newly discovered, the district court overruled Lindsay's new trial motion and subsequently sentenced Lindsay to not less than 5 nor more than 7 years' imprisonment. Lindsay's replacement counsel timely filed a notice of appeal on Lindsay's behalf. In April 1992, Lindsay notified the appellate court that he had dismissed his replacement attorney because of lack of communication.

Acting pro se, Lindsay filed a motion to dismiss his direct appeal without prejudice which was granted on August 12, 1992.

Still acting pro se, Lindsay, on October 9, 1992, filed with the district court for Douglas County motions for postconviction relief and appointment of counsel. In his motion for postconviction relief, Lindsay alleged that the district court had erred in overruling his motions to suppress physical evidence, to reinstate jurors, for a mistrial, to dismiss, and for new trial. In

addition, Lindsay claimed he had received ineffective assistance of counsel because his trial attorney failed to investigate Johnson's claims of his nonparticipation in the crime charged and to call Johnson as a witness. Finding that all of Lindsay's allegations could have been raised on direct appeal, the district court overruled his postconviction relief motion on October 21.

On November 3, 1992, Lindsay filed an amended motion for postconviction relief. In his amended motion, Lindsay alleged that (1) his trial attorney should have requested a separate trial and called Johnson to testify on Lindsay's behalf; (2) his second attorney failed to adequately investigate his prior counsel's actions; and (3) because his second attorney had constructively abandoned his case, Lindsay dismissed his appeal on the advice of an inmate at the Omaha Correctional Center (OCC) who Lindsay claims was "assigned by OCC staff to serve as legal aide to inmates." On November 6, the district court overruled Lindsay's motion to amend his postconviction motion because it was untimely, Lindsay's postconviction relief motion having been ruled upon and disposed of by the trial court's October 21 order.

Lindsay timely appealed to the Nebraska Court of Appeals the district court's October 21, 1992, order which denied his motion for postconviction relief. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

As his sole assignment of error on appeal, Lindsay claims that the district court erred in denying his motion for postconviction relief.

STANDARD OF REVIEW

In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable. *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994). On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Escamilla*, 245 Neb. 13, 511 N.W.2d 58 (1994).

ANALYSIS

We begin by noting that the district court correctly dismissed as untimely Lindsay's November 3, 1992, amended motion for postconviction relief. Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed. *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989). The additional facts alleged in Lindsay's amended motion clearly were available at the time he filed his prior postconviction relief motion. Consequently, we need not consider any alleged new facts or issues raised in Lindsay's amended motion for postconviction relief.

Our review is further limited by Lindsay's brief on appeal. It only discusses Lindsay's claim of ineffective assistance of counsel at trial. To be considered by an appellate court, a claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party. Neb. Ct. R. of Prac. 9D(1)d (rev. 1992). See, also, *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993); *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993). Therefore, we will not review the other grounds for postconviction relief raised by Lindsay in his motion to the district court. We will confine our consideration to Lindsay's claim of ineffective assistance of counsel at the trial level.

With regard to Lindsay's claim of ineffective assistance at trial, the district court found that Johnson's testimony was presented to the trial court at Lindsay's motion for new trial hearing and that the decision of Lindsay's trial counsel not to call Johnson as a witness could have been raised on direct appeal. We agree.

A motion for postconviction relief cannot be used to secure the review of issues which were or could have been litigated on direct appeal. *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993); *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993). Some types of attack upon effectiveness of counsel cannot be reached upon a direct appeal because the evidence which may bear upon such a determination is not shown in the trial record.

State v. Hert, 192 Neb. 751, 224 N.W.2d 188 (1974).

The trial record in this case discloses the relevant evidence bearing upon Lindsay's claim of ineffective assistance of trial counsel. The record discloses the content of Johnson's exculpatory statements, Lindsay's trial counsel's knowledge of those statements prior to trial, and trial counsel's failure to call Johnson as a witness. Based on this trial record, Lindsay could have litigated through direct appeal his claim of ineffective assistance of counsel.

Lindsay had employed a new attorney when he filed his direct appeal, but chose to dismiss the attorney and his direct appeal before a hearing on the direct appeal. Regardless of why or upon whose advice, Lindsay chose this course of action while acting pro se, and he must accept the consequences of his decision. A pro se party is held to the same standards as one who is represented by counsel. *State v. Bowen, supra*; *State v. Shepard*, 239 Neb. 639, 477 N.W.2d 567 (1991). The district court was not clearly wrong in denying Lindsay's motion for postconviction relief on the ground that his claim of ineffective assistance of trial counsel could have been litigated on direct appeal.

Moreover, a review of the record discloses that Lindsay's claim that his trial counsel rendered ineffective assistance is without merit. 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, a defendant must show that his or her counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Bowen, supra*.

The standard for determining the propriety of a defendant's claim that his or her counsel's performance was deficient is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law area. See *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. *Id.*

The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel. *Id.*; *State v. Evans*, 235 Neb. 575, 456 N.W.2d 739 (1990). Trial counsel is afforded due deference to formulate trial strategy and tactics. See, *State v. Navrkal*, 242 Neb. 861, 496 N.W.2d 532 (1993); *State v. Wickline*, 241 Neb. 488, 488 N.W.2d 581 (1992).

The record discloses that Lindsay's trial counsel knew before trial of Johnson's claims that she had purchased the crack cocaine and that Lindsay had no knowledge of the drugs. Indeed, during trial and in arguing Lindsay's motion to dismiss, trial counsel attempted to show that the evidence linking Lindsay with the residence was insufficient and that it was Johnson's crack cocaine. Nonetheless, Lindsay's trial counsel did not call Johnson to testify in support of this theory of defense.

Given the circumstances of this case, we find that trial counsel's decision not to call Johnson as a witness was a strategy decision within the range of reasonable professional assistance and that, therefore, trial counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law area.

Johnson testified at the hearing on Lindsay's motion for new trial that her attorney had advised her prior to trial of her right to testify and that she had elected not to testify at trial.

Johnson did not claim at the hearing on Lindsay's motion for new trial nor has Lindsay alleged in this appeal that Johnson ever changed her mind about not testifying at trial. Because Johnson had elected not to testify at her and Lindsay's joint trial, it is likely that she would have asserted her right not to testify if Lindsay's trial counsel had called her as a witness in Johnson's behalf. Thus, Lindsay's trial counsel made a reasonable decision not to call Johnson as a witness.

Even assuming Johnson would have testified, the prosecutor could have elicited damaging testimony from her on cross-examination that would have emphasized the evidence connecting Lindsay with Johnson's residence or otherwise undermined Lindsay's defense. Because of the risk of any such detrimental testimony, the decision not to call Johnson as a

witness was reasonable trial strategy.

CONCLUSION

The district court was not clearly wrong in finding that Lindsay could have litigated his ineffective assistance of counsel claim on direct appeal. In any event, Lindsay has failed to establish that his trial counsel's assistance was deficient. The district court's denial of Lindsay's motion for postconviction relief is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

SHAKUR ABDULLAH, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

517 N.W.2d 108

Filed June 10, 1994. No. S-92-512.

1. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to those questions.
2. **Pleadings: Proof.** A party will not be permitted to plead one cause of action and upon trial rely upon proof establishing another.
3. _____: _____. Proof must correspond with the allegations in the pleadings, and relief cannot be granted upon proof of a cause substantially different from the case made in the pleadings.
4. **Trial: Appeal and Error.** Issues not properly presented to and passed upon by a trial court may not be raised on appeal.
5. **Due Process: Prisoners.** In order to implicate the protections of the Due Process Clause, there must be a protectible liberty interest of the inmate's at stake.
6. **Due Process: Statutes.** A statute or rule may create a liberty interest protected by due process guarantees.
7. **Constitutional Law: Statutes.** To create a liberty interest, a state statute must place significant substantive restrictions on the decision-making process.
8. **Constitutional Law.** To obtain a protectible right, a person clearly must have more than an abstract need or desire for it. He or she must have more than a unilateral expectation of it. He or she must, instead, have a legitimate claim of entitlement to it.

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

Shakur Abdullah, pro se.

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

Kenneth N. Thompson, amicus curiae.

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

HASTINGS, C.J.

Shakur Abdullah, plaintiff, appeals from the judgment of the district court which, on his petition for declaratory judgment, denied his claim that a portion of the adult inmate classification manual of the Department of Correctional Services is unconstitutional. Abdullah assigns as error (1) the district court's finding that the nonpromulgation of the particular rule pursuant to Neb. Rev. Stat. § 84-901 et seq. (Reissue 1987 & Cum. Supp. 1992) was not an issue in the action and (2) the finding that Abdullah's automatic 3-year waiting period before he could become eligible for a custody change under the adult inmate classification manual did not violate the Due Process and Equal Protection Clauses of the federal or state Constitutions. We affirm.

When a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to those questions. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994); *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993).

Plaintiff Abdullah is an inmate of the Nebraska State Penitentiary currently serving a life sentence for first degree murder and a concurrent sentence of 15 to 50 years for shooting to kill or maim. See *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). Abdullah testified that he was in maximum custody from 1975, when he entered the penitentiary, until 1983. Sometime during 1983, a new custody classification program was adopted which allowed his custody to be reduced to medium, and eventually, minimum custody. However, in 1985 the classification system was again revamped, and, according to Abdullah, minimum custody was summarily taken away from anyone in that classification. At that time, he was placed

in medium custody. During his incarceration, Abdullah has received several misconduct reports. The most recent report prior to this action was received on March 21, 1991.

On May 10, 1991, Abdullah's request for promotion to minimum custody was denied by the acting unit administrator, due to disciplinary reports received during the past 3 years. Abdullah appealed that decision as a "step one" grievance to chief executive officer and superintendent Howard Ferguson, who denied the appeal on May 23. Abdullah filed a "step two" grievance to the director of the Department of Correctional Services, Harold Clarke. The step two appeal was denied on June 5 by Clarke, who noted in his response that Abdullah had not stated any reason for his appeal.

For the purposes of inmate classification and assignments, the adult inmate classification manual provides:

> 1. LIFE TO LIFE (Class IA felony)
>
> Inmates serving a life sentence for a Class IA felony, in which the minimum sentence is also life, shall not be eligible for consideration for promotion to minimum custody until they have served at least ten (10) calendar years; and shall not be eligible for consideration for promotion to community custody until they have been granted a sentence commutation to a definite term of years by the Board of Pardons. Inmates shall be free of misconduct for the immediate past three (3) years to be considered for promotion to minimum or community custody grades.

Clarke testified that the overriding purpose of the classification system is, first, to protect the public, and also to facilitate rehabilitation, protect offenders, and aid in management of the department. He also explained that the reason for the requirement that a life-to-life inmate remain misconduct-free for 3 years prior to promotion is that it is the position of the department that those inmates are more dangerous individuals, and they are therefore expected to adhere to more stringent standards.

In determining whether an inmate may have a change in custody, an objective factoring system is employed, which evaluates issues such as the nature of the offender's crime, the

amount of time that a person might be serving, and the offender's adjustment within the facility.

The State alleged a lack of jurisdiction over this action, both by demurrer and answer in the trial court. Those defenses were denied. The district court found that Abdullah had failed to sustain his burden of proving that the contested rule regarding reclassification of inmates serving life-to-life sentences is invalid or unconstitutional and ordered his petition dismissed. Abdullah has appealed; the State has not cross-appealed.

Abdullah first asserts that the district court erred in finding that the nonpromulgation of the rule pursuant to § 84-901 et seq. was not an issue in the action. Abdullah's petition states only that "[t]he Defendants are currently executing an unpromulgated rule and or policy" (emphasis omitted) and goes on to assert that the rule is in violation of his equal protection rights. It does not allege that the rule should have been promulgated pursuant to § 84-901 et seq. or that the agency exceeded its statutory authority. The district court thus did not receive evidence or rule on the issue of promulgation of the adult inmate classification system; therefore, the issue is not properly before this court.

A party will not be permitted to plead one cause of action and upon trial rely upon proof establishing another. *Barker v. Wrehe*, 217 Neb. 793, 351 N.W.2d 412 (1984).

Proof must correspond with the allegations in the pleadings, and relief cannot be granted upon proof of a cause substantially different from the case made in the pleadings. *Id.*; *Badran v. Bertrand*, 210 Neb. 747, 316 N.W.2d 763 (1981).

Issues not properly presented to and passed upon by a trial court may not be raised on appeal. *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992); *K & K Farming v. Federal Intermediate Credit Bank*, 237 Neb. 846, 468 N.W.2d 99 (1991).

As his second assignment of error, Abdullah asserts that the district court erred in finding that the appellees' automatic 3-year waiting period before Abdullah could become eligible for a custody change did not violate the Due Process and Equal Protection Clauses of the federal or state Constitutions. Abdullah alleges in his brief that there is a "great dissimilar treatment of residents as to when [a] misconduct report

(major/minor) will clear allowing them to become eligible for a custody change." Brief for appellant at 10. He further argues that

> "[t]he Equal Protection clause entitles similarly situated persons to equal treatment and or application of the law, rules and regulations, and the Appellant contends that the treatment he has received was dissimilar from the treatment that was afforded other residents within the [Department of Correctional Services] for receiving the same type of misconduct reports."

Brief for appellant at 16-17.

In *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), inmates brought a class action challenging two regulations promulgated by the Missouri Division of Corrections. In reviewing the challenged regulations, the Court found:

> [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations." *Jones v. North Carolina Prisoners' Union*, 433 U. S. [119, 128, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977)]. Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.

482 U.S. at 89.

Director Clarke was asked to explain the requirement that an inmate who is serving a life-to-life sentence remain misconduct-free for 3 years prior to being promoted to minimum custody. He stated:

> Quite simply, we felt one, the Parole Board requirement in part governs that they will not consider an offender who is serving life to life for any contacts within the community prior to having served at least ten years, and secondly, it is the position of the Department that those are more

> dangerous individuals within the Department of Correctional Services, and so therefore, they are expected to adhere to more stringent standards or higher standards for them.

Clarke stated that the only inmates serving under more stringent conditions than those serving life-to-life sentences are the offenders in death row. Clarke further explained that offenders who are serving "ten-to-life" are required to remain misconduct-free for 2 years rather than 3, because they are not considered as dangerous in the eyes of the courts and are therefore not required to adhere to the same standards. When asked to discuss why the department does not have a system to rate the various types of misconduct, he stated:

> Offenders are required to behave. They are required to conform to norms, rules and standards, and it's important that an offender who is serving a life sentence or ten-to-life sentence understand that they are going to be expected to adhere to rules and regulations and so forth. If they are not able to do so within prison, there is a reasonable expectation that they are not going to be able to adhere to those rules, regulations, et cetera, in a free society. So therefore, we do not rate them.

The challenged rule, which requires a life-to-life inmate to be misconduct-free for 3 years in order to be considered for promotion to minimum custody, is reasonably related to legitimate penological interests of protection of the public, protection of offenders, rehabilitation, and management of correctional institutions. Thus, the district court did not err in finding that Abdullah had failed to sustain his burden of proving that the contested rule is unconstitutional.

Although the record indicates that Abdullah received a hearing in regard to his March 1991 misconduct report, he apparently contends that due process requires a second hearing and "opportunity to be heard at said hearing to refute any previously received misconduct reports." Brief for appellant at 18.

In order to implicate the protections of the Due Process Clause, there must be a protectible liberty interest of the inmate's at stake. *Lynch v. Nebraska Dept. of Corr. Servs.*, 245

Neb. 603, 514 N.W.2d 310 (1994); *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991).

While Abdullah does not articulate the argument, a statute or rule may create a liberty interest protected by due process guarantees. See, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *Howard v. Grinage*, 6 F.3d 410 (6th Cir. 1993). However, as stated by the Eighth Circuit in *Flittie v. Solem*, 827 F.2d 276, 279 (8th Cir. 1987):

> [T]o create a liberty interest a state statute must place significant substantive restrictions on the decision making process. *Dace v. Mickelson*, 816 F.2d 1277, 1279-80 (8th Cir.1987) (en banc). Additionally, the statute must contain mandatory language similar to that in the statutes in issue in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). These "same standards apply to a review of a state rule, regulation, or practice . . . ." *Dace v. Mickelson*, 816 F.2d at 1279.

In *Greenholtz*, inmates of the Nebraska Penal and Correctional Complex brought a civil rights action against the Nebraska State Board of Parole, alleging due process violations in the board's consideration of the inmates' suitability for parole. The inmates argued that a protectible expectation of parole was created by statutory language which provided that the Board of Parole " '*shall* order [the offender's] release unless it is of the opinion that his release should be deferred because [of one of four reasons].' " (Emphasis supplied.) 442 U.S. at 11. The Supreme Court found that "the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, we emphasize that this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." 442 U.S. at 12.

In examining the adult inmate classification and assignment regulations, we find no mandatory language which would give rise to an expectation of custody promotion. On the contrary, in addition to the language involving recent misconduct reports

which preclude promotion to a minimum custody classification, Abdullah also falls within a category of inmates who "shall *not* be promoted to minimum custody except after review by and upon approval of the Director's Review Committee," by virtue of the violent nature of his offense.

"[T]o obtain a protectible right 'a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.' " *Greenholtz*, 442 U.S. at 7.

Because prison inmates have no inherent due process right to have their security level downgraded, see *Howard v. Grinage, supra*, and the regulatory language did not itself create a protectible expectation of custody promotion, there is no merit to Abdullah's assertion that he was entitled to a hearing. See, also, *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994).

The judgment of the district court was correct, and it is affirmed.

AFFIRMED.

JEANIE VENTURA, APPELLANT AND CROSS-APPELLEE, V. STATE OF NEBRASKA EQUAL OPPORTUNITY COMMISSION, APPELLEE AND CROSS-APPELLANT, AND RAYMOND PINA, ALSO KNOWN AS RAYMOND PENA, APPELLEE.

517 N.W.2d 368

Filed June 10, 1994. Nos. S-92-950, S-93-466.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** A judgment rendered or final order made by the district court pursuant to the Administrative Procedure Act may be reversed, vacated, or modified on appeal for errors appearing on the record.
2. **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.
3. **Administrative Law: Time.** The procedures and procedural rules to be applied

are those in effect on the date of the hearing and not those in effect when the act or violation is charged to have taken place.

4. **Administrative Law.** An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.
5. _____. As a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties.
6. **Courts: Administrative Law.** Only a judicial tribunal, and not an administrative agency acting as a quasi-judicial tribunal, can provide relief that was "within the general power of the court" to provide.
7. **Discrimination: Evidence: Rebuttal Evidence: Proof.** Under the framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), for employment discrimination cases, a plaintiff, in a housing discrimination case, must establish a prima facie case of racial discrimination, which can be rebutted by the defendant by articulating a legitimate nondiscriminatory reason for its action. If the defendant articulates a nondiscriminatory reason for his action, then the plaintiff is given the opportunity to show that the landlord's or seller's stated reason was in fact a pretext for discrimination.
8. **Discrimination: Proof.** In order to establish a prima facie case of housing discrimination, the plaintiff must prove by a preponderance of the evidence (1) that he is a member of a racial minority, (2) that he applied for and was qualified to rent or purchase the housing, (3) that he was rejected, and (4) that the housing opportunity remained available.
9. _____: _____. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.
10. **Discrimination: Presumptions: Proof.** Once the defendant articulates a nondiscriminatory reason for his action, the presumption established by the plaintiff's prima facie case is no longer relevant; instead, the trier of fact must then decide the ultimate question of whether the plaintiff has proven that the defendant intentionally discriminated against him because of his race.
11. **Discrimination: Proof.** Disbelief by the trier of fact of the defendant's reasons, coupled with the elements of a prima facie case, may be sufficient to show intentional discrimination without any additional proof.
12. **Discrimination: Words and Phrases: Evidence: Proof.** "Testers" are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices, and use of such evidence in proving housing discrimination is common and has been approved by the U.S. Supreme Court.
13. **Discrimination: Evidence.** A pretext may be found when the totality of the evidence presented leads the finder of fact to conclude that the proffered explanation is unworthy of credence.
14. **Service of Process: Legislature: Intent.** Where the Legislature has intended for service to be executed as a summons in civil cases, it has specifically stated so within the statutes.

15. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
16. **Administrative Law: Judgments.** An administrative agency's power to exercise judicial or quasi-judicial authority also implies the power to reconsider its own decision.
17. **Courts: Jurisdiction: Appeal and Error.** In civil appeals, after an appeal to an appellate court has been perfected, a lower court is without jurisdiction to hear a case involving the same matter between the same parties.
18. **Administrative Law: Judgments: Appeal and Error: Time.** The power of an administrative agency to reconsider its decision exists only until the aggrieved party files an appeal or the statutory appeal time has expired.
19. **Motions for New Trial: Appeal and Error.** The district court may hear a motion for new trial on the grounds of newly discovered evidence, if timely presented, although the cause is pending in a higher appellate court for review.
20. **Complaints: Discrimination: Parties.** Complainant is not a party of record where the Nebraska Equal Opportunity Commission has filed the original complaint on behalf of the complainant pursuant to Neb. Rev. Stat. § 20-333 (Reissue 1991).

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed in part, and in part reversed.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

Don Stenberg, Attorney General, Alfonza Whitaker, and Elaine A. Chapman for appellee State.

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

LANPHIER, J.

Two appeals concerning the same cause of action are the subject of this opinion, S-92-950 (*Ventura I*) and S-93-466 (*Ventura II*). These appeals involve a housing discrimination complaint filed by Raymond Pina with the Nebraska Equal Opportunity Commission (Commission). The district court affirmed the decision of the Commission finding that Jeanie Ventura had engaged in illegal discrimination. Ventura appealed. That appeal is the subject of *Ventura I*. During the pendency of the appeal to the Nebraska Court of Appeals, Ventura filed a motion for new trial with the Commission on the

grounds of newly discovered evidence. The Commission denied the motion. Ventura filed a petition for judicial review, and the district court dismissed the motion in part for lack of jurisdiction because of the pending appeal of the underlying case. Ventura appealed. The latter appeal is the subject of *Ventura II*. Subsequently, *Ventura I* was moved to our docket, and we moved *Ventura II* as well to address the jurisdictional questions which arose from the filing of the second appeal.

FACTS

Raymond Pina, who is Mexican-American, was searching for an apartment or duplex in Gering, Nebraska, in July 1991. He saw an advertisement in the newspaper listing the unit in question. On July 17, at approximately 9:30 a.m., he called the telephone number in the newspaper and was told that the unit was available. At approximately 10:30 a.m., after driving by the unit, Pina called the number again and spoke to Ventura. He told Ventura that he wanted the apartment and that he would like to see it. When Pina gave Ventura his name, Ventura told him the unit had already been rented.

Later that same day, Pina spoke to Deborah Surber, a Caucasian coworker, about the incident. It appeared strange to her that the unit had rented within an hour after Pina had expressed an interest in it. She agreed to inquire about the unit in order to determine whether there was any discrimination involved in Ventura's decision not to rent the unit to Pina.

At approximately 1:30 p.m. on the same day, Surber contacted Ventura for information on the unit, and she was given an appointment to see it at 2:30 p.m. After examining the unit, Surber told Ventura she would take the unit, and agreed to return by 3:30 with a deposit check. Ventura informed Surber that she needed to submit the deposit by 3:30 because shortly thereafter another prospective tenant would be examining the unit.

As Surber was leaving, Pina returned to the unit and asked Ventura to show him the unit. Ventura stated that she had rented the unit to Surber. Pina left and then returned to the unit shortly after 3:30. He attempted to explain to Ventura that Surber and her husband did not want the unit and stated that he would like

to rent the unit. Ventura did not allow Pina to see the apartment, and told him that another woman had an appointment to view it at 4 p.m.

The following day, several other individuals of Mexican-American descent called Ventura seeking to examine the unit. Rita Sabala and Ben Castinado testified that they called for information on the unit and were told the unit was still available. Castinado used Martinez as his last name when he called Ventura. They testified that after they stated their surnames to Ventura, Ventura became evasive and would not agree to a definite time when they could see the unit.

Garold Newton, a Caucasian, also called for the unit on July 18. Newton also stated his full name to Ventura. Newton testified that although Ventura stated she could not show him the unit on that day, she set an appointment on the following day for 5:30 p.m. The following day he learned that it had been rented to Charles Haggard, a Caucasian, later the prior evening.

Evidence presented at the hearing revealed that with the exception of one Hispanic that Ventura knew, the unit in question was rented only to Caucasians. In addition, the evidence also showed that the units with the highest monthly rental rates were rented to Caucasians, while the lower rental rate units were rented to people of Mexican descent. The hearing officer found that Ventura intentionally discriminated against Pina because of his national origin and that she intentionally maintained a policy of discrimination against potential renters of the residence who were of Hispanic descent. In awarding relief, the hearing officer awarded Pina $5,000 in damages for emotional distress. Pursuant to Neb. Rev. Stat. § 20-338 (Reissue 1991), the Commission issued a final order on June 19, 1992, adopting the findings of fact and conclusions of the hearing examiner. The district court affirmed the decision of the Commission.

The jurisdictional question arises from the separate appeals on the underlying case. Ventura appealed the decision of the district court to the Court of Appeals, *Ventura I*. During the pendency of this appeal, Ventura filed with the Commission a motion for new trial on the grounds of newly discovered

evidence. The Commission denied the motion, and the district court affirmed on the basis, in part, that it lacked jurisdiction because of the pending appeal of the underlying action. Ventura appeals that decision as well, *Ventura II*.

ASSIGNMENTS OF ERROR

In *Ventura I*, Ventura asserts the district court erred in not finding that (1) the order of the Commission and the damages it awarded were contrary to law and the evidence, (2) the Commission did not establish a prima facie case of housing discrimination, (3) Ventura's reasons for not renting the unit to Pina were not pretextual, (4) the Commission erred in awarding emotional damages, (5) there had not been compliance with the notice to make election provisions under Neb. Rev. Stat. §§ 20-333(2) and 20-335 (Reissue 1991), and (6) the Commission had not complied with all statutory procedural provisions of the law of conciliation.

On cross-appeal, the Commission asserts that the district court erred in affirming the $5,000 award of compensatory damages for emotional distress, the award being too small to fully compensate Pina.

In *Ventura II*, Ventura asserts the district court erred in (1) sustaining the Commission's demurrer without giving Ventura the opportunity to amend her petition for judicial review and (2) sustaining the Commission's demurrer on the grounds that it did not have jurisdiction to hear the matter because of the pendency of the first appeal on the underlying action.

STANDARD OF REVIEW

A judgment rendered or final order made by the district court pursuant to the Administrative Procedure Act may be reversed, vacated, or modified on appeal for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992). 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. *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993).

APPLICABLE LAW

NEBRASKA CIVIL RIGHTS ACT OF 1969 V. NEBRASKA FAIR HOUSING ACT

Ventura raises a question of whether the appropriate law was applied by the hearing officer. The alleged discrimination occurred on July 17, 1991. At that time, the law in effect was the Nebraska Civil Rights Act of 1969, Neb. Rev. Stat. §§ 20-105 through 20-125, 48-1102, and 48-1116 (Reissue 1987 & Cum. Supp. 1990). At the time the two-part hearing took place, January 29 and February 12, 1992, the current statute addressing housing discrimination, the Nebraska Fair Housing Act, Neb. Rev. Stat. §§ 20-301 through 20-344 (Reissue 1991), was in effect. We will refer to these two acts as the old law and the new law, respectively.

The relevant substantive provisions of the old law regarding impermissible discrimination in housing remain the same. See §§ 20-107 and 20-318. The relevant procedural differences between the two statutes are the methods by which an aggrieved person may seek relief. See §§ 20-114 through 20-119 and §§ 20-326 through 20-337. Under the old law, once a determination was made by the Commission that probable cause existed to credit the allegations of the aggrieved person, and informal methods of conciliation proved fruitless, then the Commission could commence an action in the district court. Under former § 20-118, the district court would hear the case as if it were sitting on a civil case. After a hearing, if the district court found that there was discrimination, then it was authorized to provide relief as specified under § 20-118, including taking "such other action as is within the general power of the court to insure justice and carry out the purposes of [the civil rights act]."

The relevant sections of the new law created a procedure by which relief can be sought by an aggrieved person after the Commission has investigated and made a determination that a discriminatory practice has occurred. Under the new law, the Commission then issues a charge against the respondent. The aggrieved person or the respondent may elect to have the matter determined in a civil action. If no election is made, then the

respondent is provided an opportunity for a hearing before an officer appointed by the Commission. See §§ 20-333 and 20-336. If the hearing officer finds that discrimination has occurred, then he can issue an order of relief for the aggrieved party. See §§ 20-337 and 20-338.

SUBSTANTIVE V. PROCEDURAL

At the hearing, the hearing officer used the substantive portions of the old law in assessing damages and the procedural provisions of the new law. In short, the procedural rules of the new law authorized the Commission to bring a charge of discrimination against Ventura on behalf of Pina and provide her with a hearing before a hearing officer after informal methods of conciliation had failed. See §§ 20-333 to 20-337. We find this was proper, because we have generally held that the procedures and procedural rules to be applied are those in effect on the date of the hearing and not those in effect when the act or violation is charged to have taken place. See *Durousseau v. Nebraska State Racing Commission*, 194 Neb. 288, 231 N.W.2d 566 (1975). Therefore, although Ventura was subject to the substantive portions of the old law, the newly operative law governed the procedural aspects of the case.

COMPENSATORY DAMAGES

However, the question remains as to the propriety of the hearing officer's imposing compensatory damages upon Ventura. The hearing officer found that Ventura had discriminated against Pina. The hearing officer's order cited §§ 20-117 and 20-118 as the applicable provisions for determining the relief which should be granted. Section 20-118 stated:

> Actions brought pursuant to section 20-117, shall be subject to the rules of procedure for other civil actions in the district courts . . . . In considering and determining such actions, the court shall have the authority to:
>
> (2) Grant temporary or permanent injunctions or restraining orders or other orders which will effectuate the purposes of sections 20-105 to 20-125, 48-1102, and 48-1116;
>
> . . . .

> (7) Take such other action as is *within the general power of the court* to insure justice and carry out the purposes of sections 20-105 to 20-125, 48-1102, and 48-1116.

(Emphasis supplied.)

An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act. *NAPE v. Game & Parks Comm.*, 220 Neb. 883, 374 N.W.2d 46 (1985). In addition, as a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties. *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979). The hearing officer cited § 20-118(7) as authorizing him to award compensatory damages for Pina's emotional distress. Section 20-118(7) authorized the "district courts" to take such other action, in addition to those actions specified in the statute, "as is within the general power of the court" to take. Thus, under the old law, the district court alone was authorized to provide relief which included taking "such other action as is within the general power of the court to insure justice and carry out the purposes of [the civil rights act]." § 20-118. However, the hearing officer could not take additional action under this section, because an agency has no general judicial powers. Accordingly, his power to afford relief was limited to exercising only those remedies specifically provided by § 20-118. In issuing the order for compensatory damages for Pina's emotional distress, the hearing officer went beyond his powers. Therefore, the award for compensatory damages for $5,000 was improper. This conclusion precludes the Commission's asserted error on cross-appeal that these damages are inadequate.

HOUSING DISCRIMINATION

ELEMENTS

Ventura's first three assignments of error combine to assert that the evidence presented at the hearing was insufficient as a matter of law to prove that Ventura discriminated against Pina. In determining whether Pina was entitled to relief, we look to federal decisions for guidance, since the antidiscrimination acts

are patterned after federal law. See *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

Ventura alleges that the Commission failed to establish a prima facie case of discrimination. One of the principal cases establishing the prima facie elements for employment discrimination cases is *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). In *McDonnell Douglas Corp.*, the Court held that the plaintiff must establish a prima facie case of racial discrimination, which can be rebutted by the defendant by articulating a legitimate nondiscriminatory reason for its action. If the defendant articulates a nondiscriminatory reason for his action, then the plaintiff is given the opportunity to show that the employer's stated reason was in fact a pretext for discrimination. *Id.* Federal courts have held that the *McDonnell Douglas Corp.* test also applies in cases brought under the Fair Housing Act. See, *U.S. v. Badgett*, 976 F.2d 1176 (8th Cir. 1992); *Secretary, HUD on behalf of Herron v. Blackwell*, 908 F.2d 864 (11th Cir. 1990). Therefore, in order to establish a prima facie case of housing discrimination, the plaintiff must prove by a preponderance of the evidence (1) that he is a member of a racial minority, (2) that he applied for and was qualified to rent or purchase the housing, (3) that he was rejected, and (4) that the housing opportunity remained available. *Blackwell, supra.* In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), the Court stated that the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

The U.S. Supreme Court recently reaffirmed the holdings of *McDonnell Douglas Corp.* and *Burdine* in *St. Mary's Honor Center v. Hicks*, ____ U.S. ____, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). In *St. Mary's Honor Center v. Hicks*, an employment discrimination case, the district court found that the respondent had established a prima facie case of racial discrimination in employment by proving that (1) he was black, (2) he was qualified for the position he held, (3) he was demoted and ultimately discharged, and (4) the position remained open

and was ultimately filled by a white man. The district court also found that the reasons given by the employer petitioner for its action were not the real reasons for demoting and discharging the respondent. Nevertheless, the district court did not grant the respondent relief because it found that the respondent had failed to carry his ultimate burden of proving that respondent's race was the determining factor in the employer's decision to demote and discharge him.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed because it found that once the plaintiff proved that the employer's proffered reasons for the actions taken against the respondent were pretextual, the respondent was entitled to judgment as a matter of law. See *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th Cir. 1992).

The U.S. Supreme Court reversed the Court of Appeals decision. The Court noted that the presumption established by *McDonnell Douglas Corp.* was a procedural device designed to establish an order of proof and production. The Court stated that the framework set forth in *McDonnell Douglas Corp.* and *Burdine* established an allocation of the burden of production and an order for the presentation of proof in title VII discriminatory-treatment cases and did not relieve the respondent of retaining the ultimate burden of persuading the trier of fact that the petitioner had intentionally discriminated against the respondent. See *St. Mary's Honor Center v. Hicks, supra.*

The Court held that if the defendant succeeds in carrying its burden of production, then

> the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in *Burdine* that to rebut the presumption "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." . . . The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. . . . The defendant's "production" (whatever its persuasive effect)

> having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race . . . .

(Citations omitted.) *St. Mary's Honor Center v. Hicks*, 113 S. Ct. at 2749.

Thus, under *St. Mary's Honor Center v. Hicks*, the plaintiff is entitled to judgment only if the plaintiff persuades the trier of fact that intentional racial discrimination was the cause of the negative treatment by the defendant. Rejection of a defendant's proffered reasons does not compel a judgment for the plaintiff, since the plaintiff always retains the ultimate burden of persuasion. *Id.* Furthermore, although the trier of fact finds that the defendant's reasons for its negative treatment of the plaintiff are not legitimate, the plaintiff nevertheless retains the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against him. "It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.*, 113 S. Ct. at 2754.

However, the Court also noted that disbelief by the trier of fact of the defendant's reasons, coupled with the elements of a prima facie case, may be sufficient to show intentional discrimination without any additional proof. See *St. Mary's Honor Center v. Hicks, supra.*

APPLICATION TO THIS CASE

The hearing officer found that the Commission had met the prima facie case requirements. It established that Pina was a Mexican-American, that he applied to and was qualified to rent the unit, that he was rejected from renting the Ventura unit, and that after Pina was rejected, the unit remained available. Ventura denied that she refused to show or rent the unit to Pina. She met her burden of producing a nondiscriminatory reason by stating that she would not rent the apartment to Pina after Surber saw the unit because Pina was "mean" to her, and she would not rent the apartment to someone who was mean to her.

The hearing officer found that the Commission succeeded in proving that Ventura's articulated reasons were pretexts. The

Commission introduced the testimony of various "testers." "Testers" are individuals who, "without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982). The use of tester evidence in proving housing discrimination is common and has been approved by the U.S. Supreme Court in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979).

The tester evidence showed that Ventura told Pina the unit was rented after he gave Ventura his last name, which is Hispanic. Thereafter, Ventura told a Caucasian tester, Surber, that the unit was still available and made arrangements for her to inspect the unit. After inspecting the unit, Surber agreed to take the unit, and agreed to return by 3:30 that afternoon with a deposit check. Ventura informed Surber that she would be showing the unit to someone else shortly after 3:30 if she did not return with the deposit check by that time. Shortly after 3:30, Pina returned and asked to see the unit. Ventura refused to show him the unit and stated that another person would be viewing the apartment at 4 p.m. Ventura claimed that she did not want to show Pina the unit because he was mean to her, and she would not rent the unit to someone who was mean to her. However, there was no indication that Pina was rude to her in the initial telephone contacts with Ventura when she gave him the address to the unit and then when she informed him that the unit was no longer available upon learning his Hispanic surname.

In addition, on the following day, two other Mexican-American individuals called Ventura for information about the unit and later stated that after they provided a Hispanic last name, Ventura would not agree to a time when she could show them the apartment. In contrast, when another Caucasian, Newton, called for the unit later that same day, Ventura set an appointment for 5:30 p.m. on the following day. Newton also gave Ventura his full name. Newton did not see the unit the next day because it had been rented to another Caucasian individual the prior evening.

In addition to the tester testimony, there was other evidence to support Pina's allegations in the rental pattern practiced by Ventura. Exhibit 7 showed that the units which rented at the highest rates were occupied by Caucasians, while units with the lower rental rates were occupied by individuals with Hispanic surnames. The evidence demonstrated that Ventura refused to show or rent to Pina because of his national origin.

Ventura denied refusing to show or rent the unit to Pina because of his national origin. She stated that she would not rent the unit to Pina because he was mean to her. Ventura's statement that Pina was mean to her referred to the second time he attempted to see the unit. There was no indication that when he originally sought to look at the unit, during the 10:30 a.m. phone conversation with Ventura, he was rude to her. Therefore, Ventura could not credibly be heard to say that she refused to show or to rent the unit to Pina because he was mean to her when she first rejected his attempts to secure the unit. The Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), stated that a pretext may be found when the totality of the evidence presented leads the finder of fact to conclude that the "proffered explanation is unworthy of credence." We agree with the hearing officer, finding that Ventura's proffered reasons were not worthy of credence.

Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Burdine, supra*; and the subsequent case *St. Mary's Honor Center v. Hicks*, ____ U.S. ____, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), we find that Pina successfully carried his burden of persuading the court that Ventura had intentionally discriminated against him.

NOTICE

Ventura claims that the Commission failed to serve her with the charge and information on election for civil action, as required by § 20-333(2)(a). Determination of this issue requires a brief overview of the procedure for seeking a remedy under the Nebraska Fair Housing Act. Under § 20-326, an aggrieved person files a complaint with the Commission alleging discriminatory practice. After this complaint is filed, the

Commission must serve notice on the respondent, "identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under the act, together with a copy of the original complaint." § 20-326(1)(b)(ii). Thereafter, the Commission investigates the complaint, and if it determines that reasonable cause exists to believe that discrimination occurred, then it must issue a charge of discrimination on behalf of the aggrieved person. § 20-333. After a charge is issued by the Commission, the Commission must "cause" a copy of the charge, along with additional information specified in the statute, to be served on the respondent.

Ventura does not argue that she was not personally served with the original complaint pursuant to § 20-326. Her allegation is that she was not properly served with the charge under § 20-333 because a copy of the charge, accompanied by the required information, was sent to her attorney of record, Robert Brenner. Under Neb. Rev. Stat. § 25-534 (Reissue 1989), the Commission was authorized to serve the notice of the charge to Ventura's attorney of record. Section 25-534 states:

> Whenever in any action or proceeding, any order, motion, notice, or other document, except a summons, is required by statute or rule of the Supreme Court to be served upon or given to any party represented by an attorney whose appearance has been noted on the record . . . such service or notice may be made upon or given to such attorney, unless service upon the party himself or herself is ordered by the court.

Ventura asserts that § 25-534 is inapplicable because the issuance of the charge amounts to a summons, which is not subject to the provisions of § 25-534. We find this statement unpersuasive. Generally, a summons is an instrument used to provide notice to a party of civil proceedings and of the opportunity to appear and be heard. *State ex rel. Ill. Farmers v. Gallagher*, 811 S.W.2d 353 (Mo. 1991). It is also used as a means of acquiring jurisdiction over a party. *Id.* Section 20-333 states in relevant part:

> (2) After the commission issues a charge under this section, the commission shall cause a copy of the charge,

together with information as to how to make an election under section 20-335 and the effect of such an election, to be served:

(a) On each respondent named in the charge, together with a notice of opportunity for a hearing at a time and place specified in the notice, unless such an election is made....

Although the notice requirements in § 20-333 serve a similar purpose as a summons by notifying the respondent of the pendency of a hearing, there is nothing in the statute which requires it to be served as a summons in a civil case. Where the Legislature has intended for service to be executed as a summons in civil cases, it has specifically stated so within the statutes. See Neb. Rev. Stat. §§ 48-174 and 48-190 (Reissue 1988) (upon filing a petition in workers' compensation cases, a summons shall be served upon the adverse party, as in civil cases, together with a copy of the petition); Neb. Rev. Stat. § 84-917 (Cum. Supp. 1992) (petition for judicial review under Administrative Procedure Act: "Summons shall be served . . . in the manner provided for service of a summons in a civil action"); Neb. Rev. Stat. § 83-1027 (Reissue 1987) (in mental health commitment hearings, district court required to cause a summons to be prepared and issued to sheriff, who shall "personally serve" upon the subject the summons and copy of the petition). Thus, if the Legislature had intended the notice in § 20-333 to be served as a summons in civil cases, then it would have made it clear in the statute. Therefore, the Commission's service of the charge upon Ventura's attorney of record was permissible under § 25-534, since § 20-333 did not require any particular form of service. See, also, *Ranger Division v. Bayne*, 214 Neb. 251, 333 N.W.2d 891 (1983) (substantial compliance with notice requirement where service is made upon attorney of record, and no particular form of service is prescribed by statute).

Ventura's remaining assignment of error regarding conciliation is meritless, since the record reflects that conciliation was attempted and failed.

We also do not address the Commission's cross-appeal, as the issue of damages has been disposed of.

VENTURA II

We now address Ventura's second appeal to this court. Ventura's original appeal was based on the determination of the district court that the hearing officer's findings were proper. During the pendency of that appeal, Ventura filed with the Commission a motion for new trial based on newly discovered evidence. The hearing officer denied the motion on January 22, 1993, after finding that the "newly discovered evidence" was evidence which was in existence prior to the public hearing and that the exercise of due diligence before the public hearing would have produced the information. The order became final on February 22, 1993, as set forth in § 20-338. On March 4, Ventura filed a petition for judicial review of the denial of the motion for new trial. The Commission filed a demurrer. The petition named the Commission and Pina as respondents. On April 27, the district court dismissed the petition, finding that it had no jurisdiction over the subject matter, that there was a defect in the parties respondent, and that the petition did not state facts sufficient to constitute a cause of action.

Ventura filed a motion for new trial in the district court on May 4, 1993. The district court properly refused to consider the motion because it was improper pleading. See *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993) (motion for new trial not properly filed in district court acting as an appellate court). Ventura appealed the April 27 and May 4 decisions on May 26, but addresses only the former decision in her brief. Accordingly, we address only the issues raised by the April 27 decision. See *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993) (this court will not consider assignments of error which are not discussed in the brief).

Ventura claims the district court erred in sustaining the Commission's demurrer because it did not have subject matter jurisdiction over the action because of the pendency of the other appeal, *Ventura I*. In addition, Ventura claims the district court erred in sustaining the demurrer on the grounds that there was a defect in the parties respondent and that Ventura failed to state facts sufficient to constitute a cause of action, without giving Ventura the opportunity to amend her petition for judicial

review.

A demurrer which challenges the sufficiency of the allegations is a general one. In our review of a ruling on a general demurrer, this court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992).

It is an abuse of discretion by the court " ' "to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint." . . .' " *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 183, 302 N.W.2d 697, 701 (1981). Accord *LaPan v. Myers, supra.*

NEW TRIAL

Ventura claims that the pendency of the appeal of the original action did not preclude the district court from considering her motion for new trial based on newly discovered evidence. We agree. The statute authorizing a party to file a motion for new trial, Neb. Rev. Stat. § 25-1143 (Reissue 1989), requires that an application for a new trial must be made within 10 days, either within or without the term, after the verdict, report, or decision was rendered, except for the cause of newly discovered evidence which the applying party could not, with reasonable diligence, have discovered and produced at trial. When newly discovered evidence is the grounds for a motion for new trial, Neb. Rev. Stat. § 25-1145 (Reissue 1989) requires the motion to be filed within 1 year after the final judgment was rendered.

Although there is no statutory provision which gives the Commission the authority to reconsider its order, we have stated that an administrative agency's power to exercise judicial or quasi-judicial authority also implies the power to reconsider its own decision. See *Bockbrader v. Department of Insts.*, 220 Neb. 17, 367 N.W.2d 721 (1985).

The issue is whether an administrative agency may reconsider its decision after an appeal of the underlying case has been filed. In civil appeals, after an appeal to this court has been perfected, a lower court is without jurisdiction to hear a case

involving the same matter between the same parties. *Bell Fed. Credit Union v. Christianson*, 237 Neb. 519, 466 N.W.2d 546 (1991); *Zeeb v. Delicious Foods*, 231 Neb. 358, 436 N.W.2d 190 (1989). See, also, *Nuttelman v. Julch*, 228 Neb. 750, 424 N.W.2d 333 (1988), *cert. denied* 489 U.S 1031, 109 S. Ct. 1167, 103 L. Ed. 2d 225 (1989) (after jurisdiction has vested in the Nebraska Supreme Court, any order made by the district court is void and of no effect). This is also true for administrative agencies. In *Morris v. Wright*, 221 Neb. 837, 381 N.W.2d 139 (1986), this court held that the power of an administrative agency to reconsider its decision exists only until the aggrieved party files an appeal or the statutory appeal time has expired. Under these principles, it would appear that the Commission and the district court were precluded from hearing Ventura's motion for new trial because jurisdiction had vested in this court.

However, we have also held that under the statutes authorizing a new trial on the grounds of newly discovered evidence, if timely presented, a motion may be entertained by the district court although the cause is pending in this court for review. *Hellman v. Adler*, 60 Neb. 580, 83 N.W. 846 (1900).

> A party desiring to obtain a new trial . . . has, therefore, the right in every case to make his application within one year from the date of the judgment in the district court, and that court has authority to entertain his petition and grant the relief demanded, although the cause may be pending for review in this court.

Id. at 582, 83 N.W. at 847.

Other cases addressing this issue have held similarly. In *State v. Youngstrom*, 191 Neb. 112, 214 N.W.2d 27 (1974), the defendant, after perfecting his appeal to this court, had filed a motion in the trial court asking the court to vacate his sentence. On appeal, this court found that all proceedings occurring after the appeal had been perfected were void because "the authority of the District Court, after appeal to this court has been perfected, seems limited to granting a new trial on the basis of the newly discovered evidence." *Id.* at 117, 214 N.W.2d at 30.

In *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499 (1958), this court addressed the question of jurisdiction of the district court

to hear a motion for new trial during the pendency of a proceeding in the Supreme Court. The defendant filed a motion for new trial on the grounds of newly discovered evidence after filing for review by a petition in error in this court. The district court found that jurisdiction to consider it was suspended during the pendency of this court's review, unless this court gave the district court permission to consider the motion. This court found that the district court had jurisdiction to hear the motion for new trial without first acquiring permission from this court to consider the motion for new trial.

> There is nothing in the statutes stating or indicating that consideration shall be delayed until after the decision on review by the Supreme Court of a conviction of a criminal offense on petition in error, unless permission to hear and determine is granted by this court. No decisions have been cited or found indicating that there should be any such delay. Reason appears to indicate that the legislative intent was that the two proceedings as such should be conducted separately and independently of each other, and that such independent conduct by the district court could not be regarded as an invasion of the jurisdiction of the Supreme Court.
>
> It is to be observed of course that a motion for new trial is directed to the trial court. . . . There is no provision for filing such a motion elsewhere. . . . At no point is the right to file or to have an original adjudication upon it related to a proceeding for review. Specifically the statute relating to the filing of a motion for new trial on the ground of newly discovered evidence . . . contains no restrictions upon the jurisdiction of that court to hear and make an adjudication on the sufficiency or merits of the motion at any time after it has been filed.
>
> Undoubtedly in a case where there had been a conviction and a review on petition in error by the Supreme Court resulting in affirmance a motion, if filed within 3 years, would be proper. If the district court properly sustained the motion the conviction and its affirmance would be nullified and a new trial would become necessary. Reasonably therefore it may not well be

> said that the exercise of this original jurisdiction of the trial court must be delayed and required to depend upon final disposition of the proceeding for review or upon consent of the reviewing court, when no such restriction of power is declared. If there are valid grounds for re-examination on the basis of newly discovered evidence to ascertain whether or not a person has been wrongfully convicted the steps provided for such re-examination should be taken timely and without undue delay.

Id. at 494-95, 93 N.W.2d at 500-01.

The principles set forth in *Hellman*, *Smith*, and *Youngstrom* can properly be applied in this case to permit the Commission to hear a motion for new trial based on newly discovered evidence although an appeal is pending. If a party that had appealed an administrative agency decision was obligated to wait until after the appeal had been disposed of to file a motion for new trial based on newly discovered evidence, then a situation could arise in which the party would be left without a remedy. The statute authorizing a new trial limits the time in which a motion for new trial may be made on the grounds of newly discovered evidence to 1 year. See § 25-1145. If an appeal is not disposed of until after 1 year had expired, then a party would be without any remedy regardless of the merit of his motion for new trial. Since a motion for new trial may appropriately be filed only in a trial court, the party would be precluded from seeking relief in this court as well. See, *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993); *Booker v. Nebraska State Patrol*, 239 Neb. 687, 477 N.W.2d 805 (1991).

Given that the statute requires the party seeking the new trial to exercise diligence once the newly found evidence is discovered, it follows that the party should be permitted to file such a motion at the earliest date possible; otherwise, the party would face dismissal because the motion is untimely or because the party failed to show due diligence.

PARTY RESPONDENT AND SUFFICIENCY OF FACTS

PARTY RESPONDENT

Ventura asserts that the district court erred when it found

that there was an error in the parties respondent. Under § 84-917(2)(a), which governs proceedings for judicial review of the decision of an administrative agency, "[a]ll parties of record shall be made parties to the proceedings for review." The party of record before the hearing examiner and throughout the entire litigation has been the Commission, although acting on behalf of Pina. Pina was not a party of record because the Commission had filed the original complaint on behalf of Pina. Had Pina elected to file a civil suit on his own behalf, then he would have been a "party of record." We find support for this conclusion in § 20-340, which permits an aggrieved party to intervene as a matter of right if he elects to have the matter asserted in a civil action. However, naming Pina as a respondent, alone, would not warrant the sustaining of a demurrer because it did not affect the substantial rights of the Commission, and it could easily be remedied.

SUFFICIENCY OF FACTS PLED

It is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action, and a petition is sufficient if, from the statement of facts set forth in the petition, the law entitles the plaintiff to recover. *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991). Ventura's petition is insufficient because it is replete with conclusions of law and is devoid of any facts which would entitle her to relief. Although a petitioner generally is provided with the opportunity to amend the pleading where there is a reasonable possibility that the defect can be cured by amendment, the district court did not abuse its discretion in dismissing the petition for judicial review. On its face, the petition completely lacked any factual allegations which would entitle the plaintiff to relief. Therefore, the order of the district court is affirmed.

CONCLUSION

The district court was correct in finding in *Ventura I* that Ventura had intentionally discriminated against Pina in refusing to show or rent to him. However, the Commission lacked authority to assess damages. In addition, although the district court could properly have considered Ventura's appeal

of the hearing officer's denial of the motion for new trial based on newly discovered evidence, it properly dismissed the petition because it failed to state facts sufficient to state a cause of action.

AFFIRMED IN PART, AND IN PART REVERSED.

WHITE, J., participating on briefs.

KAREN KROPP, APPELLANT AND CROSS-APPELLEE, V. GRAND ISLAND PUBLIC SCHOOL DISTRICT NO. 2, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT.

517 N.W.2d 113

Filed June 10, 1994. No. S-92-977.

1. **Administrative Law: Jurisdiction: Appeal and Error.** Petition-in-error jurisdiction is limited by statute to a review of a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court.
2. **Administrative Law: Appeal and Error.** For petition-in-error purposes, a board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner.
3. **Evidence: Proof: Words and Phrases.** Adjudicative facts are facts which relate to a specific party and are adduced from formal proof. Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent. They are roughly the kind of facts which would go to a jury in a jury case.
4. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
5. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Contracts.** The meaning of an unambiguous contract is a question of law.
7. _____. The meaning of an ambiguous contract is generally a question of fact.
8. **Contracts: Intent.** When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
9. **Contracts.** A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.
10. **Commission of Industrial Relations: Labor and Labor Relations: Public Officers and Employees.** Neb. Rev. Stat. § 48-816(2) (Reissue 1988) does not require public employers to act in a judicial manner when administering

grievances; it authorizes public employers to recognize employee organizations for the purpose of collective bargaining in the administration of grievances.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with directions to dismiss.

Scott J. Norby, of McGuire and Norby, for appellant.

Gregory H. Perry, of Perry, Guthery, Haase & Gessford, P.C., for appellee.

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

PER CURIAM.

A teacher instituted error proceedings following the denial of her grievance by the school board. The district court affirmed the school board's action, and the teacher appealed. We reverse, and the cause is remanded with directions to dismiss the petition in error.

Karen Kropp is a teacher in the Grand Island Public Schools. The present dispute concerns her placement on past and present salary schedules. The salary schedules are part of a negotiated agreement between Grand Island Public School District No. 2 (school district) and the Grand Island Education Association.

In August 1987, Kropp received a master's degree. After receiving her degree, Kropp applied for an advancement on the salary schedule. In March 1988, Kropp's request was granted, and she advanced to the master's-level pay scale.

In September 1991, Kropp read a "taxpayer ad" in the newspaper, listing teachers and their salaries. Kropp noticed that another teacher with equal experience and less education was making more money than Kropp. After some investigation, Kropp determined that her 1988 placement had been incorrect. Kropp concluded that as a result of this error, her current placement on the schedule and her corresponding salary are lower than they should be.

Kropp instituted grievance proceedings requesting that her placement on the salary schedule be adjusted. Kropp sought and was granted a hearing before the grievance committee of the Grand Island school board (school board). The grievance

committee found that Kropp was entitled to the requested adjustment in her placement. The school board, however, rejected the grievance committee's recommendation and denied Kropp's requested adjustment.

Kropp filed a petition in error in the district court, and the court affirmed the school board's decision. Kropp appealed, and the school district cross-appealed. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

On appeal, Kropp asserts that the district court erred in finding that sufficient evidence existed to support the decision of the school board. On cross-appeal, the school district assigns three errors which together constitute an assertion that the district court erred in failing to dismiss the petition for lack of jurisdiction.

We begin with the jurisdictional question, as it takes logical precedence over Kropp's assignment of error. The school district argues that the district court did not have jurisdiction because the school board was not exercising a judicial function. We agree.

Petition-in-error jurisdiction is limited by statute to a review of "[a] judgment rendered or final order . . . made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court." Neb. Rev. Stat. § 25-1901 (Reissue 1989). A board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. *Thomas v. Lincoln Public Schools*, 228 Neb. 11, 421 N.W.2d 8 (1988); *Richardson v. Board of Education*, 206 Neb. 18, 290 N.W.2d 803 (1980); *Kosmicki v. Kowalski*, 184 Neb. 639, 171 N.W.2d 172 (1969); *School Dist. No. 23 v. School Dist. No. 11*, 181 Neb. 305, 148 N.W.2d 301 (1967).

We first consider whether the board decided any dispute of adjudicative fact. "Adjudicative facts" are facts which relate to a specific party and are adduced from formal proof. *Van Fossen v. Board of Governors*, 228 Neb. 579, 423 N.W.2d 458 (1988); *State v. Freeman*, 440 P.2d 744 (Okla. 1968). Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent. *Wood County*

Bank v. Camp, 348 F. Supp. 1321 (D.D.C. 1972); *People v Forbush*, 170 Mich. App. 294, 427 N.W.2d 622 (1988). They are roughly the kind of facts which would go to a jury in a jury case. *Grason Elec. v. Sacramento Municipal Utility Dist.*, 571 F. Supp. 1504 (E.D. Cal. 1983), *rev'd on other grounds and remanded* 770 F.2d 833 (9th Cir. 1985); *Wood County Bank, supra.*

In order for us to determine whether the school board decided a dispute of adjudicative fact, we must examine Kropp's claim in greater detail. The school district's salary schedule contains columns which correspond to a teacher's level of education. For example, placement in the "MA-36" column would mean that a teacher had earned a master's degree plus 36 additional credit hours.

The columns on the salary schedule were changed between the 1986-87 agreement and the 1987-88 agreement. The 1986-87 agreement included the following sequence: BA-18, BA-45/MA. The 1987-88 agreement included the following sequence: BA-18, BA-36, MA. The 1987-88 agreement also provided that a certificated staff member, such as Kropp, could not advance more than one column in 1 fiscal year.

The parties agree that during 1986-87, Kropp was placed in the BA-18 column. The parties also agree that in March 1988, Kropp was placed in the MA column. The only real dispute is whether this 1988 placement was proper. To decide this dispute, the school board needed to interpret the contract.

It will be helpful to review some basic principles of contract interpretation. In setting out these principles, we emphasize that we are not considering the substance of the school board's decision; we are merely attempting to determine whether the school board decided any dispute of adjudicative fact.

In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994); *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Murphy, supra*; *Plambeck, supra*. The meaning of an

unambiguous contract is a question of law. *Husen v. Husen*, 241 Neb. 10, 487 N.W.2d 269 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992). In contrast, the meaning of an ambiguous contract is generally a question of fact. *Plambeck, supra*; *Schwindt v. Dynamic Air, Inc.*, 243 Neb. 600, 501 N.W.2d 297 (1993).

Thus, in order to find that the school board decided a dispute of adjudicative fact, we would have to find that the contract was ambiguous and that the school board determined the meaning of the contract. This we cannot do, for the contract is not ambiguous. The contract plainly states that certificated employees cannot move more than one column per year.

At the hearing, the school administration did not claim that the one-column-per-year provision was ambiguous. Instead, through the testimony of Marvin D. Maurer, superintendent of the Grand Island public school system, the administration contended that the one-column-per-year rule did not apply when an employee changed degree levels, that is, went from a bachelor's degree to a master's degree. This contention, however, is merely an attempt to demonstrate the intent of the parties with respect to the contract. When a contract is unambiguous, the intentions of the parties must be determined from the contract itself. *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993); *Husen, supra*. A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include. *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993); *Rees v. Huffman*, 222 Neb. 493, 384 N.W.2d 631 (1986).

The school board did not decide any dispute of adjudicative fact. The parties agreed as to Kropp's actual placements on the school district's salary schedule and the times those placements occurred. In deciding whether Kropp's placement was proper, the school board needed to apply the terms of the contract. Because the contract is unambiguous, the school board did not need to determine the factual question of the intent of the parties. In short, the school board determined solely questions of law.

We next consider whether any statute required the school

board to act in a judicial manner. Kropp refers us to two statutes.

Kropp first cites Neb. Rev. Stat. § 48-816(2) (Reissue 1988), which provides, in pertinent part: "[P]ublic employers are hereby authorized to recognize employee organizations for the purpose of negotiating collectively in the determination of and administration of grievances arising under the terms and conditions of employment . . . ." This statute does not *require* public employers to act in a judicial manner when administering grievances. Insofar as the statute has any relevance to Kropp's claim, it *authorizes* public employers to recognize employee organizations for the purpose of collective bargaining in the administration of grievances. Cf. *Kuhl v. Skinner*, 245 Neb. 794, 515 N.W.2d 641 (1994). That is, if a grievance arises and the public employees seek collective bargaining, then the public employer is authorized to recognize employee organizations for the purpose of such collective bargaining.

Kropp next cites Neb. Rev. Stat. § 79-12,109 (Reissue 1987), which authorizes a superintendent to "take action with regard to a certificated employee's performance or conduct . . . including: (1) Counseling; (2) oral reprimand; (3) written reprimand; and (4) suspension without pay for not to exceed thirty working days." Section 79-12,109 also specifies certain procedures which must be followed if a superintendent takes action under subdivisions (3) or (4) above. We have recognized that a school board exercises certain judicial functions under § 79-12,109. See *Thomas v. Lincoln Public Schools*, 228 Neb. 11, 421 N.W.2d 8 (1988).

Section 79-12,109 does not apply to Kropp's claim. This is not a teacher discipline case. The superintendent did not take action with regard to Kropp's performance or conduct; Kropp took action with regard to her pay, requesting a change in her placement on the salary schedule. The superintendent simply denied her request.

Neither of the two statutes cited by Kropp requires the school board to act in a judicial manner when hearing pay-scale grievances. We have not found any other statutes which would place such a requirement upon the school board.

The school board did not decide any dispute of adjudicative fact and was not statutorily required to act in a judicial manner. Therefore, the orders of the school board in this case are not reviewable by proceedings in error. The fact that Kropp's claim cannot be reviewed by a proceeding in error, we emphasize, does not prevent her from filing an appropriate action. Accord *Thomas, supra*.

We conclude that the district court lacked jurisdiction to hear Kropp's petition in error. In light of this conclusion, it is unnecessary to address Kropp's assignment of error. The judgment is reversed and the cause remanded with directions to dismiss the petition in error.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, J., participating on briefs.

JULIE A. MCDONALD, APPELLEE, V. CHERYL MILLER, APPELLANT.

518 N.W.2d 80

Filed June 10, 1994. No. S-92-1015.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not by judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
2. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.
3. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
4. **Trial: Witnesses: Appeal and Error.** The trial court is given discretion in determining whether a witness is qualified to state his opinion, and such determination will not be disturbed on appeal absent an abuse of discretion.
5. **Evidence: Appeal and Error.** Testimony objected to which is substantially similar to evidence admitted without objection results in no prejudicial error.
6. **Trial: Expert Witnesses.** The admissibility of expert testimony depends on

whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact.

7. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
8. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.
9. **Jury Instructions: Proof: Appeal and Error.** In an appeal 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.
10. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.

Appeal from the District Court for Saunders County: EVERETT O. INBODY, Judge. Affirmed.

Alan L. Plessman for appellant.

Gordon R. Hauptman and Matthew A. Lathrop, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellee.

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

WRIGHT, J.

Julie A. McDonald sued Cheryl Miller for injuries sustained by McDonald in a boating accident on July 4, 1989. A jury awarded McDonald $73,000, and Miller appeals. We affirm.

SCOPE OF REVIEW

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not by judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994).

A jury verdict will not be disturbed on appeal unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of

passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Sanwick v. Jenson*, 244 Neb. 607, 508 N.W.2d 267 (1993).

FACTS

On October 18, 1991, McDonald commenced an action against Miller in which McDonald sought damages for injuries she suffered as the result of a July 4, 1989, boating accident. McDonald was a passenger in a boat (Marquardt boat) which was struck by a boat operated by Miller. McDonald alleged that Miller failed to maintain a proper lookout; failed to yield the right-of-way; failed to maintain reasonable control of the boat; and failed to turn aside, swerve, or otherwise avoid striking the boat which was carrying McDonald. She claimed serious and permanent injuries as a result of the accident.

Before trial, the parties stipulated that Miller was operating a boat on Thomas Lake on July 4, 1989; that McDonald was in another boat at that time; and that a collision occurred. They stipulated that the hospital and medical expenses were fair and reasonable for the services provided.

The Marquardt boat was driven by Irvin Vrana. Dan Marquardt was water-skiing behind the boat, which was owned by his father. As the boat passed through a channel, Marquardt fell. Vrana throttled back and dragged the ski rope around to Marquardt. During this time, Vrana noticed the Miller boat approaching and decided not to proceed until it had passed.

Miller testified that as she navigated about the lake, she was originally traveling at approximately 30 m.p.h. and that the boat was level to the water. When the water became choppy, she slowed the boat to approximately 15 m.p.h., which, according to Miller, raised the front of the boat and limited her vision. She continued around the lake in this manner while visiting with passengers in the boat.

Vrana testified that while the Marquardt boat was stationary, the Miller boat drew closer and closer. The bow of the Miller boat was raised in the air, and Vrana could not see the driver of the boat. As the Miller boat approached, Vrana became concerned, stood up, and began shouting, but he failed

to attract Miller's attention. He then moved toward the front of the boat, stood on the seats in the bow, and began yelling and waving.

Bradley Pfeiffer was on the beach and heard Vrana yelling. Pfeiffer testified that the Marquardt boat was stopped, that the women in the boat driven by Miller were talking back and forth, and that the driver of the Miller boat was facing sideways, as if talking to someone next to her.

Miller testified that she became aware of the Marquardt boat when she was approximately 20 feet away and that she heard a man yelling at approximately the same time. McDonald testified that prior to the collision, she was facing the back of the boat and talking with Marquardt, who was in the water. After Vrana indicated the Miller boat was approaching, McDonald turned to look as Vrana began waving his hands. Next, according to McDonald, "it hit." McDonald testified that the Miller boat slid up on her back, pushed her head and face down into the Marquardt boat, and "clamped" her head down on the boat.

Pfeiffer testified that as the boats collided, half of the Miller boat went up onto the Marquardt boat, slid across the top of the Marquardt boat, and then slid back down into the water. Pfeiffer, an emergency medical technician, swam to the Marquardt boat, applied a stabilizing hold to McDonald's neck, and immobilized McDonald's back until a rescue squad arrived. The rescue squad placed McDonald on a backboard and applied a "C-collar."

McDonald testified that the day after the accident, she had a black eye and swelling over her other eye and her cheekbones. She had stiffness and soreness in her shoulders and back, had a severe headache, and had red marks on her back. Her recovery progressed slowly, and at the end of July, she consulted John Hannam, an Omaha neurologist.

Hannam took a thorough history of McDonald's symptoms and complaints. He was informed by McDonald that she was in a good state of health prior to the boating accident. Hannam was told by McDonald that another boat rode up over the top of the boat in which she was riding and struck her in the back of the head, that the force of the collision caused her to fall

forward, and that she struck her face against the boat in which she was riding. She complained of severe headaches and pain upon passive flexion of her neck. Based upon his examination, Hannam diagnosed McDonald's condition as posttraumatic headaches. Hannam continued to treat McDonald, and in August 1990, he prescribed physical therapy for McDonald's neck pain because patients with soft-tissue injuries develop muscle spasms.

McDonald again sought medical assistance in August 1992 because of intense pain in her shoulders and neck. After undergoing physical therapy, she visited Hannam in late August, and her condition had improved. Hannam concluded that McDonald suffered from chronic cervical strain, and he testified with a reasonable degree of medical certainty that the cervical strain was permanent and was caused by the accident of July 4, 1989.

John Dobler, McDonald's physical therapist, described the pain McDonald experienced in the back of her neck. Based upon his examination, he testified to a degree of certainty within his profession that sitting and looking down "would tend to aggravate a condition that Julie has." In his opinion, McDonald's physical therapy treatments were medically necessary.

In January 1992, McDonald consulted Thomas Huerter, an orthodontist, complaining of pain in both joints of her jaw and headaches. Upon examination, Huerter noted that McDonald was experiencing pain in both of her temporomandibular joints and had referred neck pain and tightness and that he could feel "popping" in both joint areas. He diagnosed her condition as temporomandibular joint dysfunction syndrome (TMJ).

ANALYSIS

Miller assigns 11 errors. The first five assignments of error concern the court's overruling of objections to testimony by Duane Arp, a conservation officer with the Nebraska Game and Parks Commission. After interviewing Miller, Arp concluded that "she was probably going too slow at the time which would bring the bow of the boat up blocking her vision." Over Miller's objection as to foundation, Arp was allowed to

state his opinion that the driver of a boat has to adjust to bring down the bow of the boat when it is raised up out of the water. Miller contends that there was no foundation laid to establish Arp had any expertise in operating motorboats or knew the responsibilities of the operator of a motorboat and that a lay witness may testify only to facts perceived by his senses and may not give opinions or state conclusions. See *Shamburg v. Folkers*, 187 Neb. 169, 188 N.W.2d 723 (1971).

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not by judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissiblity of evidence. *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994). Miller claims that Arp's testimony imposed upon her a duty to keep the bow of the boat down to control the boat when there was no apparent basis for Arp to know that such duty existed and that allowing Arp's conclusion or opinion into evidence without any foundation was error which requires a new trial on all issues.

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. Neb. Rev. Stat. § 27-103(1) (Reissue 1989). As a general rule, to constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992).

We find that even if there was insufficient foundation for Arp's opinion regarding a duty to keep the bow down to control the boat, the testimony was not prejudicial to Miller. There was sufficient evidence in the record from which a jury could find that the Miller boat struck the Marquardt boat, which was not moving, and from which a jury could properly find that the cause of McDonald's injuries was Miller's failure to maintain a proper lookout and to maintain proper control of the boat regardless of whether the bow of the boat was in the air.

Miller testified that when she first saw the Marquardt boat, she was operating her boat at approximately 30 m.p.h. and the

boat was level in the water. As she came around a curve, the water became choppy, and she slowed down to 15 m.p.h. That speed caused the front end of the boat to rise in the air. Miller said that when the front end of the boat tilts up, she sits on her knees to see over the steering wheel. She explained that a boat is level in the water if it is operating at the proper speed and that if the boat is traveling too slowly, the back of the boat sits deeper in the water, raising the front end of the boat, which is not as heavy.

Miller argues that the court erroneously permitted Arp to state that the Miller boat "came up and over the top" of the Marquardt boat, because there was a dispute as to whether the Miller boat went up onto the Marquardt boat. Previously, Arp stated that he had determined through his investigation that the bottom of the Miller boat struck the upper left-hand side of the Marquardt boat. No objection was made to this statement. Pfeiffer also testified without objection that the Miller boat hit the Marquardt boat, went halfway up onto it, and then slid across the top and back down. Sue Sandberg, a passenger in Miller's boat, stated that the Miller boat slid up onto the Marquardt boat and slid back down after the collision and that the bow of the Miller boat was high in the air prior to the collision. Testimony objected to which is substantially similar to evidence admitted without objection results in no prejudicial error. *Greenwood Ranch v. Morrill Cty. Bd. of Equal.*, 232 Neb. 114, 439 N.W.2d 760 (1989). We find this assignment of error to be without merit.

Miller claims the court erroneously permitted Arp to testify that the Marquardt boat was stationary at the time of the collision. This assignment of error has no merit. Arp testified previously without objection that Miller told him the Marquardt boat was stationary at the time of the collision. Pfeiffer also testified that the Marquardt boat was stationary. Sandberg stated that at the time of the collision, the Marquardt boat was sitting still. The testimony to which Miller objects is substantially similar to evidence which was admitted without objection, and no prejudicial error occurred. See *id.*

Miller next argues that the court erred in overruling her objections to Pfeiffer's testimony that McDonald told him the

Miller boat hit her in the head. McDonald's attorney asked Pfeiffer what McDonald said when he first arrived to help her. We find no error in the admission of the statement by Pfeiffer because the statement was an exception to hearsay under Neb. Rev. Stat. § 27-803(1) (Reissue 1989) as an excited utterance. In addition, the testimony was substantially similar to evidence admitted without objection. See *Greenwood Ranch, supra.* McDonald testified that she turned to jump out of the Marquardt boat or to get away from the Miller boat, but it hit her in the back, slid up on her back, and pushed her head and face down into the boat so that she was clamped down. She testified that her face, neck, shoulders, and the back of her head all hurt immediately after the accident. The court limited the admission of this testimony, even though the limitation was not necessary.

Miller next asserts that it was error for the court to allow Huerter to testify as to the "high and low" of the future cost of treatment for McDonald's condition, because the testimony called for speculation and lacked foundation. Huerter, who had treated McDonald from 1983 to 1987, stated that she returned for treatment on January 29, 1992, reporting headaches, difficulty in chewing, pain in her temporomandibular joints, and referred pain in her neck. McDonald told Huerter that she had been involved in a boating accident in which a boat had come up over the top of the boat in which she was riding and compressed her head and part of her jaw into the railing of the boat. Huerter diagnosed McDonald as having TMJ and testified that it was his opinion, with reasonable medical certainty, that the TMJ was the result of trauma from the accident because the pain began soon after the accident.

Huerter testified that McDonald would need treatment for 12 to 18 months and that if the treatment did not provide relief, surgical intervention could be required. Miller objected to the following question asked of Huerter: "Do you have an opinion as to, say, the high and the low of what the treatment might cost Julie McDonald in the future for this condition?" Huerter stated that the minimum cost based upon the current course of treatment would be $1,200 and that the maximum cost if McDonald needed further tests and diagnosis or fixed

appliances would be $4,000.

The admissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact. The soundness of its determination depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case. *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993). The testimony was properly admitted. McDonald's future medical expenses were a fact in issue. Huerter taught orthodontics at Creighton University dental school for 4 years. He treated McDonald for 4 years prior to the accident and was familiar with the condition of her teeth prior to the accident. Huerter regularly dealt with TMJ and other types of joint dysfunctions of the jaw. Based upon the foundation presented, the testimony was properly admitted and was not the result of conjecture. The evidence was sufficiently definite to provide a basis for future medical expenses.

Miller next claims the court erred by allowing Dobler, a physical therapist, to give his opinion that McDonald would aggravate her injuries if she sat for an extended period of time. Miller's objections were based on foundation, relevancy, and speculation. She also argued that Dobler was not a proper expert to give such an opinion. We find that the testimony was relevant, proper foundation was given, the testimony was not speculative, and Dobler was a proper expert to give an opinion.

Dobler held a bachelor of science degree in physical therapy and had been a physical therapist for 17 years. He was the director of physical therapy at Midwest Sports and Industrial Rehabilitation (Midwest Rehabilitation) and had treated more than 100 patients with chronic cervical strain.

"If scientific, technical, or other specialized knowledge will assist the trier of fact 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." Neb. Rev. Stat. § 27-702 (Reissue 1989). A trial court's ruling in receiving or excluding an expert's testimony

which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Lantis v. City of Omaha*, 237 Neb. 670, 467 N.W.2d 649 (1991). The trial court did not abuse its discretion in permitting Dobler's testimony.

Miller's next argument is that Dobler was not qualified to testify as to the medical necessity of McDonald's physical therapy. This testimony was similar to the testimony of Hannam. Hannam prescribed the physical therapy and testified that the physical therapy with Midwest Rehabilitation was necessary for McDonald's treatment and care. The admission of the testimony resulted in no prejudicial error. See *Greenwood Ranch v. Morrill Cty. Bd. of Equal.*, 232 Neb. 114, 439 N.W.2d 760 (1989).

Miller next claims that the trial court erred in admitting exhibits 7A through 7K and in instructing the jury on damages based upon admission of these items because no medical provider stated that the charges for the medical services to McDonald were necessary *as a result of the accident*. Exhibit 7A, a summary of medical expenses, was not admitted in evidence. Exhibits 7B through 7K, which are medical bills, were stipulated as being fair and reasonable.

Miller correctly points out that although litigants may stipulate that a plaintiff's medical expenses are fair and reasonable costs or charges, in order to recover the stipulated expenses as damages in a negligence action, the plaintiff must prove that the defendant's conduct was the proximate cause of the medical expenses. See *Renne v. Moser*, 241 Neb. 623, 490 N.W.2d 193 (1992).

In *Renne*, although the parties had stipulated that certain itemized medical expenses were fair and reasonable, there was no evidence that the accident was the proximate cause of the expenses offered in the exhibit. We stated that the stipulated list of expenses was merely a collection of names and numbers without reference to any particular time and, as such, lacked probative value and was irrelevant information which was properly excluded from the jury's consideration.

Therefore, we review the record to determine whether there is sufficient evidence to support the admission of the medical bills. The ultimate determination of whether McDonald's

medical expenses were proximately caused by the injuries she sustained in the boating accident is for the jury.

Exhibit 7B, a $900 bill from Huerter for splint therapy, was properly admitted. Huerter testified that the treatment was medically necessary and that the TMJ was caused by the boating accident.

Exhibit 7C, a statement from Ashland Emergency Service for transportation on July 4, 1989, and exhibit 7D, a statement for emergency room and x-ray services, were properly admitted based on records which show that McDonald was taken by ambulance to the emergency room immediately following the accident.

Exhibit 7E is a bill from Bergan Mercy Medical Center for $205.90. Exhibit 7G is a statement from Midwest Rehabilitation for physical therapy in the amount of $1,036. Exhibit 7I is a statement from Hannam for $766. Exhibit 7J is a $150 statement from Radiology Consultants, P.C., for an MRI (magnetic resonance imaging). Hannam testified that these expenses were medically necessary as part of McDonald's treatment for cervical strain caused by the boating accident. Exhibits 7E, 7G, 7I, and 7J were properly admitted.

Exhibit 7F is a statement for $292 from Immanuel Medical Center for physical therapy treatment in August 1992. The dates of the treatment correspond to an office visit with Hannam, who prescribed the physical therapy. Hannam was continuing to treat McDonald for cervical strain which was caused by the July 1989 boating accident. The evidence was sufficient to establish that the medical expenses described in exhibit 7F were a proximate result of the accident caused by Miller.

Exhibit 7H is a bill for $35 from Physicians Clinic, P.C., for an office visit on July 6, 1989. The record shows that Miller's attorney conceded there was proper foundation for this exhibit.

Exhibit 7K sets forth prescriptions written for McDonald following the boating accident. Two of the prescriptions, amounting to $13.58, lacked adequate foundation. However, Miller has not shown she was prejudiced by the inclusion of these two prescriptions in exhibit 7K or by the admission of exhibit 7K into evidence.

In order to constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded. *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). Miller has failed to establish that she was unfairly prejudiced by the receipt into evidence of the medical bills.

There was approximately $4,000 in medical bills which were submitted to the jury for its consideration. The verdict of the jury was general and was in the amount of $73,000. " 'The amount of damages to be awarded is one solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.' " *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 443, 500 N.W.2d 529, 542 (1993). Accord *Union Ins. Co. v. Bailey*, 234 Neb. 257, 450 N.W.2d 661 (1990). We find that Miller's assignment of error with regard to the admission of exhibits 7B through 7K is without merit.

Miller objected to jury instruction No. 3 on damages. There was sufficient evidence to warrant the giving of the instruction on the value of medical care to date or in the future. In an appeal 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. *Macholan v. Wynegar*, 245 Neb. 374, 513 N.W.2d 309 (1994); *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994). Miller has not met that burden.

Miller's final assignment of error is the trial court's overruling of her motion for new trial. This error was not argued, and it will not be considered. To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *Florist Supply of Omaha v. Prochaska*, 244 Neb. 776, 509 N.W.2d 209 (1993).

A jury verdict will not be disturbed on appeal unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate as to indicate that it was the result of

passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded evidence or rules of law. *Sanwick v. Jenson*, 244 Neb. 607, 508 N.W.2d 267 (1993).

None of Miller's assignments of error have merit. The evidence shows that McDonald was injured as a result of Miller's negligent operation of the boat which struck McDonald. The damages awarded by the jury were for injuries resulting from the boating accident. We affirm the judgment of the district court.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

MIROSLAV M. HAMERSKY, APPELLANT, V. NICHOLSON SUPPLY CO., APPELLEE.

517 N.W.2d 382

Filed June 10, 1994. No. S-92-1122.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.
2. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
3. **Employment Contracts.** An employee's at-will status can be modified by contractual terms that may be created by employee handbooks and oral representations.
4. **Employment Contracts: Breach of Contract: Proof.** In an action for breach of a contract of employment, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract.
5. **Employment Contracts.** Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee.
6. _____. An employee's subjective understanding of job security is insufficient to establish an implied contract of employment to that effect.
7. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court reviews 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.

8. **Employment Contracts.** An agreement to give permanent employment simply means to give a steady job of some permanence, as distinguished from a temporary job or temporary employment.
9. **Courts: Ordinances: Judicial Notice: Records: Appeal and Error.** Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will appellate courts on appeal.

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

Robert F. Bartle, of Healey & Wieland Law Firm, for appellant.

George C. Rozmarin and Mary Kay Frank, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

HASTINGS, C.J.

The plaintiff, Miroslav M. Hamersky, appeals a summary judgment entered in favor of the defendant, Nicholson Supply Co., and against him on his claim for damages for wrongful termination and age discrimination under title 11 of the Lincoln Municipal Code. The plaintiff asserts that the district court erred in (1) failing to find that the defendant's employee handbook, together with the defendant's actions and statements to the plaintiff, constituted an agreement not to discharge him except for good cause; (2) failing to find that the defendant's oral assurances, in conjunction with company practice and policy, created an expectation of permanent employment and constituted a modification of any at-will status of his employment; (3) determining that there was no genuine issue of material fact and that the defendant was entitled to judgment as a matter of law; and (4) failing to find that the actions of the defendant in wrongfully discharging the plaintiff, without notice or due process, constituted age discrimination and a violation of the Lincoln Municipal Code. We transferred this case to our docket as part of our authority to equalize caseloads.

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994); *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993).

According to the plaintiff's petition and the affidavits on file, the plaintiff was born on June 30, 1933.

He was employed as a sales representative by the defendant from 1970 until January 22, 1992. From 1970 until 1987, he worked as an "outside" sales representative in a territory in west and central Nebraska. In the spring of 1986, he was advised by company representatives that he would be allowed to move from an outside sales position to an "inside" position, on a salary basis, until his retirement. Also in 1986, because of the retirement of another sales representative, he was asked to move to a different sales territory south of Lincoln. He worked this sales position on a "draw-plus-commission" basis from 1986 until approximately March 1991. At that time, he requested and was allowed to move from the outside sales territory to an inside position. His primary responsibilities were to handle telephone sales, training of other sales representatives, and other office duties. He received a flat hourly wage. Between May and September 1991, he trained three sales representatives. From September 1991 until his discharge in January 1992, he performed office duties and also worked as a sales representative in northeast Lincoln and around Ashland, Nebraska. The plaintiff did not receive additional compensation or commissions for these duties.

On January 15, 1992, the plaintiff was discharged from his employment "without any notification, cause or reason." This action was allegedly in disregard of oral assurances of continued employment, past practices of the company, and implicit assurances given in the company's employment handbook.

The plaintiff first contends that the district court erred in failing to find that the defendant's employee handbook, interpreted with the defendant's actions and statements, constituted an agreement not to discharge him except for good

cause.

We recently stated, in *Hillie v. Mutual of Omaha Ins. Co.*, 245 Neb. 219, 223, 512 N.W.2d 358, 361 (1994), that "[u]nless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason."

An employee's at-will status can be modified by contractual terms that may be created by employee handbooks and oral representations. *Hillie v. Mutual of Omaha Ins. Co., supra*; *Hebard v. AT&T*, 228 Neb. 15, 421 N.W.2d 10 (1988).

In *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 738, 408 N.W.2d 261, 266 (1987), we noted:

> [I]f the handbook language constitutes an offer definite in form which is communicated to the offeree, and the offer is accepted and consideration furnished for its enforceability, the handbook provision becomes part of the employment contract. . . . In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. . . . The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer.

The plaintiff argues that the defendant's February 2, 1987, handbook, unlike many such handbooks, does not specifically limit the rights of employees; he also refers us to general language regarding loyalty to the company. He further asserts that there is an "implicit assurance" in the section of the handbook which states that " 'employees who quit or are discharged for causes shall not be eligible for any unused paid vacation.' " The plaintiff contends that this reference clearly implies that "employees leave Nicholson Supply only by way [of] quitting or being fired for cause." Brief for appellant at 9. To the contrary, the language means what it says; if an employee quits or is discharged for cause, he or she will not be entitled to unused paid vacation time. If one is terminated for any other reason, that person would be entitled to vacation benefits.

In an action for breach of a contract of employment, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract. *Hillie v. Mutual of Omaha Ins. Co., supra.*

The referenced language in the defendant's employee handbook clearly does not constitute an offer definite in form, and thus, the plaintiff has failed to prove that the handbook supports the formation of a unilateral contract.

The plaintiff next asserts that the district court erred in failing to find that the defendant's oral assurances, in conjunction with its practice and policy, created an expectation of permanent employment and constituted a modification of any at-will status of his employment.

Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee. *Hillie v. Mutual of Omaha Ins. Co., supra*; *Hebard v. AT&T, supra.*

In regard to oral representations, the plaintiff states in paragraph 5 of his affidavit:

> In approximately Spring of 1986, I was advised by company representatives, including Steve Nicholson, an officer and treasurer of Nicholson Supply Company, that I would be allowed to move from an outside sales position to an "inside" position, on a salary basis, until my retirement. In other words, I understood my job would be secure, even if I elected to give up my sales territory and commission income to avoid the strain of travel associated with outside sales.

The defendant properly asserts that an employee's subjective understanding is insufficient to defeat the at-will employment doctrine.

An employee's subjective understanding of job security is insufficient to establish an implied contract of employment to that effect. *Hillie v. Mutual of Omaha Ins. Co., supra*; *Johnston v. Panhandle Co-op Assn., supra.*

It must be conceded from the record that paragraph 5 of the plaintiff's affidavit is the only specific reference to any assurances given to him. However, in an apparent reference to paragraph 5, the plaintiff states in paragraph 3 of his affidavit:

"[A]s I describe more completely below, I was provided oral representations and assurances by company management representatives concerning the nature and permanency of my employment, *unless I was specifically discharged for cause*." (Emphasis supplied.)

Nevertheless, the additional allegations are conclusionary in nature and make no reference to specific facts. We thus are left with a bare statement of "fact" that the plaintiff would be permitted to work inside until his retirement.

In appellate review of a summary judgment, the court reviews 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. *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994); *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993).

In *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), we rejected an employee's argument that his employment was to last until his retirement at age 65, based on his employer's statements that he was to have a "career" at the bank. The plaintiff attempts to distinguish this case from *Mau* in that here the plaintiff claims to rely on alleged specific assurances of employment until his retirement.

Cited with approval in *Mau* is *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976), in which the employee claimed that the employer's designation of him as a "permanent" employee took him out of the at-will status. The Kansas court said that "an agreement to give permanent employment simply means to give a steady job of some permanence, as distinguished from a temporary job or temporary employment." *Id.* at 55, 551 P.2d at 782.

At another point in his affidavit, the plaintiff states:

> In approximately March, 1991, at a company sales meeting in Omaha, attended by both Jack Nicholson and the sales manager, Steve Aerts, to whom I reported at this time, I requested and was allowed to move from my outside sales territory to a [sic] "inside" position with the company. . . . In agreeing to this new position, Mr. Nicholson not only acknowledged past assurances given

> to me, but also asked me to accept a flat hourly wage, as opposed to prior commissions. I agreed to do this, at a level roughly equivalent to the compensation level I received in 1990.

In his affidavit, Jack Nicholson states:

> To my knowledge, Mr. Hamersky, during his period of employment with Nicholson Supply Company, was never given any written assurances, and no oral statements were made to him by company management or representatives, to the effect that his employment with Nicholson Supply Company was permanent in nature or that he could be discharged only for cause.

In any event, the plaintiff's affidavit lacks specificity in regard to his reliance on "company practice and policy," and the only assurance made was that he "would be allowed to move from an outside sales position to an 'inside' position, on a salary basis, until [his] retirement." This is no more time-specific than having a "career" or "permanent employment." We conclude that the only conclusion properly drawable from the undisputed facts is that the plaintiff's employment was for an indefinite period.

As his final assignment of error, the plaintiff contends that the district court erred in failing to find that the conduct, actions, and decisions of the defendant in wrongfully discharging him, without notice or due process, constituted age discrimination and a violation of title 11 of the Lincoln Municipal Code. The applicable ordinance does not appear in the record. In *Hawkins Constr. Co. v. Director*, 240 Neb. 1, 480 N.W.2d 183 (1992), we reiterated the rule that courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will appellate courts on appeal. We further stated:

> Without the benefit of the applicable municipal ordinances involved, neither a district court nor an appellate court is in a position to declare the rights of the parties under the ordinances, any more than a court could declare the rights of parties to a contract without the benefit of the contract.

Id. at 2, 480 N.W.2d at 184.

The plaintiff's assignments of error are without merit. The judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

DONNA MAE GOFF ET AL., APPELLANTS, V. MARY ANN WEEKS, APPELLEE.

517 N.W.2d 387

Filed June 17, 1994. No. S-92-723.

1. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court reviews the record de novo, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Actions: Parties: Standing.** In determining if a party is a real party in interest, the focus of the inquiry is whether the party has standing to sue because the party has some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
3. _____: _____: _____. The purpose of the inquiry as to whether a party is a real party in interest is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
4. **Contracts: Undue Influence: Proof.** To warrant a rejection of a written instrument on the ground of undue influence, the proponent of undue influence must establish each of the following elements: (1) that the person who executed the challenged instrument was subject to undue influence, (2) that there was an opportunity to exercise undue influence, (3) that there was an intent to exercise undue influence for an improper purpose, and (4) that the result was clearly a product of the undue influence.
5. **Equity: Undue Influence: Proof.** In an equitable action, the proponent of an undue influence theory bears the burden to prove each of the elements by clear and convincing evidence.
6. **Contracts: Undue Influence.** It is not merely the exercise of influence which invalidates a written instrument; rather, it is the exercise of *undue* influence.
7. **Undue Influence: Words and Phrases.** Undue influence is unlawful or fraudulent influence which controls the will of the actor.
8. **Undue Influence: Proof.** Because undue influence is often difficult to prove with direct evidence, it may be reasonably inferred from the facts and circumstances surrounding the actor; his life, character, and mental condition.

However, the party seeking to establish such influence has not met his burden of proof if all the evidence is circumstantial and the inferences to be drawn therefrom are as equally consistent with the hypothesis that undue influence was not exercised as they are with the hypothesis that such influence was exercised.

9. _____: _____. Although the burden of persuasion or the burden of going forward on the issue of undue influence may shift, the ultimate burden of proof remains at all times on the party asserting the issue.
10. **Contracts: Undue Influence: Evidence.** Evidence that the party benefiting by a written document executed made no attempt to keep others from seeing and conversing with the party executing the document tends to show the absence of a disposition to exert undue influence.
11. **Decedents' Estates.** The law recognizes the right of a person to control and dispose of his own property and the right to choose the person who shall be the recipient of his bounty.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Russell S. Daub, of Daub & Nelson, for appellants.

Neil W. Schilke, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellee.

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

LANPHIER, J.

Donna Mae Goff, the former wife of Floyd Goff, now deceased, and their three surviving children filed an action in the Dodge County District Court. Donna Goff and the three surviving children sought to prevent life insurance proceeds payable on the death of Floyd Goff from being paid to Mary Ann Weeks, defendant. Floyd Goff had developed a relationship with Weeks after his separation from Donna Goff. Weeks was named as beneficiary on a significant amount of insurance on the life of Floyd Goff. The plaintiffs contend that beneficiary changes to the policies should be voided because Weeks exerted undue influence over the decedent and breached her fiduciary duties by exercising her power of attorney to effectuate these changes, in violation of the express powers granted in the power of attorney. This appeal arises from an order of the Dodge County District Court in favor of Weeks denying the plaintiffs' request for a permanent injunction against Weeks from making any claim on the decedent's

insurance policies and declaring Weeks to be the rightful and legal beneficiary of the decedent's life insurance policies. We affirm the judgment of the district court.

FACTUAL BACKGROUND

Floyd Goff, the decedent, was married to Donna Goff for 33 years before their divorce in February 1988. The marriage produced four children, three of whom survived Floyd Goff. Donna Goff and the three children are the plaintiffs in this action.

In September 1987, Floyd Goff began living with Weeks, the defendant in this case. He was involved in a loving relationship with Weeks and with her children. His relationship with his own three children deteriorated, and there were infrequent communications between the children and him from the time of his divorce from Donna Goff until the time of his death. He was first diagnosed with cancer on June 23, 1991, and was hospitalized for two periods of time; the first from June 29 to August 18, and the second from September 23 to October 18. He died November 1, 1991.

Floyd Goff had six life insurance policies which are the subject of this dispute. Three Prudential policies and a New England Life policy named the Omaha National Bank as beneficiary, as trustee under a revocable trust agreement. The trust agreement originally named Donna Goff as primary beneficiary and his children as secondary beneficiaries. A NACOLAH policy (previously AMOCO) had named both Donna Goff and Weeks as beneficiaries, with 50 percent of the proceeds to each. A Loyalty Life policy had named Donna Goff as the beneficiary. On July 12, during his first hospitalization period, Floyd Goff executed change of beneficiary forms on the Prudential, NACOLAH,and Loyalty Life policies to name Weeks as sole beneficiary to each of these policies. On July 17, he then executed a change of beneficiary form on the New England Life policy, naming Weeks as primary beneficiary and his three children as secondary beneficiaries.

ASSIGNMENTS OF ERROR

We have summarized and reorganized the errors raised by appellants in an effort to present them in an orderly manner.

Appellants contend that the district court erred in not voiding the beneficiary changes because (1) the tape recordings, letters, and statements made by the decedent establish that Weeks exerted undue influence over the decedent; (2) Weeks breached her fiduciary duty pursuant to the power of attorney; (3) Weeks violated the express terms of the power of attorney; and (4) Weeks as attorney in fact made an impermissible gift to herself pursuant to a power of attorney. Appellants also claim that the district court's holding that Donna Goff was not a real party in interest to the Loyalty Life insurance policy of the decedent is in error.

STANDARD OF REVIEW

This is an equitable action commenced in the district court, wherein the plaintiffs sought to enjoin the defendant from making a claim on the decedent's life insurance policies and a declaration of the rightful and legal beneficiaries of the decedent's policies. In an appeal of an equity action, an appellate court reviews the record de novo, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Pruss v. Pruss*, 245 Neb. 521, 514 N.W.2d 335 (1994); *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991); *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986).

ANALYSIS

REAL PARTY IN INTEREST

The first issue we address is whether Donna Goff is a real party in interest with respect to the Loyalty Life insurance policy. Upon review of the record, we find that she is. Neb. Rev. Stat. § 25-301 (Reissue 1989) provides that, with an exception not involved here, every "action must be prosecuted in the name of the real party in interest." In determining if a party is a real party in interest, the focus of the inquiry is whether the party has standing to sue because the party has some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. The purpose

of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993). Exhibit 120 is a letter from Loyalty Life presenting the beneficiary history and a stipulation between the parties confirming such. The history shows Donna Goff to be the named beneficiary prior to the July 12, 1991, change of beneficiaries. If the change of beneficiary to Weeks is voided, Donna Goff would be entitled to the proceeds. Therefore, Donna Goff is a real party in interest.

UNDUE INFLUENCE

The second issue before this court is whether Weeks exerted undue influence over the decedent causing him to change the beneficiaries of his life insurance policies from Donna Goff and her three children to Weeks.

To warrant a rejection of a written instrument on the ground of undue influence, the proponent of undue influence must establish each of the following elements:

> (1) that the person who executed the challenged instrument was subject to undue influence, (2) that there was an opportunity to exercise undue influence, (3) that there was an intent to exercise undue influence for an improper purpose, and (4) that the result was clearly a product of the undue influence.

Pruss v. Pruss, 245 Neb. 521, 536, 514 N.W.2d 335, 346 (1994). Accord, *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991); *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983); *In re Estate of Saathoff*, 206 Neb. 793, 295 N.W.2d 290 (1980). In an equitable action, the proponent of an undue influence theory bears the burden to prove each of the elements by clear and convincing evidence. *Pruss, supra*. See *In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986) (explaining that the burden of proof on a particular issue is controlled by the nature of the cause of action, not by the instrument involved).

It is not merely the exercise of influence which invalidates the written instrument; rather, it is the exercise of *undue* influence. *Pruss, supra*; *In re Estate of Price, supra*. Undue influence is

unlawful or fraudulent influence which controls the will of the actor. *Miller, supra*; *Rule v. Roth*, 199 Neb. 746, 261 N.W.2d 370 (1978).

Because undue influence is often difficult to prove with direct evidence, it may be reasonably inferred from the facts and circumstances surrounding the actor; his life, character, and mental condition. *In re Estate of Villwok*, 226 Neb. 693, 413 N.W.2d 921 (1987). However, the party seeking to establish such influence has not met his burden of proof if all the evidence is circumstantial and the inferences to be drawn therefrom are as equally consistent with the hypothesis that undue influence was not exercised as they are with the hypothesis that such influence was exercised. *In re Estate of Price, supra*.

Although the burden of persuasion or the burden of going forward on the issue of undue influence may shift to the proponent of the instrument, the ultimate burden of proof remains at all times on the party asserting the issue. *Pruss, supra*; *In re Estate of Novak*, 235 Neb. 939, 458 N.W.2d 221 (1990). The party bearing that burden must put forth evidence that convincingly establishes the necessary elements of undue influence. Anything less is not enough to support a finding of undue influence. *Pruss, supra*.

WAS FLOYD GOFF SUBJECT TO UNDUE INFLUENCE?

In the present case, although Floyd Goff was a well-educated man with a long history of employment in the insurance business, we find that with respect to the first element, he was susceptible to undue influence at the time the beneficiary changes were executed. These changes were executed during his first period of hospitalization, when he underwent chemotherapy, blood transfusions, and morphine treatments. He relied upon Weeks for aid with a number of activities while in the hospital, including help with eating, obtaining information, and obtaining the change of beneficiary forms which he requested. He also granted a power of attorney to Weeks. These facts prove that he was susceptible to undue influence.

WAS THERE OPPORTUNITY TO EXERCISE UNDUE INFLUENCE?

The parties do not dispute that Weeks had the opportunity to exercise undue influence over Floyd Goff.

WAS THERE INTENT TO EXERCISE UNDUE INFLUENCE?

Appellants contend Weeks had an intent or disposition to exercise undue influence over Floyd Goff because she was "burned out, embarrassed, and upset about sharing insurance" with Donna Goff and because she did not seek advice for Floyd Goff. Brief for appellants at 45. We do not agree.

Evidence that the party benefiting by the document executed made no attempt to keep others from seeing and conversing with the party tends to show the absence of a disposition to exert undue influence. See *Fremont Nat. Bank & Trust Co. v. Beerbohm*, 223 Neb. 657, 392 N.W.2d 767 (1986). Weeks informed Donna Goff and the children of Floyd Goff's hospitalization and allowed them to visit him alone in the hospital. Weeks called Bill Olson, who was Floyd Goff's friend and manager at Prudential, with a request for him to visit Floyd Goff. Lastly, Weeks obtained the change of beneficiary forms for him and helped fill them out, per his request. In fact, Weeks obtained additional change forms for him *after* she had been named sole beneficiary, again per his request. We find that there is insufficient evidence to prove that Weeks intended to gain an unfair advantage by devices which reasonable persons would regard as improper.

WAS RESULT A PRODUCT OF UNDUE INFLUENCE?

Appellants claim the resulting changes were the product of undue influence because Floyd Goff bestowed upon Weeks a greater amount than he had intended to and effectively disinherited his children. However, the law recognizes the right of a person to control and dispose of his own property and the right to choose the person who shall be the recipient of his bounty. *Eggert v. Schroeder*, 158 Neb. 65, 62 N.W.2d 266 (1954); *Johnson v. Mayfield*, 163 Neb. 872, 81 N.W.2d 308 (1957). The type of undue influence which will void a written instrument is an unlawful or fraudulent influence which controls the will of the actor. *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991); *Rule v. Roth*, 199 Neb. 746, 261

N.W.2d 370 (1978).

Appellants place a great deal of emphasis upon a tape-recorded conversation between Floyd Goff and appellants, during which Floyd Goff stated, "[T]hey were power of appointing and changing beneficiaries to the point — well, I don't know what the hell was going on, to be honest with you." But just moments prior to issuing this statement, he expressed a large degree of hesitancy to communicate his decision to Donna Goff and the children. This statement was made in the context of a difficult conversation in which a dying man struggled to explain to his former wife of 33 years and his children that they were no longer beneficiaries of his insurance policies. We must weigh that conversation with other evidence in the case.

Appellants also assert Floyd Goff made a statement that he wished Weeks to have between $200,000 and $250,000. Prior to his illness, he had placed assets worth $151,267 in Weeks' name. Appellants contend that the actions of naming Weeks as sole beneficiary to the six policies discussed provide Weeks with proceeds of $347,472; more than the amount intended by him in his statement. Appellants contend that this is in violation of express instructions of the principal. However, at the time Floyd Goff made these monetary range statements, he did not know how much his policies were worth. He then obtained information that the policies were worth more than he had previously believed. He subsequently changed beneficiaries. This did give Weeks a greater amount than indicated in his prior statements; however, the record discloses the lack of consistency is due to his lack of knowledge of the policies' worth at the time of the earlier statements.

Floyd Goff's relationship with Donna Goff and the children had deteriorated since his divorce, and communications between them became infrequent. Conversely, he enjoyed a loving and close relationship with Weeks. They discussed their retirement needs, generally had merged their property, and treated each other as husband and wife. Floyd Goff stated he wished to "provide for" and "take care of" Weeks. The evidence shows that the relationship between him and Weeks was one of affection. It would appear that it was that

relationship which influenced him to make the beneficiary changes. This is no doubt distressing and regretful to his former longtime wife and natural children; however, it is not fraudulent and unlawful.

Appellants thus have not satisfied their ultimate burden to prove by clear and convincing evidence each of the last two elements necessary to establish undue influence.

Appellants' remaining assignments of error are without merit. Appellants contend that in exercising her power of attorney to change the beneficiaries of the six policies, Weeks breached her fiduciary duty to Floyd Goff, violated the express terms of the power of attorney, and as attorney in fact made an impermissible gift to herself pursuant to her power of attorney. Weeks did not exercise her power of attorney to execute the beneficiary changes. While it is true that Weeks helped obtain information and the forms per Floyd Goff's request and that she and her brother helped fill them out per his request, it was Floyd Goff himself who executed the change of beneficiary forms.

CONCLUSION

The district court was correct in declaring Weeks to be the rightful and legal beneficiary of Floyd Goff's life insurance policies. The decision of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

VIRGINIA HORTON, APPELLANT, V. FORD LIFE INSURANCE CO., APPELLEE.

518 N.W.2d 88

Filed June 17, 1994. No. S-92-1106.

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

2. **Demurrer: Pleadings.** In considering a demurrer, a court cannot assume the existence of a fact not alleged, make factual findings to aid the pleadings, or consider evidence which might be adduced at trial.
3. **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.
4. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled.
5. **Demurrer: Pleadings: Records.** A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action.
6. **Actions: Pleadings: Records.** Exhibits attached to a petition in a case, and being a part of the files therein, which are designated and referred to in an amended petition as exhibits attached thereto, and by reference made a part of the pleading, will be treated as such, in the absence of a motion directed to the same, in determining whether such amended pleading states a cause of action, even though not physically attached to such amended petition.
7. **Subrogation: Pleadings.** Ordinarily, one seeking subrogation must plead it and set forth the facts from which the right of subrogation arises.
8. **Subrogation: Words and Phrases.** Subrogation is the substitution of one person who is not a volunteer, a subrogee, for another, a subrogor, as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee.
9. _____: _____. Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.
10. **Subrogation.** Absent an agreement, the doctrine of subrogation applies only when a party pays the debts of a third person, not as a volunteer, but either out of a legal or moral obligation to do so or to protect his or her own rights or interests or to save his or her own property.
11. **Decedents' Estates: Affidavits.** Anyone paying pursuant to an affidavit prepared under Neb. Rev. Stat. § 30-24,125 (Reissue 1989) is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit.

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

Robert J. McCormick, of Anderson, Klein, Peterson & Swan, for appellant.

Michael Heavey, of Dwyer, Pohren, Wood, Heavey, Grimm, Goodall & Lazer, for appellee.

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

FAHRNBRUCH, J.

Virginia Horton claims it was error for a district court to sustain a demurrer to her third amended petition and dismiss her lawsuit against Ford Life Insurance Co. (Ford Life) for the proceeds of a credit life insurance policy on the decedent, Roger E. Horton, M.D.

We reverse the ruling of the district court for Douglas County dismissing Horton's cause of action and remand the cause for further proceedings.

FACTS

On April 10, 1992, Horton filed a petition in the trial court seeking a $10,000 judgment against Ford Life, together with interest and attorney fees. In her petition, Horton alleged that (1) Dr. Horton died April 23, 1987, from injuries he sustained when a shotgun accidentally discharged; (2) prior to Dr. Horton's death, Ford Life sold him a disability insurance policy containing life insurance coverage; (3) the policy contained a provision promising to pay Brooks Ford, Inc., a benefit in the amount of $10,000 upon the death of Dr. Horton; (4) the policy was in effect at the time of Dr. Horton's death; (5) immediately after Dr. Horton's death, Brooks Ford submitted a claim to Ford Life "requesting the balance due on the 1986 automobile be paid in full"; (6) the balance due on the automobile at the time of Dr. Horton's death was about $10,000; and (7) Ford Life "refused to pay the balance due on the loan which [Dr. Horton] maintained with Brooks Ford," and as a result, Horton was required to pay the balance due on the loan.

A copy of the insurance policy Dr. Horton purchased from Ford Life was attached to and referred to in Horton's petition. The policy has an effective date of October 7, 1986, a term of 36 months, and is in the original amount of $12,266.40. The policy states: "Claim payments are made to the Creditor to pay off or reduce your debt. If claim payments are more than the balance of your debt, the difference will be paid to you or to a Second Beneficiary or to your estate." The policy does not describe or identify the debt it purports to cover other than to declare that

Brooks Ford is the creditor beneficiary of the policy.

On May 18, Ford Life, claiming that Horton failed to state facts sufficient to constitute a cause of action against Ford Life, demurred to Horton's petition. Following a hearing, the district court sustained Ford Life's demurrer and granted Horton 2 weeks to file an amended petition.

On June 23, Horton filed an amended petition alleging substantially the same facts alleged in her original petition, but adding that because she paid the debt of Dr. Horton, she became subrogated to any claim he might have against Ford Life by virtue of the policy it issued.

On June 29, Ford Life demurred to the amended petition for its failure to state facts sufficient to constitute a cause of action. The district court sustained the demurrer and granted Horton 14 days to file a second amended petition.

In her second amended petition, Horton added that pursuant to Neb. Rev. Stat. §§ 30-24,125 and 30-24,126 (Reissue 1989), she was entitled to bring this lawsuit for and on behalf of Dr. Horton. She further alleged that on November 6, 1989, Horton, then known as Virginia Cookson, signed an "Affidavit for Collection of Personal Property" pursuant to the Nebraska Probate Code.

A conformed copy of that affidavit was attached to and referred to in Horton's second amended petition. The affidavit states that Virginia Cookson is *the* successor of Dr. Horton and that as such, and pursuant to §§ 30-24,125 and 30-24,126, she is entitled to any money due and owing to him, any tangible personal property of his, and all instruments evidencing a debt, obligation, stock, or chose in action belonging to Dr. Horton.

Also attached to the second amended petition was a document entitled "Affidavit for Transfer of Decedent's Motor Vehicle." That "affidavit" states that Virginia Cookson is the surviving spouse of Dr. Horton and that Dr. Horton died seized of a 1986 Ford Tempo. This "affidavit" is not signed by Horton, dated, notarized, or specifically referred to in Horton's second amended petition.

On August 7, Ford Life demurred to Horton's second amended petition. After a hearing at which only Ford Life's counsel appeared, the district court sustained the demurrer and

granted Horton until September 11 to file a third amended petition.

On October 28, Horton filed a motion for leave to file a third amended petition, asserting that her counsel had moved his office prior to receiving Ford Life's demurrer to the second amended petition and that she had not received notice of the hearing on the demurrer until October 20.

On November 5, the district court held a hearing at which (1) the court sustained Horton's motion to file a third amended petition, (2) Horton filed her third amended petition, and (3) Ford Life demurred to the third amended petition.

Horton's third amended petition is identical to her second amended petition, except that she did not attach a copy of the insurance policy to her third amended petition. No copy of the "Affidavit for Transfer of Decedent's Motor Vehicle" was attached to, nor was it referred to in, Horton's third amended petition.

Upon Ford Life's demurrer to Horton's third amended petition, the trial court sustained the demurrer and dismissed Horton's lawsuit.

ASSIGNMENTS OF ERROR

Horton claims that the district court erred in (1) sustaining the demurrer of Ford Life and (2) dismissing her lawsuit.

SCOPE AND STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader. See, *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994); *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994).

In considering a demurrer, a court cannot assume the existence of a fact not alleged, make factual findings to aid the pleadings, or consider evidence which might be adduced at trial. *Id.*

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. *Lawyers Title Ins. Corp., supra*; *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993).

In ruling on a demurrer, the petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled. *Wheeler, supra.*

A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action. See, *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991); *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977); *Prucha v. Department of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75 (1961). Exhibits attached to a petition in a case, and being a part of the files therein, which are designated and referred to in an amended petition as exhibits attached thereto, and by reference made a part of the pleading, will be treated as such, in the absence of a motion directed to the same, in determining whether such amended pleading states a cause of action, even though not physically attached to such amended petition. *Bank of Stockham v. Alter*, 61 Neb. 359, 85 N.W. 300 (1901). Accord *Gilbert Central Corp. v. Overland Nat. Bank*, 232 Neb. 778, 442 N.W.2d 372 (1989). Pursuant to these cases, Dr. Horton's insurance policy will be considered as if it were attached to Horton's third amended petition.

ANALYSIS

Based on the foregoing rules, we review Horton's third amended petition, together with (1) the copy of Dr. Horton's insurance policy, which was attached to Horton's original petition, and (2) the affidavit Horton prepared pursuant to §§ 30-24,125 and 30-24,126, which was attached to and referred to in Horton's third amended petition. After such review, we find that, although perhaps unartfully drafted, Horton's petition nevertheless does state facts sufficient to constitute a cause of action under two theories.

The facts alleged by Horton are sufficient to state a cause of action that she is subrogated to whatever rights Brooks Ford possessed as the creditor beneficiary of the Ford Life insurance policy. The facts alleged by Horton in her third amended

petition are also sufficient to state a cause of action that she is entitled to collect claim payments owed to Dr. Horton's estate pursuant to a specific provision of the policy.

SUBROGATION

Ordinarily, one seeking subrogation must plead it and set forth the facts from which the right of subrogation arises. *Cagle, Inc., supra.* Subrogation is the substitution of one person who is not a volunteer, a subrogee, for another, a subrogor, as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee. *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993). Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other. *Id.*

Absent an agreement, the doctrine of subrogation applies only when a party pays the debts of a third person, not as a volunteer, but either out of a legal or moral obligation to do so or to protect his or her own rights or interests or to save his or her own property. See, *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990); *J.J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988); *Rawson v. City of Omaha*, 212 Neb. 159, 322 N.W.2d 381 (1982); *Cagle, Inc., supra.*

To state her right of subrogation, Horton must have pled facts sufficient to show the following material elements: (1) Brooks Ford had a right to be paid a benefit from Ford Life under the insurance policy issued by Ford Life to Dr. Horton; (2) Ford Life failed to pay that benefit to Brooks Ford; (3) Horton paid Brooks Ford the amount of the benefit, or in other words, the debt owed by Ford Life to Brooks Ford under the policy; and (4) Horton paid that debt either out of a legal or moral obligation to do so *or* to protect her own rights or interests or to save her own property.

Horton clearly pled facts sufficient to show the first two elements. With regard to the third element, the insurance policy attached to and made part of Horton's petition insures a debt that Dr. Horton owed to the named creditor beneficiary,

Brooks Ford. In her third amended petition, Horton further alleged that she paid the balance due on "*the* loan which [Dr. Horton] maintained with Brooks Ford." (Emphasis supplied.)

It can reasonably be inferred from the alleged facts that Dr. Horton had but one loan with Brooks Ford, that the Ford Life insurance policy covered that loan, and that therefore the debt Horton paid was the same debt insured by Ford Life. The alleged facts in Horton's third amended petition, and the reasonable inferences to be drawn therefrom, are sufficient to show that Horton paid the benefit—or in other words, the debt—owed by Ford Life under the insurance policy involved here.

As to the fourth element necessary to show Horton's right of subrogation, Ford Life argues that Horton failed to state facts sufficient to show she had an interest or property to be protected by having paid the balance due on the loan Dr. Horton maintained with Brooks Ford. Specifically, Ford Life argues that to state her right of subrogation, Horton had to plead that the loan Dr. Horton maintained with Brooks Ford was secured by a lien on a 1986 automobile and that Horton had acquired an interest in that 1986 automobile. Without these allegations, Ford Life argues, Horton failed to show that payment of Dr. Horton's loan would prevent repossession of the automobile and, thereby, protect her interest in the automobile.

This argument is without merit because Horton pled facts sufficient to show that she had an interest *in Dr. Horton's estate*, regardless of whether she had an interest in any particular automobile Dr. Horton may have owned. Attached to and incorporated by reference into Horton's third amended petition was a conformed copy of an "Affidavit for Collection of Personal Property." That document states that Horton, then known as Virginia Cookson, is "*the* successor of Roger E. Horton, deceased." (Emphasis supplied.) Horton also pled that she signed this document pursuant to the Nebraska Probate Code.

The Nebraska Probate Code defines successors as "those persons, other than creditors, who are entitled to property of a decedent under his will or this code." Neb. Rev. Stat.

§ 30-2209(46) (Reissue 1989). Therefore, it can reasonably be inferred from Horton's pleaded facts that Horton, as *the* successor of Dr. Horton, succeeded to the estate of Dr. Horton under his will or the Nebraska Probate Code. It can also be reasonably inferred that by paying off the loan Dr. Horton maintained with Brooks Ford, Horton protected her interest in his estate from the consequences of a default on that loan, including a potential claim against the estate.

HORTON'S ESTATE RIGHTS

Under the heading of "Who Gets Paid," the insurance policy provides that "[i]f claim payments are more than the balance of your debt, the difference will be paid to you or to a Second Beneficiary or *to your* [*Dr. Horton's*] *estate*." (Emphasis supplied.)

In pleading that she paid the balance due on Dr. Horton's loan with Brooks Ford, Horton pled facts showing that the balance of Dr. Horton's debt under the insurance policy was zero at the time she filed this lawsuit. Horton pled further that the amount still owed by Ford Life under the policy was $10,000. Pursuant to the foregoing policy provision, Horton has pled facts showing that as the successor to the estate of Dr. Horton, she has a right to the difference between any claim payments due under the policy at the time of Dr. Horton's death and the balance of Dr. Horton's debt, which she alleged was reduced to zero upon her repayment of Dr. Horton's loan to Brooks Ford. As a matter of law, Ford Life cannot escape paying the benefits due under the policy upon Dr. Horton's death solely because his successor fully paid the debt to Brooks Ford that Ford Life contracted to pay.

In its brief, Ford Life claims that §§ 30-24,125 and 30-24,126 are not applicable because Horton has not shown that Dr. Horton's estate is less than $10,000. In an apparent effort to defeat any interest that Horton has in her claim against Ford Life, Ford Life argues that filings by Horton indicate Dr. Horton's estate is valued in excess of $10,000. Horton's affidavit as successor to Dr. Horton's estate alleges that the "fair market value of the entire estate of the decedent [Dr. Horton], wherever located, *less liens and encumbrances*, does

not exceed ten thousand dollars." (Emphasis supplied.) Section 30-24,126 provides that anyone paying pursuant to an affidavit prepared under § 30-24,125 is "not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit." Ford Life, as one allegedly owing a debt to Dr. Horton's estate, upon payment of a debt owed to Dr. Horton's successor, is protected because it is not required to inquire into the truth of the statements in Horton's affidavit.

Furthermore, as stated previously, a court can consider an exhibit attached to and made part of a petition in determining whether the petition states a cause of action. See, *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991); *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977); *Prucha v. Department of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75 (1961). Whether attached exhibits must meet certain statutory or other legal requirements in order to be used as *proof* of the allegations contained therein is a question we need not consider in reviewing an order sustaining a demurrer.

CONCLUSION

Giving a liberal construction to Horton's third amended petition, together with the exhibits attached to and referred to in Horton's third amended petition and its predecessor petitions, we find that Horton alleged facts sufficient to state a cause of action (1) that she is subrogated to whatever rights Brooks Ford possessed as a creditor beneficiary of the Ford Life insurance policy and (2) that under §§ 30-24,125 and 30-24,126, as the successor of Dr. Horton, she is entitled to collect claim payments owed to Dr. Horton's estate pursuant to a specific provision of the policy.

We reverse the district court's judgment dismissing Horton's cause of action and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., participating on briefs.

LARRY R. BOYLES AND OLGA J. BOYLES, APPELLANTS, V. GARY J. HAUSMANN AND RENEE S. HAUSMANN, HUSBAND AND WIFE, ET AL., APPELLEES.

517 N.W.2d 610

Filed June 24, 1994. No. S-92-204.

1. **Declaratory Judgments.** An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989, Cum. Supp. 1992, & Supp. 1993) is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. The test is whether, in the absence of the prayer for declaratory judgment, the issues presented should properly be disposed of in an equitable as opposed to a legal action.
2. **Restrictive Covenants: Equity.** The action to declare a restrictive covenant invalid and unenforceable is essentially equitable in nature.
3. **Equity: Appeal and Error.** In an equity action, the appellate court reviews the record de novo. In such a review, the appellate court reaches conclusions independent of the factual findings of the trial court, provided, where credible evidence is in conflict, the reviewing court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Appeal and Error.** As to questions of law, the appellate court is obligated to reach its conclusions independent of the determinations of the trial court.
5. **Declaratory Judgments: Justiciable Issues.** Declaratory judgments are available when a present actual controversy exists and all interested persons are parties to the proceedings, and then only when a justiciable issue exists for resolution. A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible of immediate resolution and capable of present judicial enforcement.
6. _____: _____. A declaratory judgment action cannot be used to determine the legal effects of a set of facts which are future, contingent, or uncertain. At the time that the declaration is sought, there must be an actual justiciable issue from which the court can declare law as it applies to a given set of facts.
7. **Restrictive Covenants: Intent.** Restrictive covenants are to be construed so as to give effect to the intention of the parties at the time they agreed to the covenants.
8. **Restrictive Covenants.** If the language is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction.
9. **Contracts.** An ambiguity exists when the instrument at issue is susceptible of two or more reasonable but conflicting interpretations or meanings. Moreover, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
10. **Restrictive Covenants.** When asked to consider a restrictive covenant, a court should keep in mind that restrictive covenants which restrict the use of land are

not favored by the law, and if ambiguous, they should be construed in a manner which allows the maximum unrestricted use of the property. If the language is unambiguous, the covenant should be enforced according to its plain language.

11. _____. If a restrictive covenant agreement also contains a provision which provides for future alteration, the language employed determines the extent of that provision.

12. _____. Under no circumstances shall restrictions on the use of land be extended by mere implication.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, IRWIN, and WRIGHT, Judges, on appeal thereto from the District Court for Washington County, DARVID D. QUIST, Judge. Judgment of Court of Appeals affirmed as modified.

Nile K. Johnson, of Johnson & Mock, for appellants.

Gregory P. Drew for appellees.

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

WHITE, J.

This appeal arises from an action filed by appellants, Larry R. Boyles and Olga J. Boyles, seeking to declare that a restrictive covenant on their real property is invalid. After a bench trial the district court entered an order declaring the covenants valid. The Nebraska Court of Appeals reversed the decision of the district court. *Boyles v. Hausmann*, 2 Neb. App. 388, 509 N.W.2d 676 (1993). We modify and affirm the decision of the Court of Appeals.

On August 14, 1977, appellants purchased Lot 18 of the Pioneer Hills Subdivision. The Pioneer Hills Subdivision is located at Section 7, Township 17 North, Range 12 East of the 6th P.M. in Washington County, Nebraska. At the time of the purchase, there were covenants on the subdivision lots which restricted the use of the land. These covenants had been established by the original owners of the lots within the subdivision.

Generally, the covenants address the following: (1) limiting residential buildings to one single-family residence per lot; (2) limiting the size and number of attached garages or carports; (3) prohibiting the building of a residence on a plot smaller than the

original lot size; (4) prohibiting noxious or offensive activities; (5) prohibiting trailers, tents, shacks, junk cars, or other temporary structures on a lot; (6) setting minimum size of ground floor living space in residences; (7) restricting the extent of grading the land; (8) restricting type and number of various animals permitted on a lot; (9) limiting the use, size, and number of outbuildings on a lot; (10) prohibiting preconstructed dwellings' being moved to a lot; and (11) requiring preapproval of all construction plans.

The covenants also provided that

> [t]hese covenants, restrictions and conditions shall run with the land and continue until January 1, 1983, after which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recorded in the office of the County Clerk of Washington County, Nebraska, agreeing to change same in whole or in part.

In February 1984, the original covenants were amended by a majority of the lotowners. Appellants voted in favor of these changes. The following covenants were changed at that meeting: (5), permitting recreation vehicles to be parked on lots on which the resident resides; (8), changing the type and number of animals which may be kept on the lots; (9), changing the size of outbuildings permitted on lots of a particular size; (10), excepting new factory-built homes from the prior restriction; and (11), requiring that all building plans be submitted and approved by Pioneer Hills Association officers.

According to the February 1984 amending instrument, the covenants were to

> continue until January 1, 1988, after which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recorded in the office of the County Clerk of Washington County, Nebraska, agreeing to change same in whole or in part.

Amendments were made again in February 1990. Appellants also voted in favor of these amendments. The amendments included the following: (2), changing the restriction on garages

and carports; (6), changing square-foot minimum for residential ground floor space; and (9), changing size limitations on outbuildings. The document also included "Water Use Regulations." These regulations generally involve defining the interests of some lotowners in a jointly owned water system, establishing the fees associated with such interests, providing insurance for the system, regulating the maintenance of the system, and outlining the permissible uses of water from the system.

Finally, the February 1990 instrument provided that

> [t]hese covenants, water use regulations, restrictions and conditions shall run with the land and continue until January 1, 1995, after which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recoded [sic] in the office of the County Clerk of Washington County, Nebraska, agreeing to change same in whole or in part.

On August 24, 1990, a majority of the landowners changed the covenants to include the covenant which is the source of the present dispute. The disputed covenant prohibits the building of residences or other buildings within 120 feet of Pioneer Hills Road (the county road which runs through the subdivision). This covenant was added to an existing covenant, which prohibited residential structures "on any building lot which is smaller in area than the original plotted number on which it is erected." Appellants did not agree to the disputed covenant and did not sign the new instrument.

Appellants filed a declaratory judgment action seeking to have the district court declare the August 1990 covenant invalid. In their petition, appellants contend that as a result of the new covenant, the value of their lot has substantially decreased. Appellants state that because of the size of Lot 18 and an existing pipeline and easement across the lot, the disputed covenant makes the lot unsuitable for building.

After a bench trial, the district court found generally for appellees. Appellants timely filed an appeal to the Court of Appeals.

In the Court of Appeals, appellants argued that the

covenants should be declared invalid because (1) although existing covenants could be changed, new covenants could not be added; (2) appellants detrimentally relied on the fact that when they purchased Lot 18, no setback restriction existed; and (3) the 120-foot setback does not apply uniformly to all of the lots in the subdivision.

The Court of Appeals, finding plain error in the record, examined the February 1990 covenant and found that it did not authorize any changes until after 1995. Accordingly, the Court of Appeals held that the August 1990 covenant was invalid and reversed the decision of the district court. *Boyles v. Hausmann*, 2 Neb. App. 388, 509 N.W.2d 676 (1993). We granted appellees' petition for further review.

An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989, Cum. Supp. 1992, & Supp. 1993) is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. The test is whether, in the absence of the prayer for declaratory judgment, the issues presented should properly be disposed of in an equitable as opposed to a legal action. *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992). See *Buhrmann v. Buhrmann*, 231 Neb. 831, 438 N.W.2d 481 (1989). In the present case, the action to declare a restrictive covenant invalid and unenforceable is essentially equitable in nature. See, *Northwestern Bell Tel. Co., supra* (stating that an action seeking to declare a statute unconstitutional is an equitable action); *Micek v. Metzger*, 228 Neb. 437, 422 N.W.2d 791 (1988).

In an equity action, the appellate court reviews the record de novo. *Drew, supra*. In such a review, the appellate court reaches conclusions independent of the factual findings of the trial court, provided, where credible evidence is in conflict, the reviewing 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. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994); *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992); *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989); *Knudtson v. Trainor*, 216 Neb. 653, 345

N.W.2d 4 (1984). As to questions of law, the appellate court is obligated to reach its conclusions independent of the determinations of the trial court. *How, supra*; *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993); *Drew, supra*; *State Bd. of Ag., supra*; *Northwestern Bell Tel. Co., supra*.

Appellees contend that the Court of Appeals erred in interpreting the covenant agreement and finding that the covenant agreement could not be amended until 1995. Appellees contend that the covenant provision which permits changes is ambiguous and that the action must be remanded for further proceedings in the district court.

Restrictive covenants are to be construed so as to give effect to the intention of the parties at the time they agreed to the covenants. *Breeling v. Churchill*, 228 Neb. 596, 423 N.W.2d 469 (1988); *Micek, supra*. If the language is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction. *Baltes v. Hodges*, 207 Neb. 740, 301 N.W.2d 92 (1981); *Lakeland Prop. Owners Ass'n v. Larson*, 121 Ill. App. 3d 805, 459 N.E.2d 1164 (1984). See, also, *Knudtson, supra*; *Ross v. Newman*, 206 Neb. 42, 291 N.W.2d 228 (1980). An ambiguity exists when the instrument at issue is susceptible of two or more reasonable but conflicting interpretations or meanings. Moreover, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993) (quoting *Crowley v. McCoy*, 234 Neb. 88, 449 N.W.2d 221 (1989)).

The relevant covenant provision provides that

> [t]hese covenants, water use regulations, restrictions and conditions shall run with the land and continue until January 1, 1995, after which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recoded [sic] in the office of the County Clerk of Washington County,

Nebraska, agreeing to change same in whole or in part.

Appellees contend that the word "unless" causes the provision to be susceptible of at least three conflicting meanings. On the contrary, we find that the word "unless" does not render the provision ambiguous. The "unless" clause modifies the immediately preceding clause regarding automatic extension. Thus, the only reasonable reading of the provision is that the term will be automatically extended unless changes are made by a majority.

After thorough review of the decision rendered by the Court of Appeals and our own independent review of the record and the relevant law, we find that the analysis and conclusion of the Court of Appeals are correct with regard to the meaning of the plain language of the covenant agreement. We therefore find it unnecessary to restate the discussion of the Court of Appeals. See *Boyles v. Hausmann*, 2 Neb. App. 388, 509 N.W.2d 676 (1993).

However, we do find it necessary to consider whether the Court of Appeals should have addressed the primary issue raised by appellants: whether a majority of the lotowners may adopt covenants which are new and different from the existing covenants and which are binding on all of the lotowners.

Declaratory judgments are

> available when a present actual controversy exists and all interested persons are parties to the proceedings, and then only when a justiciable issue exists for resolution. . . . A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.

Koenig v. Southeast Community College, 231 Neb. 923, 926, 438 N.W.2d 791, 794 (1989). Accord, *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989); *Ellis v. County of Scotts Bluff*, 210 Neb. 495, 315 N.W.2d 451 (1982); *Berigan Bros. v. Growers Cattle Credit Corp.*, 182 Neb. 656, 156 N.W.2d 794 (1968). A declaratory judgment action cannot be used to determine the legal effects of a set of facts which are future, contingent, or uncertain. At the time that the declaration is sought, there must be an actual justiciable issue

from which the court can declare law as it applies to a given set of facts. *Mullendore, supra* (quoting *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981)); *Ellis, supra*. If, however, an actual dispute as to the parties' legal rights is demonstrated, a violation of those rights is not a condition precedent to the availability of declaratory relief. See, *Hickory Point v. Anne Arundel County*, 316 Md. 118, 557 A.2d 626 (1989); *Neidhart v. Areaco Investment Company*, 514 S.W.2d 831 (Mo. App. 1974).

As discussed above, the Court of Appeals correctly concluded that the covenant agreement did not authorize amendments until after January 1, 1995. Nevertheless, we find that the issue regarding whether a majority of the lotowners may adopt a new covenant presents an actual controversy between the parties, for which the requested relief will provide a remedy. The record in the district court and the Court of Appeals demonstrates that the likelihood that appellees will attempt to adopt a similar covenant on or after January 1, 1995, is both imminent and certain. Additionally, the record reflects that the disputed covenant has adversely affected appellants' recent attempts to sell Lot 18. In the context of the instant case, this issue is specifically defined, the affected parties are identified and are parties to the proceeding, and the issue is capable of judicial resolution. We therefore find that it is appropriate for this court to address whether, pursuant to the covenant agreement, a majority of the lotowners may adopt new covenants which restrict the use of all lots within the subdivision. See *How v. Baker*, 223 Neb. 100, 388 N.W.2d 462 (1986) (considering whether plaintiffs were entitled to declaratory judgment regarding proposed future amendments to existing restrictive covenants).

Restrictive covenants are to be construed in connection with the surrounding circumstances at the time that the covenants were made to give effect to the intention of the parties. *Breeling v. Churchill*, 228 Neb. 596, 423 N.W.2d 469 (1988); *Micek v. Metzger*, 228 Neb. 437, 422 N.W.2d 791 (1988); *Baltes v. Hodges*, 207 Neb. 740, 301 N.W.2d 92 (1981); *Hogue v. Dreeszen*, 161 Neb. 268, 73 N.W.2d 159 (1955); *Caughlin Homeowners Ass'n v. Caughlin Club*, 849 P.2d 310 (Nev.

1993); *Lakeland Prop. Owners Ass'n v. Larson*, 121 Ill. App. 3d 805, 459 N.E.2d 1164 (1984); *Van Deusen v. Bussmann*, 343 Mo. 1096, 125 S.W.2d 1 (1939). When asked to consider a restrictive covenant, a court should keep in mind that restrictive "covenants which restrict the use of land are not favored by the law, and, if ambiguous, they should be construed in a manner which allows the maximum unrestricted use of the property." *Knudtson v. Trainor*, 216 Neb. 653, 655, 345 N.W.2d 4, 6 (1984). Accord, *Ross v. Newman*, 206 Neb. 42, 291 N.W.2d 228 (1980); *Egan v. Catholic Bishop*, 219 Neb. 365, 363 N.W.2d 380 (1985); *Larson, supra*. If the language is unambiguous, the covenant should be enforced according to its plain language. *Larson, supra*. See, also, *Knudtson, supra*; *Ross, supra*. If a restrictive covenant agreement also contains a provision which provides for future alteration, the language employed determines the extent of that provision. *Larson, supra*. Further, under no circumstances shall restrictions on the use of land be extended by mere implication. *Van Deusen, supra*.

In the instant case, the provision of the covenant agreement which authorizes changes provides that

> [*t*]*hese covenants*, water use regulations, restrictions and conditions shall run with the land and continue until January 1, 1995, after which time *they* shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recoded [sic] in the office of the County Clerk of Washington County, Nebraska, agreeing *to change same* in whole or in part.

(Emphasis supplied.)

In light of the principles set forth above, we find that the unambiguous language of this provision authorizes a majority of the lotowners to make changes to existing covenants, but the provision does not authorize a majority to add new and different covenants. In the covenant agreement, the change provision follows the itemization of the land-use covenants, and the provision refers to "these covenants" and provides that "they" shall be automatically extended, unless the majority changes the "same." The references throughout this provision refer only to the previously listed covenants. We find that there

is no other reasonable reading of this provision and that the provision does not authorize a majority of lotowners to bind all lotowners to new and different covenants which restrict the use of land. See, *Larson, supra* (discussing a provision nearly identical to that presented in this case); *Caughlin Homeowners Ass'n, supra* (adopting the rationale of *Larson*).

Appellees rely on a decision by this court in *How v. Baker, supra*, and argue that amendments which are made to existing covenants pursuant to authority granted in the original covenant agreement are enforceable. Although the *How* case is factually similar to the case at bar, the court in *How* did not address the issue with which we are presented in this case.

In *How*, the plaintiffs had filed a declaratory judgment action, seeking a declaration that a proposed amendment to the original covenants was invalid. The issues raised by the plaintiff involved an amendment regarding assessments on the real estate located in the subdivision. The first issue considered on appeal was whether the original covenants ran with the land and whether plaintiffs had adequate notice of such covenants. The second issue was whether the board of directors of the homeowners' association, acting on behalf of the association, was authorized to make amendments to the original covenants. The court did not consider whether the proposed amendment was a change of an existing covenant, or whether the association had the authority to adopt new and different covenants without the unanimous consent of the lotowners.

The statement of facts provided in the *How* opinion does not indicate that the proposed amendment at issue was a new and different covenant. It is true that courts shall enforce changes to original covenants when such changes are permitted by the covenant agreement. We emphasize, however, that such changes may not exceed the scope and extent of that authority to make changes as set forth in the covenant agreement. We find that our decision in the instant case is not inconsistent with the *How* decision, nor is our decision controlled by *How*.

The issue then becomes whether the disputed covenant constitutes a new and different covenant when compared with the existing covenants.

The disputed covenant provides that no building may be

erected within 120 feet of Pioneer Hills Road. This covenant was added to an existing covenant, which prohibited residential structures from being built "on any building lot which is smaller in area than the original plotted number on which it is erected." The existing covenant to which the disputed covenant was added did not address where on the lot a building could be erected or how far from the lot boundaries a building could stand. We find that compared with this existing covenant, the disputed covenant is new and different.

Similarly, the disputed covenant is new and different from the other covenants which existed when the disputed covenant was adopted. The other covenants involved the size of a residence and the size of its floor plan, limited the size of garages, prohibited nuisances, prohibited temporary shelters, restricted the type and number of animals, limited the number of outbuildings, and required preapproval of construction plans. We find that none of these existing covenants involved setbacks, nor did such covenants restrict in any way the location of a building on a lot.

The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants. Although we will enforce those restrictions of which a landowner has notice, we will not hold that a property owner is bound to that of which he does not have notice. There is nothing in the existing covenants which would have put appellants on notice that their land would one day be subject to a setback limit. See, *Egan v. Catholic Bishop*, 219 Neb. 365, 363 N.W.2d 380 (1985) (holding that a landowner may not later seek to enforce a restrictive covenant, if prior to purchase he knew of a continuing violation of the covenant); *Caughlin Homeowners Ass'n v. Caughlin Club*, 849 P.2d 310 (Nev. 1993) (stating that there was nothing in the existing covenant agreement which alerted plaintiff that the defendant could change the covenants to include assessment fees against plaintiff); *Lakeland Prop. Owners Ass'n v. Larson*, 121 Ill. App. 3d 805, 459 N.E.2d 1164 (1984) (stating that courts should not enforce covenant changes of which the owner did not have reasonable notice at the time he acquired the

land).

Finally, we address appellees' estoppel argument. Appellees appear to offer two different theories that appellants are estopped from challenging the disputed covenant. First, appellees argue that appellants, by their previous actions, are estopped from challenging the validity of the "covenant which provides for amendment by majority action." Brief for appellees at 3. Broadly accepting appellees' estoppel argument, we find that its premise is flawed. Appellants do not challenge the validity of the covenant provision which permitted changes; rather, appellants challenge the extent of the changes permitted pursuant to that provision. As stated above, we acknowledge the validity of a provision which permits change; however, we hold that the disputed covenant exceeded the extent and scope of the changes permitted by the covenant agreement.

Second, appellees contend that appellants accepted the 1984 and 1990 changes to the original covenant agreement, and thus, appellants waived their right to challenge the validity of the disputed covenant. This theory is similarly flawed. Unlike the disputed covenant, the prior changes did not constitute new and different covenants. The changes made by a majority of the lotowners in 1984 and 1990 were changes made to existing covenants, not the addition of new covenants restricting the use of the land.

In summary, we find that (1) the provision of the February 1990 covenant agreement did not authorize changes by a majority of the lotowners until after January 1, 1995; (2) although a majority could adopt changes to the original covenants, a majority did not have the authority to adopt new and different covenants which restricted the use of the land; and (3) appellants were not estopped from asserting their right to challenge the validity of the disputed covenant.

We therefore affirm, as modified herein, the decision of the Court of Appeals reversing the decision of the district court.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., participating on briefs.

WRIGHT, J., not participating.

IRIS A. SMITH, APPELLANT, V. RICHARD D. SMITH, APPELLEE, AND NORWEST BANK NEBRASKA, N.A., BOTH FOR ITSELF AND AS TRUSTEE OF THE VERN W. SMITH FAMILY TRUST AND AS TRUSTEE OF THE OPAL L. SMITH FAMILY TRUST, GARNISHEE-APPELLEE.

517 N.W.2d 394

Filed June 24, 1994. Nos. S-92-797, S-92-798.

1. **Trusts.** Interpretation of the language of a trust is a matter of law.
2. **Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
3. **Trusts: Intent.** The primary rule of the construction of trusts is that a court must, if possible, ascertain the intention of the testator or creator.
4. _____: _____. In interpreting a trust, the entire instrument, all its parts, and its general purpose and scope are to be considered; no parts are to be disregarded as meaningless if any meaning can be given them consistent with the rest of the instrument.
5. **Trusts: Debtors and Creditors.** Generally, support trusts may be reached by creditors for support-related debts, but discretionary trusts may not be reached by creditors for any reason.
6. **Judgments: Debtors and Creditors: Garnishment.** A judgment creditor has no greater right against a garnishee than that possessed by a judgment debtor.
7. **Trusts.** The trustee of a discretionary support trust can be compelled to carry out the purposes of the trust in good faith.
8. _____. Ordinarily, the trustee of a discretionary support trust should consider factors such as the degree of need experienced by the beneficiaries, the standard of living experienced by the beneficiaries at the time the trust was created, and the financial relations between the settlor and the beneficiaries prior to the formation of the trust.
9. **Res Judicata: Judgments.** The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
10. **Final Orders: Words and Phrases.** A ruling is final when no further action of the court is required to dispose of the cause pending.
11. **Motions for New Trial: Appeal and Error.** A trial court must rule on a motion for new trial before an appeal can be perfected.
12. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact or as to the ultimate inferences to be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
13. **Summary Judgment: Appeal and Error.** On appellate review of a summary

judgment, the court views the evidence in a light most favorable to the party against whom judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Judgment in No. S-92-798 affirmed as modified. Judgment in No. S-92-797 reversed and remanded for further proceedings.

Neil W. Schilke and Bradley E. Nick, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellant.

Keith Miller and Martin P. Pelster, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for garnishee-appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and WRIGHT, JJ.

PER CURIAM.

This opinion involves two appeals which arise from consecutive cases regarding the same matter.

In case No. S-92-798, the initial action, the plaintiff, Iris A. Smith, appeals from an order of the district court for Douglas County which held that the assets of two trusts held in favor of her former husband, Richard D. Smith, were not available for garnishment for the purpose of paying the former husband's child support arrearage. The plaintiff claims that under the terms of the trusts and applicable precedent, the trusts may be reached for the purpose of paying a support obligation.

In case No. S-92-797, the subsequent action, the plaintiff appeals from the order of the district court for Douglas County which granted the motion of the trustee, Norwest Bank Nebraska, N.A. (Norwest), to quash her application.

APPLICATION TO DETERMINE LIABILITY OF GARNISHEE

In consideration of the motion, the trial court found that "the legal questions proffered by the parties [were] basically the same as [had been] decided by the court" in the initial action.

Richard and Iris Smith were married in 1956 and divorced in 1965. The marriage produced three children. The divorce

decree granted custody of the children to Iris and ordered Richard to pay child support in the amount of $40 a week. Richard has never made any payments. The total amount due, with interest, is more than $90,000.

The trusts in issue were established by Richard's parents, Opal L. and Vern W. Smith. The provisions of the trusts which pertain to this case are nearly identical. The trust created by Vern states:

> (a) Until the death of my son Richard the Trustee shall pay over to, or for the benefit of, any one or more of the living members of a class composed of my son Richard and his issue, so much of the net income and principal of the trust as the Trustee shall deem to be in the best interests of each such person, from time to time. Such distributions need not be made equally unto all members of the class. In determining the amount and frequency of such distributions, the Trustee shall consider that:
>
> (1) The primary purpose of the trust is to provide for the health, support, care and maintenance of my son Richard during his lifetime.
>
> (2) The secondary purpose of the trust is to provide for the health, support, care, comfort and education of the issue of my son Richard in the event the parents of any such issue are unable to provide the same [hereinafter referred to as the support provision].

The trusts also provide that the corpus of each trust in existence at the time of Richard's death should be distributed to his issue then living.

Another provision of the trusts grants power to the trustee. In Vern's trust, this provision states, in pertinent part:

> The Trustee shall have full, absolute and uncontrolled discretionary power and authority to exercise or fail to exercise any and all of the powers, rights and authorities provided under this Declaration of Trust without license, leave or order of any court. All decisions made in good faith pursuant to discretionary powers and authorities herein conferred upon the Trustee shall be final and conclusive upon all beneficiaries hereunder [hereinafter referred to as the discretionary provision].

The plaintiff filed the initial action on May 28, 1991, in an attempt to garnish assets in the possession of Norwest. During the course of the action, the garnishee, Norwest, indicated in interrogatories that it was indebted to Richard in the amount of $1,721.83. Norwest did not report that it was the trustee for the Smith trusts held for the benefit of Richard. On June 24, the trial court entered an order directing Norwest to pay funds into the court which were applied to the arrearage. Norwest complied with the order. On that same day, the plaintiff filed an application to determine the liability of the garnishee with respect to the trusts.

The trial court held a hearing on the application on August 7, 1991. The trial court found that the trusts were discretionary trusts, rather than support trusts, and, as such, beyond the reach of creditors. The trial court dismissed the initial action, and the plaintiff filed a motion for a rehearing or for a new trial.

During the time that the trial court was considering the motion in the initial action, Richard was held in contempt of the district court for Dodge County for failure to heed the divorce decree. The contempt order allowed Richard to purge himself of contempt by paying the arrearage or by demanding that the trustee pay the arrearage with trust assets. Shortly thereafter, Richard explained to Norwest that the contempt charge was having detrimental effects on his health and requested Norwest to pay the arrearage. Norwest refused.

The plaintiff then filed the subsequent garnishment action against Norwest and, in conjunction with that action, filed a second application to determine the liability of the garnishee with respect to the trusts. Norwest filed a motion to quash the application. The trial court granted the motion to quash, and the plaintiff filed a motion for a rehearing. The court denied the motions for rehearing of both garnishment actions in August 1992, and these appeals followed.

APPEAL FROM INITIAL GARNISHMENT ACTION, NO. S-92-798

In the initial action, the plaintiff asserts that the trial court erred (1) in holding that the trusts were not subject to

garnishment for the payment of Richard's child support obligation, (2) in finding that the trusts were discretionary trusts, (3) in dismissing the garnishment action, and (4) in overruling the motions for a new trial or a rehearing.

The facts are not in dispute in this case. The trial court based its holding solely on the legal conclusion that the trusts were discretionary trusts. Interpretation of the language of a trust is a matter of law. *Burch v. George*, 7 Cal. 4th 246, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994). Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Sherard v. State*, 244 Neb. 743, 509 N.W.2d 194 (1993).

The primary rule of the construction of trusts is that a court must, if possible, ascertain the intention of the testator or creator. *Karpf v. Karpf*, 240 Neb. 302, 481 N.W.2d 891 (1992). It is also the rule that in interpreting a trust, the entire instrument, all its parts, and its general purpose and scope are to be considered; no parts are to be disregarded as meaningless if any meaning can be given them consistent with the rest of the instrument. *Id.*

The Smith trusts contain provisions which are in conflict under the facts of the case. The discretionary provision allows the trustee essentially unlimited freedom in controlling trust assets; the support provision limits the trustee's power to apply trust assets. Generally, courts have held that support trusts may be reached by creditors for support-related debts, but that discretionary trusts may not be reached by creditors for any reason. Evelyn G. Abravanel, *Discretionary Support Trusts*, 68 Iowa L. Rev. 273 (1983).

Norwest promotes the interpretation of the trusts that was adopted by the trial court, which interpretation gives effect to the discretionary provisions of the trusts and nullifies the support provisions of the trusts. Norwest argues that a judgment creditor has no greater right against a garnishee than that possessed by a judgment debtor. See *Action Heating & Air Cond. v. Petersen*, 229 Neb. 796, 429 N.W.2d 1 (1988). Norwest claims that Richard cannot compel Norwest to make payments from the trusts and, as a creditor, neither can the plaintiff. Conversely, the plaintiff would interpret the trusts such that the

support provisions would be given effect and the discretionary provisions would be inoperative. Neither of these interpretations is correct. The trusts should not be construed as either type of trust but as a hybrid of the two types of trusts: a discretionary support trust. See, *Lang v. Com., Dept. of Public Welfare*, 515 Pa. 428, 528 A.2d 1335 (1987); Abravanel, *supra*.

This court interpreted a discretionary support trust in *In re Will of Sullivan*, 144 Neb. 36, 12 N.W.2d 148 (1943). In *In re Will of Sullivan*, the wife of a beneficiary of a trust filed suit against the trustee to obtain the proceeds of the trust. The trial court determined that the wife could compel the trustee to make support payments of $50 per month to her. On appeal, this court stated that the wife was in need and entitled to support payments, but that the court could not determine the amount of those payments. The court stated that the discretionary language served to dispose of the reasonableness standard to which support trustees were held. The cause was remanded with directions that the trial court order the trustee to make payments in accord with the language of the trust.

We find that *In re Will of Sullivan* does not stand for the proposition that in all cases the dependents of a beneficiary of a discretionary support trust can compel a trustee to make payments for their benefit. We interpret the case to mean that the trustee of a discretionary support trust can be compelled to carry out the purposes of the trust in good faith.

As indicated by the language of the trusts, the settlors' purpose in creating the trusts was not only to support the beneficiaries of the trusts, Richard and his issue, but also to grant the trustee greater liberty in decisionmaking than the trustee of an ordinary support trust. These purposes must be served by Norwest as the trustee of the Smith trusts. In *In re Will of Sullivan, supra*, we stated:

> "The settlor may, however, manifest an intention that the trustee's judgment need not be exercised reasonably . . . . [Words which purport to give trustees unlimited discretion] are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. . . . Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the

> accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment."

144 Neb. at 39-40, 12 N.W.2d at 150. Accord Restatement (Second) of Trusts § 187, comment *j*. (1959).

Ordinarily, the trustee of a discretionary support trust should consider factors such as the degree of need experienced by the beneficiaries, the standard of living experienced by the beneficiaries at the time the trust was created, and the financial relations between the settlor and the beneficiaries prior to the formation of the trust. Abravanel, *supra*. In this case, however, the payment of the child support arrearage would not further the purposes of the trusts, since the children are emancipated. Without a showing that the payment of the arrearage would contribute to the support of the beneficiaries of the trusts, Norwest could not be compelled to distribute trust assets.

The trial court correctly ruled that the plaintiff was not entitled to payment of Richard's child support arrearage from the Smith trusts. The trial court incorrectly ruled that the trusts were discretionary trusts and beyond the reach of creditors and beneficiaries alike. We direct that the judgment of the trial court be modified to reflect the reasoning of this opinion, and we affirm the judgment as so modified.

APPEAL FROM SECOND GARNISHMENT PROCEEDING, NO. S-92-797

The parties agreed at oral argument that the appeal from the ruling in the subsequent action was of no effect if the ruling in the initial action was affirmed as written. Given our modification of that ruling such that the trusts are no longer considered pure discretionary trusts, we will address the issues raised in this appeal.

The plaintiff asserts that the trial court erred in granting the motion to quash. The trial court order does not specify the reason for the granting of the motion, but, given its language, the order could have been based on the principles of either res judicata or summary judgment. We will analyze both theories.

The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered

by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994); *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990). To analyze Norwest's res judicata defense, we must determine whether a judgment is final when a motion for a rehearing of the matter is under consideration.

The ruling of the trial court in the initial action was not a final decision for the purposes of appeal as defined by Neb. Rev. Stat. § 25-1902 (Reissue 1989). A ruling is final when no further action of the court is required to dispose of the cause pending. *Lake v. Piper, Jaffray & Hopwood, Inc.*, 212 Neb. 570, 324 N.W.2d 660 (1982). A trial court must rule on a motion for a new trial before an appeal can be perfected. *Harkness v. Central Nebraska Public Power & Irrigation Dist.*, 154 Neb. 463, 48 N.W.2d 385 (1951). Because the initial action was not final for the purposes of appeal, we hold that the trial court was incorrect if it quashed the subsequent action as barred by res judicata.

This court has addressed an analogous procedural situation. In *Fassler v. Streit*, 92 Neb. 786, 139 N.W. 628 (1913), the court held that a supersedeas bond and an appeal from a trial court ruling rendered the ruling inadmissible as evidence of a final adjudication. In the present case, the plaintiff could not file either an appeal or a supersedeas bond prior to the commencement of the subsequent action due to the motion which was under consideration. Norwest might properly have disposed of the action by filing a plea in abatement, but since no plea was filed, we need not address its merits.

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact or as to the ultimate inferences to be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Dahlke v. John F. Zimmer Ins. Agency*, 245 Neb. 800, 515 N.W.2d 767 (1994); *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994). On appellate review of a summary judgment, the court views the evidence in

a light most favorable to the party against whom judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Dahlke, supra*; *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993).

The plaintiff asserts that material issues of fact exist regarding Norwest's duty to make a distribution of the trust assets. The plaintiff claims that under the facts detailed in the hearing to determine Norwest's liability, the trier of fact could compel Norwest to pay trust assets under the terms of the trusts. We acknowledge that the possibility exists in this case. At the hearing, the plaintiff introduced evidence of Richard's written request that the arrearage be paid by the trusts. The plaintiff also introduced uncontroverted expert testimony that the stress stemming from the contempt charge was detrimental to Richard's health. As trustee, Norwest should not be allowed to dismiss the expert testimony without examination. Norwest should consider the terms of the trusts and the circumstances of the beneficiaries. Norwest should then make a good faith determination regarding payment of the arrearage.

Accordingly, the judgment of the district court in granting the motion to quash is reversed, and the cause is remanded for further proceedings consistent with this opinion.

JUDGMENT IN NO. S-92-798 AFFIRMED AS MODIFIED.
JUDGMENT IN NO. S-92-797 REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., participating on briefs.
LANPHIER, J., not participating.

CHRISTINE L. HITZEMANN, APPELLANT, V. GEORGE M. ADAM, M.D., AND MARY LANNING MEMORIAL HOSPITAL, APPELLEES.

518 N.W.2d 102

Filed June 24, 1994. No. S-92-1013.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing a ruling on a general demurrer, an appellate court is required to accept as true all facts which are well

pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.

2. **Actions: Malpractice.** A cause of action arising while a patient and health care provider are subject to the Nebraska Hospital-Medical Liability Act is to be adjudicated in accordance with the provisions of the act.
3. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, the trial court must grant the plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that by repleading the plaintiff will be able to 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.
4. **Malpractice: Physicians and Surgeons: Parent and Child: Damages.** Parents of a healthy, normal child born after an unsuccessful sterilization operation may not recover child-rearing costs, but may recover damages for such child for prenatal and delivery medical expenses; for emotional distress, loss of wages, pain and suffering, and loss of consortium caused by the failed sterilization, pregnancy, and childbirth; and for any costs associated with a second corrective sterilization procedure.
5. **Malpractice: Damages: Proof.** Because of the speculative nature of the damages, the cost of rearing a healthy, normal child born as the result of medical malpractice cannot be recovered. However, damages for such child for prenatal and delivery medical expenses; for emotional distress, loss of wages, pain and suffering, and loss of consortium caused by the failed sterilization, pregnancy, and childbirth; and for any costs associated with a second corrective sterilization procedure if proven, may be recovered.

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

Daniel J. Thayer, of Lauritsen, Brownell, Brostrom & Stehlik, for appellant.

Mark E. Novotny, of Kennedy, Holland, DeLacy & Svoboda, for appellee Adam.

Robert W. Wagoner for appellee Mary Lanning Memorial Hospital.

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

PER CURIAM.

The plaintiff, Christine L. Hitzemann, filed this action against the defendants, George M. Adam, M.D., and Mary Lanning Memorial Hospital (Hospital), for medical malpractice under the Nebraska Hospital-Medical Liability Act

and for breach of contract. The trial court sustained the defendants' demurrers to the plaintiff's second amended petition and dismissed the plaintiff's cause of action without prejudice. The plaintiff has appealed to this court assigning as error the trial court's sustaining the defendants' demurrers.

When reviewing a ruling on a general demurrer, an appellate court is required to accept as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994).

On May 4, 1991, the plaintiff was admitted to the Hospital complaining of pain in her lower abdomen. At that time, she was seen by Dr. Adam, and after consultation with Dr. Adam, he recommended that the plaintiff undergo a procedure to remove cysts from her ovaries and sterilization, both through a laproscopic surgical procedure. The plaintiff verbally consented to both procedures, the latter to prevent conception. The plaintiff signed a permit authorizing Dr. Adam to perform both procedures.

The operation was performed the next day by Dr. Adam at the Hospital; however, the sterilization procedure was never completed. Subsequent to the surgery, the plaintiff received postoperative information and counseling regarding her sterilization procedure.

Subsequent to the plaintiff's surgery, the plaintiff resumed marital relations with her husband. Approximately 8 weeks after the surgery, the plaintiff's husband was informed by Dr. Adam's office that the sterilization procedure had not been performed.

The plaintiff claimed that as a result of Dr. Adam's and the Hospital's (1) failing to perform the tubal sterilization, (2) counseling of the plaintiff as to the postoperative consequences of the tubal sterilization, and (3) failing to timely inform the plaintiff of the omission to perform the tubal sterilization, the plaintiff and her husband resumed marital relations without the use of birth control procedures.

On July 20, 1991, the plaintiff was informed that she was pregnant. The child was conceived between May 14 and 30,

1991. On February 5, 1992, the plaintiff's son was born as a result of the pregnancy.

For her second cause of action, the plaintiff alleged that she entered into a contract with Dr. Adam and the Hospital whereby the defendants agreed to perform a tubal sterilization. The plaintiff further alleged that the defendants breached the contract by failing to perform the sterilization and that the breach was the cause of the pregnancy and birth of her son.

The plaintiff claimed damages for prenatal and birthing expenses and sought child-rearing expenses up to and beyond her son's age of majority. The plaintiff also claimed physical pain and suffering, mental and emotional pain and suffering, loss of consortium, and loss of wages.

In her second amended petition, the plaintiff alleged the defendants were qualified as health care providers under the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801 et seq. (Reissue 1988 & Cum. Supp. 1990). She affirmatively waived her right to a medical review panel pursuant to § 44-2840(4).

Section 44-2821 provides in part:

> (2) If a health care provider shall qualify under the Nebraska Hospital-Medical Liability Act, the patient's exclusive remedy against the health care provider or his or her partner, employer, or employees for alleged malpractice, professional negligence, failure to provide care, breach of contract relating to providing medical care, or other claim based upon failure to obtain informed consent for an operation or treatment shall be as provided by the Nebraska Hospital-Medical Liability Act unless the patient shall have elected not to come under the provisions of such act. Unless the patient or his or her representative shall have (a) elected not to be bound by the terms of the Nebraska Hospital-Medical Liability Act, (b) filed such election with the director in advance of any treatment, act, or omission upon which any claim or cause of action is based, and (c) notified the health care provider of election as soon as is reasonable under the circumstances that such patient has so elected, it shall be conclusively presumed that the patient has elected to be bound by the terms and

provisions of the Nebraska Hospital-Medical Liability Act.

The plaintiff did not allege an election on her part not to be bound by the provisions of the act. Accordingly, the provisions of the act provide the plaintiff's exclusive remedy against the defendants.

A cause of action arising while a patient and health care provider are subject to the Nebraska Hospital-Medical Liability Act is to be adjudicated in accordance with the provisions of the act. *Barry v. Bohi*, 221 Neb. 651, 380 N.W.2d 249 (1986).

Malpractice or professional negligence is defined under the Nebraska Hospital-Medical Liability Act as follows:

> Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in his or in similar localities. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a health care provider in a particular community, the test shall be that which health care providers, in the same community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances.

§ 44-2810.

The plaintiff has failed to allege in her petition that the defendants, in rendering professional services, failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by health care providers practicing in Adams County or similar communities. The trial court correctly sustained the defendants' demurrers as to the plaintiff's first cause of action for medical malpractice.

The plaintiff's second cause of action was for breach of contract by the defendants.

Breach of contract actions are restricted by the Nebraska Hospital-Medical Liability Act. Section 44-2818 states in part:

> No liability shall be imposed upon any health care provider on the basis of an alleged breach of an express or

> implied contract assuring results to be obtained from any procedure undertaken in the course of health care, unless such contract is expressly set forth in writing and is signed by such health care provider or by an authorized agent of such health care provider.

The plaintiff's second amended petition does not allege a contract expressly set forth in writing, signed by the defendants or their authorized agents regarding an express or implied contract assuring the results to be obtained from the procedures undertaken by Dr. Adam in the health care of the plaintiff. The only allegation concerning a written document of any kind refers to the permit signed by the plaintiff authorizing the sterilization procedure.

The trial court correctly sustained the defendants' demurrer as to the plaintiff's second cause of action as well.

When a demurrer to a petition is sustained, the trial court must grant the plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that by repleading the plaintiff will be able to 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. *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993). See, also, *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994).

Although the trial court correctly sustained the defendants' demurrers to the plaintiff's second amended petition, the trial court erred in dismissing the plaintiff's second amended petition without leave to amend, because it may be possible for the plaintiff to state a cause of action for medical malpractice against the defendants in an amended petition.

A question has been raised by the parties' briefs concerning the appropriate measure of damages in a cause of action for medical malpractice where a healthy, normal child is born after an unsuccessful sterilization operation. Courts from many jurisdictions have dealt with this issue, and the majority of jurisdictions have held that parents of a healthy, normal child born after an unsuccessful sterilization operation may not

recover child-rearing costs, but may recover damages for such child for prenatal and delivery medical expenses; for emotional distress, loss of wages, pain and suffering, and loss of consortium caused by the failed sterilization, pregnancy, and childbirth; and for any costs associated with a second corrective sterilization procedure. *Girdley v. Coats*, 825 S.W.2d 295 (Mo. 1992); *McKernan v. Aasheim*, 102 Wash. 2d 411, 687 P.2d 850 (1984).

There are a variety of reasons for denying recovery of child-rearing costs for a normal child born as the result of medical malpractice. The Washington Supreme Court summarized these reasons in *McKernan v. Aasheim, supra*. It stated:

> Many hold that the benefits of joy, companionship, and affection which a healthy child can provide outweigh the costs of rearing that child. . . .
>
> Another common rationale is that recovery of child-rearing costs would be a windfall to the parents and an unreasonable burden on the negligent health care provider. . . .
>
> Still other courts have denied recovery in order to protect the psyche of the child who is the subject of the action. . . .
>
> Other reasons for denying recovery of child-rearing costs include the speculative nature of the damages . . . and the possibility of fraudulent claims.

Id. at 414-16, 687 P.2d at 852-53.

Damages which are uncertain, speculative, or conjectural cannot be a basis for recovery. *Karpf v. Karpf*, 240 Neb. 302, 481 N.W.2d 891 (1992). "The costs of child rearing—and especially education—are necessarily speculative." *Girdley v. Coats*, 825 S.W.2d at 298.

Because of the speculative nature of the damages, the cost of rearing a healthy, normal child born as the result of medical malpractice cannot be recovered. However, damages for such child for prenatal and delivery medical expenses; for emotional distress, loss of wages, pain and suffering, and loss of consortium caused by the failed sterilization, pregnancy, and childbirth; and for any costs associated with a second corrective

sterilization procedure, if proven, may be recovered.

The trial court's judgment dismissing the plaintiff's second amended petition without leave to amend is reversed, and the cause is remanded to the trial court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., participating on briefs.

STANLEY F. BARTA, JR., AND DORENE BARTA, HUSBAND AND WIFE, APPELLEES, V. RANDY KINDSCHUH AND JEANEEN KINDSCHUH, HUSBAND AND WIFE, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLANTS, AND COLDWELL BANKER DOVER CO., A CORPORATION, AND TOM HAIAR, THIRD-PARTY DEFENDANTS, APPELLEES.

518 N.W.2d 98

Filed June 24, 1994. No. S-92-1018.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **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.
3. **Contracts: Real Estate: Principal and Agent.** A real estate agent owes his principal a fiduciary duty to use reasonable care, skill, and diligence in performing his obligations and to act honestly and in good faith. The relationship may be governed by a contract, and in such a case, the contract may also define the obligations of the agent.
4. **Principal and Agent: Liability.** When an agent fails to fulfill his agency duties, the agent may be held liable to the principal for losses suffered by the principal.
5. _____: _____. If the principal authorized an agent's acts, or otherwise acquiesced in or ratified such acts, the agent will not be held liable to the principal for the losses resulting from those acts.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed.

Thomas B. Donner for appellants.

Michael T. Brogan, of Brogan & Stafford, P.C., for appellees Coldwell Banker Dover and Tom Haiar.

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

WHITE, J.

Appellants, Randy Kindschuh and Jeaneen Kindschuh (sellers), are third-party plaintiffs in an action against appellees Coldwell Banker Dover Co. and its selling agent, Tom Haiar, third-party defendants, for misrepresentation, breach of contract, and breach of fiduciary duties. The district court granted Coldwell and Haiar's motion for summary judgment, and sellers appealed. We affirm.

The following constitutes a summary of the relevant facts: In 1989, sellers retained Effie Larson, a Coldwell agent, to sell their house. In connection with Larson's representation of sellers, Larson and sellers completed, but did not sign, a "Property Disclosure Information" form.

The form is designed to provide information which agents use when showing the house to potential buyers. The two-page form lists seven major topics related to items around the house: plumbing, electrical, structure, insulation, heating and cooling, kitchen equipment, and miscellaneous. Below each numbered topic is a list of several related items. Beside each item is a blank line on which the condition of each topic is to be provided. For example, the item with which we are concerned in this case appears as follows:

3. STRUCTURE	CONDITION
Roof	_____
Has roof ever leaked or been repaired?	_____
Foundation	_____
Basement/Water	_____

The form completed in this case indicates that the condition of the roof is "good" and that the roof has never leaked or been

repaired. Above the signature line the form provides that "any inconsistencies with the above statement shall be [sellers'] personal responsibility. Coldwell Banker Dover Realtors as my agent, shall have no responsibility in repairing or replacing any of these items." (Emphasis in original.)

Sellers became dissatisfied with Larson and requested that Haiar, another Coldwell agent, market their house. On January 21, 1990, Haiar and sellers met at sellers' house and reviewed the information provided in the disclosure form that had been prepared by sellers and Larson. When Haiar asked about the condition of the roof, sellers told Haiar that the roof had recently developed some leaks. These new leaks were not repaired by sellers.

With regard to this discussion on January 21, there are some factual discrepancies between the evidence presented by Haiar and that presented by sellers. Haiar states that sellers told him that the roof had begun to leak, but that the leaks had been fixed. Sellers state that they only told Haiar of the new leak and showed Haiar the spot in the attic where the leak was evident.

Neither Haiar nor sellers made any changes to the form with regard to the condition of the roof. Although sellers knew the form stated that the roof was in good condition and had never been repaired, they signed the form on January 21. Sellers stated that they assumed Haiar would make the necessary changes to the form. Haiar stated that he gave the form to sellers to read and sign and that he left it to them to decide what information to disclose on the form.

Subsequently, Stanley F. Barta, Jr., and Dorene Barta (buyers) purchased the house. After discovering several problems with the condition of the house, buyers filed a lawsuit against sellers alleging that sellers made material misrepresentations regarding the condition of the house. The alleged acts of misrepresentation arise from the information regarding the condition of the roof that was contained in the disclosure form. The buyers maintain that they read the form prior to the purchase and that they would not have purchased the house if they had known about its actual condition.

The case before this court involves the third-party action commenced by sellers against Coldwell and Haiar. Sellers allege

that Haiar was their agent in the sale and that Haiar should be liable for any losses incurred because of his actions as sellers' agent. In their petition, sellers raise three alternative theories of recovery: misrepresentation, breach of contract, and breach of the fiduciary duty of care. We note that in their action entitled "misrepresentation," sellers allege that appellees made knowingly false representations to *buyers*, and therefore appellees should be liable for any damages sellers may incur in the main action.

The district court granted Coldwell and Haiar's motion for summary judgment. The court found that the property disclosure form was dispositive of any issue of liability. Sellers timely filed a notice of appeal to the Court of Appeals. On our own motion, the action was moved to this court.

Sellers allege that the district court erred in finding that there was no genuine issue of material fact and granting summary judgment.

In reviewing a summary judgment, an appellate 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. *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994); *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994); *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993). 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. *Larson v. Vyskocil*, 245 Neb. 917, 515 N.W.2d 660 (1994); *Franksen, supra*; *Schmidt, supra*; *Rowe, supra*.

Each of the theories of liability asserted by sellers arises from the alleged misrepresentation that was contained in the disclosure form regarding the condition of the roof. The issue which we are asked to address is whether Coldwell and Haiar, as agents of sellers, are liable for any damages suffered by sellers for that alleged misrepresentation.

A real estate agent owes his principal a fiduciary duty to use

reasonable care, skill, and diligence in performing his obligations and to act honestly and in good faith. *Firmature v. Brannon*, 223 Neb. 123, 388 N.W.2d 119 (1986); *Tetherow v. Wolfe*, 223 Neb. 631, 392 N.W.2d 374 (1986); *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975). Additionally, the relationship may be governed by a contract, and in such a case, the contract may also define the obligations of the agent. When an agent fails to fulfill his agency duties, the agent may be held liable to the principal for losses suffered by the principal. *Walker Land & Cattle Co. v. Daub*, 223 Neb. 343, 389 N.W.2d 560 (1986); *Vogt, supra*; Restatement (Second) of Agency, Introductory Note for §§ 376 to 398 (1958); 3 C.J.S. *Agency* §§ 297 and 461 (1973); Harold G. Reuschlein & William A. Gregory, The Law of Agency and Partnership §§ 65 to 81 (2d ed. 1990).

However, if the principal authorized the agent's acts, or otherwise acquiesced in or ratified such acts, the agent will not be held liable to the principal for the losses resulting from those acts. See, *McNamara v. Johnston*, 522 F.2d 1157, 1165 (7th Cir. 1975) (explaining that "as between agent and principal, an agent cannot be held liable for the use of the principal's property in an unlawful manner when it is reasonable to infer that the principal authorized the agent's conduct"); *Olson v. Thompson*, 273 Minn. 152, 140 N.W.2d 321 (1966) (stating that although the actions of the agent constituted a tort, the agent is not liable to the principal for damages arising from such actions because the agent was acting in accordance with the principal's instructions); *Gutting v. Jacobson*, 184 Neb. 402, 167 N.W.2d 762 (1969) (stating that an agent is liable to the principal for violations of the agent's fiduciary duties, but that a principal may by acquiescence release the agent from such liability); *Kidd v. Maldonado*, 688 P.2d 461 (Utah 1984) (finding that although the agent completed an earnest money agreement contrary to the principal-seller's instructions, the seller ratified the agent's acts when the seller read and signed the agreement); Restatement, *supra*, § 401, comment *d*. Cf., *Putnam v. DeRosa*, 963 F.2d 480 (1st Cir. 1992) (holding that a principal does not have an action against his agent for indemnification based on the agent's misrepresentations because the principal

was not "blameless" in the misrepresentations made to the third parties); *Warner v. Reagan Buick*, 240 Neb. 668, 483 N.W.2d 764 (1992); *City of Wood River v. Geer-Melkus Constr. Co.*, 233 Neb. 179, 444 N.W.2d 305 (1989) (discussing indemnification actions and stating that a party seeking indemnification must have been free from any wrongdoing); *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 443 N.W.2d 872 (1989); Restatement, *supra*, § 411, comments *c.* and *d.* (stating that if both the principal and the agent are aware that the performance of an act is wrongful, ordinarily the agent is not liable to indemnify the principal for damages arising from the performance of that act).

In a case factually similar to the case before us, the Supreme Court of Utah considered whether the seller had ratified the wrongful acts of his agent. In *Kidd, supra*, the seller of a home retained a real estate agent to assist in the marketing and sale of the home. After a buyer was located, the seller instructed the agent to prepare an earnest money agreement. The seller contended that he instructed the agent to include in the agreement a "subject to" provision, which would have provided that *sale* of the house was subject to seller relocating to another house. Contrary to those instructions, the agent drafted an agreement which provided that *possession* of the house by buyers was subject to relocation of the seller. Seller signed the earnest money agreement as drafted by the agent. Seller did not acquire another house and refused to complete the sale to buyers. Buyers then sued seller for specific performance of the sale contract, and seller filed a third-party petition against the agent. The trial court granted summary judgment in favor of the agent.

On appeal, seller argued that the agent violated the agency-principal relationship because the agent drafted an agreement in violation of the seller's specific instructions. According to seller, therefore, the agent should have been liable for damages suffered by seller in the main action. The court, however, rejected seller's argument.

The court stated that as an agent of the seller, the agent owed a duty to the seller to conduct the sale in accordance with the seller's instructions. The court found that the evidence

established that the agent violated that duty when the agent drafted an earnest money agreement that contained a clause other than that requested by the seller. The court also found that before the agreement was presented to the buyers and before the seller signed the agreement, the seller read the agreement which included the disputed "subject to" clause. The court stated that the seller did not question the language in the agreement and did not ask that the agent change the language. The court noted that the language of the agreement was unambiguous, nontechnical, and "readily understandable." 688 P.2d at 462. Additionally, there was no evidence that the agent engaged in any fraud or misrepresentation which may have induced the seller to sign the agreement.

The court held that the agent was not liable to the seller. The court reasoned that when a principal sees and understands the acts of his agent, "the law does not permit the principal to ignore what is obvious, even if it be contrary to his instructions." *Id.* The court explained that if an agent exceeds his express authority, the principal may by ratification release the agent from liability for damages incurred by the principal. See, Restatement, *supra*, § 416; *Southwest Title Ins. Co. v. Northland Bldg.*, 542 S.W.2d 436 (Tex. Civ. App. 1976), *modified on other grounds* 552 S.W.2d 425 (Tex. 1977). The court stated that the seller knew and was capable of understanding the acts of the agent as expressed in the agreement and that the seller voluntarily signed the agreement and permitted the agreement to be presented to the buyers. The court held that by these acts the seller ratified and approved of the agent's acts and that, thus, as between the seller and the agent, the seller could not hold the agent liable for the resulting damages.

Similarly, in the present case we assume that Haiar violated a duty owed to the sellers when Haiar did not change the information provided in the disclosure form to reflect that the roof had begun to leak before sellers signed the form. There is no factual dispute, however, that after this discussion between sellers and Haiar regarding the leak, sellers were permitted to read over the form, that the form was easy to understand, and that sellers did not question the written statement regarding the

condition of the roof. The release of liability language in the form further emphasized that sellers were responsible for the information contained in the form.

Additionally, the sellers do not allege and the evidence does not indicate that the agent fraudulently induced the sellers to sign the form. In the depositions by sellers, they state that they "assumed" that Haiar would make any necessary changes to the form at a later date. The sellers do not contend that their assumption was based on any acts or representations of Haiar. See *Tetherow v. Wolfe*, 223 Neb. 631, 392 N.W.2d 374 (1986) (finding that agent misrepresented the effect of the agreement he prepared for principal and induced principal to sign the agreement).

We therefore find that even if Haiar exceeded his authority as sellers' agent by failing to change the form to reflect the information provided by sellers, the law will not afford sellers protection for ignoring the obvious. When sellers read and signed the form which included misrepresentations regarding the condition of the roof, sellers acquiesced in and ratified the acts of their agent, thereby releasing the agent from liability to sellers for the resulting damages.

The decision of the district court regarding the third-party action between sellers and Coldwell and Haiar is hereby affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

VIRGIL D. ANDERSON AND ROSE M. ANDERSON, APPELLANTS, V. ELAINE J. MATTHIS, APPELLEE.

518 N.W.2d 94

Filed June 24, 1994. No. S-92-1024.

1. **Motions to Dismiss: Pleadings: Demurrer.** A motion to dismiss another's action prior to trial is not a permissible pleading in Nebraska. Under certain circumstances, and where, by stipulation of the parties or court rule, it is allowed, such an irregular motion may be treated as a demurrer.

2. **Demurrer.** The two procedures of demurrer and dismissal are distinct. If a demurrer is sustained, the case still pends.
3. **Pleadings: Demurrer.** Following the sustaining of a demurrer, the losing party is entitled to amend the pleadings unless there exists no reasonable possibility that amendment will remedy the deficiency.
4. **Motions to Dismiss.** If a motion to dismiss is sustained, the case ends.
5. **Judgments: Pleadings: Demurrer.** Res judicata may be raised in a demurrer when the pleading challenged by the demurrer sets forth the facts to which the rule of res judicata applies.
6. **Actions: Pleadings: Demurrer.** Neb. Rev. Stat. § 25-806(3) (Reissue 1989) allows a defendant to demur to a petition when it appears on its face that there is another action pending between the same parties for the same cause.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded for further proceedings.

James D. Sherrets and Mark L. LaFontaine, of Sherrets Smith & Gardner, P.C., for appellants.

Wesley E. Hauptman for appellee.

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

FAHRNBRUCH, J.

By petition, Virgil D. Anderson and Rose M. Anderson asked a district court to declare that Elaine J. Matthis, as an owner and user of an easement on the Andersons' property, and Matthis' successors are responsible for half the cost of maintaining and improving the real estate on which the easement is located.

Matthis filed a "pretrial motion to dismiss" in which she claims that res judicata bars the Andersons' lawsuit. The district court for Douglas County sustained Matthis' motion to dismiss. The Andersons appealed.

Because Nebraska does not recognize a pretrial motion to dismiss as a permissible pleading, we reverse the district court's ruling and remand the cause to that court for further proceedings.

FACTS

In their petition, the Andersons allege the following facts: In January 1981, Matthis acquired a parcel of real property in

Douglas County. As part of the conveyance, she also acquired, for ingress and egress to her property, a temporary easement over certain property adjoining hers. The conveyance setting forth the easement was filed of record in the register of deeds' office for Douglas County on March 5. The Andersons are owners of the property on which the easement is located. The property was deeded to the Andersons on June 26, and they received it subject to easements of record.

In December 1991, Matthis filed suit in the district court for Douglas County to enjoin the Andersons from disturbing Matthis' use of the temporary easement (Anderson I). The district court granted Matthis continuous use of the easement.

The Andersons appealed the Anderson I ruling to the Nebraska Court of Appeals. While that appeal was pending, the Andersons filed this action (Anderson II). The Andersons' petition requests a declaration that, in the event the Nebraska Court of Appeals affirmed Anderson I, Matthis and her successors in interest will be responsible for reimbursing the Andersons for half the past costs of maintaining and improving the easement since Matthis became owner of the adjacent property. In addition, the Andersons requested a declaration that Matthis and her successors in interest will be responsible for half the future costs of maintaining the easement.

Rather than filing an answer or a demurrer to the Andersons' petition, Matthis filed a motion to dismiss the Andersons' petition on the grounds that the issues raised were res judicata and that an action involving the same issues was pending at that time before the Court of Appeals. After a hearing on that motion, the district court found that the Andersons could have raised the issue of maintenance and improvement costs in Anderson I, but failed to do so. The court further found that under the doctrine of res judicata, the Andersons could not raise the issues in a separate lawsuit. Whereupon, the district court sustained Matthis' motion to dismiss the Andersons' petition.

The Andersons filed a motion for reconsideration of the order dismissing their petition, which the district court overruled. The Andersons timely appealed.

Subsequent to the district court's dismissal of Anderson II and the Andersons' appeal to this court, the Court of Appeals

found that the appeal of Anderson I was not timely filed and dismissed it for lack of jurisdiction. *Matthis v. Anderson*, 94 NCA No. 12, case No. A-92-692 (not designated for permanent publication).

ASSIGNMENTS OF ERROR

Summarized and restated, the Andersons claim that the district court erred in (1) disposing of their action on a "pretrial motion to dismiss" and (2) finding that the doctrine of res judicata bars them from litigating the issue of whether Matthis should be required to pay half the costs of maintaining and improving the easement.

ANALYSIS

A motion to dismiss another's action prior to trial is not a permissible pleading in Nebraska. Neb. Rev. Stat. § 25-803 (Reissue 1989); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993); *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992); *Cool v. Sahling Trucks, Inc.*, 237 Neb. 312, 466 N.W.2d 71 (1991); *United States Fire Ins. Co. v. Affiliated FM Ins. Co.*, 225 Neb. 218, 403 N.W.2d 383 (1987); *Voyles v. DeBrown Leasing, Inc.*, 222 Neb. 250, 383 N.W.2d 36 (1986).

Under certain circumstances, and where, by stipulation of the parties or court rule, it is allowed, such an irregular motion may be treated as a demurrer. *United States Fire Ins. Co., supra*; *Voyles, supra*; *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984); *Blitzkie v. State*, 216 Neb. 105, 342 N.W.2d 5 (1983). Cf. *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984) (treating a pretrial motion to dismiss as a demurrer where the district court had sustained the motion to dismiss *but allowing the party to amend the pleading as if it were a demurrer*). Such circumstances do not exist in this case.

We cannot, as a matter of convenience, treat Matthis' pretrial motion to dismiss as a demurrer. The two procedures of demurrer and dismissal are distinct. See *State, ex rel. Johnson, v. Consumers Public Power District*, 142 Neb. 114, 5 N.W.2d 202 (1942). If a demurrer is sustained, the case still pends. *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977). Following the sustaining of a demurrer, the losing party is

entitled to amend the pleadings unless there exists no reasonable possibility that amendment will remedy the deficiency. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). If a motion to dismiss is sustained, the case ends. *State, ex rel. Johnson, supra*.

Furthermore, we have no procedure or method of review for allowing cases to proceed upon an impermissible pleading, such as a pretrial motion to dismiss. As this court stated in *Nelson*, 216 Neb. at 486, 344 N.W.2d at 635-36:

> Questions as to the burden of proof, or the res judicata effect of a judgment based on a pleading not recognized by this state, should not be determined academically. There are enough uncertainties in the law without expanding them by introducing procedures not contained in our statutes or court rules.
>
> We are not by this action exalting form over substance, but we are stating that procedural laws as to the conduct of civil litigation must be followed in order to let trial courts and appellate courts maintain some uniformity as to the posture of cases ripe for decision.

Matthis' motion claims that the Andersons' petition is barred by res judicata and because an appeal in Anderson I was pending at that time. Res judicata may be raised in a demurrer when the pleading challenged by the demurrer sets forth the facts to which the rule of res judicata applies. *DeVaux, supra*; *Card v. Card*, 174 Neb. 124, 116 N.W.2d 21 (1962). In addition, Neb. Rev. Stat. § 25-806(3) (Reissue 1989) allows a defendant to demur to a petition when it appears on its face that "there is another action pending between the same parties for the same cause." Therefore, if the Andersons' petition sets forth facts to establish res judicata or to show that the action pending in the Court of Appeals was for the same cause, the proper method for raising Matthis' arguments would have been by demurrer.

Because the posture of this case at the present time does not allow us to review the district court's order of dismissal, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JAMES ROBERT BLACKSTONE, RESPONDENT.

517 N.W.2d 400

Filed June 24, 1994. No. S-94-265.

Original action. Judgment of disbarment.

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

PER CURIAM.

In this disciplinary action a complaint against James Robert Blackstone was filed with the Counsel for Discipline of the Nebraska State Bar Association. On June 6, 1994, a pleading was filed with the Nebraska Supreme Court in which Blackstone voluntarily surrendered his license to practice law. We accept Blackstone's surrender and order Blackstone disbarred.

Although Blackstone took the Nebraska bar examination in July 1991, he was not admitted to the Nebraska bar until February 1993. During the period between taking the exam and being admitted to the Nebraska bar, Blackstone engaged in criminal acts which he did not disclose to the Nebraska bar prior to his admission.

On October 9 and 28, 1991, Blackstone offered forged checks in the amount of $250 and $500 to the Marquette Bank in Minneapolis, Minnesota. Blackstone admits that he presented the forged checks with the intent to defraud. On February 24, 1992, Blackstone was charged with felony forgery. After successfully completing a pretrial diversion program, the charge was dismissed in April 1993.

Blackstone's conduct was discovered by the Nebraska disciplinary office when Blackstone applied for admission to the Minnesota bar. Upon reviewing his application, the Minnesota bar discovered the above-described acts and contacted the Nebraska bar. Subsequently, a complaint was filed against Blackstone by the Nebraska Counsel for Discipline.

Pursuant to Neb. Ct. Rule of Discipline 15 (rev. 1992), Blackstone voluntarily surrenders his license to practice law. In

his pleading to surrender, Blackstone admits that the allegations contained in the complaint are true and that he has violated Canon 1, DR 1-102(A)(1), (3), and (4) of the Code of Professional Responsibility. Blackstone waives his right to notice and hearing prior to an entry of this court's order.

Blackstone's admissions demonstrate to this court that Blackstone has been engaged in dishonest and fraudulent conduct which will not be tolerated. We thus accept Blackstone's surrender and order him disbarred from the practice of law in Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

TRAILBLAZER PIPELINE COMPANY ET AL., APPELLEES, V. M. BERRI BALKA, STATE TAX COMMISSIONER, AND NEBRASKA DEPARTMENT OF REVENUE, APPELLANTS.

518 N.W.2d 646

Filed July 1, 1994. No. S-92-317.

Constitutional Law: Taxation: Proof. A taxpayer who seeks a refund of taxes which are claimed to have been invalid as in violation of the constitutional provision requiring uniformity and proportionality in the taxation of tangible property is at most entitled to a refund of the difference between the taxes levied against the property and the taxes if all of the property treated as exempt had been placed on the rolls and taxed. In such a proceeding, the burden is upon the taxpayer to prove the amount of the refund to which he may be entitled.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Lancaster County, WILLIAM D. BLUE, Judge. Judgment of Court of Appeals reversed.

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

William R. Johnson, of Kennedy, Holland, DeLacy & Svoboda, for appellees.

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

BOSLAUGH, J.

The plaintiffs, Trailblazer Pipeline Company, Natural Gas Pipeline Company of America, and Mid-America Pipeline Company, applied for a refund of their 1987 personal property taxes from the defendant Tax Commissioner M. Berri Balka. The plaintiffs' request for refund was denied by the defendant Tax Commissioner. The Department of Revenue is also a defendant. The plaintiffs appealed the defendant Tax Commissioner's order to the district court, which reversed the order. The defendants appealed to the Nebraska Court of Appeals the district court's order requiring the Department of Revenue to refund to the plaintiffs all taxes paid upon their personal property in 1987. The Court of Appeals affirmed the district court's order, see *Trailblazer Pipeline Co. v. Balka*, 93 NCA No. 49, case No. A-92-317 (not designated for permanent publication), and this court granted the defendants' petition for further review.

The plaintiffs are natural gas pipeline companies. Their personal property is centrally assessed for tax purposes.

The equalization rate for all centrally assessed taxpayers, including car companies, railroads, and pipeline companies, was set by the State Board of Equalization and Assessment on August 10, 1987. The plaintiffs timely paid their 1987 property taxes at such rate in November 1987 and June 1988 to each of the counties in which they operated.

On October 30, 1989, the plaintiffs made written demand upon the defendant Tax Commissioner for a refund of their 1987 personal property taxes. The plaintiffs' demand was based upon the invalidity of the imposed personal property tax, within the meaning of Neb. Rev. Stat. § 77-1776 (Reissue 1986).

A hearing was held before the defendant Tax Commissioner, who denied the plaintiffs' claim for a refund. The plaintiffs appealed the defendant Tax Commissioner's ruling pursuant to Neb. Rev. Stat. § 84-917 (Cum. Supp. 1992) of the Administrative Procedure Act.

The district court found that despite the repeal of § 77-1776 in 1989, the general saving statute, Neb. Rev. Stat. § 49-301 (Reissue 1988), preserved the plaintiffs' right to recover a refund on an invalid tax and that the 1987 personal property taxes imposed upon the plaintiffs were invalid. The district court held that the plaintiffs were entitled to a full refund of their 1987 personal property taxes.

The defendants appealed the district court's order to the Court of Appeals, which affirmed the district court's judgment in the opinion which was not designated for permanent publication.

In their petition for further review, the defendants assign as error the Court of Appeals' failure to follow this court's decisions in *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 242 Neb. 263, 494 N.W.2d 535 (1993), *cert. denied* ____ U.S. ____, 113 S. Ct. 2930, 124 L. Ed. 2d 681, and *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993).

The plaintiffs brought their claims for refund under § 77-1776, contending the personal property taxes they paid in 1987 were invalid because they were in violation of the uniformity requirements of article VIII, § 1, of the Nebraska Constitution and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

In the *AMISUB* case, the plaintiff brought an action to recover real and personal property taxes paid for the year 1989. The petition asserted that the taxes assessed, levied, and paid by the plaintiff for 1989 were unconstitutional because the taxes violated Nebraska's uniformity clause and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. This court stated and held:

> AMISUB's theory of recovery seems to be that because the exemptions granted to certain taxpayers were unconstitutional, AMISUB is to be placed in the same position as those taxpayers which escaped taxation by receiving a full refund of the taxes paid. That is not the rule to come out of any of the recent tax cases beginning with *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 culminating in *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 242 Neb. 263, 494 N.W.2d 535 (1993). At most, AMISUB would be entitled to a refund of the difference between the taxes levied against the property of AMISUB and the taxes which AMISUB would have been required to pay if all of the property treated as exempt had been placed on the tax rolls and taxed. See *id.* Contrary to the facts developed in *MAPCO Ammonia Pipeline* as to the ratio between property which was treated as exempt plus the value of property of the railroads and the value of all tangible property in Nebraska, the record here contains no evidence upon which such a determination could be made. Therefore, AMISUB has failed to meet its burden of establishing these facts, and its petition was properly dismissed.

AMISUB, 244 Neb. at 664, 508 N.W.2d at 832.

The theory of recovery of the plaintiffs' taxes in the present case is the same as the plaintiff's in *AMISUB*. Also, as the plaintiff in *AMISUB*, the plaintiffs in this case have failed to establish facts showing the amount of refund to which they are entitled.

The Court of Appeals erred in affirming the district court's order allowing the plaintiffs a full refund of their personal property taxes for 1987. Since the plaintiffs failed to establish facts showing the amount of refund to which they are entitled, the plaintiffs' action should have been dismissed.

Because of our disposition of this assignment of error, it is unnecessary to discuss the other assigned errors in the defendants' petition for further review.

The judgment of the Court of Appeals is reversed.

REVERSED.

CARLA FITZPATRICK, APPELLANT, V. U S WEST, INC., A COLORADO CORPORATION, ET AL., APPELLEES.

518 N.W.2d 107

Filed July 1, 1994. No. S-92-580.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **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.
3. **Pleadings: Actions.** Although a petition should not leave uncertainty as to the theory on which the pleader wishes to proceed, in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader.
4. **Independent Contractor: Agents.** One acting on behalf of another may do so 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 place of work for the one 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. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from the undischarged duty.
6. _____. "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.
7. **Negligence: Words and Phrases.** A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
8. **Negligence.** The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
9. **Negligence: Independent Contractor: Liability.** Generally, the employer of an independent contractor is not liable for physical harm caused to another by the

acts or omissions of the contractor or his servants.

10. _____: _____: _____. The employer of an independent contractor may be liable (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor.

11. _____: _____: _____. As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.

12. **Negligence: Independent Contractor: Liability: Public Utilities.** Where the employer of an independent contractor could not control or have any authority over the operations conducted by its independent contractor because the independent contractor was a public utility, the employer owes no legal duty to protect an employee of the independent contractor from the hazards of conducting the independent contractor's operations.

13. **Negligence: Public Utilities: Electricity: Liability.** The connection of electricity to a building, when performed by a public utility, is not an abnormally dangerous or ultrahazardous activity, and the employer of the public utility will not be held strictly liable for injuries sustained during the course thereof.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

James E. Harris and Timothy K. Kelso, of Harris, Feldman, Stumpf Law Offices, for appellant.

George A. Carroll and Richard Johnson for appellees U S West, Inc., and Northwestern Bell Telephone Company.

Michael G. Mullin, of McGrath, North, Mullin & Kratz, P.C., for appellees AT&T, Inc., and AT&T Communications of the Midwest, Inc.

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

LANPHIER, J.

The appellant, Carla Fitzpatrick, initiated this action in Douglas County District Court to recover damages for personal injuries sustained in an explosion which occurred on June 17, 1989, in an underground vault she was working in. At the time of the accident, she was employed by the Omaha Public Power District (OPPD), which was hired by appellee U S West, Inc., to reconnect electrical service to a building near the vault. U S West was the owner of the real estate where the vault was

located, but OPPD had been granted an exclusive easement to the vault and had sole access to the vault in which electrical equipment and connections were located. Fitzpatrick named as defendants the following: U S West, Inc., and Northwestern Bell Telephone Company (collectively U S West); AT&T, Inc., and AT&T Communications of the Midwest, Inc. (collectively AT&T); National Electric Company, Inc.; and OPPD. According to Fitzpatrick's third amended petition, OPPD was named as a defendant solely for the purpose of preserving its subrogation interest for amounts paid under the Nebraska Workers' Compensation Act pursuant to Neb. Rev. Stat. § 48-118 (Reissue 1988). The order Fitzpatrick appeals from did not address OPPD as a defendant, and consequently there are no issues involving OPPD as a defendant before us. Fitzpatrick filed a motion for partial summary judgment, and each of the defendants, except OPPD, filed a motion for summary judgment. The district court granted those defendants' motions for summary judgment. The grant of summary judgment in favor of National Electric Company was not appealed, and on January 12, 1993, Fitzpatrick and AT&T filed a stipulation dismissing AT&T from this action. Thus, the appeal concerns only the grant of summary judgment rendered in favor of U S West. Fitzpatrick appealed the district court's order to the Court of Appeals. We, however, removed the case to this court on our own motion in order to regulate the caseloads of the appellate courts.

The argument underlying Fitzpatrick's appeal is that the trial court erroneously analyzed this case on the theory of premises liability. Fitzpatrick states that "this action was brought under the dangerous instrumentality rule whereunder liability may be imposed on the employer of an independent contractor whose negligence causes injury." Brief for appellant at 2. Even when analyzed on this basis, Fitzpatrick's claim must fail. Contrary to what Fitzpatrick asserts, U S West did not have a nondelegable duty to protect Fitzpatrick from harm. Although U S West employed OPPD, a public utility, it had no control over OPPD's operations. U S West, as the employer of an independent contractor, had no control over the independent contractor herein, OPPD, and no legal basis for imposing

liability exists. We, therefore, affirm the judgment of the district court.

BACKGROUND

On June 17, 1989, Fitzpatrick, then employed by OPPD as a cable splicer, was one member of a crew reconnecting electrical service to a building owned by U S West. Reconnecting the electrical service to the building, located in downtown Omaha, required that certain operations be performed in underground cable vaults nearby. In order to reconnect the electrical service, Fitzpatrick was required to go inside the vault containing circuit No. 27. The crew foreman decided not to shut down circuit No. 27, and Fitzpatrick knew that circuit No. 27 had not been shut down. Inside the vault was a transformer. The transformer was used to convert, or step down, the 14,100 volts coming in through the primary cables to a lesser voltage, referred to as the secondary voltage. Here, the lesser, secondary voltage was directed to the building owned by U S West. Attached to the transformer was a network protector. The network protector, according to Fitzpatrick, acts as a circuit breaker. When reconnecting electrical service, the network protector must be grounded. Having tested a portion of the network protector to assure that it was deenergized, Fitzpatrick went about grounding the network protector. She had just finished attaching an uninsulated grounding cable when she saw a "big ball of fire." Before she was able to get out of the vault, she sustained serious burns.

U S West concedes that it requested and paid OPPD to disconnect and reconnect electrical power to its building located in downtown Omaha, near 19th and Douglas Streets. Although U S West owned the vault, it had granted OPPD an easement to build, maintain, and repair the underground utility vault. All the equipment within the vault was owned by OPPD. U S West did not have access to the vault, nor control over the activities that went on there. The vault was under the exclusive control of OPPD.

STANDARD OF REVIEW

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. *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994). 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. *Id.*

ASSIGNMENTS OF ERROR

Fitzpatrick asserts that the trial court erred (1) in sustaining the defendants' motions for summary judgment and dismissing the case using theories of premises liability, (2) in failing to apply the appropriate law imposing liability upon employers of independent contractors under certain and limited circumstances, and (3) in overruling her motion for partial summary judgment seeking a determination of the duties owed her. Nowhere does Fitzpatrick argue that genuine issues of material fact exist; rather, Fitzpatrick's argument seems to be that, given the facts of the case, U S West was not entitled to judgment as a matter of law.

THEORY OF RECOVERY PLED

Fitzpatrick first assigns as error the fact that the trial court's ruling was based upon premises liability. The third amended petition sounds in negligence. Although it would appear from the petition that Fitzpatrick may have wished to proceed on the basis of premises liability, it also appears that she may have wished to proceed in the context of employer and independent contractor. Although a petition should not leave uncertainty as to the theory on which the pleader wishes to proceed, we have held that in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader. *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988). Thus, since Fitzpatrick stated the theory of employer and independent contractor liability as the theory upon which she wishes to proceed, and since her pleadings support her contention, we shall proceed on that basis.

INDEPENDENT CONTRACTOR

Fitzpatrick asserts this case should have been analyzed under the "nondelegable duty" exception to the general rule that the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993).

Of course, underlying Fitzpatrick's assertion is the assumption that the relationship between U S West and OPPD was that of employer and independent contractor. Thus, we are confronted with the threshold question of how to characterize U S West's relationship with OPPD. U S West has conceded that it requested and paid OPPD to disconnect and reconnect electrical power to its building; however, U S West points out that it was not subcontracting work which it could otherwise perform. OPPD has a sanctioned monopoly on the transmission of electrical power. As U S West points out, Neb. Rev. Stat. § 86-304 (Reissue 1987) makes it unlawful to "interfere with the transmission of . . . light, heat and power in this state." Moreover, it is undisputed that U S West did not have access to the underground vault in which the necessary work was to be done.

U S West argues that the relationship was not that of employer and independent contractor, nor that of principal and agent either. U S West asks that we recognize a new category for public utilities and their customers. However, U S West cites no authority, and we can find none, to support recognition of this third type of relationship, customer and public utility. Neither are we persuaded that such a category is necessary or beneficial to the resolution of this case.

In Nebraska, one acting on behalf of another may do so as an agent or an independent contractor. *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993). 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 place of work for the one 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. *Id.* See, also, *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983).

With regard to those factors, it is clear that OPPD was an independent contractor. OPPD admits that employees of U S West generally had no right or authority to control the manner in which OPPD's representatives, including Fitzpatrick, performed repairs or services within the cable vault. OPPD admits that on the date of the incident, no employee of U S West made any attempt to control the manner in which OPPD's representatives performed services or repairs within the cable vault. OPPD was the sole possessor and in exclusive control of the cable vault. No representatives of U S West were consulted on the decision to use an uninsulated jumper cable or on the decision to not deenergize circuit No. 27. OPPD was being paid $1,067.90 for the disconnection and reconnection of electrical service to the building. Thus, OPPD was the independent contractor of its employer, U S West.

THEORIES OF RECOVERY

Having concluded that OPPD was U S West's independent contractor, we now move on to Fitzpatrick's proposed theories of recovery. Fitzpatrick states that "this action was brought under the dangerous instrumentality rule whereunder liability may be imposed on the employer of an independent contractor whose negligence causes injury." Brief for appellant at 2.

NEGLIGENCE

For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from the undischarged duty. *Schmidt v. Omaha Pub.*

Power Dist., 245 Neb. 776, 515 N.W.2d 756 (1994).

> " 'Duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .
>
> "A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."

Id. at 786, 515 N.W.2d at 763.

The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.* Thus, the core issue of this appeal, given the facts as contained in the pleadings, depositions, admissions, stipulations, and affidavits in the record, is whether U S West owed a duty to Fitzpatrick.

Fitzpatrick acknowledges the general rule with regard to the liability of an employer of an independent contractor: "[T]he employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants." *Erickson v. Monarch Indus.*, 216 Neb. 875, 879, 347 N.W.2d 99, 105 (1984). See, also, *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). However, Fitzpatrick asserts that U S West should be held liable under an exception to the general rule. We have stated that the employer of an independent contractor may be liable (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor. *Id.* As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another. *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985).

Fitzpatrick argues that there are five common-law doctrines which impose nondelegable duties upon U S West as the employer of an independent contractor. As Fitzpatrick

describes them, the doctrines are (1) a duty to provide for the taking of precautions against dangerous conditions involved in work entrusted to a contractor, as described in the Restatement (Second) of Torts § 413 (1965); (2) a duty to take "special precautions" against recognizable peculiar risks of physical harm, described more fully in the Restatement, *supra*, § 416; (3) from the Restatement, *supra*, § 427, the rule that the employer of an independent contractor is liable for the negligence of the contractor in doing work which is inherently dangerous; (4) from *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988); *Foltz v. Northwestern Bell Tel. Co., supra*; and *Erickson v. Monarch Indus., supra*, a nondelegable duty to use due care to protect persons against injury from the hazards or risks which inhere in the work to be undertaken; and (5) from the Restatement (Second) of Torts §§ 519 and 520 (1977), the rule that one who carries on an abnormally dangerous activity is strictly liable for harm resulting from the activity, although the utmost care has been taken to prevent the harm.

We will first discuss the first four asserted bases for the existence of a nondelegable duty. The fifth and last asserted basis will be discussed below in the subsection entitled "Strict Liability."

A careful review of the law cited by Fitzpatrick reveals that she is concentrating on U S West's position as the employer of an independent contractor to the exclusion of another pertinent fact—that the employer in this case has no authority over the independent contractor, which is a public utility. The existence of the employer-independent contractor relationship alone is insufficient to establish a duty owed by U S West to Fitzpatrick given the unique fact that U S West could not exercise any control over the operations of OPPD. Fitzpatrick has not cited any cases, and we have been unable to find any, in which the employer of an independent contractor was held liable for the negligence of the independent contractor where the employer could not exercise any authority over the operations of the independent contractor.

However, in *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982), the Supreme Court of North Carolina held

that neither the owner nor the occupier of land upon which a power company had placed a transformer pursuant to an easement had a duty to make the transformer safe for children playing in the vicinity because the landowner had no control over the transformer or authority over the power company. In support of its holding, the court in *Green* stated:

> In instant case, neither the owner nor the occupier of the property . . . had the right to deny access to the transformer or to remedy the dangerous condition of the device. The transformer was the sole property of appellant Duke Power. It was placed on the premises pursuant to a valid easement . . . . Any interference or tampering with Duke's transformer would clearly encroach upon the rights granted to Duke by the easement. Likewise, locking or fencing the transformer would impair Duke's access to it and would be inconsistent with the terms of the easement. It was not reasonably practical for the owner of the realty . . . or the occupier . . . to prevent access to the transformer or to render it harmless.

Id. at 611, 290 S.E.2d at 598.

In another similar case, *Mark v. Pacific Gas and Electric Company*, 7 Cal. 3d 170, 496 P.2d 1276, 101 Cal. Rptr. 908 (1972), the Supreme Court of California held that a landlord breached no duty of care owed to a college student who was electrocuted while attempting to remove a light bulb from a street lamp located outside his bedroom window, in view of the fact that the landlord possessed no control or authority over the street lamp.

Absence of control over the utility was the determinative issue in the two cases above. In the case at hand, U S West did not and could not exercise any control over how OPPD conducted its operations. OPPD has stated that employees of U S West had no right or authority to control the manner in which OPPD's representatives, including Fitzpatrick, performed repairs or services within the cable vault. OPPD stated that on the date of the incident, no employee of U S West made any attempt to control the manner in which OPPD's representatives performed services or repairs within the cable vault. OPPD was

the sole possessor and in exclusive control of the cable vault. No representatives of U S West were consulted on the decision to use an uninsulated jumper cable or on the decision to not deenergize circuit No. 27.

It is important to note that U S West *could not* control OPPD's operations. This is not a case where U S West relinquished control or refused to exercise control it possessed. It simply had none. It would be futile to impose a duty to prevent harm upon one who has neither the opportunity nor the ability to reduce the risk of harm. Under these facts, as a matter of law, U S West had no legal duty to protect Fitzpatrick from the hazard of an explosion and fire in the underground cable vault.

STRICT LIABILITY

There is an inherent inconsistency with respect to Fitzpatrick's last urged common-law basis for U S West's having a nondelegable duty. The following is Fitzpatrick's stated theory of recovery: "[T]his action was brought under the dangerous instrumentality rule whereunder liability may be imposed on the employer of an independent contractor whose negligence causes injury." Brief for appellant at 2. Clearly, Fitzpatrick's theory is based on negligence principles. However, she relies upon §§ 519 and 520 of the Restatement, *supra*, to establish a common-law basis for the existence of a nondelegable duty. Those sections of the Restatement concern strict liability. Strict liability is a doctrine that imposes liability without regard to breach of a duty. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 75 (5th ed. 1984). To hold U S West strictly liable for the harm caused Fitzpatrick, it would be unnecessary to establish that U S West owed her a nondelegable duty. Thus, those sections of the Restatement are inconsistent with and irrelevant to Fitzpatrick's stated theory of recovery.

Even if we give Fitzpatrick the benefit of the doubt and presume that she wished to state an alternative theory of recovery based upon principles of strict liability, her claim must fail. Fitzpatrick would have us hold that reconnecting electricity to a building is an ultrahazardous activity. The

activity being an ultrahazardous one, Fitzpatrick would then hold the owner of the building strictly liable for any harm proximately caused by its performance. We decline to do so. Fitzpatrick cites no authority in support of her position, and as far as we can determine, such a holding would be unprecedented. According to Prosser and Keeton in their oft-cited treatise on tort law, strict liability has been applied to the following "abnormally dangerous" or ultrahazardous activities, the terms generally being considered synonymous:

> water collected in quantity in a dangerous place, or allowed to percolate; explosives or inflammable liquids stored in quantity in the midst of a city; blasting; pile driving; crop dusting; the fumigation of part of a building with cyanide gas; drilling oil wells or operating refineries in thickly settled communities; an excavation letting in the sea; factories emitting smoke, dust or noxious gases in the midst of a town; roofs so constructed as to shed snow into a highway; and a dangerous party wall.

Id. at 549-50.

Things and activities not considered abnormally dangerous or ultrahazardous include:

> water in household pipes, the tank of a humidity system, or authorized utility mains; gas in a meter, electric wiring in a machine shop, and gasoline in a filling station; a dam in the natural bed of a stream; ordinary steam boilers; an ordinary fire in a factory; an automobile; Bermuda grass on a railroad right of way; a small quantity of dynamite kept for sale in a Texas hardware store; barnyard spray in a farmhouse; a division fence; the wall of a house left standing after a fire; coal mining operations regarded as usual and normal; vibrations from ordinary building construction; earth moving operations in grading a hillside; the construction of a railroad tunnel; and even a runaway horse.

Id. at 550-51.

Additionally, there is no basis in reason or logic for such a holding. Building owners and homeowners have no direct authority over how a public utility conducts its operations, even, as here, where the operations concern the owner's own

piece of property. It is best that building owners and homeowners have no direct authority, as employees of a public utility will presumably almost always be better qualified to determine how an operation should be conducted and what safety precautions should be taken. Absent negligence, we do not even hold power companies engaged in the transmission of high voltage electricity liable for the harm caused those who inadvertently come into contact with electrical lines. *Engleman v. Nebraska Public Power Dist.*, 228 Neb. 788, 424 N.W.2d 596 (1988). See, also, *Lorence v. Omaha P. P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974); *Gillotte v. Omaha Public Power Dist.*, 185 Neb. 296, 176 N.W.2d 24 (1970). We, therefore, refuse to rule as a matter of law that the connection of electricity to a building is an abnormally dangerous or ultrahazardous activity. Thus, U S West could not be held strictly liable for the harm caused Fitzpatrick.

CONCLUSION

In this appeal from the district court's order granting U S West summary judgment, Fitzpatrick did not assert that there was a genuine issue of material fact to prevent summary judgment. Rather, she essentially argued that under the facts presented, U S West was not entitled to judgment as a matter of law. She contended that U S West as the employer of an independent contractor owed her a number of nondelegable duties which U S West breached. However, U S West, even as the employer of an independent contractor, could not control or have any authority over the operations conducted by its independent contractor, OPPD, a public utility. We determine that under the facts presented, U S West, as a matter of law, had no legal duty to protect Fitzpatrick from the hazard of an explosion and fire in the underground cable vault. Neither does the doctrine of strict liability impose liability on U S West. There being no genuine issue of material fact, we find that the grant of summary judgment by the district court was appropriate, and we affirm that court's decision.

AFFIRMED.

JANIS L. ERICHSEN, APPELLANT, V. NO-FRILLS SUPERMARKETS OF OMAHA, INC., A NEBRASKA CORPORATION, AND HAROLD COOPERMAN, AN INDIVIDUAL, APPELLEES.

518 N.W.2d 116

Filed July 1, 1994. No. S-92-1119.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but it does not accept as true the conclusions of the pleader.
2. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.
3. _____. "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff, and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.
4. **Negligence: Words and Phrases.** A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
5. **Invitor-Invitee: Negligence.** An allegation of many occasions of similar criminal activity in one fairly contiguous area in a limited timespan may make further such acts reasonably foreseeable so as to create a duty to a business invitee.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for further proceedings.

Robert C. Guinan, of Guinan & Scott, and Kirk L. Meisinger, of Meisinger & Spindler, for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

LANPHIER, J.

This appeal arises out of a personal injury action. Janis L. Erichsen, appellant, a customer of appellee No-Frills Supermarkets of Omaha, Inc. (No-Frills), sustained injuries as a result of being dragged by a car during an attempted purse-snatching in No-Frills' parking lot. Appellee Harold Cooperman owns the shopping center. Appellant sought

recovery from appellees for negligently failing to warn her of prior criminal activity which occurred on "at least ten occasions" in or about the parking lot or for failing to protect her from criminal activities which were allegedly foreseeable because of such prior criminal activity. The district court sustained appellees' demurrers, finding that neither appellee owed a duty to appellant.

STATEMENT OF FACTS

In her third amended petition, appellant alleged that on July 28, 1991, at 6 a.m., she went shopping at No-Frills located in Cooperman's shopping center, known as Harold's Square Shopping Center, at 8005 Blondo Street in Omaha and parked her vehicle in No-Frills' parking lot area. While returning to her vehicle, she was assaulted, beaten, and robbed of her purse by at least one assailant. In the course of the assault and robbery, appellant, who was outside the assailant's vehicle, became entangled in the safety belt or seat of the vehicle. As a result, appellant was dragged on the pavement for approximately 1.6 miles and severely injured.

Appellant claimed that on at least 10 occasions within a 16-month period prior to the assault on appellant, similar crimes, including theft, purse-snatching, and robbery, had been committed in the No-Frills parking lot or in surrounding premises and parking lot. Appellant further alleged that appellees knew or should have known that under the foregoing circumstances, their practice of maintaining fewer employees to assist customers to their vehicles increased the risk of criminal activity against appellees' customers. Appellant claimed that appellees had a duty to foresee the type of criminal activity of which appellant was a victim and to take steps to guard her against the harm or at least warn her of the risk. Appellees demurred, stating that the facts pled were insufficient to state a cause of action. The district court sustained the demurrer.

Appellant's sole assignment of error asserts that the district court erred in sustaining the demurrer of appellees on the grounds that appellees did not owe appellant a duty of due care.

STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate

court accepts the truth of facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but it does not accept as true the conclusions of the pleader. *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994).

NEGLIGENCE

For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty. *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994). "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff, and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. *Id.* A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. *Id.* Foreseeability is a factor in establishing a defendant's duty. *Id.*

RESTATEMENT (SECOND) OF TORTS

We have adopted the rule regarding landlord liability to business invitees, as set forth in Restatement (Second) of Torts § 344 (1965). See, *C.S. v. Sophir*, 220 Neb. 51, 368 N.W.2d 444 (1985); *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982); *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946). The Restatement, *supra*, at 223-24 provides:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Comment *f.* to § 344 makes it clear that the owner of the property is not an insurer of the land or the visitor's safety while

on it. However, liability will be found under certain circumstances:

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. *He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual.* If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, *either generally* or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford reasonable protection.

(Emphasis supplied.) *Id.* at 225-26.

NEBRASKA PREMISES LIABILITY

We have interpreted the Restatement and have held that a landlord is under a duty to exercise reasonable care to protect his patrons. Such care may require giving a warning or providing greater protection where there is a *likelihood* that third persons will endanger the safety of the visitors. *C.S. v. Sophir, supra.*

We have applied these principles in several cases. In *Harvey v. Van Aelstyn, supra*, we held that no liability attached to the owner of a bar where the appellant, a patron, was assaulted by a third party while in the bar. The assailant had not been present in the bar, but had entered the bar suddenly, went straight for the appellant, and struck him. The assailant had been violent in the establishment on *one* prior occasion a year or more prior to the incident at issue. We stated that the possessor of the premises was not bound to anticipate the unforeseeable independent acts of third persons, nor did she have a duty to take precautionary measures to protect against such acts, because those acts could not be reasonably anticipated.

In *Harvey*, we cited several cases in reaching this conclusion. One case, *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946), denied recovery against a restaurant owner where a patron suffered injuries from an assault by another patron. This court noted that there was no history of any fights in the establishment and that the assault occurred suddenly and unexpectedly where no precautionary measures would have prevented the assault.

In *C.S. v. Sophir, supra*, the plaintiff, a tenant in the defendant landlord's apartment complex, was sexually assaulted. There had been one prior assault in the complex. We held that it would be unfair to impose liability upon a landlord based on a *single* prior assault at the complex. This court noted that other jurisdictions that had imposed liability upon a landlord under similar circumstances had done so only where there was a "history of criminal activity at the leased premises sufficient to create in the landlord constructive notice of the foreseeability that such activity would recur in the future." 220 Neb. at 53-54, 368 N.W.2d at 447.

The most recent case involving landlord liability for the acts of third persons is *K.S.R. v. Novak & Sons, Inc.*, 225 Neb. 498, 406 N.W.2d 636 (1987). In *K.S.R.*, the appellant was sexually assaulted in the apartment complex owned by the appellee. The assailant had been seen by the building manager several times near the complex exhibiting inappropriate sexual behavior in public. This court reaffirmed the holdings of the prior cases involving the same issue by stating that "a landlord is not an insurer of a tenant's safety. However, a landlord has a duty to protect a tenant against the foreseeable criminal acts of a third person." *Id.* at 500, 406 N.W.2d at 638.

In *K.S.R.*, we held that unlike *Sophir*, there was a history of criminal activity on the premises, and therefore the assault perpetrated against the appellant was foreseeable. In finding that liability could be imposed against a landlord for reasonably foreseeable criminal acts of third parties, this court cited *Waters v. New York City Housing Authority*, 69 N.Y.2d 225, 505 N.E.2d 922, 513 N.Y.S.2d 356 (1987), and quoted:

> "It is also now beyond dispute that a landlord, private or public, may have a duty to take reasonable precautionary

> measures to secure the premises if it has notice of a likelihood of criminal intrusions posing a threat to safety [citations omitted]. . . . [A] building owner who breaches such a duty may be held liable to an individual who is injured in a reasonably foreseeable criminal encounter that was proximately caused by the absence of adequate security [citations omitted]."

225 Neb. at 500-01, 406 N.W.2d at 638.

This court has denied relief where the appellant based his or her allegations of negligence on a single act of violence. In those cases, we held that one incident did not, under the facts presented in those cases, constitute sufficient notice to make the criminal acts sued upon reasonably foreseeable. See, *C.S. v. Sophir*, 220 Neb. 51, 368 N.W.2d 444 (1985); *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982); *Hughes v. Coniglio, supra*. However, as *K.S.R.* demonstrates, a duty to undertake reasonable precautionary measures will be imposed on the landlord when there is a sufficient amount of criminal activity to make further criminal acts reasonably foreseeable. The question is one of foreseeability. The trial court was in error in determining that the prior criminal activity must all involve the same suspect to make further criminal acts reasonably foreseeable. In *K.S.R.*, the prior criminal activity did involve the same suspect. However, this is not a required element of the foreseeability of further criminal acts. Under our standard of review, the allegation of many occasions of "similar" criminal activity in one fairly contiguous area in a limited timespan may make further such acts sufficiently foreseeable to create a duty to a business invitee.

We find that appellant has pled sufficient facts which, if accepted as true (as we are required to do under applicable law), are legally sufficient to support appellant's assertion that appellees owed her a duty of reasonable care which they breached. Appellant alleged that

> [o]n at least ten occasions within the sixteen month period preceding July 28, 1991 [the date of the attack upon the appellant], criminal activity of a nature similar to that involved in this action occurred in the No-Frills parking area or upon the surrounding premises and parking lot.

> Included within the criminal activities were thefts, a purse snatching, and robbery . . . . At least some of the criminal activity prior to July 28, 1991, including the purse snatching, took place on the No-Frills parking area and involved invitees of No-Frills as victims of the criminal activity.

Appellant also alleged that appellees knew or should have known that absent adequate security, criminal activity was likely to take place within the No-Frills parking area.

Although appellant concedes that not all of the criminal activities took place in the No-Frills parking lot, she did allege that at least some of the incidents of criminal activity, including a purse-snatching, actually took place on the area of the parking lot assigned to No-Frills. Criminal acts that occur near the premises in question give notice of the risk that crime may travel to the premises of the business owner. *Murrow v. Daniels*, 321 N.C. 494, 364 S.E.2d 392 (1988); *Brown v. J. C. Penney Co.*, 297 Or. 695, 688 P.2d 811 (1984); *Virginia D. v. Madesco Inv. Corp.*, 648 S.W.2d 881 (Mo. 1983). Accordingly, the district court erred in sustaining the demurrer.

We do not now determine what specific measures business possessors must employ to protect business invitees. Rather, we continue to hold that a business possessor must exercise reasonable care to keep the premises safe for its business invitees. See, *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988); *Havlicek v. Desai*, 225 Neb. 222, 403 N.W.2d 386 (1987). Whether particular measures discharge a business owner's duty to exercise reasonable care is decided in hindsight with the benefit of knowledge. See *id.* Speculating on the cost of given measures in light of their relative benefit is not within the province of this court. See, *Anderson v. Service Merchandise Co., supra* (we did not speculate as to how a light is properly hung); *Havlicek v. Desai, supra* (we did not speculate on how many lumens would be sufficient to light the stairway); *Nownes v. Hillside Lounge, Inc.*, 179 Neb. 157, 137 N.W.2d 361 (1965) (we did not speculate on how a barstool should be fastened to the floor).

CONCLUSION

We find that appellant has alleged sufficient facts in her petition to overcome the demurrer of appellees. The cause is therefore remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FAHRNBRUCH, J., dissenting.

I respectfully dissent from the majority's opinion, which, in effect, holds that a business owner who is aware of prior criminal activity in the immediate vicinity of the owner's place of business is under a duty to either warn potential customers of the criminal activity or to provide security to business invitees.

The majority extends this state's doctrine of what it characterizes as "premises liability" far beyond any of this court's previous holdings. This court has previously considered pure premises liability to arise out of a defect or condition of the premises, rather than from the acts of third parties. See, e.g., *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983) (holding that accident which occurred when employees failed to move grain cars in reasonable manner was not a case of premises liability). However, in the present case, the majority is willing to impose "premises liability" upon a defendant for the independent and random criminal acts of a third party.

Citing Restatement (Second) of Torts § 344 (1965), the majority has found that Erichsen's allegation of 10 incidents of criminal activity in the vicinity of the No-Frills parking lot during the previous 16 months is sufficient to raise a factual question whether the attack on Erichsen was foreseeable by No-Frills.

The issue of foreseeability was discussed by the District of Columbia Court of Appeals in *Cook v. Safeway Stores, Inc.*, 354 A.2d 507 (D.C. App. 1976), a case with facts strikingly similar to the one before us. In *Cook*, a customer at a grocery store attempted to restrain a man who had taken her wallet from her shopping cart. When the customer grabbed the man's arm, the man struck her in the face with his fist and ran from the store. The customer sued Safeway to recover for her personal injuries sustained in the incident.

Plaintiff's counsel argued that the store was located in a high-crime area, that similar incidents had occurred there and in the adjacent streets, that assaults on customers were foreseeable by store management, and that the store had a duty to provide guard service. The trial court directed a verdict in favor of Safeway after plaintiff's opening statement, holding that plaintiff had not stated a cause of action.

The District of Columbia Court of Appeals affirmed the order of the trial court. That court noted that crime was foreseeable, but held that the act of the customer in attempting to physically restrain a purse-snatcher was not one which the storekeeper could anticipate, and thus, the events leading to the customer's injury were not foreseeable by Safeway.

Quoting *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 186 A.2d 291 (1962), the court stated:

> "Everyone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide 'police' protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner. And since hijacking and attack upon occupants of motor vehicles are also foreseeable, it would be the duty of every motorist to provide armed protection for his passengers and the property of others. Of course, none of this is at all palatable.
>
> "The question is not simply whether a criminal event is foreseeable, but whether a *duty* exists to take measures to guard against it. . . ."

Cook, 354 A.2d at 509-10.

Similarly, while a purse-snatching in the No-Frills parking lot is certainly foreseeable by both No-Frills *and* Erichsen, it is utterly unforeseeable by No-Frills that a purse-snatching victim in the parking lot would somehow become entangled in the seatbelt of her assailant's automobile and be dragged 1.6 miles. By its holding that "many" occasions of " 'similar' " criminal activity in an area may be sufficient to make further criminal acts foreseeable, the majority has done no more than state the obvious and has created a broad category of civil liability for business owners in Nebraska. I would adopt a more narrow

analysis and hold that Erichsen's petition failed to state a cause of action because No-Frills could not possibly have foreseen the bizarre events leading to Erichsen's injuries.

Having determined that criminal acts in its parking lot were foreseeable by No-Frills, the majority concludes that Erichsen has pled sufficient facts to impose some amorphous duty of reasonable care upon No-Frills. However, the majority declines to determine in what way No-Frills might have met its duty to Erichsen, stating that "[s]peculating on the cost of given measures in light of their relative benefit is not within the province of this court." If the majority is unwilling or unable to more clearly define the duty of a business owner to customers, the matter should be left to the Legislature and not to speculation of the business owner.

Although in some cases it may be inappropriate for the court to speculate on how a defendant may meet a duty, the cases cited by the majority do not support this proposition. In none of the three cases cited by the court was the issue of duty before the court. Both *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992), and *Nownes v. Hillside Lounge, Inc.*, 179 Neb. 157, 137 N.W.2d 361 (1965), dealt with the issue of whether the instrumentality of harm was within the exclusive control of the defendant for purposes of res ipsa loquitur. In *Havlicek v. Desai*, 225 Neb. 222, 403 N.W.2d 386 (1987), the defendant acknowledged that he had a duty to keep his business premises safe for the plaintiff's use. Therefore, it was not necessary in any of the three cases for the court to speculate on the extent of the defendant business owners' duties.

On the other hand, this court has in some cases defined the duty which it imposed upon a defendant. See, e.g., *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994) (holding that defendant underground utility clearinghouse had duty to warn callers that only equipment owned by member utilities would be located and to specifically warn that secondary electric lines in a commercial setting would not be located by the member electric company).

By offering no guidance as to how such business owners may conduct their businesses within the bounds of the law, the majority imposes an unreasonable burden upon business

owners. Because the majority refuses to speculate, it is now well-intentioned business owners who are left to speculate as to what duty is owed to customers or prospective customers in the store parking lot. Thus, the majority has set the classic "trap for the unwary," for only when the litigation trap is sprung will the business owner finally learn the extent of the duty owed.

According to Restatement (Second) of Torts § 344 (1965), a business may meet its duty to its customers by either giving an adequate warning or providing protection. To hold that a business owner has a duty to warn of potential criminal activity in the vicinity of the owner's business is to require the owner to warn of the obvious: The world is a dangerous place. Random acts of crime and violence against the person are rampant in today's society and are of epidemic proportions. This is common knowledge and is sufficient to put everyone on notice that a person can be mugged any time, any place. I would find a warning in such a situation to be a futile and unreasonable requirement.

The alternative to warning invitees is for business owners to "provide protection." Presumably, this means that the business is required to hire security guards for the premises.

Even with all of modern technology, the existence of armed police does not prevent crime and violence in society at large, for an obvious reason: The police cannot be in all places at all times. Similarly, armed security officers are unable to prevent crime and violence in the microcosm of a parking lot. Security officers themselves have been the victims of violent crime while on duty. See, e.g., *State v. Brock*, 245 Neb. 315, 512 N.W.2d 389 (1994) (security officer shot while attempting to apprehend shoplifter). Moreover, security officers are ordinarily hired for the purpose of protecting the business itself against criminal activity, and any benefit to customers is incidental thereto.

There is no duty on the part of an invitor owner to protect, or to warn, an invitee against hazards which are known to the invitee or are so apparent that he may reasonably be expected to discover them and protect himself. *Bruyninga v. Nuss*, 216 Neb. 801, 346 N.W.2d 245 (1984). Because I would find that the hazard of random criminal activity is as well known to customers such as Erichsen as it is to businesses such as

No-Frills, I would hold that No-Frills had no duty to either warn or protect Erichsen.

Finally, while recognizing that the owner of property is not an insurer of the owner's land or the visitor's safety in a parking lot, the majority has, in fact, made business owners the insurers of the safety of invitees. The economic impact of such duties is certain to be especially disastrous to low-profit-margin businesses. The grocery business comes to mind.

Must the business owner erect a billboard in the owner's parking lot to advise potential customers of the perils of possible victimhood to which they may fall prey should they decide to exit their vehicles? Yes, according to the Restatement, *supra* at comment *g*. at 226 (rule applies "not only to make it the possessor's duty to protect his visitors after they have entered the land, but also *to warn them before their entry of any acts or threatened acts of third persons which may endanger them if they enter*" (emphasis supplied)). Once such a billboard is in place, will potential customers ever become actual customers? It seems unlikely that any business could survive such a "warning." The rule is unrealistic in today's world.

Additionally, the provision of a full panoply of security personnel is inconsistent with the basic premise of "no-frills" or discount retail operations; that is, the business saves money by providing less service but passes along this saving to the customer in the form of lower prices. To the extent that the courts impose a duty upon these establishments to hire additional personnel, they contribute to the economic demise of such businesses.

Moreover, I cannot imagine any insurance company in the world which would be willing to insure a business against intentional criminal acts of third parties directed at actual or potential customers of that business. The entire burden of this uninsurable risk thus falls upon the business owner.

For the reasons discussed above, I disagree with the majority that the events leading to Erichsen's injury were foreseeable, and I find the potential amorphous duties on business owners inherent in the majority's opinion to be both unreasonable and economically disastrous. I would affirm the order of the district court sustaining the defendants' demurrers.

RYDER TRUCK RENTAL, INC., APPELLANT, V. HELEN ROLLINS AND JOHN H. CROM, APPELLEES.

518 N.W.2d 124

Filed July 1, 1994. No. S-92-1134.

1. **Declaratory Judgments.** In any case where declaratory relief is sought, there must be present an actual controversy.
2. _____. An action for a declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain; there must, at the time that the declaration is sought, be an actual justiciable issue.
3. _____. Declaratory relief cannot be used to obtain a judgment which is merely advisory.
4. **Declaratory Judgments: Torts.** A declaratory judgment action should not be entertained when it is initiated by a prospective tort defendant.
5. **Declaratory Judgments.** The function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies.
6. _____. Declaratory judgment does not lie where another equally serviceable remedy is available.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with direction to dismiss.

Leif D. Erickson, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Wadie Thomas, Jr., and Lavon Stennis for appellee Rollins.

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

CAPORALE, J.

In this declaratory judgment action, the district court held that as the owner of the van-type vehicle the plaintiff-appellant, Ryder Truck Rental, Inc., rented to the defendant-appellee John H. Crom, Ryder is jointly and severally liable with Crom for any damages sustained by the defendant-appellee Helen Rollins, arising from the collision between the vehicle she was operating and the van Crom was operating. Claiming error in that ruling, Ryder appealed to the Nebraska Court of Appeals; we, on our own motion, removed the case to this court in order to regulate the caseloads of the two courts. We now reverse the

judgment of the district court and remand the cause with the direction that it be dismissed.

On September 1, 1991, Crom entered into a written "Rental Agreement" with Ryder at Hinesville, Georgia, for a day of local use of the van. The relevant provisions of the agreement gave Ryder the right to terminate the agreement at any time and provided that Crom's failure to return the vehicle at the designated destination within 3 days of the specified time constituted an unauthorized taking, in which event Ryder could consider the vehicle stolen and issue theft notices and warrants for Crom's arrest and take such other steps as Ryder might deem reasonable. In addition, Crom agreed not to permit the vehicle to be used in violation of any law or to be operated in a reckless or abusive manner.

Crom did not return the vehicle at the scheduled time, and it was reported stolen to the Hinesville Police Department. An Omaha police officer later came upon Crom in a restricted area and told him to leave. Afterward, the officer determined that the vehicle Crom was driving, or the registration plate it bore, had been reported stolen. When the officer attempted to stop the departing van, Crom accelerated, and a chase ensued. At some point, Crom stopped the van, and when the police cruiser approached him, Crom put the van into reverse and rammed the cruiser. Crom continued to flee and during the continuing police chase struck the automobile Rollins was operating. Crom ultimately pled guilty to theft of the van and other charges.

Ryder subsequently filed this action, asking the district court to construe the agreement and to find that Crom stole the van and was operating it in violation of the agreement, that Crom operated the van in a reckless and abusive manner in violation of Nebraska's motor vehicle statutes, that the agreement is a Georgia contract which should be construed and interpreted in accordance with the laws of that state, and that Ryder has no vicarious liability to Rollins under the provisions of Neb. Rev. Stat. § 39-6,193 (Reissue 1988) or otherwise.

In general, § 39-6,193 makes the owner of certain types of vehicles leased to others jointly and severally liable with the lessee and the operator for damage occasioned by operation of

the vehicle in Nebraska. Although Ryder alleges that Rollins asserted a claim against it for damages arising out of the collision, Rollins denies that she has done so. We neither find nor are we pointed to any evidence in this regard.

Our first task is to determine whether a declaratory judgment action may or should be used as a means by which a prospective defendant may obtain a declaration of nonliability. In essence, we must determine whether the trial court abused its discretion in exercising its jurisdiction in this matter.

Neb. Rev. Stat. § 25-21,149 (Cum. Supp. 1992) provides that the courts

> shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

In addition, Neb. Rev. Stat. § 25-21,151 (Reissue 1989) permits a contract to be construed either before or after there has been a breach thereof.

We have previously addressed an issue similar to the one now before us in *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). The insureds therein appealed from a declaratory judgment entered by the district court holding that the insurance company was not obligated to defend the insureds or to pay any judgment rendered against them under the terms of a policy of insurance issued by Allstate to the insureds. While this court found that the insurance company had a duty to defend the insureds, it refused to grant declaratory judgment as to the carrier's obligation to pay. Noting that the existence of a controversy is required to maintain an action for a declaratory judgment, we held that such an action could not be used to "decide the legal effect of a state of facts which are future, contingent, or uncertain." *Id.* at 188, 313 N.W.2d at 638. We therefore ruled that until it was determined that the insured was legally obligated to pay the injured party, the question of the insurer's obligation was uncertain and contingent. However,

citing two earlier cases, we recognized that there might be appropriate circumstances wherein a carrier's obligation to pay could be determined prior to a determination of an insured's liability.

Although this case does not involve an insurer, and we need not here explore the circumstances under which an insurer may obtain a declaration of its rights, *Allstate Ins. Co.*'s holding is relevant in that it clearly requires the existence of an actual controversy as a prerequisite to declaratory relief. See, *Boyles v. Hausmann, ante* p. 181, 517 N.W.2d 610 (1994); *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992); *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989); *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989).

A court should refuse a declaratory judgment unless the pleadings present a justiciable controversy which is ripe for judicial determination. See *Skowron v. Skowron*, 259 Wis. 17, 47 N.W.2d 326 (1951). Therefore, an action for a declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. *Boyles v. Hausmann, supra*; *Mullendore v. Nuernberger, supra*; *Allstate Ins. Co. v. Novak, supra*.

While it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable. *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 316 S.E.2d 59 (1984); *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974); *Stabler, et al., v. Ramsey, et al.*, 32 Del. Ch. 547, 88 A.2d 546 (1952); *Ex parte State*, 241 Ala. 304, 2 So. 2d 765 (1941); *Hicks v. Hicks*, 60 N.C. App. 517, 299 S.E.2d 275 (1983). Mere apprehension or the mere threat of an action or a suit is not enough. *Gaston Bd. of Realtors v. Harrison, supra*; *McKinnon v. Lane*, 285 S.W.2d 269 (Tex. Civ. App. 1955). See *Third Nat. Bank in Nashville v. Carver*, 31 Tenn. App. 520, 218 S.W.2d 66 (1948) (declaratory judgment act does not enable courts to make declaration with regard to claim which complainant merely fears defendant may assert in future). Contra *N.J. Home Builders Ass'n v. Div. on Civil Rights*, 81 N.J. Super.

243, 195 A.2d 318 (1963), *aff'd sub nom. David v. Vesta Co.*, 45 N.J. 301, 212 A.2d 345 (1965) (existence of claim or threat of possible claim disturbing peace of plaintiffs' freedom by casting doubt or uncertainty upon rights or status establishes requisite condition of justiciability for declaratory judgment action). Nor is a declaratory judgment action to be used to adjudicate hypothetical or speculative situations which may never come to pass. *Commonwealth Insurance Agency, Inc. v. Arnold*, 389 S.W.2d 803 (Mo. 1965) (claim against insurance company presents concrete, not hypothetical, situation). The declaratory judgment proceedings do not " 'require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.' " *Gaston Bd. of Realtors v. Harrison*, 311 N.C. at 234, 316 S.E.2d at 62 (quoting *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E.2d 450 (1942)).

Here, Ryder seeks to have a declaration of nonliability before Rollins has sued anyone. We do not know if Rollins will bring suit against Ryder nor in which state such a suit may be brought. Moreover, even if we assume that Rollins will bring suit against Ryder, we still lack the requisite knowledge as to the claims Rollins would assert. She may, for example, assert that Ryder is vicariously liable under § 39-6,193 or through some other theory under the laws of Nebraska or Georgia; or, as discussed by Ryder in its brief, Rollins may instead file suit against the city of Omaha because her injuries were incurred during a police chase. Therefore, the required element of controversy does not exist and may never do so.

Finally, Rollins seeks no damages herein; consequently, this action will not end the controversy. We have previously ruled that a court should enter a declaratory judgment only where such judgment would terminate or resolve the controversy between the parties. *Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd.*, 229 Neb. 740, 428 N.W.2d 895 (1988); *VisionQuest, Inc. v. State*, 222 Neb. 228, 383 N.W.2d 22 (1986); *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985). See Neb. Rev. Stat. § 25-21,154 (Reissue 1989). The court must make a full and complete declaration, and where it will be necessary to bring another action or proceeding to settle

the controversy, declaratory judgment will not be granted. *Graham v. Beauchamp*, 154 Neb. 889, 50 N.W.2d 104 (1951); *Dobson v. Ocean Accident & Guarantee Corporation*, 124 Neb. 652, 247 N.W. 789 (1933).

This does not, however, mean that the mere filing of a suit would render this case a proper one for declaratory judgment. Neb. Rev. Stat. § 25-21,163 (Reissue 1989) suggests that the statutes dealing with declaratory judgment be interpreted in conformity with the interpretation of other jurisdictions which have like statutes. With that suggestion in mind, we note that federal case law clearly establishes the rule that a declaratory judgment action should not be entertained when it is initiated by a prospective tort defendant. *Cunningham Brothers, Inc. v. Bail*, 407 F.2d 1165 (7th Cir. 1969), *cert. denied* 395 U.S. 959, 89 S. Ct. 2100, 23 L. Ed. 2d 745 (declaratory judgment denied where general contractor sought declaration it did not "have charge of" work being performed by employees of masonry subcontractor who were injured); *Frito-Lay, Inc. v. Dent*, 373 F. Supp. 771 (N.D. Miss. 1974); *States Steamship Company v. Featherstone*, 240 F. Supp. 830 (D. Or. 1965) (relief denied where shipowner sought declaration of nonliability for injuries to crewmembers caused by assault of coworkers); *Sun Oil Co. v. Transcontinental Gas Pipe Line Corp.*, 108 F. Supp. 280 (E.D. Pa. 1952), *aff'd* 203 F.2d 957 (3d Cir. 1953) (no declaratory relief where operator of tanker sought declaration of nonliability for damage to underwater pipeline fouled by plaintiff's anchor); *Aktiebolaget Bofors v. United States*, 93 F. Supp. 134 (D.C. 1950), *aff'd* 194 F.2d 145 (D.C. Cir. 1951) (no action may be entertained for declaratory judgment adjudicating that defendant is guilty of tort).

The federal courts reason that to compel potential personal injury plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tort-feasor would be a perversion of declaratory judgment proceedings. *Cunningham Brothers, Inc. v. Bail, supra* (sustaining suit would force injured party to litigate claim he may not have wanted to litigate at time which might be inconvenient to him or which might precede his determination of the full extent of damages, and in forum chosen by alleged tort-feasor); *Frito-Lay, Inc. v. Dent, supra.*

See *Aetna Casualty & Surety Co. v. Yeatts*, 99 F.2d 665 (4th Cir. 1938). A court should not grant declaratory relief for a party who simply is in a position of one expecting to be sued and who desires an anticipatory adjudication at the time and place of its choice of the validity of defenses it expects to raise. See *Hanes Corp. v. Millard*, 531 F.2d 585 (D.C. Cir. 1976).

In addition, the *Cunningham Brothers, Inc.* court observed that the primary purpose of declaratory judgment proceedings is to prevent the accrual of avoidable damages to those not certain of their rights and to afford them an early adjudication without waiting until their adversaries should see fit to begin suit after damage had accrued. Where it is not contended that the action is brought to avoid damages which would accrue if a certain course of conduct were taken in the future, the suit must fall within some other purpose of declaratory judgment proceedings if it is to be entertained. *Id.*

It appears as well that the majority of state jurisdictions which have addressed this question have also held that a trial court should not exercise jurisdiction over a suit for declaration of nonliability by a potential or, in some instances, actual defendant. See, *Abor v. Black*, 695 S.W.2d 564 (Tex. 1985) (declaratory judgment filed by potential defendant in tort action seeking declaration of nonliability should not be entertained because defendant in effect chooses time and forum for trial by beating potential plaintiff to courthouse and filing suit seeking declaration of nonliability); *Howlett v. Scott*, 69 Ill. 2d 135, 370 N.E.2d 1036 (1977); *Donadio v. Cunningham*, 58 N.J. 309, 277 A.2d 375 (1971); *Employers' Fire Ins. Co. v. Beals*, 103 R.I. 623, 240 A.2d 397 (1968); *Ennis v. Casey*, 72 Idaho 181, 238 P.2d 435 (1951); *Bankers & Shippers Ins. Co. v. Kildow*, 9 Ark. App. 86, 654 S.W.2d 600 (1983); *Allstate Ins. Co. v. Shuman*, 163 Ga. App. 313, 293 S.E.2d 868 (1982); *K.M.S. Research Laboratories v. Willingham*, 629 S.W.2d 173 (Tex. App. 1982); *Watson v. Sansone*, 19 Cal. App. 3d 1, 96 Cal. Rptr. 387 (1971). Only in *Ditzler v. Spee*, 288 Minn. 314, 180 N.W.2d 178 (1970), has a state court allowed the use of a declaratory judgment action to litigate tort liability. In so doing, the court did not abrogate the basic rule cited above, but only found the circumstances of its case distinguishable.

The function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies. *Krieger v. Krieger*, 25 N.Y.2d 364, 254 N.E.2d 750, 306 N.Y.S.2d 441 (1969). See, *Volkswagenwerk v. Watson*, 181 Ind. App. 155, 390 N.E.2d 1082 (1979) (declaratory judgment statute not intended to eliminate well-known causes of action nor to substitute appellate court for tribunal of original jurisdiction where issues are ripe for litigation through usual processes; such statute intended to furnish full and adequate remedy when none existed before it); *In the Matter of Dewar*, 169 Mont. 437, 548 P.2d 149 (1976) (not purpose of declaratory judgment to provide substitute for other regular actions); *Rego Industries, Inc. v. American Mod. Metals Corp.*, 91 N.J. Super. 447, 221 A.2d 35 (1966) (denied declaratory relief where controversy had progressed to point where relief could be obtained in ordinary lawsuit).

Thus, we have noted that declaratory judgment does not lie where another equally serviceable remedy is available. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992); *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985). Here, the wrong (that is to say, the collision) has occurred, and declaratory relief is not necessary to protect Ryder from the accrual of further damages or to guide it in some future act. Any of Ryder's defenses to liability can be presented without any consequential harm to Ryder if and when Rollins brings suit against it.

In these circumstances, we hold that declaratory relief is inappropriate, since more effective relief can and should be obtained in other proceedings. See *Aetna Casualty & Surety Co. v. Yeatts*, 99 F.2d 665 (4th Cir. 1938) (benefits of declaratory judgment should not be extended unless there is actual controversy between parties, and even then court should not decide disputed question if result would be merely to anticipate trial of issue involved in pending case or to determine validity of defense which could be tried equally well therein or to try controversy piecemeal without complete decision of

matters in dispute).

As suggested by the judge in *Township of Ewing v. Trenton*, 137 N.J. Eq. 109, 110, 43 A.2d 813, 814 (1945), the declaratory judgment proceeding was not "intended to be utilized defensively to bag in advance an imminent and impending law suit." See, also, *Independent Tape Merchant's Association v. Creamer*, 346 F. Supp. 456 (M.D. Pa. 1972) (not to be granted if issuance appears calculated to reward winner of race to courthouse).

Accordingly, we reverse the judgment of the district court and remand the cause with the direction that it be dismissed.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

GUY DEAN'S LAKE SHORE MARINA, INC., APPELLANT, V. BERNICE M. RAMEY, APPELLEE.

518 N.W.2d 129

Filed July 1, 1994. No. S-93-017.

1. **Landlord and Tenant: Leases: Time.** A tenant has no right to renew a lease unless the renewal option is exercised in a timely manner in strict accordance with the specifications of the lease agreement.
2. **Equity.** In dealing with legal rights, a court of equity adopts and follows the rules of law in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law.
3. _____. The maxim "equity follows the law" in its broad sense means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common law or statute.
4. **Pleadings: Demurrer.** Following sustainment of a demurrer, the losing party is entitled to amend the petition unless there exists no reasonable possibility that the amendment will remedy the deficiency.

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

Gary J. Nedved, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellant.

Kevin J. Schneider, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

CAPORALE, J.

This is an action in equity through which the plaintiff-appellant lessee, Guy Dean's Lake Shore Marina, Inc., seeks to compel the defendant-appellee lessor, Bernice M. Ramey, to extend the term of the parties' lease agreement. The district court sustained Ramey's demurrer and subsequently dismissed the marina's petition. Assigning the dismissal as error, the marina appealed to the Nebraska Court of Appeals. On our own motion, we removed the matter to this court in order to regulate the caseloads of the two courts. We affirm.

According to the petition, on August 31, 1967, the marina leased the commercial property in question from Ramey for a term of 25 years, commencing January 1, 1968, and expiring December 31, 1992, with options to renew for two additional 25-year terms. The renewal provision required the marina to give Ramey certified mail notice of its election to exercise the first option on or before July 1, 1992. The lease agreement further provided that if the marina did not exercise the renewal option before July 1, 1992, the tenancy would automatically terminate on December 31, 1992, and that time was of the essence.

While the lease gave the marina the right to make improvements to the real estate, it also provided that any improvements or affixed additions would, at the expiration of the lease or any extension or renewal thereof, become Ramey's property. During the lease period, the marina made substantial improvements on the premises.

The marina failed to give the required notice of its intent to exercise the option by the July 1, 1992, deadline, and on July 21, Ramey notified the marina that the option had expired. The marina then orally advised Ramey that it intended to extend the lease; Ramey, however, informed the marina that the lease would expire as of December 31 and that she would evict the marina from the premises. The marina nonetheless sent written

confirmation of its intent to renew in a letter dated July 22, 1992, and, in a letter dated October 8, 1992, expressed more specifically its intent to exercise the option and extend the term an additional 25 years.

The marina urges that as its failure to timely exercise its renewal option was the result of "honest mistake" or "excusable default" which did not prejudice Ramey, the deadline should not be strictly enforced, for to do so would cause it "unconscionable harm." The petition does not describe the nature of the mistake or default, but the parties argue the matter as if the marina simply forgot the deadline.

In support of its position, the marina cites four cases from other jurisdictions: *Linn Corp. v. LaSalle Nat'l Bk.*, 98 Ill. App. 3d 480, 424 N.E.2d 676 (1981); *JNA Realty v Cross Bay*, 42 N.Y.2d 392, 366 N.E.2d 1313, 397 N.Y.S.2d 958 (1977); *Sosanie v. Pernetti Holding Corp.*, 115 N.J. Super. 409, 279 A.2d 904 (1971); *Trollen v. City of Wabasha*, 287 N.W.2d 645 (Minn. 1979).

Each of these cases found a basis in equity to avoid application of the general rule, which is that acceptance of an option to extend a lease must be strictly in accordance with the terms of the option. 1 Samuel Williston, A Treatise on the Law of Contracts § 5:18 (4th ed. 1990); *Western Sav. Fund, Etc. v. Southeastern, Etc.*, 285 Pa. Super. 187, 427 A.2d 175 (1981); *Koch v. H. & S. Development Co.*, 249 Miss. 590, 163 So. 2d 710 (1964); *McClellan v. Ashley*, 200 Va. 38, 104 S.E.2d 55 (1958); *Bekins Moving & Storage v. Prudential Ins.*, 176 Cal. App. 3d 245, 221 Cal. Rptr. 738 (1985); *Simons v. Young*, 93 Cal. App. 3d 170, 155 Cal. Rptr. 460 (1979); *Ahmed v. Scott*, 65 Ohio App. 2d 271, 418 N.E.2d 406 (1979); *Reynolds-Penland Co. v. Hexter & Lobello*, 567 S.W.2d 237 (Tex. App. 1978); *Woodrum v. Pulliam*, 453 S.W.2d 263 (Ky. App. 1970); *Clayman v. Totten*, 56 App. D.C. 115, 10 F.2d 910 (1926). Each also noted, however, that generally, equity will not relieve against mere forgetfulness when a tenant fails to give timely notice.

In *Linn Corp., supra*, the lessee brought an action for specific performance of a lease renewal option which required the tenant to make " 'at least' $60,000 worth of improvements"

and to provide written notice of the intention to exercise the option " ' "not less than one year prior to expiration of the original term . . . ." ' " 98 Ill. App. 3d at 481, 424 N.E.2d at 677. On several occasions prior to the expiration of the notice period, the tenant orally notified the landlord of the former's intention to renew the lease. However, the tenant did not send written notification until after the landlord notified the tenant that the option term had expired. The *Linn Corp.* court reasoned that those facts warranted equity's intervention. The court, citing *Dikeman v. Sunday Creek Coal Co.*, 184 Ill. 546, 56 N.E. 864 (1900), nonetheless wrote:

> " 'A court of equity is bound by a contract as the parties have made it, and has no authority to substitute for it another and different agreement, and particular language is not necessary to make the time of performance essential, *if right and justice in the individual case demand it*. An agreement must be complied with as made unless some stipulation is waived or there is just excuse for non-compliance. . . .' "

(Emphasis in original.) 98 Ill. App. 3d at 483, 424 N.E.2d at 678. In *JNA Realty, supra*, the court noted that equity should give relief for the " 'venial inattention' " of the tenant when the gravity of the hardship outweighs the gravity of the fault. 42 N.Y.2d at 399, 366 N.E.2d at 1317, 397 N.Y.S.2d at 962. Likewise, in *Sosanie, supra*, the court considered the forgetting of a deadline to be an honest mistake of fact and excused a 40-day delay in giving the required notice to renew. And in *Trollen, supra*, the court excused the failure to give timely written notice to renew where the parties had in the past dealt with each other in a less formal manner.

It should be noted, however, that *JNA Realty* was decided by a sharply divided court in which the dissenters observed that the majority opinion upset established precedent, introduced instability in business transactions, and disregarded commercial realities. They reasoned that mere negligence does not justify departing from the rule that notice of an intention to exercise an option to renew must be given within the prescribed period and emphasized that equitable relief is not justified merely by the fact that a party will suffer some sort of economic

detriment, writing:

> Once an option to renew a lease has been conditioned upon the tenant's giving timely notice, the commercial lessee should not be heard to complain that through carelessness a valued asset has been lost, anymore than one would allow the landlord to complain of the economic detriment to him in agreeing to an improvident option to renew.

42 N.Y.2d at 404, 366 N.E.2d at 1320, 397 N.Y.S.2d at 965. The dissenters also noted that under the guise of sheer inadvertence, a tenant could gamble with a fluctuating market at the expense of the landlord by delaying the renewal decision beyond the time fixed within the agreement and warned that such instability would allow for ad hoc dispensations in particular cases without reliable rules that are essential to commercial enterprises.

The exception articulated in *JNA Realty v Cross Bay*, 42 N.Y.2d 392, 366 N.E.2d 1313, 397 N.Y.S.2d 958 (1977), was narrowed in *Soho Development Corp. v. Dean & DeLuca*, 131 A.D.2d 385, 517 N.Y.S.2d 498 (1987). The *Soho Development Corp.* court determined that a tenant could not exercise the lease renewal option after it had expired because the landlord had not misled the tenant, and there was no ambiguity in the lease. *Soho Development Corp.* distinguished *JNA Realty* on the ground that while the *JNA Realty* landlord had regularly informed the tenant of its other obligations under the lease, the landlord had failed to inform the tenant of the impending expiration of the option.

More importantly, our precedent has long adhered to the general rule. For example, in *Wolf v. Tastee Freez Corp.*, 172 Neb. 430, 109 N.W.2d 733 (1961), we held that a tenant who provided only an 89-day written notice in the face of a provision which required a 90-day written notice had failed to properly exercise the renewal option. In so ruling, we wrote:

> The lessors' agreement to renew is an executory contract, and until the lessee has exercised it in some affirmative way, the lessor cannot be held for the additional term. That the acceptance of an offer must be made within the time specified in the offer is a general rule of law. . . . "The

> power to create a contract by acceptance of an offer terminates at the time specified in the offer . . . ." . . . [U]nder a provision specifically designating the time within which notice must be given, that time is of the essence, and such provision is to be strictly construed.

172 Neb. at 432, 109 N.W.2d at 735. Therefore, a tenant has no right to the renewal term unless the option is exercised in a timely manner in strict accordance with the specifications of the lease agreement. See, also, *Gleeson v. Frahm*, 211 Neb. 677, 320 N.W.2d 95 (1982); *State Securities Co. v. Daringer*, 206 Neb. 427, 293 N.W.2d 102 (1980); *Master Laboratories, Inc. v. Chesnut*, 154 Neb. 749, 49 N.W.2d 693 (1951); *Wright v. Barclay*, 151 Neb. 94, 36 N.W.2d 645 (1949); *In re Estate of Lee*, 137 Neb. 567, 290 N.W. 437 (1940).

The marina, however, argues that *Wolf* is distinguishable from the instant case because *Wolf* was an action at law and thus did not address the equitable issues presented here. The marina claims that a forfeiture will result if it is forced from the leasehold due to the substantial improvements it has made during its tenancy. However, as noted by the Restatement (Second) of Contracts § 25, comment *d*. (Reporter's Note) at 75 (1981):

> Despite equity's dislike of forfeitures . . . requirements governing the time and manner of exercise of a power of acceptance under an option contract are applied strictly. It is reasoned that any relaxation of terms would substantively extend the option contract to subject one party to greater obligations than he bargained for.

Similarly, 1 Samuel Williston, A Treatise on the Law of Contracts § 5:18 at 740-42 (4th ed. 1990), observes:

> When the optionee decides to exercise his option, he must act unconditionally and according to the terms of the option, and as soon as the acceptance is so made, the optionor becomes bound. Nothing less than an unconditional and precise acceptance will suffice unless the optionor waives one or more of the terms of the option. . . . Because the option itself affords the offeree protection against the offeror's inconsistent action, the general attitude of the courts is to construe the attempt to

> accept the terms offered under the option strictly. The problem of a potential forfeiture does not enter into the matter.

Moreover, contrary to the marina's position, no forfeiture is involved. The renewal option did not grant it a right to renew the lease; it merely gave the marina the right to accept within a stated time Ramey's offer to extend the lease for the additional term. When the marina failed to comply with the terms of the option, the option expired, and as a result, the marina lost the power of acceptance under the terms of the lease.

In relying on the so-called equities created by the improvements the marina made, the marina overlooks that as the option rendered Ramey's offer to extend irrevocable until the specified expiration date, Ramey was at risk for a period of 24 years 6 months, or until July 1, 1992, when the option expired. The marina, on the other hand, was free during that period to consider whether market conditions dictated relocation, thus counseling against extension of the lease.

In dealing with legal rights, a court of equity adopts and follows the rules of law in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law. *McCauley v. Stewart*, 177 Neb. 759, 131 N.W.2d 174 (1964).

The maxim " ' "[e]quity follows the law" ' " in its broad sense means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common law or statute. *In re Petition of Ritchie*, 155 Neb. 824, 828, 53 N.W.2d 753, 756 (1952). The maxim is strictly applicable whenever the rights of the parties are clearly defined and established by law. *Id.*

There being no basis for departing from our precedent, we decline the marina's invitation to do so. Since the allegations here show no legal duty from Ramey to the marina, and the marina cannot change the fact that it forgot the deadline, the district court properly dismissed the marina's petition. See *Anderson v. Matthis*, *ante* p. 215, 518 N.W.2d 94 (1994) (following sustainment of demurrer, losing party entitled to

amend unless there exists no reasonable possibility amendment will remedy deficiency).

AFFIRMED.

HASTINGS, C.J., and WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLANT, V. RONALD L. HOFFMAN, APPELLEE.

517 N.W.2d 618

Filed July 1, 1994. No. S-93-744.

1. **Constitutional Law: Sentences: Appeal and Error.** Neb. Rev. Stat. § 29-2322 (Cum. Supp. 1992) held constitutional.
2. **Sentences: Sexual Assault.** Sentence of 5 years' probation for first degree sexual assault on a child held excessively lenient.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Sentence modified.

James S. Jansen, Douglas County Attorney, and Robert Francis Cryne for appellant.

Daniel W. Ryberg for appellee.

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

BOSLAUGH, J.

The defendant, Ronald L. Hoffman, was found guilty by a jury of first degree sexual assault on a child. The trial court sentenced the defendant to 5 years of intensively supervised probation, with 100 days of electronic monitoring, and the last 90 days to be served in the Douglas County Correction Center unless waived by the court.

The State has appealed to this court, contending the sentence is excessively lenient.

The victim in this case was born November 12, 1979. He was 13 years old at the time of trial. The defendant was born August 13, 1963, and was 29 years old at the time of trial.

The defendant had befriended the victim's family approximately 6 to 8 years prior to the charged offense. The

defendant began to pay special attention to the victim sometime between the victim's 9th and 10th birthdays. The defendant provided the boy with treats and took him on outings on a weekly basis over the following years.

The victim would spend the night at the defendant's home and sleep in his bed with him over the same period of time. The victim testified that this occurred every weekend or almost every weekend.

The victim testified that when he slept in the defendant's bed, the defendant would fondle the victim's private parts. When the victim resisted these advances, the defendant would strike him. The victim testified that the defendant would tell him that the touching was a secret and not to tell anyone. The victim testified that the years of fondling culminated in an act of oral intercourse performed on the boy by the defendant in October 1992.

The victim reported the incident of oral intercourse to his mother after he had been sent home from school for threatening his classmates. The mother suspected, based on the victim's behavior at home and school, that the victim might have been abused.

The victim comes from a dysfunctional family. He has had a history of behavior problems in school; however, the problems worsened during the last 2 years of the victim's relationship with the defendant.

After the victim reported the abuse by the defendant, the victim was hospitalized for a month. He was diagnosed as suffering from posttraumatic stress disorder, major depression, identity disorder, and oppositional defiant disorder.

In addition to our consideration of the State's assignment of error regarding the leniency of the trial court's sentence, we will first consider the defendant's claim that Neb. Rev. Stat. § 29-2322 (Cum. Supp. 1992) is unconstitutional because it requires an appellate court to consider factors different from those the trial court considers in determining the leniency of a sentence and because the standard of review for the State's appeal of a lenient sentence is different from the standard of review for a defendant's appeal of an excessive sentence. The defendant's argument is without merit.

The defendant's approach to this case assumes that § 29-2322 and Neb. Rev. Stat. § 29-2260(2)(a) (Reissue 1989) are mutually exclusive. We have said that a sentencing court has a broad discretion in the source and type of evidence that the court may use in determining the kind and extent of punishment to be imposed within the limits fixed by statute. *State v. Minor*, 188 Neb. 23, 195 N.W.2d 155 (1972). The fact is that the court should consider all of the circumstances of the case in determining a proper sentence.

In *State v. Foral*, 236 Neb. 597, 599, 462 N.W.2d 626, 628 (1990), this court stated:

> When the State appeals from a sentence, contending that it is excessively lenient, this court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court. *State v. Dobbins*, 221 Neb. 778, 380 N.W.2d 640 (1986). In reviewing such a case for an abuse of discretion, "our review is governed by § 29-2322, which sets out the factors we are to consider in determining whether the sentence imposed is 'excessively lenient.' Additionally, we note that § 29-2260(2)(a), (b), and (c) sets out factors to be considered by a sentencing judge in determining if a defendant should be imprisoned, while § 29-2260(3)(a) through (k) sets out factors to be considered in the decision to withhold imprisonment. The sentencing judge's discretion is guided by all these factors. Our review of the alleged abuse of the sentencing judge's discretion, therefore, must recognize these statutory guidelines set out for the direction of the sentencing judge in imposing or withholding imprisonment." *State v. Jallen*, [218 Neb. 882,] 884, 359 N.W.2d [816,] 818 [(1984)].

A sentence of imprisonment that is 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).

As reflected in the above-cited cases, there is not a different standard of review for sentences when the State appeals a sentence as excessively lenient or when a defendant appeals a

sentence as excessive. An appellate court reviews for an abuse of discretion in either case. Furthermore, while an appellate court's review for an abuse of discretion in a sentence claimed to be excessively lenient is governed by § 29-2322, the appellate court must also recognize the statutory guidelines in § 29-2260 considered by the sentencing judge in his or her determining whether a defendant should be imprisoned or not.

In this case, the defendant was convicted of first degree sexual assault on a child, which is a Class II felony. See Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989). A Class II felony is punishable by a maximum of 50 years' imprisonment and a minimum of 1 year's imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1989).

Section 29-2260 provides in pertinent part:

> (2) Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or
>
> (c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.
>
> (3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:
>
> (a) The crime neither caused nor threatened serious harm;
>
> (b) The offender did not contemplate that his or her crime would cause or threaten serious harm;
>
> (c) The offender acted under strong provocation;

(d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;

(e) The victim of the crime induced or facilitated commission of the crime;

(f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;

(g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;

(h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

Regarding the factors under subsection (2), there is a risk that during a period of probation the defendant would engage in additional criminal conduct. An evaluation of the defendant indicates that the defendant has "somewhat less than average compliance to social expectations." Furthermore, a sentence of probation depreciates the seriousness of the defendant's crime and promotes disrespect for the law.

As to the factors under subsection (3), there are none that apply to the defendant.

Section 29-2322 requires an appellate court, when determining whether a sentence is excessively lenient, to have regard for the following:

(1) The nature and circumstances of the offense;

(2) The history and characteristics of the defendant;

(3) The need for the sentence imposed:

(a) To afford adequate deterrence to criminal conduct;

(b) To protect the public from further crimes of the defendant;

(c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the

offense; and

(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and

(4) Any other matters appearing in the record which the appellate court deems pertinent.

After reviewing the standards set out in § 29-2322 and the factors set forth in § 29-2260, we find that the sentence to probation in this case was excessively lenient and that the trial court abused its discretion in granting probation.

The offense for which the defendant was convicted followed a lengthy history of other sexual assaults upon the victim involving violence. While the defendant had no prior felony convictions, his criminal record includes traffic violations, a conviction of driving under the influence of alcohol, and two convictions of theft. The defendant has expressed no remorse for his actions.

A sentence to imprisonment is needed in this case to afford adequate deterrence of this type of criminal conduct, to protect the public from further crimes by the defendant, to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense committed.

The trial court abused its discretion by sentencing the defendant to probation, and we, therefore, vacate that order and sentence the defendant to the Department of Correctional Services for a term of not less than 6 nor more than 8 years.

SENTENCE MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES RAYMOND McCORMICK, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. DAVID EUGENE HALL, APPELLANT.

518 N.W.2d 133

Filed July 1, 1994. Nos. S-93-844, S-93-845.

1. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is jurisdictional.
2. **Criminal Law: Jurisdiction: Appeal and Error.** Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1992) sets forth the only method by which a party may invoke the jurisdiction of an appellate court to review a criminal case.
3. **Criminal Law: Judgments.** In a criminal case, judgment occurs when the verdict and sentence are rendered by the court.
4. **Criminal Law: Motions for New Trial: Time: Appeal and Error.** Although Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 1992) provides for the termination of the 30-day limitation period for filing a notice of appeal, this terminating provision does not apply to criminal actions. The filing of a motion for new trial shall have no effect on the jurisdictional requirement that, in a criminal action, an appealing party must file a notice of appeal within 30 days after the date of sentencing.
5. **Motions for New Trial: Evidence: Time.** A motion for new trial must be filed within 10 days of the verdict unless the motion is based on newly discovered evidence material to the moving party, which he could not with reasonable diligence have discovered and produced at trial, or unless filing within 10 days was unavoidably prevented. If the motion is filed more than 10 days after the verdict, the motion shall have no effect unless it falls within one of the two statutory exceptions.
6. **Motions for New Trial: Time: Appeal and Error.** Unlike the 30-day limitation provided by Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1992), the 10-day limitation period for filing a motion for new trial begins to run from the date of the verdict, not the date of sentencing.
7. **Motions for New Trial: Appeal and Error.** A motion for new trial based on newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the determination of the trial court will not be disturbed on appeal.
8. **Motions for New Trial: Evidence.** To constitute newly discovered evidence, the evidence presented in a motion for new trial must be material to the moving party and must be evidence which he could not with reasonable diligence have discovered and produced at trial.
9. _____: _____. Materiality has been explained as referring to newly discovered evidence which is so potent that by strengthening the evidence already offered, a new trial would probably result in a different verdict; the newly discovered evidence must be relevant and credible and not merely cumulative.
10. **Motions for New Trial: Words and Phrases.** Reasonable diligence is defined as

appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Chris M. Arps, of Arps & Schirber Law Offices, for appellants.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

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

WHITE, J.

These appeals arise from the convictions of the appellants, Charles Raymond McCormick and David Eugene Hall, for manufacturing a controlled substance: marijuana. Appellants were each sentenced to 5 years' imprisonment.

This case involves three codefendants, McCormick, Hall, and Bryle Edward Radden. The appeals of McCormick and Hall are consolidated on appeal because appellants raise the same issues and are represented by the same attorney.

This case comes before the court with numerous procedural problems which have caused a tremendous amount of confusion between the parties regarding what proceedings and issues are before this court for review. It will be helpful to first outline the chronology of events surrounding the arrest and prosecution of the appellants and then determine which proceedings are properly before this court for review.

On January 19, 1993, pursuant to a search warrant, the Sarpy County sheriff's office simultaneously executed search warrants on two separate residences. During the course of these searches, evidence was gathered and several arrests were made. Among those persons arrested were McCormick and Hall. McCormick and Hall were each charged with one count of manufacturing a controlled substance, to wit: marijuana; possession of marijuana (more than 1 pound); and failing to affix a tax stamp.

The criminal investigation leading up to the searches commenced after an anonymous informant provided

information to the police. On March 17, prior to trial, appellants learned that the informant had been on probation at the time he provided the information to the police. Concerned that evidence derived from the information provided by the informant might be inadmissible pursuant to Neb. Rev. Stat. § 29-2262.01 (Reissue 1989), defense counsel attempted to discern the informant's role in the investigation. In response, the county attorney told the court that the informant did not act as an employee or undercover agent of the law enforcement agency when he provided the information. Although the district court did not allow appellants to learn the identity of the informant, the court did permit defense counsel to question, under oath, two Sarpy County police officers regarding the nature of the informant's involvement in the investigation.

Defense counsel was permitted to question Sgt. Mark A. Topil and Deputy Sheriff Randall J. Scott, each of whom had direct contact with the informant. During the questioning defense counsel inquired whether the informant was on probation or parole. The officers told defense counsel that the informant was on probation when he provided the information to the police. Defense counsel also asked the officers whether the informant was paid for the information. Topil stated that the informant was not paid for providing information to the police. Defense counsel then attempted to question the officers about the informant's criminal history and alleged history of substance abuse. The district court sustained the county attorney's objections to those questions. Defense counsel did not ask the officers any other questions regarding the informant or his role in the criminal investigation.

On April 19, the district court held a bench trial based on stipulated facts. On April 20, the district court found each appellant guilty of one count of manufacturing a controlled substance.

After the guilty verdict was rendered, but before sentencing, a private investigator hired by appellants discovered the informant's name and criminal history. On June 3, appellants filed motions for new trial based on newly discovered evidence. The basis for appellants' motions was the information the investigator had gathered about the informant. On June 4,

appellants were each sentenced to 5 years' imprisonment.

At a hearing held June 11 on appellants' motions, the district court ordered the county attorney to disclose to appellants the name of the informant and allow appellants to depose the informant. On July 5 and August 23, appellants served the county attorney with notice of scheduled depositions of the informant. On both occasions, the county attorney refused to appear, refused to disclose the identity of the informant, and refused to produce the informant for the depositions. The county attorney subsequently filed his own appeal from the June 11 order.

Without any other action, the district court denied appellants' motions for new trial based on newly discovered evidence on August 25. Appellants filed motions for rehearing, and on September 10 the court denied those motions. On September 23, appellants each filed a notice of appeal.

Before considering the merits of the issues raised on appeal, we must first consider appellee's argument that the appeals are not timely. Timeliness of an appeal is jurisdictional. *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994); *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992); *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988); *State v. Stickney*, 222 Neb. 465, 384 N.W.2d 301 (1986).

Liberally construing appellants' arguments, we note that they appeal from two separate proceedings: (1) the judgments and (2) the orders overruling their motions for new trial based on newly discovered evidence. In determining the timeliness of the appeals, we will separately address each of these proceedings.

Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1992) sets forth the only method by which a party may invoke the jurisdiction of an appellate court to review a criminal case. Section 25-1912(1) provides that

> the proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the rendition of such judgment or decree

> or the making of such final order, a notice of intention to prosecute such appeal signed by the appellant . . . .

In a criminal case, judgment occurs when the verdict *and* sentence are rendered by the court. *Spotted Elk, supra* (stating that in a criminal case the judgment date is the date on which the defendant is sentenced); *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980). Although § 25-1912(2) provides for the termination of the 30-day limitation period, this terminating provision does not apply to criminal actions. *Spotted Elk, supra*. Thus, the filing of a motion for new trial shall have no effect on the jurisdictional requirement that, in a criminal action, an appealing party must file a notice of appeal within 30 days after the date of sentencing. See *State v. Flying Hawk*, 227 Neb. 878, 420 N.W.2d 323 (1988).

In the instant case the district court rendered its guilty verdicts on April 20 and sentenced appellants on June 4. Each appellant timely filed a notice of appeal on June 4. Those appeals, however, were dismissed by the Nebraska Court of Appeals. *State v. McCormick*, 4 NCA xi (case No. A-93-494, Aug. 19, 1993); *State v. Hall*, 4 NCA xi (case No. A-93-495, Aug. 19, 1993). Contra *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499 (1958) (holding that proceedings in an appeal filed in the Supreme Court and in a motion for new trial on the ground of newly discovered evidence filed in district court may be separately conducted in both courts at the same time). Appellants did not seek further review of the dismissals by the Court of Appeals. Despite the questionable ruling of the Court of Appeals, the dismissals terminated the appeals, and the notices of appeal filed by appellants on June 4 is ineffective to confer jurisdiction on this court to review the present appeals. Thus, appellants failed to properly invoke the jurisdiction of this court to review their appeals from the judgment.

Although the filing of a motion for new trial in a criminal case does not terminate the running of the 30-day period in which a criminal defendant must file a notice of appeal, the Nebraska criminal procedure statutes allow a criminal defendant to file a motion for new trial. Neb. Rev. Stat. §§ 29-2101 to 29-2103 (Reissue 1989). See Neb. Rev. Stat. § 25-1912.01 (Reissue 1989) (generally, motions for new trial

are not a prerequisite to perfecting an appeal). It is also apparent from a reading of the relevant statutes that a party who timely files a motion for new trial pursuant to those statutes may appeal from the overruling of such a motion provided that the party complies with § 25-1912(1). In this respect, a party may be able to preserve for appellate review issues which are presented to the district court in a timely filed motion for new trial. We caution, however, that such an appeal will be limited to those issues properly presented to the trial court in the motion.

Section 29-2101 sets forth six reasons for which a party may file a motion for new trial. § 29-2101. To be effective, the motion must be filed within 10 days of the verdict unless the motion is based on newly discovered evidence material to the moving party, which he could not with reasonable diligence have discovered and produced at trial, or unless filing within 10 days was unavoidably prevented. § 29-2103; *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993); *State v. Daly*, 227 Neb. 633, 418 N.W.2d 767 (1988). Unlike the 30-day limitation provided by § 25-1912(1), the 10-day limitation for filing a motion for new trial begins to run from the date of the verdict, not the date of sentencing. *Daly, supra*; *State v. Applegarth*, 196 Neb. 773, 246 N.W.2d 216 (1976) (explaining that the 10-day limit runs from the date of verdict, not the date of the sentencing, unless the verdict and sentencing occur on the same day); *State v. Wood*, 195 Neb. 353, 238 N.W.2d 226 (1976). If the motion is filed more than 10 days after the verdict, the motion shall have no effect unless it falls within one of the two statutory exceptions stated above. *Thompson, supra* (stating that the requirements of § 29-2103 are mandatory; if the motion is not timely filed, it will not be considered on appeal); *Daly, supra*; *State v. Hawkman*, 198 Neb. 578, 254 N.W.2d 90 (1977) (discussing what constitutes "unavoidably prevented" and considering only those issues timely raised). As stated above, when a party files a timely motion for new trial and does not otherwise file a timely notice of appeal from the judgment, the only issues which may be preserved for appellate review are those issues raised in the motion.

In the instant case, the district court entered its verdicts

against appellants on April 20, 1993. Appellants filed motions for new trial on June 3. The motions were filed more than 10 days after the verdicts and were limited only to issues relating to the alleged newly discovered evidence. Therefore, only the issues relating to the newly discovered evidence have been preserved for our review.

To summarize, the notices of appeal filed by appellants were dismissed by the Court of Appeals and are ineffective to confer jurisdiction over the present appeals. Moreover, the motions for new trial filed by appellants did not preserve any issues arising from the judgments. This court, therefore, lacks jurisdiction to address the appeals from the judgments.

As stated above, however, we do have jurisdiction to consider the appeals from the overruling of appellants' motions for new trial based on newly discovered evidence. The 10-day limitation period for filing a motion for new trial does not apply to motions based on newly discovered evidence. Appellants' motions for new trial based on newly discovered evidence, therefore, were timely filed. See, § 29-2103; *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994) (stating that a motion for new trial must be filed within 10 days after the verdict is rendered, unless the motion is based on newly discovered evidence); *Thompson, supra*; *Applegarth, supra*. The district court overruled those motions on August 25. Pursuant to § 25-1912(1), appellants timely filed notices of appeal from those final orders on September 23. This court, therefore, has jurisdiction over the proceeding in which the district court overruled appellants' motions for new trial based on newly discovered evidence. We thus confine our analysis in this case to whether the district court should have overruled appellants' motions for new trial.

A motion for new trial based on newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the determination of the trial court will not be disturbed on appeal. *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993); *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991); *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991); *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302

(1987); *State v. French*, 200 Neb. 137, 262 N.W.2d 711 (1978).

To constitute newly discovered evidence, the evidence presented in the motion must be material to the moving party and must be evidence which he could not with reasonable diligence have discovered and produced at trial. *Boppre, supra*; *State v. Glouser*, 193 Neb. 190, 226 N.W.2d 328 (1975). Materiality has been explained as referring to newly discovered evidence which is "so potent that by strengthening the evidence already offered, a new trial would probably result in a different verdict; the newly discovered evidence must be relevant and credible and not merely cumulative." *Boppre*, 243 Neb. at 928, 503 N.W.2d at 538 (citing *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991), and *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)). Accord, *State v. Hortman*, 207 Neb. 393, 299 N.W.2d 187 (1980); *State v. Pierce*, 204 Neb. 433, 283 N.W.2d 6 (1979), *overruled on other grounds*, *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983); *State v. Smith*, 202 Neb. 501, 276 N.W.2d 104 (1979); *French, supra*; *Glouser, supra*. We have defined reasonable diligence as "appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful." *Hirsch*, 245 Neb. at 50, 511 N.W.2d at 82 (citing *State v. Munson*, 204 Neb. 814, 285 N.W.2d 703 (1979)).

At this juncture, we note that appellants failed to properly assign as error the overruling of the motions for new trial. On appeal, appellants did assert and discuss as error the use of evidence derived from the informant in violation of § 29-2262.01. This is, in essence, the same error asserted in their motions. From our review of the motions and the hearing held on those motions, appellants appear to argue that the newly discovered evidence demonstrates that the evidence derived from the informant should have been excluded from their trials pursuant to § 29-2262.01. Thus, the substance of the error is before this court, and in an effort to give this case complete appellate review, we will consider the error asserted in appellants' motions.

We now consider whether the evidence provided in appellants' motions is material and whether the evidence is such

that appellants could not with reasonable diligence have discovered and produced at trial.

As stated above, evidence is material if it is so potent that by strengthening the evidence already offered, its use in a new trial would probably result in a different verdict. Additionally, the newly discovered evidence must be relevant and credible and not merely cumulative. In considering whether the evidence presented by appellants is material, it is necessary to consider what factors are relevant to the application of § 29-2262.01. That statute provides:

> A person placed on probation by a court of the State of Nebraska, an inmate of any jail or correctional or penal facility, or an inmate who has been released on parole, probation, or work release shall be prohibited from acting as an undercover agent or employee of any law enforcement agency of the state or any political subdivision. Any evidence derived in violation of this section shall not be admissible against any person in any proceeding whatsoever.

This statute mandates that any evidence derived from a person who falls within the class of persons described in the statute shall be inadmissible at trial. *State v. Schuh*, 237 Neb. 667, 467 N.W.2d 409 (1991) (single-judge opinion); *State v. Wilcox*, 230 Neb. 123, 430 N.W.2d 58 (1988) (single-judge opinion).

Prior to trial, appellants had actual knowledge that the informant was on probation at the time he provided information to the police. Appellants maintain that after trial, they learned the name of the informant, his criminal history, and that he was in county jail when he provided the information to police. We find that this alleged newly discovered evidence is not of such a quality that if a new trial is granted, its consideration would change the result.

The exclusionary rule provided by § 29-2262.01 does not apply unless the informant is both (1) in jail, on probation, or on parole and (2) acting as an undercover agent or employee of a law enforcement agency. *Schuh, supra* (finding that the informant was on parole but did not act as an undercover agent). The alleged new evidence does not make it any more likely that the evidence derived from the informant would have

been excluded pursuant to § 29-2262.01. See, *Hortman, supra* (finding that the proffered evidence would not likely have resulted in a different verdict); *Munson, supra*.

The alleged new evidence is the same in quality as the evidence that appellants were aware of prior to trial. The evidence available prior to trial established that the informant fell within the first classification set forth in § 29-2262.01 because he was on probation at the time that he provided the information to police. The alleged new evidence also establishes that the informant fell within the first classification of § 29-2262.01. In this respect, the newly discovered evidence is merely cumulative of the evidence available prior to trial. See *State v. French*, 200 Neb. 137, 262 N.W.2d 711 (1978). The new evidence is not material. See, *State v. Koch*, 224 Neb. 926, 402 N.W.2d 275 (1987) (finding that evidence offered in support of the motion was merely cumulative of evidence received during trial); *State v. Wycoff*, 180 Neb. 799, 146 N.W.2d 69 (1966).

Even if appellants brought forth evidence in their motions for new trial which demonstrated that the informant fell within § 29-2262.01, appellants failed to exercise reasonable diligence to discover and produce relevant evidence prior to trial. On March 17, 1993, during a pretrial hearing which was held in chambers, appellants' counsel raised the issue of whether the evidence derived from the informant fell within § 29-2262.01. At that time, the county attorney acknowledged that the informant had been on probation at the time he provided information to the police.

Despite assurances from the county attorney that the informant did not otherwise fall within the class of persons described in § 29-2262.01, the district court stated that during a later suppression hearing it would allow appellants' counsel to question those officers who had direct contact with the informant to determine whether § 29-2262.01 applied to the cases. The district court stated, however, that it would not permit appellants' counsel to learn the identity of the informant.

At the suppression hearing, appellants' counsel was permitted to question two officers who had been in contact with the informant. Sergeant Topil of the Sarpy County sheriff's

office testified first. The following relevant testimony was elicited by appellants' counsel from Topil:

Q. Did you participate in obtaining a search warrant for the property at 1703 Pelton Avenue and 2704 Calhoun?

A. Yes, I did.

Q. How did this all start?

A. The 12th of January, 1993, I received information from a captain at the sheriff's office that a party had information on two houses in the Bellevue area that were growing marijuana and selling the product.

Q. Were you aware of the criminal history of the gentleman?

MR. WELLMAN [county attorney]: Object; relevance, materiality.

THE COURT: Overruled. The answer would be yes or no.

A. Yes, I did.

Q. What was that?

MR. WELLMAN: Object; relevance and materiality.

THE COURT: Sustained.

MR. ARPS [appellants' counsel]: To shorten this up, Judge, if I ask any further questions, is the county attorney going to make the same objection? Like whether this person —

THE COURT: You can ask him if he was on probation, the person that he talked to.

Q. (By Mr. Arps) Was he on probation?

. . . .

A. Yes, he was on probation.

Q. For what?

MR. WELLMAN: Object; relevance and materiality.

THE COURT: Sustained.

Q. (By Mr. Arps) Was he paid?

A. No, he was not.

Q. Any prior information from this individual?

A. I had not received any information from him prior.

Q. Was he in jail?

MR. WELLMAN: Object; relevance and materiality.

THE COURT: Overruled. Calls for a yes or no answer.

A. No, he was not.
Q. Were you told how this knowledge was acquired?
MR. WELLMAN: Yes or no.
A. No.
Q. Is this person a drug user?
MR. WELLMAN: Object; relevance and materiality.
THE COURT: Sustained.
Q. (By Mr. Arps) Is this person a drug purchaser?
MR. WELLMAN: Object; relevance and materiality.
THE COURT: Sustained.
Q. (By Mr. Arps) The date of this information was on the 12th?
THE COURT: The basis for sustaining these is not the legal basis, but our in camera conference that was held.
MR. WELLMAN: All right.

Appellants' counsel did not ask any more questions with regard to whether the informant may have been an undercover agent or employee of a law enforcement agency. The remaining examination of Topil concerned what the Sarpy County sheriff's office did with the information provided by the informant.

Appellants' counsel again had an opportunity to elicit information which may have indicated that the informant was acting as an undercover agent or employee of a law enforcement agency when Deputy Sheriff Scott of the Sarpy County sheriff's office testified. During that testimony, the following exchange occurred:

Q. [appellants' counsel] Okay. When did you first start this investigation?
A. It was on — around January 12th, '93.
Q. And that's when you got a tip, right?
A. Yes.
Q. Did you know who anonymous was?
A. Yes.
Q. Was he on probation?
A. I believe that was confirmed later on, yes.
Q. Was he on parole?
MR. WELLMAN: Object; relevance, materiality.
THE COURT: Sustained for purposes of the in camera

proceeding.

Q. (By Mr. Arps) How many times did you talk to him?

A. I talked to him once.

Q. And when was that?

MR. WELLMAN: Object; relevance, materiality.

THE COURT: Overruled.

A. It was around about I believe the 14th. It was within a couple of days after Investigator Topil had received a tip.

Q. Where?

MR. WELLMAN: Object; relevance, materiality.

THE COURT: Sustained.

Q. (By Mr. Arps) Was he paid?

MR. WELLMAN: Object; relevance, materiality.

THE COURT: Sustained.

Q. (By Mr. Arps) Did he ever give you any prior information?

A. To me, no.

Q. Did he ever give you any indication how he acquired this knowledge?

MR. WELLMAN: Object; relevance, materiality.

THE COURT: Sustained.

Q. (By Mr. Arps) Was he a drug user?

MR. WELLMAN: Object; relevance, materiality.

THE COURT: Sustained.

Q. (By Mr. Arps) Drug purchaser?

MR. WELLMAN: Object; relevancy, materiality.

THE COURT: Sustained. All these are based on the in camera hearing.

MR. ARPS: Okay.

Q. (By Mr. Arps) Going back, in any event, you started an investigation, right?

A. Yes.

Appellants' counsel did not attempt to further question Scott regarding the informant's participation in the criminal investigation of appellants.

After thoroughly reviewing the in camera hearing and the subsequent testimony of the officers involved with the informant, we find that appellants' counsel failed to exercise reasonable diligence prior to trial to discover and produce

evidence which may have indicated that evidence derived from the informant was inadmissible pursuant to § 29-2262.01. Although the district court ordered that the identity of the informant was to be kept anonymous, the court did allow appellants' counsel an opportunity to question the officers regarding the informant's role in the investigation. The questions asked by appellants' counsel, however, demonstrate that counsel failed to take advantage of the opportunity to elicit evidence which may have indicated that § 29-2262.01 applied to this informant.

This court considered whether a party had exercised reasonable diligence in *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991). In *Jensen*, the defendant was arrested and charged with knowingly or intentionally possessing with the intent to manufacture, distribute, deliver, or dispense a controlled substance, to wit: cocaine, and with knowingly or intentionally possessing a controlled substance other than marijuana, to wit: methamphetamine. At trial, the county attorney introduced evidence that money found in the defendant's purse tested positive for cocaine residue. Subsequent to trial, defendant filed a motion for new trial based on newly discovered evidence: an affidavit from an expert which stated that he needed 10 days to test the money, that the tests conducted by the county attorney could have been contaminated, and that the results were inconclusive because any money pulled from general circulation could test positive. *Id.*

On appeal, there was disputed evidence regarding what happened prior to trial. This court, however, found that the district court was not clearly erroneous in accepting the county attorney's version of events. Based on that factual scenario, this court found that defense counsel failed to exercise reasonable diligence prior to trial. Specifically, defense counsel was given notice more than 4 weeks before trial that the county attorney would test the money. The county attorney also provided defense counsel with a reasonable opportunity to test the money. Defense counsel, however, never picked up the money to be tested. This court found that defense counsel failed to take advantage of the advance warning of expert testimony and the

opportunity to gather his own expert testimony. Thus, this court found that defense counsel failed to exercise reasonable diligence, and we affirmed the order of the district court overruling the motion for new trial. *Id.*

Similarly, in the instant case, appellants' counsel failed to take advantage of opportunities prior to trial to gather evidence relevant to determining whether the evidence derived from the informant was inadmissible pursuant to § 29-2262.01. It therefore cannot be said that appellants' counsel diligently pursued a reasonable course of action prior to trial. A motion for new trial based on newly discovered evidence is not a mechanism for parties to present evidence which may have been uncovered and produced prior to trial. It is important to emphasize that what those opportunities would have yielded is irrelevant to our decision; the salient factor in our analysis is the failure of appellants' counsel to fully utilize those opportunities. To hold otherwise would condone the lack of reasonable diligence which is expected and required of all parties prior to trial. See, also, *Hansl v. Creighton Univ.*, 243 Neb. 21, 497 N.W.2d 63 (1993) (finding that the moving party failed to exercise reasonable diligence in producing alleged "newly discovered evidence" prior to trial); *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992); *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990); *State v. Costanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990); *State v. Daly*, 227 Neb. 633, 418 N.W.2d 767 (1988); *State v. Munson*, 204 Neb. 814, 285 N.W.2d 703 (1979); *State v. Crawford*, 195 Neb. 181, 237 N.W.2d 140 (1976) (moving party failed to demonstrate reasonable diligence, and court stated that there appeared to be no reason why party could not have made an effort to uncover and produce the evidence prior to trial).

We therefore find that the district court did not abuse its discretion in overruling appellants' motions for new trial. The decisions of the district court are affirmed.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. BRYLE EDWARD RADDEN, APPELLANT.

518 N.W.2d 143

Filed July 1, 1994. No. S-93-846.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Carl I. Klekers for appellant.

Don Stenberg, Attorney General, and James A. Elworth for appellee.

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

WHITE, J.

This appeal arises from the conviction of appellant, Bryle Edward Radden, for manufacturing a controlled substance: marijuana. Appellant was sentenced to 7 years' imprisonment.

Appellant's case is indistinguishable from the cases of appellant's codefendants, Charles Raymond McCormick and David Eugene Hall. The records in all three cases are virtually identical. Specifically, we note that there is no difference between the bills of exceptions and the pleadings and motions filed in each of the three cases. More importantly, the procedural problems discussed in *State v. McCormick and Hall*, *ante* p. 271, 518 N.W.2d 133 (1994), are identical to those associated with this appeal. It is therefore unnecessary to restate the relevant facts and analysis in this opinion.

For the reasons set forth in *McCormick and Hall*, the only proceeding properly before this court for review is the motion for new trial based on newly discovered evidence filed by appellant on June 3, 1993. The decision of the district court overruling appellant's motion for new trial based on newly discovered evidence is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JOHN J. JOUBERT, APPELLANT.

518 N.W.2d 887

Filed July 8, 1994. No. S-84-842.

1. **Death Penalty: Appeal and Error.** Neb. Rev. Stat. § 29-2525 (Reissue 1989) grants a prisoner convicted and sentenced to death an automatic appeal to the Nebraska Supreme Court, during which time Neb. Const. art. I, § 23, stays execution of the sentence until further order of this court.
2. **Death Penalty: Courts: Jurisdiction.** The Nebraska Supreme Court has the statutory authority to set an execution date once it has considered the prisoner's automatic appeal and determined that death is the legally appropriate sentence.
3. **Death Penalty: Courts: Warrants.** The failure to execute a death warrant on the original date fixed does not result in the discharge of a prisoner sentenced to die, but requires the Nebraska Supreme Court to fix a new date for the execution.
4. **Statutes.** Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language.
5. _____. When the language used in a statute requires interpretation or may reasonably be considered ambiguous, the statute is open to construction.
6. **Criminal Law: Statutes.** Although a penal statute must be strictly construed, it is to be given a sensible construction, and general terms are to be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence.
7. **Statutes: Intent: Appeal and Error.** In construing a statute, an appellate court must look at the statutory objective to be accomplished, problem to be remedied, or purpose to be served, and then place on the statute a reasonable construction which best achieves its purpose, rather than a construction which will defeat the purpose.
8. **Statutes.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of the statute.
9. _____. The language of a statute is to be considered in its plain, ordinary, and popular sense.
10. **Statutes: Legislature: Intent.** A series or collection of statutes pertaining to a certain subject matter, statutory components of acts which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible.
11. _____: _____: _____. In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.
12. **Statutes: Legislature: Intent: Presumptions.** Generally, where a statute has been judicially construed and that construction has not evoked amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its

intent.

13. **Courts: Words and Phrases.** The inherent judicial power of a court is that power which is essential to the court's existence, dignity, and functions.
14. **Constitutional Law: Courts.** Inherent judicial power is not derived from legislative grant or specific constitutional provision, but from the very fact that a court has been created and charged by the Constitution with certain duties and responsibilities.
15. _____: _____. Inherent judicial power is essential to the existence of a court and the orderly and efficient exercise of the administration of justice. Inherent judicial power exists in addition to the express grants of judicial power to each court and originates in the mandate of the Nebraska Constitution of the separation of powers between three coequal branches or departments of government.
16. **Courts.** Inherent judicial power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or a court would be unable to function.
17. _____. Through its inherent judicial power, the Nebraska Supreme Court has authority to do all things that are reasonably necessary for the proper administration of justice, whether any previous form of remedy has been granted or not.
18. **Courts: Jurisdiction.** A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.
19. **Courts.** The primary duty of the courts is the proper and efficient administration of justice.
20. **Constitutional Law: Courts.** It is the duty of a court to see that justice is administered speedily, without delay, and legally, and in conformity to constitutional mandates.
21. **Courts.** A ministerial act may be completed by the Nebraska Supreme Court even after its mandate is issued because such act in no way involves a reconsideration of the judicial determination made.
22. **Courts: Judgments: Jurisdiction.** The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied.
23. **Courts: Jurisdiction.** In order for an inferior court to reacquire jurisdiction, it must take action on the Nebraska Supreme Court's mandate.

Special appearance overruled. Motion for setting of execution date overruled without prejudice. Motion for sanctions overruled without prejudice.

Mark A. Weber, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

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

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

PER CURIAM.

Notwithstanding the existence of a stay issued by the U.S. District Court for the District of Nebraska, the plaintiff State, through its Attorney General, has moved this court to set still another date for executing the convicted prisoner, John J. Joubert. The prisoner has responded by filing a special appearance objecting to this court's jurisdiction over the matter and by filing a motion for sanctions, claiming that given the pendency of the federal stay, the Attorney General's motion is frivolous and vexatious. For the reasons hereinafter stated, the prisoner's special appearance is overruled, the Attorney General's motion is overruled without prejudice, and the prisoner's motion for sanctions is overruled without prejudice.

PART I

Upon pleading guilty, the prisoner was convicted in the district court of two counts of first degree murder and sentenced to death on each count. This court affirmed those sentences in *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), and thereupon issued its mandate to the district court with the direction to "enter judgment in conformity with the judgment and opinion of this court." This court subsequently issued a warrant ordering that Joubert be put to death by passing an electric current through his body. That order of execution was stayed by the U.S. Supreme Court on Joubert's petition for a writ of certiorari. Upon the termination of that stay, this court issued a second death warrant. Upon Joubert's motion, this court itself later stayed that order of execution so that he might pursue his legislatively created proceeding for postconviction relief. When that quest proved unsuccessful, *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990), this court issued a third death warrant. That order of execution was again stayed by the U.S. Supreme Court on another petition by Joubert for a writ of certiorari. Upon the termination of that stay, this court issued the fourth death warrant, yet again ordering that Joubert be put to death. On July 3, 1991, the U.S. District Court for the District of Nebraska, upon Joubert's

petition for federal habeas corpus relief, entered an order staying "execution of [the] sentence" pending resolution of the petition. Joubert v. Hopkins, case No. 8:CV 91-00350.

PART II

This opinion concerns itself with the two issues presented by the Attorney General's motion and the prisoner's special appearance: whether this court has jurisdiction to entertain the Attorney General's motion and, if so, whether this court may set an execution date notwithstanding the federal stay of the "sentence."

1. JURISDICTION

There are two aspects to the prisoner's claim that this court lacks jurisdiction to entertain the Attorney General's motion: the contention that no court possesses jurisdiction to set successive execution dates and the position that even if such jurisdiction exists, this court has surrendered its jurisdiction to the district court.

Whether jurisdiction exists to entertain the Attorney General's motion in turn breaks down into two questions: whether there is a statutory basis for such jurisdiction and whether there is any other basis for such jurisdiction.

Because the Legislature has addressed the setting of execution dates in several statutes, we initially turn to those enactments for guidance in determining whether, upon appeal to this court, an execution date is properly set by this or the original sentencing court.

Neb. Rev. Stat. § 29-2543 (Supp. 1993) provides:

> Whenever any person has been tried and convicted before any district court in this state of a crime punishable by death and under the conviction has been sentenced by the court to suffer death, it shall be the duty of the clerk of the court before which the conviction was had to issue a warrant, under the seal of the court, reciting therein the conviction and sentence directed to the warden of the Nebraska Penal and Correctional Complex, commanding him or her to proceed at the time named in the sentence to carry the same into execution....

However, Neb. Rev. Stat. § 29-2525 (Reissue 1989) grants a

prisoner convicted and sentenced to death an automatic appeal to this court, during which time Neb. Const. art. I, § 23, stays execution of the sentence until further order of this court. See *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied* 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, *reh'g denied* 434 U.S. 961, 98 S. Ct. 496, 54 L. Ed. 2d 322.

Neb. Rev. Stat. § 29-2528 (Reissue 1989) further provides that after consideration of the appeal, this court shall "order the prisoner to be discharged, a new trial to be had, or appoint a day certain for the execution of the sentence."

Accordingly, there is no question that this court has the statutory jurisdiction to set an execution date once it has considered the prisoner's automatic appeal and determined that death is the legally appropriate sentence.

Neither is there any basis for an argument that no state court has the jurisdiction to reset an execution date once the initial date set has passed. Without regard to who has the duty of fixing the date, the failure to execute a death warrant on the original date fixed does not result in the discharge of a prisoner sentenced to die, but requires the court to fix a new date for the execution. In *Iron Bear v. Jones*, 149 Neb. 651, 658, 32 N.W.2d 125, 129 (1948), we said, " 'Where a defendant in a criminal action has been legally sentenced to death and has not been executed at the time fixed in the death warrant, he is not entitled to be discharged . . . but a new date for the execution may be fixed by the proper court.' " See, *Simmons v. Fenton*, 113 Neb. 768, 205 N.W. 296 (1925); *State v. Miller*, 169 Kan. 1, 217 P.2d 287 (1950).

The question, then, is whether this court has the statutory jurisdiction to set a new execution date upon the expiration of an earlier date it had set and to issue a warrant thereon. In these regards, the statutes are not entirely clear.

Neb. Rev. Stat. § 29-2544 (Reissue 1989), without giving direction as to who is to issue the document, provides that upon receipt of a death warrant fixing the execution date, the warden of the Nebraska Penal and Correctional Complex shall proceed at the time named in the warrant to carry out the sentence. In addition, Neb. Rev. Stat. § 29-2545 (Reissue 1989) provides that if a writ of error is granted and execution of the

proceedings is suspended, this court may thereafter issue a warrant commanding the warden to carry the sentence into execution at the time stated therein. However, with the exception of coram nobis, the 1972 amendment of Neb. Const. art. I, § 23, abolished writs of error and instead provided for review by appeal to this court. *In re Contempt of Liles*, 217 Neb. 414, 349 N.W.2d 377 (1984); *State v. Longmore*, 178 Neb. 509, 134 N.W.2d 66 (1965) (Legislature abolished writ of error in 1961).

It is true that where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983), *cert. denied* 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987). But when the language used in a statute requires interpretation or may reasonably be considered ambiguous, the statute is open to construction. *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991).

Although a penal statute must be strictly construed, it is to be given a sensible construction, and general terms are to be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence. See, *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993); *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991). Further, in construing a statute, an appellate court must look at the statutory objective to be accomplished, problem to be remedied, or purpose to be served, and then place on the statute a reasonable construction which best achieves its purpose, rather than a construction which will defeat the purpose. *Saulsbury, supra*; *State v. Seaman*, 237 Neb. 916, 468 N.W.2d 121 (1991). In construing a statute, the court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of the statute. *State ex rel. Grams v. Beach*, 243 Neb. 126, 498 N.W.2d 83 (1993). The language of a statute is to be considered in its plain, ordinary, and popular sense. *Arizona Motor Speedway v. Hoppe*, 244 Neb. 316, 506 N.W.2d 699 (1993); *State ex rel.*

Grams, supra.

Moreover, a series or collection of statutes pertaining to a certain subject matter, statutory components of acts which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible. *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993); *Arizona Motor Speedway, supra*; *State v. Escamilla*, 237 Neb. 647, 467 N.W.2d 59 (1991). Furthermore, in construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately. *Neumeyer v. Omaha Public Power Dist.*, 188 Neb. 516, 198 N.W.2d 80 (1972).

By the time of the enactment of § 29-2545, the Legislature had already abolished most writs of error and provided that appeals under the criminal code would be the same as for civil cases. See *Longmore, supra.* We must therefore conclude that when read with the legislative purpose in mind, § 29-2545 grants this court jurisdiction to set an execution date and issue a warrant upon completion of an appeal.

Thus, when the foregoing statutes are read conjunctively, they provide that after appeal, this court sets an execution date. Further, under the provisions of §§ 29-2543 and 29-2545, this court has jurisdiction to set successive execution dates and issue warrants as may be needed to carry out the sentence.

In point of fact, this court has in the past set execution dates and issued death warrants in at least 14 appeals. Some of these cases involved setting execution dates numerous times during the appeal and postconviction process. E.g., *State v. Anderson*, S-42301; *State v. Harper*, S-43070; *State v. Hochstein*, S-42302; *State v. Holtan*, S-40638; *State v. Joubert*, S-84-842; *State v. Moore*, S-43557; *State v. Otey*, S-42204; *State v. Palmer*, S-84-733; *State v. Peery*, S-40967; *State v. Reeves*, S-81-706; *State v. Rust*, S-40451; *State v. Ryan*, S-86-946; *State v. Victor*, S-88-982; *State v. Williams*, S-42235. And in *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992), we instructed that as this

court had issued the death warrant which had been stayed, further application for a death warrant should be filed with this court.

Generally, where a statute has been judicially construed and that construction has not evoked amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent. *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). See, also, *State, ex rel. Case Threshing Machine Co., v. Marsh*, 117 Neb. 832, 223 N.W. 126 (1929); *State, ex rel. Village of Dakota City, v. Bryan*, 112 Neb. 692, 200 N.W. 870 (1924); *State, ex rel. Western Bridge & Construction Co., v. Marsh*, 111 Neb. 185, 196 N.W. 130 (1923); *Douglas County v. Vinsonhaler*, 82 Neb. 810, 118 N.W. 1058 (1908) (it is one of principles governing interpretation and construction of statutes that where meaning of statute is dubious, long usage is just medium by which to expound it).

The contention that this court needs separate statutory or other authority to issue a death warrant in addition to the authority to set an execution date overlooks that the death warrant in this context is nothing more than an extension of the setting of a date. Thus, no separate authority to issue a warrant is required. See, *State v. Armstrong*, 45 Or. 25, 74 P. 1025 (1904) (once death warrant issued, subsequent death warrant not needed); *Commonwealth v. Hill*, 185 Pa. 385, 39 A. 1055 (1898); *Hopkinson v. State*, 704 P.2d 1323 (Wyo. 1985), *cert. denied* 474 U.S. 1026, 106 S. Ct. 582, 88 L. Ed. 2d 564.

It should also be noted that even in the absence of such statutory jurisdiction, this court possesses the inherent judicial power to set successive execution dates and issue death warrants. The inherent judicial power of a court is that power which is essential to the court's existence, dignity, and functions. See *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937). Such power is not derived from legislative grant or specific constitutional provision, but from the very fact that this court has been created and charged by the Constitution with certain duties and responsibilities. See *id.* See, also, *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979). Accordingly, the Legislature cannot limit the exercise of

inherent judicial power, such being essential to the existence of the court and the orderly and efficient exercise of the administration of justice. Inherent judicial power exists in addition to the express grants of judicial power to each court and originates in the mandate of the Nebraska Constitution of the separation of powers between three coequal branches, or departments, of government. *State, ex rel. Ralston, v. Turner*, 141 Neb. 556, 4 N.W.2d 302 (1942). See, Neb. Const. art. II, § 1; *Beard v. N.C. State Bar*, 320 N.C. 126, 357 S.E.2d 694 (1987).

In addressing the nature of inherent power of the courts in *In re Integration of Nebraska State Bar Ass'n*, we wrote:

> The Constitution does not, by any express grant, vest the power to define and regulate the practice of law in any of the three departments of government. In the absence of an express grant of this power to any one of the three departments, it must be exercised by the department to which it naturally belongs because "It is a fundamental principle of constitutional law that each department of government, whether federal or state, 'has, without any express grant, the inherent right to accomplish all *objects naturally within the orbit of that department*, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the Constitution.' . . ."

(Emphasis in original.) 133 Neb. at 285, 275 N.W. at 266.

The power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function. *Cottle v. Superior Court (Oxnard Shores Co.)*, 3 Cal. App. 4th 1367, 5 Cal. Rptr. 2d 882 (1992).

This court has recognized the inherent power of courts in many cases and circumstances, e.g., *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 501 N.W.2d 281 (1993) (inherent power to dismiss action for disobedience of court order); *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993) (courts inherently possess power to stay civil proceedings when required by interests of justice); *In re Interest of D.A.*, 239 Neb. 264, 475 N.W.2d 511

(1991) (within inherent power of court to appoint guardian ad litem in absence of statutory requirements); *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986) (allowance of attorney fees made pursuant to inherent power of court); *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985) (inherent power to continue court's jurisdiction over alimony judgment to avoid inequitable results); *Kirby v. Liska*, 214 Neb. 356, 334 N.W.2d 179 (1983) (courts have authority to monitor and determine reasonableness of contingent fee contract under inherent power to regulate the bar); *State ex rel. Partin v. Jensen*, 203 Neb. 441, 279 N.W.2d 120 (1979) (inherent power of court may be exercised as to bail, although not specifically vested by statute); *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975) (inherent power to appoint counsel to represent indigent misdemeanant); *Roach v. Roach*, 192 Neb. 268, 220 N.W.2d 27 (1974) (court has inherent power to retain jurisdiction to determine amounts due and enforce its judgment); *State, ex rel. Ralston, supra* (inherent power to regulate conduct and qualifications of attorneys); and *In re Integration of Nebraska State Bar Ass'n, supra* (inherent power to promulgate rules providing for integration of bar of state).

Through its inherent judicial power, this court has authority to do all things that are reasonably necessary for the proper administration of justice, whether any previous form of remedy has been granted or not. *In re Integration of Nebraska State Bar Ass'n, supra*. See, *Kovarik, supra*; *Beard, supra*. A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect. *State ex rel. Brubaker v. Pritchard, Judge, etc.*, 236 Ind. 222, 138 N.E.2d 233 (1956); *State ex rel. Watkins v. Land and Timber Company, Limited*, 106 La. 621, 31 So. 172 (1902); *State ex rel. Martin v. Superior Court*, 101 Wash. 81, 172 P. 257 (1918). Contra *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930), *cert. denied* 282 U.S. 896, 51 S. Ct. 181, 75 L. Ed. 789 (1931).

Neb. Const. art. V, § 2, vests this court with, among other things, "such appellate jurisdiction as may be provided by law"

and requires that the judges of this court hear and determine all appeals "involving capital cases." As noted earlier, § 29-2525 grants a prisoner sentenced to death an automatic appeal to this court, during which period the sentence is constitutionally stayed. Thus, the only question is whether the setting of successive execution dates is necessary to the administration of justice so as to fall within the scope of inherent powers.

Courts in other jurisdictions have answered affirmatively, holding that setting an execution date is within the courts' inherent powers necessary to allow them to enforce their own judgments. *State v. Miller*, 169 Kan. 1, 217 P.2d 287 (1950) (once state supreme court affirmed death sentence on appeal and entered order setting execution date, was within court's inherent authority to enforce judgment and order); *Williams v. Moore*, 262 F.2d 335 (5th Cir. 1959), *cert. denied* 360 U.S. 911, 79 S. Ct. 1297, 3 L. Ed. 2d 1261. In *Williams*, much like the situation presented here, no statutory authority existed for the court to set a new date after the expiration of the stay. See, *Upshaw v. State*, 350 So. 2d 1358 (Miss. 1977) (inherent power of court to prescribe rules of procedure for cases involving death penalty); *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

The primary duty of the courts is the proper and efficient administration of justice. *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937). See, also, *In Matter of Richards*, 333 Mo. 907, 63 S.W.2d 672 (1933). Likewise, it is the duty of a court to see that justice is administered speedily, without delay, and legally, and in conformity to constitutional mandates. *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 29 N.E.2d 405 (1940). See, *People v. Felella*, 131 Ill. 2d 525, 546 N.E.2d 492 (1989) (judicial power includes adjudication and application of law, administration of courts, and imposition of criminal sentences); *State v. Wilkins*, 220 Kan. 735, 556 P.2d 424 (1976) (trial court has inherent power to enforce its own orders).

Accordingly, this court has the inherent power, as well as the statutory power, to set successive execution dates and issue death warrants as the circumstances may dictate.

It is urged, however, that once the mandate of this court issued, the court no longer retained jurisdiction; rather,

jurisdiction was returned to the district court in order that it might enter judgment in accordance with the mandate. See, *State v. Horr*, 232 Neb. 380, 441 N.W.2d 139 (1989); *Rehn v. Bingaman*, 152 Neb. 171, 40 N.W.2d 673 (1950); *State Bank of Beaver Crossing v. Mackley*, 118 Neb. 734, 226 N.W. 318 (1929) (when some action was taken by district court upon mandate, that court acquired exclusive jurisdiction of cause).

But *Rehn* notes that a ministerial act may be completed by this court even after its mandate is issued because such act "in no way involves a reconsideration of the judicial determinations made." 152 Neb. at 177, 40 N.W.2d at 677 (award of costs which is part of judgment awarded could be corrected after issuance of mandate and without its recall and even after district court has taken action on mandate). See *State v. Blankenfeld*, 228 Neb. 611, 423 N.W.2d 479 (1988) (where county court's judgment and sentence appealed to district court and to this court, which remanded upon affirmance to district court, district court was not required to remand to county court for performance of ministerial task of enforcing order of this court). Because the setting of an execution date has been uniformly held to be a ministerial and not a judicial act, this court retains the authority to set an execution date. See, *Pate v. State*, 393 P.2d 247 (Okla. Crim. 1964); *Ex parte Grayson*, 86 Okla. Crim. 86, 187 P.2d 232 (1948); *Rose v. Commonwealth*, 189 Va. 771, 55 S.E.2d 33 (1949). See, also, *Iron Bear v. Jones*, 149 Neb. 651, 32 N.W.2d 125 (1948) (time designated by court for executing sentence of death is not part of sentence; it is simply order prescribing time when sentence shall take effect); *In re Cross*, 146 U.S. 271, 13 S. Ct. 109, 36 L. Ed. 969 (1892); *Schwab v. Berggren*, 143 U.S. 442, 12 S. Ct. 525, 36 L. Ed. 218 (1892).

It has "long been settled that, 'The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied.' " *Williams*, 262 F.2d at 338 n.4. See *Anderson v. State*, 267 So. 2d 8 (Fla. 1972) (where supreme court originally obtained jurisdiction of certain criminal cases because each was capital case, court would retain jurisdiction for all purposes until final disposition of case). Contra *State ex rel. Vance v. Hatten*, 508 S.W.2d 625 (Tex.

Crim. App. 1974) (once criminal court of appeals has acquired jurisdiction, it is only by judgment of that court that jurisdiction over case is restored to lower court, which acquires jurisdiction of case only to see that judgment of criminal court of appeals is carried out). Thus, this court retains jurisdiction to set an execution date and issue a death warrant notwithstanding the issuance of a mandate to the inferior court.

Moreover, in order for the inferior court to reacquire jurisdiction, it must take action on this court's mandate. Here, Neb. Rev. Stat. § 29-2522 (Reissue 1989) prevented the district court from setting an execution date "until after the conclusion of the appeal provided for by section 29-2525." This court's mandate did not direct the district court to set an execution date, and we find nothing in the record which demonstrates that the district court undertook to do so. Consequently, the issuance of this court's mandate did not surrender its jurisdiction to the district court.

2. EXERCISE OF JURISDICTION

The Attorney General contends in the brief for appellee that notwithstanding the pendency of the federal court stay, this court may and should set an execution date in the future so as to provide the federal court with a deadline within which to adjudicate the matter before it. He concedes, however, that if the federal court fails to meet such a deadline, the State would be powerless to prepare for and to carry out the sentence.

A prisoner who has been sentenced to death has two separate avenues of review by the federal courts. If a federal question is involved, a prisoner sentenced to death may seek review by the U.S. Supreme Court by petitioning that court for a writ of certiorari. *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983), *reh'g denied* 464 U.S. 874, 104 S. Ct. 209, 78 L. Ed. 2d 185. In addition, Congress has provided for federal review via habeas corpus. Not only is a stay permitted in the event of a direct appeal, 28 U.S.C. § 2101(f) (1988), but 28 U.S.C. § 2251 (1988) provides that once a federal stay has been granted in a habeas corpus action, any proceeding in any state court or by or under any state authority shall be void. See, also, U.S. Sup. Ct. R. 23; Fed. R. Crim. P. 38; 8th Cir. R. 8A.

In *Rogers v. Peck*, 199 U.S. 425, 436, 26 S. Ct. 87, 50 L. Ed. 256 (1905), the U.S. Supreme Court, in speaking of U.S. Comp. Stat. § 766 (1901), the predecessor to § 2251 (see *In re Strauss*, 126 F. 327 (1903)), said:

> Statutes should be given a reasonable construction with a view to make effectual the legislative intent in their enactment. The object of this statute is apparent. It requires the state courts and authorities to make no order and entertain no proceeding which shall interfere with the full examination and final judgment in a *habeas corpus* proceeding in the Federal courts . . . .

See, *Louie Yung v. Coleman*, 5 F. Supp. 702 (D. Idaho 1934) (state authorities and courts are prevented by this statute from making any order or entering any proceedings which shall interfere with full determination and final judgment in habeas corpus proceeding pending in federal court); *Rogers, supra* (statute aims to entirely prevent action which shall interfere with perfect freedom of federal courts to inquire into case and make such orders and render such judgment as they shall see fit).

In like vein, in *In re Shibuya Jugiro*, 140 U.S. 291, 295, 11 S. Ct. 770, 35 L. Ed. 510 (1891), the U.S. Supreme Court had written:

> Of the object of the statute there can be no doubt. It was—in cases where the applicant was held in custody under the authority of a state court or by the authority of a State—to stay the hands of such court or State, while the question as to whether his detention was in violation of the Constitution, laws or treaties of the United States was being examined by the courts of the Union having jurisdiction in the premises. But the jurisdiction of the state court in the cases specified is restrained only pending the proceedings in the courts of the United States, and until final judgment therein.

In accord are the decisions of *United States v. Shipp*, 203 U.S. 563, 27 S. Ct. 165, 51 L. Ed. 319 (1906), and *United States v. Brown*, 281 F. 657 (8th Cir. 1922). In *Shipp*, the prisoner, who had been sentenced to death for a rape, presented a petition for a writ of habeas corpus. After denial of the writ, he appealed to

the U.S. Supreme Court. The Court allowed the appeal and ordered that all proceedings against the prisoner be stayed and custody of the prisoner be retained pending the appeal. The sheriff and his deputies were informed of the Court's stay but conspired to break into the jail for the purpose of lynching and murdering the defendant. The U.S. Supreme Court declared:

> [T]he order suspended further proceedings by the State against the prisoner and required that he should be forthcoming to abide the further order of this court. It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the trial of the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step. If that step is taken the contempt is proved.

203 U.S. at 575.

Similarly, in *Brown*, after the prisoner had appealed to the U.S. Court of Appeals for the Eighth Circuit and while the appeal was pending, the county attorney, sheriff, and clerk of the district court were proceeding to "try, convict, and imprison the petitioner under the indictment in the case." 281 F. at 661. The Eighth Circuit Court stated that if the actions of the state proceeded to imprisonment pending the appeal, the power of the court to grant relief to the petitioner would have been impaired, if not destroyed. Thus, it had the power to protect and preserve its jurisdiction and to give effect to its jurisdiction unimpaired.

The Attorney General advises this court he "perceive[s] no tension between a stay of execution issued by a federal court and the establishment of a viable date of execution for a death-sentenced prisoner should that prisoner's last established execution date have passed as a result of a federal stay of execution." Brief for appellee at 13. In part, the Attorney General argues that the stay precludes only the execution of the prisoner, not the ministerial act of setting a date on which the execution is to be carried out. See *Pate v. Smith*, 393 P.2d 247 (Okla. Crim. 1964).

However, in *In re Ebanks*, 84 F. 311 (N.D. Cal. 1897), *aff'd sub nom., Ebanks v. Hale*, 168 U.S. 707, 18 S. Ct. 942, 42 L.

Ed. 1214, when, during the pendency of an appeal and stay, the state court made an order directing the warden to carry into execution the judgment convicting the prisoner of murder by inflicting upon him on a stated date the penalty of death, the federal court held that it necessarily followed from its grant of an appeal and the stay imposed upon all proceedings in the state court that the state's order was given without jurisdiction and was absolutely void. Moreover, if carried into effect, the federal court stated, the state's actions would deprive the prisoner of the right to have the judgment of that court in the matter of his petition for a writ of habeas corpus reviewed by the U.S. Supreme Court, a right guaranteed to him by the laws of the United States. See *Ex parte Martin*, 180 F. 209 (D. Or. 1910) (after issuance of writ, state court is wholly without authority to proceed further as against prisoner).

It has also been held that preparations by a state consisting of moving the prisoner from his cell on death row to a special holding area with the intent to carry out the death sentence promptly if the state's motion to vacate was granted are improper. *Smith v. Armontrout*, 825 F.2d 182 (8th Cir. 1987). The court in *Smith* held that the prisoner should not be subject to these " 'preparations' " until the habeas corpus petition was dismissed and the stay of execution finally dissolved. *Id.* at 184. See *Levine v. Torvik*, 986 F.2d 1506 (6th Cir. 1993), *cert. denied* ____ U.S. ____, 113 S. Ct. 3001, 125 L. Ed. 2d 694 (pursuant to § 2251 district court has authority to grant stay of all state court proceedings that have effect of defeating or impairing federal court's jurisdiction; stay is necessary to preserve status quo); *Jackson v. Justices of Superior Court of Mass.*, 423 F. Supp. 50 (D. Mass. 1976), *judgment vacated* 549 F.2d 215 (1st Cir. 1977), *cert. denied* 430 U.S. 975, 97 S. Ct. 1666, 52 L. Ed. 2d 370 (court has jurisdiction under § 2251 to stay state court proceedings where it is necessary to do so to prevent state from acting in manner which will render relief by federal court meaningless).

In *Bates v. Estelle*, 483 F. Supp. 224 (S.D. Tex. 1980), the court disposed of a similar argument that a stay did not reach purely ministerial or administrative acts of the court. Therein, the respondents, the director of the Texas Department of

Corrections and the sheriff, argued that the execution of a state court mandate is not a proceeding within the terms of § 2251 and could not be stayed pending a ruling on the petition. The court defined the respondents' argument as being, in effect, that Congress considered habeas corpus rights important enough to authorize federal courts to halt or even void state court proceedings but not to authorize federal courts to interfere with administrative and ministerial actions related to these proceedings. Characterizing the argument as untenable, the court held that the execution of a state court sentence was a proceeding in the sense that the federal district court had the power to stay the execution of its mandate calling for the habeas corpus petitioner's incarceration pending review of a habeas corpus petition.

To determine what constitutes a "proceeding . . . in any State court" for the purposes of § 2251, the *Bates* court turned to the construction given to similar language in the federal Anti-Injunction Act. See 28 U.S.C. § 2283 (1988). According to the U.S. Supreme Court, the term " 'proceedings in a State court' " in the Anti-Injunction Act " 'includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process.' " *Bates*, 483 F. Supp. at 227. See, *Hill v. Martin*, 296 U.S. 393, 56 S. Ct. 278, 80 L. Ed. 293 (1935) (stay of proceedings in any court of state applies alike to action by court and its ministerial officers; applies not only to execution issued on judgment, but to any proceeding supplemental or ancillary taken with view to making suit or judgment effective); *Leathe v. Thomas*, 97 F. 136 (7th Cir. 1899) (prohibition of statute extends not only to proceedings up to and including final judgments, but to entire proceedings from commencement of suit until execution); *American Ass'n v. Hurst*, 59 F. 1 (6th Cir. 1893) (act of executive officer of court done under color of its process is to be regarded as proceeding of that court); Black's Law Dictionary 1204 (6th ed. 1990) (term "proceeding" refers to "[r]egular and orderly progress in form of law, including all possible steps in an action from its commencement to execution of judgment . . . an act necessary to be done in order to obtain a given end").

While we agree that the purpose of a stay is to prevent a state

from doing an act which is challenged and may be declared unlawful in a pending proceeding, *In re Strauss*, 126 F. 327 (1903), we must reject the Attorney General's position that the setting of an execution date is exempted from the stay.

The setting of execution dates in anticipation of the termination of a stay clearly constitutes preparation for the carrying out of an execution, in violation of federal law. See *Clair v. Vasquez*, 827 F. Supp. 1465 (C.D. Cal. 1993) (seven jurisdictional challenges by state to stays of execution close to line between advocacy and frivolousness); *Smith v. State*, 145 So. 2d 688 (Miss. 1962) (affirmative action by state court on state's motion to have new date set for execution of death sentence precluded where justice of U.S. Supreme Court stayed execution of death sentence of defendant pending action of Court on defendant's petition for certiorari).

Thus, the Attorney General asks us not only to perform a useless act, he asks us to perform a lawless one. It appears he has overlooked that U.S. Const. art. VI subjects the State of Nebraska to the "Constitution, and the Laws of the United States" and that he has sworn not only to support the Constitution of this state, but that of the United States as well. Neb. Const. art. XV, § 1; Neb. Rev. Stat. § 7-104 (Reissue 1991).

It must be borne in mind that the "legal barriers that exist to preserve the individual's constitutional rights and protect against the unlawful execution of a death sentence" separate the unlawful killing by a person and the lawful killing by the state. *Mercer v. Armontrout*, 864 F.2d 1429, 1431 (8th Cir. 1988). "If the law is not given strict adherence, then we as a society are just as guilty of a heinous crime as the condemned felon." *Id.*

Concerns for finality to a state's judgments do not outweigh the absolute need to protect against the deprivation of an individual's constitutional rights which might invalidate his capital sentence. *Mercer, supra.*

PART III

We therefore hold that this court may not set an execution date anticipating the termination of a federal stay. The

prisoner's special appearance is overruled, and the Attorney General's motion is overruled without prejudice.

Although it is clear from the foregoing analysis that the Attorney General could have had no legitimate legal reason for moving for the setting of an execution date while a federal stay was pending, because this is the first time we have directly so held, we overrule, without prejudice, the prisoner's motion for sanctions.

SPECIAL APPEARANCE OVERRULED.
MOTION FOR SETTING OF EXECUTION DATE OVERRULED WITHOUT PREJUDICE.
MOTION FOR SANCTIONS OVERRULED WITHOUT PREJUDICE.

STATE OF NEBRASKA, APPELLEE, V. CHARLES JESS PALMER, ALSO KNOWN AS CHARLES TINSLEY, ALSO KNOWN AS J. R. KIRKPATRICK, APPELLANT.

518 N.W.2d 899

Filed July 8, 1994. No. S-84-733.

1. **Death Penalty: Warrants: Courts.** The Nebraska Supreme Court has the inherent power, as well as the statutory power, to set successive execution dates and issue death warrants as the circumstances may dictate.
2. **Death Penalty: Courts: Jurisdiction.** Where the original date set for execution has passed, and where there is no federal proceeding pending nor a stay of execution in effect, the Nebraska Supreme Court may set a new date for execution.
3. **Death Penalty: Records: Time.** In any capital case in which the State moves that an execution date be set, the Attorney General shall, at the time of filing such motion, file a signed statement under oath briefly outlining any activity which has taken place in any federal court, together with the date or dates thereof, and shall specifically state whether a stay of state proceedings has been issued or has

been sought by any party and, if so, when such was requested or issued. If a stay has been issued, the Attorney General shall attach a true copy thereof to the motion; if no stay is in effect, the Attorney General shall attach a true copy of a certificate or letter issued by the federal courts involved, stating that no stay is in effect. Further, the Attorney General shall, within 5 days, supplement the statement under oath so as to reflect any subsequent ruling relating to the status of any federal court stay.

Motion to set execution date. Motion sustained.

Gary L. Dolan, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellant.

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

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

PER CURIAM.

The appellant, Charles Jess Palmer, has been tried, convicted and sentenced to death three times for the felony murder of Eugene Zimmerman. *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981). Palmer was scheduled to be executed on July 6, 1987. However, before Palmer's sentence was carried out, his execution was stayed. On June 12, 1987, the Supreme Court of the United States stayed Palmer's execution pending the filing of a petition for writ of certiorari. That stay, by its own terms, automatically terminated on October 5, 1987, when the Supreme Court denied Palmer's petition for a writ of certiorari. Subsequently, Palmer pursued further litigation in the federal courts. Palmer v. Clarke, case No. CU 84-L-144 (D. Neb.). However, as of June 13, 1994, when the U.S. Supreme Court denied Palmer's petition seeking a writ of certiorari, Palmer no longer had any proceeding pending in the federal courts.

On January 4, 1994, more than 6 years after the last stay of execution expired, the Attorney General, acting on behalf of the appellee, the State of Nebraska, moved this court to set a new execution date for Palmer.

In response to that motion, and similar motions filed by the

State in *State v. Otey*, S-42204, and *State v. Joubert*, S-84-842, this court ordered the parties to brief and argue the following issues:

> (1) Whether, at the termination of all federal jurisdiction in this matter this Court or the sentencing trial court has jurisdiction to set an execution date;
>
> (2) Whether conceding that a federal stay of execution is in full force and effect this Court or any state court has the authority to either disregard or anticipate the expiration of federal jurisdiction by setting an execution date prior to that expiration;
>
> (3) Whether this Court or any state court is permitted by the doctrine of comity or otherwise, to set an execution date during the pendency of federal proceedings even though a stay of execution is not in effect.

Given that Palmer no longer has a stay of execution in effect or federal proceedings pending, the only issue now relevant to this motion is whether this court has jurisdiction to set an execution date after an earlier execution date has expired. In *State v. Joubert*, *ante* p. 287, 518 N.W.2d 887 (1994), issued contemporaneously, we addressed this issue in detail. There we held, "[T]his court has the inherent power, as well as the statutory power, to set successive execution dates and issue death warrants as the circumstances may dictate." *Id.* at 297, 518 N.W.2d at 895.

Setting executions where there is no legal impediment to the execution is, by law and this court's experience, a ministerial act done routinely in order to carry out the court's judgment. *State v. Joubert, supra*. As we demonstrated in *Joubert*, it has long been the practice of this court to set execution dates under the appropriate circumstances.

However, starting in 1993, the Attorney General began to request writs of execution when not appropriate, e.g., in circumstances where a stay was in effect or after a decision was rendered, but before a mandate was issued. The Attorney General has sought a writ of execution in a case where a stay was in effect, requesting that we anticipate the date and outcome of an expected decision. *State v. Joubert, supra*. What formerly had been routine and ministerial could not be handled

routinely. This court ordered further briefing to clarify the Attorney General's request and also, hopefully, to identify cases in which this court should and could act, such as the case at hand, and those in which it could not and should not act, such as *Joubert*. Unfortunately, the Attorney General's office presented almost identical briefs in factually and legally dissimilar cases. Here no federal case is pending. In *State v. Otey, post* p. 309, 518 N.W.2d 901 (1994), a federal case had been pending, but no mandate had been issued. Finally, in *Joubert*, a federal court had issued a stay of execution. The briefs of the Attorney General failed to recognize these dissimilarities and treated each case the same.

Moreover, the Attorney General failed to provide this court with an adequate factual record to support his motion. Of principal concern in these matters was the status of related federal court proceedings. Rather than providing this court with evidence, the Attorney General apparently expected us to rely upon bare allegations or predictions in briefs. In order to determine the status of pending federal court actions, this court was forced to procure the necessary information from federal court records. This created an additional delay. The Attorney General's failure to present pertinent facts and law made what had formerly been routine and ministerial, not routine and not ministerial.

Henceforth, in any capital case in which the State moves that an execution date be set, the Attorney General shall, at the time of filing such motion, file a signed statement under oath briefly outlining any activity which has taken place in any federal court, together with the date or dates thereof, and shall specifically state whether a stay of State proceedings has been issued or has been sought by any party and, if so, when such was requested or issued. If a stay has been issued, the Attorney General shall attach a true copy thereof to the motion; if no stay is in effect, the Attorney General shall attach a true copy of a certificate or letter issued by the federal courts involved, stating that no stay is in effect. Further, the Attorney General shall, within 5 days, supplement the statement under oath so as to reflect any subsequent ruling relating to the status of any federal court stay.

CONCLUSION

There are no federal stays of execution in force and effect for Palmer. We therefore sustain the State's motion to set an execution date for Palmer. We therefore direct that the Clerk of this court, pursuant to the provisions of Neb. Rev. Stat. § 29-2545 (Reissue 1989), issue her warrant, under the seal of this court, to the warden of the Nebraska State Penitentiary directing the execution of the sentence of death imposed upon Palmer to be carried out on the 16th day of September 1994, between the hours of 12:01 a.m. and 11:59 p.m. on said day, in the manner provided by Neb. Rev. Stat. § 29-2532 (Reissue 1989).

MOTION SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD LAMONT OTEY, APPELLANT.

518 N.W.2d 901

Filed July 8, 1994. No. S-42204.

1. **Death Penalty: Warrants: Courts: Jurisdiction.** The Nebraska Supreme Court has both the statutory jurisdiction and the inherent judicial power to set a new execution date upon the expiration of an earlier execution date, and to issue a warrant thereon.
2. **Death Penalty: Records: Time.** In any capital case in which the State moves that an execution date be set, the Attorney General shall, at the time of filing such motion, file a signed statement under oath briefly outlining any activity which has taken place in any federal court, together with date or dates thereof, and shall specifically state whether a stay of state proceedings has been issued or has been sought by any party and, if so, when such was requested or issued. If a stay has been issued, the Attorney General shall attach a true copy thereof to the motion; if no stay is in effect, the Attorney General shall attach a true copy of a certificate or letter issued by the federal courts involved, stating that no stay is in effect. Further, the Attorney General shall, within 5 days, supplement the statement under oath so as to reflect any subsequent ruling relating to the status of any federal court stay.

Motion to set execution date. Motion sustained.

Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

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

BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., ENDACOTT, D.J., and RONIN, D.J., Retired.

PER CURIAM.

The State of Nebraska, through its Attorney General, has moved this court to set an execution date for convicted prisoner Harold Lamont Otey. We sustain the State's motion, and direct the Clerk of this court to issue her warrant to the warden of the Nebraska State Penitentiary directing the execution of Otey on the 2d day of September 1994, in the manner provided by statute.

STATEMENT OF CASE

Otey was convicted of first degree murder in the perpetration of a first degree sexual assault in the June 11, 1977, slaying of Jane McManus. In 1978, he was sentenced to death by the district court for Douglas County. Otey challenged his conviction and sentence in numerous state and federal proceedings, none of which has been ultimately successful on the merits.

In Otey's first state proceeding, a direct appeal, his conviction and sentence were affirmed by this court. See *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979), *cert. denied* 446 U.S. 988, 100 S. Ct. 2974, 64 L. Ed. 2d 846 (1980).

Otey has twice been denied state postconviction relief by this court. See, *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. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982), *cert. denied* 459 U.S. 1080, 103 S. Ct. 502, 74 L. Ed. 2d 641. In a third postconviction motion, Otey claimed that Nebraska's reasonable doubt instruction was invalid. That claim was overruled by the state district court and was on appeal to this court when it was dismissed by stipulation of the parties following the U.S. Supreme Court's ruling in *Victor v. Nebraska*, ____ U.S. ____, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

Otey also challenged the results of a 1991 commutation

hearing before the Nebraska Board of Pardons in which that board refused to commute Otey's death sentence to life imprisonment. See *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992). This court reversed a district court order enjoining the enforcement of Otey's death sentence, and ordered Otey's petition dismissed.

Otey has also had numerous proceedings in the federal courts. He had twice been denied federal habeas corpus relief at the time the State's motion to set an execution date was filed. See, *Otey v. Grammer*, 859 F.2d 575 (8th Cir. 1988), *cert. denied* 497 U.S. 1031, 110 S. Ct. 3288, 111 L. Ed. 2d 796 (1990); *Otey v. Hopkins*, 951 F.2d 354 (8th Cir. 1991), *cert. denied* 502 U.S. 1041, 112 S. Ct. 894, 116 L. Ed. 2d 797 (1992), *aff'g denial of motion to vacate*, 992 F.2d 871 (8th Cir. 1993).

In a third petition for a federal writ of habeas corpus, case No. 4:CV92-3239, filed on July 7, 1992, Otey raised issues related to the constitutionality of his commutation hearing before the Nebraska Board of Pardons. On July 30, the U.S. District Court for the District of Nebraska granted Otey a stay of execution, which was subsequently vacated on December 31, when the district court entered judgment for the respondent on all issues. The U.S. Court of Appeals for the Eighth Circuit affirmed the denial of habeas corpus relief. See *Otey v. Hopkins*, 5 F.3d 1125 (8th Cir. 1993). Otey subsequently filed a petition for a writ of certiorari to the U.S. Supreme Court.

Following the vacation of Otey's stay of execution by the federal district court, the State, on January 4, 1993, moved this court to set an execution date because there were no state or federal stays of execution prohibiting the enforcement of the sentence of death ordered imposed upon Otey in June 1978. That motion was superseded by a similar motion of September 27, 1993, which is now before this court. Similar motions also were filed by the State in *State v. Joubert*, S-84-842, and *State v. Palmer*, S-84-733.

On January 27, 1994, this court ordered the parties in all three cases to submit simultaneous briefs on certain issues related to the State's motion. Oral argument was had on May 17, at which time Otey's petition for a writ of certiorari remained pending before the U.S. Supreme Court. The Court

denied certiorari on June 27, thus terminating Otey's federal proceedings. See *Otey v. Hopkins*, ____ U.S. ____, 114 S. Ct. 2768, 129 L. Ed. 2d 881 (1994).

ANALYSIS

The issues briefed by the parties in response to the order of this court are (1) whether this court has jurisdiction to set an execution date for Otey, (2) whether this court may set an execution date while a federal stay of execution is in full force and effect, and (3) whether this court may set an execution date during the pendency of federal habeas corpus proceedings even though a federal stay of execution is not in force.

In *State v. Joubert, ante* p. 287, 518 N.W.2d 887 (1994), this court held that when a federal stay of execution is in full force and effect, this court does not have the authority to issue an execution warrant. Because Otey's federal proceedings have been terminated, the only issues before the court are whether Otey has a federal stay of execution in force and effect and whether the court has jurisdiction to set an execution date for Otey.

This court disposed of the issue of the court's jurisdiction to set an execution date in *Joubert, supra.* In that case, we held that the Nebraska Supreme Court has both the statutory jurisdiction and the inherent judicial power to set a new execution date upon the expiration of an earlier execution date, and to issue a warrant thereon. We adopt the rationale and holding of the court in *Joubert* and incorporate it by reference into this opinion.

To ensure that no federal stay of execution is presently in force for Otey, the Clerk of this court, at the direction of the court, made inquiry of the Clerk of the U.S. District Court for the District of Nebraska, the Clerk of the U.S. Court of Appeals for the Eighth Circuit, and the Clerk of the U.S. Supreme Court. Each of those courts has responded that there is no stay of execution in force and effect for Otey at this time. Copies of the responses from the three federal courts have been filed with the Clerk of this court.

There being no federal stay of execution in force and effect for Otey at the present time, there exists no legal impediment to

this court's setting an execution date for Otey.

We note that although the court on its own initiative determined the status of this prisoner as to any federal stays of execution, in the future this court will not assume the burden of obtaining such information. That duty will rest upon the Attorney General. See *State v. Palmer, ante* p. 305, 518 N.W.2d 899 (1994).

Henceforth, in any capital case in which the State moves that an execution date be set, the Attorney General shall, at the time of filing such motion, file a signed statement under oath briefly outlining any activity which has taken place in any federal court, together with date or dates thereof, and shall specifically state whether a stay of state proceedings has been issued or has been sought by any party and, if so, when such was requested or issued. If a stay has been issued, the Attorney General shall attach a true copy thereof to the motion; if no stay is in effect, the Attorney General shall attach a true copy of a certificate or letter issued by the federal courts involved, stating that no stay is in effect. Further, the Attorney General shall, within 5 days, supplement the statement under oath so as to reflect any subsequent ruling relating to the status of any federal court stay.

CONCLUSION

There are no federal stays of execution in force and effect for Otey. We therefore sustain the State's motion to set an execution date for Otey. We therefore direct that the Clerk of this court, pursuant to the provisions of Neb. Rev. Stat. § 29-2545 (Reissue 1989), issue her warrant, under the seal of this court, to the warden of the Nebraska State Penitentiary directing that the execution of the sentence of death imposed upon Otey be carried out on the 2d day of September 1994, between the hours of 12:01 a.m. and 11:59 p.m. on said day, in the manner provided by Neb. Rev. Stat. § 29-2532 (Reissue 1989).

MOTION SUSTAINED.

HASTINGS, C.J., and WRIGHT, J., not participating.

MICHAEL W. MANSKE, APPELLANT, V. DIANE M. MANSKE, NOW KNOWN AS DIANE M. MARTIN, APPELLEE.

518 N.W.2d 144

Filed July 8, 1994. No. S-92-831.

1. **Jurisdiction: Appeal and Error.** An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction.
2. _____: _____. An appellate court, on its own motion, may examine and determine whether jurisdiction is lacking as the result of a procedural defect which prevents acquisition of appellate jurisdiction.
3. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte.
4. **Motions for New Trial: Time: Appeal and Error.** A timely motion for new trial suspends the time limit for filing a notice of appeal, until the motion for new trial has been disposed of by the court rendering the decision.
5. _____: _____: _____. An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal.
6. **Motions for New Trial: Appeal and Error.** A motion for new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears on the record.
7. **Courts: Judgments.** In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered.
8. **Judgments: Time: Appeal and Error.** Where a second judgment in part contradicts an earlier judgment, the time for appeal from that portion of the second judgment which contradicts the earlier judgment, and that portion only, runs from the rendition of the second judgment.
9. **Appeal and Error.** Errors which are argued but not assigned will not be considered by an appellate court.

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

Gary B. Randall, P.C., and Elizabeth Stuht Borchers, P.C., of Marks & Clare, for appellant.

Terrance A. Poppe, of Hecht, Sweet, Morrow, Poppe & Otte, P.C., for appellee.

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

LANPHIER, J.

This is an appeal from two orders of the Lancaster County

District Court in a divorce action. The first order, dated July 30, 1992, modified a child support obligation set forth in a 1987 decree of dissolution. The second order, dated August 21, 1992, modified the July 30 order. The husband appeals both orders; however, he did not timely appeal the first order. A timely appeal was made of the second order. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Michael W. Manske and Diane M. Manske, now known as Diane M. Martin, were married approximately 7 years before their divorce in 1987. The marriage produced two children. The original decree ordered Michael Manske to pay a total of $260 per month in child support. On March 6, 1992, an action was brought by Martin in the district court to modify the decree. The court, having found a material change in the circumstances, modified the decree in a July 30, 1992, order to require Manske to pay a total of $729 per month in child support.

On August 11, 1992, Manske filed a "Combined Motion Re: Leave to File Post-Trial Motion Out of Time; Enlargement of Findings; New Trial; Notice of Hearing." The district court overruled the motion for new trial on August 21 and on the same date also modified the July 30 order, reducing the child support obligation of Manske to a total of $709 per month. On September 18, 1992, Manske filed a notice of appeal of both the July and August orders to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

ANALYSIS

JULY 30, 1992, ORDER

Jurisdiction is a prerequisite to this court's consideration of Manske's appeal. An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction. *In re Interest of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222 (1989). We must therefore examine whether jurisdiction exists to review the July 30, 1992, order of the district court from which Manske appeals. See Neb. Ct. R. of Prac. 7A(2) (rev. 1992). An appellate court, on its own motion,

may examine and determine whether jurisdiction is lacking as the result of a procedural defect which prevents acquisition of appellate jurisdiction. *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992); *Wicker v. Waldemath*, 238 Neb. 515, 471 N.W.2d 731 (1991). Timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte. *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994).

Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1992) prescribes the time within which a notice of appeal must be filed to vest jurisdiction in this court:

> [P]roceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the rendition of such judgment or decree or the making of such final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and . . . by depositing with the clerk of the district court the docket fee required by section 33-103.

Section 25-1912(2) then provides: "The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a motion for a new trial under section 25-1143 if such motion is filed by any party within ten days after the verdict, report, or decision was rendered . . . ." See, also, Neb. Rev. Stat. § 25-1143 (Reissue 1989) (an application for a new trial must be made within 10 days after the verdict or decision is rendered). As stated in *Metrejean v. Gunter*, 240 Neb. at 168, 481 N.W.2d at 177-78:

> "If a motion for new trial, authorized by law, has been filed within 10 days of a decision (see Neb. Rev. Stat. § 25-1143 . . . and § 25-1912(2)), the motion for new trial suspends the time limit for filing a notice of appeal. When the motion for new trial has been disposed of by the court rendering the decision, appellate jurisdiction is vested in the Supreme Court by compliance with the provisions prescribed by § 25-1912, i.e., timely notice of appeal and deposit of docket fee."

Manske's motion for new trial was filed August 11, 1992. Allowing for weekends, the 10-day period for filing such a motion expired on August 10, 1992. Hence, the motion for new trial was filed after the 10-day period statutorily allowed for filing a motion for new trial. An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal. *Metrejean v. Gunter, supra*; *In re Interest of B.M.H., supra*. See, also, *Williams v. Gering Pub. Schools*, 236 Neb. 722, 463 N.W.2d 799 (1990) (motion for new trial not filed within the time constraints required by statute is a nullity and does not extend the time within which a notice of appeal may be filed). While § 25-1143 allows for filing of an untimely motion for new trial after the 10-day period if a party is unavoidably prevented from timely filing such motion, as Manske herein so alleged in his combined motion, such a filing outside the 10-day time limit would not, in any event, toll the 30-day appeal time of § 25-1912(1). See § 25-1912(2). Here, there was no appeal filed within 30 days of the July 30, 1992, order, and therefore, Manske's motion for new trial is a procedural nullity for the purposes of appellate review.

It does not matter that Manske's untimely motion for new trial was overruled, even though he withdrew his motion to file posttrial motions out of time. When a motion for new trial is filed out of time, the overruling thereof does not extend the time for appeal. *Ricketts v. Continental Nat. Bank*, 169 Neb. 809, 101 N.W.2d 153 (1960). As stated in *Ricketts*, " 'A motion for new trial not filed within time cannot form the basis for extension of the time within which an appeal can be taken.' " *Id.* at 813, 101 N.W.2d at 156-57.

Neb. Rev. Stat. § 25-1912.01(1) (Reissue 1989) provides: "A motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears on the record." Pursuant to § 25-1912.01(1), an appellate court acquires jurisdiction, notwithstanding the absence of a motion for new trial, if the requirements of § 25-1912 have been satisfied for appellate review of a final order, decision, or verdict in the trial court. *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992); *In re Interest of*

B.M.H., 233 Neb. 524, 446 N.W.2d 222 (1989).

Without a timely motion for new trial, Manske had 30 days from July 30, 1992, to file his notice of appeal of the July 30 order. Manske filed his notice of appeal September 18, 1992, well beyond the statutorily mandated 30-day time limit.

Therefore, because Manske failed to comply with the requirements of § 25-1912 with respect to the July 30 order, this court has no jurisdiction to review that order, and Manske's appeal of such must be dismissed.

AUGUST 21, 1992, ORDER

The district court modified its July 30 order in an August 21 order. On August 21, the court modified the July 30 order by providing in pertinent part:

> [O]rder . . . dated 7-30-92, is modified to allow Petitioner a deduction in the guideline calculation "Exhibit 1" for health insurance in amount of $55.00 per month. Thereby modifying the amount of child support for two child [sic] from $729 per month to $709 and for on [sic] child reduced from $469 to $457. So ordered.

In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered. *Russell v. Luevano*, 234 Neb. 581, 452 N.W.2d 43 (1990); *In re Estate of Weinberger*, 207 Neb. 711, 300 N.W.2d 818 (1981); *Barney v. Platte Valley Public Power and Irrigation District*, 147 Neb. 375, 23 N.W.2d 335 (1946). This action by the trial court prior to the termination of term may be either on the court's own motion or at the request of either party. *In re Estate of Weinberger, supra*.

The July 30 order was modified on August 21 by the district court, before the termination of term. Where a second judgment in part contradicts an earlier judgment, the time for appeal from that portion of the second judgment which contradicts the earlier judgment, and that portion only, runs from the rendition of the second judgment. *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986). Manske's notice of appeal of the August 21 order was filed September 18, within the statutorily prescribed 30-day time limit. See § 25-1912. Thus, this court has appellate jurisdiction to review

that portion of the August 21 order which reduced Manske's child support obligation from $729 in the July 30 order to $709 total per month.

Errors which are argued but not assigned will not be considered by an appellate court. *In re Interest of B.M.*, 239 Neb. 292, 475 N.W.2d 909 (1991); *In re Interest of T.F.P.*, 237 Neb. 922, 468 N.W.2d 116 (1991). Manske neither assigned as error nor argued that the district court erred in reducing the child support obligation in the August 21 order. The errors assigned and argued address only the July 30 order. Therefore, the district court's order of August 21 will be affirmed.

CONCLUSION

Since the appeal of the Lancaster County District Court's order of July 30, 1992, was not timely filed, the appeal of that order is dismissed. Since Manske did not assign as error or discuss in his brief the reduction of the child support obligation in the August 21, 1992, order, that order is affirmed.

AFFIRMED IN PART, AND IN PART DISMISSED.

DONALD W. CRAWFORD, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, AN ADMINISTRATIVE AGENCY OF THE STATE OF NEBRASKA, APPELLANT.

518 N.W.2d 148

Filed July 8, 1994. No. S-92-1086.

1. **Administrative Law: Pleadings: Appeal and Error.** When a petition instituting review pursuant to the Administrative Procedure Act is filed in the district court, the review by the district court shall be de novo on the record.
2. **Judgments: Final Orders: Appeal and Error.** The judgment rendered or final order made by the district court may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record.
3. _____: _____: _____. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

4. **Trial: Rules of Evidence: Expert Witnesses.** A witness may qualify as an expert by virtue of either formal training or actual practical experience in the field.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Don Stenberg, Attorney General, and Paul N. Potadle for appellant.

Tim J. Kielty for appellee.

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

LANPHIER, J.

Following an administrative hearing, the Nebraska Department of Motor Vehicles (Department) revoked Donald W. Crawford's driver's license on February 25, 1991, pursuant to the implied consent law. The arresting officer, who was not certified to administer the Intoxilyzer breath test, had observed the technician attempt to administer the test. The officer testified at the administrative hearing before the Department that Crawford unreasonably refused to submit to the Intoxilyzer test by pretending to blow into the machine. Crawford claimed medical conditions were the cause of the apparent refusal. Crawford appealed to the Douglas County District Court, which reversed the Department's order finding that the arresting officer was not qualified to give an opinion that Crawford unreasonably refused to submit to the breath test. The Department appealed to this court. We affirm the district court.

FACTUAL BACKGROUND

Appellee, Donald W. Crawford, was arrested November 5, 1991, by Officer David Baker for suspicion of operating a motor vehicle while under the influence of alcoholic liquor or drugs. At the Omaha police station, crime lab technician Donald Veys administered a breath test to Crawford using an Intoxilyzer 5000 machine to measure Crawford's blood alcohol content. Veys is certified and licensed to administer such a test pursuant to Neb. Rev. Stat. § 39-669.11 (Cum. Supp. 1990). Veys did not testify. Officer Baker, who is not certified to

administer the test, witnessed Veys' administration of the test to Crawford. Crawford blew into the machine four separate times, giving a partial but insufficient sample. Crawford was subsequently cited for refusal to take the test under Neb. Rev. Stat. § 39-669.15 (Reissue 1988). At an administrative hearing before the Department, Officer Baker rather than Veys testified that Crawford refused to cooperate. Crawford submitted medical testimony that he had conditions on the date of the test which would inhibit his ability to blow into the machine. The Department terminated Crawford's license. Crawford timely appealed to the district court, which, after a de novo review, reversed the Department's order. The Department timely appealed the district court's order to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court. We affirmed the order of the district court.

ASSIGNMENTS OF ERROR

Appellant, the Department, asserts that the district court erred (1) in determining that Officer Baker was not qualified to give an opinion as to whether Crawford was blowing into the Intoxilyzer properly and (2) in reversing the order of the Department in the absence of a finding of physical disability.

STANDARD OF REVIEW

When a petition instituting review pursuant to the Administrative Procedure Act is filed in the district court, the review by the district court shall be de novo on the record. Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 1992); *Lee v. Nebraska State Racing Comm.*, 245 Neb. 564, 513 N.W.2d 874 (1994). The judgment rendered or final order made by the district court may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992); *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Lee v. Nebraska State Racing Comm., supra.*

ANALYSIS

A witness may qualify as an expert by virtue of either formal training or actual practical experience in the field. Neb. Rev. Stat. § 27-702 (Reissue 1989); *State v. Chambers*, 241 Neb. 66, 486 N.W.2d 481 (1992). The district court determined that Officer Baker was not qualified to offer his opinion as to whether or not Crawford blew into the Intoxilyzer machine properly. Officer Baker had never physically administered an Intoxilyzer 5000 test before, and he was not licensed to administer the test. Officer Baker did not physically administer the Intoxilyzer 5000 test to Crawford, although he was a witness. He had not read the Department's procedures for administering the test. Officer Baker had observed the administration of the Intoxilyzer 5000 test on only 10 occasions previously. We need not reach the question of whether Officer Baker was qualified as an expert witness. Under our standard of review, we affirm the judgment of the district court if there is competent evidence in the record to support the judgment. We find no errors appearing on the record which support the Department's contention that the district court erred in its judgment.

In its second assignment of error, the Department asserts that the district court erred in reversing its order in the absence of a finding of physical disability. Physical inability to perform a test may excuse conduct which might otherwise be treated as refusal. *State v. Clark*, 229 Neb. 103, 425 N.W.2d 347 (1988); *Jamros v. Jensen*, 221 Neb. 426, 377 N.W.2d 119 (1985). However, absent Officer Baker's opinion that Crawford blew into the Intoxilyzer improperly, there is no evidence that Crawford manifested an unwillingness to submit to the test. In the absence of evidence that Crawford's conduct constituted a refusal, the question of whether or not a physical disability was the cause of the alleged refusal is moot.

CONCLUSION

There being no errors which appear on the record, the order of the district court is affirmed.

AFFIRMED.

PAUL D. EVANS, SHAREHOLDER, ON BEHALF OF D & E COPIERS, INC., A NEBRASKA CORPORATION, APPELLEE, V. JON E. ENGELHARDT AND CHARLES R. DALTON, APPELLANTS.

518 N.W.2d 648

Filed July 8, 1994. No. S-92-1129.

1. **Equity: Appeal and Error.** In an appeal of an equitable action, the appellate court reviews the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Actions: Equity: Accounting: Appeal and Error.** A derivative action which seeks an accounting and the return of money is an equitable action. In an appeal of an equitable action, the appellate court reviews the facts de novo without reference to the findings of fact made by the trial court and reaches an independent conclusion.
3. **Corporations.** An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders, and is treated by the courts as a trustee.
4. **Proof.** The burden of proof is upon the party holding a confidential or fiduciary relationship to establish the fairness, adequacy, or equity of the transaction with the party with whom he holds such relation.
5. **Equity: Appeal and Error.** 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.

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

Thom K. Cope, of Bailey, Polsky, Cope, Wood & Knapp, for appellants.

Mark J. Krieger, of Bowman & Krieger, for appellee.

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

WRIGHT, J.

This is a shareholder action brought by Paul D. Evans against Jon E. Engelhardt and Charles R. Dalton, the remaining two shareholders of D & E Copiers, Inc. (D & E Copiers). Evans alleged that Engelhardt and Dalton paid themselves unreasonable salaries after Evans left the corporation. The district court for Lancaster County held that Evans, on behalf of D & E Copiers, was entitled to a judgment

against Engelhardt and Dalton, jointly and severally, in the amount of $27,640.

SCOPE OF REVIEW

In an appeal of an equitable action, the appellate court reviews the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994).

FACTS

In 1986, Engelhardt and Dalton approached Evans with the suggestion that they form a corporation for the servicing of copy machines. In December 1986, 10,000 shares of stock with a par value of $1 per share were issued by the resulting corporation, D & E Copiers. Engelhardt and Dalton each invested $5,000 in D & E Copiers when the stock was issued. Following a meeting of the incorporators on December 10, 1986, Evans was issued a certificate from the corporation for 4,000 shares, which represented 40 percent of the stock in D & E Copiers. Engelhardt and Dalton owned 30 percent of the stock each. Dalton signed the minutes of the incorporators' meeting, which minutes showed that the consideration for Evans' shares was $4,000.

The parties operated the corporation in 1987, 1988, and the first 5 months of 1989. During that time, Evans was responsible for the day-to-day operations, while Engelhardt and Dalton acted primarily as capital investors who contributed their efforts only from time to time. Engelhardt and Dalton worked full time for another corporation known as D & E Technical Service, Inc. (Technical Service), which was a separate corporation involved in servicing and selling typewriters, dictation machines, and other equipment, but not the servicing or selling of copiers.

From 1986 through 1989, D & E Copiers made profit distributions to its shareholders in amounts proportionate to their percentage ownership of the shares: Evans, 40 percent; Dalton, 30 percent; and Engelhardt, 30 percent. D & E Copiers was a subchapter S corporation which passed its retained earnings to its shareholders for inclusion as income on the

individual shareholders' income tax returns. While Evans worked for D & E Copiers, he was the only shareholder who drew a salary.

On May 31, 1989, Evans resigned as president of D & E Copiers and left the employment of the corporation. He formed a corporation called Advanced Office Automation, Inc. (AOA). On June 27, AOA contracted with Engelhardt and Dalton to purchase all but a few of the assets of D & E Copiers. The agreement recited that D & E Copiers was a Nebraska business corporation wholly owned by Engelhardt, Dalton, and Evans, its only shareholders. According to the terms of the agreement, AOA promised to pay $1,000 for used copiers, $16,032 for the parts identified in an exhibit attached to the agreement, $2,721.36 for all Panasonic supplies, and $60,349.41 for all new equipment in D & E Copiers' inventory identified in an attached exhibit. AOA assumed the yearly maintenance contracts held by D & E Copiers. Only a small fraction of the parts inventory, toner, and paper supplies for copiers remained with D & E Copiers.

The agreement further provided that D & E Copiers would continue in business until December 31, 1989, at which time D & E Copiers would begin voluntary dissolution if AOA had made all payments as set forth in the agreement. Following dissolution, the proceeds would be paid to the individual stockholders as their interests appeared. The record is not clear as to when AOA made its final payment under the contract. However, when the payment was made, Engelhardt and Dalton did not take any action to voluntarily dissolve the corporation.

In July 1989, Engelhardt and Dalton voted themselves annual salaries of $15,000 each from D & E Copiers. At the time, both worked full time for Technical Service. After Evans left D & E Copiers, no distributions were made to any of the shareholders except the salaries of Engelhardt and Dalton. Neither Engelhardt nor Dalton could recall the reason for selecting $15,000 per year as the salary. Dalton said it was " 'just a number.' " Neither produced any written documentation or other evidence to substantiate any of the time or effort they claimed to have put forth on behalf of D & E Copiers after July 1989.

When Engelhardt and Dalton were in charge of D & E Copiers, the corporation paid a secretary $5,304 as a salary. During this period, the secretary answered the phone, did typing, and waited on customers for Technical Service, but she was paid exclusively by D & E Copiers.

ANALYSIS

We first consider the claim by Engelhardt and Dalton that Evans had no standing to bring a derivative action on behalf of D & E Copiers because he was not a shareholder. They rely upon Neb. Rev. Stat. § 21-2018 (Reissue 1991), which provides in part: "No corporation shall be permitted to issue stock except for an equivalent in money paid or labor done, or property actually received and applied to the purpose for which such corporation was created." They argue that since Evans did not give any value for the 4,000 shares issued to him, he did not comply with the requirements of § 21-2018 and, therefore, has no standing to bring a shareholder action.

When D & E Copiers was formed, Evans was issued a certificate for 4,000 shares. The minutes of the meeting of incorporators show that Evans' consideration for the shares of stock was $4,000. Section 21-2018 also provides that "[i]n the absence of fraud in the transaction, the judgment of the board of directors or the stockholders, as the case may be, as to the value of the consideration received for stock shall be conclusive." Here, the corporation was paid for the shares issued, and Evans' shares were validly issued. The fact that the 4,000 shares were issued to Evans instead of to another shareholder does not invalidate Evans' shares of stock.

During the operation of the corporation, Evans was recognized by Engelhardt and Dalton as an active shareholder and participant in the corporation until June 1989. Distributions from the corporation were based on the percentage of stock ownership. The corporation's income tax returns for 1986 through 1990 list Evans as a shareholder, and Evans' shareholder distributions were reported on a schedule K-1. Engelhardt and Dalton notified Evans of shareholders' and directors' meetings, which notice evidenced their acknowledgment of Evans as a shareholder of the corporation.

In *Frasier v. Trans-Western Land Corp.*, 210 Neb. 681, 316 N.W.2d 612 (1982), stockholders disputed whether certain stock issued to the Frasiers was issued without consideration and was therefore void. The trial court found that the stock was void because the Frasiers had not paid an equivalent in money, labor done, or property delivered to the corporation. We reversed the judgment and remanded the cause with directions, holding that the majority stockholders would not be permitted to claim that the Frasiers were not stockholders when the majority stockholders had participated and acquiesced in the manner in which the stock was issued to the Frasiers. We noted that the action was a suit between informed and consenting stockholders as opposed to creditors or uninformed stockholders. The rule that permits a corporation to declare the issuance of stock void is applied in one manner as it relates to creditors of the corporation and in a totally different manner as it relates to stockholders who participated in the issuing of the stock and who now seek to attack the manner in which the stock was issued to a particular stockholder.

Engelhardt and Dalton are not in a position to claim that Evans does not own 4,000 shares of D & E Copiers' stock, and we find that Evans is a shareholder and has standing to bring this action.

Engelhardt and Dalton next claim that the trial court erred in finding they had not proved that their salaries were reasonable. A derivative action which seeks an accounting and the return of money is an equitable action. In an appeal of an equitable action, the appellate court reviews the facts de novo without reference to the findings of fact made by the trial court and reaches an independent conclusion. *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994); *Lanphier v. OPPD*, 227 Neb. 241, 417 N.W.2d 17 (1987).

An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders, and is treated by the courts as a trustee. *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944). The burden of proof is upon the party holding a confidential or fiduciary relationship to establish the fairness, adequacy, or equity of the transaction with the party with whom he holds such relation. *Id.* It was the

burden of Engelhardt and Dalton to show that their salaries were reasonable.

The trial court did not err in finding that Engelhardt and Dalton failed to meet this burden. Engelhardt and Dalton held a board meeting to vote on their salaries after Evans left D & E Copiers. Engelhardt said he worked an average of 30 hours per week for D & E Copiers during the 3-month period after Evans left, although he was also employed full time with Technical Service. He was unable to document any of the time he spent on behalf of D & E Copiers. Engelhardt claimed that during the last 6 months of 1989, he sold supplies, did public relations with customers, completed inventory, and serviced one machine which had not been sold to AOA. He claimed that some of the salary was intended to cover additional work he was required to do after Evans left, but that the salary was also to make up for work Engelhardt had completed in the past.

Dalton did not provide documentation of the time he spent working for D & E Copiers between July 1989 and March 1990. He claimed he worked 20 to 25 hours per week while also working full time for Technical Service. He claimed that he priced the inventory, talked to customers, inspected the inventory, and assisted in preparing lawsuits. The inventorying was completed in June 1989, but Dalton did not begin drawing a salary until July 1989. Dalton claimed that salary was geared to cover activities done after Evans left.

Our review of the record convinces us that the trial court was correct in finding that Engelhardt's and Dalton's testimony as to the time spent working for D & E Copiers was not credible. 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. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994).

Engelhardt and Dalton did not prove the reasonableness of their compensation. Although they claim to have spent 20 to 30 hours each per week working for the corporation, the evidence shows there was little work left to be done because AOA had purchased the inventory and all service contracts from D & E Copiers. By the time Engelhardt and Dalton began drawing a

salary, D & E Copiers was not a large or complex business, and the corporation was to eventually dissolve.

Finally, Engelhardt and Dalton argue that the district court erred in finding they engaged in fraudulent transactions that were detrimental to D & E Copiers. The trial court found that by paying a secretary to complete work for Technical Service with D & E Copiers' funds, Engelhardt and Dalton caused damage to D & E Copiers in the amount of $5,304. We agree.

The trial court's total judgment of $27,640 was based upon $22,336 in salaries paid to Engelhardt and Dalton after Evans left D & E Copiers and $5,304 in salary paid to a secretary after Evans left D & E Copiers. We find no error in the trial court's determination, and we affirm the judgment of the trial court.

AFFIRMED.

AMY JAMES, APPELLEE, V. MARY DEAN HARVEY, IN HER OFFICIAL CAPACITY AS THE DIRECTOR OF SOCIAL SERVICES, ET AL., APPELLANTS.

518 N.W.2d 150

Filed July 8, 1994. No. S-93-180.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Trial: Appeal and Error.** The standard of review on a trial court's determination of a request for sanctions is whether the trial court abused its discretion.
3. **Administrative Law: Jurisdiction.** The filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1987 & Cum. Supp. 1992).

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

Don Stenberg, Attorney General, and Royce N. Harper for appellants.

Margaret A. McDevitt, of Legal Services of Southeast Nebraska, for appellee.

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

WRIGHT, J.

Mary Dean Harvey, in her official capacity as Director of Social Services; the Department of Social Services; and the State of Nebraska (hereinafter collectively referred to as DSS) appeal from an order of the district court for Lancaster County which imposed a sanction upon DSS for failure to timely file the transcript of an agency hearing. The district court reversed DSS' denial of reimbursement for medical expenses incurred by Amy James, which denial was based on the fact that one of the doctors who treated James was suspended from participation in the medicaid program at the time he treated James. We affirm.

SCOPE OF REVIEW

In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. See, Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992); *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993).

The standard of review on a trial court's determination of a request for sanctions is whether the trial court abused its discretion. *Paro v. Farm & Ranch Fertilizer*, 243 Neb. 390, 499 N.W.2d 535 (1993).

FACTS

On July 15, 1992, Amy James filed a petition for review in the district court for Lancaster County seeking reversal of an order issued by the Director of Social Services. The director's order affirmed a finding by DSS' medical service division that medicaid would not reimburse the hospital at which James was treated for medical expenses she incurred on September 4 and 5, 1991.

James alleged that she was eligible for medicaid assistance for medical services involving her unborn child and that she

received medical services in September 1991 after a miscarriage. One of the physicians who provided the care, Dr. Harold Thaut, was suspended from participation in the medicaid program from October 2, 1990, until June 2, 1992. The other physician involved and the hospital at which James was treated were not suspended from participation in the medicaid program.

The hospital billed James in the amount of $3,265.50 for medical services and supplies, and Thaut billed for his services separately. DSS determined that Thaut's involvement in James' care precluded medicaid reimbursement of the hospital under Nebraska medicaid regulations 471 Neb. Admin. Code, ch. 2, §§ 002.05C and 002.05D (1988). James claimed that she did not request Thaut's services and did not know that he was involved in her care until after he had performed surgery on her. She did not learn Thaut had been suspended from participation in the medicaid program until a hospital employee told her in January 1992.

James claimed that the expenses billed by the hospital were not performed or provided by Thaut. She alleged that DSS' decision was in excess of its statutory or regulatory authority; was unsupported by competent, material, and substantial evidence; and was arbitrary and capricious.

DSS generally denied the allegations in James' petition and filed a motion for leave to file the transcript out of time because DSS' reporters had an increased volume of work and were attempting to complete a backlog of cases. DSS was granted an extension until October 15, 1992.

On October 27, 1992, James moved the court for an order striking DSS' answer and entering default judgment because DSS had failed to file the transcript pursuant to Neb. Rev. Stat. § 84-917(4) (Cum. Supp. 1992). As a sanction, the district court reversed the decision of DSS' director. The court noted that the transcript of the proceedings before the agency had not been filed until October 28, the day after James filed her motion to strike. The court then taxed the costs of the action to DSS.

ASSIGNMENTS OF ERROR

On appeal, DSS claims the district court abused its discretion

in imposing the sanction for failure to file the transcript in the time required by statute and in considering the failure to timely file the transcript as jurisdictional.

ANALYSIS

We first address the question of jurisdiction. This assignment of error is without merit because the record shows that the district court did not treat the lateness of the transcript as a jurisdictional issue.

Section 84-917(2)(a) provides:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. . . . Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action.

The filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1987 & Cum. Supp. 1992). In *Maurer v. Weaver*, 213 Neb. 157, 328 N.W.2d 747 (1982), we held that the preparation and filing of a transcript under the Administrative Procedure Act was not jurisdictional. The current language in § 84-917 which addresses the time allowed for filing a transcript is nearly identical to the language which was applicable in *Maurer*, the exception being that the time allowed for filing a transcript has been expanded from 15 days to 30 days. Our holding that the filing of the transcript is not jurisdictional still applies, and the district court had jurisdiction to take action on James' petition even though DSS had not timely filed the transcript.

We next address whether the district court can reverse DSS' order as a sanction for the agency's failure to timely file the transcript. DSS argues that it had good cause for the delay and for requesting an extension because of the increased volume of pending work for the agency's reporters. DSS did not provide documentation, but stated that it was common knowledge that there had been an increasingly high volume of administrative

hearings before the director and a proportionate number of appeals to the district court.

Our review of a trial court's determination of sanctions is whether the trial court abused its discretion in imposing the sanctions. *Paro v. Farm & Ranch Fertilizer*, 243 Neb. 390, 499 N.W.2d 535 (1993). The U.S. Supreme Court has stated that an appellate court should apply an abuse of discretion standard in reviewing all aspects of a federal district court's determination of sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990). The standard was adopted by this court in *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991).

Here, the petition was filed July 15, 1992, and the transcript was not filed until more than 3 months later. Upon DSS' motion, the court granted the agency until October 15 to file the transcript. In its order, the court specifically excised a phrase which stated that the court had found good cause for the extension. When October 15 arrived and no transcript had been filed, James filed a motion asking the court to strike DSS' answer and enter a default judgment.

It is the duty of courts to prevent dilatory proceedings in the administration of justice. *Aetna Cas. & Surety Co. v. Dickinson*, 216 Neb. 660, 345 N.W.2d 8 (1984). In *Pressey v. State*, 173 Neb. 652, 114 N.W.2d 518 (1962), we recognized the inherent power of the court to dismiss an action for disobedience of a court order. However, in this situation it would be inequitable to dismiss the case because that would penalize James, the party seeking review of the agency's order. The district court stated at the hearing on James' motion to strike that this was the third or fourth case in the prior 3 months in which the filing of the transcript by DSS had been a problem. The court found that DSS' claim of an increased workload was not sufficient for the court to make a finding that good cause had been shown for an extension.

The transcript consisted of 23 pages of testimony and 21 exhibits which total less than 50 pages. DSS provided no rational explanation as to why it would take more than 3 months to produce the transcript. As the court noted, a sanction which would require DSS to pay the costs of preparing

the transcript would serve no purpose because the agency's employees prepare the transcript and because James was proceeding in forma pauperis. The court determined that the only sanction which would send a message to DSS concerning its dilatory practice was to reverse the agency's order.

In an action brought under the Administrative Procedure Act, it is the responsibility of the agency to provide the transcript in a timely fashion. The failure to do so subjects the agency to the disciplinary powers of the court. In the present case, we find that the district court did not abuse its discretion in reversing the agency's order.

The decision of the district court is affirmed.

AFFIRMED.

CAE VANGUARD, INC., A DELAWARE CORPORATION, APPELLEE, V. MAURICE NEWMAN, APPELLANT.

518 N.W.2d 652

Filed July 8, 1994. No. S-93-340.

1. **Actions: Injunction: Equity.** An action for injunction sounds in equity.
2. **Actions: Contracts: Reformation: Equity.** Reformation of a contract is an equity action.
3. **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.
4. **Restrictive Covenants: Courts: Reformation.** It is not the function of the courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable.
5. **Courts.** Private parties may not confer upon the court powers which it does not possess.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with direction.

Gary J. Nedved, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellant.

Michael L. Jeffrey, of Jeffrey, Hahn & Hemmerling, P.C., for appellee.

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

BOSLAUGH, J.

The appellee, CAE Vanguard, Inc., filed a suit to enjoin the appellant, Maurice Newman, from violating the terms of a noncompetition agreement which was signed in conjunction with the sale of stock. Newman admits that he violated the agreement, but claims that the agreement is unenforceable.

Vanguard Pacific Metal Builders of Kentucky and VMB Company assigned their rights under the noncompetition agreement to CAE Vanguard, Inc. (the companies are hereinafter referred to collectively as Vanguard). Vanguard is in the business of rebuilding railroad car axles. The rebuilding process consists of either downsizing—the milling of a worn axle into a smaller axle—or brush plating—a process of electrochemically metalizing a worn axle such that it conforms to industry standards. Through the use of trade secrets developed for brush plating, Vanguard had become the largest railroad axle brush plater in North America, servicing 90 percent of the electrochemically metalized axles in the United States and Canada.

Newman worked as a plant manager for Vanguard and performed a variety of tasks, including development of shop procedures and pricing schedules, quality control, and sales. During his tenure with Vanguard, he acquired intimate knowledge of Vanguard's trade secrets and 10 percent of its stock.

Newman left Vanguard in 1989 and sold his stock to the other three stockholders. In conjunction with the sale and with benefit of legal counsel, Newman signed an agreement not to compete with Vanguard's business of brush plating railroad axles or to divulge trade secrets pertaining thereto. The provision in the covenant not to compete, in pertinent part,

states:

> Newman agrees and covenants that he will not, for a period of five (5) years after the date of this Covenant, and anywhere in the United States, the continent of North America, or anywhere else on earth, or such lesser period of time or geographical area restriction as a court of law might later determine to be the limits of enforceability of this covenant, (a) directly or indirectly solicit electrochemical metalizing business regarding railroad axles and/or mounted wheel sets . . . .

Newman argues that the covenant against competition in this case was designed not to eliminate just unfair competition, but was intended to eliminate all competition from Newman. As we said in *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991), a covenant may protect against competition by improper and unfair methods, but an employer is not entitled to enforce a covenant which merely protects against ordinary competition.

The agreement also contains the following paragraph:

> In the event that any portion of this Covenant may be held to be invalid or unenforceable for any reason, it is agreed that said invalidity or unenforceability shall not affect the other portions of this Covenant, and that the remaining covenants, terms and conditions or portions thereof shall remain in full force and effect and any court of competent jurisdiction may so modify the objectionable provision as to make it valid, reasonable and enforceable.

In the years following the stock sale agreement, Newman was unable to find employment in the railroad industry. In July 1991, he began purchasing equipment for the purpose of opening a shop which would brush plate railroad axles. He also divulged Vanguard's trade secrets to three individuals and contacted Vanguard's customers in an attempt to solicit business.

Vanguard filed a suit in the district court for Lancaster County seeking to enjoin Newman from violating the terms of the agreement. The trial court found that the covenant not to divulge information was reasonable as written. The trial court then found that the covenant not to compete was unreasonable

as written and reformed the agreement so that it would be enforceable. In reforming the agreement, the trial court struck from the covenant the words "or anywhere else on earth, or such lesser period of time or geographical area restriction as a court of law might later determine to be the limits of enforceability of this covenant." The court enjoined Newman from violating the reformed covenant.

Newman appeals from the ruling and asserts that the trial court erred (1) in reforming the covenant not to compete, (2) in enforcing the reformed covenant, and (3) in failing to find that the covenants constitute an unreasonable restraint of trade.

An action for injunction sounds in equity. *County of Dakota v. Worldwide Truck Parts & Metals*, 245 Neb. 196, 511 N.W.2d 769 (1994); *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993). Reformation of a contract is also an equity action. *Ames v. George Victor Corp.*, 228 Neb. 675, 424 N.W.2d 106 (1988). 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. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 515 N.W.2d 390 (1994); *County of Dakota v. Worldwide Truck Parts & Metals, supra*.

This court has never allowed reformation of a covenant not to compete. Previous cases have implied that, under certain circumstances, reformation would be allowed. For example, in *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 669, 407 N.W.2d 751, 756-57 (1987), we stated:

> In previous cases of this nature we have declined, for various reasons, to rewrite the covenant so as to make it "no greater than necessary." [Citations omitted.] We once again do not believe that this is a proper case for reformation of the covenant not to compete. . . . [The party seeking to reform the covenant] did not request reformation in its answer and cross-petition and did not argue that issue either at the trial court level or on appeal.

See, also, *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982).

Vanguard argues that reformation should be allowed in this case for three reasons. First, Vanguard notes that the agreement was formed in conjunction with the sale of a business interest, rather than with an employment contract. "[C]ourts have generally been more willing to uphold promises to refrain from competition made in connection with sales of good will than those made in connection with contracts of employment." Restatement (Second) of Contracts § 188, comment *b*. at 42 (1981). Second, Vanguard notes that both parties to the agreement were represented by counsel and therefore had equal bargaining power. Vanguard's final argument, upon which the trial court relied, raises a question of first impression in this jurisdiction—whether parties can agree to allow a court to reform an unreasonable covenant. The courts that have addressed this question have not reached uniform results. See, generally, Annot., 61 A.L.R.3d 397 (1975).

Vanguard cites several decisions from other courts which reflect the recent trend to allow the modification of covenants not to compete regardless of whether the parties have agreed to such modification. The courts which have allowed the modification have either allowed modification by "blue penciling" or by the "rule of reasonableness." The "blue pencil" rule, which was followed by the trial court, allows a court to strike an unreasonable restriction from a covenant if, after its removal, the covenant remains grammatically meaningful. E.g. *Solari Industries, Inc. v. Malady*, 55 N.J. 571, 264 A.2d 53 (1970).

Most courts which have recently addressed the question have granted modification by the rule of reasonableness, which allows the court to fashion an agreement which reasonably protects the interests of the party seeking to enforce the covenant. E.g., *Data Management, Inc. v. Greene*, 757 P.2d 62 (Alaska 1988); *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984); *Ehlers v. Iowa Warehouse Company*, 188 N.W.2d 368 (Iowa 1971), *modified* 190 N.W.2d 413. In a case which was factually similar to this case, the Supreme Court of Tennessee held that judicial modification of an unreasonable

covenant not to compete was justified, especially where the parties had agreed to such modification. *Central Adjustment Bureau, Inc. v. Ingram, supra.*

A minority of the courts which have addressed the question have held that courts may not revise an agreement so as to make it enforceable. These courts have reasoned that reformation is tantamount to the construction of a private agreement and that the construction of private agreements is not within the power of the courts. See, *Rollins Protective Svcs. Co. v. Palermo*, 249 Ga. 138, 287 S.E.2d 546 (1982); *Rector-Phillips-Morse v. Vroman*, 253 Ark. 750, 489 S.W.2d 1 (1973).

We find the minority view the most reasonable view and the view which is most in harmony with existing precedent. In *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455, 455 N.W.2d 772, 776 (1990), we stated that "[i]t is not the function of the courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable." The provision of the agreement which states that a court may reform the covenant is of no effect. Private parties may not confer upon the court powers which it does not possess. *Rector-Phillips-Morse v. Vroman, supra.* This court has stated repeatedly that courts may not rewrite a contract for parties. *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993); *Husen v. Husen*, 241 Neb. 10, 487 N.W.2d 269 (1992).

Because we find that the covenant is not subject to modification, we must either enforce it as written or not enforce it at all. The trial court found as a matter of law that the covenant not to compete was unenforceable as written. That finding was not challenged, and we let it stand.

Accordingly, we reverse the judgment of the trial court and remand the cause, directing the trial court to enter an order consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

KIMBERLY K. RATH, APPELLANT, V. SELECTION RESEARCH, INC., APPELLEE.

519 N.W.2d 503

Filed July 15, 1994. No. S-92-991.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** On appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Records: Depositions: Appeal and Error.** In order to receive consideration on appeal, depositions used on a motion for summary judgment must have been offered into evidence in the trial court and preserved in and made part of the bill of exceptions.
4. **Contracts: Statute of Frauds: Time: Words and Phrases.** For purposes of the statute of frauds, a contract "not to be performed within one year" is one which by its terms cannot be performed within 1 year.
5. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded for further proceedings.

Christopher J. Connolly, of Olds, Pieper & Connolly, and Arch Stokes and Maggie Stokes, of Stokes & Murphy, for appellant.

Roger P. Cox and Gregory D. Barton, of Harding & Ogborn, for appellee.

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

WHITE, J.

Following her termination from employment, Kimberly K. Rath sued her employer, Selection Research, Inc. (SRI), for negligent misrepresentation, breach of an implied contract, and breach of an implied covenant of good faith and fair dealing. Rath also sought a declaratory judgment, alleging that a

noncompetition agreement that she had signed was void as a matter of law. The district court granted summary judgment to SRI on all issues except the declaratory judgment. Rath appealed to the Nebraska Court of Appeals from that summary judgment. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court. We reverse the judgment and remand the cause for further proceedings.

Rath began working for SRI on a part-time basis while she was in college. After her graduation from college in the spring of 1983, Rath began working for SRI full time. The terms of Rath's full-time employment are the subject of the present appeal and will be discussed more fully in conjunction with our analysis.

In 1986, Rath married another SRI employee. In March 1989, according to Rath's petition, Dr. Donald O. Clifton (founder, president, and chairman of the board of SRI) informed Rath's husband that his employment would be terminated on May 31, 1989. In April 1989, also according to the petition, Rath's primary supervisor, Dr. Mick Zangari, told Rath that her employment could continue despite her husband's termination.

On May 31, 1989, Rath's husband filed a lawsuit naming SRI as defendant. On June 2, Rath alleges, Clifton and Zangari fired Rath for lack of loyalty, stating that a loyal employee would have informed the company of an impending lawsuit.

On June 14, Rath filed suit against SRI. After Rath had filed two amended petitions, SRI filed an answer and counterclaim, and Rath responded with a reply and answer. SRI then filed a motion for summary judgment. Before a hearing on the summary judgment motion, Rath filed a third amended petition, which SRI answered. The parties have stipulated that the motion for summary judgment should be decided with respect to the third amended petition.

On June 15, 1992, at the first hearing on SRI's motion for summary judgment, both parties submitted evidence and Rath requested a continuance, which was granted. On July 29, at the second hearing, Rath submitted supplemental exhibits. SRI objected to the exhibits and also filed a motion to strike the

exhibits.

On September 29, Rath filed a "response" to SRI's objection and motion to strike. The response consists of a 30-page brief, extensive deposition testimony, and the accompanying deposition exhibits.

Also on September 29, the district court granted SRI's motion for summary judgment. The court found that Rath's employment contract was either for 50 years or until age 65, that the contract could not be performed within 1 year, and therefore that Rath's claims based on her employment contract were barred by the statute of frauds. The court found that Rath had failed to produce any written memoranda which would satisfy the writing requirement of the statute of frauds. The court dismissed all of Rath's claims except for the declaratory judgment and sustained SRI's motion to strike to the extent that the evidence objected to was parol evidence.

Rath has assigned five errors, which in sum assert that the district court erred in granting summary judgment to SRI. 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 and that the moving party is entitled to judgment as a matter of law. *Carpender v. Bendorf, ante* p. 77, 516 N.W.2d 619 (1994); *Horvath v. M.S.P. Resources, Inc., ante* p. 67, 517 N.W.2d 89 (1994). On appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Carpender, supra*; *Horvath, supra*.

Since the perfection of this appeal, additional motions have been filed in this court. We reserved rulings on two of these motions: SRI's motion to strike Rath's response of September 29, 1992, and SRI's supplemental motion to strike those portions of Rath's appellate briefs which cite the material contained in Rath's response. Before addressing the merits of this appeal, we first dispose of the pending motions.

In moving to strike Rath's response of September 29, and any references thereto, SRI argues that the addenda to the response—the depositions and accompanying exhibits—are

not a part of the appellate record. We agree.

In order to receive consideration on appeal, depositions used on a motion for summary judgment must have been offered into evidence in the trial court and preserved in and made part of the bill of exceptions. See *Brown v. Shamberg*, 190 Neb. 171, 206 N.W.2d 846 (1973). See, also, *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982) (corresponding rule for affidavits). The evidence Rath wants us to consider was never offered or entered into evidence in the trial court and was never made a part of the bill of exceptions. Instead, Rath simply filed her response of September 29 after the hearing on the motion for summary judgment and attached to that response the voluminous depositions of Rath and her husband.

Rath contends that her response of September 29 constitutes a pleading filed in the court and that the depositions were filed as a part of the pleading. By statute, the only pleadings allowed are the petition by the plaintiff, the answer or demurrer by the defendant, the demurrer or reply by the plaintiff, and the demurrer to the reply by the defendant. Neb. Rev. Stat. § 25-803 (Reissue 1989). Rath has provided us with no authority, and we are aware of none, which holds that a response to a motion is a permissible pleading.

We conclude that Rath's response is not a part of the appellate record. Therefore, the materials included in the response form no part of the basis for our decision.

Rath claims that her oral contract of employment could be performed within 1 year and thus was not void under the statute of frauds. The statute of frauds provides, in relevant part: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: (1) Every agreement that, by its terms, is not to be performed within one year from the making thereof . . . ." Neb. Rev. Stat. § 36-202 (Reissue 1988).

A contract "not to be performed within one year" is one which by its terms cannot be performed within 1 year. *Johnson v. First Trust Co.*, 125 Neb. 26, 248 N.W. 815 (1933); *Grotte v. Rachman*, 114 Neb. 284, 207 N.W. 204 (1926); *Carter White*

Lead Co. v. Kinlin, 47 Neb. 409, 66 N.W. 536 (1896). See *Montgomery v. Quantum Labs, Inc.*, 198 Neb. 160, 251 N.W.2d 892 (1977). To state the rule in positive terms, an oral agreement is valid under the statute of frauds if it is capable of being performed within 1 year from the date of making.

To determine whether Rath's alleged oral contract of employment is capable of being performed within 1 year, we must determine the duration of the alleged contract. As to the duration of the alleged contract, the record is confusing at best. Throughout her pleadings, affidavits, and answers to interrogatories, Rath uses numerous terms to describe the duration of her alleged contract. According to Rath, the alleged contract was to last for her "lifetime," her "career," her "work lifetime," "50 years," and "until age 65." In addition to using a wide variety of terms, Rath also combines these terms in a variety of ways. For example, Rath alleges in her petition that SRI promised her "a 'lifetime' career at [SRI] until age 65," alleges in an affidavit that she was offered a "fifty year/lifetime contract," and alleges in answers to interrogatories that SRI made her a "fifty (50)-year/work lifetime commitment."

Rath argues that the alleged contract was for an indefinite period—her work lifetime. SRI argues that, accepting everything Rath alleges as true, the alleged contract was for a definite term—either until age 65 or 50 years. These two positions each yield a different result under the statute of frauds.

Under the statute of frauds, an oral employment contract with a work lifetime duration is valid. *Boothby v. Texon, Inc.*, 414 Mass. 468, 608 N.E.2d 1028 (1993) (oral contract for permanent employment is valid under statute of frauds); *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 766 P.2d 280 (1988), *cert. denied* 490 U.S. 1109, 109 S. Ct. 3163, 104 L. Ed. 2d 1026 (1989) (oral contract for permanent employment is valid under statute of frauds); Restatement (Second) of Contracts § 130, comment *a.*, illus. 2 (1981). See *Doherty v. Doherty Ins. Agency, Inc.*, 878 F.2d 546 (1st Cir. 1989) (contract to supply benefits for a partner's lifetime is valid under statute of frauds). But see *Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469 (5th Cir. 1991), *cert. denied* 502 U.S. 984, 112 S. Ct. 591, 116

L. Ed. 2d 615 (oral contract for permanent employment is barred by statute of frauds). Such a contract is valid because, in theory, the employee could die within 1 year. If the employee died within 1 year of making the contract, the employee would have worked and been employed for his lifetime, thus, both parties would have fully performed the contract. *Doherty, supra*; the Restatement, *supra*. The contract is therefore capable of performance within 1 year.

In contrast, unless an exception applies, an oral employment contract with a 50-year duration is void under the statute of frauds. See, *McBride v. City of McCook*, 212 Neb. 112, 321 N.W.2d 905 (1982) (oral employment contract for 18 months is void under the statute of frauds); *Montgomery, supra* (oral employment contract for 15 months is void under the statute of frauds). If the employee died within 1 year of making the 50-year contract, the contract would terminate and the parties would be excused from performance, but the contract would not have been fully performed. *Celi v. Canadian Occidental Petroleum Ltd.*, 804 F. Supp. 465 (E.D.N.Y. 1992) (termination of a contract as a result of its breach is not performance for purposes of statute of frauds); *Blue Valley Creamery Co. v. Consolidated Products Co.*, 81 F.2d 182 (8th Cir. 1936), *appeal after remand* 97 F.2d 182 (8th Cir. 1938), *cert. denied* 305 U.S. 629, 59 S. Ct. 93, 83 L. Ed. 403 (1938) (statute of frauds looks to the performance of the contract, not the defeat of the contract). See the Restatement, *supra* at comment *b.*, illus. 5. Thus, the 50-year employment contract is not capable of performance within 1 year. For similar reasons, an oral employment contract "until age 65" would be void under the statute of frauds. See, *Trum v. Melvin Pierce Marine Coating*, 562 So. 2d 235 (Ala. 1990); *Harris v. Arkansas Book Co.*, 287 Ark. 353, 700 S.W.2d 41 (1985); *Burton v. Atomic Workers Fed. Cr. Union*, 119 Idaho 17, 803 P.2d 518 (1990).

The district court determined that the contract between Rath and SRI was to last either until age 65 or for 50 years. In either case, the court reasoned, the contract was void under the statute of frauds. We find that the record is not sufficiently clear for the district court to have determined the duration of the contract; rather, the record presents a genuine issue of material fact as to the duration of the contract.

We recognize that this issue of fact is largely the result of Rath's failure to present her case in a consistent manner. However, SRI has failed to force Rath, through any procedural means, to choose from among the inconsistent facts which she has presented. Instead, SRI has been content to emphasize the favorable portions of the record.

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Young v. First United Bank of Bellevue, ante* p. 43, 516 N.W.2d 256 (1994); *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994). As a result of SRI's failure to pin Rath down to any one version of the facts, SRI has failed to sustain its burden of demonstrating that there is no genuine issue of material fact. Having found that there is a genuine issue of material fact, it is unnecessary for us to consider Rath's alternative arguments.

The district court improperly granted summary judgment. The judgment of the district court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. FREDERICK WHITE, APPELLANT.

518 N.W.2d 923

Filed July 15, 1994. No. S-92-1061.

1. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution, the defendant must show that counsel's performance was deficient and that such deficient performance prejudiced the defense. The standard for determining the propriety of the claim is whether the attorney, in representing the defendant, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.

2. **Constitutional Law: Effectiveness of Counsel.** Defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make.
3. **Constitutional Law: Effectiveness of Counsel: Proof.** To support a claim of ineffective assistance of counsel, the defendant must first show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
4. **Effectiveness of Counsel: Appeal and Error.** A review of an ineffective assistance of counsel claim must be made from the perspective of defense counsel, taking into account all circumstances of the case as they were known to counsel at the time of the representation.

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

Toney J. Redman for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

Kenneth N. Thompson, amicus curiae.

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

PER CURIAM.

Defendant, Frederick White, appeals from the order of the district court denying his motion for postconviction relief. The single assignment of error is that the district court found that defendant was not denied effective assistance of counsel when he was not given the opportunity to testify at his trial. This case has been transferred to the docket of the Supreme Court under our authority to regulate the caseloads of the appellate courts. We affirm.

Defendant was charged with the August 17, 1979, felony offense of escape from official detention, a violation of Neb. Rev. Stat. § 28-912 (Reissue 1989). His first trial, to a jury, commenced March 4, 1980, and resulted in a conviction, but the conviction was set aside and defendant was granted a new

trial because of an erroneous instruction. The second trial began April 16, 1980, and again resulted in a conviction. Defendant was represented by the Lancaster County Public Defender, Dennis Keefe, at both trials. On appeal to this court, defendant having cited grounds for error other than ineffective assistance of counsel, his conviction was affirmed. See *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981). Defendant's amended motion for postconviction relief was filed by his court-appointed attorney, Toney J. Redman, which motion alleged ineffective assistance of counsel by defendant's lawyer at the second trial.

It is beyond dispute that to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution, the defendant must show that counsel's performance was deficient and that such deficient performance prejudiced the defense. The standard for determining the propriety of the claim is whether the attorney, in representing the defendant, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993).

The bases of defendant's claim of ineffective assistance of counsel were counsel's failure to pursue the legality of defendant's arrest and to appeal the issue, failure to appeal the issue of the constitutionality of § 28-912, failure to object to or appeal the issue of improper closing statements by the prosecution, and failure to advise defendant of his right to testify in the second jury trial.

The postconviction trial court, in a well-reasoned and detailed order, denied each of defendant's specific complaints with a full explanation of each. The only complaint which defendant argues on appeal is counsel's failure to advise defendant of his right to testify. Therefore, we confine our analysis to that issue.

On August 17, 1979, an Officer Spanel of the Lincoln Police Department was investigating a series of sexual assaults in a Lincoln neighborhood. The officer was in plain clothes and in

an unmarked car. He walked up to defendant and one Julius Nivens to show them a composite sketch of the sexual assault suspect. As defendant reached out his right hand to take the sketch, the officer noted a series of distinctive scars on defendant's right forearm. Aside from the fact that the suspect was a black male, which defendant was, the suspect was reported to have scars on his left forearm.

According to Spanel, he told defendant that defendant was coming downtown with him. Spanel reached into his car to radio in to headquarters, and defendant struck him and ran. Defendant contends that the officer never identified himself and never placed defendant under arrest. Defendant was subsequently arrested and charged with escape.

The first trial commenced March 4, 1980, and the following appears of record after the close of the State's evidence:

> Mr. Keefe: Mr. White and I have talked at length prior to the trial, this weekend and last week, about the fact that he does have the right to testify, and also the fact that he has the right not to testify, if he doesn't want to. My advice to him is that as a tactical maneuver that we would—that he not testify, nor do we call a witness by the name of Julius Nivens. And those are tactical considerations on my part and my advice has been to him that neither he testify nor do we call Mr. Nivens as a witness. Is that agreeable with you, Fred?
>
> The Defendant: Yes.

The second trial commenced April 16, 1980, and the record of that trial does not disclose any similar statement made by defense counsel or defendant. Defendant was not called as a witness. It is counsel's failure to call defendant as a witness or obtain a waiver from defendant that defendant now claims was error on trial counsel's part.

Just before the beginning of the second trial, defendant, his counsel, and counsel for the State appeared before the court in response to a motion by the State to endorse an additional witness. The following exchange took place:

> The Court: This is the matter of the State of Nebraska versus Fred White. Mr. McGinn, who do you wish to endorse? I don't see it here.

> Mr. McGinn: I filed it more than a week ago.
>
> The Court: Who do you wish to endorse?
>
> Mr. McGinn: I filed it on April 9th, and it asks leave of Court to endorse Officer Stan Chalis of the Lincoln Police Department as a witness in the above-entitled case. The motion went on to say that the State showed the Court that Officer Chalis would offer testimony regarding a prior similar act of escape committed by the defendant, Fred White. It's my understanding that it is likely that intent will become an issue in this case, of course, depending on the Court's Instructions, and if it does, certainly evidence of prior similar crimes is relevant to show—
>
> . . . .
>
> Mr. Keefe: It was when the defendant was under charge and leaving the courtroom. Not a similar situation here. There is no intent. Mr. McGinn wants to introduce this simply to let the jury know that the defendant has been convicted of a felony. There is no theory on which this can be a prior—
>
> . . . .
>
> The Court: Well, I didn't anticipate this. We didn't get into it the last time. But I'm going to deny your request.

The case proceeded to trial, at which Nivens testified but defendant did not. Nothing appears of record which indicates whether defendant was to testify or whether he would waive his right to testify.

At the postconviction hearing and on appeal to this court, defendant argues simply that he was not given the opportunity to testify, that he wanted to testify, and that under *U.S. v. Teague*, 953 F.2d 1525 (11th Cir. 1992), a criminal defendant has a fundamental constitutional right to testify in his or her own behalf, which right is personal to the defendant and cannot be waived either by the trial court or by defense counsel. In the present case, counsel for defendant, in addressing the trial court before the taking of evidence in the postconviction proceedings, stated:

> At the second trial, Mr. White tells me that the judge made a ruling before the trial, that evidence of that escape

could not be offered if Mr. White testified, and as a result, it was Mr. White's intention to testify at the second trial.

So, the argument would be, whatever occurred at the first trial, was irrelevant as far as advice given to Mr. White, because the facts were different, and the facts being different because the State at the second trial was no longer going to use evidence of the prior escape.

Teague holds that defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make. *Teague* relies on *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in deciding the case:

In *Strickland*, the Supreme Court defined two requirements for a claim of ineffective assistance of counsel: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064.

The first prong of this test requires that defendant show that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2065. Where the defendant claims a violation of his right to testify by defense counsel, the essence of the claim is that the action or inaction of the attorney deprived the defendant of the ability to choose whether or not to testify in his own behalf. In other words, by not protecting the defendant's right to testify, defense counsel's performance fell below the constitutional minimum, thereby violating the first prong of the *Strickland* test. For example, if defense counsel refused to accept the defendant's decision to testify and would not call him to the stand, counsel would have acted unethically to prevent the defendant from exercising his fundamental constitutional right to

testify. Alternatively, if defense counsel never informed the defendant of the right to testify, and that the ultimate decision belongs to the defendant, counsel would have neglected the vital professional responsibility of ensuring that the defendant's right to testify is protected and that any waiver of that right is knowing and voluntary. Under such circumstances, defense counsel has not acted " 'within the range of competence demanded of attorneys in criminal cases,' " and the defendant clearly has not received reasonably effective assistance of counsel. [Citations omitted.]

In the case at bar, the district court made specific findings after an evidentiary hearing on this issue. "We defer to the district court's findings of fact absent a clearly erroneous determination but apply our own judgment as to whether the conduct determined by these facts constitutes ineffective assistance of counsel." *Wiley v. Wainwright*, 793 F.2d 1190, 1193 (11th Cir. 1986). The district court found that "the evidence fail[ed] to show that the Defendant's will was 'overborne' by his counsel. The Defendant was advised of his right to testify, was advised that he should not exercise that right, and did not protest." Upon review of the record of the evidentiary hearing, we cannot say that these findings of fact are clearly erroneous.

Moreover, although at the time of the evidentiary hearing counsel clearly had misgivings about whether Teague had understood that he was choosing not to testify, a review of ineffective assistance of counsel claims must be made from the perspective of defense counsel, taking into account all circumstances of the case as they were known to counsel *at the time of the representation*. [Citation omitted.] Teague's counsel clearly had advised him that it would be unwise and unnecessary for him to testify. At the evidentiary hearing, counsel testified that when she rested the defense case, she believed that Teague had assented or acceded to her recommendation. We find that counsel's performance was not constitutionally deficient. Because the defendant has failed to meet the first prong of

> *Strickland*, we need not address whether Teague's defense was prejudiced in this case.

U.S. v. Teague, 953 F.2d at 1534-35.

The factual situation at the first trial as presented here by defendant is simply not correct. The record does not disclose that defendant was advised by his trial counsel not to testify because the State was going to offer evidence of his prior escape. Defendant's trial counsel, Keefe, when questioned by defendant's postconviction counsel, Redman, was asked:

> Q. So that I understand correctly, then, one of the reasons strategywise that you had in mind then, for Mr. White not to testify was because if he did, then his prior record would inevitably go before the jury; is that correct?
>
> A. Not his prior record, but the fact that he was a prior convicted felon would have come in to affect his credibility.

According to the presentence investigation report, defendant was sentenced on December 29, 1976, to prison terms of 2 to 5 years on the escape conviction and 15 to 30 months for a burglary conviction. In his testimony, defendant admitted the two prior felony convictions. The two felony convictions quite obviously are the ones about which defendant's trial counsel was concerned.

When asked about the proceedings which occurred immediately before the commencement of the second trial, Keefe testified that "[m]y recollection of this hearing was that the prosecutor had filed a motion to endorse [an] additional witness and informed the court that that witness was going to testify to what could be termed prior similar act[s] evidence. Specifically, I believe it was a prior escape." Keefe went on to testify:

> A. . . . I guess the judge ruled because of time differential, he wasn't going to allow the witness either to be endorsed or to testify about that prior escape as prior similar act evidence.
>
> Q. [Redman] Okay. Do you know whether or not Mr. White understood the import of the judge's ruling at the time?
>
> A. I don't know what Mr. White thought. I know that I

> had talked to him earlier about how the fact that he was a prior convicted felon would be admissible as affecting his credibility. So I am comfortable he understood that. I do not specifically recall talking to Mr. White about this issue about this hearing. I don't specifically recall our conversation about that.

Keefe's testimony is summed up in the following:

> I do remember obviously when we received a favorable ruling on the motion for new trial, it was based on specifically on [sic] instructions regarding arrest. I remember talking with Mr. White about our success in obtaining a new trial, the reasons for that and the fact that there would be a second trial. I know that we had conversations about how the second trial would proceed and I can't say to you now, I specifically recall "x" day this conversation took place when Mr. White specifically said, "x", "y" and "z". But I am very comfortable with the fact that Mr. White fully was aware we were proceeding with the trial the same, on the same theory. He acquiesced in that and agreed to it.

At the postconviction hearing, defendant testified regarding the first trial that "it was my understanding that if I testified, then Mr. Keefe explained to me that if I were to testify, the prosecuting attorney could come into court and say to the jury, Fred White has done this before; this, being escape." Of course, according to Keefe, no mention of the attempted use of a prior similar act was discussed until the second trial.

Defendant also testified that it was after the second trial had concluded and the defense had rested that he said to Keefe, "Hey, I thought I was going to testify and we discussed it." This was completely contrary to the earlier testimony by Keefe that he had never refused to allow a client to testify who wanted to do so.

After discussing in its order the issue of defendant's contention that he was not allowed to testify, the postconviction trial court stated:

> I find that defendant agreed with his experienced counsel that defendant should not testify.
>
> It was proper trial strategy for counsel not to call the

defendant, and the Court so finds.

THE COURT FURTHER FINDS that the defendant has failed to show that his attorney failed to perform at least as well as lawyers with ordinary training and skill in the criminal law in the area. Nor did the defendant show that he was prejudiced in the defense of his case as a result of his attorney's actions or inactions. The defendant's rights under the U.S. and Nebraska Constitutions, were neither denied nor infringed so as to render his convictions void or voidable.

It is quite apparent that the postconviction trial court determined from the record that the facts were as related by trial counsel, Keefe, and not according to the story that defendant came up with for the first time some 10 or more years after the fact. "In an appeal from a denial of a motion for postconviction relief, the lower court's findings will be upheld unless clearly erroneous. *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992)." *State v. Victor*, 242 Neb. 306, 309, 494 N.W.2d 565, 568 (1993).

The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

PATRICK B. GIBB, APPELLANT, V. CITICORP MORTGAGE, INC., A FOREIGN CORPORATION, APPELLEE.

518 N.W.2d 910

Filed July 15, 1994. No. S-92-1107.

1. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law. Regarding such a question, an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
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 shows a legal liability of the defendant to the plaintiff.

3. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally; if as so construed it states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
4. _____: _____. 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 facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
5. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader.
6. **Fraud.** In order to maintain an action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result.
7. _____. In order to maintain an action based on fraudulent concealment, a plaintiff must allege and prove the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
8. **Fraud: Principal and Agent: Liability.** A principal may be liable for the fraudulent actions of its agent.
9. **Contracts: Fraud.** A disclaimer clause is relevant in determining whether a claimant relied on a false representation disclaimed in the clause.
10. _____: _____. A clause that an article is taken in the condition in which it is, or in other words, "as is," is relevant in determining whether a claimant relied on a false representation concerning the condition of the article, but is not controlling.
11. **Principal and Agent.** Whether an act is within the scope of an agent's apparent authority is to be determined as a question of fact from all the circumstances.
12. **Principal and Agent: Custom and Usage: Presumptions: Estoppel.** Where a principal has, by its voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped from denying the agent's authority as against such third person.
13. **Vendor and Vendee: Fraud.** As between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done

which tends to impose on the purchaser or to mislead him or her, the failure of the vendor to disclose such facts does not amount to actionable fraud.

14. **Fraud.** One is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth.
15. **Fraud: Liability.** An actor who, in the course of the actor's business, profession, or employment (or in any other transaction in which the actor has a pecuniary interest), supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if the actor fails to exercise reasonable care or competence in obtaining or communicating the information. The liability is limited to loss suffered (1) by the person or one of a limited group of persons for whose benefit and guidance the actor intends to supply the information or knows that the recipient intends to supply it; and (2) through reliance upon the information in a transaction that the actor intends the information to influence or knows that the recipient so intends, or in a substantially similar transaction. However, the liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created in any of the transactions in which it is intended to protect them.
16. **Principal and Agent: Liability.** The rule that a principal is liable for the contracts of its agent applies even though the agent, in contracting, acts in his or her own interests and adversely to the principal, where the party with whom the agent contracts has no knowledge of the agent's dereliction and is not cognizant of any fact charging him or her with knowledge thereof.
17. **Breach of Contract: Pleadings: Proof.** In order to recover for breach of contract, a plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that actuate the defendant's duty.
18. **Contracts: Fraud: Election of Remedies.** A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies; he or she may either affirm the contract and sue for damages or disaffirm it and be reinstated to the position he or she was in before the contract was consummated.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for further proceedings.

Steven J. Olson and Brian J. Siebken, of Liakos & Olson, for appellant.

Bartholomew L. McLeay and Michael K. Bydalek, of Kutak Rock, for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

Through his operative petition, the plaintiff-appellant, Patrick B. Gibb, seeks, under a variety of theories, to recover damages resulting from the termite infestation of the house he purchased through an agent acting for the seller, the defendant-appellee, Citicorp Mortgage, Inc. After Citicorp successfully demurred, Gibb elected to stand on his pleading; the district court thereupon dismissed his action. Gibb then appealed to the Nebraska Court of Appeals, assigning the dismissal as error, claiming in effect that the district court erred in concluding he had failed to state a cause of action. We, on our own motion, removed the matter to this court in order to regulate the caseloads of the two appellate tribunals. We now reverse, and remand for further proceedings.

II. SCOPE OF REVIEW

Whether a petition states a cause of action is obviously a question of law. Regarding such a question, an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Bartunek v. Gentrup, ante* p. 18, 516 N.W.2d 253 (1994).

A statement of facts sufficient to constitute a cause of action means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. *Horton v. Ford Life Ins. Co., ante* p. 171, 578 N.W.2d 88 (1994); *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

In determining whether a cause of action has been stated, the petition is to be construed liberally; if as so construed it states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Id.*; *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). 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 facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Hitzemann v. Adam, ante* p. 201,

518 N.W.2d 102 (1994); *Hoiengs, supra.*

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader. *Horton, supra*; *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994).

III. FACTUAL ALLEGATIONS

According to the operative petition, Citicorp acquired the house through the foreclosure of a mortgage when the mortgagee abandoned the property because of extensive termite infestation and damage and defaulted on his mortgage obligation. Citicorp's selling agent had been informed through a report of a termite service that the property in question was infested with termites and appeared to have extensive damage. The service recommended that a qualified building inspector assess the damage. However, Citicorp chose to ignore the recommendation and instead hired the service to treat the termites and "[shore] up" the visible damage to the house.

Prior to the purchase, Citicorp's selling agent showed Gibb a single area where termite damage had occurred and assured Gibb that this was the only termite-damaged area and that all necessary repairs and treatments had been made to eliminate the termite problem.

Although neither the agent nor Citicorp made any effort to determine the full extent of the damage, the agent knew that the nonvisible termite damage had not been repaired and that it was much greater than the visible evidence indicated; nonetheless, the agent represented that the damage had been repaired and the termite problem alleviated. Citicorp knew the agent's representations to be false but failed to repudiate them; rather, Citicorp and the agent concealed and suppressed all evidence of termite damage, failed to disclose that the termite damage extended beyond those areas said to be repaired, and concealed and suppressed the fact that the additional " 'wood destroying insect inspection' " required by the purchase agreement to be made at Gibb's cost had not in fact been obtained. In point of fact, at the closing of the transaction, Citicorp provided Gibb

with a copy of a 5-month-old report prepared by the termite service after it had submitted its recommendation that the damage be assessed, which indicated that visible evidence of infestation was noted and proper control measures were performed.

The purchase agreement recited that the transaction was "based upon [Gibb's] personal inspection or investigation of the Property and not upon any representation or warranties of condition by [Citicorp] or [its] agent." The agreement further provided that the property was "sold strictly in 'AS IS' condition. [Citicorp] does not make any warranties regarding the condition of the property at the time of sale and thereafter."

Nonetheless, Gibb claims to have relied on the misrepresentations made to him and asserts he has suffered damage as a consequence.

IV. ANALYSIS

Gibb seeks recovery under any one of two fraud theories, a negligence theory, or a contract theory.

1. Fraud Theories

Gibb first avers he was deceived by the fraudulent misrepresentations and fraudulent concealment made by Citicorp through its agent.

(a) Fraudulent Misrepresentation

In order to maintain an action for fraudulent misrepresentation, the plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result. *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986).

Gibb has pled all the essential elements for recovery based on fraudulent misrepresentation. He has claimed that Citicorp's selling agent represented that the only termite damage was the visible damage and further represented that all the necessary

repairs and treatments had been made. Therefore, a representation was alleged. In addition, Gibb avers that the representation was false because the report from the termite service reveals extensive damage and recommends that a qualified building inspector assess the damage.

Moreover, it can reasonably be inferred that the representation was made with the intention that Gibb rely on it because it relates to a material fact, and Gibb asserts he did in fact rely on the misrepresentations and that he suffered damage as a consequence.

(b) Fraudulent Concealment

In order to maintain an action based on fraudulent concealment, the plaintiff must allege and prove the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result. *Nelson v. Cheney*, 224 Neb. 756, 401 N.W.2d 472 (1987).

Gibb's operative petition states sufficient facts to allege all the elements for recovery based on fraudulent concealment. He avers that Citicorp concealed or suppressed the fact that the termite damage was more extensive than the visible damage. In addition, by asserting that Citicorp's agent informed it of the termite service's initial report and recommendations, Gibb claims that Citicorp knew the extent of the damage.

Furthermore, Gibb alleges that the material facts regarding the termite damage were not within his diligent attention or observation because he was misled as to the true condition of the house.

Gibb also charges that Citicorp concealed the extent of the termite damage to intentionally mislead him as to the true condition of the house. In addition, the petition states that Gibb was misled and suffered damage as a result.

(c) Citicorp's Contentions

Notwithstanding that Gibb has pled all of the elements of those two bases of recovery, Citicorp asserts that where an agreement for the sale of real estate contains a disclaimer and an "as is" clause such as those present here, the seller should not be held liable for the fraudulent misrepresentations or concealments of its agent. Citicorp further urges that Gibb had as much access to the relevant information as did Citicorp.

(i) Effect of "As Is" and Disclaimer Clauses

In so arguing, Citicorp acknowledges that under our law, a principal may be liable for the fraudulent actions of its agent, *Corman v. Musselman*, 232 Neb. 159, 439 N.W.2d 781 (1989), but urges that we adopt the position of New York's highest court in *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 157 N.E.2d 597, 184 N.Y.S.2d 599 (1959). Therein, the New York Court of Appeals held that a purchaser had no cause of action against a seller for false representation when the contract for the purchase of a lease contained disclaimer, "as is," and merger clauses as follows:

> "The Purchaser has examined the premises agreed to be sold and is familiar with the physical condition thereof. The Seller has not made and does not make any representations as to the physical condition, rents, leases, *expenses, operation* or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the Purchaser hereby *expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises 'as is'* * * * It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, *and that the same is entered into after full investigation, neither party relying upon any statement or representation*, not embodied in this contract . . . ."

(Emphasis in original.) *Danann Realty Corp.*, 5 N.Y.2d at 320, 157 N.E.2d at 598, 184 N.Y.S.2d at 601.

The *Danann Realty Corp.* purchaser nonetheless claimed

that he had been induced to enter into a contract for the purchase of a lease by the sellers' false oral representations regarding the building's operating expenses. The purchaser sought to affirm the contract and recover damages for fraud.

The *Danann Realty Corp.* majority concluded that the specific disclaimer clause, in conjunction with the merger clause, declared that the parties did not rely on representations not embodied in the contract and thus prevented the purchaser from adducing parol evidence to establish otherwise, thereby destroying the purchaser's allegations of reliance.

However, on several occasions we have addressed whether a disclaimer clause within a contract will bar a purchaser's fraud-based claim. In *Schuster v. North American Hotel Co.*, 106 Neb. 672, 184 N.W. 136 (1921), *reh'g denied* 106 Neb. 679, 684, 186 N.W. 87, 89, we wrote:

> It is quite generally held that a provision in a contract, to the effect that the agent cannot bind the company by any representations, statements or agreements, will not relieve the principal from responsibility for the fraudulent representations, as to the subject-matter of the contract, made by the agent, since such representations are within the scope of the agent's actual or ostensible authority.

Although *Schuster* concerned the sale of stock, we applied the same principle to the sale of real estate. In *Menking v. Larson*, 112 Neb. 479, 199 N.W. 823 (1924), we held that a disclaimer clause in a contract for the purchase of real estate does not relieve the vendor or his agent from responsibility for the fraudulent representations made by the vendor's agent concerning the subject matter of the contract.

In *Menking*, the disclaimer clause was similar to the provision in the agreement now before us. There, the purchaser stated and agreed that " 'he has made personal inspection of the property covered by the within contract, and is buying it solely on his own investigations, and not on any representations made by any one else as to any material matter affecting said property, or his purchase thereof.' " *Id.* at 484, 199 N.W. at 825.

Considering whether such a provision barred the purchaser from maintaining any action for fraud or deceit, we reiterated:

> "A provision in such a contract, to the effect that the agent

> cannot bind the company by any representations, statements or agreements, will not relieve the principal from responsibility for the fraudulent representations, made by its agents, concerning the subject-matter of the contract . . . for a sales agent has ostensible authority to make representations as to the subject-matter of the sale, and his fraud, committed within the limits of such authority, will fix responsibility upon his principal."

Id.

More recently, in *Flakus v. Schug*, 213 Neb. 491, 494-95, 329 N.W.2d 859, 863 (1983), *overruled on other grounds, Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986), we emphasized:

> It is true that in discussing the elements of fraud we said a disclaimer clause is relevant in determining whether a claimant relied on a false representation disclaimed in the clause. We also said, however, that the disclaimer is ineffective to preclude the trier of fact from considering whether fraud induced formation of the bargain.

We have also concluded that an "as is" clause does not necessarily bar a purchaser's fraud-based claim, writing in *Wolford v. Freeman*, 150 Neb. 537, 547, 35 N.W.2d 98, 103 (1948), that " '[a] provision that the buyer takes the article in the condition in which it is, or in other words, "as is," does not prevent fraudulent representations relied on by the buyer from constituting fraud . . . .' "

Claiming fraud, the *Wolford* plaintiff sought to rescind a contract for the purchase of a house, which recited that he had " 'been advised as to settling of structure and is buying same as is.' " 150 Neb. at 546, 35 N.W.2d at 101. He asserted that the vendor's agent represented that the cracks in the foundation of the house had been repaired and that the damage had been corrected, so that the purchaser should have no fear of further cracking.

After the purchaser took possession, the cracks in the foundation became progressively worse and eventually appeared in the outer walls and the foundation. The purchaser learned that the house had been built on filled ground, in violation of the city building code, and asserted the vendor knew the house had been built on filled ground, rendering the

foundation faulty, yet had concealed those facts.

We determined that the purchaser was entitled to prevail unless the vendor was relieved by the "as is" clause. We then reasoned that while the clause disclosed the purchaser's knowledge of the cracking, it did not disclose or suggest the cause of that condition. We accordingly ruled that the clause did not bind the purchaser to buying a house with the undisclosed or concealed condition which caused the visible cracking. Thus, a clause that an article is taken in the condition in which it is, or in other words, "as is," is relevant in determining whether a claimant relied on a false representation concerning the condition of the article, but is not controlling.

In like fashion here, Gibb agreed to purchase a house with visible termite damage, which Citicorp's agent misrepresented as being the extent of the termite destruction. Like the purchaser in *Wolford*, Gibb was aware of the repair to the visible damage to the structure, but, according to his allegations, was unaware of the extent of the damage. Thus, just as the disclaimer does not necessarily prevent Gibb from stating causes of action for fraudulent misrepresentation or fraudulent concealment, neither does the "as is" clause, nor do the two clauses together prevent him from doing so. Under these circumstances, the question as to whether Gibb acted reasonably is one of fact.

(ii) Principal's Responsibility for Agent

Quoting a portion of another aspect of *Wolford*, Citicorp also contends, in effect, that as the house was sold with a disclaimer and an "as is" clause, Gibb necessarily knew that Citicorp's agent had no authority to make any representations.

In this connection Citicorp calls our attention to the following language in *Wolford*:

> " 'A principal who authorizes an agent to conduct a transaction for him, intending that the agent shall make representations to another in the course of it which the principal knows to be untrue, is liable for such misrepresentations . . . if, although he does not intend that the agent shall make misrepresentations, he should know that the agent will do so, the principal is liable . . . .' "

[Citation omitted.]

. . . .

"As between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud . . . ."

150 Neb. at 544-45, 35 N.W.2d at 102-03. However, Citicorp neglects to quote the remainder of that paragraph, which comments on when an agent's misrepresentations constitute actionable fraud:

"[W]here such facts are known by the vendor and he knows them to be not within reach of the reasonably diligent attention, observation and judgment of the purchaser, and they are such as would readily mislead the purchaser as to the true conditions of the property, the vendor is bound to disclose such facts."

150 Neb. at 545, 35 N.W.2d at 103. According to the operative petition, Citicorp and its agent knew of the extensive termite infestation and damage but elected to repair only the visible portion, and its agent represented that all the necessary repairs had been made and the problem had been eliminated. Under *Wolford*'s analysis, Citicorp had a duty to disclose such facts relating to the condition of the property regardless of whether it authorized its agent to make representations concerning the condition of the property.

Moreover, we have declared:

An agent, even though the contract which he presents contains a clause declaring that the company will not be bound by the representations that he may make, is known to be an agent sent out for the express purpose of making representations as an inducement to the sale . . . and the provision in the contract, therefore, is not considered as limiting the scope of his ostensible authority [and] the company is responsible . . . .

Schuster v. North American Hotel Co., 106 Neb. 672, 184 N.W. 136 (1921), *reh'g denied*, 106 Neb. 679, 684, 186 N.W. 87. 89.

Whether an act is within the scope of an agent's apparent

authority is to be determined as a question of fact from all the circumstances. *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986); *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983).

Consequently, Citicorp cannot escape liability for the fraudulent conduct of its agent on the sole basis that it included a disclaimer clause in the purchase agreement. What was said and whether the statements were within the agent's apparent authority are questions of fact.

(iii) Access to Information

Citing *Nelson v. Cheney*, 224 Neb. 756, 401 N.W.2d 472 (1987), Citicorp argues as well that as it had no contact with the termite service, it had no greater knowledge than Gibb concerning the termite damage, and thus, Citicorp cannot have any misrepresentation liability to Gibb. Once again, Citicorp's argument overlooks the posture of the case and the allegations of the operative petition.

Moreover, Citicorp's reading of *Nelson* is incorrect. The *Nelson* purchaser demanded that the vendors' agent obtain a termite inspection prior to closing. The agent explained that an exterminator already had conducted an inspection and that the agent had the termite-proofing guarantee. The sale closed, and the agent delivered the guarantee to the purchaser. The purchaser then discovered termite damage and brought an action against the vendors under the theories of false representation and fraudulent concealment. In upholding the dismissal of the false representation claim, we noted that the only representations alleged to have been made by the vendors regarding termites related to the existence of the termite-proofing guarantee. The guarantee only obligated the exterminator to return to the premises if reinfestation occurred within the guarantee period and to treat the premises for a fee. The purchaser failed to allege that the vendors or their agents made any representations concerning the condition of the premises, an essential element of the cause.

That is not the situation here; Gibb alleged specific misrepresentations regarding the extent of the termite damage and its repair. Citicorp may be liable for its agent's

misrepresentations if the fact proves to be that Gibb was justified in presuming that Citicorp's agent had the authority to make representations concerning the condition of the house.

> " ' "Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority. . . ." ' "

Draemel, 223 Neb. at 653, 392 N.W.2d at 764.

As to Gibb's fraudulent concealment claim, Citicorp further argues that nothing that it did or said regarding the property could be considered misleading, since the petition reveals that the termite service was an independent entity unassociated with Citicorp. Citicorp seems to argue that Gibb could have acquired the information regarding the extent and repair of the termite damage from the service if only he had asked. Citicorp urges that the material fact suppressed must not have been equally within the knowledge or reach of the purchaser for a purchaser to proceed with a fraudulent concealment claim. See *Nelson, supra*.

However, this argument ignores part of Gibb's claim. He alleges that Citicorp's agent misrepresented the condition of the premises. Gibb may argue that the information was not equally accessible to him due to the misrepresentations of Citicorp's agent, for we have written that " '[a]s between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud . . . .' " *Nelson*, 224 Neb. at 760, 401 N.W.2d at 475. Accord, *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985); *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983), *overruled on other grounds, Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986); *Dargue v. Chaput*, 166 Neb. 69, 88 N.W.2d 148 (1958); *Wolford v. Freeman*, 150 Neb. 537, 35 N.W.2d 98 (1948). In the instant case, Citicorp's agent is alleged

to have made representations that misled Gibb. Therefore, Citicorp may have had a duty to disclose facts regarding the condition of the premises to correct its agent's misrepresentations.

Moreover, the general rule is that one is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth. *Omaha Nat. Bank v. Manufacturers Life Ins. Co.*, 213 Neb. 873, 332 N.W.2d 196 (1983). While no action will lie where ordinary prudence would have prevented the deception, this rule is generally applied when the means of discovering the truth was in the hands of the party defrauded. *Id.* In the instant case, Gibb claims to have relied on the information provided by Citicorp's agent. Whether such reliance was reasonable when the purchase agreement contained a disclaimer is a question of fact.

Citicorp's contentions with respect to Gibb's fraud theories are without merit.

2. Negligence Theory

Gibb next asserts that Citicorp negligently misrepresented the situation, declaring that Citicorp, through its agent, failed to use reasonable care when he represented that the property was free of termites. Furthermore, Gibb charges that the representations by Citicorp's agent were false, that he relied upon the representations, and that as a result he suffered damage. And it can be inferred from the setting in which the transaction allegedly arose that both the agent and Citicorp had a pecuniary interest in it.

Without detailing the elements of the negligent misrepresentation cause, we, in *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991), citing *Bayer v. Lutheran Mut. Life Ins. Co.*, 184 Neb. 826, 172 N.W.2d 400 (1969), ruled that an insurance agent or broker may be held liable for a negligent misrepresentation made to an insured. *Bayer* held that a letter in which the insurer's agent misrepresented the amount of accumulated benefits bound the insurer. Subsequently, in the course of holding that an accountant may become liable to a third party for a negligently performed service to the

accountant's client, we, in *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993), noted the position of Restatement (Second) of Torts § 552 (1977) regarding negligent misrepresentation as a basis of liability.

Thereunder, liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information. *Id.*, § 552, comment *a*. Section 552 specifies at 126-27:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

The Restatement further observes that the liability for negligent misrepresentation is more restricted than for fraudulent misrepresentation, explaining that the reason for the narrower scope of liability fixed for negligent misrepresentation is the difference between the obligations of honesty and of care.

> Honesty requires only that the maker of a representation speak in good faith and without consciousness of a lack of any basis for belief in the truth or accuracy of what he

> says. . . . Any user of commercial information may reasonably expect the observance of this standard by a supplier of information to whom his use is reasonably foreseeable.
>
> On the other hand, it does not follow that every user of commercial information may hold every maker to a duty of care. Unlike the duty of honesty, the duty of care to be observed in supplying information for use in commercial transactions implies an undertaking to observe a relative standard, which may be defined only in terms of the use to which the information will be put, weighed against the magnitude and probability of loss that might attend that use if the information proves to be incorrect.

§ 552, comment *a*. at 128. Therefore, the difference between fraudulent misrepresentation and negligent misrepresentation is the duty required in each claim. In fraudulent misrepresentation, one becomes liable for breaching the general duty of good faith or honesty. However, in a claim of negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances.

As noted in *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 415, 507 N.W.2d at 280, "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."

While we have not heretofore specifically enumerated the elements of negligent misrepresentation, other jurisdictions have adopted the language of § 552 of the Restatement. See, *St. Joseph's H & M. Ctr. v. Reserve Life*, 154 Ariz. 303, 742 P.2d 804 (Ariz. App. 1986); *Pietramale v. Dugay*, 714 S.W.2d 281 (Tenn. 1986); *Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 197 Mont. 1, 640 P.2d 453 (1982); *Beeck v. Kapalis*, 302 N.W.2d 90 (Iowa 1981); *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969); *Springdale Gardens v. Countryland Dev., Inc.*, 638 S.W.2d 813 (Mo. App. 1982); *Merriman v. Smith*, 599 S.W.2d 548 (Tenn. App. 1979); *First State Sav. v. Albright & Assoc.*, 561 So. 2d 1326 (Fla. App. 1990), *disapproved on other grounds, Garden v. Frier*, 602 So. 2d 1273 (Fla. 1992);

Price-Orem Inv. v. Rollins, Brown & Gunnell, 713 P.2d 55 (Utah 1986).

We follow suit and now specifically adopt the definition of the negligent misrepresentation cause of action found in § 552, *supra*.

As we have established in part IV(1)(c)(ii) that a principal may be liable for the representations of its agent, it follows that Gibb's negligence theory does not fail merely because he alleges that Citicorp's liability arises from its agent's negligent misrepresentations.

The rule that a principal is liable for the contracts of its agent applies even though the agent, in contracting, acts in his or her own interests and adversely to the principal, where the party with whom the agent contracts has no knowledge of the agent's dereliction and is not cognizant of any fact charging him or her with knowledge thereof. The principal, having selected its representative and vested him or her with apparent authority, should be the loser in such case, and not the innocent party who relied thereon. *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986).

Other jurisdictions have recognized a purchaser's claim against a vendor based on the negligent misrepresentations of the vendor's agent. See, *John v. Robbins*, 764 F. Supp. 379 (M.D.N.C. 1991); *Silva v. Stevens*, 156 Vt. 94, 589 A.2d 852 (1991). In *John*, the purchasers brought an action against the vendors and their real estate broker, alleging that the vendors were directly liable for fraud and negligent misrepresentation, and vicariously liable for the fraudulent and negligent misrepresentation of their broker. On appeal, the reviewing court, noting that North Carolina had adopted the Restatement (Second) of Torts definition of negligent misrepresentation, determined that a material question of fact regarding the reasonableness of the purchasers' reliance precluded a grant of summary judgment in favor of the vendors on the purchasers' negligent misrepresentation claim.

In so ruling, the *John* court acknowledged that a purchaser could bring a claim against a vendor based on the negligent misrepresentations of its agent under the § 552 definition.

Silva also held that the vendor of a house is responsible for

the negligent misrepresentations made by an agent within the scope of the agent's authority.

Thus, as was the case with respect to Gibb's fraud theories, the reasonableness of Gibb's reliance on the agent's misrepresentations under these circumstances is a factual question.

3. Contract Theory

Lastly, Gibb asserts Citicorp breached the contract between the parties.

In order to recover for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that actuate the defendant's duty. *Department of Banking, Receiver v. Wilken*, 217 Neb. 796, 352 N.W.2d 145 (1984). Gibb alleged that pursuant to the purchase agreement, Citicorp was required to obtain a wood-destroying-insect inspection at his expense, that Citicorp failed to arrange the inspection but presented Gibb with an old inspection report, and that he was damaged.

Citicorp argues not that Gibb has failed to plead the necessary elements of a breach of contract, but that such a claim is inconsistent with his other theories of recovery. In support of its argument, Citicorp cites *Schuster v. North American Hotel Co.*, 106 Neb. 672, 184 N.W. 136 (1921), *reh'g denied* 106 Neb. 679, 682, 186 N.W. 87, 88:

> When fraudulent promises act as the inducement to the execution of a written contract, the remedy is for fraud, and not upon the oral promise as a contractual obligation, for the oral promise as an obligation has become merged in the written agreement and cannot, as such, legally be proved.

However, in the instant case, Gibb is not asking for the enforcement of any fraudulent promise. Regardless of any misrepresentations or concealments, Gibb charges that Citicorp failed to perform a term of the purchase agreement and claims damages as the result of that breach. We have ruled that a party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He or she may either affirm the contract and sue for damages or

disaffirm it and be reinstated to the position he or she was in before the contract was consummated. *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955).

Here, Gibb asserts four separate theories of recovery that are all based on the same cause of action, that is to say, on the same set of facts on which recovery may be had. See *Lewis v. Poduska*, 240 Neb. 312, 481 N.W.2d 898 (1992). For his fraud- and negligence-based theories, Gibb elected to affirm the contract and sue for damages instead of requesting rescission. Thus, Gibb does not, on the one hand, ask the court to disaffirm the contract in his fraud- and negligence-based claims and, on the other, ask the court to recognize the contract in his breach of contract claim. Since Gibb chose to affirm the contract, it is entirely consistent for him to also assert a claim based on breach of its terms. Therefore, all of Gibb's legal theories of recovery are consistent with each other.

V. JUDGMENT

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

NANCY STEINEKE, APPELLANT, V. SHARE HEALTH PLAN OF NEBRASKA, INC., APPELLEE.

518 N.W.2d 904

Filed July 15, 1994. No. S-92-1115.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **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.

3. **Expert Witnesses: Physicians and Surgeons.** Medical opinions must be based on reasonable medical certainty.
4. _____: _____. Medical testimony couched in terms of "possibility" is insufficient to support a causal relationship.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

James R. Welsh, of Bradford, Coenen, Ashford & Welsh, for appellant.

Leo A. Knowles and Ronald G. Fleming, of McGrath, North, Mullin & Kratz, P.C., for appellee.

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

FAHRNBRUCH, J.

Nancy Steineke appeals the order of the district court for Douglas County granting summary judgment in favor of Share Health Plan of Nebraska, Inc. (Share), in her breach of contract action against Share.

We affirm the order of the district court.

STANDARD OF REVIEW

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. *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994).

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. *Id.*

FACTS

Giving Steineke the benefit of all reasonable inferences deducible from the evidence, as we are required to do, the facts of this case are as follows:

Share, at all times material to this case, was a Nebraska corporation authorized to operate a health maintenance

organization pursuant to Neb. Rev. Stat. § 44-3201 et seq. (Reissue 1988) (§ 44-3201 et seq. has since been replaced by the Health Maintenance Organization Act, Neb. Rev. Stat. § 44-3292 et seq. (Cum. Supp. 1992)). Steineke, an employee of Douglas County, was entitled to health care services provided by Share as a result of an agreement between Share and Douglas County.

The evening of September 30, 1987, Steineke entered the emergency room at Archbishop Bergan Mercy Hospital (Bergan) complaining of left lower abdominal pain. Steineke was seen the following day, October 1, by Dr. Robert Luby, who informed her that she had an ectopic pregnancy. An ectopic pregnancy is one in which a fertilized ovum develops outside the uterine cavity. Dorland's Illustrated Medical Dictionary 1349 (27th ed. 1988). It was ultimately determined that Steineke's fetus had implanted in her left fallopian tube.

Dr. Luby, who was a non-Share physician at that time, advised Steineke that emergency surgery was required. Dr. Luby scheduled the surgery to be done at Bergan that same day by a Share physician. In the surgery contemplated by Dr. Luby, the physician would remove the fetus and tissue from Steineke's fallopian tube in an attempt to preserve the tube so that a microsurgical technique could be used at a later time to repair the tube. Steineke's other fallopian tube had been removed in 1983 due to a prior tubal pregnancy.

Before Steineke was taken to surgery, a representative of Share telephoned Steineke at Bergan and informed Steineke that it was necessary for her to be transferred to University of Nebraska Medical Center (UNMC), where her primary physician was located. Steineke was told that if she chose to remain at Bergan, she would be responsible for the cost of her care.

Steineke was then transferred to UNMC by ambulance. At UNMC, Steineke was informed that the physicians at that facility would be unable to save either the fetus or her fallopian tube because "that procedure" was not done at UNMC. The record fails to reflect any evidence that Dr. Luby, Steineke, or any Share representative was aware at the time Steineke was transferred to UNMC that physicians at UNMC would be

unable to perform a procedure to attempt to save Steineke's fallopian tube such as the procedure contemplated by the physicians at Bergan. Before signing a written consent for surgery at UNMC, Steineke was told that neither her fetus nor her remaining fallopian tube could be saved. Surgery was performed, rendering Steineke permanently unable to conceive and bear children.

On April 3, 1990, Steineke sued Share, alleging in her petition that Share breached its contract to provide medical services to Steineke by "refusing to authorize the medical services of Bergen [sic] to be covered for the emergency medical problems of [Steineke], when the defendant Share, knew or should have known, that such services to be rendered to the plaintiff, as an emergency were covered by the [health care plan] with Share." Steineke requested damages for mental and physical pain and suffering, both past and future, as well as damages "by reason of her inability to conceive and bear children in the future."

The trial court subsequently sustained a motion by Share for summary judgment

> for the reason that no genuine issue of fact exists with respect to the issue of causation, and there is no genuine issue of fact that any act or omission of the Defendant had any causal relation to the damages claimed by the Plaintiff, which damages, to the extent that they seek recompense for pain and suffering and/or emotional distress, are not recoverable in a breach of contract claim as a matter of law.

Steineke timely appealed from that order. We removed the case from the Nebraska Court of Appeals pursuant to our authority to regulate the workload of the appellate courts of this state.

ASSIGNMENT OF ERROR

Steineke's sole assignment of error on appeal is that the trial court erred in granting summary judgment for Share.

ANALYSIS

Steineke argues that because of Share's actions in overriding the judgment of her physician, Dr. Luby, she lost the chance to

keep her one remaining fallopian tube intact and thus lost the chance to conceive and bear children through the breach of some contractual duty on the part of Share.

Share argues that any alleged breach of contract on its part was not the proximate cause of Steineke's damages, because there is a lack of evidence that Steineke's remaining fallopian tube could have been saved had her surgery been done at Bergan. Share also argues that subsequent intervening acts by the physicians at UNMC were the cause of Steineke's damages.

As to Steineke's loss of chance arguments, she has cited no authority, nor have we discovered any, that Nebraska recognizes loss of chance as a cause of action or as an element of damages in either tort or contract cases. We decline to adopt the loss of chance doctrine in this case, and therefore we do not address Steineke's loss of chance arguments.

Because the loss of chance theory is inapplicable to our analysis of this case, we are instead guided by principles of contract law as to Share's argument that any alleged breach of contract on its part was not the proximate cause of Steineke's alleged damages.

> 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. In a breach of contract case 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, 497, 288 N.W.2d 467, 474 (1980).

As to whether Share's alleged breach of contract was the proximate cause of Steineke's alleged damages, the rule is that the party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that such movant is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994). After the movant has shown facts entitling it to

judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which, as a matter of law, prevents judgment for the movant. *Id.*

Share's evidence on the issue of proximate cause of Steineke's alleged damages was composed entirely of the deposition testimony of Dr. Luby entered into evidence by Share in support of its motion for summary judgment. Steineke joined in offering Dr. Luby's deposition, and offered no other expert evidence in opposition to Share's summary judgment motion.

Dr. Luby, Steineke's medical expert witness, testified in his deposition that in his opinion, there would have been a better chance of saving Steineke's fallopian tube had she remained at Bergan. However, Dr. Luby was unable to say with a reasonable degree of medical certainty whether Steineke's tube could have been saved.

Medical opinions must be based on reasonable medical certainty. *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983). Accord, *Edmonds v. IBP, inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992); *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988).

The only permissible inference from the evidence is that Steineke's fallopian tube *possibly* could have been saved had she remained at Bergan for surgery. Medical testimony couched in terms of "possibility" is insufficient to support a causal relationship. See, e.g., *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597 (1991); *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981). See, also, *Fuglsang v. Blue Cross*, 235 Neb. 552, 456 N.W.2d 281 (1990) (holding that a medical opinion which is rendered on a 50-50 basis is no more than speculation and conjecture and that an inference favorable to claimant which can be reached only on the basis of possibility or speculation is insufficient to support an award for claimant).

In the absence of a showing by Steineke to a reasonable medical certainty that her alleged damages were proximately caused by Share's alleged breach of contract, Steineke has failed in her burden to present evidence creating an issue of material fact in this matter. Share is therefore entitled to judgment as a matter of law, and the district court correctly sustained Share's

motion for summary judgment. This finding being dispositive of the appeal, it is not necessary for us to discuss any other issues raised by the parties.

CONCLUSION

Giving Steineke the benefit of all reasonable inferences deducible from the evidence, we find that there is no genuine issue of material fact and that Share is entitled to judgment as a matter of law. The order of the trial court sustaining Share's summary judgment motion is affirmed.

AFFIRMED.

WHITE, J., concurring.

The issue in this case is whether Steineke may recover damages representing the loss of her ability to conceive and bear children. I would recognize the loss of chance doctrine to the extent that it would allow recovery for the loss of the chance to conceive. I am, therefore, compelled to write separately from the majority opinion, and I concur only in its result.

The majority opinion necessarily recognizes loss of chance when the majority considers whether Steineke established a causal connection between appellee's breach and Steineke's alleged damages—the loss of the chance to conceive. To this extent, I respectfully contend that the opinion is inconsistent with its summary declaration that this jurisdiction will not recognize loss of chance as a cause of action or an element of damages in either contract or tort cases.

In this case, however, Steineke failed to present evidence raising a genuine issue of material fact that she had a chance to conceive and bear children. Specifically, Steineke could not establish to a reasonable degree of medical certainty that her fallopian tube could have been saved but for defendant's alleged breach. The inability to establish that the fallopian tube could have been saved eliminates Steineke's right to recover for the loss of the chance to conceive. In this respect I agree with the decision of the majority. If Steineke could have produced evidence of this element of her cause of action, I would hold that she should be allowed to recover for the loss of the chance to conceive.

WRIGHT, J., joins in this concurrence.

CAPORALE, J., dissenting.

In the first instance, I disagree with the majority's statement that this court has not recognized loss of chance as an element of damages in either tort or contract.

In *Washington v. American Community Stores Corp.*, 196 Neb. 624, 244 N.W.2d 286 (1976), a 24-year-old parole officer involved in a collision brought a personal injury action, claiming that his injuries prevented him from pursuing a wrestling career. While he had successfully competed in wrestling competitions at the high school and college levels and was characterized as a prime candidate for the U.S. Olympic team, there was no evidence that he would have been an Olympic wrestler or that he had been promised a job as a wrestling coach. This court nonetheless rejected the defendant's argument that the claim of damages was speculative and conjectural, as it rested on uncertain future possibilities and uncertain future happenings, and permitted the plaintiff to recover for the loss of earning capacity as a professional wrestler or coach.

Thus, it seems to me that wittingly or unwittingly, wisely or unwisely, this court has recognized loss of chance as an element of tort damages. Perhaps the majority opinion has, knowingly or otherwise, silently overruled *Washington*.

In any event, as I view it, this case does not turn on the loss of a chance to bear children. Share Health Plan of Nebraska, Inc., was obligated under its contract "to arrange to provide" Nancy Steineke "medical, surgical and hospital services and benefits," including "care for a Medical Emergency furnished by or under the order of a PLAN PHYSICIAN," which order could be "made retroactively if justified by the Medical Emergency." The contract defined medical emergency as

> the sudden onset of an illness or an accidental bodily injury subject to the following additional requirements.
>
> (a) The condition so treated must have required treatment of such immediate nature that the patient's life or health might have been jeopardized had he been taken to a PLAN PHYSICIAN.
>
> (b) The patient must have been in shock, or have been unconscious or incapable of rational, independent

judgment concerning the medical treatment or services rendered.

Steineke alleged that Share Health Plan breached its contract when its representative refused to authorize the medical services at Archbishop Bergan Mercy Hospital when Share Health Plan knew or should have known that such services were covered as a medical emergency. Furthermore, Steineke alleged that as a direct and proximate result, she sustained mental and physical pain and suffering and lost as well the ability to conceive and bear children in the future.

Although those allegations sound in contract, as the majority concludes, they also imply that Share Health Plan failed to act reasonably under the circumstances, thereby also stating a cause of action in tort. *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994) (negligent failure to fulfill common-law duty to perform agreed-upon activity with care, skill, reasonable expediency, and faithfulness may be a tort as well as breach of contract).

The record reveals that at the time of the ultrasonic examination at Bergan Mercy, there was no free fluid in Steineke's "perineal cavity." However, by the time surgery was performed at the University of Nebraska Medical Center, there was blood in her abdomen. In the opinion of Dr. Robert Luby, the "implantation side of [Steineke's fallopian] tube" started bleeding between the time of the ultrasonic test at Bergan Mercy and the surgery at the medical center.

At this point in the proceedings and under the present state of the record, it must be inferred that the bleeding might have jeopardized Steineke's health or life and thus brought her condition within the definition of a medical emergency. See *Barta v. Kindschuh, ante* p. 208, 518 N.W.2d 98 (1994) (on appellate review, party against whom summary judgment granted given benefit of all reasonable inferences deducible from evidence).

While it appears that the majority takes some comfort from the fact that Steineke consented to the surgery performed at the medical center, the fact is that whatever import the consent form she signed might have as between the medical center and her, it has none as between Share Health Plan and her. Thus,

under the circumstances, I would hold Share Health Plan liable for all the consequences of its inappropriate insistence that Steineke be transferred to the medical center, including tort damages.

In *Wickline v. State*, 192 Cal. App. 3d 1630, 228 Cal. Rptr. 661 (1986), *republished* 239 Cal. Rptr. 810, a Medi-Cal recipient sued the State of California for negligent discontinuance of her Medi-Cal eligibility. The plaintiff's physician sought to extend her hospitalization to 8 days. However, a Medi-Cal utilization reviewer authorized only 4 days. Upon returning home, the plaintiff suffered complications that later required amputation of her leg. Although the state was not held liable due to the physician's failure to file another request for extension of hospital stay, the court left the door open for claims against third-party payors who make medically inappropriate decisions.

> The patient who requires treatment and who is harmed when care which should have been provided is not provided should recover for the injuries suffered from all those responsible for the deprivation of such care, including, when appropriate, health care payors. Third party payors of health care services can be held legally accountable when medically inappropriate decisions result from defects in the design or implementation of cost containment mechanisms . . . .

Wickline, 192 Cal. App. 3d at 1645, 239 Cal. Rptr. at 819.

Private third-party payors are potentially liable as well. In *Wilson v. Blue Cross of Southern Cal.*, 222 Cal. App. 3d 660, 271 Cal. Rptr. 876 (1990), a private insurer refused to authorize hospitalization for a patient suffering from depression, chemical dependency, and anorexia. The patient subsequently committed suicide. The California Court of Appeal reversed the trial court's summary judgment in favor of the defendants and held that there was substantial evidence that the insurer's decision not to approve hospitalization was a substantial factor in bringing about the patient's demise.

Accordingly, I would reverse the judgment of the district court and remand the cause for further proceedings.

LANPHIER, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. SCHUYLER DAWN, APPELLANT.

519 N.W.2d 249

Filed July 15, 1994. No. S-93-396.

1. **Pretrial Procedure: Prosecuting Attorneys: Witnesses.** Neb. Rev. Stat. § 29-1912(4) (Reissue 1989) provides that whenever a prosecuting attorney believes that the granting of an order under the provisions of this section will result in the possibility of bodily harm to witnesses or that witnesses will be coerced, the court may permit him or her to make such a showing in the form of a written statement to be inspected by the court alone.
2. **Criminal Law: Attorneys at Law: Appeal and Error.** Attorneys of record of the respective parties in the court below shall be deemed the attorneys of the same parties in an appellate court, until a withdrawal of appearance has been filed. Counsel in any criminal case pending in an appellate court may withdraw only after obtaining permission of the appellate court.
3. **Right to Counsel: Appeal and Error.** When an indigent defendant is deprived of his constitutional right to counsel by not being furnished an attorney to present his direct appeal to an appellate court, the defendant is not afforded an effective appeal, and the decision thereon is deemed a nullity.
4. **Right to Counsel: Courts: Appeal and Error.** After a defendant has perfected his or her direct appeal to an appellate court, if the defendant is without counsel, the appellate court, in its supervisory capacity and through its inherent power to do those things reasonably necessary for the administration of justice, may enter an order directing the trial court to appoint counsel to represent that defendant on direct appeal if the defendant asks that counsel be appointed and the defendant satisfactorily shows by affidavit to the district court that he or she is indigent.
5. **Prisoners: Probation and Parole: Evidence.** A person placed on probation, an inmate of any jail, or an inmate who has been released on parole, probation, or work release is prohibited from acting as an undercover agent or employee of any law enforcement agency of the state, and any evidence derived in violation of this rule is not admissible against any person in any proceeding whatsoever.
6. **Constitutional Law: Effectiveness of Counsel: Proof.** To state a claim of ineffective assistance of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, and thereby obtain reversal of a conviction, a defendant must show that his or her counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
7. **Pleas: Effectiveness of Counsel: Proof.** When a defendant has entered a guilty plea, counsel's deficient performance constitutes prejudice if the defendant shows with a reasonable probability that but for counsel's errors, the defendant would have insisted on going to trial rather than pleading guilty.
8. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at

the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.

9. **Due Process: Prosecuting Attorneys: Evidence.** Irrespective of the good or bad faith of the prosecution, its suppression of evidence favorable to an accused violates due process if the evidence is material to either guilt or punishment.
10. **Constitutional Law: Prosecuting Attorneys: Evidence.** If the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty arises even if no request is made. In such situations, if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.
11. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
12. **Pretrial Procedure: Prosecuting Attorneys: Evidence.** In the typical case where a defendant makes only a general request for exculpatory material, it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final.
13. **Appeal and Error.** 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.
14. **Convictions: Bail Bond.** Once a defendant has been convicted of the felony charged, he is not entitled to be released on bail; such determination is left to the discretion of the trial court, which may prescribe the amount of the bond and the conditions thereof if one is set.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Box Butte County, BRIAN SILVERMAN, Judge. Judgment of Court of Appeals affirmed.

Dean S. Forney, Box Butte County Public Defender, for appellant.

Schuyler Dawn, pro se.

Don Stenberg, Attorney General, Delores Coe-Barbee, and J. Kirk Brown for appellee.

Dennis R. Keefe, Lancaster County Public Defender, Michael D. Gooch, and Julie B. Hansen for amicus curiae Nebraska Criminal Defense Attorneys Association.

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

FAHRNBRUCH, J.

Further review of Schuyler Dawn's appeal of his conviction for distribution of a controlled substance has been granted to remedy the failure of the lower courts to appoint counsel for Dawn's direct appeal and to address his claims that in the trial court (1) he received ineffective assistance of counsel, (2) the prosecutor failed to disclose information material to his defense, and (3) the trial court abused its discretion in setting his appeal bond.

The Nebraska Court of Appeals affirmed Dawn's conviction on direct appeal even though Dawn had not been afforded his constitutional right to counsel during his appeal. That affirmation is a nullity.

After appointing counsel for Dawn for his appeal to this court, after receiving briefs from the parties, after hearing arguments, and after our own review of Dawn's remaining assignments of error, we affirm Dawn's conviction.

FACTS

Dawn was charged by information with (1) criminal conspiracy, (2) two counts of distribution of a controlled substance, and (3) being a habitual criminal.

After Dawn's arraignment on an information in the district court for Box Butte County, his trial counsel filed a motion for discovery. Dawn asked, inter alia, for any "[r]eports prepared or statements given, either orally or in writing, by any law enforcement officers or any agent of the state . . . who participated in any way in the investigation or surveillance of the defendant at any time."

In connection with that motion, the State, pursuant to Neb. Rev. Stat. § 29-1912(4) (Reissue 1989), filed a confidential affidavit with the court. Section 29-1912(4) provides:

> Whenever the prosecuting attorney believes that the granting of an order under the provisions of this section will result in the possibility of bodily harm to witnesses or that witnesses will be coerced, the court may permit him or her to make such a showing in the form of a written statement to be inspected by the court alone.

In an affidavit filed in Dawn's case, a police official stated

that police investigatory reports contained information about a confidential informant who was not endorsed as a State's witness and a coconspirator who, at that time, was a fugitive. The official also stated his belief that Dawn might harm or coerce witnesses in this case. The official stated that in the past, he and other officers had received complaints from citizens that Dawn had threatened or physically harmed them. In cases police investigated, "it has been impossible to gather enough evidence to prosecute Schuyler for the offenses complained of because witnesses refuse to cooperate and testify against Schuyler Dawn." The official listed specific instances, some of which he observed and others which were reported to him, which led him to believe that Dawn "is a violent person capable of causing serious injury or death to a person who is a witness against him." The district court overruled Dawn's motion to produce the requested police reports.

Dawn's trial counsel later filed a motion to depose the informant used by law enforcement officers to apprehend Dawn. At the hearing on that motion, Dawn's trial counsel identified a person who he thought was the informant. The State would not verify that identification. The district court advised Dawn's trial counsel to contact the individual he identified and, if he refused to talk to Dawn's trial counsel, to issue a subpoena for the individual to testify at trial. The district court denied Dawn's trial counsel's motion to depose the alleged informant.

Dawn has not assigned as error the district court's overruling of his motion for discovery of the police reports or his motion to depose the State's informant.

On March 1, 1993, Dawn pled guilty to one count of distributing a controlled substance on January 24, 1992. In exchange for the plea, the State agreed to dismiss the other charges.

At the guilty plea hearing on March 1, the State recited the following facts upon which the charge was founded: On January 18, 1992, an individual involved in drug trafficking in western Nebraska (the confidential informant) went with an undercover law enforcement officer to a bar in Alliance and introduced the officer to Dawn. The three discussed whether

cocaine was available. Eventually, the officer saw Dawn meet and make an exchange with a fourth man behind the bar. Dawn then delivered cocaine to the officer, and the officer paid Dawn for it.

On January 22, the same confidential informant and officer met Dawn at his house. On that night, Dawn said he was again looking for cocaine. Dawn met with the same man he had met behind the bar, but was told that cocaine could not be obtained on such short notice.

On January 24, the officer met Dawn at a bar and observed him meet again with the man who had previously been involved in the cocaine deliveries to the officer. Immediately after that, Dawn placed a Kool cigarette package containing cocaine in the officer's hand, and the officer paid for it. It is not entirely clear from the prosecutor's recitation of facts at the plea hearing as to when the informant was present, if at all, during the controlled drug buy from Dawn on January 24. However, the police reports indicate that the confidential informant was present during the drug buy. Those reports are part of Dawn's presentence investigation report and were made available to Dawn's counsel prior to sentencing. At the sentencing hearing, Dawn's counsel advised the court that he had "gone over" the report with his client.

The prosecutor further stated at the plea hearing that both the officer and informant were wearing body microphones and that tapes of the conversations between the officer, the informant, and Dawn would have been introduced as evidence, together with corroboration from other officers who witnessed Dawn's activities on the days in question.

On April 13, 1993, after considering Dawn's presentence investigation report, the trial judge sentenced Dawn to not less than 5 nor more than 20 years' imprisonment.

Although Dawn's trial counsel had not filed a motion to withdraw as counsel at this point, Dawn proceeded pro se and timely filed a notice of appeal, a motion for permission to proceed in forma pauperis, a poverty affidavit, and a motion for appointment of counsel. All of these documents were filed at the same time on May 12 in the district court for Box Butte County. Dawn subsequently filed a motion for an appeal bond.

The district court sustained Dawn's motion to proceed in forma pauperis, appointed the public defender to represent Dawn on appeal, and set an appeal bond at $50,000 cash. Dawn filed a motion for reduction of the appeal bond, which the district court denied.

The prosecutor then filed a motion to set aside the court's order appointing the public defender as Dawn's counsel on appeal. No notice was given to Dawn of the motion or that it was set for hearing, although apparently notice was sent to Dawn's trial counsel and court-appointed public defender. Present at the hearing on this motion were the prosecutor, the judge, and Dawn's court-appointed public defender who had no objection to the motion to set aside his appointment. The district court granted the prosecutor's motion to set aside the appointment of the public defender on the ground that the court was without jurisdiction to enter the order after Dawn's appeal had been perfected to the Court of Appeals.

Dawn then filed several motions for appointment of counsel alternately in the Court of Appeals and district court, with each court determining that it had no jurisdiction to appoint counsel. By memorandum entry on February 9, 1994, the Court of Appeals affirmed Dawn's conviction. The entry stated, "Appeal considered and no need is present for a detailed opinion. See State v. Dixon, 237 Neb. 630, 467 N.W.2d 397 (1991). Conviction affirmed."

Dawn filed a petition for further review by the Supreme Court. The State joined in seeking further review. Upon consideration of Dawn's petition, we granted further review, appointed counsel to represent Dawn in this court, and granted leave for Dawn and the State to file briefs.

On May 12, 1994, Dawn's trial counsel, stating that he had not been retained or appointed to represent Dawn on appeal and that he had no involvement or connection with Dawn's appeal, belatedly filed a motion to withdraw as counsel. The Nebraska Criminal Defense Attorneys Association (NCDAA) filed a brief amicus curiae in support of Dawn's arguments regarding the failure of the lower courts to appoint counsel for Dawn on direct appeal. The only issue commented upon by NCDAA is that the district court and Court of Appeals erred in

not appointing Dawn counsel on direct appeal in violation of his rights under the U.S. and Nebraska Constitutions.

ASSIGNMENTS OF ERROR

Summarized and restated, Dawn assigns as error that (1) the Court of Appeals erred in refusing to appoint him counsel on direct appeal, (2) he received ineffective assistance of counsel because his trial counsel failed to investigate the State's use of a county jail inmate as an undercover agent and because trial counsel failed to file a motion to suppress all evidence derived from that informant, (3) his right to due process was violated by prosecutorial misconduct because the prosecutor failed to disclose that the State used an inmate as an undercover agent to apprehend Dawn, and (4) the district court abused its discretion by setting a $50,000 appeal bond for an indigent defendant.

ANALYSIS

APPOINTMENT OF COUNSEL

The rules of practice and procedure for the Nebraska Supreme Court and Court of Appeals provide in substance that the attorneys of record of the respective parties in the court below shall be deemed the attorneys of the same parties in an appellate court, *until a withdrawal of appearance has been filed. Counsel in any criminal case pending in this court may withdraw only after obtaining permission of the appellate court*. See Neb. Ct. R. of Prac. 1F(1) (rev. 1993).

Dawn's trial counsel filed a motion to withdraw as counsel on May 12, 1994, after this court appointed counsel for Dawn on his petition for further review of his case here. We granted trial counsel's motion to withdraw, but take this opportunity to remind trial attorneys of the foregoing court rule and their duty to fulfill their responsibilities to clients on appeal.

In this case, Dawn's trial counsel violated the foregoing rule by purporting to withdraw from Dawn's criminal case without filing a motion to withdraw and without obtaining permission from the Court of Appeals after Dawn perfected his appeal to that court.

Dawn's right to counsel on direct appeal was, therefore, violated when he was forced to proceed with his direct appeal

pro se. It is beyond dispute that upon showing that he was an indigent and upon his request for counsel, Dawn had the right to appointed counsel for his direct appeal. See, *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). When an indigent defendant is deprived of his constitutional right to counsel by not being furnished an attorney to present his direct appeal to an appellate court, the defendant is not afforded an effective appeal, and the decision thereon is deemed a nullity. See *State v. Blunt*, 197 Neb. 82, 246 N.W.2d 727 (1976).

We have remedied this defect in this case by granting Dawn's petition for further review and, through our inherent power to do those things reasonably necessary for the administration of justice in the exercise of our jurisdiction, by appointing counsel to represent Dawn on appeal to this court. See *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975).

Nevertheless, the question remains unresolved as to which level of the judicial branch has jurisdiction to appoint counsel for an indigent defendant in circumstances similar to Dawn's. Because this situation affects the public interest and is capable of repetition, yet evading review, we now resolve that question. See *Williams v. Hjorth*, 230 Neb. 97, 430 N.W.2d 52 (1988).

Without representation from his trial counsel and upon filing his notice of appeal, Dawn became trapped in a procedural Catch-22. When Dawn sought appointment of counsel from the district court, that court denied his motion based on the rule that upon perfection of an appeal to an appellate court, the district court loses jurisdiction. See *Zeeb v. Delicious Foods*, 231 Neb. 358, 436 N.W.2d 190 (1989). When Dawn sought appointment of counsel from the Court of Appeals, that court followed the usual appellate court practice of overruling such motions without prejudice to refile the request for counsel in the district court.

Because the district court has explicit statutory authority under Neb. Rev. Stat. § 29-3901 et seq. (Cum. Supp. 1992) to appoint counsel for indigent defendants, our appellate courts have in the past followed the practice that the Court of Appeals employed in this case. We now modify that practice and hold

that after a defendant has perfected his or her direct appeal to an appellate court, if the defendant is without counsel, the appellate court, in its supervisory capacity and through its inherent power to do those things reasonably necessary for the administration of justice, may enter an order directing the trial court to appoint counsel to represent that defendant on direct appeal if the defendant asks that counsel be appointed and the defendant satisfactorily shows by affidavit to the district court that he or she is indigent. See *Kovarik, supra.*

We now turn to Dawn's remaining assignments of error.

INEFFECTIVE ASSISTANCE OF COUNSEL

Dawn argues that his trial counsel failed to investigate whether the State, in violation of Neb. Rev. Stat. § 29-2262.01 (Reissue 1989), used an inmate as an undercover agent or employee of the state. We note that there is nothing in the record or presentence investigation showing that the State violated § 29-2262.01. That section provides, in substance, that a person placed on probation, an inmate of any jail, or an inmate who has been released on parole, probation, or work release is prohibited from acting as an undercover agent or employee of any law enforcement agency of the state and that any evidence derived in violation of this rule is not admissible against any person in any proceeding whatsoever.

Dawn argues that if his trial counsel had conducted an investigation, he would have discovered that the State's informant was a jail inmate at the time he was used in the State's investigation and apprehension of Dawn and that all evidence derived from the informant could have been suppressed. Dawn further argues that his guilty plea was not voluntary because, if his trial counsel had moved to suppress the evidence under § 29-2262.01, he would not have pled guilty, but would have insisted on going to trial.

To state a claim of ineffective assistance of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a conviction, a defendant must show that his or her counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a

reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Lindsay, ante* p. 101, 517 N.W.2d 102 (1994); *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991).

When a defendant has entered a guilty plea, counsel's deficient performance constitutes prejudice if the defendant shows with a reasonable probability that but for counsel's errors, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993).

We first note that Dawn did not raise his claim of ineffective assistance of counsel at the trial court level. Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). When the issue has not been raised or ruled on at the trial court level *and the matter necessitates an evidentiary hearing*, an appellate court will not address the matter on direct appeal. See, *State v. Morley, supra*; *State v. Dixon*, 223 Neb. 316, 389 N.W.2d 307 (1986).

The record before this court is insufficient to adequately review the question. The record fails to disclose what Dawn's trial counsel did or did not do to investigate the possibility that the State's informant was on probation, a jail inmate, or an inmate released on parole, probation, or work release at the time he was used in the investigation and arrest of Dawn.

The record does show that Dawn's trial counsel filed a motion for discovery of any reports of the police or agents of the State who participated in the investigation of Dawn and that he later filed a motion to depose the State's informant. The record does not disclose that Dawn's trial counsel filed these motions because he was seeking information as to the informant's status as a jail inmate.

When Dawn's trial counsel sought to depose the State's informant, the district court suggested that he interview the individual he thought was the informant and, if that individual refused to talk, issue him a subpoena to testify at trial. The record does not disclose whether Dawn's trial counsel

interviewed that individual. Nor does the record show whether Dawn's trial counsel pursued any other investigation of the informant or the informant's possible status as a jail inmate. The record is silent as to whether Dawn's trial counsel interviewed or attempted to take the deposition of the principal undercover law enforcement officer to determine whether his confidential informant was in jail, on probation, on parole, or on work release when he assisted the officer in receiving a delivery of cocaine from Dawn. Therefore, we are unable to review Dawn's claim that his trial counsel's performance was deficient.

Even if we could determine whether Dawn's trial counsel's performance was deficient, the record contains no information showing that Dawn was prejudiced by his counsel's failure to investigate the informant's status as set forth in § 29-2262.01. The record does not show that the state's confidential informant was on probation, a jail inmate, or an inmate released on parole, probation, or work release *at the time the confidential informant was used in the State's investigation and apprehension of Dawn*. Nor does the record disclose what basis, if any, Dawn has for suspecting that the informant was used in violation of § 29-2262.01 at that time.

During the hearing on Dawn's motion to depose the State's confidential informant, the prosecutor stated that the person Dawn alleged to be the informant was in jail *at the time of the hearing*. In his brief to this court, Dawn highlights this statement. However, that hearing was held more than a year after Dawn's arrest. Evidence that the alleged informant was in jail at that time provides no basis for determining that the confidential informant was on probation, a jail inmate, or an inmate released on parole, probation, or work release at the time of his involvement around the time Dawn was alleged to have committed the crimes referred to in this case.

Without such evidence in the record, we cannot determine with reasonable probability whether any failure of Dawn's trial counsel to investigate the matter prejudiced Dawn such that, but for his counsel's alleged failure to investigate, Dawn would have insisted on going to trial rather than pleading guilty.

We find that the record in this case is insufficient to

adequately review on direct appeal Dawn's claim of ineffective assistance of counsel at the trial level. Because the issue was not raised or ruled on by the trial court and the matter necessitates an evidentiary hearing, we will not address the matter further on direct appeal.

PROSECUTORIAL MISCONDUCT

Dawn also argues that his due process rights were violated because the prosecutor failed to disclose that the State's informant was a jail inmate at the time of the investigation.

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the U.S. Supreme Court held that irrespective of the good or bad faith of the prosecution, its suppression of evidence favorable to an accused violates due process if the evidence is material to either guilt or punishment. See *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

Dawn did not make a specific request for information regarding the status of the State's confidential informant at the time of the crime with which Dawn was convicted, nor did he request *Brady* material in general. Nevertheless, the U.S. Supreme Court has stated that if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty arises even if no request is made. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). In such situations, if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. *Id.*

Section 29-2262.01 prohibits law enforcement agencies from using as undercover agents persons on probation, inmates of any jail, or inmates released on parole, probation, or work release. In this case, the State used an informant to introduce an undercover officer to Dawn for the purpose of making controlled drug purchases. In addition, the informant wore a microphone during these encounters to obtain evidence for use against Dawn.

Assuming, without deciding, that the State's use of this informant violated § 29-2262.01, any evidence derived from that informant would be inadmissible. Therefore, evidence that the State violated § 29-2262.01 would constitute evidence

material to Dawn's guilt or innocence because most, if not all, of the State's evidence against Dawn apparently was derived from the State's use of its confidential informant. Dawn, however, never raised this issue at the trial court level. In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994).

The record before this court shows that Dawn apparently attempted to discover the identity of the informant, first through a motion to obtain police reports and then through a motion to depose the informant. The record fails to show that Dawn filed these motions because he was seeking information as to the informant's status as a jail inmate, probationer, parolee, or an inmate on work release or information of the prosecutor's failure to disclose such information. The record fails to reflect that Dawn presented the issue for disposition to the trial court or that Dawn even suggested that he suspected the prosecutor had failed to disclose information in violation of *Brady*.

Our rule precluding appellate courts from reviewing issues not raised at the trial court level is consistent with the usual duties of the prosecutor, defense counsel, and court with regard to *Brady* material. The U.S. Supreme Court has stated that in the typical case where a defendant makes only a general request for exculpatory material under *Brady*, it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld *and brings it to the court's attention*, the prosecutor's decision on disclosure is final. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

Because Dawn never presented the issue to the trial court, we must disregard this issue in the absence of plain error. 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. See *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994). In this case, the record contains nothing to show that the prosecutor failed

to disclose that the State used an informant in violation of § 29-2262.01. As stated in our discussion of Dawn's ineffectiveness of counsel claim, the record fails to disclose any evidence that the State's informant was on probation, a jail inmate, or an inmate released on parole, probation, or work release at the time he was used in the State's investigation and apprehension of Dawn. Without such evidence in the record, we cannot find plain error on the record to support a finding that the prosecutor failed to disclose material information in violation of *Brady*.

APPEAL BOND

Dawn argues that the district court abused its discretion by setting an appeal bond in the amount of $50,000 cash for an indigent. Once a defendant has been convicted of the felony charged, he is not entitled to be released on bail; such determination is left to the discretion of the trial court, which may prescribe the amount of the bond and the conditions thereof if one is set. See, Neb. Rev. Stat. § 29-2303 (Reissue 1989); *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982).

Dawn was convicted of a Class III felony, which carries a penalty of up to 20 years' imprisonment, a $25,000 fine, or both. See Neb. Rev. Stat. §§ 28-416 (Cum. Supp. 1992) and 28-105 (Reissue 1989). In addition, the record shows that in two prior cases, Dawn had failed to appear after being released on bail in each case. Under these circumstances, we find no abuse of discretion in the district court's decision to set the appeal bond at $50,000 cash.

CONCLUSION

Until this court appointed counsel for Dawn, he was denied his constitutional right to counsel on direct appeal. We hold that after a defendant has perfected his or her direct appeal to an appellate court, if the defendant is without counsel, the appellate court, in its supervisory capacity and through its inherent power to do those things reasonably necessary for the administration of justice, may enter an order directing the trial court to appoint counsel to represent that defendant on appeal if the defendant asks that counsel be appointed and the

defendant satisfactorily shows by affidavit to the district court that he or she is indigent.

We further find that the record in Dawn's case is inadequate to review on direct appeal his claim of ineffectiveness of counsel. Because he failed to present the issue of prosecutorial misconduct to the trial court and because the record is insufficient to support a finding of plain error on this issue, we also are unable to find that the prosecutor violated Dawn's due process rights by failing to disclose material information. Finally, we find no abuse of discretion in the district court's decision to set Dawn's appeal bond at $50,000 cash. Therefore, the trial court's judgment is in all respects affirmed.

AFFIRMED.

DANIEL HENRY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF, V. DAWN E. ROCKEY, TREASURER OF THE STATE OF NEBRASKA, ET AL., DEFENDANTS.

518 N.W.2d 658

Filed July 15, 1994. No. S-93-828.

1. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
2. _____: _____: _____. The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Claims: Legislature.** As to claims approved by the State Claims Board in excess of $10,000, the Legislature has two affirmative duties: (1) to review the claim and (2) to make an appropriation for the claim if appropriate.
4. **Constitutional Law: Statutes: Special Legislation.** A legislative act violates Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class.
5. **Statutes: Special Legislation.** The test for statutes challenged under the special-laws prohibitions is that they must bear a reasonable and substantial relation to the object sought to be accomplished by the legislation.
6. **Equity.** Equity follows the law.
7. **Legislature.** The Legislature is not vested with unlimited power to make appropriations.

8. _____. The purpose of an appropriation bill is to make provision for lawfully taking money out of the state treasury.
9. _____. The Legislature is empowered to make appropriations to meet the legal obligations of the state.
10. _____. The Legislature is not empowered to make appropriations for purely charitable purposes.
11. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute, or where the uniform course of procedure has been to allow such a recovery.

Original action. Judgment for plaintiff.

Paula B. Hutchinson and, on brief, David Edward Cygan, for plaintiff.

Don Stenberg, Attorney General, and Lisa D. Martin-Price for defendants.

John W. DeCamp, of DeCamp Legal Services, P.C., for amicus curiae Commonwealth State Securities American Savings Litigation Committee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., HANNON, Judge, and BLUE, District Judge.

PER CURIAM.

This is an original class action wherein Daniel Henry, a Nebraska resident taxpayer, challenges the constitutionality of 1993 Neb. Laws, L.B. 657. In that law, the Legislature appropriated a total of $16.5 million over 4 bienniums to reimburse depositors of the failed Commonwealth Savings Company, State Security Savings Company, and American Savings Company (hereinafter, collectively, Commonwealth creditors).

We find L.B. 657 to be unconstitutional special legislation in violation of Neb. Const. art. III, § 18.

FACTS

The following facts have been stipulated by the parties:

On November 1, 1983, the Nebraska Department of Banking and Finance closed Commonwealth Savings Company and placed it in receivership. The district court for Lancaster County appointed the Department of Banking and Finance as receiver. Two other industrial loan and investment companies,

State Security Savings Company and American Savings Company, have sought protection under the Bankruptcy Code but have not been placed into receivership as of the date of a stipulation of facts filed by the parties in this case.

Deposits in the three failed industrial loan companies were insured by the Nebraska Depository Institution Guaranty Corporation (NDIGC), created pursuant to the Nebraska Depository Institution Guaranty Act, Neb. Rev. Stat. § 21-17,127 et seq. (Reissue 1991). This act has not been repealed.

On January 4, 1985, the NDIGC surrendered all of its assets to the Commonwealth receiver, and thereafter had no assets to fulfill its guarantees of deposits. Various types of claims and lawsuits then ensued on behalf of the Commonwealth creditors. Eventually, a compromise amount of $8.5 million was approved for payment of a tort claim of the Commonwealth creditors against the State, and the Legislature appropriated that amount for payment to the Commonwealth receivership. The amount was paid in September 1985.

In return for the payment, both the district court for Lancaster County and the Legislature required the Commonwealth receiver to execute a release of "any and all claims and causes of action on behalf of the receivership and Commonwealth's depositors and creditors which they might have to that point against the State or the State's officers and employees arising out of the Commonwealth collapse, the regulation of Commonwealth and the NDIGC."

In 1990, the Legislature appropriated an additional $33.8 million for Commonwealth depositors. That appropriation was declared unconstitutional. See *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

On January 25, 1991, the Commonwealth creditors filed a claim with the Office of Risk Management under Nebraska's State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987 & Cum. Supp. 1990). On August 13, 1992, the claimants filed a letter requesting that the previously filed tort claim in the amount of $100,902,500 be converted into a miscellaneous claim, which then became claim No. 91-310, under the State Miscellaneous Claims Act, Neb. Rev. Stat.

§ 81-8,294 et seq. (Cum. Supp. 1992).

On November 16, 1992, the State Claims Board approved the claim in the amount of $16.5 million and forwarded its decision to the Legislature for review and appropriation of funds. The Ninety-third Legislature, First Session, enacted L.B. 657 for payment of miscellaneous items of indebtedness in claim No. 91-310. L.B. 657 appropriated (1) $11,100 from the General Fund for "FY1993-94," (2) $11,100 from the General Fund for "FY1994-95," and (3) an additional $16,477,800 from the General Fund, to be disbursed in equal amounts over the following 3 bienniums if the act is challenged in court and upheld as constitutional. L.B. 657 was approved by the Governor on June 7, 1993, and had an operative date of July 1.

On August 23, 1993, Daniel Henry, individually and on behalf of all others similarly situated, filed in this court an "Application for Leave to Commence an Original Action" pursuant to Neb. Const. art. V, § 2. Plaintiff's application was sustained on September 22. Upon application of plaintiff, this court issued a temporary restraining order on October 7 prohibiting the disbursement of funds appropriated pursuant to L.B. 657 until further order of the court.

In his "Original Verified Petition for Declaratory and Injunctive Relief," plaintiff challenges the constitutionality of L.B. 657, requests permanent injunctive relief, and requests an award of attorney fees and costs. Dawn E. Rockey, Treasurer of the State of Nebraska; Lawrence S. Primeau, director of the Department of Administrative Services of the State of Nebraska; and James A. Hansen, director of the Department of Banking and Finance of the State of Nebraska, were named as defendants in their official capacities.

The Commonwealth State Securities American Savings Litigation Committee also filed a brief as amicus curiae in support of defendants.

ISSUES PRESENTED

The issues defined by plaintiff's petition in this original action are whether L.B. 657 is (1) special legislation in violation of article III, § 18, of the Nebraska Constitution; (2) an appropriation in excess of the biennium in violation of article

III, § 22, of the Nebraska Constitution; and (3) an unconstitutional delegation of legislative authority to the judiciary.

STANDARD OF REVIEW

The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994). The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993).

ANALYSIS

SPECIAL LEGISLATION

Plaintiff contends that L.B. 657 represents the Legislature's attempt to circumvent this court's decision in *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991), and to do indirectly what it could not do directly, as indicated by the legislative history of the bill. Plaintiff argues that L.B. 657 is special legislation both because it creates a totally arbitrary and unreasonable method of classification and because it was enacted for the benefit of a closed class, the Commonwealth creditors being a class permanently closed to future members. Plaintiff claims that the taking of money from one class to pay the claims of another class is a violation of the due process and equal protection rights guaranteed by the federal and state Constitutions.

Defendants seek to distinguish the present case from *Haman* by arguing that L.B. 657 is not a substantive bill, but merely an appropriations bill enacted to pay claim No. 91-310 pursuant to the State Miscellaneous Claims Act, § 81-8,294 et seq. Therefore, they reason, L.B. 657 cannot constitute special legislation. Defendants urge that it is the State Miscellaneous Claims Act which the court must find to be unconstitutional special legislation before the court can find L.B. 657 to be unconstitutional. Thus, our first inquiry must be whether L.B. 657 may constitute special legislation.

We note that 1990 Neb. Laws, L.B. 272A, which this court

found unconstitutional in *Haman*, was also an appropriations bill. Defendants cite no authority for the proposition that an appropriations bill cannot constitute special legislation, nor has our research revealed any such authority. In fact, the express language of the State Miscellaneous Claims Act, as applied to L.B. 657, indicates otherwise.

The appropriation of funds by L.B. 657 is governed by the terms of the State Miscellaneous Claims Act. Section 81-8,300 gives the State Claims Board the authority to approve claims. However, § 81-8,300 requires that claims in excess of $10,000 "*shall be reviewed* by the Legislature and an appropriation made therefor *if appropriate*." (Emphasis supplied.)

At least as to claims approved by the State Claims Board in excess of $10,000, the Legislature has two affirmative duties: (1) to review the claim and (2) to make an appropriation for the claim if appropriate. The language of § 81-8,300 is mandatory as to these duties. Because claim No. 91-310 was for an amount in excess of $10,000, it was mandatory for the Legislature to review the claim and determine whether an appropriation to pay the claim was appropriate. That being so, L.B. 657 represents more than the Legislature's rubberstamp of the State Claims Board's recommendation to pay claim No. 91-310.

Obviously, the passage of L.B. 657 indicates that the Ninety-third Legislature was in substantive agreement with the decision of the State Claims Board, i.e., the Legislature reviewed claim No. 91-310 and found payment of the claim to be appropriate. That the Legislature did exactly that is confirmed by L.B. 657, § 1, which states that "[t]he Legislature . . . finds that further reimbursement of the depositors' financial losses *is warranted*." (Emphasis supplied.)

For the above reasons, we disagree with defendants that L.B. 657 cannot be considered to be special legislation because it is not substantive. Any attempt to distinguish this case from *Haman* on that basis must fail.

L.B. 657 seeks to authorize payments to the same group of people as did L.B. 272A, that is, the depositors of the Commonwealth Savings Company, State Security Savings Company, and American Savings Company. Thus, to determine whether L.B. 657 is special legislation in violation of

Neb. Const. art. III, § 18, we need look no further than our holding in *Haman*.

A legislative act violates Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). The test for statutes challenged under the special-laws prohibitions is that they must bear a reasonable and substantial relation to the object sought to be accomplished by the legislation. *Id.*

In *Haman*, defendants argued that although the State had no legal obligation to reimburse the Commonwealth creditors, it had a moral obligation to do so. In that case, we stated that

> a moral obligation attaches when there is "a law [which] is passed notifying and warning the taxpayer and the citizen generally that the state . . . will undertake the burden of such damages." Nowhere in the NDIGC legislation was such a notification or warning present. In fact, the NDIGC act provides that "[n]o state funds of any kind shall be allocated or paid to the corporation." Neb. Rev. Stat. § 21-17,135(4) (Reissue 1987).

Haman v. Marsh, 237 Neb. at 714, 467 N.W.2d at 847.

We concluded that the State had no moral obligation to pay the claims of the Commonwealth creditors, and for that reason, it was not necessary for us to reach the question of whether moral obligation would provide reasonable and substantial support for the classification in question. We then held that L.B. 272A, authorizing payments from the state treasury to Commonwealth creditors, created a totally arbitrary and unreasonable method of classification and also created a permanently closed class, and thus was special legislation under both prongs of the test.

In this case, defendants argue that an award pursuant to the Miscellaneous Claims Act is an *equitable* remedy which permits the Legislature to consider any valid claim against the State which cannot be pursued elsewhere. Defendants state that the Legislature has the "broad equitable jurisdiction" to do this, brief for defendants at 28, analogous to the equitable jurisdiction of the courts. Again, defendants cite no authority

for this novel proposition. Assuming arguendo that the Legislature does possess some broad equitable power analogous to that of the judicial branch, we remind defendants of the maxim that "equity follows the law." See *Miller v. School Dist. No. 69*, 208 Neb. 290, 296, 303 N.W.2d 483, 488 (1981).

The powers of the Nebraska Legislature are legally derived from Neb. Const. art. III. The Legislature is specifically empowered to make appropriations for the expenses of the government. See Neb. Const. art. III, § 22. However, the Legislature is not vested with unlimited power to make appropriations. "The purpose . . . of an appropriation bill is to make provision for *lawfully* taking money out of the state treasury . . . ." (Emphasis supplied.) *Rein v. Johnson*, 149 Neb. 67, 78, 30 N.W.2d 548, 556 (1947), *cert. denied* 335 U.S. 814, 69 S. Ct. 31, 93 L. Ed. 369 (1948).

The Legislature is empowered to make appropriations to meet the legal obligations of the state. See, *Haman v. Marsh, supra*; *Weaver v. Koehn*, 120 Neb. 114, 231 N.W.2d 703 (1930). The Legislature is *not* empowered to make appropriations for purely charitable purposes. See *Weaver v. Koehn, supra*.

Nowhere in their brief do defendants contend that the Legislature has a legal duty to reimburse the Commonwealth creditors for their losses. In fact, defendants concede that no legal remedies are available to reimburse the Commonwealth creditors. Therefore, the Legislature's right to appropriate state funds for that purpose must be grounded, if at all, in moral obligation.

As previously noted, this court has already determined in *Haman* that the State has no moral obligation to reimburse the Commonwealth creditors. Thus, even if a moral obligation would provide a reasonable and substantial support for the classification in question, a matter we do not decide, we can only conclude that the Legislature's enactment of L.B. 657 constitutes an act of charity on the part of the State toward the Commonwealth creditors.

Once again we declare, as we have for more than 60 years, that " '[*c*]*learly it has not yet come to pass that the state, in its supervision of the banking business, has become an eleemosynary institution*.' " (Emphasis supplied.) *Haman v.*

Marsh, 237 Neb. at 715, 467 N.W.2d at 848. Accord *Weaver v. Koehn, supra. The purse strings of this state are not open for the purpose of simply giving money away.*

We now hold, adhering to our analysis in *Haman*, that L.B. 657's authorizing payments from the state treasury to the Commonwealth creditors creates an arbitrary and unreasonable method of classification, that it creates a permanently closed class, and that it is therefore unconstitutional special legislation in violation of Neb. Const. art. III, § 18.

Having determined that L.B. 657 is constitutionally infirm as special legislation, we find it unnecessary to reach the other constitutional issues raised by the plaintiff. We have also considered the arguments raised by the amicus curiae in its brief and find them unpersuasive.

ATTORNEY FEES

Plaintiff requests attorney fees and costs for the services of his attorneys in this case. Attorney fees and expenses may be recovered only where provided for by statute, or where the uniform course of procedure has been to allow such a recovery. *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994).

Neb. Rev. Stat. § 24-204.01 (Reissue 1989) provides in relevant part:

> When an original action is instituted in the Supreme Court by or against the state, or any office, department, or officer thereof, involving the constitutionality of any act of the Legislature no matter when such act was passed, attorney fees and costs may be allowed if any of the following conditions set forth in subdivision (1), (2), or (3) of this section are found to exist:
>
> (1)(a) The action challenges the constitutionality of an act which the Attorney General has previously ruled constitutional or unconstitutional or as to which he has made no ruling . . . .

In this case, the Attorney General has made no ruling on the constitutionality of L.B. 657. Therefore, the necessary conditions for the awarding of attorney fees and costs have been met, and plaintiff is entitled to attorney fees.

CONCLUSION

L.B. 657 is special legislation which unconstitutionally appropriates state funds in violation of Neb. Const. art. III, § 18. Judgment is entered for plaintiff and against defendants and each of them in their official capacities. The Treasurer of the State of Nebraska is hereby permanently enjoined from disbursing on behalf of the State of Nebraska any funds appropriated by 1993 Neb. Laws, L.B. 657, to depositors of any former industrial loan and investment companies, and the director of the Department of Administrative Services of the State of Nebraska and the director of the Department of Banking and Finance of the State of Nebraska are enjoined from implementing the provisions of L.B. 657.

Plaintiff is awarded $13,164.27 for attorney fees and expenses pursuant to § 24-204.01, in addition to costs of this action.

JUDGMENT FOR PLAINTIFF.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MICHAEL D. CARPER, RESPONDENT.

518 N.W.2d 656

Filed July 15, 1994. No. S-93-930.

Original action. Judgment of disciplinary sanctions.

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

PER CURIAM.

On October 19, 1993, formal disciplinary charges were filed against the respondent, Michael D. Carper. Carper subsequently filed a conditional admission in exchange for a stated form of consent judgment of discipline. See Neb. Ct. R. of Discipline 13 (rev. 1992). We accept Carper's conditional admission and impose discipline.

Carper has conditionally admitted the following:

Carper was admitted to the Nebraska State Bar Association in September 1986. At all relevant times he was engaged in the private practice of law in Kearney, Nebraska.

In January 1991, Carper entered into a contingency employment agreement with his then roommate, Jeffrey S. Grant. Carper was to represent Grant with regard to injuries Grant sustained in a motor vehicle accident. At the time of the accident, Grant was a passenger in a car driven by Shannon Sullivan. The accident was allegedly caused by Allison Markham. This disciplinary action concerns Carper's handling of settlement checks issued by Sullivan's and Markham's insurers.

In June 1991, a settlement check was issued by Sullivan's insurer. The draft was in the amount of $1,000 and was payable to "Jeff Grant." On July 6, Carper endorsed Grant's name on the back of the settlement draft. Carper did not have Grant's written permission to make this endorsement; instead, he relied on the authority of Neb. Rev. Stat. § 7-107 (Reissue 1991). Carper placed the proceeds of the draft into his trust account. On July 25, Carper issued a check from his trust account. The check was in the amount of $666.67 and was payable to Grant.

On August 27, Carper advised Grant that Markham's insurer had made a net settlement offer of $7,000. Grant agreed to accept the offer at that time, believing that $7,000 was the gross settlement, not including the $1,000 previously received. That same day Markham's insurer issued a check in the amount of $11,000, payable to "Jeff Grant an individual and Michael Carper his Attorney."

On August 28, Carper endorsed Grant's name on this second check. Carper did not have Grant's written permission to make this endorsement; he again relied on the authority of § 7-107. Carper placed the proceeds of the check into his trust account. At the time he endorsed the check, Carper also endorsed a form entitled "Final Release of All Claims." Carper signed Grant's name to the release and signed his own name as "witness." Carper had Grant's express permission to sign Grant's name on this form.

On August 29, Carper issued a check to Grant in the amount

of $4,470.73. This amount represented $7,000 less $500 in attorney fees to Carper and less $2,029.27 in medical expenses. Carper advised Grant that he would attempt to negotiate a reduction in the payments owing to the medical care providers.

On September 5, at Grant's request, Carper issued Grant a check in the amount of $2,043.96. Carper advised Grant that Grant should proceed to pay all medical expenses with those funds.

On October 1, Grant called Markham's insurer and was told that the gross amount of the settlement was $11,000. Grant then spoke with Carper about this information. Carper issued Grant a check, from his attorney trust account, in the amount of $4,000. There is a genuine disagreement between Grant and Carper as to the reason for this $4,000 payment.

On May 8, 1992, Carper filed a civil lawsuit against Grant for the recovery of his attorney fees in this matter. This lawsuit was settled prior to the hearing before the Committee on Inquiry of the Sixth Disciplinary District.

Carper's actions, as set forth above, establish that he allowed the personal relationship between himself and Grant to negatively affect his professional and business judgment. As a result, Carper's conduct subjected the profession, as well as himself, to undue scrutiny and criticism by the public. Carper's conduct constitutes a violation of his oath of office and a violation of Canon 1, DR 1-102(A)(1), (4), and (6), and Canon 9, DR 9-102(B)(1) and (3), of the Code of Professional Responsibility.

Accepting Carper's conditional admission, we impose the following disciplinary measures:

(1) Carper, having violated a disciplinary rule and having failed to act competently in a matter entrusted to him, is guilty of unprofessional conduct and is hereby publicly reprimanded for conduct violative of the Code of Professional Responsibility and of his oath as a member of the bar of this court.

(2) Carper is hereby placed on probation for 2 years from this date. During this probationary period, he shall be subject to suspension for 6 months upon motion of the Counsel for Discipline if he subsequently violates the conditions of probation or any disciplinary rule. Any such suspension shall

be in addition to any further discipline under the Nebraska Supreme Court Rules of Discipline for any such subsequent violation.

(3) The conditions of probation are that, during the probationary period, Carper shall:

(a) Within the first 60 days of the probationary period, establish an office system that encompasses complete records of all funds and properties of a client coming into the possession of Carper;

(b) Within the first 60 days of the probationary period, establish an office system such that within 3 days of receipt of client funds, Carper will advise the client in writing of the receipt of the funds and, thereafter, within the first 10 days of each following month, render complete records of appropriate accounts to each of his clients regarding those accounts;

(c) Allow another attorney, chosen by Carper with the consent of the Counsel for Discipline, to examine Carper's trust account records and the contents of any contingency fee agreement with any client and to observe Carper when he places his signature on any such agreement, and Carper shall maintain a copy of such agreement and the related file for a period ending 2 years after the expiration of the probationary period or the expiration of any additional period of suspension imposed by this court pursuant to paragraph (2) above;

(d) Not make any oral or written amendment to a contingency fee agreement with any client without first receiving written approval from the attorney identified pursuant to paragraph (3)(c) above;

(e) Successfully complete a course in legal ethics at an accredited law school within the first 365 days of probation;

(f) Complete an accredited continuing legal education course in law office management during the probationary period;

(g) Pay all costs of the prosecution of this action and all costs and professional fees of the attorney identified to carry out the requirements of paragraphs (3)(c) and (d) above; and

(h) File a report with the Counsel for Discipline every 3 months advising the Counsel for Discipline as to Carper's fulfillment of the conditions of probation.

JUDGMENT OF DISCIPLINARY SANCTIONS.

WHITE, J., not participating.

ASHLAND STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLEE AND CROSS-APPELLANT, V. ELKHORN RACQUETBALL, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLEE, AND KENNETH OPSTEIN, APPELLANT AND CROSS-APPELLEE.

520 N.W.2d 189

Filed July 22, 1994. No. S-92-784.

1. **Judgments: 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 they are clearly wrong.
2. _____: _____. In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
4. **Contracts: Intent.** The intent of the parties is determinative of whether a party is an accommodation maker or the principal obligor of an instrument.
5. **Trial: Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
6. **Pleadings: Appeal and Error.** An appellate court is obligated to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried.
7. **Debtors and Creditors: Interest.** In the absence of a contract or statute, compensation in the form of compound interest is not allowed to be computed upon a debt.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Patrick M. Flood and Edith T. Peebles, of Zweiback, Hotz & Lamberty, P.C., for appellant.

Dean J. Sitzmann, of Steier, Rogers & Pistillo, P.C., for appellee Ashland State Bank.

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

WRIGHT, J.

Ashland State Bank (Bank) sued Elkhorn Racquetball, Inc. (Elkhorn), and Kenneth Opstein to recover on a promissory note. The district court for Douglas County entered judgment against Elkhorn and Opstein for the principal balance due plus

simple interest, a total of $138,261.94, plus costs. Opstein appeals; the Bank cross-appeals.

SCOPE OF REVIEW

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 they are clearly wrong. *Gibb v. Strickland*, 245 Neb. 325, 513 N.W.2d 274 (1994).

FACTS

In 1977, Harry Farnham built a racquet club in Elkhorn, Nebraska. In 1982, Opstein purchased the racquet club from Farnham, giving him the promissory note in question as a part of the purchase price. Farnham testified that the note was drawn so that Opstein would be personally responsible for the obligation and so that Farnham would be able to look to Opstein personally for payment.

The racquet club was transferred to a limited partnership, 99 percent of which was owned by Opstein, for the beginning of the tax year 1983. Upon instructions from Opstein's accountant, Farnham formed a subchapter S corporation for the racquet club in 1987. Opstein carried the losses relating to the racquet club to offset income on his personal income tax returns.

The promissory note at issue indicates that it was part of a number of transactions. On December 20, 1982, Farnham made a notation on the note which extended the due date from November 15, 1983, to November 15, 1985. Farnham testified that he notified Opstein of the extension and that Opstein did not object.

In an entry dated December 21, 1982, the note recites: "In consideration of Seventy-two thousand & five hundred dollars, ($72,500) undersigned sells, assigns, & transfers the above note to Frank Bemis, with recourse. /s/ Harry J. Farnham." Farnham testified that he transferred the note to Bemis with notice to Opstein and that Opstein did not object.

Thereafter, Farnham repaid Bemis, and Bemis made a "paid in full" notation on the note and reassigned the note to Farnham. On the reverse side of the second page of the note is the entry: "In consideration of payment of $84,000.00

($75,000.00 principal and $9,000.00 interest) by Harry J. Farnham to undersigned as of 11/15/84, the above note is reassigned and transferred to Harry J. Farnham as of said date. /s/ Frank Bemis."

The next entry recites: "Harry J. Farnham acknowledges receipt from Elkhorn Racquet Club, Inc. of the sum of $9,000.00 in full payment of interest on above note for period of 11/15/82 to 11/15/83. /s/ Harry J. Farnham."

Farnham then made this notation on March 1, 1984:

> For and in consideration of the sum of Seventy-five Thousand Dollars ($75,000.00) received from Ashland State Bank, Ashland, Nebraska, the undersigned, Harry J. Farnham, hereby assigns with recourse this note and all proceeds hereunder to the Ashland State Bank, as collateral security for a Promissory Note in like amount dated March 1, 1984. /s/ Harry J. Farnham.

The Bank had loaned Farnham $75,000, taking the note as collateral. Farnham testified that at the time he assigned the note to the Bank, the note was not overdue and had not been dishonored, he was not aware of any defenses by any person, and he had not informed anyone at the Bank of any alleged setoffs or defenses. At the time of the assignment to the Bank, Farnham had other loans with the Bank which were current.

Farnham later defaulted on his loan obligations to the Bank and filed bankruptcy. The Bank initiated a replevin action against Elkhorn. Opstein then personally executed a "Stipulation for Payment," which was filed with the trial court on August 28, 1989, and thereafter, he personally made two payments of $2,500 to the Bank.

The stipulation was approved by Opstein as to form and content and provided for full payment of the note either at a date certain or when a judgment which was the subject of an appeal pending before this court was affirmed. In its petition, the Bank contended that the action pending before the Supreme Court was "sustained" November 9, 1989, and that the note became immediately due and payable. The Bank demanded payment, but Opstein and Elkhorn refused, and suit was commenced against Opstein and Elkhorn on March 2, 1990.

The Bank alleged that on November 15, 1982, Elkhorn,

Opstein, and Farnham executed and delivered to Farnham, in his individual capacity, a promissory note in the amount of $75,000 with interest accruing at 12 percent per annum. The Bank alleged that on March 1, 1984, Farnham assigned to the Bank all his rights in the promissory note, including all rights in the personal property described in the security interest, and that the Bank remained the holder and owner of the note in question.

Opstein asserted various defenses to the action, inter alia, that the Bank was not the owner of the note, that Farnham did not have an interest in the note which he could assign, and that Opstein had been discharged from liability on the note. Further, Opstein alleged that the Bank was not a holder in due course, that Elkhorn was not indebted to Farnham, that the note was fraudulently obtained by a fiduciary and was unenforceable, and that Opstein was entitled to a setoff against the Bank in excess of $1 million.

The trial court found that Opstein was a principal obligor or maker on the note and that the Bank took the note as a holder in due course and was entitled to a judgment against Elkhorn and Opstein for the principal balance due plus simple interest as provided in the note.

ASSIGNMENTS OF ERROR

Opstein assigns as error the trial court's finding that he was a principal obligor or maker on the note and that the Bank was a holder in due course. He alleges that the court erred in failing to allow the Bank's claim to be offset by sums Opstein asserts were owed to him by Farnham and in failing to find that Opstein was discharged from liability on the note. The Bank cross-appeals, claiming that the court erred in holding that the interest on the note was simple interest.

ANALYSIS

In our review of a bench trial in 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 they are clearly wrong. *Gibb v. Strickland*, 245 Neb. 325, 513 N.W.2d 274 (1994). In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence but considers the judgment in a light

most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Florist Supply of Omaha v. Prochaska*, 244 Neb. 776, 509 N.W.2d 209 (1993).

Since Opstein claims that the trial court erred in finding that the Bank was a holder in due course, we examine the Bank's status in that regard. We first note that the applicable law, the Uniform Commercial Code (U.C.C.), has been amended and recodified since the issuance of the note. Changes in the law became effective in 1991 and 1992. The action here was commenced in March 1990. We have held that statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes. *Norwest Bank Neb. v. Bowers, ante* p. 83, 516 N.W.2d 623 (1994); *Schall v. Anderson's Implement*, 240 Neb. 658, 484 N.W.2d 86 (1992). Therefore, the U.C.C. provisions appearing in the 1980 reissue apply in this case.

Neb. U.C.C. § 3-302(1) (Reissue 1980) provided: "A holder in due course is a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." Accord *John Deere Co. v. Boelus State Bank*, 233 Neb. 818, 448 N.W.2d 163 (1989). A holder is a person who is in possession of an instrument drawn, issued, or endorsed to him, to his order, to bearer, or in blank. Neb. U.C.C. § 1-201(20) (Reissue 1980).

It was not disputed at trial or on appeal that the Bank was in possession of the note or that the note was a negotiable instrument. In the stipulation referred to above, the Bank, Opstein, and Elkhorn stipulated that the Bank was the holder of a negotiable instrument (the promissory note dated November 15, 1982) and that Opstein's signature appeared on the note.

Patricia Adams, vice president of the Bank, testified that the Bank loaned Farnham $75,000 and took the note as collateral for the loan. Thus, the evidence established that the note was given for value. Also, no evidence in the record indicates that the Bank failed to act in good faith (which § 1-201(19) defined

as honesty in fact in the conduct or transaction concerned).

We next consider whether the Bank took the note without notice that it was overdue or had been dishonored, or without notice of any defense or claim on it on the part of any person. Opstein asserts that the Bank had notice of a claim or defense because the note had been extended and transferred multiple times on its face and because a nonparty to the note had written "paid in full" on its face.

The purchaser has notice of a claim or defense if (1) the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms, or ownership or to create an ambiguity as to the party to pay; or (2) the purchaser has notice that the obligation of any party is voidable in whole or in part or that all parties have been discharged. Neb. U.C.C. § 3-304(1) (Reissue 1980).

As we examine the record and the note in question, we find that although the note had been transferred and assigned several times and contained a "paid in full" notation, the note also contained satisfactory explanations of the transactions and showed that the note had been reassigned and transferred to Farnham before Farnham assigned the note to the Bank. There was no evidence that the note had been paid by the obligors on the note.

We do not accept Opstein's argument that the note was overdue because Opstein did not agree to extend the maturity date via his signature on the note. Although Opstein testified that he was never asked for his consent to an extension of the maturity date, Farnham testified that he notified Opstein of every one of the transactions set forth on the note and that Opstein did not object to any of them. In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Moore v. State*, 245 Neb. 735, 515 N.W.2d 423 (1994). The court heard the testimony of Farnham and Opstein and found that the Bank was a holder in due course. We cannot say that the court was clearly wrong.

Opstein argues that it was the Bank's burden to prove it did not have notice of a claim or defense. We disagree. A signature

on a promissory note is presumed genuine unless specifically denied in the pleadings. Neb. U.C.C. § 3-307(1) (Reissue 1980). When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense. § 3-307(2). Opstein stipulated that his signature appeared on the note. Thus, Opstein had the burden of proof to establish a defense to the promissory note.

The defense asserted by Opstein was that he did not consent to the extension of the maturity date on the note. Farnham testified that every transaction was carried out with Opstein's knowledge and consent. In this case, we do not reweigh the evidence, but consider the judgment in a light most favorable to the successful party and resolve the evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. See *Florist Supply of Omaha v. Prochaska*, 244 Neb. 776, 509 N.W.2d 209 (1993). Opstein has not proven that the Bank had notice of his claim or defense.

As a part of his argument that the Bank was not a holder in due course, Opstein contends that the Bank had notice of a claim against the note because Farnham had signed the note as a fiduciary of Elkhorn when the Bank knew that Farnham was transacting business for his own benefit. Section 3-304(2) provided: "The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty."

Opstein argues that the Bank had notice because Farnham was president of Elkhorn and had pledged the note as collateral for a personal loan. The record does not support Opstein's argument. Farnham testified that he must have notified someone at the Bank of the purpose of the loan. He could think of many reasons for needing the loan, including the monthly payments for the racquet club. Farnham was asked the following question: "Would you have told Lee Sapp that at Ashland State Bank; that's why you needed the loan?" Farnham replied, "I don't know. I could have. As I said, I could have given them a hundred reasons and they would all be

true so I — I have no specific recollection — I'm sure the bank does — as to what I needed the money for." Opstein did not call Sapp to testify as to his recollection of the purpose of the loan. There was no other evidence to establish the purpose of the loan. Therefore, the record does not support Opstein's claim that the Bank knew that Farnham was seeking a loan for personal reasons. The Bank is entitled in this case to every reasonable inference deducible from the evidence. See *Florist Supply of Omaha, supra.*

Knowledge of the fact that any person negotiating an instrument is or was a fiduciary does not of itself give the purchaser notice of a claim or defense. § 3-304(4)(e). The mere existence of a fiduciary relation is not enough to prevent the holder from taking in due course, and such holder is free to take the instrument on the assumption that the fiduciary is acting properly. There is no evidence the Bank had notice that Farnham was breaching any fiduciary duty when he negotiated the note to the Bank. The note was given to Farnham when Opstein purchased Farnham's interest in the racquet club.

Opstein contends that the Bank was on notice that the note was overdue when the Bank made additional loans using the note as collateral. The record shows that at the time the note was assigned to the Bank on March 1, 1984, the note's due date had been extended to November 15, 1985. The note was not overdue when the Bank accepted it, and we find that this argument is without merit. The evidence established the Bank was a holder in due course, and the Bank therefore took the note free from all claims asserted by Opstein. See Neb. U.C.C. § 3-305 (Reissue 1980).

Opstein next claims that the trial court erred in finding that he was a principal obligor or maker on the note. He asserts that he was merely an endorser because the signature is ambiguous and because the note itself refers only to Elkhorn.

The intent of the parties is determinative of whether a party is an accommodation maker or the principal obligor of an instrument. *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. 1, 434 N.W.2d 532 (1989). Farnham testified that it was his intent that Opstein be obligated personally as well as in his capacity as vice president of Elkhorn. Opstein's tax returns indicate he carried

the obligation as a deduction on his personal income tax returns, and he personally made payments on the note on two separate occasions.

On the basis of the evidence presented at trial, we find that Opstein was a principal obligor on the note and that the trial court correctly so determined. Opstein benefited from his signature on the note by receipt of the ownership of the racquet club, and he used the obligation on the note as a deduction on his personal income tax returns. Opstein's testimony failed to contradict the evidence that he was a principal obligor on the note.

Opstein next contends that his signature served as an accommodation because Farnham needed Opstein's signature to negotiate the note and because it was Farnham who received the cash after the note was assigned. Having decided that the Bank was a holder in due course, we determine that Opstein's claim that his signature served as an accommodation is not a defense to the Bank's action on the note. See § 3-305. We also point out that Opstein did not raise this defense at trial, and therefore, Opstein has waived his right to argue such issue on appeal. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994). This court is obligated to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried. *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993).

Opstein's argument that the trial court erred in failing to offset the Bank's claim against any sums owed by Farnham to Opstein relies upon the assertion that the Bank was not a holder in due course. Having found that the trial court correctly decided the Bank was a holder in due course, we find that the Bank took the note free and clear of these claims and defenses. See § 3-305.

Finally, Opstein argues that as an accommodation party, he is a surety under the U.C.C. and is entitled to assert the special suretyship defenses set forth in Neb. U.C.C. § 3-606 (Reissue 1980). First, we have found that Opstein was a principal obligor on the note and not an accommodation party, and second, this defense is not available against a holder in due course. See

§ 3-305. This argument has no merit.

We find that the reasonable inferences deducible from the evidence support the trial court's findings that Opstein was a principal obligor or maker on the note and that the Bank took the note as a holder in due course and was entitled to judgment against Elkhorn and Opstein on the note.

We next address the cross-appeal that the trial court erred in finding that interest on the note was simple interest rather than compound interest. "The general rule is that in the absence of contract or statute, compensation in the form of compound interest is not allowed to be computed upon a debt." *Abbott v. Abbott*, 188 Neb. 61, 68, 195 N.W.2d 204, 209 (1972). Accord *Cherokee Nation v. United States*, 270 U.S. 476, 46 S. Ct. 428, 70 L. Ed. 694 (1926). The Bank argues that because the parties treated the note as bearing interest on a compound basis, Opstein should be estopped from arguing to the contrary. We disagree. There was no evidence presented of a contract, and there is no statute which allows compound interest on the note in this case. The trial court was correct in ordering the award of simple interest.

The judgment of the trial court is hereby affirmed in all respects.

AFFIRMED.

MIKE ANDERSON, APPELLANT, V. NASHUA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, LIBERTY MUTUAL INSURANCE COMPANY, DEFENDANT, AND W.S. BUNCH CO., A CORPORATION, ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

519 N.W.2d 275

Filed July 22, 1994. No. S-92-802.

1. **Summary Judgment: Appeal and Error.** In an appellate review of a summary judgment, the appellate court reviews the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.
3. **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.
4. **Negligence: Strict Liability: Proximate Cause: Words and Phrases.** As a term of art, "abnormally dangerous" is considered interchangeable with "ultrahazardous" to define an activity that, when conducted, proximately causes harm to another, for which a possessor of land is held strictly liable.
5. **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.
6. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter 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.
7. **Statutes.** If there is a conflict between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes.
8. **Statutes: Legislature: Intent: Employer and Employee.** The Legislature intended to limit the application of Neb. Rev. Stat. §§ 48-403 and 48-422 (Reissue 1988) to the employer-employee relationship.
9. **Statutes: Words and Phrases.** The "aforesaid places" referred to in Neb. Rev. Stat. § 48-403 (Reissue 1988) are those which are mentioned in Neb. Rev. Stat. §§ 48-401 and 48-402 (Reissue 1988): factories, mills, or workshops; mercantile or mechanical establishments; or other buildings where one or more persons are employed.
10. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from the undischarged duty.
11. _____. "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.
12. **Negligence: Words and Phrases.** A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
13. **Negligence.** The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
14. **Negligence: Contractors and Subcontractors.** In the landowner-independent

contractor context, a landowner's duty to maintain the premises in a reasonably safe condition is limited to latent defects that the independent contractor or his employees do not have knowledge of.

15. _____: _____. There is a duty of due care imposed on an employer of an independent contractor when the independent contractor's work involves special risks or dangers, including work that is dangerous in the absence of special precautions.
16. **Negligence: Liability: Contractors and Subcontractors.** If a general contractor hires an independent contractor to perform work which the general contractor "should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken," the general contractor may be liable for physical harm caused to employees of the subcontractor if the general contractor fails to exercise reasonable care to take such precautions, even though the general contractor has provided, in the contract or otherwise, that the subcontractor be responsible for such precautions.
17. **Negligence: Words and Phrases.** A "peculiar risk" is one which involves some special hazard resulting from the nature of the work done, which calls for some special precaution.
18. **Negligence: Liability: Contractors and Subcontractors.** Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants.
19. _____: _____: _____. The employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor.
20. **Negligence: Contractors and Subcontractors: Workers' Compensation.** A landowner employer's nondelegable duty to maintain the premises in a safe condition does not extend to employees of an independent contractor or agent who are injured due to the failure of the independent contractor or agent to make those repairs and who, as a result, receive workers' compensation benefits.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for further proceedings.

James E. Harris and Timothy K. Kelso, of Harris, Feldman, Stumpf Law Offices, for appellant.

Jay L. Welch, of Rickerson, Welch, Wulff & Childers, and J. Patrick Green for appellee Nashua Corp.

David D. Ernst and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellee W.S. Bunch Co.

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

LANPHIER, J.

This is an appeal by the plaintiff, Mike Anderson, of an order of the Douglas County District Court granting summary judgment on behalf of the defendant Nashua Corporation (Nashua). Nashua had hired Anderson's employer, W.S. Bunch Co. (Bunch), to paint the interior of several underground storage tanks on Nashua's property. Anderson was severely burned when the underground storage tank he was painting burst into flames while he was inside it. Anderson, having received workers' compensation benefits through Bunch, brought this action, predicated on strict liability and negligence, against Nashua. The issues presented concern the liability of an owner of property to an employee of an independent contractor. Nashua filed a third-party petition against Bunch and its president and vice president. Anderson then filed a motion for partial summary judgment, and Nashua filed a motion for summary judgment. The district court for Douglas County sustained Nashua's motion for summary judgment, held the third-party action was moot, and dismissed Anderson's action. On appeal, Anderson argues that Nashua should have been held strictly liable for conducting an ultrahazardous activity. Anderson also argues that Nashua should have been held strictly liable for violating health and safety regulations, specifically Neb. Rev. Stat. §§ 48-403 and 48-422 (Reissue 1988). With respect to his allegations of negligence, Anderson argues that the trial court should have held Nashua directly liable for its own negligence in failing to see that proper safety precautions were taken and vicariously liable for the negligence of its independent contractor, Bunch. We hold pursuant to *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), that Nashua could not be held vicariously liable for Bunch's negligence, since Bunch is immune from suit pursuant to the exclusivity provision of the workers' compensation laws. However, genuine issues of material fact exist with regard to whether Nashua was directly negligent. We therefore reverse that part of the district court's

holding and remand the cause for further proceedings consistent with this opinion.

BACKGROUND

The defendant and third-party plaintiff, Nashua, owns and operates a manufacturing plant in Omaha, Nebraska. Nashua hired Bunch, a third-party defendant, to paint the interior of three underground storage tanks located outside the plant. Two of Bunch's employees, Anderson and Eddie Donner, were assigned to do the work.

On December 21, 1986, Anderson and Donner began to paint the first of the three tanks with an epoxy paint. The paint, as it cured, put off flammable vapors. The tank was 8 or 9 feet in diameter and "15 or 20 feet long." There was a single round entrance, approximately 18 inches in diameter, located in the middle of the top of the tank. A single non-explosive-proof light bulb was hanging over this entrance. Donner mixed the paint outside the tank. Anderson used a spray gun to apply paint to the inside of the tank. The first coat was applied without incident and dried overnight. The next day, when Anderson was almost finished with the second application, he started to signal Donner to send a ladder down for him. As he did so, he looked up at the manhole and noticed that the glove on his left hand had caught fire. The flames quickly spread over the rest of Anderson's body, and soon the tank was full of flames. Donner initially covered the manhole in an effort to snuff out the flames, but later pulled Anderson from the tank.

Anderson received benefits from Bunch's workers' compensation insurance carrier, the defendant Liberty Mutual Insurance Company.

ASSIGNMENTS OF ERROR

Anderson's assignments of error, as restated, are that the trial court erred (1) in failing to hold Nashua strictly liable, having found that the work being performed was abnormally dangerous; (2) in determining that Anderson was not one to whom Nashua owed a nondelegable duty; (3) in determining that certain health and safety regulations, §§ 48-403 and 48-422, did not apply to Nashua; and (4) in applying *Plock, supra*, to the case at hand.

STANDARD OF REVIEW

In an appellate review of a summary judgment, the appellate court reviews 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. *Horvath v. M.S.P. Resources, Inc., ante* p. 67, 517 N.W.2d 89 (1994). Summary judgment is proper when the pleadings, depositions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

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).

STRICT LIABILITY

In two of his assignments of error, Anderson alleges that the trial court erred in not holding Nashua strictly liable for the injuries he sustained.

COMMON LAW LIABILITY

Anderson first argues that since the trial court found that the work contracted for created an abnormally dangerous situation and since there is "no question that the activity was a direct and proximate cause of Plaintiff's injuries," the trial court should have held Nashua strictly liable. Brief for appellant at 21. We disagree.

It is true that the trial court, in its order granting Nashua's summary judgment, stated that "[t]he evidence shows that the work contracted for and undertaken creates an inherently or *abnormally dangerous situation*." (Emphasis supplied.) However, we do not believe the trial court used the phrase "abnormally dangerous" in the sense in which Anderson asserts it was used. Anderson asserts the trial court used "abnormally dangerous" as a term of art. As a term of art, "abnormally dangerous" is considered interchangeable with "ultrahazardous" to define an activity that, when conducted, proximately causes harm to another, for which a possessor of

land is held strictly liable. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 78 at 555-56 (5th ed. 1984). Despite Anderson's assertion to the contrary, it is apparent from reading the trial court's order that the phrase "abnormally dangerous" was used as a synonym for "inherently dangerous," a different term of art. Nowhere in the order was the phrase "abnormally dangerous" used alone; it was always immediately preceded by the words "inherently or," so as to read "inherently or abnormally dangerous." Throughout the order, the trial court used the phrase only in the context of the nondelegable duty exception to the general rule that the employer of an independent contractor is not liable for the negligence of the independent contractor.

If we assume, as Anderson asserts, notwithstanding the foregoing, that the trial court used the phrase "abnormally dangerous" to mean ultrahazardous as that term is commonly used in the context of strict liability, we would not hold Nashua strictly liable for the injuries Anderson sustained while painting the underground tank.

Anderson has cited no authority to support the imposition of strict liability in this case. He merely relies upon NJI2d Civ. 8.41 comment at 540, which is the "Burden of Proof part of the Statement of the Case instruction for damages allegedly caused by ultrahazardous activities . . . ." Apparently, Anderson considers the instruction to be evidence of the law of Nebraska. To the contrary, the instructions contained in the second edition of the Nebraska Jury Instructions are designed to be used when they reflect the law and the pleadings and evidence call for such an instruction. Neb. Ct. R. Regarding Nebraska Jury Instructions.

The first issue we must address is whether Nebraska has adopted the doctrine of strict liability for ultrahazardous (or abnormally dangerous) activities. It is clear that the issue has never been expressly addressed by this court. In *Wendt v. Yant Construction Co.*, 125 Neb. 277, 280, 249 N.W. 599, 600 (1933), this court stated that "one who uses dynamite in blasting, so as to cause likelihood of risk to property, is liable, if damage to the property results, whether from direct impact of rock thrown out by the explosion or from concussion."

However, that case was tried to the jury on a negligence theory. In affirming the jury's verdict, this court stated the following: "The jury had testimony to warrant their verdict on the question of negligence. Certainly the appellants cannot complain that appellee was required to show more than the rule of law as to liability in this case." *Id.* at 280-81, 249 N.W. at 601.

In *Krance v. Faeh*, 215 Neb. 242, 338 N.W.2d 55 (1983), a strict liability instruction was given to the jury at trial. In that case, we held that the giving of the strict liability instruction was erroneous because the doctrine of strict liability was inapplicable given the relationship between the parties, which was that of lessor-lessee.

Most recently, in *Fitzpatrick v. U S West, Inc., ante* p. 225, 518 N.W.2d 107 (1994), we declined to impose the doctrine of strict liability on an employer of a public utility which had been hired to reconnect electrical power to a building.

In light of these cases, it appears that the doctrine of strict liability for ultrahazardous activities has not been adopted in Nebraska, but neither has it been repudiated. In any event, we decline in this case to rule on the applicability of the doctrine of strict liability for ultrahazardous activities. There is an insufficient basis for concluding that the activity undertaken is ultrahazardous.

STATUTORY LIABILITY

Anderson also sought to hold Nashua strictly liable on a statutory basis for the injuries he sustained. Anderson alleges that Nashua violated § 48-403 and is therefore liable for damages to Anderson pursuant to § 48-422.

Section 48-403 states the following:

> If in any of the aforesaid places any process is carried on by which dust or fumes are caused, which may be inhaled by the persons employed therein, or if the air shall become exhausted or impure, there shall be provided a fan or other such mechanical device as will substantially carry away all such dust or fumes or other impurities, subject to the approval of the Department of Labor.

Section 48-422 states:

> Every person operating a plant where machinery is used

> who shall violate any of the provisions of sections 48-401 to 48-424 shall be liable in damages to any person injured, as a result thereof, or to the heirs of any person who shall have died as a result thereof.

The trial court held that these health and safety regulations were inapplicable in the case at hand for two reasons: First, because the statutes do not apply to the employer-subcontractor relationship. Second, because a storage tank set apart from the plant is not the type of place in which the statutes require that the given precautions be taken. Anderson disagrees with the trial court's interpretation of the statutes.

In settling upon the meaning of a statute, we 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 our duty to discover, if possible, the Legislature's intent from the language of the statute itself. *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993). Further, the components of a series or collection of statutes pertaining to a certain subject matter 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. *Id.* Finally, if there is a conflict, the special provisions of a statute prevail over the general provisions in the same or other statutes. *Id.*

Anderson bases his argument partially on language found in § 48-403 and partially on language found in § 48-422. From § 48-403, he relies on the phrase "aforesaid places," which apparently refers to the places listed in Neb. Rev. Stat. §§ 48-401 and 48-402 (Reissue 1988): every factory, mill, or workshop; mercantile or mechanical establishment; or other building where one or more persons are employed. From § 48-422, Anderson relies on the phrase "any person" to show that the statutes were intended to apply to him.

Although it is true that Nashua does operate a factory and that Anderson is "any person," those facts alone do not mean the health and safety regulations are applicable here. At issue is, To whom and under what circumstances do the health and safety regulations apply?

First, regarding to whom the regulations apply, we find instructive the case of *Quist v. Duda*, 159 Neb. 393, 67 N.W.2d 481 (1954). In *Quist*, this court was confronted with the issue of whether one of the health and safety regulations applied to a landlord who owned an office building-parking garage. Our holding, that the regulations did not apply to the landlord, was not based upon any express statement, but upon the words used in the act. The words "employer" and "employee" were used throughout the act. From this language, we determined that the Legislature intended that the act's application be limited to the relationship of employer and employee. Although we were not specifically concerned with §§ 48-403 and 48-422 in *Quist*, those sections were a part of chapter 48, article 4, as was the section we were concerned with. Neither of those sections has been amended since *Quist* was decided. Although in these specific sections there are not as many references to the employer-employee relationship, we are convinced that the Legislature intended to limit the application of these sections to the employer-employee relationship. Thus, since that relationship does not exist between Nashua and Anderson, §§ 48-403 and 48-422 are not applicable here.

With regard to whether an underground tank apart from a factory is within the purview of the health and safety regulations, we again look to the plain language of the statutes. Section 48-403 refers to "aforesaid places." There are no places mentioned in § 48-403, and there is no definitional section of the act defining that phrase. However, §§ 48-401 and 48-402, which immediately precede § 48-403, refer to factories, mills, or workshops; mercantile or mechanical establishments; or other buildings where one or more persons are employed. It is clear that these are the "aforesaid places" referred to in § 48-403. These being the "aforesaid places," the trial court's determination was correct that Nashua did not violate the statutes by failing to ventilate the underground storage tank, located away from the building where the manufacturing takes place.

NEGLIGENCE

Anderson's remaining assignments of error are interrelated

and will be addressed together. They combine to assert that the trial court erred in determining that as a matter of law, Nashua could not be held directly or vicariously liable for Anderson's injuries.

The trial court held that there was no pleading or evidence presented of any direct negligence on the part of Nashua which created a duty to Anderson. The trial court also found that although Nashua owed third parties a nondelegable duty to protect them from harm resulting from the inherently dangerous work, Nashua could not be held vicariously liable for Bunch's negligence. The trial court, applying *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), concluded that since Nashua's agent, Bunch, was immune from suit by virtue of the exclusivity of workers' compensation, so was the principal, Nashua.

Thus, the core issue of this appeal is whether, given the facts as contained in the pleadings, depositions, admissions, stipulations, and affidavits contained in the record, Nashua owed a duty to Anderson.

It is fundamental that for actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from the undischarged duty. *Fitzpatrick v. U S West, Inc., ante* p. 225, 518 N.W.2d 107 (1994); *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994).

> " ' "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .
>
> " 'A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.' "

Fitzpatrick, ante at 232, 518 N.W.2d at 113. Accord *Schmidt, supra*.

The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a

particular situation. *Fitzpatrick, supra*; *Schmidt, supra*.

Anderson argues that he has pled and presented facts to demonstrate that Nashua owed him duties of care, for the breach of which Nashua may be held liable. Anderson further argues that Nashua breached some of the duties directly and that Bunch breached some of the duties. With regard to the duties allegedly breached by Bunch, Anderson claims the duties were nondelegable and that Nashua would be vicariously liable. The allegations of Nashua's vicarious liability for Bunch's negligence and for Nashua's own direct negligence will be discussed in separate sections of this opinion.

DIRECT NEGLIGENCE

First, we will address the duties allegedly breached directly by Nashua. In this respect, the trial court addressed only one duty, the duty to keep premises safe for business invitees. The trial court, citing *Plock*, noted that the duty to keep premises safe for business invitees has been modified in the landowner-independent contractor context. In that context, the landowner's duty to maintain the premises in a reasonably safe condition is limited to latent defects that the independent contractor or his employees do not have knowledge of. *Plock, supra*. The trial court found that the buildup of dangerous fumes was not a latent defect, but one which arose out of the work performed by the subcontractor. Thus, the trial court held that Nashua had no duty to protect Anderson from the harm resulting from the hazard. In this respect, the trial court's holding was proper. However, the facts Anderson pled and presented establish that Nashua had an additional duty.

There is a duty of due care imposed on an employer of an independent contractor when the independent contractor's work involves special risks or dangers, including work that is dangerous in the absence of special precautions. *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). In *Parrish*, we outlined the duty as follows:

> As expressed in Restatement (Second) of Torts § 416 (1965), if a general contractor hires an independent contractor to perform work which the general contractor "should recognize as likely to create during its progress a

> peculiar risk of physical harm to others unless special precautions are taken," the general contractor may be liable for physical harm caused to employees of the subcontractor if the general contractor fails to exercise reasonable care to take such precautions, even though the general contractor has provided, in the contract or otherwise, that the subcontractor be responsible for such precautions.

Id. at 799-800, 496 N.W.2d at 913.

In *Parrish*, a " 'peculiar risk' " was defined as one which involves some special hazard resulting from the nature of the work done, which calls for some special precaution. *Id.* at 800, 496 N.W.2d at 913. Without question, the task to be completed by Bunch involved a "peculiar risk." Consequently, Nashua was required to exercise reasonable care to ensure that Bunch utilized proper safety precautions.

There was evidence adduced at the summary judgment hearing to the effect that the risk of a fire could have been significantly reduced. There was testimony from Bunch employees and experts to the effect that the use of an explosion-proof lamp, a ventilation fan, and an air monitor could have made performance of the work safe. Moreover, the contract between Nashua and Bunch illustrates that Nashua retained a substantial amount of control over the project. The contract contained "boilerplate" language on the reverse side relating to the owner's retaining control of the project. The contract, along with other provisions relating to control, contained the following clause:

> RESERVATION OF RIGHTS: Buyer [Nashua] reserves the right to make changes in, or defer shipment of, this order or any part thereof, or to terminate all or any part of this order at any time, if Buyer's production plans change, are delayed or curtailed, or any contingencies interfere with the receipt, handling or stocking of the goods, or performance of the services, ordered herein. Buyer shall not be liable for any cost or expense incurred by Seller [Bunch], in connection with this order, after date of Seller's receipt of any such change or termination notice.

It is clear from this clause that Nashua retained enough control to implement whatever safety precautions it deemed necessary. Although a provision of the contract required Bunch to comply with the Occupational Safety and Health Act of 1970, among other laws, that provision would not serve to diminish the responsibility that accompanied Nashua's retained control. Thus, we conclude that there was sufficient evidence to present a genuine issue of material fact concerning Nashua's duty to protect Anderson from harm, and whether Nashua breached that duty by failing to exercise due care to protect Anderson from the hazard that resulted.

VICARIOUS LIABILITY

The trial court determined as a matter of law that the work being conducted was inherently dangerous. As we stated above, the trial court then correctly decided that in light of the inherently dangerous work, Nashua had a nondelegable duty to protect third parties from harm resulting from negligently performed work. However, relying upon *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), the trial court concluded that Anderson, as an employee of the independent contractor employed by Nashua, was not one to whom Nashua could be held vicariously liable. Anderson argues that the trial court erred in applying *Plock* to the case at hand, since here different nondelegable duties are involved.

Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Fitzpatrick v. U S West, Inc., ante* p. 225, 518 N.W.2d 107 (1994); *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). There are two recognized exceptions to the general rule. The employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor. *Fitzpatrick, supra*; *Parrish, supra*. However, notwithstanding these exceptions, we have held:

[T]he landowner employer's nondelegable duty to

> maintain the premises in a safe condition does not extend to employees of an independent contractor or agent who are injured due to the failure of the independent contractor or agent to make those repairs and who, as a result, receive workers' compensation benefits.

Plock, 239 Neb. at 230-31, 475 N.W.2d at 118.

In *Plock*, the defendant, Crossroads Joint Venture (CJV), was the owner of the Crossroads Shopping Center in Omaha. CJV entered into a management agreement with MS Management Associates, Inc. (MSM), whereby MSM assumed responsibility for the management, control, and maintenance of the shopping center. Plock, the plaintiff, was an employee of MSM. He was injured when he stepped out of the sweeper truck he had been operating into an uncovered drain hole. The case was tried to a jury, which returned a verdict in favor of Plock. CJV appealed from the verdict and asserted that the trial court erred in failing to hold that CJV was immune from suit. CJV contended that it was immune because its agent, MSM, was liable to Plock only for workers' compensation benefits and that therefore CJV was immune from other common-law tort liability; and as the only liability of CJV was that imputed to it by its agent, and the agent being immune, CJV as the principal was also immune. We determined that CJV was immune. Consequently, we reversed the jury verdict and remanded the cause to the district court to enter judgment for the defendant.

Contrary to Anderson's assertion, our holding in *Plock* was not based on the nature of the nondelegable duty involved, but, rather, on the notion that in the context of vicarious liability, a principal cannot be liable where the agent is immune. Since Bunch, by virtue of the exclusivity provision of the workers' compensation laws, is immune from suit, Nashua, its employer-principal, necessarily cannot be held vicariously liable. In this respect, the trial court was correct, and this part of the judgment is affirmed.

CONCLUSION

The district court's use of the term "abnormally dangerous" in its order was confusing. Despite the use of that term, we refuse to hold Nashua strictly liable for the harm arising out of

the performance of work conducted herein. The district court's determination that the health and safety regulations were not applicable to Nashua in the case at hand was correct. Also, the district court's application of *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), was appropriate under the circumstances of this case. However, the district court's grant of summary judgment was improper given the genuine issues of material fact surrounding the allegations of Nashua's direct negligence. Therefore, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DIANE L. WELCH, APPELLEE AND CROSS-APPELLANT, V. RICHARD A. WELCH, JR., APPELLANT AND CROSS-APPELLEE.

519 N.W.2d 262

Filed July 22, 1994. No. S-92-883.

1. **Motions for New Trial: Appeal and Error.** If an appellant has assigned errors properly presented in a motion for new trial, then the appellant need not also assign as error the overruling of the motion for new trial.
2. _____: _____. An appellate court will affirm the district court's denial of a motion for new trial absent an abuse of discretion.
3. **Judgments: Equity: Time.** A litigant seeking the vacation of a prior decree or judgment after term may take one of two routes. The litigant may proceed either under Neb. Rev. Stat. § 25-2001 (Reissue 1989) or under the district court's independent equity jurisdiction.
4. **Attorneys at Law: Fraud.** A party should not be forced to answer for the fraud of opposing counsel.
5. **Attorney and Client: Fraud.** If anyone must lose because of the fraud of a lawyer, it should be the party who selected and employed that lawyer as his counsel.
6. **Attorney and Client.** A litigant is not responsible for the acts of an attorney that he has not hired. However, a litigant is responsible, as against his opponent, for the acts of an attorney that he has hired.
7. **Courts: Justiciable Issues.** A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract

questions or issues that might arise in a hypothetical or fictitious situation or setting.

8. **Courts: Jurisdiction.** The existence of an actual case or controversy is necessary for the exercise of judicial power in Nebraska.
9. **Jurisdiction: Words and Phrases.** Jurisdiction is a court's power or authority to hear a case.
10. **Child Support: Modification of Decree: Appeal and Error.** An appellate court reviews modifications of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.
11. **Child Support: Visitation.** A failure to pay child support does not justify a parent's unilateral withdrawal of visitation rights, and a failure to allow visitation does not justify a parent's unilateral nonpayment of support.
12. **Child Support.** The power of a court to suspend child support should be exercised only as a last resort or where it is apparent that to do so affords the only remedy that can reasonably be expected to fit the mischief.
13. **Child Support: Visitation.** A court may suspend child support payments when the custodial parent deprives the noncustodial parent of visitation and there is no showing that the children are in need.
14. **Appeal and Error.** As to matters of law, an appellate court has an obligation to reach its own independent conclusion.
15. **Child Support: Interest: Time.** Under Neb. Rev. Stat. § 42-358.02 (Reissue 1988), prior to September 6, 1991, interest on delinquent child support payments accrued at a rate determined by Neb. Rev. Stat. § 45-104.01 (Reissue 1988).
16. _____: _____: _____. Under Neb. Rev. Stat. § 42-358.02 (Cum. Supp. 1992), as of September 6, 1991, interest on delinquent child support payments accrues at a rate determined by Neb. Rev. Stat. § 45-103 (Reissue 1988).
17. **Estoppel.** When a person, knowing her rights, takes no steps to enforce those rights until the adverse party has, in good faith, changed his position such that he could not be restored to his former state if the rights are enforced, the delay becomes inequitable and the person is estopped from asserting the rights.
18. **Courts: Equity: Judgments: Interest.** A court of equity has discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right.
19. _____: _____: _____: _____. A court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money.
20. **Judgments.** A decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty on a judgment debtor.

Appeal from the District Court for Wheeler County: RONALD D. OLBERDING, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard A. Welch, Jr., pro se, and, on brief, George T. Babcock, of Babcock & Associates, for appellant.

Curtis A. Sikyta for appellee.

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

WHITE, J.

This case arises from a decree of dissolution and a series of related motions. In January 1988, Diane Dugan (Dugan), then known as Diane L. Welch, filed a petition for dissolution of her marriage to Richard A. Welch, Jr. (Welch). Welch filed a special appearance, a motion to transfer jurisdiction to Illinois (his claimed state of legal residence), and a motion for a stay under the Soldiers' and Sailors' Civil Relief Act. The district court denied the special appearance, finding that it had jurisdiction over Welch, and denied both motions.

In November 1988, the court entered its decree of dissolution. The decree awarded custody of the parties' two minor children to Dugan and awarded Dugan $280.80 per month in child support. The decree ordered Welch to maintain health and dental coverage for the children, and provided that Dugan would be responsible for any sums not covered by the insurance. The decree also awarded Dugan $1,500 in attorney fees and $583 in travel expenses. The remaining portions of the decree are not relevant to the present appeal. The decision was not appealed.

In June 1991, represented by a new attorney, Welch filed a "cross-petition" which alleged that his divorce attorney had committed various acts of fraud. Welch requested that the court vacate the divorce decree. The parties and the court have treated this cross-petition as a motion to vacate, and we will do likewise. In October 1991, Dugan demurred to the motion to vacate, and Welch filed a motion for a continuance.

On November 12, 1991, the district court held a hearing on Welch's motion to vacate. The court overruled the demurrer, denied the motion for a continuance, and denied the motion to vacate.

There followed a series of three motions. Welch timely filed a motion for new trial and also filed a motion to determine sums due. Dugan filed a motion, under the Nebraska Child Custody Jurisdiction Act (NCCJA), Neb. Rev. Stat. § 43-1201 et seq. (Reissue 1988), to transfer jurisdiction to Colorado, where she

and the children had moved.

On August 31, 1992, the district court held a hearing on the three motions. The court denied Welch's motion for new trial, determined various sums due, and granted Dugan's motion to transfer jurisdiction. Welch appealed and Dugan cross-appealed. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the case to this court.

On appeal, Welch asserts that the district court erred in failing to vacate the decree and in transferring jurisdiction to Colorado. On cross-appeal, Dugan asserts that the district court erred in determining the sums due with respect to child support, fees, and costs. We address each alleged error in turn.

Welch has assigned as error the district court's failure to vacate the decree. Welch's notice of appeal is not timely with respect to the court's denial of his motion to vacate. Technically, then, this assignment of error is incorrect.

Welch's technical mistake is not fatal. If an appellant has assigned errors properly presented in a motion for new trial, then the appellant need not also assign as error the overruling of the motion for new trial. See *Maher v. State*, 144 Neb. 463, 13 N.W.2d 641 (1944). Welch's motion for new trial alleges that the denial of his motion to vacate was contrary to law. Therefore, Welch has preserved the substantive issue of vacating the decree for our review and has adequately assigned the error.

The district court's failure to vacate the decree arrives before this court by way of Welch's motion for new trial, which was denied. An appellate court will affirm the district court's denial of a motion for new trial absent an abuse of discretion. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). To determine whether the district court correctly denied Welch's motion for new trial, we must determine whether, as Welch contends, the district court's failure to vacate the decree was contrary to law.

Welch first argues that the court should have vacated the decree based on various acts of fraud committed by his divorce attorney. A litigant seeking the vacation of a prior decree or judgment after term may take one of two routes. *DeVaux v.*

DeVaux, 245 Neb. 611, 514 N.W.2d 640 (1994). The litigant may proceed either under Neb. Rev. Stat. § 25-2001 (Reissue 1989) or under the district court's independent equity jurisdiction. *DeVaux, supra*. See, *Joyce v. Joyce*, 229 Neb. 831, 429 N.W.2d 355 (1988); *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983). Welch concedes that his action does not fall within the confines of § 25-2001 and therefore that he may proceed, if at all, under the court's general equity jurisdiction.

Welch alleges that his divorce attorney committed numerous fraudulent acts. The first set of allegedly fraudulent acts revolves around a special appearance. Welch testified that he initially hired his divorce attorney to enter a special appearance *contesting* jurisdiction. Through what appears to have been a typographical error, the divorce attorney filed a special appearance *consenting* to jurisdiction. Realizing the error, the divorce attorney asked the district court for leave to amend the special appearance. The district court found that Welch had consented to jurisdiction and also that by asking for affirmative relief, Welch had subjected himself to the jurisdiction of the court. Welch testified that his divorce attorney failed to advise him of the flawed special appearance and instead told him that the judge had said, "I have jurisdiction because I have jurisdiction." In addition, Welch claims, his divorce attorney never told him how to appeal the denial of his special appearance.

The second set of allegedly fraudulent acts revolves around a motion for a stay under the Soldiers' and Sailors' Civil Relief Act. Welch's divorce attorney did file a motion to stay the proceedings. The district court, however, found that Welch had ample time to prepare his case and that the motion was untimely. Welch testified that his divorce attorney told him that the district court had ruled that the Soldiers' and Sailors' Civil Relief Act was irrelevant.

The third set of allegedly fraudulent acts revolves around the procedures for appeal. Welch testified that his divorce attorney advised him that to appeal his case, Welch would have to ask the trial judge's permission. According to Welch, his divorce attorney further advised him that the judge "had it out" for

Welch and was not going to do anything for Welch. As to alternative remedies, Welch claims, his divorce attorney suggested that Welch sue the judge in federal court but added that because he, the attorney, was not sworn before the federal bench, Welch would have to find a new attorney.

Based on these alleged acts of fraud, Welch sought the vacation of the dissolution decree. Some courts have found that fraud perpetrated by an attorney on his own client can form the basis for vacating a decree. See, *United States v. Throckmorton*, 98 U.S. (8 Otto) 61, 66, 25 L. Ed. 93 (1878) (stating, in dicta, that "where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat . . . there has never been a real contest in the trial or hearing of the case," and the judgment may be set aside); *Leeker v. Leeker*, 23 Ariz. 170, 202 P. 397 (1921) (following *Throckmorton, supra*, court vacates divorce decree because wife's attorneys had financial incentive to disregard, and did disregard, wife's instructions to obtain a settlement and a legal separation but not a divorce). See, also, *Rhoades v. Rhoades*, 157 Cal. App. 3d 169, 211 Cal. Rptr. 531 (1984) (stating that default divorces should be set aside readily, court set aside default divorce decree because husband's divorce attorney reassured husband and then did nothing to represent husband, allowing default to be entered); *Younkins v. Younkins*, 121 Ill. App. 2d 416, 257 N.E.2d 521 (1970) (court vacates default divorce decree because wife's attorney consented to a default judgment without wife's authority). These cases are based on the principle that fraud vitiates everything it touches. See, *Throckmorton, supra*; *Leeker, supra*.

A contrasting principle is that a party should not be forced to answer for the fraud of opposing counsel. See *Brooks v. Brooks*, 184 Md. 419, 41 A.2d 367 (1945) (despite wife's allegations that her attorney acted with reckless disregard for her rights, court refused to vacate divorce decree). This court has recognized this principle in the context of a negligence action. See *Sargent Feed & Grain v. Anderson*, 216 Neb. 421, 344 N.W.2d 59 (1984).

In *Sargent Feed & Grain*, the plaintiff sent the defendants requests for admissions, and the defendants failed to respond

within 30 days. The plaintiff filed a motion for summary judgment based on the admissions, and the court granted the plaintiff summary judgment. After obtaining new counsel, the defendants filed a motion to vacate the judgment. Reasoning that the defendants' original counsel had mishandled the case, depriving the defendants of their day in court, the court granted the motion to vacate. The case proceeded to trial, and the defendants prevailed.

On appeal, this court held that the trial court had improperly granted the motion to vacate. We found that the negligence of the defendants' counsel did not justify vacating the judgment in favor of the plaintiff. The rationale for this decision was that the plaintiff should not be deprived of a favorable judgment due to the neglect of the opposing attorney:

> The neglect and fault of the defendants' [original counsel] could not be a basis for setting aside the judgment in this case. Certainly his conduct is not chargeable to the plaintiff. *If anyone must lose because of the neglect of a lawyer, it should be the party who selected and employed that lawyer as his counsel.*

(Emphasis supplied.) *Id.* at 425, 344 N.W.2d at 61-62.

Although Welch's motion to vacate is based on fraud and not negligence or neglect, we find that the rationale of *Sargent Feed & Grain* applies. Welch's dispute is with his divorce attorney, not with Dugan. There is no suggestion that Welch's failure to timely appeal the denial of his special appearance or the decree is a result of any act of Dugan's; yet the relief prayed for is against Dugan. Although both Welch and Dugan, arguably, can be seen as innocent parties in this legal quagmire, it is Welch, and not Dugan, who must ultimately be responsible for the acts of Welch's own divorce attorney. The district court properly refused to vacate the decree on the basis of the alleged fraud of Welch's divorce attorney.

Welch also argues that the district court should have vacated the decree because it did not have personal jurisdiction over him. At the dissolution hearing and in the decree, the district court stated that it had jurisdiction over both Dugan and Welch. These findings were not timely appealed. Welch argues that he could not file a timely appeal because his attorney lied to him about the process for appeal. The acts of Welch's attorney,

as we have just explained, are not cause for a court to vacate a decree.

Welch cites three cases which, he claims, compel the court to vacate the decree on the basis of a lack of personal jurisdiction: *Kaufmann v. Drexel*, 56 Neb. 229, 76 N.W. 559 (1898); *Kepley v. Irwin*, 14 Neb. 300, 15 N.W. 719 (1883); and *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365 (1877). These three cases stand for the following proposition: While a court will presume that an attorney appearing before the court on behalf of a litigant is authorized to do so, a court may vacate a judgment if the litigant later shows that the attorney appearing on his behalf was unauthorized to do so. In other words, if Welch had never hired his divorce attorney but the attorney had appeared in court purporting to represent Welch, then all of the acts of the attorney would be void and the judgment based on those acts would be void.

The proposition embodied in the three cases cited by Welch does not apply to Welch. The proposition concerns the acts of an *unauthorized attorney*; Welch's case concerns the *unauthorized acts* of an *authorized attorney*. A litigant is not responsible for the acts of an attorney that he has not hired. However, as we have explained above, a litigant is responsible, as against his opponent, for the acts of an attorney that he has hired. Welch's argument that the decree should be vacated because the district court lacked personal jurisdiction is without merit. The district court's denial of Welch's motion to vacate was not contrary to law. Accordingly, the district court did not abuse its discretion in denying Welch's motion for new trial.

Welch next contends that the district court erred in transferring jurisdiction to Colorado under the NCCJA. Upon Dugan's motion to transfer jurisdiction under the NCCJA, the district court found that Wheeler County, Nebraska, was an inconvenient forum. The court granted Dugan's motion to transfer and ordered Dugan to file an action in the district court for Weld County, Colorado, before September 14, 1992, at 1 p.m. or report for a hearing on a contempt motion.

As a threshold matter, we note that the NCCJA does not authorize a court to *transfer jurisdiction*. The NCCJA allows a court to *decline jurisdiction* under certain circumstances. We will treat Dugan's motion to transfer jurisdiction as a motion to

decline jurisdiction.

The NCCJA allows a court to "decline to exercise its jurisdiction any time *before making a decree* if [the court] finds that it is an inconvenient forum to make a custody determination." (Emphasis supplied.) § 43-1207(1). A custody decree is defined by the NCCJA as "a custody determination contained in a judicial decree or order made in a custody proceeding." § 43-1202(4). A custody determination includes court decisions providing for the custody of a child or visitation rights, but does not include decisions relating to child support or other monetary obligations. § 43-1202(2).

At the time the motion to decline jurisdiction was filed, neither party had requested a custody determination. The record does not reveal any custody proceedings pending before the district court in Nebraska. Moreover, it appears that there were no custody proceedings pending before the district court in Colorado. Dugan, in effect, is asking Nebraska to decline jurisdiction in the abstract.

"[A] court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting." *State v. Baltimore*, 242 Neb. 562, 568, 495 N.W.2d 921, 926 (1993). Accord *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989). The existence of an actual case or controversy is necessary for the exercise of judicial power in Nebraska. *Baltimore, supra*; *Mullendore, supra*. Without an actual case or controversy, a court has no opportunity to exercise judicial power and, consequently, has nothing to decline. In the absence of an actual dispute, the district court had nothing over which to take—or decline—jurisdiction.

Dugan might argue that she was asking the court to decline its continuing jurisdiction over child custody. Jurisdiction is a court's power or authority to hear a case. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990); *Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988). Accord *Baltimore, supra*. Accordingly, continuing jurisdiction means that the court is continually empowered to hear matters of child custody and visitation; it does not mean that the court is continually

exercising jurisdiction. A court's continuing jurisdiction over matters of child custody and visitation does not, by itself, constitute a custody determination and therefore cannot be the basis for declining jurisdiction. The district court improperly declined jurisdiction under the NCCJA.

On cross-appeal, Dugan first contends that the trial court erred in abating child support. An appellate court reviews modifications of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). In order to properly address this assignment of error, we briefly summarize the relevant portions of the record.

On August 2, 1991, about 6 weeks after Welch filed his motion to vacate, the district court held a hearing on the issue of temporary visitation. The court granted specific visitation, including telephone visitation, pending trial on the motion to vacate.

Welch subsequently filed an application for contempt, and on August 19, the district court held a hearing on the application. At this hearing, Welch testified that he had been unable to exercise his temporary visitation; he had not reached the children on the phone and had not received an address so he could meet the children in person. He also testified that he had not seen the children since 1988 and had not spoken with them on the phone for over a year. Finding that the recent visitation problems were a result of miscommunication between Dugan and her attorney, the court decided not to hold Dugan in contempt. However, the court did state that Dugan had "been pulling [Welch's] chain" by failing to allow telephone calls and visitation. The court stated that it had asked the parties and counsel to try and work something out but that the parties were "at logger-heads." The court ordered very specific visitation so that neither party could claim to be mistaken about the arrangements.

Welch soon filed another application for contempt, claiming that Dugan had again failed to allow visitation, and on October 1, the district court held a hearing on the application. Dugan did not appear personally at the hearing. According to her

attorney, Dugan had argued the case in Colorado and believed Colorado had jurisdiction. The court stated that it could not hold Dugan in contempt without her personal presence. However, the court issued a bench warrant for Dugan's arrest. The court then heard evidence as to visitation that had been denied. The court abated child support as of October 1, 1991.

The record contains sparse information as to visitations occurring after this hearing. It appears that Welch and his mother visited with the children in Colorado in early October 1991. It also appears that Welch attempted a visit during late November and early December. Welch has testified that he has spent approximately $6,000 attempting to exercise visitation. There is no information in the record as to the success or extent of these attempts.

On August 31, 1992, the district court held a hearing on Welch's motion to determine sums due. The court's journal entry states that "child support was abated by this Court as [sic] October 1, 1991, and has not, and will not be reinstated." At the hearing, the court elaborated on its reasons for abating child support:

> The last thing as to child support, child support was abated October 1, 1991 and the reason for that was that [Dugan] was failing to obey the orders of the Court as to visitations. It appears there has been a continuing problem probably due to both parties' fault. The Court is not going to change that, that was not changed by the parties or counsel as of this date and it remains abated as of this date.
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> . . . .
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> . . . The mother has the custody of the children. The father is entitled to reasonable visitation of those children, including telephone visitation. If you would follow the orders of the Court in that area you would not have any problems. The father is entitled to reasonable visitation. He may have a duty of support but at this point since neither party — at least [Dugan] does not seem to want to follow the orders of the Court as to visitation. I am not going to order any child support.

The question which we must now determine is whether the

district court erred in abating child support. We find that it did not.

As a general rule, the custodial parent's right of support and the noncustodial parent's right of visitation are entitled to separate enforcement. A failure to pay child support does not justify a parent's unilateral withdrawal of visitation rights, and a failure to allow visitation does not justify a parent's unilateral nonpayment of support. See, *State v. Beck*, 238 Neb. 449, 471 N.W.2d 128 (1991); *Conrad v. Conrad*, 208 Neb. 588, 304 N.W.2d 674 (1981); *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980). "Neither of the parties is authorized to interfere with the court's orders and only the court can determine what, if any, adjustments should be made." *Id.* at 773, 295 N.W.2d at 273.

That is not to say, however, that a court is without power to suspend child support. The frustration of enforcing visitation rights from hundreds of miles away cannot be ignored. *Dep't of Public Aid v. Peterson*, 156 Ill. App. 3d 657, 509 N.E.2d 146 (1987). The power of a court to suspend child support should be exercised only as "a last resort or where it is apparent that to do so affords the only remedy that can reasonably be expected to fit the mischief." *Biesecker v. Biesecker*, 190 Neb. 808, 809, 212 N.W.2d 576, 577 (1973). Specifically, we have held that a court may suspend child support payments when the custodial parent deprives the noncustodial parent of visitation and there is no showing that the children are in need. See *McGee v. McGee*, 190 Neb. 415, 209 N.W.2d 339 (1973).

Since the divorce, Dugan has effectively deprived Welch of any meaningful visitation. Welch did not see the children at all from 1988 until August 1991. Beginning in August 1991, the district court attempted to reunite Welch and his children. Largely unsuccessful in this attempt, the court ordered child support abated. There has been no indication that the abatement, effective October 1, 1991, has adversely affected the children or that they are lacking in care. In August 1992, the district court found that there had been a continuing problem with visitation and ordered child support to remain abated. We conclude that the district court did not err in abating child support.

Dugan last contends that the district court erred in determining various sums due. We briefly address each of the arguments presented in Dugan's brief. In so doing, we are mindful that, as to matters of law, an appellate court has an obligation to reach its own independent conclusion. *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994); *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994).

Dugan argues that the district court erred in assessing too little interest on delinquent child support payments. The court ordered that interest on child support should be calculated at 14 percent before October 1, 1991, and 6.86 percent thereafter.

It is undisputed that child support payments become delinquent the day after they are due, and interest begins to accrue 30 days later. See Neb. Rev. Stat. § 42-358.02(2) (Cum. Supp. 1992). At issue, however, is the proper rate of interest. The rate of interest on delinquent child support payments is governed by § 42-358.02, which was amended in 1991.

Before amendment, § 42-358.02 provided that interest accrued at the rate specified by Neb. Rev. Stat. § 45-104.01 (Reissue 1988), which prescribed a flat rate of 14 percent per annum. See § 42-358.02(1) (Reissue 1988). The amendments to § 42-358.02 became effective on September 6, 1991. The amendments do not affect interest which accrued prior to September 6. See § 42-358.02(5) (Cum. Supp. 1992).

As of September 6, 1991, delinquent child support payments accrue interest under the amended statute. See § 42-358.02(5) (Cum. Supp. 1992). Under the amended statute, interest accrues at the rate specified by Neb. Rev. Stat. § 45-103 (Reissue 1988), which prescribes a fluctuating rate related to certain bond yields. See § 42-358.02(1). The amended statute directs the court to apply the rate "in effect on the date of the most recent order or decree." *Id.*

Applying these statutes to the present action should have resulted in a three-part order with respect to interest on delinquent child support payments. First, until September 5, 1991, under the prior statute, interest accrued at the rate of 14 percent per annum. Second, beginning on September 6, under the amended statute, interest accrued at the rate, established pursuant to § 45-103, in effect on the date of the "most recent

order or decree." See § 42-358.02(1). On September 6, the most recent order or decree was the dissolution decree, entered on November 18, 1988. Therefore, beginning on September 6, child support accrued at the rate in effect on November 18, 1988. Third, on October 1, 1991, the district court ordered an abatement of child support. This order supplanted the decree as the "most recent order or decree." Therefore, beginning on October 1, interest should have been calculated at the rate which was in effect on that date.

The district court failed to account for the effective date of the amended statute as triggering a change in the applicable interest rate. As a result, the court erred, as a matter of law, in calculating the interest on delinquent child support payments. On remand, the district court shall calculate interest for the following periods at the following rates: Until September 5, 1991, interest shall be calculated at 14 percent per annum. From September 6 until September 30, 1991, interest shall be calculated at the rate, established pursuant to § 45-103, in effect on November 18, 1988. As of October 1, 1991, interest shall be calculated at the rate, established pursuant to § 45-103, in effect on October 1.

Dugan next argues that the district court erred in refusing to award her payment of various medical and dental expenses. The decree provides that Welch shall maintain health and dental insurance for the children and that Dugan shall be responsible for any sums not covered by insurance. Dugan submitted evidence demonstrating that she and her husband had paid insurance premiums from October 1989 until May 1992 totaling $2,040, that expenses from March 1987 until May 1992 totaled $4,463.10, and that the insurance had covered $1,109.53 of these expenses.

In ruling on this claim, the court stated:

> As to medical payments or medical expenses, [Welch] has testified insurance was available. Both parties have apparently avoided each other from day one in this case and have not communicated and come in here at this late date after the payments have already been incurred, it is too late to apply those toward any insurance coverage, it is too late as far as the Court is concerned and [Dugan] is

> estopped from asserting those medical payments to [Welch].

Accordingly, the district court refused to order any payments for medical expenses.

When a person, knowing her rights, takes no steps to enforce those rights until the adverse party has, in good faith, changed his position such that he could not be restored to his former state if the rights are enforced, the delay becomes inequitable and the person is estopped from asserting the rights. *Nathan v. McKernan*, 170 Neb. 1, 101 N.W.2d 756 (1960); *Whitaker v. Stout*, 166 Neb. 850, 91 N.W.2d 44 (1958); *State v. Nielsen*, 163 Neb. 372, 79 N.W.2d 721 (1956). This estoppel rule parallels the doctrine of laches, which bars a claimant whose unreasonable delay in protecting his right has worked inequitably to disadvantage or prejudice another. See, *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990); *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990). See, also, 1 Dan B. Dobbs, Dobbs Law of Remedies § 2.3(5) at 89 (2d ed. 1993) ("[e]stoppel is closely related to and sometimes identical with laches." If the plaintiff is barred only by an unreasonable and prejudicial delay, laches appears to be merely an instance of estoppel). Because the district court decided the case on the ground of estoppel, we will review the decision on that basis.

As reflected in the record, Dugan purchased numerous medical and dental services for the children. The decree clearly provides that Welch is obligated to maintain medical and dental coverage for the children. However, Dugan never attempted to enforce this provision of the decree.

Dugan testified that she had attempted to contact Welch at various addresses, without success. She also testified that she never received any information from Welch regarding insurance. However, there is no evidence to suggest that Dugan ever asked a court to enforce the decree with respect to medical or dental bills.

Furthermore, although Welch may have been difficult, or even impossible, to contact at some points in time, some of the medical bills presented by Dugan were incurred at times when Dugan clearly could have contacted Welch. For example, Welch was in the U.S. Navy until March 1989; until that time, Dugan

could have contacted Welch through the Navy. Welch filed his motion to vacate in June 1991; after that time, Dugan could have contacted Welch through his attorney of record. Based on the record, we are unable to say that Dugan made any reasonable efforts to enforce her rights.

If Dugan's rights were now to be enforced, Welch would suffer prejudice. At the August 31, 1992, hearing, Welch testified as to his insurance coverage as follows: Welch was separated from the Navy in March 1989, and his medical benefits ceased in July 1989. In August 1989, Welch found employment with Bob O'Connor Ford, which offered a family health plan. From August 1989 until May 1990, Welch and the children were covered under this family health plan. In May 1990, Welch's employer changed health plans. Under the new plan, in order to have the children covered outside the local area, certain documents had to be completed by the custodial parent. Welch testified that he attempted to have the documents sent to Dugan in O'Neill, Nebraska. Welch also contacted Dugan's counsel and the clerk of the court in order to find out where Dugan was located. Additionally, Welch spoke with Jan Krotter, Wheeler County Attorney, regarding the insurance. Effective August 11, 1991, Welch was discharged from Bob O'Connor Ford. Since that time Welch has been receiving unemployment compensation. Welch testified that the "Public Aid Department" would authorize medical coverage for the children only if they were in his possession.

Distilled, these facts show that Welch complied with the decree by obtaining the required coverage for the children until at least August 11, 1991. Any expenses incurred before that date should have been presented to Welch's insurer so that the insurer could determine whether the expenses were covered and would be paid. Dugan's delay in presenting Welch with the medical bills denied Welch the opportunity to submit these expenses to his insurer. Welch cannot now recoup this lost opportunity. Therefore, he has suffered prejudice as a result of Dugan's delay.

After August 11, 1991, however, it appears that Welch no longer had insurance coverage for the children. Although the children apparently would be covered by the public aid

department, this coverage applied only when the children were in Welch's possession. This coverage is clearly inadequate under the decree. The decree awarded custody of the children to Dugan, required Welch to obtain medical and dental insurance for the children, and required Dugan to pay any uncovered expenses. Clearly, the decree contemplated that Welch's insurance would cover the children while they were in Dugan's possession.

Because Welch has not had insurance coverage for the children since August 11, 1991, he has not been prejudiced by Dugan's delay in enforcing her rights. If Dugan had, for example, handed Welch medical bills in October 1991, he would not have been able to submit those bills to an insurance company. As a matter of law, Welch has not suffered prejudice as to medical and dental expenses incurred after August 11, 1991. Therefore, the district court erred in finding that Dugan was wholly estopped from seeking repayment for medical and dental expenses.

On the present record, we are unable to determine the extent of Welch's liability. The decree, as we have stated, provides that Welch is responsible for maintaining medical and dental insurance and that Dugan is responsible for uncovered expenses. The decree does not assign responsibility for medical and dental expenses incurred in the absence of an insurance policy. We therefore remand the cause to the district court for an equitable determination of which party is liable for the expenses incurred after August 11, 1991.

Dugan next argues that the trial court erred in finding that the "other judgments of [Dugan] had been paid." Brief for appellee at 28. At the hearing on the motion to determine sums due, in addition to claiming sums due for child support and medical expenses, Dugan claimed that Welch owed her the following sums: (1) witness fees pursuant to a promise from Welch to Dugan, (2) attorney fees pursuant to the dissolution decree, and (3) interest on a "Contempt Judgment of July 28, 1988."

Addressing each of these sums in turn, we note that as a result of the hearing on the motion to determine sums due, the court ordered payment of the witness fees and the attorney fees.

Clearly, the court did not, as Dugan suggests, find that these sums had been paid. As to the contempt judgment, the court found that Welch had been ordered to pay Dugan $583 and that Welch had paid that amount. A document submitted into evidence and stipulated to by the parties purports to calculate "Principal and Interest on Contempt Judgment of July 28, 1988." This document shows that the principal amount of $583 was paid in February 1991, and shows interest due and owing in the amount of $128.03. The court did not err in finding that the principal had been paid.

Dugan also argues, however, that the court erred in failing to determine interest due on the judgments. We have already addressed the issue of interest on child support. The witness fees were first ordered to be paid at the hearing on the motion to determine sums due, and therefore, no interest on those fees had yet accrued. We need only consider whether interest should have been calculated on the attorney fees and on the contempt judgment.

A court of equity has discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right. *Kullbom v. Kullbom*, 215 Neb. 148, 337 N.W.2d 731 (1983); *Cumming v. Cumming*, 193 Neb. 601, 228 N.W.2d 296 (1975). Our statutes provide that "[j]udgment interest *shall* accrue on decrees and judgments for the payment of money from the date of rendition of judgment until satisfaction of judgment." (Emphasis supplied.) Neb. Rev. Stat. § 45-103.01 (Reissue 1988). The statutes also provide that the interest rate for "decrees and judgments for the payment of money" *shall* be 1 percentage point above certain bond yields, the exact rate to be distributed by the State Court Administrator to all Nebraska judges. See § 45-103. Based on the mandatory language of these statutes, we hold that a court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money.

A decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty on a judgment debtor. See, *Dryden v. Dryden*, 205 Neb. 666, 289 N.W.2d 525 (1980); *Cumming, supra*; *Patterson v. Spelts Lumber Co.*, 166 Neb. 692, 90 N.W.2d 283

(1958), *overruled on other grounds, Gillespie v. Hynes*, 168 Neb. 49, 95 N.W.2d 457 (1959). Interest does not accrue until the debt becomes due. See, *Dryden, supra* (interest on installment payment accrues when each individual payment becomes due); *Cumming, supra* (where divorce decree required wife to pay husband a portion of a future distribution from her father's estate, money was not due until wife received the distribution, and interest would not accrue until that date).

The court in the present action found due "[a]ttorney fees in the amount of $1,400.00 from [Welch] to [Dugan], being the balance of the $1,500.00 ordered November 14, 1988." November 14, 1988, was the date of the parties' dissolution hearing, which was followed on November 18 by the entry of a dissolution decree. The decree provided that Welch "should pay $1,500.00 toward [Dugan's] attorney fees. Said amount is to be paid within 90 days of this date."

The award of attorney fees is a judgment for the payment of money, the payment being due 90 days after November 18, 1988. As a matter of law, Dugan is entitled to interest on her award of attorney fees. The district court erred in failing to determine the amount of this interest and should determine that amount on remand.

The contempt judgment is not found separately in the record but is referenced in the dissolution decree. According to the decree: "On July 28, 1988, [Welch] was held in willful contempt and ordered to pay [Dugan's] expenses to retrieve the children from Virginia in the amount of $583.00." This award of travel expenses is a judgment for the payment of money, the payment being due on July 28, 1988. As a matter of law, Dugan is entitled to interest on her award of travel expenses. The district court erred in failing to determine the amount of this interest and should determine that amount on remand.

We note in passing that the district court also determined various sums due to Welch, his attorney, the guardian ad litem, and Dugan's present husband, Kevin Lyle. Those determinations have not been appealed, and we express no opinion as to whether interest is due thereon.

In the last sentence of her brief, Dugan asks this court to award her attorney fees and costs for appeal. Dugan has not

filed a separate motion for attorney fees, together with a supporting affidavit, as required by Neb. Ct. R. of Prac. 9F (rev. 1992).

In conclusion, we hold that the district court properly denied Welch's motion for new trial; that judgment is affirmed. The district court improperly sustained Dugan's motion to decline jurisdiction; that judgment is reversed. In ruling on the motion to determine sums due, the district court erred in its calculation of interest on delinquent child support payments, in finding that Dugan was wholly estopped from recovering medical and dental expenses, and in failing to determine the interest due on Dugan's awards of attorney fees and travel expenses. The judgment on the motion to determine sums due is reversed and the cause remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., participating on briefs.

DOROTHY STORJOHN, APPELLANT, V. WILLIAM J. FAY, APPELLEE.

519 N.W.2d 521

Filed July 22, 1994. No. S-92-1123.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous jury 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.** The proper method of presenting a case to a jury in its instructions is by a clear and concise statement by the trial court of the issues which find support in the evidence.
3. **Jury Instructions: Appeal and Error.** An instruction which misstates the issues or defenses and has a tendency to mislead the jury is erroneous.
4. **Jury Instructions: Negligence: Proximate Cause: Proof: Appeal and Error.** Where a jury is properly instructed concerning the plaintiff's burden to prove that the defendant's negligence was the proximate cause of the injury, it is

ordinarily not error to give or refuse to give an instruction on unavoidable accident.

5. **Jury Instructions: Appeal and Error.** It is error to give an unavoidable accident instruction where there is no evidence in the record to give legal support to the defense that the accident was unavoidable.
6. **Words and Phrases.** An unavoidable accident has been defined as an unexpected catastrophe which occurs without any of the parties thereto being to blame for it.
7. **Negligence: Motor Vehicles.** A sudden or momentary loss of consciousness while driving is a complete defense to an action based on negligence if such a loss of consciousness was not foreseeable.
8. **Negligence: Proof.** A loss of consciousness defense is an affirmative defense, and where the plaintiff has established a prima facie case of negligence, the burden of proof, or more accurately the burden of going forward with the evidence, shifts to the defendant to establish the loss of consciousness defense.
9. _____: _____. Where a sudden loss of consciousness is an affirmative defense, a defendant's burden is twofold. First, the defendant must present sufficient evidence to establish that he suffered a sudden loss of consciousness prior to the accident, and second, that the loss of consciousness was not foreseeable.
10. **Trial: Negligence: Motor Vehicles: Evidence.** In determining whether an issue presents a question of law for the court or a question of fact for the jury, it has been held that where the evidence is conflicting as to whether the accident was caused by the driver's sudden loss of consciousness and whether the loss of consciousness was unforeseen, it is a question of fact to be determined by the jury.
11. **Trial: Evidence.** If the evidence points to only one reasonable conclusion, it is a question of law for the court.
12. **Negligence: Proof.** When a defendant pleads the affirmative defense of assumption of risk in a negligence action, the defendant has the burden to establish the elements of assumption of risk before that defense, as a question of fact, may be submitted to the jury.
13. **Expert Witnesses.** In personal injury cases where injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, use of expert testimony is not legally necessary to establish the cause and extent of such injuries.
14. _____. Unless the character of the injury is objective, there must be expert medical testimony to establish the causation and the extent and nature of the injuries.
15. **Negligence.** Generally, where it is undisputed that the defendant knew that he or she was subject to attacks which could result in a sudden loss of consciousness, the evidence is such that the defendant's loss of consciousness was foreseeable.
16. **Negligence: Motor Vehicles.** One who is ill must conform to the standard of a reasonable person under a like disability and may be negligent in driving at all when he or she knows that he or she is subject to such attacks.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded for a new trial.

Thomas A. Wagoner for appellant.

Kenneth H. Elson for appellee.

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

HASTINGS, C.J.

Plaintiff Dorothy Storjohn appeals from a jury verdict and judgment in favor of defendant William J. Fay. Her sole consolidated assignment of error is that the district court erred in giving a jury instruction on unavoidable accident.

In an appeal based on the claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994); *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994); *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994).

The proper method of presenting a case to a jury in its instructions is by a clear and concise statement by the trial court of the issues which find support in the evidence. *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993); *Krehnke v. Farmers Union Co-Op. Assn.*, 199 Neb. 632, 260 N.W.2d 601 (1977).

An instruction which misstates the issues or defenses and has a tendency to mislead the jury is erroneous. *Wilson, supra*; *Omaha Mining Co. v. First Nat. Bank*, 226 Neb. 743, 415 N.W.2d 111 (1987).

On the evening of October 24, 1987, at approximately 7 p.m., the plaintiff was a passenger in the family pickup truck being driven by her daughter, Linda. While northbound on Elm Street in Grand Island, their vehicle was involved in a head-on collision when a southbound vehicle driven by the defendant entered the northbound lane. The plaintiff suffered personal injuries.

The plaintiff brought an action against the defendant alleging that the collision was caused by the defendant's carelessness, negligence, and recklessness in failing to yield the

right-of-way to the vehicle being operated by the plaintiff's driver. In addition, the plaintiff alleges that the defendant failed to maintain a proper lookout and failed to keep his vehicle under proper control. In his answer, the defendant denied any negligence and pled that the collision was the result of an unavoidable accident.

The defendant testified that in about 1968 or 1969, he was told that he probably had epilepsy and had been taking medication ever since. The defendant further testified that 15 years prior to the accident, he had an attack while driving down the highway. He stated that since the time of that attack, he had never passed out while driving a car; however, he had passed out at work. According to the defendant, he told a police officer after the accident that he did not remember what had happened and that he was epileptic and must have blacked out.

Over an objection by the plaintiff, the district court gave the jury an instruction on the defense of unavoidable accident. The pertinent portion of instruction No. 2 given by the court is as follows:

> In defense to the plaintiff's claim the defendant claims that the collision between the vehicles was a result of an unavoidable accident. If you find from the evidence before you that the defendant was rendered incapacitated by a sudden and unanticipated illness and that such illness causing the incapacity was the proximate cause of the accident, then the defendant was not negligent and your verdict should be for the defendant. A sudden and unanticipated illness must be one defendant did not know of or should not have known of the fact that he might be subject to such illness. If the defendant had such knowledge or should have had such knowledge of the illness which caused the incapacitation then the defendant is required to take more precautions under such circumstances than persons not subject to such illness. If you find that defendant failed to act as a reasonably prudent person under the circumstances and with such knowledge, and that such failure was a proximate cause of the accident then your verdict should be for the plaintiff and against the defendant.

The jury returned a verdict for the defendant.

The plaintiff argues that the defendant failed to meet his burden to establish the requisite elements of an unavoidable accident defense. The plaintiff's argument is based on two assertions: one, that the defendant failed to present expert testimony regarding his claim of epilepsy and the causative link between the claimed epilepsy and his loss of consciousness, and two, that the defendant failed to present evidence that his loss of consciousness was not foreseeable.

This court has held in several cases, most recently in *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985), that where, as in the present case, a jury is properly instructed concerning the plaintiff's burden to prove that the defendant's negligence was the proximate cause of the injury, it is ordinarily not error to give or refuse to give an instruction on unavoidable accident. See, also, *Schmidt v. Johnson*, 184 Neb. 643, 171 N.W.2d 64 (1969). However, this court has stated that it is error to give an unavoidable accident instruction where there is no evidence in the record to give legal support to the defense that the accident was unavoidable. *Owen, Administrator v. Moore*, 166 Neb. 226, 88 N.W.2d 759 (1958).

The unavoidable accident doctrine is well established in Nebraska and has been defined by this court as an unexpected catastrophe which occurs without any of the parties thereto being to blame for it. *Id.*; *Wright v. Lincoln City Lines, Inc.*, 163 Neb. 679, 81 N.W.2d 170 (1957). In his answer, the defendant alleged that the accident was unavoidable. However, from the record and the argument of counsel it is clear that the defendant has not based his defense upon an unavoidable accident in the ordinary negative sense where all parties prove themselves to be free from negligence; but, rather, he has characterized a sudden loss of consciousness defense as analogous to an unavoidable accident and raised it as an affirmative defense. This court has not considered whether, as in the present case, a loss of consciousness constitutes an unavoidable accident and thereby a defense to an action based on negligence.

The rationale behind a loss of consciousness defense is that where a driver was suddenly deprived of his senses by "blacking

out," he could not comprehend the nature and quality of his acts. *Moore v. Presnell*, 38 Md. App. 243, 379 A.2d 1246 (1977). The majority of courts in other jurisdictions which have addressed the defense have recognized that a sudden or momentary loss of consciousness while driving is a complete defense to an action based on negligence if such a loss of consciousness was not foreseeable. *Rogers v. Wilhelm-Olsen*, 748 S.W.2d 671 (Ky. App. 1988); *Brannon v. Shelter Mut. Ins. Co.*, 507 So. 2d 194 (La. 1987); *Knight v. Miller*, 503 So. 2d 120 (La. App. 1987); *Goodrich v. Blair*, 132 Ariz. 459, 646 P.2d 890 (Ariz. App. 1982); *Freese v. Lemmon*, 267 N.W.2d 680 (Iowa 1978); *Moore, supra*; *Lutzkovitz v. Murray*, 339 A.2d 64 (Del. 1975); *Reliance Insurance Company v. Dickens*, 279 So. 2d 234 (La. 1973); *Holcomb v. Miller*, 149 Ind. App. 46, 269 N.E.2d 885 (1971); *Wallace v. Johnson*, 11 N.C. App. 703, 182 S.E.2d 193 (1971); *van der Hout v. Johnson*, 251 Or. 435, 446 P.2d 99 (1968); *Watts v. Smith*, 226 A.2d 160 (D.C. App. 1967); *Freifield v. Hennessy*, 353 F.2d 97 (3d Cir. 1965); *Malcolm v. Patrick*, 147 So. 2d 188 (Fla. App. 1962); *Eleason v. Western Casualty & Surety Co.*, 254 Wis. 134, 35 N.W.2d 301 (1948). An exception to this general rule exists where a person knows that he is suffering from an illness which will likely cause his loss of consciousness. *Moore, supra*. Accord, *Rogers, supra*; *Knight, supra*; *Goodrich, supra*; *Lutzkovitz, supra*; *Reliance Insurance Company, supra*; *Freifield, supra*.

These courts generally hold that a loss of consciousness defense is an affirmative defense and that where, as in the present case, the plaintiff has established a prima facie case of negligence, the burden of proof shifts to the defendant to establish the loss of consciousness defense. *Rogers, supra*. See, also, *Brannon, supra*; *Knight, supra*; *Goodrich, supra*; *Moore, supra*; *Lutzkovitz, supra*; *Reliance Insurance Company, supra*; *Holcomb, supra*; *Wallace, supra*; *Freifield, supra*; *Malcolm, supra*. But see, *Myers v. Sutton*, 213 Va. 59, 189 S.E.2d 336 (1972) (court stated that the burden of proof in a negligence case never shifts, and where the plaintiff makes out a prima facie case, it is the defendant's duty to go forward with the evidence); *Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432 (Fla. App. 1965), *cert. denied* 177 So. 2d 475 (La.) (where

the court held that a sudden loss of consciousness was not an affirmative defense, since evidence of such a loss goes to the general issue of negligence).

Where a sudden loss of consciousness is an affirmative defense, a defendant's burden is twofold. First, the defendant must present sufficient evidence to establish that he suffered a sudden loss of consciousness prior to the accident, and second, that the loss of consciousness was not foreseeable. See, *Rogers, supra*; *Brannon, supra*; *Knight, supra*; *Goodrich, supra*; *Freese, supra*; *Moore, supra*; *Lutzkovitz, supra*; *Reliance Insurance Company, supra*; *Holcomb, supra*; *Wallace, supra*; *van der Hout, supra*; *Watts, supra*; *Freifield, supra*; *Malcolm, supra*.

The plaintiff argues that the defendant failed to establish the elements of a loss of consciousness defense and that, therefore, as a matter of law it was error for the trial court to instruct the jury on the issue of unavoidable accident.

In determining whether an issue presents a question of law for the court or a question of fact for the jury, it has been held that where the evidence is conflicting as to whether the accident was caused by the driver's sudden loss of consciousness and whether the loss of consciousness was unforeseen, it is a question of fact to be determined by the jury. *Watts, supra*. However, if the evidence points to only one reasonable conclusion, it is a question of law for the court. *Tannyhill v. Pacific Motor Trans. Co.*, 227 Cal. App. 2d 512, 38 Cal. Rptr. 774 (1964). See *Eleason, supra*. Cf. *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994) (as a matter of law, when reasonable persons can reach only one conclusion, questions of fact which would normally be submitted to a jury become questions of law for the court to decide).

In accord with this principle of law, this court has instructed that when a defendant pleads the affirmative defense of assumption of risk in a negligence action, the defendant has the burden to establish the elements of assumption of risk before that defense, as a question of fact, may be submitted to the jury. *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994); *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992).

In support of her contention, the plaintiff further argues that the defendant's loss of consciousness defense involves a subjective medical condition and that, therefore, expert testimony is necessary to establish his claim of epilepsy and the causative link between the epilepsy and his loss of consciousness.

This court has previously addressed the issue of when expert testimony is required and has drawn a distinction between objective and subjective medical conditions. In personal injury cases where injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, use of expert testimony is not legally necessary to establish the cause and extent of such injuries. *Eiting v. Godding*, 191 Neb. 88, 214 N.W.2d 241 (1974). In *Eno v. Watkins*, 229 Neb. 855, 429 N.W.2d 371 (1988), this court reaffirmed the principle of law that unless the character of the injury is objective, there must be expert medical testimony to establish the causation and the extent and nature of the injuries.

> "Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. . . . When symptoms from which personal injury may be inferred are subjective only, medical testimony is required. . . ."

Eno, 229 Neb. at 858, 429 N.W.2d at 373, quoting *Eiting, supra*. See, also, *Turek v. Saint Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 488 N.W.2d 567 (1992) (where the character of an alleged injury is not objective, the cause and extent of the injury must be established by expert medical testimony). This principle of law has been recognized in workers' compensation cases as well. See, e.g., *Binkerd v. Central Transportation Co.*, 236 Neb. 350, 461 N.W.2d 87 (1990) (where the character of the injury is not objective, the cause and the extent of the injury must be established by expert testimony); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987) (unless

the injury's nature and effect are plainly apparent, an expert opinion is required to establish the causal relationship between the incident and the injury as well as any claimed disability consequent to such injury); *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983) (unless the character of the injury is objective, expert testimony is required); *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981) (subjective condition necessitates expert testimony).

Drawing a parallel with personal injury and workers' compensation cases, the plaintiff asserts that in the present case, the defendant was required to present expert testimony to establish his epileptic condition; however, her argument is not persuasive. Although the plaintiff is correct in asserting that epilepsy is a subjective medical condition, she is mistaken in her belief that a determination of whether the defendant in fact suffered from epilepsy is controlling in this case. The focus of the inquiry is not whether the defendant's loss of consciousness was the result of an epileptic seizure, but, rather, whether the defendant did in fact lose consciousness. The objective nature and effect of "blacking out" or losing consciousness is plainly apparent, and therefore, no expert testimony is required. Cf. *Courtright v. Youngberg*, 4 Wash. App. 234, 480 P.2d 522 (1971) (where court noted that a defendant's loss of consciousness defense did not have to be supported by medical evidence in order to be submitted to the jury). Epilepsy is important in this case only as bearing on the issue of whether defendant should have foreseen that result.

The thrust of the plaintiff's remaining argument is that the defendant failed to establish the requisite elements of a loss of consciousness defense. First, we must consider whether the evidence presented established that the defendant suddenly lost consciousness prior to the accident.

Unconsciousness Prior to the Accident

The record reveals that the only evidence the defendant presented at trial to support his contention that he suffered a sudden loss of consciousness was his own testimony. On direct examination, the defendant was asked to recall the events prior to the accident. His testimony is set forth as follows:

Q: What happened?

A: I must have — I passed out and I hit a car, first. I don't really — don't remember, but I remember, but I hit a car and then I proceeded on down the street. The car proceeded on down the street, and so, like I said, I don't know if it was — it could have been that I didn't know where I was driving or it could have — or it could have been damage from the other car that — that caused me to run in, you know, to —.

Q: Do you recall the impact of your car with the Storjohn car?

A: Yes, but I — I — more or less that's when I woke up, after that.

The defendant further testified that he told a police officer at the scene of the accident that he did not remember anything during the accident and that he must have blacked out or passed out.

The defendant's testimony as to his recollection of events prior to the accident is inconsistent and contradictory. Without corroborating evidence, either in the form of medical testimony or other witnesses, it is difficult to reasonably infer from his testimony that he was unconscious prior to the accident. Therefore, the defendant failed to present sufficient evidence to satisfy the threshold requirement for the loss of consciousness defense, and it was error for the trial court to instruct the jury on the defense.

FORESEEABILITY

However, even assuming that the defendant suffered a sudden loss of consciousness prior to the accident, we must examine the record to determine whether such a loss was foreseeable. In establishing the loss of consciousness defense, the issue of foreseeability is crucial. The defense is not available where a driver was put on notice of facts sufficient to cause an ordinary and reasonable person to anticipate that his or her driving might likely lead to injury to others. *Rogers v. Wilhelm-Olsen*, 748 S.W.2d 671 (Ky. App. 1988). Accord, *Knight v. Miller*, 503 So. 2d 120 (La. App. 1987); *Goodrich v. Blair*, 132 Ariz. 459, 646 P.2d 890 (Ariz. App. 1982); *Lutzkovitz*

v. Murray, 339 A.2d 64 (Del. 1975); *Reliance Insurance Company v. Dickens*, 279 So. 2d 234 (La. 1973); *Freifield v. Hennessy*, 353 F.2d 97 (3d Cir. 1965).

Courts have generally held that where it is undisputed that the defendant knew that he or she was subject to attacks which could result in a sudden loss of consciousness, the evidence is such that the defendant's loss of consciousness was foreseeable. See, *Eleason v. Western Casualty & Surety Co.*, 254 Wis. 134, 35 N.W.2d 301 (1948) (stating that foreseeability was established where the defendant testified he had been subject to seizures for approximately 6 years and that during these seizures he would lose consciousness for about 15 minutes); *Reliance Insurance Company, supra* (stating that it must have been foreseeable to the defendant that she would be apt to have an epileptic attack where the evidence established that she knew she had suffered from previous seizures for 8 years prior to the accident); *Knight, supra* (court reversed jury verdict for defendant and stated that defendant had not borne the burden of showing that her loss of consciousness was unforeseeable when the evidence showed she had experienced previous seizures).

When asked on direct examination when he discovered he had an epileptic condition, the defendant testified that he first started to pass out in about 1968 or 1969. He further testified that he had been under a doctor's care from the time of his first blackout to the time of the accident and had been taking Dilantin for his condition. When questioned by his counsel concerning the foreseeability of his loss of consciousness, the defendant testified as follows:

> Q: Had you had any forewarning or any reason to think that day that you might be going to have an attack?
>
> A: Not that day, no.
>
> Q: Had you been having any problems — now, I believe you told me that 15 years before the accident you were driving down the highway one time and had an attack?
>
> A: Yes.
>
> Q: Since that time to this accident in October 1987, did you ever black out driving a car?
>
> A: Not driving a car, and I drove — I blacked out at

work in different — in there and this — I said, "Well, maybe you need — maybe, you know, that mightn't" — and the doctor says, "Well, I think it's just the stress from your work that's — that that's why you have it; beings that you have driven so many miles before, why that might" — of course, I don't — I'm not saying that the doctor was right, but he said that, "I don't think that — that's probably why you don't pass out when you drive — never had a — you know, pass out driving a car."

Q: You had no reason to think you might pass out when you went down Elm Street, did you?

A: No.

Q: And your doctor said that you could drive?

A: Yes.

The defendant testified as to the medication he was taking:

Q: Mr. Fay, how long had you been taking Dilantin?

A: Ever since 1968 or nine. '69.

Q: And how often did you take it that day.

A: Well, at first, it was three times a day, and — there — and I don't remember during the accident. I think it was — it's — I take it, now, four times a day, but I — during the accident, I think it was three times a day for sure.

. . . .

Q: Okay. And you had only taken it once that day?

A: Twice. Early in the morning and at noon.

The defendant's testimony continued:

Q: And, now, your testimony is that you passed out when you were driving. Is that what you are, now, telling us?

A: Well, that was after I passed out. That's when the — they found me — I walked to my dad's to see my dad in the — on the streets, and I was already — I had already lost my license then.

Q: But you — in this, you say, "I have passed out twice in two years, once each year, and even if I wasn't driving either time," —

A: Yeah.

Q: So here you are saying that you passed out twice and hadn't been driving.

According to the defendant's own testimony, it is quite apparent that the defendant knew he was subject to seizures and as a result would lose consciousness. It is also apparent that the medication he had been taking did not control his seizures. The only evidence the defendant offers to support his contention that the seizure was not foreseeable is his belief that he would not have an attack "that day" and the fact that his doctor told him at some unstated time that he could drive. The defendant's subjective belief alone is not sufficient to establish that his loss of consciousness was not foreseeable. Furthermore, courts have found that the fact that a doctor informed a defendant that he or she could drive is not persuasive. See *Freese v. Lemmon*, 267 N.W.2d 680 (Iowa 1978).

There is no testimony in the record to support the conclusion that the driver's loss of consciousness was not reasonably foreseeable; therefore, the trial court's instruction on the defense of unavoidable accident found no support in the record.

NEGLIGENCE AS A MATTER OF LAW

Considering the undisputed evidence establishing that the defendant knew he suffered from epileptic seizures, it is apparent that the defendant was negligent as a matter of law in driving his car. One who is ill must conform to the standard of a reasonable person under a like disability and may be negligent in driving at all when he or she knows that he or she is subject to such attacks. Restatement (Second) of Torts § 283C, comment *c*. (1965).

The Supreme Court of Wisconsin has specifically considered this issue and held that as a matter of law it is negligence for the defendant to drive a car when he knew that he was subject to seizures. *Eleason v. Western Casualty & Surety Co.*, 254 Wis. 134, 35 N.W.2d 301 (1948). The *Eleason* court noted:

> What is important is that he knew that he might be unable to control the car which he was driving. He also must have known that if he lost control of the car there was danger of someone being injured. Driving a car where people are to be met with on highways today is dangerous enough if one has complete control of his powers. When a driver knows

> that he may become unconscious and lose that control at any moment, he must be held negligent in attempting to drive.

Id. at 134-35, 35 N.W.2d at 303. The court concluded that where the evidence established that the defendant knew he was likely at any time to become incapacitated to control a car, that evidence by itself is sufficient to make driving a car negligence. *Id.* See, also, *Goodrich v. Blair*, 132 Ariz. 459, 461, 646 P.2d 890, 892 (Ariz. App. 1982) (where the court stated, "If the defendant's health was such that a reasonably prudent man would not risk driving a car, then the defendant is negligent by merely undertaking the task of driving, regardless of subsequent events").

Although unrelated as to facts and issues, this court has spoken on the matter of the foreseeability of epileptic attacks: "The fact that Goerke has not yet had a seizure while transporting others does not require the home to risk the safety of the boys in its charge on the basis of trial and error, and thereby invite and await disastrous results." *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 738, 401 N.W.2d 461, 465 (1987).

The undisputed evidence in this case establishes that the defendant knew or should have known that he was likely to lose consciousness at any time, and therefore, his driving a car under the circumstances was negligence as a matter of law.

The judgment of the trial court is reversed and the cause remanded for a new trial at which the jury shall be instructed as to the defendant's negligence as a matter or law.

REVERSED AND REMANDED FOR A NEW TRIAL.

LABENZ TRUCKING, INC., ET AL., APPELLANTS, V. RICHARD A. SNYDER, APPELLEE.

519 N.W.2d 259

Filed July 22, 1994. No. S-93-014.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **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.
3. **Criminal Law: Limitations of Actions.** Chapter 29 of the Nebraska Revised Statutes applies only to criminal procedure, and therefore, the statute of limitations in Neb. Rev. Stat. § 29-110 (Cum. Supp. 1992) has no application to civil cases.
4. **Statutes: Damages: Liability: Penalties and Forfeitures.** A statute which imposes liability for actual damages and additional liability for the same act exacts a penalty.

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

Thomas R. Zakrzewski for appellants.

Vard R. Johnson, of Broom, Johnson, Fahey & Clarkson, for appellee.

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

FAHRNBRUCH, J.

Plaintiffs, LaBenz Trucking, Inc. (LaBenz Trucking), Tracy Valley Service Center, Inc. (Tracy Valley), and Denny LaBenz, appeal from a summary judgment entered in favor of defendant, Richard A. Snyder.

Plaintiffs sued Snyder, alleging that he had maliciously and intentionally damaged plaintiffs under color of office as city engineer for the city of Humphrey.

We affirm the order of the district court for Platte County granting summary judgment in favor of Snyder and dismissing plaintiffs' petition.

STANDARD OF REVIEW

In reviewing a summary judgment, an appellate 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. *Barta v. Kindschuh, ante* p. 208, 518 N.W.2d 98 (1994). 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. *Id.*

FACTS

Viewed in the light most favorable to plaintiffs, and giving plaintiffs the benefit of all reasonable inferences deducible from the evidence, the relevant facts of this case are as follows:

LaBenz Trucking and Tracy Valley are corporations organized under the laws of the State of Nebraska and have their principal places of business in Humphrey. Denny LaBenz is a resident of Humphrey and is president of both LaBenz Trucking and Tracy Valley. Snyder is a resident of Columbus and was employed at all times material to this case as the city engineer for Humphrey.

Plaintiffs allege that on May 20, 1991, under the pretext of acting in his official capacity as city engineer, Snyder sent a letter to the Nebraska Department of Environmental Control on behalf of the city of Humphrey, "falsely and maliciously accusing plaintiffs of discharging sewage directly onto the ground."

Plaintiffs also allege that on occasions after May 20, 1991, Snyder "made statements to plaintiff threatening to destroy plaintiffs' business and that plaintiffs would know what court was all about before the Nebraska Department of Environmental Control was through with plaintiffs."

On October 19, 1992, plaintiffs filed suit against Snyder pursuant to Neb. Rev. Stat. § 28-926 (Reissue 1989), which provides that any public servant who by color of his office willfully harms any person shall be answerable in treble damages. Section 28-926 further provides that "[o]ppression

under color of office is a Class II misdemeanor." Plaintiffs did not plead to recover multiple damages, and expressly waived that right.

Snyder did not answer, but moved for summary judgment on the basis that plaintiffs' cause of action was time barred by Neb. Rev. Stat. §§ 25-208 (Cum. Supp. 1992) and 20-211 (Reissue 1991). At the hearing on Snyder's summary judgment motion, Snyder entered into evidence his affidavit stating that "any and all communications, statements or other activities referred to by the Plaintiffs, either generally or specifically, in their Petition filed in this matter have occurred more than one year prior to the filing of the Petition herein." No controverting evidence was entered by plaintiffs. The trial court sustained Snyder's motion for summary judgment and dismissed plaintiffs' petition.

Plaintiffs timely appealed to the Nebraska Court of Appeals. The case was removed from the Court of Appeals to this court pursuant to our authority to regulate the caseloads of the appellate courts of this state.

ASSIGNMENT OF ERROR

Plaintiffs' sole assignment of error is that the trial court erred in holding that plaintiffs' cause of action against Snyder is barred by the 1-year statute of limitations of § 25-208.

ANALYSIS

Plaintiffs argue that their cause of action is not barred by § 25-208 because (1) § 28-926 provides that oppression under color of office is a misdemeanor, and therefore, the 18-month statute of limitations in Neb. Rev. Stat. § 29-110 (Cum. Supp. 1992) controls; (2) plaintiffs have elected not to sue for treble damages, making § 28-926 remedial rather than penal, and therefore, § 25-208 does not apply; and (3) plaintiffs may elect the common-law remedy of compensatory damages without regard to § 28-926. We begin by addressing the issue of which statute of limitations controls, as raised in plaintiffs' first two arguments, which are interrelated.

Plaintiffs argue that their cause of action is not time barred by § 25-208 because that statute applies to actions which are *penal* in nature, and plaintiffs have waived treble damages, thus

making their action *remedial* in nature. Plaintiffs urge that their cause of action is instead subject to the 18-month statute of limitations for misdemeanors prescribed by § 29-110, because § 28-926 classifies oppression under color of office as a Class II misdemeanor.

Plaintiffs' argument that their case is subject to the statute of limitations in § 29-110 is meritless. We have held that chapter 29 of the Nebraska Revised Statutes applies only to criminal procedure, and therefore, the statute of limitations in § 29-110 has no application to civil cases. See *In re Interest of Hollenbeck*, 212 Neb. 253, 322 N.W.2d 635 (1982). Cf. *State, ex rel. Wright, v. Barlow*, 132 Neb. 166, 271 N.W. 282 (1937) (holding that the statute of limitations in § 29-110 did not apply to criminal contempt, and explaining that an act denounced by statute as a crime could constitute contempt of court even if the offender could be prosecuted under a criminal statute). The plaintiffs have brought a civil action against Snyder, and thus, § 29-110 has no application to plaintiffs' case.

Next we determine whether § 25-208 is applicable to plaintiffs' cause of action. Section 25-208 states:

> The following actions can only be brought within the periods stated in this section: Within one year, an action for libel, slander, assault and battery, false imprisonment, or malicious prosecution or *an action upon a statute for a penalty* or forfeiture, but if the statute giving such action prescribes a different limitation, the action may be brought within the period so limited....

(Emphasis supplied.)

If plaintiffs' lawsuit is an action upon a statute for a penalty, the 1-year statute of limitations in § 25-208 is applicable and will bar plaintiffs' action.

Plaintiffs contend that § 28-926 is remedial *as to them*, and not penal, because even though the statute provides for treble damages, plaintiffs have waived treble damages and have sought only actual damages.

A statute which imposes liability for actual damages and additional liability for the same act exacts a penalty. *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960); *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d

566 (1989). Plaintiffs cite no authority, nor has our research discovered any, to support the proposition that a party may convert a purely penal statute into a remedial one simply at the election of the party.

Plaintiffs attempt to support their argument by relying on *Department of Banking v. McMullen*, 134 Neb. 338, 278 N.W. 551 (1938), in which we held that a statute may be penal in part and remedial in part. However, *McMullen* is easily distinguished from the present case. In *McMullen*, the statute in question provided separate types of damages for separate violations of the banking law at issue. This is not true of § 28-926, which provides only that a public servant who violates the statute "shall be answerable to the party so injured, deceived, or harmed or oppressed *in treble damages*." (Emphasis supplied.) There is no other type or measure of damages provided to an aggrieved party bringing an action against a civil servant pursuant to § 28-926.

This is consistent with our holding in *Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.*, 104 Neb. 319, 177 N.W. 156 (1920), *reh'g denied* 104 Neb. 322, 179 N.W. 546. In *Sunderland Bros. Co.*, this court struck down a statute as unconstitutionally exacting a penalty, and stated that "[t]he question of election . . . is not in the case before us, since, *by the wording of the statute in question, no election is provided* . . . ." (Emphasis supplied.) 104 Neb. at 327, 179 N.W. at 548.

Likewise, the plain wording of § 28-926 does not provide for any election of damages by a plaintiff. Because the Legislature has not seen fit, in § 28-926, to provide for an election between actual and treble damages, this court may not construe the statute to so provide.

We therefore hold that § 28-926 is penal in nature and that plaintiffs' action is one "upon a statute for a penalty." As such, plaintiffs' action is subject to the 1-year statute of limitations of § 25-208.

Finally, we turn to plaintiffs' argument that they may elect a common-law remedy for compensatory damages. Assuming that plaintiffs could elect such a remedy, their allegations that Snyder falsely and maliciously accused plaintiffs of wrongdoing amounts to an action for defamation.

Nebraska recognizes common-law actions for libel and slander, both of which are subject to the same 1-year statute of limitations as an action on a statute for a penalty. See § 25-208. Nebraska also recognizes a statutory cause of action for invasion of privacy, which is likewise subject to a 1-year statute of limitations. See Neb. Rev. Stat. §§ 20-204 (Reissue 1991) and 20-211. Therefore, any common-law remedy elected by plaintiffs is also barred.

Because it is uncontroverted that all events upon which plaintiffs rely in their petition occurred more than 1 year prior to the filing of plaintiffs' petition, and because plaintiffs' action is time barred by the applicable statutes of limitations, Snyder is entitled to judgment as a matter of law. The district court correctly granted judgment for Snyder and dismissed plaintiffs' petition with prejudice.

CONCLUSION

The district court correctly found that plaintiffs' cause of action was filed out of time. We affirm the order of the district court granting summary judgment to defendant and dismissing plaintiffs' petition.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CRAIG T. GRIMES, APPELLANT.

519 N.W.2d 507

Filed July 22, 1994. No. S-93-668.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Search Warrants: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded upon articulable facts.

4. _____: _____. In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
5. **Search Warrants: Probable Cause: Appeal and Error.** The duty of the reviewing court is to ensure that the magistrate issuing a search warrant had a substantial basis for determining that probable cause existed.
6. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.
7. _____: _____. An affidavit in support of the issuance of a search warrant must affirmatively set forth the circumstances from which the status of the informant can reasonably be inferred.
8. _____: _____. Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
9. **Criminal Law: Search Warrants: Probable Cause.** Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search.
10. **Search Warrants: Affidavits: Appeal and Error.** An appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit underlying a search warrant.
11. **Search Warrants: Evidence.** Evidence which emerges after a search warrant is issued has no bearing on whether the warrant was validly issued.
12. **Criminal Law: Courts: Juvenile Courts: Jurisdiction.** In deciding whether to transfer proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 1988).
13. **Trial: Expert Witnesses.** The right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court.
14. **Courts: Juvenile Courts: Jurisdiction.** The consideraton of the criteria listed in Neb. Rev Stat. § 43-276 (Reissue 1988) is a balancing test. A court need not decide all of these criteria against the juvenile before denying a motion to transfer.
15. **Homicide: Intent.** The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously.
16. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of the trial

judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.

17. **Criminal Law: Due Process: Statutes.** Due process requires that criminal statutes be clear and definite and that a crime and ascertainable standards of guilt be defined with sufficient definiteness to inform those subject to the statute what conduct will render them liable to punishment.
18. **Criminal Law: Due Process: Jury Instructions: Proof.** A jury instruction which shifts the burden of proof to a defendant on any essential element of a crime charged violates a defendant's due process right to a fair trial.
19. **Criminal Law: Indictments and Informations.** Generally, to charge the defendant with the commission of a criminal offense, an information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute or in language equivalent to the statutory terms defining the crime charged.
20. **Indictments and Informations.** The purpose of an information is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also so that he may be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense.
21. **Indictments and Informations: Statutes.** If a statute does not set forth all the elements necessary to constitute the offense intended to be punished, an indictment simply following the words of the statute is not sufficient, and, in such a case, the indictment must allege with certainty all of the particular elements necessary to bring the case within the intent and meaning of the statute.

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

Julianne M. Dunn and Daniel J. Neppl for appellant.

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

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

PER CURIAM.

Following a jury trial in the Douglas County District Court, Craig T. Grimes was convicted of second degree murder and use of a firearm to commit a felony for the September 7, 1992, shooting death of James P. Kirby. He appealed his convictions of murder in the second degree and use of a firearm to commit a felony to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we

removed the matter to this court. Grimes challenges the district court's rulings on a motion to suppress and on a motion for a psychological examination. He also contends that the district court abused its discretion in sentencing him. Finally, Grimes contends that the district court committed reversible error in instructing the jury. He asserts the trial court erred by failing to instruct the jury that malice is an element of the crime of second degree murder. We agree and, accordingly, reverse the judgment of the district court and remand this cause for a new trial.

BACKGROUND

Grimes was charged by information with second degree murder and use of a firearm to commit a felony for the September 7, 1992, shooting death of Kirby. Prior to trial, Grimes, then age 16, filed a motion to have his case transferred to the separate juvenile court. Additionally, asserting that an examination 18 months earlier revealed depression and an adjustment disorder, Grimes moved the court to order a psychological exam. The trial court denied both motions. Grimes also filed a motion to suppress the evidence obtained by police during a search of his home. This motion was also denied. Grimes was tried before a jury in the Douglas County District Court. He was convicted of both second degree murder and use of a firearm to commit a felony. Grimes was sentenced to life in prison for second degree murder and to a consecutive sentence of 6 to 10 years for use of a firearm in the commission of a felony.

ASSIGNMENTS OF ERROR

Restated, Grimes assigns that the trial court erred in (1) failing to grant his motion to suppress, (2) failing to grant his motion for a psychological examination, (3) failing to instruct the jury that malice was an element of second degree murder, and (4) in sentencing him to life in prison.

STANDARD OF REVIEW

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). In determining whether a trial court's findings on a motion to suppress are

clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.*

MOTION TO SUPPRESS

Grimes asserts that the trial court erred in failing to suppress the evidence police obtained during a search of his home. Grimes contends the evidence should have been suppressed, since it was obtained during an unlawful search. He argues that the search was unlawful because the affidavit in support of the request for a search warrant failed to demonstrate that the hearsay information contained therein came from a reliable source.

The affidavit executed by the police to obtain the search warrant states in pertinent part:

> [T]he following are the grounds for the issuance of a search warrant for said property and the reasons for the Affiant's belief, to-wit: (1) On Monday, September 7, 1992, at 1746 hours, cruiser officers with the Omaha Police Division responded to a disturbance/shooting radio call at 1702 North 32nd St., Omaha, NE.
>
> The victim of this shooting incident which took place on the fore-mentioned address, was identified as James P. Kirby, a white male, Date of Birth, 10-05-1965, who resided at 1702 North 32nd St., Omaha, NE.
>
> The victim, James P. Kirby, died shortly after the shooting incident as a result of sustaining a single gun shot wound to the chest area.
>
> (2) During the course of the follow-up investigation, a spent round was recovered from the sidewalk area in front of 1702 North 32nd St., Omaha, NE, where the victim, James P. Kirby, collapsed after being shot. A subsequent preliminary examination of the spent bullet indicated an approximate size of 44 caliber. Also during the course of the follow-up investigation, affiant officers, Jadlowksi, #991, and Comstock, #860, were actively involved in developing information from numerous witnesses which indicated a chrome plated 44 caliber, long barrelled

revolver was used in this homicide and possible identification of suspects involved.

(3) One of the named suspects was identified as Doss, Ronnie L. a black male, DOB-12/09/74, residing at 4223 Binney St., Omaha, NE, currently a student at Benson High School of Omaha, NE. Doss was located at Benson High School, Omaha, NE, and transported to 505 South 15th St. Room #413, Omaha Police Headquarters on September 9, 1992, at 1515 hours, and at that location was interviewed by affiant officers, Jadlowksi, #991, and Comstock, #860, and during this interview he stated that he personally observed the suspect as Grimes, Craig, a black male, DOB-09/05/66, residing at 3915 North 43rd St., Omaha, NE, discharge what he described as 44 caliber long barrelled revolver, silver in color, with dark wood grained grips, at victim, Kirby, James. After observing the firearm discharge, witness, Doss, stated he observed the victim, Kirby, James, fall to the ground.

(4) After observing Kirby fall to the ground, Doss stated that he and Grimes, Craig with other individuals ran to Doss's vehicle and left the area. After driving around for a period of time, for approximately 2 hours, Doss stated, that he dropped Grimes off at his residence located at 3915 North 43rd St., and at this time Grimes still had in his possession the afore-mentioned 44 caliber long-barrelled revolver, silver, with wood grain grips.

(5) During the interview with Doss, he stated to affiant officers, that he had observed Grimes, Craig in possession of the afore-mentioned weapon. And two or three of these times, he was observed in possession of the weapon at 3915 North 43rd St. where Grimes, Craig resides with his father Grimes, Arthur.

A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded upon articulable facts. *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993). In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him,

including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993); *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed. *Id.*

When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). The affidavit must affirmatively set forth the circumstances from which the status of the informant can reasonably be inferred. *Id.*

Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *Id.*

Grimes concedes that Doss was an informant who made a statement against his own penal interest. However, Grimes argues that without independent corroboration, Doss' statements were not sufficiently reliable. In *State v. Sneed and Smith*, 231 Neb. 424, 436 N.W.2d 211 (1989), we addressed whether an affidavit for a search warrant containing admissions of criminal conduct established the reliability of the informant. In that case, a burglary suspect admitted to police his involvement in four burglaries. The suspect told police he had exchanged the stolen items for drugs at a particular residence. After interviewing the suspect, the investigating officer independently determined that one defendant resided at the given residence and had an extensive record for theft and

receiving stolen property. The officer also used burglary reports to identify the items to be searched for. We held that the affidavit containing the information compiled by the officer, including the burglary suspect's statements, was sufficient to establish probable cause.

Here, some of the statements made by the informant were also bolstered by information independently established by the police. The affidavit stated that the police recovered a slug at the scene of the shooting which was the approximate size of a .44-caliber slug. Also corroborative of Doss's statement was the affiant officer's statement that "numerous witnesses . . . indicated a chrome plated 44 caliber, long barrelled revolver was used in this homicide." Contrary to Grimes' contentions, the affidavit was supported by independent investigation which corroborates Doss' statements to deem them sufficiently reliable to support a search warrant.

Grimes also submits that Doss' statement against penal interest is not a sufficient indicia of reliability, since it was self-serving. Grimes contends that since Doss was also a suspect in Kirby's murder, Doss' statements were made for the purpose of exonerating himself. This issue was also previously addressed in *State v. Sneed and Smith, supra*. In support of our holding that an affidavit for a search warrant containing admissions of criminal conduct established the reliability of the informant, we quoted the following from *United States v. Harris*, 403 U.S. 573, 583-84, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971):

> Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct.

Despite Grimes' assertions to the contrary, a statement against penal interest, in and of itself, carries a sufficient indicia of reliability to support a finding of probable cause. *United States v. Harris, supra*.

Finally, with regard to the search warrant, Grimes contends that Doss' subsequent testimony at trial and in depositions

reveals that he was unreliable. What Doss' subsequent testimony revealed is irrelevant. An appellate court is restricted to consideration of the information and circumstances contained within the four corners of the underlying affidavit. *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993); *State v. Utterback, supra*. Evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *Id.*.

We conclude that under the totality of the circumstances, the underlying affidavit established probable cause to search. The warrant was therefore proper, and the trial court did not err by refusing to suppress the evidence obtained during the search of Grimes' residence.

MOTION FOR PSYCHOLOGICAL EXAMINATION

Next, Grimes contends the trial court erred in denying his motion for a psychological examination. Grimes sought the examination to support his motion to transfer to juvenile court. Grimes alleged that the psychological examination was necessary for a determination of whether he was of a sufficient psychological, emotional, and mental makeup to be tried as an adult. In support of his motion for evaluation, Grimes alleged that a psychological evaluation performed 18 months earlier showed that he suffered from depression and an adjustment disorder. At a hearing on the motion to transfer, Grimes adduced evidence to that effect.

Grimes, however, has failed to demonstrate that the trial court had any legal right, let alone any legal obligation, to grant such a motion. He has cited no statutory or case law as authority for his position. He merely argues that the denial of the motion was an abuse of discretion.

Grimes is correct in asserting that the "sophistication," "maturity," and "emotional attitude" of a defendant are relevant considerations to the issue of whether the district court should waive jurisdiction in favor of the juvenile court. See Neb. Rev. Stat. § 43-276(6) (Reissue 1988). In deciding whether to transfer proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the criteria set forth in § 43-276. *State v. Ice*, 244 Neb.

875, 509 N.W.2d 407 (1994). Section 43-276 requires that the court consider:

> (1) The type of treatment such juvenile would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; and (9) such other matters as the county attorney deems relevant to his or her decision.

See *State v. Doyle*, 237 Neb. 60, 464 N.W.2d 779 (1991).

However, the fact that evidence obtained from an updated evaluation of Grimes' condition may be relevant does not mean that an evaluation must be ordered. The right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court. *State v. Lesiak*, 234 Neb. 163, 449 N.W.2d 550 (1989). See, also, *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978).

In the case at hand, we cannot say that denial of the motion for evaluation was an abuse of discretion. Although we do not

decide whether the trial court's ruling on the motion to transfer was proper, we note that the motion for evaluation was within the context of a motion to transfer to juvenile court. We review a trial court's ruling on a motion to transfer for an abuse of discretion. *State v. Ice, supra*. Moreover, the consideration of the criteria listed in § 43-276 is a balancing test. *Id*. A court need not decide all of these criteria against the juvenile before denying a motion to transfer. *Id*. Thus, although an updated evaluation may have revealed additional information on Grimes' psychological condition, it is unlikely that the additional information would have had enough weight to shift the balance toward transferring this case to juvenile court.

The specific findings contained in the trial court's order overruling Grimes' motion to transfer reveal that many factors militated against a transfer to juvenile court: the serious nature of the charged offense; the alleged violent circumstances under which the offense was alleged to have been committed; Grimes' record with the juvenile court; his admission of gang involvement; and, if the allegations proved true, the fact that such a criminal would pose a threat to society. The trial court's denial of the motion for evaluation is affirmed.

ABSENCE OF MALICE

The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Ettleman*, 229 Neb. 220, 425 N.W.2d 894 (1988); *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986); *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). This has been the law in this state since 1983. *Id*. It has also long been the law of this state that it is the duty of the trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *State v. Breaker*, 178 Neb. 887, 136 N.W.2d 161 (1965).

In this case, the jury was not instructed that it needed to find that the killing was done maliciously. Therefore, Grimes is entitled to a reversal of his convictions and a new trial.

The State's argument that this court only recently, in *State v. Myers, supra*, added malice as an element of second degree murder, shows ignorance of, or the disregard for, 11 years of consistent holdings by this court. The suggestion that including malice as an element of second degree murder "transgresses important and well-established principles of law," supplemental brief for appellee at 3, itself transgresses important and well-established principles of law. As we pointed out in *Myers*, if malice were not an element of second degree murder, the homicide statutes would not make sense.

Additionally, defining second degree murder without malice would make the performance of many noncriminal acts illegal. For instance, a police officer who kills in the line of duty can be said to have caused the death of a person intentionally. Therefore, absent malice, Neb. Rev. Stat. § 28-304 (Reissue 1989), would be unconstitutionally vague and overbroad. See *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993) (due process requires that criminal statutes be clear and definite and that a crime and ascertainable standards of guilt be defined with sufficient definiteness to inform those subject to the statute what conduct will render them liable to punishment). The State contends that the "justification" statutes, Neb. Rev. Stat. §§ 28-1406 to 28-1416 (Reissue 1989), would save the second degree murder statute from being held unconstitutional. The State argues this would prevent a conviction for noncriminal conduct. However, this would require a police officer, for instance, who is accused of second degree murder for a death in the line of duty to use a justification statute to prove his innocence. This would unconstitutionally shift the burden of proof to the defendant. See *State v. Parks*, 245 Neb. 205, 511 N.W.2d 774 (1994) (a jury instruction which shifts the burden of proof to a defendant on any essential element of a crime charged violates a defendant's due process right to a fair trial). See, also, *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) (jury instruction which shifts the burden of proof on a mental element of a crime to the

defendant violates due process). We in no way suggest that the "justification" statutes are invalid. If malice were not a statutory element of second degree murder and we were to require a defendant committing a "justified" act to adduce some evidence of lack of malice or "justification" in his defense, we would thereby violate that defendant's presumption of innocence. We continue to hold, as we have consistently for the past 11 years, that malice is an essential element of second degree murder.

THE INFORMATION

We also note that the information charging Grimes omitted malice. In pertinent part, the information charged that Grimes did "intentionally, but without premeditation, kill James P. Kirby."

Generally, to charge the defendant with the commission of a criminal offense, an information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute or in language equivalent to the statutory terms defining the crime charged. *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989). See, also, *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993) (where an information alleges the commission of a crime using the language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient). However, where as in second degree murder the express language of the statute does not make the elements of the crime clear, the express language of the statute is insufficient. The purpose of an information is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also so that he may be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense. *State v. Laymon*, 239 Neb. 80, 474 N.W.2d 458 (1991). It is this purpose which is paramount.

The general rule has never been applied to an information charging the accused with second degree murder under the current statute, § 28-304. Since a charge under the express language of the statute would omit an essential element of the crime, the general rule is not applicable. See *State v. Oman*, 265

Minn. 277, 121 N.W.2d 616 (1963) (if a statute does not set forth all the elements necessary to constitute the offense intended to be punished, an indictment simply following the words of the statute is not sufficient, and, in such a case, the indictment must allege with certainty all of the particular elements necessary to bring the case within the intent and meaning of the statute). See, also, *Ex parte Allred*, 393 So. 2d 1030 (Ala. 1981) (indictment is sufficient which substantially follows the language of the statute, provided the statute prescribes with definiteness the constituents of the offense); *Stevens v. State*, 817 S.W.2d 800 (Tex. Crim. App. 1991) (although an indictment which tracks the language of the statute is ordinarily sufficient, it is not sufficient where more particularity is necessary to meet the requirement of notice to the accused). To be sufficient, an information charging second degree murder must allege that the accused killed purposely and maliciously.

EXCESSIVE SENTENCE

Finally, Grimes contends that his sentence of life in prison is excessive and constitutes an abuse of judicial discretion. We need not address this issue in light of our granting a new trial.

CONCLUSION

The trial court's failure to instruct the jury that malice is an element of second degree murder was prejudicial error. Grimes' convictions are reversed, and the cause is remanded to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., participating on briefs.

WRIGHT, J., dissenting.

I respectfully dissent from the majority's decision because it relies upon *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). I disagree with *Myers*, which held that malice is a required element of second degree murder. Therefore, I write to explain my reasons for disagreeing with the holdings in the case at bar, in *Myers*, and in the cases on which *Myers* relies for the proposition that malice is an element of second degree murder.

In Nebraska, all crimes are statutory. *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981).

Prior to the adoption of the present criminal code in 1977, murder in the second degree was described as "purposely and maliciously, but without deliberation and premeditation, kill[ing] another." Neb. Rev. Stat. § 28-402 (Reissue 1975). The present code, as adopted in 1977, states that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." Neb. Rev. Stat. § 28-304 (Reissue 1989).

In *Myers*, this court held that the trial court had plainly erred by failing to include malice as an element within the jury instruction on second degree murder, even though the defendant had raised no objection to the instruction. To reach this holding, the court relied on a series of cases which have added malice as an element of second degree murder. The court first relied upon *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983), which held that the essential elements of the crime of murder in the second degree were that the killing be done purposely and maliciously. In turn, *Rowe* relied upon *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979), which also stated that the essential elements for the crime of murder in the second degree were that the killing be done purposely and maliciously. In *Clermont*, the court relied upon *State v. Johnson*, 200 Neb. 760, 266 N.W.2d 193 (1978), which included malice as an element of the crime. However, at the time *Johnson* was decided, second degree murder was statutorily defined as "purposely and maliciously, but without deliberation and premeditation, kill[ing] another." § 28-402 (Reissue 1975).

The Legislature subsequently amended § 28-402 and *purposely* omitted malice from the elements of second degree murder. In explaining the revisions to the criminal code in 1977, the Judiciary Committee's summary of L.B. 38 stated:

> Section 19 is comparable to Section 28-402 or second degree murder. It differs from the present section, which requires the killing to be purposely and maliciously, whereas the new code requires that the cause of death of a person need only be done intentionally. The penalty under existing law and this section is the same, i.e., 10 years to life imprisonment.

Summary of Contents, L.B. 38, Judiciary Committee, 85th

Leg., 1st Sess. 3 (Jan. 24-26, 1977). Section 19 of L.B. 38 was codified as § 28-304, which became effective January 1, 1979. See 1978 Neb. Laws, L.B. 748, § 54.

The subsequent cases in which this court has relied upon *Johnson* and *Clermont* have added the element of malice to second degree murder, although malice was specifically omitted from the criminal code when it was revised. In my opinion, malice has not been an essential element of the crime of murder in the second degree since January 1, 1979.

Rowe was decided June 17, 1983. Because the murder for which Rowe was charged and ultimately convicted occurred May 1, 1980, Rowe was charged under § 28-304(1) for "caus[ing] the death of a person intentionally, but without premeditation." Although the crime occurred after the effective date of the new statute, this court, relying on *Clermont*, held that the essential elements of the crime of murder in the second degree were that the killing be done purposely and maliciously. The Legislature had purposely omitted malice as an element of the crime, and *Rowe*, in my opinion, incorrectly included "maliciously" as an element of second degree murder.

State v. Myers, 244 Neb. 905, 510 N.W.2d 58 (1994), stated that this court has continued to require malice as an element of second degree murder even though malice is not specified by statute. The court concluded that by omitting the element of malice from the instruction on second degree murder, the instruction, in effect, became one for the crime of intentional manslaughter as defined by *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989). This conclusion is now eroded by the fact that we have since overruled the holding in *Pettit* that "manslaughter is an intentional killing of another under Nebraska law." *State v. Jones*, 245 Neb. 821, 832, 515 N.W.2d 654, 660 (1994). We stated in *Jones*, "According to *Pettit*, the only element that distinguishes manslaughter upon a sudden quarrel and second degree murder is the element of the sudden quarrel, since both killings are intentional." 245 Neb. at 829, 515 N.W.2d at 658. "Since our statutes define manslaughter as a killing without malice, there is no requirement of an intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter upon a sudden quarrel

is the presence or absence of an intention to kill." *Jones*, 245 Neb. at 830, 515 N.W.2d at 659.

Therefore, what distinguishes second degree murder from manslaughter is the element of intent. In my opinion, malice is therefore not an element of either manslaughter or second degree murder.

In *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980), we stated that the Legislature, in enacting a statute, is presumed to have known the preexisting law. The court must conclude that in enacting an amendatory statute, the Legislature intentionally changed the language for the purpose of effecting a change in the law itself. With the amendment of the statute defining second degree murder, there is no presumption. The Judiciary Committee stated that it was changing the law by deleting the terms "purposely" and "maliciously" and requiring that the cause of death of a person need only be done intentionally.

I disagree with the majority's statement that malice has consistently been held to be an element of second degree murder in this state since *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). Where a statute has been judicially construed and that construction has not evoked amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent. *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). This rule applies where a statute is ambiguous. Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983), *cert. denied* 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987). The language of the second degree murder statute is plain—malice is not an essential element.

As recently as *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992), malice was not described as an essential element of second degree murder. The court stated:

> Under Nebraska law, second degree murder is defined as causing the death of another intentionally, but without premeditation. § 28-304(1). . . . In order to convict a person of second degree murder, the State is required to prove all *three* elements—*the death, the intent to kill, and*

causation—beyond a reasonable doubt.

(Emphasis supplied.) *Cave*, 240 Neb. at 789, 484 N.W.2d at 464.

In *Cave*, the defendant was charged with first degree murder, attempted first degree murder, and two counts of use of a firearm in the commission of a felony. Following a bench trial, the court found the defendant guilty of both counts of use of a firearm in the commission of a felony and guilty of the lesser-included offenses of second degree murder and attempted second degree murder. In affirming the convictions, this court did not describe malice as an element of second degree murder.

This court, in rejecting Cave's arguments, relied upon *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). Patterson shot and killed his estranged wife's former fiance after finding them together. He was charged with second degree murder. In New York, there were two elements of second degree murder: " 'intent to cause the death of another person' " and " 'caus[ing] the death of such person or of a third person.' " *Patterson*, 432 U.S. at 198. Malice aforethought was not an element of the crime. *Id.* In *Patterson*, the crime of second degree murder had been rewritten as part of a recent revision of the state's criminal code. The second degree murder statute in New York is similar to Nebraska's statute, and malice is not an element of the crime in New York.

The trial court instructed the jury that if it found beyond a reasonable doubt that Patterson had intentionally killed the victim, but that Patterson proved by a preponderance of the evidence that he had done so under the influence of extreme emotional disturbance, it must find him guilty of manslaughter rather than murder. Manslaughter was defined as the intentional killing of another " 'under circumstances which do not constitute murder because [the defendant] acts under the influence of extreme emotional disturbance.' " *Patterson*, 432 U.S. at 199. The jury found Patterson guilty of murder. On appeal to the U.S. Supreme Court, Patterson argued that the New York murder statute was unconstitutional. The U.S. Supreme Court rejected this argument, stating:

We cannot conclude that Patterson's conviction under

> the New York law deprived him of due process of law. The crime of murder is defined by the statute . . . as causing the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. . . .
>
> . . . It seems to us that the State satisfied the mandate of [*In re*] *Winship*[, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970),] that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged."

Patterson, 432 U.S. at 205-06. The U.S. Supreme Court declined to adopt as a constitutional imperative that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused. The Court concluded that the New York Legislature's decision to impose upon a defendant the burden of proving additional circumstances which lessen his culpability did not violate due process.

In *State v. Cave*, 240 Neb. 783, 789-90, 484 N.W.2d 458, 464 (1992), the court stated:

> In order to convict a person of second degree murder, the State is required to prove all three elements—the death, the intent to kill, and causation—beyond a reasonable doubt. None of the elements is presumed upon proof of the others, nor is any element presumed in the absence of proof by the defendant of the converse of that element. As in New York, the fact that a homicide occurs "upon a sudden quarrel" is an additional circumstance which serves to mitigate an intentional killing. [Citations omitted.]
>
> It is clear that whether a state's homicide laws violate due process depends a great deal upon the manner in which a state defines the crime charged. [Citations omitted.] Given the similarity between the second degree murder and manslaughter statutes of this state and those of New York, it is by no means clear that in a prosecution for second degree murder, the burden is on the State to

> prove the absence of a sudden quarrel beyond a reasonable doubt. We do not decide the question, however, because even assuming the State carried such a burden, the evidence is sufficient to sustain the convictions in this case.

Cave is significant for two reasons. First, it shows that this court has not *consistently* held that malice is an element of second degree murder. *Cave* held that the death, the intent to kill, and causation are the three elements required to convict a person of second degree murder. See, also, *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). Second, *Cave* cited *Patterson*, which reinforces the fact that Nebraska's second degree murder statute, § 28-304, does not violate due process if malice is not an element of the crime. New York's second degree murder statute is similar to Nebraska's, and malice is not included in the language of either state's statute.

The New York statute which placed upon Patterson the burden of proving by a preponderance of the evidence the affirmative defense of acting under the influence of extreme emotional distress in order to reduce the crime to manslaughter did not deprive Patterson of due process. I believe *Patterson* addresses the concern expressed by the majority in the present case that defining second degree murder without malice would make illegal the performance of many noncriminal acts, e.g., a police officer who kills in the line of duty can be said to have caused the death of a person intentionally.

The majority asserts that requiring a police officer who is charged with second degree murder for causing a death in the line of duty to use as a defense the "justification statutes," Neb. Rev. Stat. §§ 28-1406 to 28-1416 (Reissue 1989), would unconstitutionally shift the burden of proof to the police officer. I disagree. First, the burden of proving circumstances which are an affirmative defense or which justify or lessen culpability is not the issue before us in this case. Second, the justification statutes serve as affirmative defenses to a killing. An affirmative defense does not serve to negate any facts of the crime which the State must prove, i.e., intending to cause the death of another, but without premeditation. The elements to

be proven remain the death, the intent to kill, and causation. *State v. Cave, supra.* "Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant." *Patterson*, 432 U.S. at 211. The majority in the present case expressly states that it in no manner suggests that the justification statutes are invalid.

The majority suggests that absent malice, § 28-304 would be unconstitutionally vague and overbroad because due process requires that criminal statutes be clear and definite and that ascertainable standards of guilt be defined with sufficient definiteness to inform those subject to the statutes what conduct will render them liable to punishment. The majority states that if malice is not an element of second degree murder, the homicide statutes do not make sense. I disagree. In *Patterson*, the U.S. Supreme Court concluded that Patterson's conviction under New York law did not deprive him of due process of law. No facts beyond the death, intent, and causation are either presumed or inferred in order to constitute a murder. *Patterson v. New York, supra.*

Regardless of the number of times this court has relied upon *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983), we cannot legislate by judicial fiat that malice is an essential element of second degree murder. We simply do not have the power to do so. See Neb. Const. art. II, § 1. The Legislature deliberately removed malice from the second degree murder statute when the criminal code was revised, and malice is not an essential element of the crime until the Legislature says that it is.

In the case at bar, this court also holds that the information must contain the element of malice or the charge is insufficient. I disagree. Where the information alleges the commission of a crime using the language of the statute defining that crime, the charge is sufficient. *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993). The majority points out that the purpose of an information is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense and also be able to plead that the judgment

rendered thereon acts as a bar to later prosecution for the same offense. See *State v. Laymon*, 239 Neb. 80, 474 N.W.2d 458 (1991).

I fail to see how the absence of the word "maliciously" causes the information to be insufficient to comport with due process. Was Grimes denied procedural due process because the information did not say he "maliciously" caused the death of James P. Kirby? Grimes was charged by information as follows: "[O]n or about the 7th day of September, 1992, CRAIG T. GRIMES late of the county of Douglas and State of Nebraska, then and there being, did then and there intentionally, but without premeditation, kill James P. Kirby." The statutory elements of the crime have been described in the information. The State complied with procedural due process by charging Grimes in the language of the statute.

We have held that Nebraska's criminal procedure does not require a comprehensive and particularized factual description of elements of the offense charged in the information or complaint against a defendant. Using the language of the statute defining that crime or terms equivalent to such statutory definition is sufficient. *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989).

The majority requires malice as an element of second degree murder despite the fact that the Legislature expressly removed the word "maliciously" from the second degree murder statute by amendment in 1977. Placing malice back into the statute is judicial legislation in violation of article II, § 1, of the Nebraska Constitution.

The information in the case at bar charges the elements necessary to constitute the offense intended to be punished. Since malice is not an element of second degree murder as defined by § 28-304, it was not prejudicial error for the trial court to fail to instruct the jury that malice was an element of second degree murder. Malice is not an element of the crime for which Grimes was charged, and I would affirm the conviction and sentence.