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# REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 9, 1994 and MAY 18, 1995

IN THE

# Supreme Court of Nebraska

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## VOLUME CCXLVII

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PEGGY POLACEK

OFFICIAL REPORTER

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LINCOLN

1996

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By Peggy Polacek, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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

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C. THOMAS WHITE, Chief Justice[2]
C. THOMAS WHITE, Associate Justice[3]
D. NICK CAPORALE, Associate Justice
DALE E. FAHRNBRUCH, Associate Justice
DAVID J. LANPHIER, Associate Justice
JOHN F. WRIGHT, Associate Justice
WILLIAM C. CONNOLLY, Associate Justice[4]

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

RICHARD D. SIEVERS, Chief Judge
WILLIAM C. CONNOLLY, Associate Judge[5]
EDWARD E. HANNON, Associate Judge
JOHN F. IRWIN, Associate Judge
LINDSEY MILLER-LERMAN, Associate Judge
WESLEY C. MUES, Associate Judge
EVERETT O. INBODY, Associate Judge[6]

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

[1]Until January 31, 1995
[2]Appointed February 1, 1995
[3]Until January 31, 1995
[4]Appointed December 15, 1994
[5]Until December 14, 1994
[6]Appointed April 20, 1995

# JUDICIAL DISTRICTS AND DISTRICT JUDGES

| Number of District | Counties in District | Judges in District | City |
|---|---|---|---|
| First | Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer | Robert T. Finn | Auburn |
| | | Orville L. Coady | Hebron |
| | | William B. Rist | Beatrice |
| Second | Cass, Otoe, and Sarpy | Ronald E. Reagan | Papillion |
| | | George A. Thompson | Papillion |
| | | Randall L. Rehmeier | Nebraska City |
| Third | Lancaster | William D. Blue | Lincoln |
| | | Donald E. Endacott | Lincoln |
| | | Bernard J. McGinn | Lincoln |
| | | Jeffre Cheuvront | Lincoln |
| | | Earl J. Witthoff | Lincoln |
| | | Paul D. Merritt, Jr. | Lincoln |
| Fourth | Douglas | James A. Buckley | Omaha |
| | | James M. Murphy | Omaha |
| | | Robert V. Burkhard | Omaha |
| | | Stephen A. Davis | Omaha |
| | | Lawrence J. Corrigan | Omaha |
| | | Theodore L. Carlson | Omaha |
| | | J. Patrick Mullen | Omaha |
| | | John D. Hartigan, Jr. | Omaha |
| | | Joseph S. Troia | Omaha |
| | | Michael McGill | Omaha |
| | | Richard J. Spethman | Omaha |
| | | Mary G. Likes | Omaha |
| | | Gerald E. Moran | Omaha |
| | | 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 | Fremont |
| | | Darvid D. Quist | Blair |
| | | Maurice Redmond | Dakota City |
| Seventh | Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne | Richard P. Garden | Norfolk |
| | | Robert B. Ensz | Wayne |
| Eighth | Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler | William Cassel | Ainsworth |
| | | Ronald D. Olberding | Burwell |
| Ninth | Buffalo and Hall | John P. Icenogle | Kearney |
| | | James Livingston | Grand Island |
| | | Teresa K. Luther | Grand Island |
| Tenth | Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster | Bernard Spraque | Red Cloud |
| | | Stephen Illingworth | Hastings |
| Eleventh | Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Grant, Hayes, Hitchock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas | John J. Battershell | McCook |
| | | John P. Murphy | North Platte |
| | | Donald E. Rowlands II | North Platte |
| Twelfth | Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux | Paul D. Empson | Chadron |
| | | Alfred J. Kortum | Gering |
| | | Robert O. Hippe | Gering |
| | | John D. Knapp | Kimball |
| | | Brian Silverman | Alliance |

# JUDICIAL DISTRICTS AND COUNTY JUDGES

| Number of District | Counties in District | Judges in District | City |
|---|---|---|---|
| First | Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer | Curtis L. Maschman | Falls City |
| | | J. Patrick McArdle | Wilber |
| | | Steven Bruce Timm | Beatrice |
| Second | Cass, Otoe, and Sarpy | 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 |
| | | John J. McGrath | Omaha |
| | | Robert C. Vondrasek | Omaha |
| | | Jane H. Prochaska | Omaha |
| | | Stephen M. Swartz | 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 R. Hatfield | Central City |

# JUDICIAL DISTRICTS AND COUNTY JUDGES

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

## SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

| County | Judges | City |
|---|---|---|
| Douglas | Douglas F. Johnson | Omaha |
| | Elizabeth G. Crnkovich | Omaha |
| Lancaster | Toni G. Thorson | Lincoln |
| | Thomas B. Dawson | Lincoln |
| Sarpy | Lawrence D. Gendler | Papillion |

## WORKERS' COMPENSATION COURT AND JUDGES

| Judges | City |
|---|---|
| Ben Novicoff | Lincoln |
| Paul E. LeClair | Omaha |
| Michael P. Cavel | Omaha |
| James R. Coe | Omaha |
| Laureen K. Van Norman | Lincoln |
| Joseph S. Ramirez | Lincoln |
| Ronald L. Brown | Lincoln |

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## LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-93-613: **State v. Gentert.** Affirmed. Hastings, C.J.

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No. S-92-708: **Simon v. Wilkinson Agency.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-93-560: **Lich v. Board of Equal. of Sarpy Cty.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-93-612: **NMR, Inc. v. Department of Health.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-93-671: **City of Lincoln v. Cobb.** Motion and stipulation allowed; appeal dismissed.

No. S-93-701: **Russell v. Lacey.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. S-93-922 through S-93-924: **McDonald Farms, Inc. v. Hamilton Cty. Bd. of Equal.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-93-934: **Immanuel Medical Ctr. v. Knoles.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-93-1012: **Gas 'N Shop v. City of South Sioux City.** Motion sustained; appeal dismissed as moot.

No. S-94-336: **State v. Matthies.** Appellee's motion to dismiss for lack of jurisdiction sustained, the petition for further review having been filed too late.

No. S-94-908: **Norwest Bank Nebraska, N.A. v. Bowers.** Motion of appellee for summary dismissal sustained. See Rule 7B(1). No sanctions imposed.

No. S-94-1018: **State v. Davis.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-94-1097: **State v. Suffredini.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. S-94-1169: **State ex rel. Berthold-Riggs v. Johnson.** The respondent having complied with the court's order granting an alternative writ of mandamus, the case shall stand dismissed.

No. S-95-146: **State v. Hess.** Appeal dismissed. See Rule 7A(2).

No. S-95-295: **State v. Williams.** By order of the court, execution of Robert E. Williams stayed; matter remanded to district court; request to seal the affidavit is denied.

## LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. S-92-392: **Freeman v. Central States Health & Life Co.**, 2 Neb. App. 803 (1994). Petition of appellee for further review dismissed on January 25, 1995, as having been improvidently granted. See S-92-392, *Freeman v. Central States Health & Life Co.*, vol. 246, List of Cases on Petition for Further Review.

No. S-92-393: **Schmidt v. Central States Health & Life Co.**, 2 Neb. App. 803 (1994). Petition of appellee for further review dismissed on January 25, 1995, as having been improvidently granted. See S-92-393, *Schmidt v. Central States Health & Life Co.*, vol. 246, List of Cases on Petition for Further Review.

No. A-92-965: **S.I.D. No. 210 v. City of Omaha**, 94 NCA No. 50. Petition of appellant for further review overruled on March 15, 1995.

No. A-92-1117: **Reedy v. City of Omaha**, 94 NCA No. 49. Petition of appellant for further review overruled on February 23, 1995.

No. S-93-031: **Toulousaine de Distrib. v. Tri-State Seed & Grain**, 2 Neb. App. 937 (1994). Petition of appellee for further review dismissed on March 22, 1995, as having been improvidently granted. See S-93-031, *Toulousaine de Distrib. v. Tri-State Seed & Grain*, vol. 246, List of Cases on Petition for Further Review.

No. A-93-059: **General Siding & Roofing v. Katskee & Henatsch**, 94 NCA No. 42. Petition of appellee for further review overruled on December 21, 1994.

No. S-93-072: **Eberspacher v. Hulme**, 94 NCA No. 51. Petition of appellee for further review sustained on February 23, 1995.

No. A-93-079: **Lara v. Employers Mut. Cas. Co.**, 94 NCA No. 40. Petition of appellant for further review overruled on January 19, 1995.

No. A-93-079: **Lara v. Employers Mut. Cas. Co.**, 94 NCA No. 40. Petition of appellee for further review overruled on January 19, 1995.

No. A-93-097: **Carpenter v. Cullan**, 95 NCA No. 6. Petition of appellee for further review overruled on April 12, 1995.

No. A-93-127: **Hafer v. Hafer**, 3 Neb. App. 129 (1994). Petition of appellee for further review overruled on December 29, 1994.

No. A-93-132: **Georgetowne Square v. United States F. & G. Co.**, 3 Neb. App. 49 (1994). Petition of appellee for further review overruled on December 14, 1994.

No. A-93-140: **Carlson v. Two Rivers Auto, Inc.**, 94 NCA No. 49. Petition of appellee for further review overruled on January 25, 1995.

No. A-93-148: **Collection Bureau v. Burkhardt**, 94 NCA No. 41. Petition of appellant for further review overruled on February 15, 1995.

No. A-93-151: **Benak v. Benak**, 94 NCA No. 48. Petition of appellant for further review overruled on January 25, 1995.

No. A-93-197: **In re Estate of Wittmuss**, 95 NCA No. 7. Petition of appellant for further review overruled on March 29, 1995.

No. A-93-198: **In re Estate of Owen**, 94 NCA No. 33. Petition of appellant for further review overruled on November 30, 1994.

No. A-93-200: **Mejstrik v. Mejstrik**, 95 NCA No. 4. Petition of appellant for further review overruled on March 22, 1995.

No. A-93-217: **Halstead v. Halstead**, 94 NCA No. 34. Petition of appellant for further review overruled on November 30, 1994.

No. A-93-250: **Hay Springs Hous. Auth. v. LaBelle**. Petition of appellant for further review overruled on December 30, 1994.

No. A-93-253: **Tomlin v. Tomlin**, 94 NCA No. 49. Petition of appellee for further review overruled on April 26, 1995.

No. A-93-254: **Cullen v. Bryson Properties XVIII**. Petition of appellant for further review overruled on February 1, 1995.

No. A-93-346: **The Travelers Ins. Co. v. Nelson**. Petition of appellant for further review overruled on February 1, 1995.

No. S-93-353: **Roberts v. Weber & Sons, Co.** Petition of appellee for further review sustained on February 23, 1995.

No. A-93-737: **Currie v. Chief School Bus Service, Inc.** Petition of appellant for further review overruled on March 22, 1995.

No. A-93-831: **Sheldon v. Sheldon**. Petition of appellant for further review overruled on April 26, 1995.

No. A-93-869: **In re Interest of Michaelia N. et al.**, 94 NCA No. 43. Petition of appellant for further review overruled on January 5, 1995.

No. A-93-885: **State v. Bartlett**, 3 Neb. App. 218 (1994). Petition of appellee for further review overruled on January 25, 1995.

No. A-93-911: **State v. Bundy**, 94 NCA No. 43. Petition of appellant for further review overruled on December 21, 1994.

No. A-93-952: **State v. Jameson**, 94 NCA No. 45. Petitions of appellant for further review overruled on January 19, 1995.

No. A-93-1001: **State v. Joseph**, 94 NCA No. 40. Petition of appellant for further review overruled on January 19, 1995.

No. A-93-1033: **State v. Hendrix**, 94 NCA No. 39. Petition of appellant for further review overruled on November 30, 1994.

No. S-93-1044: **State v. Cox**, 3 Neb. App. 80 (1994). Petition of appellant for further review sustained on November 30, 1994.

No. A-93-1075: **Fass v. Fass**, 94 NCA No. 42. Petition of appellant for further review overruled on December 2, 1994, as incomplete.

No. A-93-1078: **State v. Cates**, 94 NCA No. 39. Petition of appellant for further review overruled on November 30, 1994.

Nos. S-93-1086, S-93-1087: **LeGrand v. State**, 3 Neb. App. 300 (1995). Petition of appellant for further review sustained on April 19, 1995.

No. A-93-1121: **State v. Kavan**, 95 NCA No. 7. Petition of appellant for further review overruled on March 29, 1995.

No. A-93-1128: **State v. Goering**, 94 NCA No. 42. Petition of appellant for further review overruled on December 29, 1994.

No. A-93-1129: **State v. Bowen**, 94 NCA No. 42. Petition of appellant for further review overruled on December 29, 1994.

No. A-93-1130: **State v. Strimple-Padios**, 94 NCA No. 42. Petition of appellant for further review overruled on December 29, 1994.

No. A-93-1133: **State v. Volquartsen**, 94 NCA No. 42. Petition of appellant for further review overruled on December 29, 1994.

No. A-93-1136: **State v. Larsen**, 94 NCA No. 41. Petition of appellant for further review overruled on December 14, 1994.

No. A-94-009: **State v. Davenport**, 94 NCA No. 45. Petitions of appellant for further review overruled on January 25, 1995.

No. A-94-062: **Huck v. State**, 94 NCA No. 44. Petition of appellant for further review overruled on January 5, 1995.

No. A-94-089: **State v. Winter**, 95 NCA No. 8. Petition of appellee for further review overruled on April 12, 1995.

No. A-94-096: **State v. Webb**, 94 NCA No. 41. Petition of appellant for further review overruled on March 15, 1995.

No. S-94-101: **In re Adoption of Kassandra B. & Nicholas B.**, 3 Neb. App. 180 (1994). Petition of appellant for further review sustained on January 25, 1995.

No. S-94-101: **In re Adoption of Kassandra B. & Nicholas B.**, 3 Neb. App. 180 (1994). Petition of appellee Anita B. for further review sustained on January 25, 1995.

No. A-94-111: **Winker v. Community Memorial Hosp.**, 94 NCA No. 49. Petition of appellant for further review overruled on January 5, 1995.

No. S-94-173: **Hemmerling v. Happy Cab Co.**, 94 NCA No. 44. Petition of appellant for further review sustained on December 21, 1994.

No. A-94-174: **Lousignont v. Driver Management, Inc.**, 94 NCA No. 45. Petition of appellant for further review overruled on February 1, 1995.

No. A-94-180: **State v. Frieze**, 3 Neb. App. 263 (1994). Petition of appellant for further review overruled on March 1, 1995.

No. A-94-184: **State v. Jones**. Petition of appellant for further review overruled on March 1, 1995.

No. A-94-196: **Russell v. Department of Corr. Servs.** Petition of appellee for further review overruled on April 12, 1995.

No. A-94-203: **State v. Cash**, 3 Neb. App. 319 (1995). Petition of appellant for further review overruled on March 15, 1995.

No. A-94-204: **State v. Davis**. Petition of appellant for further review overruled on November 30, 1994.

No. S-94-206: **State v. Yelli**, 3 Neb. App. 148 (1994). Petition of appellee for further review sustained on December 21, 1994.

No. A-94-208: **State v. Chronister**, 3 Neb. App. 281 (1995). Petition of appellant for further review overruled on March 1, 1995.

No. A-94-210: **State v. Reiter**, 3 Neb. App. 153 (1994). Petition of appellant for further review overruled on December 29, 1994.

No. A-94-238: **In re Interest of Elvis J.**, 94 NCA No. 51. Petition of appellant for further review overruled on February 1, 1995.

No. A-94-245: **In re Interest of Potter**. Petition of appellant for further review overruled on December 29, 1994.

No. S-94-255: **State v. Cisneros**, 95 NCA No. 6. Petition of appellant for further review sustained on March 22, 1995.

No. S-94-290: **State v. Linn**, 3 Neb. App. 332 (1995). Petition of appellant for further review sustained on March 22, 1995.

No. A-94-305: **State v. Rodgers**, 94 NCA No. 49. Petition of appellant for further review overruled on January 20, 1995.

No. A-94-340: **Doolittle v. Doolittle**, 3 Neb. App. 230 (1994). Petition of appellant for further review overruled on March 15, 1995.

No. S-94-344: **State v. Jiminez**, 3 Neb. App. 421 (1995). Petition of appellant for further review sustained on March 22, 1995.

No. S-94-344: **State v. Jiminez**, 3 Neb. App. 421 (1995). Petition of appellee for further review sustained on March 22, 1995.

No. A-94-350: **In re Interest of Travis I. et al.**, 95 NCA No. 4. Petition of appellant for further review overruled on March 22, 1995.

No. A-94-351: **In re Interest of Travis I. et al.**, 95 NCA No. 4. Petition of appellant for further review overruled on March 22, 1995.

No. A-94-366: **State v. Crabtree**, 3 Neb. App. 363 (1995). Petition of appellant for further review overruled on March 15, 1995.

No. A-94-367: **State v. Harwick**, 3 Neb. App. 363 (1995). Petition of appellant for further review overruled on March 15, 1995.

No. A-94-368: **State v. Hinkley**, 3 Neb. App. 363 (1995). Petition of appellant for further review overruled on March 15, 1995.

No. S-94-398: **State v. Pierce**, 3 Neb. App. 440 (1995). Petition of appellee for further review sustained on March 15, 1995.

No. A-94-406: **Marus v. Universal Terrazzo & Tile Co.**, 95 NCA No. 4. Petition of appellant for further review overruled on March 15, 1995.

No. A-94-457: **State v. Perry**. Petition of appellant for further review overruled on December 14, 1994.

No. A-94-464: **Sullivan v. Process Systems Inc.**, 94 NCA No. 49. Petition of appellant for further review overruled on February 1, 1995.

No. A-94-520: **State v. Gould**. Petition of appellant for further review overruled on December 29, 1994.

No. A-94-541: **State v. Bennett**. Petition of appellant for further review overruled on April 10, 1995.

No. S-94-551: **State v. Veiman**, 95 NCA No. 7. Petition of appellant for further review sustained on April 26, 1995.

No. A-94-577: **State v. Harrison**, 95 NCA No. 10. Petition of appellee for further review overruled on April 26, 1995.

No. A-94-648: **State v. Mueller**. Petition of appellant for further review overruled on January 25, 1995.

No. A-94-700: **In re Interest of McCauley H.**, 3 Neb. App. 474 (1995). Petition of appellant for further review overruled on April 12, 1995.

No. A-94-708: **Dyer v. Hastings Indus.**, 3 Neb. App. 531 (1995). Petition of appellees for further review overruled on April 26, 1995.

No. A-94-715: **Quinn v. Archbishop Bergan Mercy Hosp.**, 95 NCA No. 9. Petition of appellant for further review overruled on April 26, 1995.

No. A-94-750: **Krusemark v. Milton Waldbaum Co.**, 95 NCA No. 9. Petition of appellant for further review overruled on April 19, 1995.

No. A-94-765: **Waite v. Regional West Medical Ctr**. Petition of appellant for further review overruled on November 30, 1994.

No. A-94-766: **Waite v. Carpenter**. Petition of appellant for further review overruled on November 30, 1994.

No. A-94-769: **Kohl v. Hawkins Constr. Co.**, 95 NCA No. 5. Stipulation to dismiss appellee's petition for further review allowed on March 24, 1995.

No. A-94-900: **State v. Lara**. Petition of appellant for further review overruled on March 17, 1995.

No. A-95-043: **McMurray v. Department of Soc. Servs**. Petition of appellant for further review overruled on March 3, 1995.

# CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

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## THOMAS L. COPPI, DOING BUSINESS AS THE FACTORY BEAUTY SALON, APPELLANT, V. WEST AMERICAN INSURANCE CO., AN INSURANCE CORPORATION, APPELLEE.

524 N.W.2d 804

Filed December 9, 1994. No. S-92-704.

1. **Contracts: Insurance: Warranty.** A warranty in an insurance policy serves to establish a condition precedent to an insurer's obligation to pay.
2. **Contracts: Words and Phrases.** A condition precedent is a condition which must be performed before the parties' agreement becomes a binding contract, or a condition which must be fulfilled before a duty to perform an existing contract arises.
3. **Warranty.** A warranty may be express or implied, and affirmative or promissory.
4. **Warranty: Insurance: Words and Phrases.** A "promissory" or "executory" warranty is one in which the insured undertakes to perform some executory stipulation, as that certain acts shall or will be done, or that certain facts shall or will continue to exist.
5. **Contracts: Insurance: Warranty.** A promissory warranty requires certain action or nonaction on the part of the insured after a policy has been entered into in order that its terms shall not thereafter be breached.
6. ____: ____: ____. Neb. Rev. Stat. § 44-358 (Reissue 1993) does not relate to a breach of the terms of a policy which could arise only after the loss has occurred.
7. ____: ____: ____. Neb. Rev. Stat. § 44-358 (Reissue 1993) does not deny the insurer the right to rely upon the conditions of its policy which the insured is required to perform as a condition of recovery after the loss has occurred.
8. ____: ____: ____. Neb. Rev. Stat. § 44-358 (Reissue 1993) relates to the question of a recoverable loss and not to the question of procedure to be followed in collecting for the loss after it has occurred.
9. ____: ____: ____. Neb. Rev. Stat. § 44-358 (Reissue 1993) deals with warranties which are conditions precedent to the very existence of an insurance contract, not with promissory warranties the fulfillment of which are conditions precedent to recovery under an insurance contract which has come into being.
10. **Contracts: Pleadings: Trial: Proof.** When the pleading of performance of a condition precedent in a contract is controverted, the party pleading the

performance of such condition precedent is required to establish on the trial the facts showing such performance.

11. **Breach of Contract: Pleadings.** If a defendant relies upon nonperformance of a contract, the defendant must allege that fact in the answer, and in pleading nonperformance, the facts which constitute the breach must be alleged.
12. ____: ____. Where by statute a plaintiff is authorized to plead general performance of all conditions precedent, the defendant must, if relying upon the fact that any of the conditions precedent have not been performed, set out specifically the condition and the breach.
13. **Contracts: Pleadings.** Affirmative defenses are matters which seek to avoid a valid contract.
14. **Contracts: Insurance: Words and Phrases.** An exclusion in an insurance policy is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed.
15. **Contracts: Insurance: Proof.** Where coverage is denied, the burden of proving coverage under a policy is upon the insured.
16. **Contracts: Insurance: Records: Proof.** The burden is on an insured to prove that it complied with the recordkeeping provisions of a policy.
17. **Supreme Court: Courts: Appeal and Error.** The Nebraska Supreme Court, upon granting further review which results in the reversal of a decision of the Nebraska Court of Appeals, may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
18. **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.
19. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
20. **Trial: Expert Witnesses.** It is for the trial court to make the initial decision as to whether expert 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.
21. **Trial: Testimony.** Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
22. **Trial: Expert Witnesses.** Expert testimony which may be of assistance to the trier of fact is admissible even in areas where laypersons have competence to determine the facts.
23. **Trial: Expert Witnesses: Custom and Usage.** Expert testimony as to the custom and practice of an industry is admissible to elucidate the meaning of ambiguous language.
24. **Contracts: Intent: Expert Witnesses.** When a contract term is not defined in the parties' contract and the parties dispute the intended meaning of the term, an expert witness may properly testify as to the expert's interpretation of the

contract language.

25. **Contracts: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
26. **Contracts: Parol Evidence.** A written instrument is open to explanation by parol evidence when its terms are susceptible of two constructions, or where the language employed is vague or ambiguous.
27. **Trial: Contracts: Evidence: Custom and Usage.** Evidence of custom is admissible when there is a conflict as to the terms of the contract to explain the meaning of the words or phrases used, or where the contract is silent as to certain points which may be inherent in the nature of the contract.
28. **Directed Verdict: Evidence.** In order to sustain a motion for directed verdict, the trial court must resolve the controversy as a matter of law and is to do so only when the facts are such that reasonable minds can draw only one conclusion; in considering the evidence for the purposes of a directed verdict motion, the party against whom the motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence, and the case may not be decided as a matter of law if there is any evidence in favor of the party against whom the motion is made.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Jeffrey A. Silver for appellant.

Robert V. Roach and Matthew J. Buckley, of Hansen, Engles & Locher, P.C., for appellee.

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

CAPORALE, J.

## I. STATEMENT OF CASE

Pursuant to verdict, the district court dismissed the action brought by plaintiff-appellant, Thomas L. Coppi, doing business as The Factory Beauty Salon, against the defendant-appellee, West American Insurance Co., under a policy of insurance whereunder West American undertook to cover, to a maximum of $10,000, losses Coppi sustained as the result of the theft of money used in the conduct of his business,

provided that Coppi maintained appropriate records from which the loss could be determined. Coppi appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in (1) ruling that a statute dealing with insurance warranties had no application, (2) allocating the recordkeeping burden of proof to him, (3) permitting a witness to testify as an expert, and (4) failing to determine as a matter of law that he had complied with the policy requirements. Reasoning that the district court had misallocated the burden of proof, the Court of Appeals reversed the judgment of the district court and remanded the cause for a new trial. *Coppi v. West Am. Ins. Co.*, 2 Neb. App. 834, 516 N.W.2d 264 (1994). West American successfully petitioned this court for further review. We now reverse the judgment of the Court of Appeals and remand the cause to that court with the direction that it reinstate the judgment of the district court.

## II. FACTS

Coppi's operation consisted of a number of independent contractor stylists. Typically, after a stylist performed a service, the stylist prepared a ticket which reflected the stylist's name and the amount of the service performed. The customer would then pay by either cash or check. Thereafter, the ticket was placed in a "pigeon hole" so the stylist could be given appropriate credit. At the end of the day, the salon manager would record the total value of services rendered by each stylist on a sheet of paper and place the tickets and the total sheet in the floor safe located on the premises. Each morning, the salon manager would take the tickets out of the safe and enter the totals in a weekly ledger which reflected the amount of the ticket totals for each stylist and the amount of cash and checks received.

Coppi also kept a cash reserve of between $1,000 and $1,500, from which change was made for customers. He maintained no written record of the reserve, but kept it in the safe, along with the cash received during the day, the tickets, and the total sheet. Checks were deposited in one of two banks.

The weekly ledger was kept in the back room of the salon. Stylists could dispute any discrepancy through the day

following the salon manager's recording of the day's tickets in the ledger. Each Tuesday, the stylists received disbursements in cash according to the tickets recorded in the weekly ledger. The ledger was then discarded, and no other written record of the cash taken in for any particular week was maintained.

On Sunday, March 16, 1986, Coppi's business was burglarized and the floor safe stolen, along with its contents and other items. Although the weekly ledger was not stolen, it was discarded following payment of the stylists on Tuesday, March 18. The only matter at issue is the cash loss, the parties having come to agreement on the other items.

Coppi testified that he knew the amount of cash taken in for the previous Tuesday through Friday from the weekly ledger and determined the amount of cash taken in on the day prior to the burglary by reconstructing, "[a]s best we could," the business from the stylists' records. In addition, at West American's request, Coppi supplied it with bank statements, deposit slips, and weekly ledgers for 4 or 5 weeks following the burglary.

Coppi submitted a "Property Loss Notice" form to his insurance agent. However, he did not enter the amount of loss on the form because he did not feel comfortable letting anyone know "that kind of money existed, even when the police asked." Ultimately, he claimed a cash loss in excess of $10,000.

Coppi testified that the records he maintained were those customarily kept by beauty salons in his area. But, over Coppi's objection, West American's claim adjuster, who had 19 years' experience, including work as an independent adjuster, and who had handled "hundreds" of cash burglary losses, testified that the loss form Coppi submitted would not be an acceptable document for any insurance company he had represented.

Again over Coppi's objection, the district court instructed the jury that it was Coppi's burden to prove that he had kept the records specified in the policy.

## III. SCOPE OF REVIEW

The issues submitted for review present questions of law, in connection with which we have an obligation to reach an independent conclusion irrespective of the determination made

by any inferior court. *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994).

## IV. ANALYSIS

With the foregoing matters in mind, we direct our attention to each of the assignments of error in turn.

### 1. Warranty Statute

The first assignment of error complains that the district court failed to rule that Neb. Rev. Stat. § 44-358 (Reissue 1993) prevented West American from denying coverage on the ground that Coppi had failed to keep records.

The statute reads:

> No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding.

In analyzing whether the statute applies, it is important to understand the nature of the recordkeeping requirement of the policy.

Provisions requiring the keeping of inventories, books, and records of the insured business and providing a place of safekeeping for such documents are commonly referred to as "iron-safe clauses" or "record warranties." 5 John Alan Appleman & Jean Appleman, Insurance Law and Practice § 3021 (1970); 8 George J. Couch, Cyclopedia of Insurance Law § 37A:770 (rev. 2d ed. 1985). Insurers commonly require insured to keep books so the value of the loss is ascertainable. See *Hamann v. Nebraska Underwriters Ins. Co.*, 82 Neb. 429, 118 N.W. 65 (1908). Courts from all jurisdictions have found such provisions reasonable and enforceable. *Michigan Millers Mutual Insurance Co. v. Lindsey*, 285 So. 2d 908 (Miss. 1973) (lists cases finding such provisions reasonable and enforceable);

*Calloyan v. American Casualty Co. of Reading, Pa.*, 51 A.2d 678 (D.C. 1947); *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338, 83 N.W. 78 (1900); *Sciara v. Fidelity & Casualty Co. of New York, Inc.*, 50 Tenn. App. 608, 362 S.W.2d 935 (1961).

The weight of authority regards such a provision as a promissory warranty by the insured. 8 Couch, *supra*, § 37A:779; 5 Appleman, *supra*, § 3024; *Davis v. National Fire Ins. Co.*, 169 La. 63, 124 So. 147 (1929); *Dozark v. Westchester Fire Ins. Co.*, 50 S.D. 285, 209 N.W. 652 (1926); *Thompson v. State Assur. Co.*, 160 La. 683, 107 So. 489 (1926); *Cooper v. Ins. Co.*, 98 W. Va. 655, 127 S.E. 511 (1925); *Springfield Fire & Marine Ins. Co. v. Griffin*, 64 Okla. 131, 166 P. 431 (1917); *Cohen vs. Home Insurance Co.*, 29 Del. 201, 97 A. 1014 (1916), *affirmed* 31 Del. 51, 111 A. 264 (1918); *Hartford Fire Ins. Co. v. Farris*, 116 Va. 880, 83 S.E. 377 (1914); *Western Nat. Life Ins. Co. v. Williamson-Halsell-Frasier Co.*, 37 Okla. 213, 131 P. 691 (1913); *Shawnee Fire Ins. Co. v. Thompson & Rowell et al.*, 30 Okla. 466, 119 P. 985 (1911); *German American Ins. Co. v. Fuller*, 26 Okla. 722, 110 P. 763 (1910); *Insurance Co. vs. Rosenberg*, 23 Del. 174, 74 A. 1073 (1909); *Aetna Insurance Co. v. Johnson*, 127 Ga. 491, 56 S.E. 643 (1907); *Prudential Fire Ins. Co. v. Alley*, 104 Va. 356, 51 S.E. 812 (1905); *Great American Insurance Company v. Lang*, 416 S.W.2d 541 (Tex. Civ. App. 1967); *Wisden v. American Ins. Co.*, 9 Ohio App. 2d 48, 222 N.E.2d 826 (1964); *Fields v. Queen Insurance Company*, 31 Ga. App. 683, 121 S.E. 697 (1924); *Home Ins. Co. v. Flewellen*, 221 S.W. 630 (Tex. Civ. App. 1920), *affirmed* 247 S.W. 833 (Tex. Com. App. 1923); *Camden Fire Ins. Co. v. Yarbrough*, 215 S.W. 842 (Tex. Com. App. 1919); *Royal Exchange Assur. v. Rosborough*, 142 S.W. 70 (Tex. Civ. App. 1911); *Orient Ins. Co. v. Dorroh-Kelly Merc. Co.*, 59 Tex. Civ. App. 289, 126 S.W. 616 (1910), *affirmed* 104 Tex. 199, 135 S.W. 1165 (1911); *Johnson v. Fire Ins. Co.*, 120 Mo. App. 80, 96 S.W. 697 (1906); *Roberts, Etc., Co. v. Insurance Co.*, 19 Tex. Civ. App. 338, 48 S.W. 559 (1898).

Nebraska is no exception. See, *Continental Ins. Co. v. Waugh*, 60 Neb. 348, 83 N.W. 81 (1900) (clause requiring insured to take inventory and keep books of account characterized as warranty); *Jeary, supra*.

A warranty has been defined as a statement or promise the untruthfulness or nonfulfillment of which in any respect renders the policy voidable by the insurer. See, Robert E. Keeton & Alan I. Widiss, Insurance Law, A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices § 6.6(a) (1988); William R. Vance, Handbook on the Law of Insurance § 71 (3d ed. 1951). It enters into and forms a part of the contract itself, defining the precise limits of the obligation, and no liability can arise except within those limits. 12A John Alan Appleman & Jean Appleman, Insurance Law and Practice § 7353 (1981). That is to say, a warranty serves to establish a condition precedent to an insurer's obligation to pay. See Keeton & Widiss, *supra*. A condition precedent is a condition which must be performed before the parties' agreement becomes a binding contract, or a condition which must be fulfilled before a duty to perform an existing contract arises. *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985).

A warranty may be express or implied, and affirmative or promissory. 7 George J. Couch, Cyclopedia of Insurance Law § 36.1 (rev. 2d ed. 1985). A "promissory" or "executory" warranty is one in which the insured undertakes to perform some executory stipulation, as that certain acts shall or will be done, or that certain facts shall or will continue to exist. *Id.*, § 36.5. A promissory warranty requires certain action or nonaction on the part of the insured after the policy has been entered into in order that its terms shall not thereafter be breached. 12A Appleman, *supra*.

Thus, in considering an appeal from the federal district court for the District of Nebraska, the Eighth Circuit held that a provision in an indemnity bond against loss from employee dishonesty, requiring that all checks drawn by a particular employee would be countersigned by the bookkeeper, was a condition precedent to recovery and a warranty. *Rice v. Fidelity & Deposit Co.*, 103 F. 427 (8th Cir. 1900). It explained that "[a] warranty, in the law of insurance, is a binding agreement that the facts stated by the applicant are true. It is a part of the contract, a condition precedent to a recovery upon it . . . ." *Id.* at 430. The *Rice* court reasoned that the agreements of the

parties were mutual covenants, a covenant by the employers that they would require a countersignature, and a covenant of the fidelity company that it would pay the losses. Therefore, the *Rice* court concluded that a written statement made by employers to the obligor in a bond of indemnity against the dishonet acts of their employee to the effect that they would invariably apply certain checks to his conduct was a warranty, the fulfillment of which constituted a condition precedent to a recovery. Having failed to fulfill the condition, the *Rice* court concluded, the insured was not entitled to recover on the bond.

Here, the parties' agreement contains mutual covenants. Coppi as the insured agreed to keep records of the money in such manner that West American as the insurer could accurately determine from them the amount of loss, and West American agreed to reimburse the theft of the money used in the conduct of Coppi's business. Thus, the recordkeeping provision in Coppi's insurance policy is a promissory warranty, meaning that Coppi covenanted to do something in the future. As such, compliance with this warranty is a condition precedent to recovery under the policy.

In keeping with those principles, we have held that § 44-358 does not relate to a breach of the terms of a policy which could arise only after the loss has occurred. *First Security Bank v. New Hampshire Ins. Co.*, 232 Neb. 493, 441 N.W.2d 188 (1989); *Ach v. Farmers Mut. Ins. Co.*, 191 Neb. 407, 215 N.W.2d 518 (1974); *Clark v. State Farmers Ins. Co.*, 142 Neb. 483, 7 N.W.2d 71 (1942). Section 44-358 does not deny the insurer the right to rely upon the conditions of its policy which the insured is required to perform as a condition of recovery after the loss has occurred. *First Security Bank, supra*; *Ach, supra*. It relates to the question of a recoverable loss and not to the question of procedure to be followed in collecting for the loss after it has occurred. Clearly, notice of loss and proof of loss can be given only after the loss has occurred. *Id.*

In short, § 44-358 deals with warranties which are conditions precedent to the very existence of an insurance contract, not with promissory warranties the fulfillment of which are conditions precedent to recovery under an insurance contract which has come into being. Thus, § 44-358 has no application

to the situation at hand, and the first assignment of error fails.

2. ALLOCATION OF BURDEN OF PROOF

The second assignment of error challenges the district court's allocating to Coppi the burden of proving that he maintained the required records. He urges that it was West American's burden to prove that he did not do so.

Neb. Rev. Stat. § 25-836 (Reissue 1989) provides: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance." We have therefore held that the burden rests on a plaintiff to show the fulfillment of a condition precedent to the right of recovery. *Rubin v. Pioneer Fed. S. & L. Assn.*, 214 Neb. 364, 334 N.W.2d 424 (1983). When the pleading of performance of a condition precedent in a contract is controverted, the party pleading the performance of such condition precedent is required to establish on the trial the facts showing such performance. *Id.*

If a defendant relies upon nonperformance of the contract, the defendant must allege that fact in the answer, and in pleading nonperformance, the facts which constitute the breach must be alleged. *Cartwright and Wilson Constr. Co. v. Smith*, 155 Neb. 431, 52 N.W.2d 274 (1952). Where by statute, as is the case here, the plaintiff is authorized to plead general performance of all conditions precedent, the defendant must, if relying upon the fact that any of the conditions precedent have not been performed, set out specifically the condition and the breach. *Id.*

Coppi alleged that he had paid the premium and "fulfilled all other conditions precedent." In its answer, West American denied that Coppi had complied with the recordkeeping conditions precedent and further alleged that Coppi was not entitled to recover because the policy specifically provided that "[n]o suit shall be brought on this policy unless the insured has complied with all the policy provisions."

Although West American calls these allegations "affirmative defenses," pleading that Coppi failed to perform conditions

precedent to recovery under the policy does not plead an affirmative defense. Affirmative defenses are matters which seek to avoid a valid contract. *Lease Northwest v. Davis*, 224 Neb. 617, 400 N.W.2d 220 (1987). West American is not seeking to avoid the contract; rather, it is asserting that its contractual liability did not arise because Coppi failed to perform the conditions precedent to West American's duty to pay.

Thus, contrary to Coppi's suggestion, neither is West American's defense based upon an exclusionary clause in a policy. An exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed. *Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co.*, 195 Neb. 658, 240 N.W.2d 28 (1976). Had West American so alleged, it would have relied on an affirmative defense and would then have had the burden to prove facts which brought the occurrence within the exclusion. *Thorell v. Union Ins. Co.*, 242 Neb. 57, 492 N.W.2d 879 (1992).

West American's answer effectively asserts only that Coppi breached the contract by his failure to keep the required records. In that regard, not only have we held that where coverage is denied, the burden of proving coverage under a policy is upon the insured, *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456 (1984), but we have specifically ruled that the burden is on an insured to prove that it complied with the recordkeeping provisions.

In *Bruner Co. v. Fidelity & Casualty Co.*, 101 Neb. 825, 166 N.W. 242 (1917), this court affirmed the decision of the trial court where it had instructed the jury that the burden was upon the insured to prove that the insured kept books from which the insurer could accurately ascertain loss. In *Bruner Co.*, the insured brought an action against the insurer to recover under a burglary or theft insurance policy. The policy provided that the insurer would not be liable for any loss unless books and accounts were regularly kept so the insurer could accurately determine the loss. The insurer asserted that there should be no recovery due to the insured's violation of the bookkeeping condition.

In a general instruction, the *Bruner Co.* court instructed the jury that before the insured could recover, the burden of proof

was on it to prove that it had kept books of account from which the loss could accurately be ascertained. The insured recovered a judgment, and the insurer appealed, claiming that its defense of noncompliance with the bookkeeping provision was prejudiced because it was contained only in a general instruction. The *Bruner Co.* court concluded that the district court had correctly instructed the jury upon each of the matters the plaintiff had to establish and that it was unnecessary to restate the law in regard to a single defense in a specific instruction directed only to that defense.

Similarly, other jurisdictions have allocated to the insured the burden of proving compliance with a promissory warranty which gave rise to a condition precedent to recovery. In *Cooper v. Ins. Co.*, 98 W. Va. 655, 127 S.E. 511 (1925), the West Virginia Supreme Court of Appeals held that it was the insured's burden of proof to show compliance with an iron-safe clause warranty, since the insurer had specified a failure to comply with the warranty as defeating recovery. The Missouri Court of Appeals has also held that the burden is on the insured to show compliance with an iron-safe clause when the insurer's answer denies the insured's allegation of full performance of conditions precedent. *Pruzan v. National Surety Corporation*, 223 S.W.2d 8 (Mo. App. 1949); *Johnson v. Fire Ins. Co.*, 120 Mo. App. 80, 96 S.W. 697 (1906). Moreover, the Delaware Supreme Court has held that a bookkeeping provision is a promissory warranty, and the insured must show at least a substantial compliance to recover under the insurance policy. *Std. Acc. Ins. Co. v. Ponsell's Drug*, 57 Del. 485, 202 A.2d 271 (1964); *Insurance Co. vs. Rosenberg*, 23 Del. 174, 74 A. 1073 (1909). See, also, *Rehburg v. Constitution States Ins. Co.*, 555 So. 2d 79 (Ala. 1989) (endorsement in liability policy requiring insureds' pool be fenced and locked was promissory warranty and condition precedent to recovery); *Alaska Foods, Inc. v. American Mfr.'s Mut. Ins. Co.*, 482 P.2d 842 (Alaska 1971) (monthly reporting provisions in fire insurance policy are conditions precedent to liability under policy); *Jonette Jewelry Co. v. Liberty Mutual Ins.*, 105 R.I. 308, 251 A.2d 521 (1969) (recordkeeping provision was condition precedent to liability of defendant insurer); *Damron v. Fireman's Fund Insurance*

*Company*, 430 S.W.2d 956 (Tex. Civ. App. 1968) (provisions in jeweler's block policy requiring itemized inventory was promissory warranty and condition precedent to recovery); *Great American Insurance Company v. Lang*, 416 S.W.2d 541 (Tex. Civ. App. 1967) (provision in theft policy requiring jewelry store owner to keep percentage of insured property in safe was promissory warranty and condition).

Nor was the allocation of the burden of proof affected, as Coppi suggests, by the fact that he provided, as West American had requested, financial records of his postloss business activities. Although Coppi urges that this provided West American an alternative means of determining the loss, the fact is that West American's exploration of other ways of determining the loss did not establish what amount of cash was in the safe when it was stolen.

Accordingly, the district court properly allocated the burden of proof on this issue to Coppi; the second assignment of error also fails.

### 3. Expert Testimony

In the third assignment of error, Coppi contends the district court wrongly permitted West American's adjuster to, in effect, testify that he, Coppi, did not comply with the recordkeeping requirement of the policy.

The Court of Appeals did not reach this or the fourth and last assignment of error. In the interest of judicial economy, we have in the past addressed assignments of error not reached by the Court of Appeals instead of remanding the action for further consideration on those issues. *Florist Supply of Omaha v. Prochaska*, 244 Neb. 776, 509 N.W.2d 209 (1993). Such a practice is consistent with that of other jurisdictions which have held that the supreme court of a state has the option, when reversing the intermediate court's judgment, of remanding unaddressed assignments of error to the intermediate appellate court or of addressing the issues itself. *Capitol Brick, Inc. v. Fleming Mfg. Co.*, 722 S.W.2d 399 (Tex. 1986); *Zontelli & Sons v. City of Nashwauk*, 373 N.W.2d 744 (Minn. 1985); *Roark v. Allen*, 633 S.W.2d 804 (Tex. 1982). But see *Relational Systems International v. Cable*, 303 Or. 71, 733 P.2d 1379 (1987). Thus,

we may, upon granting further review which results in the reversal of a decision of the Court of Appeals, consider, as we deem appropriate, some or all of the assignments of error the Court of Appeals did not reach.

Having so determined, we choose to consider the remaining assignments of error, and move on to Coppi's claim that the adjuster's testimony was excludable, in his view, for a variety of reasons. First, the opinion dealt with the ultimate fact at issue before the jury. Second, the matter did not involve knowledge that was superior to that of the public in general, so the jury was not aided by the testimony. Third, the evidence was not relevant because the issue was not what other insurance companies would have done, but what West American should have done. And fourth, the adjuster lacked the necessary qualification to testify.

We begin by recalling that in proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by those rules, not by judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d 550 (1994).

Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989), provides that if "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." A witness may qualify as an expert by virtue of either formal training or actual practical experience in the field. *Crawford v. Department of Motor Vehicles*, 246 Neb. 319, 518 N.W.2d 148 (1994).

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. *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994). Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994); Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue

1989). It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact. *McDonald, supra*. 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. *Id.*

The opinion was not inadmissible because it embraced the ultimate issue to be decided by the trier of fact. Indeed, Neb. Evid. R. 704, Neb. Rev. Stat. § 27-704 (Reissue 1989), provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Coppi's argument that the adjuster's testimony was inadmissible because it did not involve knowledge which was superior to that of the public in general is also without merit. Expert testimony which may be of assistance to the trier of fact is admissible even in areas where laypersons have competence to determine the facts. *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983).

Expert testimony as to the custom and practice of an industry is admissible to elucidate the meaning of ambiguous language. *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993). When a contract term is not defined in the contract and the parties dispute the intended meaning of the term, an expert witness may properly testify as to the expert's interpretation of the contract language. *Id.* Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993). A written instrument is open to explanation by parol evidence when its terms are susceptible of two constructions, or where the language employed is vague or ambiguous. *Lovelace v. Stern*, 207 Neb. 174, 297 N.W.2d 160 (1980). Evidence of custom is admissible when there is a conflict as to the terms of the contract to explain the meaning of the words or phrases used, or where the contract is silent as to certain points which may be inherent in the nature of the contract. *Rickertsen v. Carskadon*, 172 Neb. 46, 108 N.W.2d 392 (1961).

The recordkeeping provision in question is not clear because it does not specify the type of records to be kept. The provision merely states that the insured shall keep records such that the loss can be accurately determined. In the face of Coppi's testimony that the records he kept were of the type normally kept by beauty salons, the adjuster's opinion was relevant as to whether the records were sufficient to accurately determine the loss. Thus, not only did the adjuster have knowledge superior to that of the general public, his testimony was relevant.

Furthermore, the adjuster was qualified to render his opinion; not only was he the adjuster handling Coppi's claim, he had worked as an adjuster for West American and others for 19 years and had handled hundreds of cash loss burglary claims.

Consequently, the district court did not err in receiving the adjuster's testimony; the third assignment of error fails as well.

### 4. Compliance

In the fourth and final assignment of error, Coppi urges that the district court was wrong in not finding as a matter of law that he complied with the recordkeeping provisions of the policy, and thus mistakenly failed to direct a verdict in his favor or to grant him a new trial or judgment notwithstanding the verdict.

The foregoing resolutions of the preceding assignments of error presage the resolution of this assignment, for in order to sustain a motion for directed verdict, the trial court must resolve the controversy as a matter of law and is to do so only when the facts are such that reasonable minds can draw only one conclusion; in considering the evidence for the purposes of a directed verdict motion, the party against whom the motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence, and the case may not be decided as a matter of law if there is any evidence in favor of the party against whom the motion is made. *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994).

While there was no question, and indeed the district court found as a matter of law, that West American insured the theft

by burglary which took place, the amount of the loss was controverted, and whether Coppi kept the required records was a matter on which the evidence conflicted.

The district court was therefore correct in not resolving the controversy as a matter of law and in not granting a new trial or judgment notwithstanding the verdict. As a consequence, the fourth and final assignment of error fails, as did the preceding three.

## V. JUDGMENT

As first noted in part I, the judgment of the Court of Appeals is reversed and the cause remanded to that court with the direction that it reinstate the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

WHITE, J., not participating.

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# IN RE ESTATE OF ROY MARSH, DECEASED.
# J.R. KENNER, JR., PERSONAL REPRESENTATIVE OF THE ESTATE OF ROY MARSH, DECEASED, APPELLEE, V. BLUE VALLEY LUTHERAN HOMES SOCIETY, INC., APPELLANT, AND JAMES AND WILLA BUCKLES, APPELLEES.

524 N.W.2d 571

Filed December 9, 1994. No. S-92-772.

1. **Decedents' Estates: Wills.** The Nebraska Probate Code permits competent parties having beneficial interests in an estate pursuant to a will clouded by a good faith contest or controversy to reach a settlement agreement that will be approved by the court if it finds that the controversy is in good faith and that the agreement is just and reasonable.
2. **Decedents' Estates: Words and Phrases.** A schedule of distribution mailed by a personal representative to the parties in a case is a proposal for distribution within the meaning of Neb. Rev. Stat. § 30-24,104(b) (Reissue 1989).
3. **Decedents' Estates: Wills.** Neb. Rev.Stat. § 30-24,104(b) (Reissue 1989) applies

to the distribution of the assets of an estate pursuant to a settlement agreement that has been approved by the court under Neb. Rev. Stat. § 30-24.124 (Reissue 1989), and is not limited to a distribution pursuant to the terms of a will.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Thayer County, BRYCE BARTU, Judge, on appeal thereto from the County Court for Thayer County, J. PATRICK MCARDLE, Judge. Judgment of Court of Appeals reversed, and cause remanded.

Robert I. Blevens, of Blevens & Jacobs; William C. Waller, Jr., and Denis H. Mark, of Waller and Mark, P.C.; and Steven R. Hutchins, of Hutchins & Associates, for appellant.

James P. McKernan, of McKernan & Werner, and Charles E. Wright, of Cline, Williams, Wright, Johnson & Oldfather, for appellee Kenner.

Rodney P. Cathcart for appellees Buckles.

WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., RETIRED.

BOSLAUGH, J., RETIRED.

This matter involves the estate of Roy Marsh, who died on November 6, 1980. This court granted the petitions of the personal representative, J.R. Kenner, Jr., and James and Willa Buckles for further review of the Nebraska Court of Appeals' decision. The Court of Appeals reversed the district court's decision which affirmed the judgment of the Thayer County Court sustaining the personal representative's and the Buckleses' motions to strike Blue Valley Lutheran Homes Society, Inc.'s objection to the distribution of the estate and its objection to the personal representative's claims for fees.

After this court's decision in *In re Estate of Marsh*, 216 Neb. 129, 342 N.W.2d 373 (1984), which held the decedent's will of November 10, 1977, and two subsequent codicils to be invalid, the various competing interests entered into and executed a document entitled "Stipulation and Covenants to Compromise Controversies Involving Beneficiaries of the Estate of Roy Marsh," dated October 27, 1987. The settlement agreement

provided that Peggy Sweetser would receive certain funds from accounts she held in joint tenancy with the decedent; that the heirs of the decedent would receive funds from certain other joint tenancy accounts; that Blue Valley Lutheran Homes Society, Inc., would receive all of the real estate of the decedent, not otherwise sold or transferred subsequent to the death of the decedent, which real estate is situated in Thayer County; and that James and Willa Buckles would receive the residue of the estate, including all remaining cash balances and assets.

The county court approved the settlement agreement on November 23, 1987. After all estate tax matters had been settled, Blue Valley filed a motion requesting the county court to order the personal representative, J.R. Kenner, Jr., to distribute the deed for the real estate pursuant to the settlement agreement. On September 29, 1989, the county court ordered that the real estate be distributed pursuant to its order of November 23, 1987, and the settlement agreement. An affidavit of compliance was filed by the personal representative on October 30, 1989, indicating that the deed to the real estate had been delivered.

On April 2, 1991, the personal representative mailed a filing to Blue Valley titled "Schedule of Distribution" which listed the names of the distributees in one column, a description of the property distributed in a second column, and the date of distribution in a third column. On the same day, the personal representative also filed a "Petition for Complete Settlement After Formal Proceedings, Allowance and Approval of Fees and Expenses, and Approval of Final Distribution." On May 6, Blue Valley filed an objection to the personal representative's petition for settlement. Blue Valley objected to the distribution on the grounds that the schedule failed to provide for the distribution of income from the real estate which Blue Valley had received pursuant to the settlement agreement. In a supplemental pleading, Blue Valley also objected to the personal representative's claims for fees.

The personal representative and the Buckleses filed motions to strike in response to Blue Valley's objections. Following a hearing on the matter, the county court held in an order dated May 13, 1991, that Blue Valley had already received the deed to

the real estate pursuant to the settlement agreement and therefore no longer had any interest remaining in the estate and was not entitled to any further accounting from the personal representative or to object to the personal representative's fees at the closing of the estate. The county court further found that Neb. Rev. Stat. § 30-24,104(b) (Reissue 1989) required Blue Valley to object to the final distribution schedule within 30 days of receipt and that its "failure to file objections thereto in the manner and time as required and provided by law" barred Blue Valley's right to object to the distribution at the formal closing of the estate.

Blue Valley appealed to the district court, which affirmed the judgment of the county court. Blue Valley appealed to the Court of Appeals. In its opinion, the Court of Appeals, with one judge dissenting, reversed the judgment of the district court affirming the county court's judgment in *In re Estate of Marsh*, 2 Neb. App. 649, 513 N.W.2d 35 (1994). The Court of Appeals found that § 30-24,104(b) was not applicable to Blue Valley's objections to the final distribution of the estate because the decedent's estate was being distributed according to the terms of a compromise agreement instead of the terms of a will. The Court of Appeals remanded the cause for further proceedings, stating that both parties are entitled to be placed in the same position they were in before the error occurred.

In their petitions for further review, the personal representative and the Buckleses assign as error (1) the Court of Appeals' interpretation of the settlement agreement; (2) the Court of Appeals' determination that the 30-day time limitation on objections concerning the final distribution found in § 30-24,104(b) applies only to distributions under wills and not to distributions pursuant to a settlement agreement; and (3) the Court of Appeals' failure to acknowledge that any claim Blue Valley might have or claim to have for prior income was barred by Neb. Rev. Stat. § 30-2485(b) (Reissue 1989), as indicated by Judge Hannon in his dissent.

The settlement agreement provided in paragraph 3:

> All of the real estate of the Decedent, not otherwise sold or transferred subsequent to the death of the Decedent, which is situated in Thayer County, Nebraska, shall pass

> by inheritance and devise from the Decedent to Blue Valley; and Kenner shall make, execute, and deliver to Blue Valley deeds of distribution conveying said real estate to Blue Valley; and *said conveyance shall be in full and complete satisfaction of the full distributive share of Blue Valley in the Estate of the Decedent, and of all claims or causes of action that Blue Valley may have or claim to have against the Estate and its Personal Representative*, and any claim that Blue Valley may have or claim to have against any joint tenancy assets of the Decedent that are referred to in Case No. 12756 in the District Court of Thayer County; and Blue Valley agrees to execute and deliver to Kenner its voluntary appearance and waiver of notice and stipulation authorizing dismissal of Case No. 12756 pending in the District Court of Thayer County, with prejudice, and a voluntary appearance, waiver of notice, and stipulation to be filed with the County Court of Thayer County and the District Court of Thayer County consenting to approval of this agreement and to the dismissal of the actions pending for the probate of the Decedent's Wills dated August 10, 1977, and January 7, 1970, in the District Court of Thayer County; and *Blue Valley covenants that it shall make no further claim to any of the assets of the Decedent nor against the Estate or Kenner*, and it covenants that it will not, at any time in the future, offer any Will of the Decedent for probate in any court in the United States.

(Emphasis supplied.) Paragraph 8 of the settlement agreement provided in part:

> It is intended by the parties hereto that all property transferred and received pursuant to this agreement shall be taken by inheritance effective on the date of death of the Decedent; and that this agreement shall be presented to the County Court of Thayer County and the District Court of Thayer County for approval thereof and shall become final and binding upon the parties hereto, . . . and *all of the remaining parties to this agreement hereby release Kenner and the Estate of and from any and all claims and causes of action that they or any of them may*

*have or claim to have against Kenner or the Estate.* (Emphasis supplied.) The estate in this case was under supervised administration. See Neb. Rev. Stat. §§ 30-2439 through 30-2443 (Reissue 1989). Section 30-2443 directs that the estate be closed by use of the procedure described in Neb. Rev. Stat. § 30-24,115 (Reissue 1989). That section provides that a petition for an order of complete settlement of an estate may request the court to approve distribution and to adjudicate the final settlement and distribution of the estate.

Part 11 of the Nebraska Probate Code consists of Neb. Rev. Stat. §§ 30-24,123 and 30-24,124 (Reissue 1989), which permit competent parties having beneficial interests in an estate pursuant to a will clouded by a good faith contest or controversy to reach a settlement agreement that will be approved by the court if it finds that the controversy is in good faith and that the agreement is just and reasonable. "Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement." § 30-24,124(3).

Part 9, Neb. Rev. Stat. §§ 30-2499 through 30-24,114 (Reissue 1989), of the Nebraska Probate Code relates to distribution of the estate. Section 30-24,104(b) provides:

> After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, *if not waived earlier in writing*, terminates if he fails to object in writing received by the personal representative within thirty days after mailing or delivery of the proposal.

(Emphasis supplied.) In the present case, the personal representative filed a petition for complete settlement after formal proceedings pursuant to § 30-24,115. In that petition, he requested the court's approval of the distribution of the estate's assets. Also on April 2, 1991, the personal representative mailed the schedule of distribution to Blue Valley. Blue Valley was notified of the hearing on the petition for complete settlement on April 18.

Although it appears Blue Valley waived its right to object to the personal representative's proposed distribution of the estate pursuant to the court-approved settlement agreement between the parties, Blue Valley had notice that the personal representative wanted to close the estate and of how the personal representative planned to distribute the remaining assets of the estate. As provided by § 30-24,104(b), it had 30 days in which to object to the personal representative's proposed distribution. It failed to timely object and therefore is barred from complaining that it did not receive income from the land it received pursuant to the settlement agreement.

The Court of Appeals erred in its conclusion that § 30-24,104(b) applies only to distribution of an estate pursuant to a will. In light of this conclusion, it is unnecessary to address the personal representative's and the Buckleses' remaining assigned errors.

The judgment of the Court of Appeals is reversed and the cause remanded with directions to the Court of Appeals to reinstate the judgment of the district court.

REVERSED AND REMANDED.

HASTINGS, C.J., and WRIGHT, J., not participating.

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LES M. HAUSSE AND HOLLY L. HAUSSE, APPELLEES, V. KRISTOPHER T. KIMMEY, A MINOR, ET AL., APPELLEES, AND JOHN C. HOAGLAND, APPELLANT.

524 N.W.2d 567

Filed December 9, 1994. No. S-93-319.

1. **Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the trial court's ruling.
2. **Trial: Directed Verdict.** A failure to move for a directed verdict at the close of all the evidence procedurally bars consideration of a motion for judgment notwithstanding the verdict.

3. **Negligence.** The comparative negligence statute does not contemplate translating negligence into a mathematical ratio and such a rule would not further the administration of justice.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Richard L. Walentine and Eric L. Klanderud, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Dwight E. Steiner, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellees Kimmey et al.

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

HASTINGS, C.J.

John C. Hoagland appeals from the district court's denial of his motion for judgment notwithstanding the verdict and for a new trial. Hoagland sought a new trial on his cross-claim against his codefendants Kristopher T. Kimmey, a minor, and Kimmey's parents, Edward D. and Barbara S. Kimmey, in a negligence action initiated by Les M. and Holly L. Hausse.

When reviewing a question of law, an appellate court reaches a conclusion independent of the trial court's rulings. *Stack v. Sobczak*, 243 Neb. 78, 497 N.W.2d 374 (1993).

Hoagland assigns as error that the district court (1) failed to sustain his posttrial motions; (2) failed to hold Hoagland's negligence only slight, as a matter of law, in accordance with the jury's special finding that he was 15 percent negligent; (3) failed to grant Hoagland's motion for judgment notwithstanding the verdict when the record indicates that Hoagland was guilty of only slight negligence and Kimmeys' negligence was gross in comparison; (4) failed to enter judgment in accordance with the special finding as mandated by Neb. Rev. Stat. § 25-1120 (Reissue 1989); and (5) failed to grant Hoagland's motion for a new trial when the general verdicts and special finding were inconsistent and a product of jury misconduct.

This appeal arises from an action filed by the Hausses against Kristopher Kimmey, a minor; Edward and Barbara Kimmey, Kristopher's parents; and Hoagland. The Hausses alleged that on December 24, 1990, Kristopher Kimmey lost control of his

vehicle while making a turn at Cedardale and 60th Street in Sarpy County, and went off the road and through a fence. The damage to the fence allowed two horses, owned by the Hausses, to escape from the enclosed field. One of the horses was found and returned. Another horse, Ship Bar Doolin, wandered onto nearby Highway 370. Hoagland, while driving his vehicle on Highway 370, struck Ship Bar Doolin. The collision killed the horse.

The Hausses alleged that Kristopher Kimmey acted negligently in failing to keep his vehicle under reasonable control, operating his vehicle at an excessive speed, failing to repair the damaged fence in order to keep the horses contained in the field, and failing to provide timely notice to the owner of the property. The Hausses alleged that Kristopher Kimmey's parents shared responsibility because he operated the vehicle with their knowledge, consent, and permission. The Hausses also alleged that Hoagland was negligent in failing to keep his vehicle under reasonable control, failing to keep proper lookout, and operating his vehicle at an excessive speed. The Hausses sought $6,000 in general and special damages.

Hoagland filed a counterclaim against the Hausses. Hoagland alleged that the Hausses acted negligently in failing to exercise reasonable care in confining their horses, failing to maintain the fence in proper condition, failing to prevent their horses from being unattended on a highway, failing to round up and confine their horses, and failing to warn that their horses were loose and unattended. Hoagland sought dismissal of the petition and $4,864.63 in damages for the physical injuries to himself and the damage to his vehicle caused by the collision with Ship Bar Doolin.

Hoagland also filed a cross-claim against the Kimmeys. Hoagland alleged imputed negligence of Kristopher Kimmey to his parents. In the cross-claim, Hoagland alleged that the Kimmeys acted negligently in failing to keep the vehicle under reasonable control, operating the vehicle at an excessive speed, striking and penetrating a fence while knowing that the horses contained therein might escape and wander, failing to take proper measures to repair the fence while knowing that the fence served to contain the horses, failing to provide timely

notice to the Hausses and authorities, and leaving the scene of the accident before notifying authorities. Hoagland sought $4,864.63 for damages sustained from the collision with Ship Bar Doolin.

After the Hausses rested their case, the Kimmeys and Hoagland both moved for directed verdicts against the Hausses. The court denied both motions. After the close of all evidence, the Hausses moved for a directed verdict against Hoagland's counterclaim. The Kimmeys also moved for a directed verdict against Hoagland's cross-claim. The court granted the Hausses' motion for a directed verdict as to Hoagland's counterclaim, but denied the Kimmeys' motion as to Hoagland's cross-claim.

The jury returned a general verdict in favor of the Hausses for $3,000 against both the Kimmeys and Hoagland. The jury also returned a verdict in favor of the Kimmeys and against Hoagland on his cross-claim.

The court then, with the record being silent as to any request, assent, or reason, read the jury a special instruction. The special instruction stated:

> You have found both defendants to be negligent. You have one more task to perform and that is to decide what percentage of negligence each defendants' negligence bears to the entire negligence.
>
> Please determine, by completing the Special Finding form, their respective percent of the negligence that caused the damages to the plaintiffs, remembering that the total must equal 100%.

The jury returned a special finding that the Kimmeys' negligence represented 85 percent of the entire negligence and Hoagland's negligence represented 15 percent of the entire negligence. The court then entered judgment against Hoagland on his counterclaim and cross-claim and ordered the same dismissed. The court also entered judgment in favor of the Hausses, awarding them $3,000 against the Kimmeys and Hoagland jointly and severally. No judgment was entered on the special verdict.

Hoagland then filed a motion for judgment notwithstanding the verdict and motion for a new trial. Hoagland moved the

court to vacate and set aside the verdict dismissing his cross-claim against the Kimmeys, enter a partial judgment for Hoagland on his cross-claim as to liability, and order a new trial as to Hoagland's cross-claim to assess damages. Hoagland claimed that the dismissal of his cross-claim was the result of irregularity in jury proceedings, jury misconduct, a verdict not supported by sufficient evidence, a verdict contrary to the law, and an error of law at trial. The court denied Hoagland's motion for a new trial. No ruling appears of record as to the motion for judgment notwithstanding the verdict.

We can only consider Hoagland's motion for a new trial because the motion for judgment notwithstanding the verdict is not properly before us. Hoagland's failure to move for a directed verdict at the close of all the evidence procedurally bars consideration of his motion for judgment notwithstanding the verdict. *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994).

Hoagland's remaining assignments of error overlap and can be summarized into one argument. Hoagland contends that the trial court erred in denying his motion for a new trial because the jury's special finding that his negligence amounted to 15 percent of the entire negligence toward the Hausses was only slight negligence as a matter of law. Thus, Hoagland argues that the general verdict dismissing his cross-claim against the Kimmeys is fatally inconsistent with the special finding regarding the plaintiff's petition. Hoagland must show that the special finding is in irreconcilable conflict with the general verdict. See *Kafka v. Union Stock Yards Co.*, 78 Neb. 140, 110 N.W. 672 (1907).

Hoagland relies on *Stack v. Sobczak*, 243 Neb. 78, 497 N.W.2d 374 (1993), to argue that a special finding of 15 percent negligence is evidence of slight negligence as a matter of law. In *Stack*, the jury attributed 40 percent of the combined negligence to the plaintiff in a motorcycle-automobile collision case. The jury also made a special finding that the plaintiff was guilty of slight negligence and the defendant of gross negligence in comparison. The district court granted defendant's motion for judgment notwithstanding the verdict, and we affirmed, holding: "In the case at bar, it is self-evident that the jury found

the operator of each vehicle guilty of more than slight negligence and to a degree sufficient to defeat any right of recovery." *Id.* at 80, 497 N.W.2d at 376. In *Stack*, however, we also refused to adopt a rule that contributory negligence of more than a certain percentage bars recovery as a matter of law. Furthermore, we expressly limited the holding to its facts and the law in existence at that time.

In the present case, it is not self-evident that the jury found Hoagland only slightly negligent. The jury found that Hoagland and the Kimmeys were liable to the Hausses. Then in a second verdict, the jury found that the Kimmeys were not liable to Hoagland. Last, under a special finding, the jury determined the level of both defendants' negligence as to the Hausses, after being instructed by the court without any apparent authority to make a finding in that regard. In any event, it is not inconsistent for the jury to consider that Hoagland could be 15 percent negligent to the Hausses and more than slightly negligent as to his own damages. The jury clearly made two independent general verdicts and a special finding to the Hausses' successful petition. Thus, the general verdict on the cross-claim does not irreconcilably conflict with the special finding on the Hausses' petition.

Hoagland also misplaces his reliance on *Law v. Gilmore*, 171 Neb. 112, 105 N.W.2d 595 (1960). In *Law*, the defendant argued that the plaintiff's negligence was more than slight, as a matter of law, because the jury reduced plaintiff's damages by approximately one-third. We did not base our holding on this argument. We reversed the lower court because it granted a new trial based on testimony admitted in evidence without an objection. In *Law*, we did not make a holding regarding the jury's special findings.

Hoagland's argument rests entirely upon his assertion that 15 percent negligence is only slight as a matter of law. This court has never adopted a rule that contributory negligence of a certain percent bars recovery as a matter of law. The comparative negligence statute does not contemplate translating negligence into a mathematical ratio and such a rule would not further the administration of justice. See, *Stack v. Sobczak, supra*; *Nickal v. Phinney*, 207 Neb. 281, 298 N.W.2d

360 (1980); *Burney v. Ehlers*, 185 Neb. 51, 173 N.W.2d 398 (1970).

The trial court was correct in denying Hoagland's motion for a new trial. No attack has been made on the giving of the instruction requiring an allocation of fault.

The judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA EX REL. PENNY J. GRAPE, AS MOTHER AND NEXT FRIEND OF CODY J. GRAPE, A MINOR CHILD, APPELLANT, V. ROY A. ZACH, APPELLEE.

524 N.W.2d 788

Filed December 9, 1994. No. S-93-454.

1. **Jurisdiction: Motions to Dismiss: Pleadings.** A court's jurisdiction over the subject matter may and should be questioned early in the proceedings by a demurrer; the issue may not properly be raised by a pretrial motion to dismiss, such pleading not being a part of this state's procedure.
2. **Actions: Jurisdiction.** The absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
3. **Jurisdiction: Appeal and Error.** If the lower court did not possess subject matter jurisdiction, neither does any reviewing tribunal.
4. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the trial court; however, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
5. **Child Custody: Jurisdiction: Appeal and Error.** The question as to whether jurisdiction existing under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1993), should be exercised is a matter entrusted to the discretion of the trial court and is reviewed de novo on the record; absent an abuse of discretion, the decision of the trial court will be upheld on appeal.
6. **Child Custody: Jurisdiction: States.** The failure to communicate with the court of another state does not in and of itself deprive the failing court of jurisdiction under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1993).
7. **Evidence.** Ex parte statements are too unreliable to be considered in the investigation of controverted facts.

8. **Due Process: Witnesses.** Due process requires that witnesses be subject to the right of cross-examination by the parties to the proceeding.
9. **Judges.** Canon 3 of the Nebraska Code of Judicial Conduct requires that a judge perform the duties of judicial office impartially.
10. **Trial: Judges.** Canon 3B(7) of the Nebraska Code of Judicial Conduct prohibits a judge from initiating, permitting, or considering ex parte communications or considering other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except that it authorizes, where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits where the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and where the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
11. **Jurisdiction.** The resolution of a jurisdictional issue is a substantive matter.
12. **Trial: Judges: Recusal.** A judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding must recuse himself or herself from the proceedings.
13. **Trial: Judges: Witnesses.** A judge's role as a witness in a trial before the judge is manifestly inconsistent with a judge's customary role of impartiality in the adversary system of trial.
14. **Constitutional Law.** The distribution of powers clause contained in Neb. Const. art. II, § 1, prohibits the legislative department of government from telling the judicial department of government how to conduct judicial business.
15. **Constitutional Law: Statutes.** Even when a statute is constitutionally suspect, courts will attempt to interpret it in a manner consistent with the Constitution.
16. **Statutes.** If a statute is susceptible to more than one reasonable construction, the reviewing court uses the construction that will achieve the statute's purpose and preserve the statute's validity.
17. **Statutes: Legislature: Intent.** There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions; ordinarily, such differences must be determined by the intent of the Legislature as gleaned from the whole statute.
18. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.
19. **Jurisdiction.** The failure to follow a legislative recommendation does not divest a court of jurisdiction.
20. **Child Custody: Jurisdiction: States.** The correctness of the home state as the forum under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1993), may be overcome by the circumstances of a particular case.
21. ____: ____: ____. Neb. Rev. Stat. § 43-1214 (Reissue 1993) establishes a strong preference for the state which originally determined custody to exercise

its continuing jurisdiction if the jurisdictional prerequisites enumerated in the Nebraska Child Custody Jurisdiction Act are satisfied.

22. **Paternity: Child Custody.** In a filiation proceeding in which paternity has been admitted and the natural father has demonstrated a familial relationship with the child and fulfilled his parental responsibilities of support and maintenance, the fact that the child was born out of wedlock is to be disregarded and custody determined on the basis of the child's best interests.
23. **Child Custody.** While an unwed mother is initially entitled to automatic custody of the child, the issue must ultimately be resolved on the basis of the fitness of the parent and the best interests of the child.
24. **Child Custody: Jurisdiction.** Under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1993), if the evidence is sufficient to support a finding that placing custody in and with a particular parent is in the child's best interests, it does not matter that the order fails to contain an affirmative finding so declaring.
25. **Due Process: Parent and Child.** The relationship between parent and child is constitutionally protected and thus cannot be affected without procedural due process.
26. **Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and hearing before an impartial decisionmaker.
27. **Child Custody: Jurisdiction: States.** A state which is not the home state and which does not have continuing jurisdiction by virtue of having originally determined custody may nonetheless have jurisdiction under the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1993), if the relevant parties have significant contacts with the state and there is available in the state substantial evidence concerning the statutorily designated issues.
28. **Paternity: Child Custody: Appeal and Error.** In a filiation proceeding, questions concerning custody of the child are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion.
29. ____: ____: ____. When the evidence is in conflict, the appellate court, in its de novo review of questions concerning custody in a filiation proceeding, 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.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Platte County, ROBERT STEINKE, Judge. Judgment of

Court of Appeals reversed, and cause remanded with direction.

Clark J. Grant, of Grant, Rogers, Maul & Grant, for appellant.

Terrell R. Cannon, of Law Offices of Terrell R. Cannon, for appellee.

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

CAPORALE, J.

## I. STATEMENT OF CASE

The district court granted custody of the minor child of the parties, the petitioner-appellant mother, Penny J. Grape, and the respondent-appellee father, Roy A. Zach, to the latter. Grape appealed to the Nebraska Court of Appeals, contending, in summary, (1) that the district court lacked subject matter jurisdiction to entertain the proceeding and (2) that, in any event, it erred in finding that the boy's best interests would be served by placing his custody with Zach. The Court of Appeals determined that the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1993), hereinafter referred to as the act, deprived the district court of subject matter jurisdiction, and thus ordered the proceeding dismissed. *State ex rel. Grape v. Zach*, 94 NCA No. 13, case No. A-93-454 (not designated for permanent publication). Zach thereupon successfully sought further review by this court. We now reverse the judgment of the Court of Appeals and remand with the direction that it reinstate and affirm the judgment of the district court.

## II. BACKGROUND

In early 1989, the State of Nebraska, on Grape's relation, filed this filiation proceeding against Zach. The petition asserted that Grape and the minor child, a boy, who was born May 14, 1987, were residents of Platte County, Nebraska, and asked the court to adjudge Zach the boy's father and order him to pay child support. After Zach admitted paternity, the district court entered judgment in accordance with Grape's prayer.

The matter then lay dormant until March 23, 1992, when

Grape filed a "Verified Motion For Custody Order" in which Grape swore that Zach was in wrongful physical possession of the boy and prayed for an order determining her to be the boy's natural custodial parent and requiring Zach to immediately return him to her possession.

Grape further vowed in her pleading that Zach had not sought or obtained legal visitation rights to the boy and that, with the exception of a 2-week period in June 1990, there had been "little or no visitation" between the two. The pleading recited that sometime shortly after June 1990, she and the boy, with Zach's knowledge and consent, moved to Lisbon, New York, returning to Columbus, Nebraska, 1 1/2 months prior to filing her motion. The pleading recites that she thereafter, on February 27, 1992, agreed to a 1-week period of visitation between Zach and the boy. However, Zach, at the conclusion of that period, refused to return the boy to her possession, but, rather, kept the boy at his residence in Lincoln, Nebraska.

On the same day that Grape filed her motion, the district court entered an order granting custody of the boy to Grape. The March 23, 1992, order recited that the matter was before the court on an ex parte motion to "determine custody and placement" and specifically found that no other order establishing visitation rights between Zach and the boy existed and that Zach was in wrongful possession of the boy. It further ruled that Grape was the natural custodial parent of the boy and was entitled to his immediate possession.

Zach subsequently filed a document entitled "Motion to Set Aside Order, for Temporary Custody, and for Order Prohibiting [Grape] from Removing Child from State." At this point, Grape's counsel withdrew. Consequently, Zach sent notice of the hearing scheduled on his pleading directly to Grape at her last known address in Columbus. Grape failed to appear at the scheduled hearing, at which time the district court set aside its March 23, 1992, ex parte order and granted Zach temporary custody until it could make a permanent custody determination. The district court also ordered that the boy not be removed from Nebraska.

Zach filed that temporary custody order in New York, where Grape and the boy had gone, and Zach returned to Nebraska

with the boy in August 1992. The boy has remained in Nebraska in Zach's possession throughout the remainder of these proceedings.

Through a new attorney, Grape then filed a demurrer to Zach's motion, alleging a defect of parties and lack of personal service. Determining that Zach had not properly raised the issue of custody and had failed to properly serve Grape, the district court sustained Grape's demurrer and granted Zach leave to amend.

Zach thereupon filed an "Application for Temporary and Permanent Custody of Minor Child," along with an affidavit asserting that it was in the best interests of the boy that Nebraska assume jurisdiction because Nebraska was the state in which he was born and had lived for several years. The application further alleged that expert and family witnesses and evidence concerning the boy's education, medical care, and speech therapy were available in Nebraska.

In response, Grape filed a motion to dismiss the application, claiming that Nebraska lacked jurisdiction to determine the boy's custody because it was not the child's home state as defined in the act.

Following a hearing, the district court found that substantial evidence concerning the boy's care, protection, training, and personal relationships was available in Nebraska; concluded that it had jurisdiction to determine the boy's custody; and overruled Grape's motion to dismiss. After a still further hearing on April 22, 1993, at which the evidence described later in part VI was adduced, the district court, on April 29, 1993, entered an order which placed permanent custody of the boy in and with Zach and granted Grape supervised visitation rights.

## III. PROCEDURAL IRREGULARITY

At this juncture we focus on Grape's election to question whether the district court possessed subject matter jurisdiction by a "Motion to Dismiss for Lack of Jurisdiction." While a court's jurisdiction over the subject matter may and should be questioned early in the proceedings by a demurrer, Neb. Rev. Stat. § 25-806 (Reissue 1989) and *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654

(1993), we must point out once again that the issue may not properly be raised by a pretrial motion to dismiss, such pleading not being a part of this state's procedure. See, *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); *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); Neb. Rev. Stat. § 25-803 (Reissue 1989).

We recognize that in *Van Norman v. Upperman*, 231 Neb. 524, 436 N.W.2d 834 (1989), an action arising under the act, our opinion, unfortunately employing the same language as that used by the parties and lower court, speaks in terms of affirming the sustainment of a pretrial motion to dismiss. However, what was actually at issue was not a motion to dismiss, but a motion that the lower court decline to exercise its jurisdiction.

Grape's procedural impropriety aside, the fact is that the absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. See *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991).

Thus, it was quite appropriate for the Court of Appeals to concern itself with whether the district court possessed subject matter jurisdiction, for if it did not, neither would any reviewing tribunal. *Knerr v. Swigerd*, 243 Neb. 591, 500 N.W.2d 839 (1993).

## IV. THE ACT

The act, which virtually parallels the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 115 (1988), governs child custody disputes having interstate implications. Section 43-1203(1) of the act provides in pertinent part:

> A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before

> commencement of the proceeding and the child is absent from this state because of his or her removal or retention by a person claiming his or her custody or for other reasons, and a parent or person acting as parent continues to live in this state;
>
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his or her parents, or the child and at least one contestant, have a significant connection with this state and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships[.]

Section 43-1214(1) reads:

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

The act defines "custody determination" as "a court decision and court orders and instructions providing for the custody of a child, including visitation rights, but shall not include a decision relating to child support or any other monetary obligation of any person," § 43-1202(2); defines "initial decree" as the "first custody decree concerning a particular child," § 43-1202(6); and defines "home state" as the "state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as parents for at least six consecutive months," § 43-12025(5).

The act further provides in § 43-1206 that a court of this state shall not exercise its jurisdiction

> if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this act, unless the proceeding is stayed by the court of the other state because this state is a more appropriate

forum or for other reasons.

> . . . Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under section 43-1209 and shall consult the child custody registry established under section 43-1216 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the State Court Administrator or other appropriate official of the other state.
>
> . . . If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 43-1219 to 43-1222. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

Section 43-1207 further specifies that a court which has jurisdiction under the act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum. Section 43-1207 then reads:

> Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the

> parties. The court shall give to the parties the substance of any communication or exchange of information under this subsection, and afford the parties reasonable opportunity to respond.
>
> . . . .
>
> . . . Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact or, if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.
>
> . . . Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

In addition, § 43-1208 provides: "Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody . . . has improperly retained the child after a visit or other temporary relinquishment of physical custody."

## V. ANALYSIS OF ISSUES RELATING TO SUBJECT MATTER JURISDICTION

With the foregoing matters in mind, we reach Grape's first assignment of error, which challenges the district court's finding that it had subject matter jurisdiction to entertain these proceedings. The Court of Appeals concluded that such jurisdiction was lacking because (1) the district court had made no record of any communication with the New York court, (2) Nebraska was not the boy's home state, (3) the district court did not have continuing jurisdiction by virtue of the March 1992 order, and (4) there were no significant connections with Nebraska.

Before proceeding to review each of those grounds, we recall that when a jurisdictional question does not involve a factual

dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the trial court. *Bradley v. Hopkins*, 246 Neb. 646, 522 N.W.2d 394 (1994). However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. See *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989). The question as to whether jurisdiction existing under the act should be exercised is another matter. That determination is entrusted to the discretion of the trial court and is reviewed de novo on the record. See *Van Norman v. Upperman*, 231 Neb. 524, 436 N.W.2d 834 (1989). As in other matters entrusted to a trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal. See, e.g., *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994); *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

1. COMMUNICATIONS

It is true that some courts have concluded that provisions like those of §§ 43-1206 and 43-1207 impose upon judges aware that proceedings are pending in another state a mandate to communicate with the out-of-state court. E.g., *In re Marriage of Pedowitz*, 179 Cal. App. 3d 992, 225 Cal. Rptr. 186 (1986); *Duval v. Duval*, 149 Vt. 506, 546 A.2d 1357 (1988), *overruled on other grounds, Shute v. Shute*, 158 Vt. 242, 607 A.2d 890 (1992); *In re Aisha B.*, 206 Cal. App. 3d 1030, 254 Cal. Rptr. 116 (1988); *Hickey v. Baxter*, 461 So. 2d 1364 (Fla. App. 1984); *Webb v. Webb*, 245 Ga. 650, 266 S.E.2d 463 (1980), *cert. dismissed* 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981); *In re Marriage of Nasica*, 12 Kan. App. 2d 794, 758 P.2d 240 (1988); *Matter of Appeal in Pima County*, 147 Ariz. 584, 712 P.2d 431 (Ariz. 1986). However, other courts have ruled that the failure to communicate with the court of another state does not in and of itself deprive the failing court of jurisdiction. *Sawle v. Nicholson*, 408 N.W.2d 173 (Minn. App. 1987); *Lofts v. Superior Court*, 140 Ariz. 407, 682 P.2d 412 (Ariz. 1984).

In *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992), we directed that a court communicate with a foreign court to determine the appropriate forum. However, no issue concerning the property of such communication was present. In

other contexts, we have held that ex parte statements are too unreliable to be considered in the investigation of controverted facts and that due process requires that witnesses be subject to the right of cross-examination by the parties to the proceeding. *Jorgensen v. Jorgensen*, 194 Neb. 271, 231 N.W.2d 360 (1975); *Dier v. Dier*, 141 Neb. 685, 4 N.W.2d 731 (1942).

Nor is Canon 3 of the Nebraska Code of Judicial Conduct to be forgotten. It requires, in relevant part, that a judge perform the duties of judicial office impartially. The pertinent portions of Canon 3B(7) provide that a judge

> shall not initiate, permit or consider ex parte communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
>
> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized;
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

The resolution of a jurisdictional issue is a substantive matter. See *Yost v. Johnson*, 591 A.2d 178 (Del. 1991). See, also, *Allen v. Fisher*, 118 Ariz. 95, 574 P.2d 1314 (Ariz. App. 1977) (substantive law creates, defines, and regulates rights and duties of parties).

Furthermore, we have held that a judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding must recuse himself or herself from the proceedings. *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988). This rule is based on Neb. Evid. R. 605, which states in part that "[t]he judge presiding at the trial may not testify in that trial as a witness." Neb. Rev. Stat. 27-605 (Reissue 1989). A judge's role as a witness in a trial before the judge is manifestly inconsistent with the judge's customary role of impartiality in the adversary system of trial. *Barker, supra*,

citing McCormick on Evidence § 68 (Edward W. Cleary 3d ed. 1984).

At least one other court has recognized that communication between judges under statutory provisions similar to those at hand presents procedural due process concerns. In *Yost, supra*, the children's father lived in Delaware, and the mother and the children lived in Virginia. The Virginia court modified a custody decree that a Pennsylvania court initially rendered. Subsequent to the modification, the mother and children moved to Italy. When the children visited their father in Delaware, the father filed a petition for temporary custody in the Delaware family court and refused to return the children to their mother's custody. The mother challenged the Delaware family court's jurisdiction. However, the Delaware family court determined that it had jurisdiction after its judge had an ex parte telephone call with a Virginia judge. Even though there was no record of the conversation between the judges and no order from the Virginia judge, the Delaware family court judge acknowledged the conversation and concluded that Virginia had " 'declined jurisdiction.' " 591 A.2d at 181.

On appeal, the mother argued that the Delaware family court had violated her rights to procedural due process when it contacted the Virginia court without notifying the parties, failed to permit the parties to participate in the telephone conversation, and failed to create a written record of the phone call.

In reversing the judgment of the family court, the Supreme Court of Delaware held that the family court judge's ex parte communication with the Virginia judge resulted in a serious violation of the mother's due process rights and declared that a judge should not engage in a substantive ex parte communication concerning the merits of an issue pending before the court.

The due process and ethical problems which arise when judges turn into inquisitors by undertaking to personally investigate the facts in matters they must adjudicate illustrate one of the reasons the distribution of powers clause contained in Neb. Const. art. II, § 1, prohibits the legislative department of government from telling the judicial department of

government how to conduct judicial business. See *State, ex rel. Sorensen, v. State Bank of Minatare*, 123 Neb. 109, 242 N.W. 278 (1932) (imperative duty of judicial department to protect its jurisdiction at boundaries fixed by Constitution).

However, even when a statute is constitutionally suspect, courts will attempt to interpret it in a manner consistent with the Constitution. *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993). If a statute is susceptible to more than one reasonable construction, the reviewing court uses the construction that will achieve the statute's purpose and preserve the statute's validity. *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993). Thus, if the portions of §§ 43-1206 and 43-1207 at issue merely recommend that a judge engage in certain communications rather than command that the judge do so, that is, if the provisions are directory rather than mandatory, they will survive constitutional scrutiny.

There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions. *Anderson v. Board of Educational Lands & Funds*, 198 Neb. 793, 256 N.W.2d 318 (1977). Ordinarily, such differences must be determined by the intent of the Legislature as gleaned from the whole statute. *Id.*

While the word "shall" may render a particular provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977).

As an example, in *State, ex rel. Sorensen*, 123 Neb. at 113, 242 N.W. at 280, the statute in question provided that the " 'secretary of the department of trade and commerce shall be the sole and only receiver of failed or insolvent banks . . . .' " This court nonetheless ruled that in the context of a judicial proceeding, the statute amounted to no more than a legislative recommendation to the judiciary to appoint the secretary in the interests of economy and business management. The *Sorensen* court thus affirmed the lower court's appointment of someone other than the secretary. More recently, we have held that as the Legislature had not fashioned a remedy for the failure to hold a

hearing within the statutorily specified time, the statute was directory rather than mandatory. *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990).

Neither do the statutory provisions here specify a remedy for a judge's failure to take on the investigatory tasks at issue; thus, we hold these provisions to be directory only and not mandatory. That being so, we need not concern ourselves with whether these provisions would, were they mandatory, pass constitutional scrutiny.

What is clear, however, is that the failure to follow a legislative recommendation does not divest a court of jurisdiction, particularly where due process and ethical concerns counsel against complying with the recommendation. It is for the parties to present the facts relating to the case and controversy a court is to adjudicate.

Thus, any failure of the district court to communicate with the New York court could not divest the district court of subject matter jurisdiction.

### 2. Home State

In *Mace v. Mace*, 215 Neb. 640, 341 N.W.2d 307 (1983), a habeas corpus action seeking to enforce a foreign custody judgment, we reviewed the jurisdictional basis under which the foreign court acted, determined that under the act Nebraska was the home state and therefore presumably the correct forum, and refused to enforce the foreign judgment. Here, the boy had neither been living in Nebraska with a parent or one acting as a parent for 6 months before Grape filed her motion for a custody order, nor had the boy been taken from Nebraska within 6 months prior to the filing of said motion. Thus, it is clear that Nebraska is not the home state as defined by the act.

### 3. Nature of March 1992 Order

However, it is also clear that the correctness of the home state as the forum may be overcome by the circumstances of a particular case. For example, in *Range v. Range*, 232 Neb. 410, 440 N.W.2d 691 (1989), we concluded the fact that the child in question had lived in Nebraska most of her 14 years gave her and her Nebraska father a significant connection with Nebraska. Distinguishing *Mace* on the basis that, there, most of the

evidence concerning the younger children involved was in Nebraska, which was the home state, we ruled in *Range* that the Nebraska courts had jurisdiction to adjudicate the matter of the child's custody notwithstanding that the foreign state was the home state. In so doing, we noted the act establishes a strong jurisdictional preference for the state which originally determined custody to exercise its continuing jurisdiction if the requirements of § 43-1203(1)(b) are satisfied. Other courts have also held that language like that contained in § 43-1214 establishes a strong preference for the state which originally determined custody to exercise its continuing jurisdiction if the jurisdictional prerequisites enumerated in the act are satisfied. E.g., *Kumar v. Superior Court of Santa Clara Cty.*, 32 Cal. 3d 689, 652 P.2d 1003, 186 Cal. Rptr. 772 (1982); *Kraft v. Dist. Ct.*, 197 Colo. 10, 593 P.2d 321 (1979); *Hamill v. Bower*, 487 So. 2d 345 (Fla. App. 1986); *Funk v. Macaulay*, 457 N.E.2d 223 (Ind. App. 1983); *In re Marriage of Leyda*, 398 N.W.2d 815 (Iowa 1987).

Thus, the nature of the March 1992 order entered in response to Grape's motion for a custody order is a pertinent inquiry.

Under the circumstances, the fact that the order arose in the context of a filiation proceeding is not significant. In *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981), we held that in such an action in which paternity had been admitted and the natural father had demonstrated a familial relationship with the child and fulfilled his parental responsibilities of support and maintenance, the fact that the child was born out of wedlock was to be disregarded and custody determined on the basis of the child's best interests; there was no presumption favoring custody with either parent.

Here, Zach admitted paternity, paid child support, and maintained some contact with the boy before obtaining temporary custody over him. Thus, the fact that the boy was born out of wedlock is not relevant to the custody determination, for while an unwed mother is initially entitled to automatic custody of the child, see *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986), the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child, see *Lancaster v.*

*Brenneis*, 227 Neb. 371, 417 N.W.2d 767 (1988).

Provided the evidence is such as to support a finding that entry of the order was in the boy's best interests, neither is it significant that the order fails to expressly find that placing custody in and with Grape was in the boy's best interests. In *Cox, supra*, we reasoned that as the evidence was sufficient to support a finding that placing custody in and with the mother was in the child's best interests, it did not matter that the order failed to contain an affirmative finding so declaring.

The March 1992 order fits the definition of a custody determination, as it provides for the custody of the boy. See, *Zellat v. Zellat*, 351 Pa. Super. 623, 506 A.2d 946 (1986) (where series of orders culminating in placement of child in exclusive possession and control of mother resulted in rendition of custody determination); *In re Marriage of Zierenberg*, 11 Cal. App. 4th 1436, 16 Cal. Rptr. 2d 238 (1992) (orders of court in Puerto Rico commanding mother to relinquish children from California to Puerto Rico and deliver them to father were custody orders).

However, what is significant is that although the March 1992 order purported to permanently affect Zach's custody status with respect to the boy, it was entered without any notice to him and without giving him an opportunity to be heard. The relationship between parent and child is constitutionally protected and thus cannot be affected without procedural due process. See, *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Shoecraft, supra*. See, also, *Ex parte Harris*, 506 So. 2d 1003 (Ala. App. 1987).

Procedural due process includes notice to the person whose right is affected by the proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and hearing before an impartial decisionmaker. *In re Interest of*

*L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). See, also, *Black v. Black*, 223 Neb. 203, 388 N.W.2d 815 (1986); *Benton v. Board of Ed. of Sch. Dist. No. 17*, 219 Neb. 134, 361 N.W.2d 515 (1985); *State ex rel. Douglas v. Schroeder*, 212 Neb. 562, 324 N.W.2d 391 (1982). Under the circumstances, the March 1992 order was a nullity; an order which is a nullity cannot become the basis for any future judicial action. See *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994).

Consequently, the March 1992 order did not create continuing subject matter jurisdiction in the district court.

4. CONNECTION WITH NEBRASKA

Thus, so far as the record establishes, until the district court's April 29, 1993, order placing custody of the boy in and with Zach, no court had, as of that date, made a custody determination. (The record suggests, however, that Grape had initiated a custody proceeding in New York in the spring or summer of 1992, which resulted in the scheduling of a pretrial hearing for April 30, 1993, and further, that said proceeding may have been dismissed by the time of the April 22 trial in the district court.)

But under § 43-1203(1)(b), a state which is not the home state and which does not have continuing jurisdiction by virtue of having originally determined custody may nonetheless have jurisdiction if the relevant parties have significant contacts with the state and there is available in the state substantial evidence concerning the statutorily designated issues. The questions are whether it was in the boy's best interests that the district court exercise subject matter jurisdiction because the boy and both Grape and Zach or either of them had a significant connection with Nebraska and whether there was available in Nebraska substantial evidence concerning the boy's present or future care, protection, training, and personal relationships.

In resolving those questions, it must be remembered that the boy was born in Nebraska and lived in Nebraska for over 3 years before he was taken to New York; that Grape returned to Nebraska with the boy because she was homesick and having problems with her live-in boyfriend; that about 5 weeks later, she sought a custody determination from the district court; and

that the boy's maternal grandparents live in Nebraska. Under the circumstances, not only the boy, but if not Grape, at least Zach, had a significant connection with Nebraska at the time Zach filed his application for custody. See, *Scheafnocker v. Scheafnocker*, 356 Pa. Super. 118, 514 A.2d 172 (1986); *Houtchens v. Houtchens*, 488 A.2d 726 (R.I. 1985); *Lustig v Lustig*, 99 Mich. App. 716, 299 N.W.2d 375 (1980).

Moreover, while the guardian ad litem would have liked to have been able to visit with Grape in New York, he nonetheless was able to detail a variety of reasons on which he based his recommendation that the boy's custody be placed in and with Zach. Indeed, as the recitation of the relevant portions of the record in part VI below establishes, there was in Nebraska substantial evidence concerning the boy's present and future care, protection, training, and personal relationships as to enable the district court to adjudicate the matter, and it was therefore in the boy's best interests that the district court assume jurisdiction.

Nor is there any merit in Grape's suggestion that § 43-1208 precludes the exercise of jurisdiction because Zach improperly retained the boy beyond the agreed period of visitation. The short answer is that the provision applies only where there exists a custody decree of another state. So far as the record establishes, such is not the situation here.

Accordingly, the district court had subject matter jurisdiction and did not abuse its discretion in deciding to exercise it.

## VI. ANALYSIS OF CUSTODY ISSUE

Although the Court of Appeals did not reach the issue, the foregoing determination leads us to consider Grape's second assignment of error, in which she claims the district court erred by placing the boy's custody in and with Zach.

It therefore becomes necessary to recall that in a filiation proceeding, questions concerning custody of the child are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in

conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Lancaster v. Brenneis*, 227 Neb. 371, 417 N.W.2d 767 (1988).

When Zach first took possession of the boy in 1992, the boy was 7 pounds underweight, had bruises on various parts of his body, and was covered with insect bites and a rash. While under Zach's care, the boy began visits with a speech pathologist and a child psychologist to address his developmental problems. In addition, Zach enrolled the boy in school and immediately sought medical treatment for his condition.

While the record reflects that Zach was incarcerated for burglary at the time of the boy's birth, his record contains no subsequent convictions or arrests for other than traffic matters. He has been married for 3 years, has held the same job for 5 years, and has lived in Lincoln, Nebraska, his entire life. He and his wife have a house in which they live with the boy and the wife's son, and each child has his own bedroom. Zach has arranged a regular babysitter to care for the boy while he and his wife are working. Furthermore, Zach, his wife, her son, and the boy have attended family counseling to ease the boy's transition into their family. The boy has developed friendships and continues to receive treatment for his special needs.

In contrast, the record reflects that Grape is an unmarried mother of at least four children, who has a history of illegal drug abuse and who has moved between Nebraska and New York. While in New York, Grape, her boyfriend, and her children, at least one of whom was sired by the boyfriend, live in a rebuilt house which, at the time of the trial in question, still displayed signs of fire damage and had been without running water for a period of time. Grape's live-in boyfriend also has a history of illegal drug usage and abusive behavior. Moreover, Grape has applied for protection orders against her boyfriend on two separate occasions. She had arranged minimal medical care for the boy and had failed to arrange any treatment for the boy's speech impairment.

Not only, as noted above, did the guardian ad litem conclude it was in the boy's best interests that his custody be placed in and with Zach, but Grape's parents were of that view.

Under that state of the record, it cannot be said that the district court abused its discretion in ruling as it did.

## VII. JUDGMENT

Accordingly, the judgment of the Court of Appeals is reversed and the cause remanded with the direction that it reinstate the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

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# KATHLEEN CLAYTON, APPELLANT, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES AND JACK CONRAD, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, APPELLEES.

524 N.W.2d 562

Filed December 9, 1994. No. S-93-557.

1. **Administrative Law: Motor Vehicles: Appeal and Error.** An appellate court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record.
2. **Constitutional Law: Statutes: Motor Vehicles: Notice.** The Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. § 60-501 et seq. (Reissue 1988 & Cum. Supp. 1992), complies with the notice and hearing requirements of the federal and state Constitutions.
3. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Insurance: Damages.** The Department of Motor Vehicles is required to suspend an operator's license if it determines that there is a reasonable possibility of a judgment against the operator. Neb. Rev. Stat. § 60-507(2) (Reissue 1988). Section 60-507 does not apply if the operator or owner is able to respond in damages or had an automobile liability policy in effect at the time of the accident. Neb. Rev. Stat. § 60-508 (Reissue 1988).
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Proof: Appeal and Error.** An appellant who is challenging a suspension order of the Department of Motor Vehicles bears the burden of proof.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Appeal and Error.** In an appeal from a Department of Motor Vehicles order suspending an operator's license, a district court must affirm the suspension order upon concluding that a reasonable possibility of a judgment exists against the operator.
6. **Equity: Statutes.** Equitable remedies are generally not available where a statute provides an adequate remedy at law.
7. **Words and Phrases.** An adequate remedy at law means a remedy which is plain

and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

8. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Records: Appeal and Error.** Upon a petition for review of an order of suspension of a driver's license, the district court is required to consider the record made before the director of the Department of Motor Vehicles.

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

Catherine Mahern, of Creighton Legal Clinic, for appellant.

Don Stenberg, Attorney General, and Paul N. Potadle for appellee.

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

LANPHIER, J.

Pursuant to the Motor Vehicle Safety Responsibility Act (Act), the appellant, Kathleen Clayton, lost her driving privileges after she was ticketed for causing a chain collision after the brakes failed on her car. The Act, Neb. Rev. Stat. § 60-501 et seq. (Reissue 1988 & Cum. Supp. 1992), seeks to protect the public against the operation of motor vehicles by financially irresponsible persons. *Montgomery v. Blazek*, 161 Neb. 349, 73 N.W.2d 402 (1955). Clayton was uninsured and unable to provide a security deposit which would serve as a fund to compensate the other drivers' losses. Clayton asserts the Act is unconstitutional on its face and as applied to her case and assigns several other errors. We find no constitutional infirmities and affirm the order of the district court for Douglas County which upheld the Department of Motor Vehicles' suspension of Clayton's license.

## BACKGROUND

On November 20, 1992, Clayton caused a chain collision when the brakes on her car failed. Two people suffered minor personal injuries, and seven cars, including Clayton's car, were damaged. Clayton had recently separated from her husband, was driving his car, and believed that she was insured.

Clayton was ticketed at the site of the accident for following too closely and for not having proof of insurance. After the

accident, Clayton promptly purchased insurance.

On January 26, 1993, the Nebraska Department of Motor Vehicles (DMV) determined that there was a reasonable possibility of a judgment against Clayton. This conclusion was based on a review of accident reports completed by the onscene investigator. However, Clayton had not submitted a state accident report form as required by § 60-505, part of the Act. Therefore, on January 27, the DMV sent Clayton a state accident report form and requested that she complete it and return it immediately. Clayton was informed that failure to comply with the Act by February 11 would result in the suspension of her driving privileges.

On February 11, the DMV sent Clayton notice that due to her failure to comply with the Act, her driving privileges would be suspended effective March 3. Several methods were available to Clayton to come into compliance with the Act and prevent suspension. These alternatives included providing the DMV with proof of liability insurance in effect at the time of the accident; depositing security sufficient to satisfy the possible damages, $66,301; or providing proof that she had been released from any liability associated with the accident.

Clayton filed a petition in the district court for Douglas County on March 2, seeking review of the DMV's suspension order. In her petition, Clayton claimed that the security deposit was excessive, the notice inadequate, and her due process violated. The filing of the appeal stayed the suspension of her license pending review by the district court. See § 60-503.

Clayton received a hearing on June 11. At the hearing, Clayton asserted that the DMV's suspension of her license violated her due process rights. Clayton also asserted that the burden of going forward was on the DMV and that the DMV's records were inadmissible hearsay. Additionally, Clayton asked the district court to consider her personal circumstances and exercise its equity power to overrule the DMV's suspension of her license.

The district court held that the DMV's suspension of Clayton's license was proper given that there was a reasonable possibility of a judgment being rendered against her. Clayton timely filed a notice of appeal to the Nebraska Court of

Appeals and subsequently gave notice that she was challenging the constitutionality of the Act. By order of this court, the case was moved to the Supreme Court docket.

## ASSIGNMENTS OF ERROR

In summary, Clayton asserts that the district court erred by (1) failing to conclude that the Act was unconstitutional on its face and as applied; (2) placing the burden of proof on Clayton rather than on the DMV; (3) concluding that a reasonable possibility of judgment against Clayton existed without first addressing whether the possible amount was reasonable; (4) failing to consider equitable relief; and (5) admitting the DMV's records, exhibit 1, into evidence.

## STANDARD OF REVIEW

An appellate court's review of a district court's review of a decision of the director of the DMV is de novo on the record. *Wollenburg v. Conrad*, 246 Neb. 666, 522 N.W.2d 408 (1994); *Jacobson v. Higgins*, 243 Neb. 485, 500 N.W.2d 558 (1993); *Larson v. Jensen*, 228 Neb. 799, 424 N.W.2d 352 (1988).

## NO DUE PROCESS VIOLATION

Section 60-507(1) provides that the Director of Motor Vehicles shall suspend the license of a driver involved in an automobile accident which results in property damage in excess of $500, unless the operator provides proof of financial responsibility. Section 60-507(2), further, provides that the suspension shall be ordered unless, in the judgment of the DMV, there is no reasonable possibility of a judgment being rendered against the driver.

Clayton asserts that the Act fails to comply with the Due Process Clauses of the Constitutions of the United States and the State of Nebraska. In so doing, Clayton relies on *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), and *Jennings v. Mahoney*, 404 U.S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146 (1971). In *Wollenburg, supra*, we addressed a virtually identical argument and held that the Act complies with the notice and hearing requirements of the federal and state Constitutions. Accordingly, Clayton's argument that the Act is unconstitutional on its face is without merit.

Further, the application of the Act to Clayton violated none of her constitutional rights. Clayton received notice on February 11, 1993, that she had failed to comply with the Act and that her license would be suspended effective March 3 unless she took corrective action. The suspension was stayed upon the filing of Clayton's petition in district court. A hearing was held on June 11, and Clayton was afforded an opportunity to present evidence and cross-examine witnesses prior to the final suspension of her license. Pursuant to *Wollenburg*, such notice and hearing adequately protected Clayton's due process rights.

## BURDEN OF PROOF

Clayton argues that the district court erred when it placed the burden of proof upon her. Clayton states she was forced to prove that she was not liable, rather than the State establishing that she was.

Statutorily, the DMV was required to suspend Clayton's license if it determined that there was a reasonable possibility of a judgment against her. See § 60-507(2). However, § 60-507 does not apply if the operator or owner is able to respond in damages or had an automobile liability policy in effect at the time of the accident. § 60-508. Therefore, to meet her burden of proof and to prevent the suspension of her driving privileges, Clayton had to establish that there was no reasonable possibility of a judgment being rendered against her or to provide proof of financial responsibility as required by § 60-508.

At her hearing in the district court, Clayton was required to present her case first. Clayton argues that by being forced to present her evidence first, she was prejudiced because she was precluded from establishing that the DMV's suspension order was unreasonable, because the transcript supporting its order was not in evidence. The DMV's transcript, referred to by the parties as "Exhibit 1," contained copies of the accident records, the DMV's notices to Clayton, and an Accident Analyst Report. It is true that exhibit 1 was not entered into evidence until after Clayton had presented her evidence. But this does not mean it was unavailable until then. Clayton could have

obtained the DMV's records during discovery and, therefore, was not precluded from attacking their validity until exhibit 1 was offered into evidence.

The burden of proof is upon the licensee rather than the State. *Wroblewski v. Pearson*, 210 Neb. 82, 313 N.W.2d 231 (1981); *Hehn v. State*, 206 Neb. 34, 290 N.W.2d 813 (1980). A licensee appealing from a DMV suspension order has the burden of proving the invalidity of the order. *Wroblewski, supra*; *Hehn, supra*.

## AMOUNT OF SECURITY DEPOSIT

Clayton asserts that the district court erred in concluding that a reasonable possibility of a judgment against Clayton existed without first having addressed whether the DMV's estimation of the amount of the judgment was reasonable. The DMV is required to review accident reports when the accident resulted in bodily injury, death, or property damage to an apparent extent in excess of $500. See § 60-507(1). Based on its review of the accident reports, the DMV estimated that Clayton caused approximately $66,301 in property damage. Clayton argues that the accident reports and the DMV's notices provide no support for the conclusion that a security deposit in the amount of $66,301 was reasonable and that without determining whether this amount was reasonable, the district court erred by concluding that there was a reasonable possibility of a judgment against her.

The only issue before the DMV was whether the evidence supported a finding that there was a reasonable possibility of a judgment in excess of $500 against Clayton. See, *Wollenburg v. Conrad*, 246 Neb. 666, 522 N.W.2d 408 (1994); *Wroblewski, supra*; *Berg v. Pearson*, 199 Neb. 390, 259 N.W.2d 275 (1977). The DMV is not required to weigh the alleged negligence or contributory negligence of the parties involved. *Wollenburg, supra*; *Wroblewski, supra*. The DMV's order is based only upon the facts contained in the accident reports. A district court should not set aside a DMV suspension order unless there is *no* reasonable possibility of a judgment in excess of $500 being rendered. See, *Wollenburg, supra*; *Wroblewski, supra*. At her hearing, Clayton conceded that damages were likely to amount

to $15,000 to $20,000. This concession proved that there was a reasonable possibility of a judgment against Clayton in excess of $500.

Although Clayton conceded that the damages were likely to amount to $15,000 to $20,000, she offered no evidence in support of her estimate. As stated above, the burden of proof is on the licensee in an appeal from a DMV suspension order. By failing to produce any evidence in support of her damage estimates, Clayton failed to meet her burden of proof.

## EQUITABLE RELIEF

At the time of the accident, Clayton was a young mother, a student, a full-time employee, and recently separated from her spouse. Clayton's need for a license was considerable. She testified that she was driving her husband's car, and at the time of the accident, she believed that he had insured the vehicle. Clayton promptly obtained insurance after the accident.

Clayton asserts that the district court erred when it failed to consider equitable relief, given the hardships the suspension order would impose upon her. Section 60-503 provides that a hearing before a district court to review the validity of the DMV's suspension order shall be summarily heard as a case in equity without a jury. Clayton asserts that because the district court was sitting in equity, it had substantial discretion to fashion equitable remedies to carry out justice.

However, equitable remedies are generally not available where a statute provides an adequate remedy at law. *Southwest Trinity Constr. v. St. Paul Fire & Marine*, 243 Neb. 55, 497 N.W.2d 366 (1993); *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981). " ' "An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." ' " *Ganser v. County of Lancaster*, 215 Neb. 313, 317, 338 N.W.2d 609, 611 (1983), quoting *Golden v. Bartholomew*, 140 Neb. 65, 299 N.W. 356 (1941).

Section 60-507 provides a statutory remedy to an uninsured driver faced with the loss of her driving privileges. The suspension order may be avoided by posting an adequate security deposit. The fact that the district court was sitting in

equity did not grant it the discretion to fashion remedies outside the scope of the Act.

## ADMISSIBILITY OF DMV RECORDS

At her hearing in district court, Clayton objected to the admissibility of the DMV's records as hearsay. Clayton's objection was overruled.

Clayton acknowledges that *Hehn v. State*, 206 Neb. 34, 290 N.W.2d 813 (1980), is controlling. In *Hehn*, we approved the admissibility of the DMV's records in a district court hearing. We affirmed that holding in *Wollenburg v. Conrad*, 246 Neb. 666, 522 N.W.2d 408 (1994). These cases state that § 60-507(3) plainly suggests that the DMV's records are admissible in district court. If the district court is to determine whether the director's action was correct and if the director is required by § 60-507(3) to consider all accident reports filed in connection with the accident, then the DMV's records must be made available to the district court. *Wollenburg, supra*; *Hehn, supra*. Accordingly, the district court properly admitted exhibit 1, the DMV's records, over Clayton's hearsay objection.

## CONCLUSION

Clayton's due process rights were adequately protected under the Act. The burden of proof was on Clayton to establish that the DMV's suspension order was unreasonable. Based on its review of the DMV's records and the evidence presented at the hearing, the district court properly affirmed the DMV's suspension order. The suspension of Clayton's license is affirmed.

AFFIRMED.

# THE NEW LIGHT COMPANY, INC., DOING BUSINESS AS THE GREAT WALL RESTAURANT, APPELLANT, V. WELLS FARGO ALARM SERVICES, A DIVISION OF BAKER PROTECTIVE SERVICES, INC., AND GENERAL ELECTRIC COMPANY, JOINTLY AND SEVERALLY, APPELLEES.

525 N.W.2d 25

Filed December 23, 1994. No. S-92-694.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in the 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. **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.
4. **Public Policy: Words and Phrases.** Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community.
5. **Contracts: Public Policy.** Whether a particular exculpatory clause in a contractual agreement violates public policy depends upon the facts and circumstances of the agreement and the parties involved.
6. **Public Policy: Damages: Negligence.** Public policy prevents a party from limiting its damages for gross negligence or willful and wanton misconduct.

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 Douglas County, JAMES M. MURPHY, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Jeffrey R. Learned, of Morrison, Mahoney & Miller; Kile W. Johnson, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske; and, on brief, Marvin J. Monroe, of Denenberg, Tuffley & Jamieson, P.C., for appellant.

Michael G. Connery and Diana J. Vogt, of Kutak Rock, for appellee Wells Fargo.

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

WRIGHT, J.

The New Light Company, Inc. (New Light), sued Wells Fargo Alarm Services (Wells Fargo) and General Electric Company as jointly and severally liable defendants for damages sustained as the result of a fire in a restaurant owned by New Light. Wells Fargo had installed a fire alarm system in the restaurant. Wells Fargo moved for summary judgment, and the district court for Douglas County granted Wells Fargo's motion. The Nebraska Court of Appeals affirmed, holding that public policy did not justify the voiding of exculpatory language in the contract between Wells Fargo and New Light. We reverse the judgment and remand the cause for further proceedings.

## SCOPE OF REVIEW

In appellate review of a summary judgment, the court views the evidence in the 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. *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994); *Steenblock v. Elkhorn Township Bd.*, 245 Neb. 722, 515 N.W.2d 128 (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. *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994); *Double K, Inc. v. Scottsdale Ins. Co.*, 245 Neb. 712, 515 N.W.2d 416 (1994).

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. *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994); *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994).

## FACTS

New Light owned and operated The Great Wall Restaurant at

1013 Farnam Street in Omaha, Nebraska. On July 1, 1983, New Light and Wells Fargo executed an agreement which stated that Wells Fargo was to install and maintain a fire alarm system on the restaurant premises. Wells Fargo installed the system and maintained it through 1988. In October 1988, the parties signed a renewal of the agreement, which renewal contained an exculpatory clause stating that New Light agreed that Wells Fargo would not be liable for any loss or damage, irrespective of origin, to persons or property whether directly or indirectly caused by performance or nonperformance of any obligation imposed by the agreement or "by negligent acts or omissions of Wells Fargo Alarm, its agents or employees."

Wells Fargo failed to install a fire-sensing device in the basement-level clothes dryer room or the adjoining electrical room, which contained the main fire alarm control panel and its connection to the telephone junction box. On January 7, 1989, a fire began in the clothes dryer room. The fire alarm system failed to activate the outside alarm and communications system. The fire caused extensive damage to the building and its contents.

New Light's petition alleged, inter alia, that Wells Fargo was grossly negligent by failing to design, install, and maintain adequate fire-sensing devices in the electrical room or in the clothes dryer room of New Light's property; by failing to adequately test the fire detection system so as to ensure that a fire erupting in the electrical room or in the clothes dryer room would not incapacitate the system; by failing to take reasonable care in the design, installation, and maintenance of the system; and by failing to properly, diligently, and reasonably select, train, and supervise its employees and agents with regard to the design, installation, and maintenance of the system. New Light alleged that such acts were willful, wanton, and intentional and that they constituted gross negligence.

Wells Fargo generally denied the allegations and claimed that the petition failed to state facts sufficient to constitute a cause of action. As two of its affirmative defenses, Wells Fargo claimed that paragraph D of the renewal agreement exculpated Wells Fargo from liability and claimed that, in the alternative, such liability was limited to the lesser of the annual charges due

Wells Fargo from New Light pursuant to the agreement or $10,000.

Wells Fargo moved for summary judgment, alleging that the contract for protective alarm services between New Light and Wells Fargo relieved Wells Fargo of all liability for any losses suffered by New Light and, in the alternative, that Wells Fargo was entitled to partial summary judgment in that its liability was limited to the amount specified by the renewal agreement.

New Light's affidavits in opposition to the motion stated the following: The fire originated in a fluorescent light fixture mounted on the ceiling of the clothes dryer room, which was located in the basement at the rear of the premises. The fire smoldered for a long period of time before it was discovered. The fire alarm system failed to detect the fire, to activate its on-premises exterior alarm, and to send a signal to Wells Fargo's monitoring communications center because the system did not include a fire-sensing device in the clothes dryer room, where the fire originated, and because the system did not include a fire-sensing device in the adjoining electrical room, which resulted in the destruction of the fire alarm communication system before it could have been activated by fire-sensing devices located in other areas of the premises. One affidavit stated that the system, as designed and installed, was in violation of the National Fire Protection Association codes and that

> to design, install and maintain such a system as was installed in the Great Wall Restaurant is to be grossly negligent in that the system, as designed, installed and maintained:
>
> a) was in violation of codes and regulations governing such systems;
>
> b) was in violation of industry standards;
>
> c) failed to place a heat sensing device in the basement laundry/dryer room and adjoining electrical room where fires are very likely to occur; and
>
> d) failed to protect the very room where the fire alarm communication system was installed and thus prevented the system from operating should a fire occur in that room or the adjoining laundry/dryer room.

The district court granted Wells Fargo's motion for summary judgment and dismissed the action as it related to Wells Fargo. On appeal, New Light alleged that the district court erred in granting summary judgment in favor of Wells Fargo. The Court of Appeals affirmed, holding that the exculpatory clause was not contrary to public policy.

## ASSIGNMENT OF ERROR

In its petition for further review, New Light claims the Court of Appeals erred in holding that it is not contrary to public policy for a party to contractually exculpate itself from liability for its own gross negligence or willful and wanton misconduct.

## ANALYSIS

The issue for our determination is whether, as a matter of law, the exculpatory clause set out in paragraph D of the original agreement and the renewal agreement released Wells Fargo from liability for gross negligence or willful and wanton misconduct. The Court of Appeals held that public policy did not void the exculpatory provision in the renewal agreement which precluded the imposition of liability upon Wells Fargo for gross negligence or willful and wanton misconduct. In rendering its decision, the Court of Appeals relied upon our decision in *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988). The Court of Appeals' application of *Bedrosky* would have been correct if this case had involved exculpation from ordinary negligence.

In *Bedrosky*, a fire of uncertain origin began on the fifth and sixth floors of a building and spread to the elevator shaft, where it spread to the basement and the first floor, which was space leased to the plaintiffs. The plaintiffs claimed the defendant landlord, in violation of certain regulations of the State Fire Marshal's office, failed to enclose the elevator shaft; failed to install fire doors; and, in contravention of his representation, failed to keep the sprinkler system in proper working order. The plaintiffs made no allegations of gross negligence or willful and wanton misconduct.

The issue in *Bedrosky* was whether the exculpatory clause of the lease was effective to relieve the defendant from all liability. Paragraph 10 of the lease provided: " '[T]he Lessor shall not be or become liable for any damage . . . to said premises or to

said Lessee or to any other persons or property caused by . . . the act or neglect of any other person or caused in any other manner whatsoever.' " *Id.* at 202-03, 430 N.W.2d at 538. The plaintiffs argued that the phrase "caused by the act or neglect of any other person or caused in any other manner whatsoever" did not include negligence or intentional misrepresentation of the lessor.

In *Bedrosky*, we did not specifically address the issue of gross negligence or willful and wanton misconduct, and we do not now interpret *Bedrosky* to be a blanket approval of exculpatory clauses in all factual situations. We held that paragraph 5 of the lease plainly disposed of the misrepresentation claim. Paragraph 5 provided: " 'Lessee agrees and admits that no representation as to the condition or repair hereof has been made by the Lessor or his agent which is not herein expressed or indorsed hereon . . . .' " *Id.* at 202, 430 N.W.2d at 538. We found that the plain language of paragraph 10 did "not permit us to read into its meaning a provision limiting the exclusion to any of the specific causes previously enumerated in the lease." *Id.* at 208-09, 430 N.W.2d at 541. We did not find the language of the exculpatory clause to be a clear contravention of public policy.

Contrary to Wells Fargo's contention, we have not specifically addressed the public policy consideration regarding exculpatory clauses relating to gross negligence or willful and wanton misconduct. In *Mayer v. Howard*, 220 Neb. 328, 331, 370 N.W.2d 93, 96 (1985), the language released the defendant " 'from all liability . . . caused by the negligence of the releasees . . . .' " We held that Mayer had expressly assumed the risk of racing his motorcycle on the defendant's track after being fully informed of the dangers involved. The "Release of Liability" did not mention gross negligence or willful and wanton misconduct, and our holding was expressly based on the language at issue.

In *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 4, 443 N.W.2d 596, 599 (1989), the lease provided for indemnification for injury caused by conduct and stated the following in uppercase bold print: " 'The parties agree that Lessor shall only be liable or responsible for actions of wilful misconduct.' "

We held that although the clause did not contain the word "negligence," the intended consequence of indemnity was clearly and unequivocally expressed. The contractor was obligated to indemnify for conduct including negligence, but excluding claims based on Speedway's willful misconduct.

In determining whether the language of a particular exculpatory clause in a contract is a clear contravention of public policy, we must consider each agreement on the basis of the particular facts surrounding the agreement. We have defined public policy as

> " '[t]hat principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. * * * The principles under which the freedom of contract or private dealings is restricted by law for the good of the community.' . . ."

*OB-GYN v. Blue Cross*, 219 Neb. 199, 203, 361 N.W.2d 550, 553 (1985). Accord *United Seeds, Inc. v. Hoyt*, 168 Neb. 527, 96 N.W.2d 404 (1959).

We have stated that " ' " '[g]ross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.' " ' " *Wicker v. City of Ord*, 233 Neb. 705, 714, 447 N.W.2d 628, 634 (1989). Accord *Jones v. Foutch*, 203 Neb. 246, 278 N.W.2d 572 (1979). Willful and wanton misconduct exists where a defendant had actual knowledge that because of its actions, a danger existed to the plaintiff and the defendant intentionally failed to act to prevent a harm that was reasonably likely to result. *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990).

Whether a particular exculpatory clause in a contractual agreement violates public policy depends upon the facts and circumstances of the agreement and the parties involved. The right of contract may be restricted for the public good. The greater the threat to the general safety of the community, the greater the restriction on the party's freedom to contractually limit the party's liability. For example, a contractual agreement to dig a ditch does not have the same public policy considerations as would the installation of a fire alarm system

in a school, hospital, nursing home, restaurant, or other heavily occupied building. Common sense tells us that the greater the risk to human life and property, the stronger the argument in favor of voiding attempts by a party to insulate itself from damages caused by that party's gross negligence or willful and wanton misconduct.

In the factual setting in this case, when we balance the parties' right to contract against the protection of the public, we find a sufficiently compelling reason to prevent Wells Fargo from insulating itself by contractual agreement from damages caused by its own gross negligence or willful and wanton misconduct. Such an agreement would have a tendency to be injurious to the public. This limitation on the freedom to contract is imposed by law because of the potential risks to human life and property and is, therefore, independent of the agreement of the parties.

A similar exculpatory clause was determined to be contrary to public policy in *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992). The New York Court of Appeals stated that it was the public policy of the state that a party could not insulate itself from damages caused by grossly negligent conduct. Gross negligence was defined as "conduct that evinces a reckless indifference to the rights of others." *Id.* at 554, 593 N.E.2d at 1371, 583 N.Y.S.2d at 963. The court found that this policy would apply equally to contract clauses purporting to exonerate a party from liability and to clauses limiting damages to a nominal sum. We agree with the New York court that public policy with regard to gross negligence and willful and wanton misconduct applies both to clauses attempting to exculpate liability and clauses attempting to limit damages to a nominal sum.

We now apply the public policy considerations just outlined to the limitation-of-damages provision of the agreement in the case at bar. We note that Wells Fargo, in paragraph D of the renewal agreement, attempted to limit the amount of loss or damages attributable to the failure of the fire alarm system to the annual charge under the contract or $10,000, whichever was less. As written, this limitation on damages is unqualified, limiting all damages of whatever cause, including those that

accrue due to Wells Fargo's gross negligence or willful and wanton misconduct. We therefore hold that this limitation-of-damages clause does not create an enforceable limitation on Wells Fargo's liability for an action based upon gross negligence or willful and wanton misconduct. As was done in *Sommer v. Federal Signal Corp., supra*, we hold that in this instance, public policy prevents Wells Fargo from limiting its damages for gross negligence or willful and wanton misconduct.

Paragraph D attempted to completely release Wells Fargo from liability for only its negligent acts or omissions. Based upon New Light's allegations of gross negligence and willful and wanton misconduct, the court should not have granted summary judgment. The parties are bound by the words of the contract. *Jones v. Burr*, 223 Neb. 291, 389 N.W.2d 289 (1986). A contract which is written in clear and unambiguous language is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract, and the contract must be enforced according to its terms. *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994). Wells Fargo did not attempt to exculpate acts of gross negligence or willful and wanton misconduct from the contract. The pertinent part of paragraph D provided:

> Subscriber agrees that Wells Fargo Alarm shall not be liable for any of Subscriber's losses or damages, irrespective of origin, to person or to property, whether directly or indirectly caused by performance or nonperformance of any obligation imposed by this agreement or by negligent acts or omissions of Wells Fargo Alarm, its agents or employees.

The exculpatory clause makes no mention of gross negligence or willful and wanton misconduct on the part of Wells Fargo. Therefore, gross negligence and willful and wanton misconduct were not contemplated by the parties. Even if the exculpatory clause could be construed to include gross negligence and willful and wanton misconduct, public policy prohibits such an exclusion.

A similar result was reached in *Douglas W. Randall, Inc. v. AFA Protective Systems*, 516 F. Supp. 1122 (E.D. Pa. 1981). The district court, in discussing Pennsylvania law, noted that

exculpatory clauses in contracts relieving a party from liability for negligence are valid. The exculpatory clause in that case provided: " 'The subscriber . . . agrees that the contractor shall be exempt from liability for loss or damage due directly or indirectly to occurrences . . . from negligence, active or otherwise, of the contractor . . . .' " *Id.* at 1127. The court held that the exculpatory clause limited the defendant's liability only with respect to acts of negligence, and not for acts of gross negligence.

We do not find any language within the agreement which clearly and unequivocally expresses an intention to limit Wells Fargo's liability for acts involving gross negligence or willful and wanton misconduct. We therefore hold that the exculpatory clause does not affect New Light's right to assert a cause of action based upon gross negligence or willful and wanton misconduct.

Since a material question of fact is presented as to whether Wells Fargo's actions constituted gross negligence or willful and wanton misconduct, we reverse the judgment and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., concurs in the result.

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MAGGIE G. PENDLETON, APPELLEE, V. LLOYD J. PENDLETON, APPELLANT.

525 N.W.2d 22

Filed December 23, 1994. No. S-93-648.

1. **Modification of Decree: Alimony: Appeal and Error.** An appellate court entrusts the modification of an alimony award to the discretion of the trial court and reviews the trial court's decision de novo on the record for abuse of discretion.
2. **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 an untenable decision unfairly depriving a litigant of a substantial right or a just result.

3. **Courts: Jurisdiction: Judgments: Alimony.** The trial court has inherent power to retain jurisdiction to determine amounts due and to enforce judgments for alimony.
4. **Appeal and Error.** The holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
5. ____. Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.
6. ____. An erroneous interpretation of the law does not necessarily void the law-of-the-case doctrine.
7. **Demurrer: Pleadings.** Upon sustaining a demurrer to a petition, a court must grant a plaintiff leave to amend the petition unless no reasonable possibility exists that repleading will correct the defective petition.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Chris M. Arps, of Arps & Schirber Law Offices, for appellant.

Carll J. Kretsinger, P.C., of Kretsinger & Walsh, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and GRANT, J., Retired, and HOWARD, D.J., Retired.

HASTINGS, C.J.

Lloyd J. Pendleton appeals the order of the district court sustaining the demurrer of Maggie G. Pendleton and dismissing Lloyd's petition to modify an alimony order. That alimony order had been entered pursuant to our mandate in *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993) (*Pendleton I*). The district court sustained the demurrer under the law-of-the-case doctrine.

We entrust the modification of an alimony award to the discretion of the trial court and review the trial court's decision de novo on the record for abuse of discretion. *Kleager v. Kleager*, 242 Neb. 24, 492 N.W.2d 873 (1992). 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 an untenable decision unfairly depriving a litigant of a substantial right or a just result. *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994).

Lloyd Pendleton assigns as error that the district court (1) failed to recognize and implement 10 U.S.C. § 1408(c)(1) (Supp. II 1990) of the Uniformed Services Former Spouses' Protection Act as amended and (2) abused its discretion by sustaining the demurrer without considering "all proper and reasonable reference of 'law and fact or leave to amend.' "

In 1982, Congress passed the Uniformed Services Former Spouses' Protection Act. At that time, 10 U.S.C. § 1408(c)(1) (1982) stated:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

In 1990, Congress amended the statute by adding a second sentence. The second sentence states:

> A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

10 U.S.C. § 1408(c)(1) (Supp. II 1990). Thus, the amendment applied to the previous appeal if the legal separation, entered in 1975, was a final decree which included a court-ordered, ratified, or approved property settlement and did not treat or reserve jurisdiction to treat Lloyd's pension as property of Maggie.

We consider whether the 1975 legal separation decree

reserved jurisdiction to treat the military pension as property of both Lloyd and Maggie. We have long held that the trial court has inherent power to retain jurisdiction to determine amounts due and to enforce judgments for alimony. *Laschanzky v. Laschanzky*, 246 Neb. 705, 523 N.W.2d 29 (1994); *Roach v. Roach*, 192 Neb. 268, 220 N.W.2d 27 (1974); *Miller v. Miller*, 160 Neb. 766, 71 N.W.2d 478 (1955). In *Pendleton I*, we held, based on Neb. Rev. Stat. §§ 42-347 and 42-366 (Reissue 1974), that a legal separation, silent as to alimony, does not preclude the order of alimony in a dissolution decree. As a result, the trial court, more than 14 years after the legal separation, could award alimony in the legal dissolution of the marriage. This court, however, entered the order because remanding to the trial court for factual findings would "result in no final, appealable order." *Id.* at 683, 496 N.W.2d at 504. Clearly, the trial court retained jurisdiction to award alimony when the legal separation was silent as to alimony. Therefore, it would seem, the 1990 amendment to 10 U.S.C. § 1408(c)(1) did not apply to the Pendletons' case and would have been ineffectual if addressed in the previous appeal. However, we do not rest our decision on that ground.

Following our decision in *Pendleton I*, Lloyd did not file a motion for rehearing in this court, but did file a petition to modify in the district court on May 26, 1993. The petition alleged that the 1990 amendment was a material and significant change in circumstances requiring a modification to the decree and moved for an order terminating the allocation of his military pension dating back to October 1990.

Maggie demurred on the ground that the petition failed to state a cause of action under the law-of-the-case doctrine. The district court sustained the demurrer and dismissed the petition to modify, holding that the defect in the petition to modify cannot be cured by an amendment. The trial court noted that Lloyd did not bring the amended statute to the Supreme Court's attention.

Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all

matters ruled upon, either expressly or by necessary implication. *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994). As a result, matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts. *McKinstry v. County of Cass*, 241 Neb. 444, 488 N.W.2d 552 (1992).

The facts presented do not represent a material change since the last time we considered this litigation. The amendment to 10 U.S.C. § 1408(c)(1) existed at the time of the previous appeal, but Lloyd did not bring it to our attention. Nevertheless, Lloyd's appeal concerns the unusual situation where we based our holding on a federal statute, unaware of a possibly relevant amendment to that statute. Thus, Lloyd argues that the district court should have disregarded the law-of-the-case doctrine because, in the previous appeal, we did not apply current federal law.

An erroneous interpretation of the law does not necessarily void the law-of-the-case doctrine. See, *North Cambria Fuel Co. v. Dep't of Envtl. Resources*, 153 Pa. Commw. 489, 621 A.2d 1155 (1993) (under the law-of-the-case doctrine, a court will not reverse itself even if convinced the previous ruling was erroneous); *Feller v. Scott County Civil Serv. Comm'n*, 482 N.W.2d 154 (Iowa 1992) (law-of-the-case doctrine requires appellate decision to control even when incorrectly interpreting statute); *Union Oil Co. v. Reconstruction Oil Co.*, 58 Cal. App. 2d 30, 135 P.2d 621 (1943) (law-of-the-case doctrine precludes appellate court from reconsidering former appeal even if the former decision is erroneous).

As a result, the district court correctly applied the law-of-the-case doctrine in sustaining the demurrer, and we need go no further than that point in deciding this case today.

Lloyd also argues that the district court abused its discretion by sustaining the demurrer without granting him leave to amend. Upon sustaining a demurrer to a petition, a court must grant a plaintiff leave to amend the petition unless no reasonable possibility exists that repleading will correct the defective petition. *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994).

However, Lloyd cannot possibly cure the defect to his

petition. His petition asks the district court to disregard this court's order modifying the Pendletons' marital dissolution decree. The law-of-the-case doctrine prevents Lloyd from asking the trial court to reconsider a matter conclusively settled by the appellate court.

The judgment of the district court is affirmed.

AFFIRMED.

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ADC-I, LTD. LIMITED PARTNERSHIP, A NEBRASKA LIMITED PARTNERSHIP, APPELLEE, V. PAN AMERICAN FUELS, LTD.-GULF COAST, AND PAN AMERICAN INDUSTRIES, LTD./MID-AMERICA, APPELLANTS.

525 N.W.2d 190

Filed December 23, 1994. No. S-93-680.

1. **Quiet Title: Equity: Appeal and Error.** A suit to quiet title is equitable in nature, and an appellate court reviews the record in such a case de novo and reaches an independent conclusion without reference to findings of the trial court. However, when credible evidence is in conflict, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Contracts: Substantial Performance: Proof.** A contract has been substantially performed if the claimant proves all three of the following elements: (1) It made an honest endeavor in good faith to perform its part of the contract, (2) the results of its endeavor are beneficial to the other party, and (3) the other party retained those benefits. If the claimant fails to establish any one of these elements, then the contract has not been substantially performed, and the claimant cannot maintain an action on the contract.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Douglas G. Pauley, of Conway, Connolly & Pauley, P.C., and Robert J. Salazar for appellants.

T. Randall Wright and Steven D. Schaal, of Dixon & Dixon, P.C., for appellee.

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

WHITE, J.

Pan American Fuels, Ltd.-Gulf Coast and Pan American Industries, Ltd./Mid-America (collectively, Pan American) appeal from the decision of the district court for Adams County, dismissing their claim for damages due to an alleged breach of contract by ADC-I, Ltd. (ADC). We affirm.

This contract dispute began after ADC had solicited bids to sell its ethanol manufacturing plant located near Hastings, Nebraska. ADC, a limited partnership, had been instructed to sell the property by the Federal Savings and Loan Investment Corporation (FSLIC), the conservator of ADC's general partner, American Diversified Savings Bank, a California savings and loan institution. ADC selected Pan American's proposal as one of three final proposals. In its letter to Pan American informing Pan American that it had been selected as one of three final bidders, ADC instructed Pan American to provide it with Pan American's requirements for fully assuming a first trust deed note and for posting an earnest deposit of 1 percent of the purchase price upon acceptance.

Pan American's amended proposal provided that it would "assume fully the 'first trust deed note' covering the ADC Plant held by Security Bank of Kansas City and guaranteed by the Farmers Home Administration." Pan American's amended proposal also provided that it would

> pay an earnest money deposit of 'one percent (1%)' of the purchase price for the ADC Plant. . . . The earnest money deposit shall be delivered to the FSLIC by Pan American, in the form of a cashier's check or certified check, upon the FSLIC's written acceptance of Pan American's offer to purchase the ADC Plant.

ADC selected Pan American's amended proposal of more than $16.5 million, informing Pan American that its "proposal to purchase the . . . Plant . . . has been selected as the proposal best serving the interests of the [FSLIC]."

On June 30, 1989, the parties executed an asset purchase contract. Article II of the contract, entitled "Purchase Obligations," contains a provision relevant to Pan American's assumption of the first trust deed note. Section 2.1.4 provides:

> Assumption of Existing Indebtedness. The outstanding principal amount calculated as of the Closing Date of the note held by Security Bank of Kansas City and relating to the ADC I Assets is to be assumed by Buyer. Without intending to diminish the importance of any of the other conditions of closing established in Article VIII of this Agreement, it is specifically noted that Security Bank of Kansas City and the Farm[ers] Home Administration must approve Buyer for complete assumption of all of Seller's obligations under the First Deed of Trust as a condition of Seller's obligation to close.

Article VIII of the contract, entitled "Conditions Precedent to the Closing," also contains a provision relevant to the loan assumption. Section 8.1.6 provides:

> Buyer's Assumption of Debt. Buyer, Seller, Security Bank of Kansas City (the "Bank") and Farm[ers] Home Administration (the "Guarantor") shall have agreed to the transfer to Buyer of all of Seller's rights in, and the assumption by Buyer of[,] all of Seller's liabilities under a Loan Agreement dated November 19, 1982 by and among Seller, the Bank and the Guarantor, as amended.

Furthermore, article II also contains the provision relevant to Pan American's obligation to post an earnest money deposit upon acceptance of its amended proposal. Section 2.3.1 provides in relevant part: "Earnest Deposit. Within five days following the execution of this Agreement, Buyer shall deliver to Seller a letter of credit (the 'Letter of Credit') in the amount of $165,000 and an enforceability opinion reasonably satisfactory to Seller." Under § 2.3.1, the $165,000 letter of credit and enforceability opinion were due July 5, 1989.

On July 4, 1989, Robert Salazar, Pan American's president, informed ADC that Pan American had not had sufficient time to post the letter of credit and requested an extension. Because one of the days in the 5-day period was a holiday, ADC agreed to allow Pan American 5 "business" days from the date of

execution to post the $165,000 letter of credit and enforceability opinion. The new due date therefore was July 10.

When Pan American failed to post the $165,000 letter of credit and enforceability opinion by July 10, ADC demanded that Pan American post the letter of credit and enforceability opinion by July 12. On July 12, Pan American contacted ADC to inform ADC that Pan American would post a "company" letter of credit (drawn on Pan American). ADC's counsel informed Pan American that a company letter of credit was unacceptable.

Thereafter, when Pan American failed to post a bank letter of credit and an enforceability opinion by July 19, ADC sent Pan American a letter requiring Pan American to comply by "12:00 noon, Central Daylight Time, July 26." In addition, on July 20, ADC's counsel contacted Salazar by telephone to inform him of the July 26 deadline; Security Bank of Kansas City, also on July 20, rejected Pan American's request to assume ADC's loan on the ethanol manufacturing plant. By the July 26 deadline, ADC had received from Pan American a letter of credit for only $27,500; ADC had not received an enforceability opinion. Although ADC had received letters of credit for $137,500 by the end of business on July 26, ADC nevertheless, on July 27, decided to rescind the contract and sent Pan American a letter so stating.

Subsequently, on December 11, 1989, ADC filed an equitable action to quiet title to the property. ADC did not, however, seek money damages against Pan American. Along with its answer, Pan American filed a counterclaim against ADC, seeking specific performance and money damages. Before trial, Pan American chose to go to trial solely on the issue of damages for breach of contract. The district court granted ADC's petition to quiet title and dismissed Pan American's counterclaim for money damages. Pan American has appealed.

Pan American contends that the district court erred in dismissing its claim for damages. This case began as an action to quiet title in ADC. A suit to quiet title is equitable in nature, and an appellate court reviews the record in such a case de novo and reaches an independent conclusion without reference to findings of the trial court. However, when credible evidence is

in conflict, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Saunders v. Rebuck*, 242 Neb. 610, 496 N.W.2d 472 (1993); *Nennemann v. Rebuck*, 242 Neb. 604, 496 N.W.2d 467 (1993). See, also, *Wahrman v. Wahrman*, 243 Neb. 673, 502 N.W.2d 95 (1993).

The gravamen in this appeal is whether Pan American could bring this action for damages due to ADC's alleged breach. To successfully bring an action on a contract, a claimant first must establish that the contract has been substantially performed on the claimant's part. See, *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993); *Lange Bldg. & Farm Supply v. Open Circle "R"*, 216 Neb. 1, 342 N.W.2d 360 (1983); *Schweitz v. Robatham*, 194 Neb. 668, 234 N.W.2d 834 (1975). A contract has been substantially performed if the claimant proves all three of the following elements: (1) It made an honest endeavor in good faith to perform its part of the contract, (2) the results of its endeavor are beneficial to the other party, and (3) the other party retained those benefits. *Lange Bldg. & Farm Supply, supra*. If the claimant fails to establish any one of these elements, then the contract has not been substantially performed, and the claimant cannot maintain an action on the contract. *Id.*

In the case at bar, the evidence shows that the claimant, Pan American, failed to establish all three elements. First, Pan American failed to show that it made an honest endeavor in good faith to perform its part of the contract. The evidence is in fact to the contrary. The evidence shows that Pan American continually failed to attempt to meet its obligation under § 2.3.1 to post a $165,000 letter of credit and enforceability opinion, and when it did, Pan American first attempted to post a bogus letter of credit, drawn on itself. Subsequently, when ADC imposed a firm deadline for compliance, Pan American posted only a $27,500 letter of credit and no enforceability opinion. Only after ADC rescinded the contract did Pan American comply with § 2.3.1's requirements. This continual failure to timely satisfy the contractual requirements of § 2.3.1 for posting a letter of credit and enforceability opinion shows that Pan American did not make an honest endeavor to perform its

part of the contract in good faith. Pan American therefore has failed to establish the first element.

Second, because Pan American failed to perform at all, ADC did not derive any benefit. Although ADC would have benefited if Pan American had performed, the record contains no evidence that ADC benefited because no act occurred from which ADC could possibly have benefited. Pan American therefore has also failed to establish the second element.

Third, Pan American failed to show that ADC had retained a benefit from its actions. In fact, not only did ADC not retain any benefit from the contract, ADC also lost approximately $6 million due to Pan American's nonperformance. ADC, which had contracted with Pan American to sell its ethanol manufacturing plant to Pan American for more than $16.5 million, eventually sold it for only $10 million. Pan American therefore has also failed to establish the third element.

Because Pan American failed to establish that it had substantially performed under the contract, it cannot maintain an action on that contract against ADC. The district court therefore properly dismissed Pan American's action for damages.

On appeal, Pan American assigns seven additional errors. However, because Pan American failed to substantially perform under the contract and because that issue is dispositive, we do not reach Pan American's seven other assigned errors. We affirm the district court's decision, dismissing Pan American's claim for damages.

AFFIRMED.

# CRYSTAL CLEMENS ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLANTS, V. MARY DEAN HARVEY, DIRECTOR OF THE NEBRASKA DEPARTMENT OF SOCIAL SERVICES, AND THE NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLEES.

525 N.W.2d 185

Filed December 23, 1994. No. S-93-898.

1. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Administrative Law: Statutes.** The Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute, but this delegated authority is limited to the powers delegated to the agency by the statute which the agency is to administer.
3. ____: ____. An administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.
4. **Statutes.** A statute may adopt all or a part of another statute by a specific reference, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute.
5. **Administrative Law: Statutes: Medical Assistance.** Absent specific statutory authority, the Department of Social Services does not have the power to issue regulations eliminating medical assistance benefits.
6. **Constitutional Law.** The Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with directions.

John B. Milligan, of Legal Services of Southeast Nebraska; Georgiene Radlick-Wagoner, of Western Nebraska Legal Services; Milo Alexander, of Legal Aid Society, Inc.; and D. Milo Mumgaard, of Nebraska Center for Legal Services, for appellants.

Don Stenberg, Attorney General, Royce N. Harper, and Michael J. Rumbaugh, Special Assistant Attorney General, for appellees.

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

WRIGHT, J.

The appellants, Crystal Clemens, Garaline Ashley, Charlene Carriker, and Christine Perault, brought a declaratory action as a class of individuals challenging the revision by the Nebraska Department of Social Services (DSS) of a regulation which terminated their eligibility for a medical assistance program. The action was submitted to the Lancaster County District Court for trial on a stipulation of facts, and the district court dismissed the petition. We granted the appellants' petition to bypass the Nebraska Court of Appeals.

## SCOPE OF REVIEW

In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. *Jaksha v. Thomas*, 243 Neb. 794, 502 N.W.2d 826 (1993).

## FACTS

Commencing in 1966 with the inception of the Nebraska medical assistance program, and continuing until the revision of the state regulation at issue here, low-income individuals in nongrant eligible, aid to dependent children (ADC) families were eligible for and received medical assistance benefits. These "caretaker relatives" were not eligible for ADC benefits because their income or resources were above the ADC standard, but were low enough to make them eligible for medical assistance benefits. Pursuant to 468 Neb. Admin. Code, ch. 2, § 006.02 (1992), a caretaker relative is defined as a father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, second cousin, nephew, or niece. The relative may be half blood, related by adoption, or from a preceding generation as denoted by prefixes of grand, great, great-great, or great-great-great. The definition also includes the spouse of any person previously named even after the marriage has been terminated by death or divorce.

Nebraska's medical assistance program is administered by

DSS. Neb. Rev. Stat. § 68-1021 (Cum. Supp. 1994). In 1993, DSS promulgated an amendment to the Nebraska Administrative Code which eliminated the eligibility of caretaker relatives for medical assistance. This action was taken by DSS independent of any specific legislative directive or requirement to do so. The change was implemented due to a projected deficit in biennium funding for the medical assistance program.

In February and March 1993, more than 5,000 caretaker relatives were notified by DSS that their eligibility for medical assistance benefits had been or would be terminated because of the change in regulation. The appellants then brought this action seeking a declaratory judgment and injunctive relief. Each of the named appellants has ongoing medically necessary health care needs, and they are not able to afford medical treatment or to obtain private medical insurance to cover these medical needs.

The district court found that the appellants were entitled to have this action certified as a class action. The class included all individuals in the State of Nebraska who had received or would receive notices from DSS that their eligibility for medical assistance benefits had been or would be terminated, or whose application for assistance had been or would be denied due to the provisions of DSS' "Manual Letter # 5-93," which contained the amendment adopted by DSS.

In their petition, the appellants contended that DSS' elimination of the caretaker relatives' eligibility violated certain federal procedural standards, that DSS acted beyond the scope of its statutory authority in its attempt to reduce a projected budgetary deficit, and that DSS' actions were contrary to the separation of powers doctrine contained in article II, § 1, of the Nebraska Constitution. The district court held that the appellants were not entitled to the requested injunctive relief and that DSS' action in adopting the amendment did not violate the Nebraska Constitution, state statutes, or the federal Social Security Act.

## ASSIGNMENTS OF ERROR

The appellants make the following assignments of error: The district court erred (1) by finding that DSS' "after the fact"

consultation with the Medical Care Advisory Committee satisfied the requirements of the Social Security Act; (2) by finding that DSS' adoption of the regulations at issue was not contrary to Neb. Rev. Stat. § 68-721 (Reissue 1990), which contains the exclusive statutory method available to DSS to reduce a projected medical assistance budgetary deficit; (3) by finding that DSS' actions did not exceed the authority delegated to it in state statutes; and (4) by finding that DSS' actions did not violate the separation of powers doctrine of article II, § 1, of the Nebraska Constitution.

## ANALYSIS

We address only the appellants' third and fourth assignments of error because they are decisive of the case. The appellants argue that DSS exceeded the powers delegated to it by the Legislature when DSS adopted an amendment which eliminated more than 5,000 caretaker relatives from eligibility for medical assistance benefits. We agree.

The Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute, but this delegated authority is limited to the powers delegated to the agency by the statute which the agency is to administer. *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988). An administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *Id.*

Nebraska's medical assistance program, a cooperative federal-state medicaid program, is required to comply with federal regulations. See, *Weaver v. Reagen*, 886 F.2d 194 (8th Cir. 1989); 42 U.S.C. § 1396(a) (1988 & Supp. V 1993). When the Legislature established the medical assistance program, it adopted the federal medical assistance provisions contained in title XIX of the Social Security Act. See Neb. Rev. Stat. § 68-1018 (Reissue 1990) and § 68-1021. The federal program designated the classes of persons eligible. See Neb. Rev. Stat. § 68-1020 (Reissue 1990). Section 68-1020 provides that medical assistance shall be paid on behalf of dependent children, aged persons, and blind and disabled individuals. By adopting the provisions of the federal law, § 68-1021 also

provides that caretaker relatives as defined herein are eligible for benefits. Since their inception, the medical assistance statutes have been amended several times by the Legislature in order to make additional groups eligible for benefits, but to this date, the Legislature has not eliminated any class of recipients.

It is undisputed that the class of individuals whose eligibility for medical assistance has been terminated by DSS' action has been eligible for such benefits since the beginning of the program and that the benefits were not terminated by legislative action. With the adoption of the medical assistance program, the Legislature made specific reference to existing federal law by accepting and assenting to "all applicable provisions of Title XIX of an Act of Congress identified as H.R. 6675, 89th Congress, approved July 30, 1965." § 68-1021. H.R. 6675 provided that the medicaid program should include caretaker relatives:

> "(a) The term 'medical assistance' means payment of part or all of the cost of the following care and services . . . for individuals who are—
>
> "
>
> "(ii) relatives specified in section 406(b) (1) with whom a child is living if such child, except for section 406(a) (2), is (or would, if needy, be) a dependent child under title IV . . . ."

1965 U.S. Code Cong. & Admin. News 305, 379.

We have held that a statute may adopt all or a part of another statute by a specific reference, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute. *Adams v. State*, 138 Neb. 613, 294 N.W. 396 (1940). By making specific reference to H.R. 6675, § 68-1021 adopted the language contained therein. The Legislature may lawfully adopt by reference an existing law or regulation of another jurisdiction, including the United States. *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967). Thus, Nebraska's medical assistance statutes include the coverage that is described for caretaker relatives in H.R. 6675.

As both parties point out, title XIX of the Social Security Act was amended by the Omnibus Budget Reconciliation Act (OBRA) in 1981. Pursuant to OBRA, the states were no longer

required to provide medical assistance coverage for caretaker relatives. At the time that the Legislature adopted H.R. 6675, OBRA was not in existence. In this instance, the Legislature could not have adopted OBRA, because the adoption of an act of Congress to be passed in the future would be an unconstitutional attempt on the part of the Legislature to delegate legislative authority to Congress. See, *Anderson v. Tiemann, supra*; *Smithberger v. Banning*, 129 Neb. 651, 262 N.W. 492 (1935). As of this date, the Legislature has not passed legislation which eliminates this group from coverage.

DSS argues that it has the authority to unilaterally eliminate such coverage without a specific legislative act. We disagree. While DSS correctly asserts that it has been given general authority to promulgate medical assistance rules and regulations under Neb. Rev. Stat. §§ 68-1018 to 68-1036 (Reissue 1990 & Cum. Supp. 1994), we do not find that DSS has been given the specific authority to unilaterally eliminate coverage to the class in question. Absent specific statutory authority, DSS did not have the power to issue the regulation eliminating benefits, and the regulation therefore is invalid. In the event that the Legislature determines that coverage for caretaker relatives shall be eliminated, it may do so by appropriate legislation. It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state. *Nebraska P.P. Dist. v. City of York*, 212 Neb. 747, 326 N.W.2d 22 (1982).

The appellants also argue that DSS' amendment of the regulation violated the separation of powers doctrine. DSS is a part of the executive branch of government. The Legislature may enact statutes to set forth the law, but it may not delegate that function to the executive or judicial branches of government. See *id.* Neb. Const. art. II, § 1, provides in part: "[N]o person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." The Nebraska Constitution thus prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives. *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991). The Legislature cannot delegate

to DSS the authority to eliminate caretaker relatives from eligibility for medical assistance.

DSS' decision to exclude an entire class of persons from the medical assistance program was a legislative act. This action encroaches upon and interferes with legislative powers that cannot be delegated to DSS. See *State ex rel. Johnson v. Hagemeister*, 161 Neb. 475, 73 N.W.2d 625 (1955). Since the Legislature cannot delegate such powers and has not attempted to do so, and since DSS has unilaterally encroached upon the duties and prerogatives of the Legislature, the agency's actions are unconstitutional in violation of the language of article II, § 1, of the Nebraska Constitution. DSS' elimination of an entire class of beneficiaries, including more than 5,000 people, without specific legislation or authority is invalid and unconstitutional. Although DSS asserted that it revised the regulation in part based on a projected deficit in funding for the medical assistance program, we do not now decide what action is prescribed by law in the event of such a deficit.

We reverse the judgment of the district court and remand the cause for entry of judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, V. ROBERT M. LEE, APPELLANT.

525 N.W.2d 179

Filed December 23, 1994. No. S-93-1096.

1. **Trial: Evidence: Waiver.** Normally, an objection to inadmissible evidence is waived if the objecting party later introduces similar evidence.
2. **Trial: Evidence: Rebuttal Evidence.** The introduction of similar evidence solely for the purpose of meeting the adversary's case by explaining or rebutting the original evidence does not waive an objection to the original evidence.
3. **Rules of Evidence.** Only relevant evidence is admissible.
4. **Rules of Evidence: Words and Phrases.** Relevant evidence is that evidence having any tendency to make the existence of any fact of consequence to the

determination of the action more probable or less probable than it would be without the evidence.

5. **Trial: Rules of Evidence.** Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
6. **Rules of Evidence.** Only evidence tending to suggest a decision on an improper basis is unfairly prejudicial.
7. **Sexual Assault: Evidence.** In a sexual assault case, evidence of the plan or scheme through which one seeks to entice another into sexual congress does not tend to suggest a decision on an improper basis.
8. **Trial.** It is not error to overrule an objection which is in part valid and in part invalid.
9. **Trial: Evidence.** An objection to an exhibit as a whole is properly overruled where a part of the exhibit is admissible.
10. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, irrespective of whether an error in admitting or excluding evidence reaches a constitutional dimension, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
11. ____: ____: ____: ____: ____. In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant.
12. **Trial: Evidence: Convictions: Appeal and Error.** The improper admission of evidence is harmless error and does not require reversal if the evidence is cumulative and there is other competent evidence to support the conviction.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and HANNON, Judges, on appeal thereto from the District Court for Douglas County, JAMES A. BUCKLEY, Judge. Judgment of Court of Appeals affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Marcena M. Hendrix for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

CAPORALE, J.

## I. STATEMENT OF CASE

Pursuant to verdict, the defendant-appellant, Robert M. Lee, was adjudged guilty of two counts of first degree sexual assault,

in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989), which prohibits one 19 years of age or older from sexually penetrating, including through fellatio, another who is less than 16 years of age, Neb. Rev. Stat. § 28-318(6) (Reissue 1989). Lee appealed to the Nebraska Court of Appeals, assigning a variety of errors, including that the trial court erred in admitting certain evidence over his objections. Concluding that by making use of the evidence in question Lee had waived his objections, the Court of Appeals, in a memorandum opinion dated August 2, 1994, affirmed the judgment of the trial court. Lee thereupon sought further review by this court, asserting only that the Court of Appeals erred in concluding that he had waived his evidential objections. Although the Court of Appeals did so err, its judgment of affirmance was nonetheless correct; accordingly, we affirm.

## II. SCOPE OF REVIEW

In proceedings where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994); *State v. Baker*, 245 Neb. 153, 511 N.W.2d 757 (1994); *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994).

## III. FACTS

Overruling Lee's objections that the evidence was not relevant and that, in any event, its probative value was outweighed by its unfairly prejudicial nature, the trial court received, during the plaintiff-appellee State's case in chief, a variety of sexually explicit items which police had seized from the residence Lee shared with his wife. These items were identified as trial exhibits 12, 13, 15, and 17.

Exhibit 12 appears to be a double page removed from a magazine. It consists largely of photographs depicting an adult male and adult female engaged in sexual play, including the suggestion of fellatio.

Exhibit 13 is a book dealing primarily with adult heterosexual conduct, including fellatio, and some adult female homosexual activity.

Exhibit 15 consists of 10 paperback books found in a box which deal with a variety of sexual activity. Seven of these include depictions of pedophilic conduct. Of these, one describes homosexual acts between a middle-aged man and a reluctant 14-year-old boy servant. Several of the others concern the attraction of adult females to young boys, and one deals with incest.

Exhibit 17 is an advertisement for male homosexual videotapes. Although nothing explicitly states that underage sexual activity is portrayed, some of the males pictured appear as if they could be underage, and a few of the titles include innuendo about underage sexual activity.

Lee and his wife both babysat and otherwise visited with the younger male victim from the time he was about 2½ years old to the time he was about 5½. According to this victim, Lee had the victim perform fellatio on Lee.

Lee babysat the older male victim from the time the latter was 8 years old until he was about 15 years old. According to this reluctant witness, during these occasions Lee performed fellatio upon him. He recognized exhibit 13 and one of the nonpedophilic books in exhibit 15 from snooping in Lee's dresser.

A then-21-year-old male witness testified, without objection, that he had seen exhibit 13 in Lee's possession, as well as two of the pedophilic books from exhibit 15. This witness said that he would go to Lee's home, and Lee would show these to the witness in the company of the older victim and another boy. According to this witness, this was done "in the attempt to get us aroused." While these books were being perused, they would discuss the homosexual activities described in the books. This witness also testified, again without objection, that although he never actually had sex with Lee, one time when he was 17 years old, Lee shoved the witness' head into Lee's crotch in an unsuccessful attempt to get the witness to perform fellatio.

The police officer who searched the Lee residence testified, without objection, that in the course of the search Lee admitted that there had been one occasion when the younger of the victims performed fellatio on Lee and that the older victim and

Lee performed fellatio on each other. Lee also admitted that he and an adult male coworker had performed fellatio on each other.

After the State rested, the defense put on its case, and both Lee and his wife testified about the sexual material.

The wife testified that exhibit 13 had been given to her by an old friend before she married Lee. When asked about exhibit 15, she testified that one of the books belonged to someone else, another was given by a friend, and a third was one that she and Lee had had since the two had been going together. The others were from Lee's place of employment. In a seeming contradiction, she testified further that the books had been in the house for only a week and that Lee was going to take them back to his place of employment. She also explained that exhibit 17 kept coming in the mail even though they had written and asked that it be stopped.

Lee testified that he had picked up some of the books constituting exhibit 15 around work and that some of them were given to him at work. He kept them in his dresser until he had read them, after which they were placed in a box. He also explained that he had ordered some pornographic information for the male coworker with whom the police officer claimed Lee had admitted engaging in fellatio. As the coworker still lived with his mother, he did not want it delivered there. As a result, Lee ended up on a mailing list and in possession of exhibit 17.

Lee denied having said he and the coworker had had sexual congress and testified that on the occasion the officer described involving the younger victim, the victim had grabbed Lee's penis and attempted to put it into the victim's mouth, but that Lee prevented that. According to Lee, the victim dominated the situation. Lee explained that the victim said he had participated in such activity with an uncle. However, Lee also testified that he had told the officer that there had been 10 to 12 occasions where the older victim had at least attempted to perform fellatio on Lee.

## IV. ANALYSIS

As part I foreshadows, we must review not only the Court of Appeals' determination that Lee waived his objections, but must

consider as well the admissibility of the evidence in question and the consequences of any erroneous ruling in that regard.

1. NONWAIVER OF OBJECTIONS

It is true that normally, an objection to inadmissible evidence is waived if the objecting party later introduces similar evidence. See, *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Harper*, 218 Neb. 870, 359 N.W.2d 806 (1984); *Tyrrell v. State*, 173 Neb. 859, 115 N.W.2d 459 (1962); *Johnson v. Airport Authority*, 173 Neb. 801, 115 N.W.2d 426 (1962); *Sump v. Omaha Public Power Dist.*, 168 Neb. 120, 95 N.W.2d 209 (1959); *Johnson v. State*, 112 Neb. 530, 199 N.W. 808 (1924); *Dawson v. State*, 96 Neb. 777, 148 N.W. 957 (1914). But the rule does not apply where the objecting party introduces similar evidence solely for the purpose of meeting the adversary's case by explaining or rebutting the original evidence. See, *Macke v. Wagener*, 106 Neb. 282, 183 N.W. 360 (1921); *In re Estate of Cheney*, 78 Neb. 274, 110 N.W. 731 (1907).

In *Macke*, the trial court, over plaintiff's objection, erroneously received in evidence a certain decree. Plaintiff then offered and the court received in evidence an opinion of this court which related to the decree. In rejecting defendant's claim that by so doing, plaintiff had waived her objection, the *Macke* court wrote that the questioned evidence having been received, plaintiff "might reasonably proceed in accordance with the view of the trial court and offer evidence of a similar character to rebut the inferences which might be drawn from defendant's evidence without waiving the objection." 106 Neb. at 288, 183 N.W. at 362.

Likewise, in *In re Estate of Cheney*, the trial court erroneously, over the contestant's objections, permitted certain witnesses to testify that the testator had the mental capacity to make a will. In rejecting the proponent's contention that the objections had been waived by the contestants' similar questions of their own witnesses, the court wrote:

> It is true the general rule is that an error in the admission of evidence is waived where the party aggrieved thereby subsequently introduces the same evidence. [Citations

> omitted.] But a different rule obtains where a party, after objecting to evidence and excepting to the ruling thereof, introduces similar evidence, as in this case, solely for the purpose of meeting his adversary's case, rebutting or combating the evidence to which he excepted, but without any intention of abandoning his exceptions.

78 Neb. at 277-78, 110 N.W. at 732.

This case falls within the exception to the general rule, for Lee's testimony and that of his wife did nothing more than explain how the questioned evidence came to be in their possession. Their testimony in no sense used the questioned exhibits to bolster Lee's defense that he did not sexually penetrate the victims, but only attempted to rebut whatever inferences might be drawn by the presence of those items in Lee's residence. Consequently, Lee did not waive his objections.

### 2. Admissibility of Evidence

That determination requires that we consider the admissibility of the questioned evidence.

Only relevant evidence is admissible. Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989). Relevant evidence is that evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994).

Here, the question was whether Lee sexually penetrated two males under 16 years of age through fellatio. In the absence of competent evidence that possessing material dealing with adult heterosexual fellatio somehow leads to engaging in pedophilic homosexual fellatio, exhibit 12 is not relevant and thus should not have been admitted.

Although in a different context, the court in *State v. Starkey*, 516 N.W.2d 918 (Minn. 1994), sums this issue up well. The defendant was accused of murdering one who the defendant claimed had tried to homosexually rape him. In support of the self-defense-from-rape theory, the defendant sought to introduce the decedent's collection of pornography. Out of 87 magazines

found, 9 contained violent sexual acts and only 6 showed heterosexual contact; the rest were homosexual. Seventeen out of 204 paperback books involved themes of homosexual rape and violent sex. Ten involved heterosexual sex, and two of those were forced sex.

The *Starkey* court noted that the defense making the decedent out as a violent homosexual predator was not bolstered any by expert opinion, nor did the defense propose a theory connecting the possession of pornography with the commission of sexual violence. The court summed up the defense counsel's failure by stating, "[T]here was no proof nor even an offer of proof to link [the decedent's] 'viewing with doing.' " *Id.* at 925. Cf. *United States v. Mann*, 26 M.J. 1 (C.M.A. 1988), *cert. denied* 488 U.S. 824, 109 S. Ct. 72, 102 L. Ed. 2d 49 (accused's magazines depicting sexual conduct among children and adults admissible in court-martial for indecent acts allegedly committed against 9-year-old daughter where prosecution required to show accused committed act with intent to gratify his sexual desires).

At first blush, it would seem that exhibit 13 suffers from the same infirmity as does exhibit 12. The difference, however, is the testimony that this exhibit was used to sexually arouse the older victim. Thus, there is evidence which, if believed by the jury, connects possession of exhibit 13 with the commission of the crime charged with respect to that victim. As a consequence, it was admissible unless excludable under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), which provides that although relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." See *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989) (not error to receive in evidence movies shown to victims of homosexual contact).

Recognizing that most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party, we have held that only evidence tending to suggest a decision on an improper basis is unfairly prejudicial and thus a concern under rule 403. *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994).

Evidence of the plan or scheme through which one seeks to

entice another into sexual congress does not tend to suggest a decision on an improper basis. Thus, in a case wherein the accused was charged with committing an indecent act with his 12-year-old daughter, the Court of Military Appeals in *United States v. Acton*, 38 M.J. 330 (C.M.A. 1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 1056, 127 L. Ed. 2d 377 (1994), held admissible that portion of a videotape depicting incest which the accused had shown the daughter, as it proved, among other things, the accused's plan or scheme to condition his daughter to accept his sexual advances as permissible or normal. Similarly, in a prosecution for aggravated criminal sexual assault, the court in *People v. Mason*, 219 Ill. App. 3d 76, 578 N.E.2d 1351 (1991), held evidence that the defendant had shown the 7-year-old girl pornographic movies was admissible, as it suggested the defendant's self-arousal and could logically be interpreted as a scheme to seduce the girl. In the words of the court: "Such evidence is admissible in cases where the proffered evidence is so clearly connected with the main issue in the case at bar as to tend to prove the accused guilty of the offense charged." *Id.* at 80, 578 N.E.2d at 1355.

While Lee may have been entitled to have had the jury admonished that the evidence was relevant only with respect to the charge concerning the older victim, we have not been directed to any motion seeking such an admonition, nor has our search of the record revealed any such motion. We therefore do not concern ourselves with that issue.

Although there is no evidence that all of the books which make up exhibit 15 were shown to and discussed with the older victim, there is evidence that some of them were. Thus, for the reasons addressed with respect to exhibit 13, Lee's objections were not good as to the latter parts of exhibit 15.

The corollary to the rule that it is not error to exclude an exhibit which is in part admissible and in part inadmissible, see *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994), is that it is not error to overrule an objection which is in part valid and in part invalid. Thus, an objection to an exhibit as a whole is properly overruled where a part of the exhibit is admissible. *Skow v. Locke*, 3 Neb. (Unoff.) 176, 91 N.W. 204 (1902). In rejecting

a claim that the trial court had erred in admitting a large number of exhibits offered en masse, this court, in *Langdon v. Wintersteen*, 58 Neb. 278, 280-81, 78 N.W. 501, 502 (1899), wrote:

> The assignment relates to the whole mass of documents, and cannot permit an examination of the propriety of admitting each one separately. They came in on the redirect examination of the plaintiff after a cross-examination which was largely directed to bringing into question the fact of plaintiff's having purchased goods of the character and to the amount she had testified in chief, also towards showing that the stock was old, and being millinery, consequently of little value. The invoices were admitted after proof by the witness that she had actually bought and received the goods as therein stated, and some showed very recent purchase. The trial court restricted their use to the purposes indicated and practically told the jury they must not be considered as proving present values. There was no error in admitting some, at least, and the whole assignment must therefore fail.

See, also, *Powerine Co. v. Grimm Stamp & Badge Co.*, 127 Neb. 165, 254 N.W. 722 (1934) (objection to question properly overruled unless objection good as against entire question). Thus, all of exhibit 15 was properly admitted.

That leaves exhibit 17, which, like exhibit 12, was in no way tied by the State to the commission of the crimes at issue. Thus, it was improperly admitted.

### 3. Consequence of Erroneous Rulings

Left for consideration, then, is the consequence of the erroneous admission of exhibits 12 and 17.

In a jury trial of a criminal case, irrespective of whether an error in admitting or excluding evidence reaches a constitutional dimension, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994); *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 2738, 129 L. Ed. 2d 859 (1994); *State v. Drinkwalter*, 242

Neb. 40, 493 N.W.2d 319 (1992).

In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant. *State v. Hankins*, 232 Neb. 608, 441 Neb. 854 (1989).

The improper admission of evidence is harmless error and does not require reversal if the evidence is cumulative and there is other competent evidence to support the conviction. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993); *State v. Timmermann*, 240 Neb. 74, 480 N.W.2d 411 (1992); *State v. Guy*, 227 Neb. 610, 419 N.W.2d 152 (1988).

Given exhibit 13 and the mass of sexually explicit material contained in exhibit 15, the material contained in exhibits 12 and 17 is cumulative and pales into insignificance.

As the remaining competent evidence is sufficient to support Lee's convictions, the erroneous admission of exhibits 12 and 17 was harmless beyond a reasonable doubt.

## V. JUDGMENT

Accordingly, as first noted in part I, the judgment of the Court of Appeals is affirmed.

AFFIRMED.

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STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DONN K. NELSON, RESPONDENT.

525 N.W.2d 31

Filed December 23, 1994. No. S-94-1165.

Original action. Judgment of disbarment.

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

PER CURIAM.

Donn K. Nelson was admitted to the practice of law in Nebraska on September 26, 1976. On September 8, 1994, Nelson entered a plea of guilty in the U.S. District Court for the District of Nebraska to a charge of giving false information on a loan form. The court accepted Nelson's plea on November 28.

On December 12, Nelson voluntarily surrendered his license to practice law and consented to the entry of an order of disbarment. Nelson admitted that by overvaluing the security, assets, and income of an apartment project on a loan application, he engaged in conduct that involved misrepresentation, in violation of Canon 1, DR 1-102(A)(4), of the Code of Professional Responsibility, and has engaged in conduct that adversely reflects on his fitness to practice law, in violation of Canon 1, DR 1-102(A)(6).

Nelson freely and voluntarily waived his right to notice, appearance, or hearing prior to the entry of this order. We accept Nelson's surrender, and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

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MICHAEL A. SHADE, APPELLANT, V. AYARS & AYARS, INC., AND AETNA CASUALTY & SURETY, APPELLEES.

525 N.W.2d 32

Filed December 30, 1994. No. S-93-728.

1. **Workers' Compensation: Appeal and Error.** A judgment made by the Workers' Compensation Court after review shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment,

order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. **Workers' Compensation: Employer and Employee.** Recreational or social activities are within the course of employment when (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.
3. **Workers' Compensation.** The three tests provided in *Gray v. State*, 205 Neb. 853, 290 N.W.2d 651 (1980), are sufficient to make the needed determination concerning whether an injury occurs within the course and scope of an employment.
4. ____. The determination of whether an employee's activity comes within the limits of one of the tests identified in *Gray v. State*, 205 Neb. 853, 290 N.W.2d 651 (1980), is a factual determination to be made by the finder of fact.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MILLER-LERMAN, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed as modified.

T.J. Hallinan and Gordon D. Ehrlich, of Cobb, Hallinan & Ehrlich, P.C., for appellant.

Richard R. Endacott, of Knudsen, Berkheimer, Richardson & Endacott, for appellees.

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

WRIGHT, J.

The Nebraska Court of Appeals affirmed the decision of the Workers' Compensation Court which dismissed Michael A. Shade's petition seeking workers' compensation benefits. We granted Shade's petition for further review, and the judgment of the Court of Appeals is affirmed as modified.

## SCOPE OF REVIEW

A judgment made by the Workers' Compensation Court after

review shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. Neb. Rev. Stat. § 48-185 (Reissue 1993).

## FACTS

Shade, a laborer for Ayars & Ayars, Inc., was injured at a company picnic on Saturday, June 23, 1990. The picnic was held at Branched Oak Lake, near Lincoln, Nebraska. Each employee received a notice of the picnic, dubbed "Ayars & Ayars Summer Bash '90," in the paycheck envelope issued 2 weeks before the picnic. The notice stated that each employee should bring a covered dish and that the company would provide the main dish, pop, and beer.

Employees who were scheduled to work on the afternoon of the picnic were given time off to attend the picnic if they so chose. About 25 to 30 percent of the company's 30 to 35 employees did not attend. Although the parties stipulated that the employees were not expressly required to attend the picnic, Shade testified that he believed he was expected to attend. Several other employees testified that they understood attendance at the picnic was voluntary.

At the picnic, Shade, his foreman, and several other employees began a game of touch football, which escalated into tackle football. During the game, Shade was tackled by the foreman and a coworker, and his head was driven into the ground by the tackle. The resulting cervical spine injury left Shade a quadriplegic.

In the Workers' Compensation Court, a single judge found that Shade was not entitled to benefits because Shade failed to show that the company had received "any substantial direct benefit from the activity 'picnic', although it may be inferred that it derived the intangible value of improvement in employee

health and morale that is common to all kinds of recreation and social life." The judge, applying tests and standards adopted by this court in *Gray v. State*, 205 Neb. 853, 290 N.W.2d 651 (1980), dismissed Shade's petition, holding that the picnic was primarily social even though safety awards were presented.

A three-judge review panel affirmed the single-judge decision without opinion. The Court of Appeals affirmed, finding that Shade's subjective belief that the company required its employees to attend the picnic did not prove that the company compelled attendance or that the accident arose out of Shade's employment.

## ASSIGNMENTS OF ERROR

In his petition for further review, Shade asserts that the Court of Appeals erred in failing to find that his injuries arose out of and in the course of his employment and in failing to find that Ayars & Ayars received a substantial direct benefit from the picnic.

## ANALYSIS

In reaching a decision, the single judge of the Workers' Compensation Court applied the tests and standards adopted by this court in *Gray v. State, supra*. In *Gray*, we employed the following test, which is to be applied in determining whether recreational or social activities are considered within the course of employment:

> "Recreational or social activities are within the course of employment when (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."

*Id.* at 858, 290 N.W.2d at 654.

In its opinion, the Court of Appeals noted the three tests established by *Gray* and, in addition, adopted six factors set

forth in 1A Arthur Larson, The Law of Workmen's Compensation § 22.23 (1993), for determining whether an event comes within the scope of employment:

> (1) Did the employer sponsor the event? (2) Was attendance really voluntary? (3) Did the employer encourage attendance as reflected by its (a) taking a record of attendance, (b) paying employees for the time spent at the event, (c) requiring the employee to work if he or she did not attend, or (d) maintaining a known custom of attending? (4) Did the employer substantially finance the occasion? (5) Did the employees regard the event as a benefit to which they were entitled? and (6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

*Shade v. Ayars & Ayars, Inc.*, 2 Neb. App. 730, 736, 513 N.W.2d 881, 886 (1994).

The Court of Appeals found that Shade established only that Ayars & Ayars sponsored the event and that it financed the event. Shade did not establish that attendance was required or that the employer encouraged attendance by taking roll, paying employees for time spent at the event, requiring employees to work if they did not attend, or maintaining a known custom of attending. Shade did not show that the employees regarded the event as a benefit or that the employees benefited from the event through any tangible advantage. On further review, we must decide whether to adopt the six questions identified by the Court of Appeals, which the court may use to determine whether an event comes within the scope of employment.

Larson's questions are more specific than the three tests which we outlined in *Gray v. State*, 205 Neb. 853, 290 N.W.2d 651 (1980), and these questions are merely suggested factors which may be considered regarding whether an injury occurred within the scope of employment. We decline to adopt these questions as additional factors, and we find that the three tests provided in *Gray* are sufficient to make the needed determination concerning whether an injury occurs within the course and scope of employment.

The determination of whether an employee's activity comes within the limits of one of the tests identified in *Gray* is a factual determination to be made by the finder of fact. Under the applicable Nebraska statutes governing workers' compensation, the finder of fact is the single judge of the Workers' Compensation Court. Upon application, a review panel shall consider the findings of fact and may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law. On review, the compensation court may affirm, modify, reverse, or remand the judgment on the original hearing. Neb. Rev. Stat. § 48-179 (Reissue 1993).

The judgment made by the Workers' Compensation Court after review shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. § 48-185. When we consider the evidence in the light most favorable to Ayars & Ayars, we find that there is sufficient competent evidence to support the judgment.

While we agree with the decision reached by the Court of Appeals, we decline to adopt additional factors to be considered in determining whether an event falls within the realm of employment. We adhere to the tests set forth in *Gray v. State, supra*. The decision of the Court of Appeals is affirmed as modified.

AFFIRMED AS MODIFIED.

# STATE OF NEBRASKA EX REL. DEPARTMENT OF HEALTH OF THE STATE OF NEBRASKA, APPELLEE, V. DALE JEFFREY, APPELLANT.

525 N.W.2d 193

Filed December 30, 1994. No. S-93-742.

1. **Equity: Appeal and Error.** In equity actions, an appellate court reviews the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain a statute's meaning.
3. **Licenses and Permits: Animals: Words and Phrases.** Given its ordinary meaning, dentistry, as used in Neb. Rev. Stat. § 71-1,154(2) (Reissue 1990), includes procedures performed in an animal's mouth.
4. **Licenses and Permits: Animals.** Neb. Rev. Stat. § 71-1,155(6) (Reissue 1990) applies to owners or bona fide farm or ranch employees who work on their own animals, not another person's animals, unless an exchange of services is involved.
5. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
6. **Constitutional Law: Statutes: Standing.** In order to have standing to challenge the constitutionality of a statute under either the state or federal Constitution, the challenger must be one who is, or is about to be, adversely affected by the statutory language in question and must show that as a consequence of the alleged constitutional violation, the challenger is deprived of a protected right.
7. **Constitutional Law.** The right to conduct a lawful business or occupation is a constitutionally protected right.
8. **Licenses and Permits: Animals.** The practice of dentistry on animals is a lawful business or occupation, but one must be licensed by the State to engage in that occupation.
9. **Supreme Court: Legislature: Licenses and Permits: Animals.** The Supreme Court will not interfere with the Legislature's decision that veterinary medicine is of such a public interest that it warrants regulation by the State.
10. **Licenses and Permits: Animals.** Licensing a person to ensure quality and complete, proficient dental care of an animal is clearly a rational means to the legitimate State purpose of protecting Nebraska animal owners, as well as animals themselves.
11. **Equal Protection: Statutes.** In an equal protection challenge, when a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose.
12. **Constitutional Law: Statutes.** A vagueness challenge is conceptually distinct from an overbreadth challenge. An overbroad statute need lack neither clarity nor precision, and a vague statute need not reach constitutionally protected conduct.
13. ____: ____. A vagueness challenge questions the clarity of the statutory language.
14. **Constitutional Law: Statutes: Standing.** To have standing to challenge a statute

for vagueness, one must not have engaged in conduct which is clearly proscribed by the statute and cannot complain of the vagueness of the law as applied to the conduct of others.

15. **Constitutional Law: Statutes.** An attack on the overbreadth of a statute asserts that language in the statute impermissibly infringes on a constitutionally protected right.
16. ____: ____. A statute may be unconstitutionally overbroad only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable.
17. **Injunction.** An injunction is properly used for the protection of public rights, property, or welfare.

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

James A. Cada for appellant.

Don Stenberg, Attorney General, and Sam Grimminger for appellee.

Gregory M. Dennis and Edward E. Embree II, of Perry, Hamill & Fillmore; Harold W. Hannah; and James F. Wilson III for amicus curiae American Veterinary Medical Law Association.

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

WHITE, J.

Dale Jeffrey appeals from an order of the district court for Lancaster County enjoining him from engaging in the business of equine dentistry. The district court held that equine dentistry was an integral part of the practice of veterinary medicine and that as an unlicensed person, Jeffrey was properly enjoined.

As the constitutionality of a statute was raised in the district court and on appeal, the case was docketed in the Supreme Court.

Jeffrey assigns six errors: (1) The State did not prove that he was engaged in the practice of veterinary medicine; (2) the court erred in not finding that equine dentistry is exempt from regulation by the Department of Health under Neb. Rev. Stat. § 71-1,155(6) (Reissue 1990); (3) and (4) the court erred in not finding Neb. Rev. Stat. § 71-1,154 (Reissue 1990) and

§ 71-1,155 unconstitutional; (5) the court erred in issuing a permanent injunction, as the Nebraska Veterinary Practice Act does not provide for such a remedy; and (6) the order of the district court is vague and does not adequately define the conduct enjoined. We will discuss the errors in order.

The evidence discloses that equine dentistry consists of the examination and treatment of horses' mouths, including the cutting, filing, and extraction of teeth. Prior to the injunction issued by the district court, Jeffrey had been practicing equine dentistry full time for 9 or more years. He is not licensed to practice veterinary medicine.

On September 18, 1990, Peggy Thorp asked Jeffrey to examine Ebby, her thoroughbred mare. Thorp suspected that Ebby had hooks on her back molars. Jeffrey examined Ebby's mouth, concluded that there were hooks on the lower back molars, and removed them. Jeffrey also floated the horse's molars; that is, he cut the upper front molars with a tool that Thorp said resembled a bolt cutter. Thorp testified that Ebby bled profusely from the mouth during the procedure. Jeffrey told Thorp the bleeding would cease shortly.

Ebby's mouth continued bleeding after Thorp took Ebby home. Jeffrey examined the horse 2 days after the procedure, but could not ascertain the cause of the bleeding. Thorp asked Dr. Charles Van Patten, a licensed veterinarian, to examine the horse. Dr. Van Patten found lacerations and a quarter-sized hole on Ebby's tongue. Upon Dr. Van Patten's recommendation, and after various unsuccessful treatment procedures, Thorp took Ebby to the veterinary college at Kansas State University for treatment. Thereafter, the State brought this action against Jeffrey, successfully seeking an injunction preventing him from practicing equine dentistry.

As to the first error assigned, § 71-1,155 provides that "[n]o person may practice veterinary medicine and surgery in the state who is not a licensed veterinarian or the holder of a valid temporary license issued by the board." The statute then lists a series of exceptions, one of which is relevant and shall be discussed later.

Section 71-1,154(2) states that veterinary medicine "shall include veterinary surgery, obstetrics, *dentistry*, and all other

branches or specialties of veterinary medicine." (Emphasis supplied.) Section 71,1,154(3)(a) states that the practice of veterinary medicine shall mean "[t]o diagnose, treat, correct, change, relieve, or prevent animal disease, deformity, defect, injury, or other physical or mental conditions . . . ."

In equity actions such as this, an 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). See, also, *Metropolitan Life Ins. Co. v. Kissinger Farms*, 244 Neb. 620, 508 N.W.2d 568 (1993). With the relevant sections of the Nebraska Veterinary Practice Act listed above in mind, we review Jeffrey's conduct as presented in the record to ascertain whether Jeffrey was indeed practicing veterinary medicine.

Jeffrey admits that he practiced equine dentistry, but claims that practicing equine dentistry is somehow different than practicing dentistry under § 72-1,155 or that it falls under an exception to that statute. Jeffrey testified at trial that while practicing equine dentistry, he examines the entire mouth and diagnoses the condition of the cheeks, gums, and tongue, in addition to diagnosing possible problems with a horse's teeth. He also testified that he does "just about everything that's needed done inside a horse's mouth." Jeffrey testified that he floats and removes teeth, trims and buffs teeth, and works on incisors. Jeffrey also testified that he can change the condition of the horse's mouth by "balanc[ing] the overall mouth of the horse for performance and function." Jeffrey admitted at trial that a lay equine dentist cannot do all of the dental work required for proper treatment of a horse.

When asked if he had ever severed a palatine artery, which is an artery running through a horse's tongue, Jeffrey responded that he had and that he considered himself just as qualified as a veterinarian to treat a severed palatine artery. However, Jeffrey then testified that he did not know what the complications of a severed palatine artery could be, if any. No veterinarian was present during the few times that Jeffrey had severed the artery, so he treated the severed artery himself by placing a pressure pack on the tongue to stop the bleeding.

Section 71-1,154(2) provides that veterinary medicine shall include dentistry. When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain a statute's meaning. *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992). Given its ordinary meaning, dentistry, as used in § 71-1,154(2), includes procedures performed in an animal's mouth. The statute does not distinguish equine dentistry from canine, feline, bovine, or any other kind of dentistry. To hold otherwise would result in providing exceptions where there plainly are none.

Judging from the testimony on the record regarding Jeffrey's conduct, it is clear that Jeffrey was indeed practicing dentistry without being licensed as a veterinarian. By his own admission, Jeffrey diagnoses possible problems with and changes in the conditions of a horse's mouth. The filing, cutting, removing, trimming, and buffing of a horse's teeth, as well as diagnosing cheek, gum, and tongue conditions, clearly indicate that Jeffrey treats, corrects, and relieves defects, deformities, injuries, or other physical conditions when practicing equine dentistry.

According to § 71-1,155, one must be a licensed veterinarian to perform such tasks, and Jeffrey is not a licensed veterinarian. Jeffrey's proficiency at practicing equine dentistry is irrelevant. This court is only concerned with whether Jeffrey violated § 71-1,155 by practicing dentistry without a license, and we find that he has. There is ample evidence on the record that Jeffrey violated § 71-1,155, and therefore Jeffrey's first assignment of error has no merit.

Jeffrey argues in his second assignment of error that the trial court erred in finding that equine dentistry does not fall within the sixth exception to § 71-1,155. Section 71-1,155(6) provides that the Nebraska Veterinary Practice Act shall not be construed to prohibit

> [a]n owner of livestock or a bona fide farm or ranch employee from performing any act of vaccination, surgery, pregnancy testing, or the administration of drugs in the treatment of domestic animals under his or her custody or ownership nor the exchange of services between persons or bona fide employees who are principally farm or ranch operators or employees in the performance of these acts.

This exception allows owners or bona fide farm or ranch employees to perform the services listed in the statute when the animal is under their control or custody. Jeffrey argues that this exception applies to him because he owns livestock and his clients relinquish custody of their horses to him while he practices equine dentistry.

We disagree with Jeffrey's reading of the statute. Section 71-1,155(6) applies to owners or bona fide farm or ranch employees who work on their *own* animals, not another person's animals, unless an exchange of services is involved. Jeffrey practices equine dentistry in exchange for money, not services. Furthermore, nothing in the record indicates that he is a bona fide farm or ranch employee. Thus, Jeffrey does not fall under the owner or employee exception to § 71-1,155. Jeffrey argues that if an owner or employee is allowed to provide such services to their own animals, then an owner should be able, under the statute, to designate Jeffrey to provide the same services. Horse owners who wish to employ Jeffrey's services cannot circumvent § 71-1,155 by giving Jeffrey permission to practice dentistry on their horses. We find Jeffrey's second assignment of error meritless, as his conduct does not fall under § 71-1,155(6).

We now turn to Jeffrey's third and fourth assignments of error. Jeffrey claims that §§ 71-1,154 and 71-1,155 violate the Due Process and Equal Protection Clauses of the Nebraska and U.S. Constitutions and are therefore invalid. Jeffrey claims that the statutes are overbroad, are vague, deny due process without a rational basis, and have a classification system that bears no rational relation to a legitimate state purpose. Whether a statute is constitutional is a question of law; accordingly, the Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993).

We will first address Jeffrey's allegations that (1) the statutes in question deny Jeffrey substantive due process without a rational basis and (2) the statutes violate the Equal Protection Clause.

In order to have standing to challenge the constitutionality of a statute under either the state or federal Constitution, the

challenger must be one who is, or is about to be, adversely affected by the statutory language in question and must show that as a consequence of the alleged constitutional violation, the challenger is deprived of a protected right. *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991); *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991); *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990).

There is no doubt that Jeffrey is adversely affected by the statutory language in question; the Legislature has imposed licensing regulations upon his occupation. We have previously held that the right to conduct a lawful business or occupation is a constitutionally protected right. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). See, also, *Gillette Dairy, Inc. v. Nebraska Dairy Products Board*, 192 Neb. 89, 219 N.W.2d 214 (1974); *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960); *Morgan v. State*, 155 Neb. 247, 51 N.W.2d 382 (1952). The practice of dentistry on animals is indeed a lawful business or occupation, but one must be licensed by the State to engage in that occupation. It is this licensing regulation that Jeffrey challenges as unconstitutional. Jeffrey's right to practice his occupation is a constitutionally protected right, and thus, Jeffrey has standing to question the constitutionality of §§ 71-1,154 and 71-1,155. Whether Jeffrey has standing to challenge the overbreadth and vagueness of the statutes in question will be discussed below.

Jeffrey argues that §§ 71-1,154 and 71-1,155 infringe upon his substantive due process right to practice his equine dentistry business and are unconstitutional. The extent of the State's power to regulate business is set forth in *Gillette Dairy, Inc., supra*, where the court stated that

> [w]hether a business is charged with such a public interest as to warrant its regulation is a legislative question in which the courts ordinarily will not interfere. The Legislature may not, however, under the guise of regulation, impose conditions which are unreasonable, arbitrary, discriminatory, or confiscatory. Such regulations must be reasonable considering the nature of the business and not such as would prevent the carrying on of the business.

192 Neb. at 96-97, 219 N.W.2d at 219-20. The court further stated that " '[a] citizen clearly has the right to engage in any occupation not detrimental to the public health, safety, and welfare. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. . . .' " *Id.* at 97, 219 N.W.2d at 220. The question before this court is whether the State's licensing regulations regarding the practice of veterinary medicine generally, and dentistry in particular, bear a rational relation to legitimate State interests.

The board of examiners of veterinary medicine issues licenses to veterinarians. The purpose of regulating the practice of veterinary medicine, through the board of examiners, is found in Neb. Rev. Stat. § 71-1,152.01 (Reissue 1990). That section states that the purpose of the board which licenses veterinarians is to provide for the health, safety, and welfare of Nebraska citizens; to ensure minimum standards of proficiency and competency; to ensure that the students who attend veterinary school are qualified to serve the public in a safe and efficient manner; and to protect consumer interests. The licensing regulations are in place to protect the public from persons who do not have the minimum standards of proficiency or are unqualified to practice veterinary medicine. The licensing regulations also provide for the health, safety, and welfare of Nebraska citizens, as well as protect consumer interests.

Dentistry is an invasive practice. As Jeffrey himself testified, improper dental care can result in major digestive tract disorders. Complications may arise during a dentistry procedure that require extensive training to treat. The State deems it advisable that persons who practice dentistry on animals be competent enough to fully treat complications that may arise. In this case, we will not interfere with the Legislature's decision that veterinary medicine is of such a public interest that it warrants regulation by the State. See *Gillette Dairy, Inc., supra.* Licensing a person to ensure quality and complete, proficient dental care of an animal is clearly a rational means to the legitimate State purpose of protecting Nebraska animal owners, as well as animals themselves. We therefore hold that the State's licensing requirements are rationally related to a legitimate State

interest, and we find that Jeffrey's substantive due process challenge is meritless.

Jeffrey next argues that the exemption scheme set forth in § 71-1,155 does not apply uniformly to persons of the same class who are similarly situated, thus violating the Equal Protection Clauses of the Nebraska and U.S. Constitutions. Jeffrey claims that while persons who treat domestic chickens, turkeys, or waterfowl and persons who dehorn or castrate livestock are exempted from the licensing requirements, equine dentists are not, and that classification system is unreasonable. He argues that dehorning, castration, and equine dentistry are substantially similar and require similar treatment under the licensing regulations. We disagree.

In an equal protection challenge, when a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose. *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991). The case before us does not involve a fundamental right or suspect classification, so the question is whether the classification scheme set forth in § 71-1,155 is rationally related to a legitimate state purpose. Jeffrey concedes that the purpose of the licensing requirements for veterinary medicine is to protect the public. The purpose for creating a board to license veterinarians is detailed in § 71-1,152.01, as discussed above, and shall not be repeated here. The State's purpose for creating licensing requirements is to protect the health, safety, and welfare of Nebraskans and their animals, as well as to protect consumer interests. The question then becomes whether the classification system found in the exemptions to § 71-1,155 is rationally related to that purpose.

Dehorning and castration are not similar to dentistry, as Jeffrey suggests. Dentistry involves much more invasive procedures, as discussed above. Equine dentists are not in the same class as those exempted from the licensing statute because dentistry can have a much more profound impact on an animal's health. For this reason it is entirely rational not to exempt equine dentists from licensing regulations. The exemptions found in § 71-1,155 do treat uniformly those persons in the

same class who are similarly situated. We find that the State's purpose of protecting the public from unlicensed persons practicing veterinary medicine, specifically equine dentistry, is indeed legitimate, and the exemption scheme is rationally related to that purpose.

Jeffrey also claims that §§ 71-1,154 and 71-1,155 are unconstitutionally vague and overbroad, and are thus void. As we noted in *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987), a vagueness challenge is conceptually distinct from an overbreadth challenge. An overbroad statute need lack neither clarity nor precision, and a vague statute need not reach constitutionally protected conduct. *Id.* A vagueness challenge questions the clarity of the statutory language. *Two IGT Video Poker Games, supra.* To have standing to challenge a statute for vagueness, one must not have engaged in conduct which is clearly proscribed by the statute and cannot complain of the vagueness of the law as applied to the conduct of others. *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993); *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991); *Midwest Messenger Assn. v. Spire*, 223 Neb. 748, 393 N.W.2d 438 (1986). We have found that Jeffrey was clearly practicing equine dentistry, and therefore practicing veterinary medicine, without a license. He was engaged in conduct which was clearly proscribed by § 71-1,155. On that basis, Jeffrey has no standing to challenge the vagueness of §§ 71-1,154 and 71-1,155.

Irrespective of standing to challenge a statute for vagueness, Jeffrey may have standing to assert that the statute in question is overbroad if the statute reaches a substantial amount of constitutionally protected conduct. See *Copple, supra.* An attack on the overbreadth of a statute asserts that language in the statute impermissibly infringes on a constitutionally protected right. *Two IGT Video Poker Games, supra.* In determining whether Jeffrey has standing to challenge the statute as overbroad, we must first determine whether the statute reaches a substantial amount of constitutionally protected conduct. See *Copple, supra.* We have already decided that the right to engage in a lawful business or occupation is a constitutionally protected right. Thus, § 71-1,155, which regulates the practice of veterinary medicine, does reach a substantial amount of

constitutionally protected conduct, and Jeffrey does have standing to challenge it for overbreadth.

A statute may be unconstitutionally overbroad only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable. *Two IGT Video Poker Games, supra.* Jeffrey argues that § 71-1,154(3), which defines veterinary medicine, when read together with § 71-1,155, is overbroad because it encompasses a broad range of activities outside the practice of veterinary medicine for which licensing is neither necessary nor appropriate. Jeffrey argues that the statute does not define what activities are included within veterinary dentistry and that equine dentistry is not, and should not be, included. We disagree.

As we stated earlier, given its plain and ordinary meaning, dentistry, as used in § 71-1,154(2), includes procedures performed in an animal's mouth. The statute does not distinguish equine dentistry from any other kind of dentistry. The exemptions found in § 71-1,155 sufficiently narrow the applicability of the licensing regulations, and since equine dentistry is not among the exemptions, it is prohibited. The veterinary medicine procedures for which one needs a license are not overbroad, for they include treatment procedures that may be invasive and detrimental to an animal's health if not performed properly. Dentistry is included among the procedures for which one needs a license; the exceptions or limitations to this are found in the statute itself, and they do not include equine dentistry. Because the exemptions make the statute sufficiently narrow, Jeffrey's contention that equine dentistry should be exempted is a matter for the Legislature, not this court. We find §§ 71-1,154 and 71-1,155 not overbroad, as they are not unconstitutional in a substantial portion of the situations to which they are applicable. Jeffrey's contention that the statutes in question are overbroad is meritless.

Jeffrey claims in his fifth assignment of error that the district court erred in permanently enjoining Jeffrey from practicing equine dentistry because the issuance of an injunction is an inappropriate remedy. The Uniform Licensing Law provides that "[a]ny person engaging in the practice of any profession,

for which a license is required by the Uniform Licensing Law, without such license may be restrained by temporary and permanent injunctions." Neb. Rev. Stat. § 71-164 (Reissue 1990). The Nebraska Veterinary Practice Act is a subpart of the Uniform Licensing Law. See Neb. Rev. Stat. § 71-101 (Reissue 1990). Thus, Jeffrey may be enjoined by a temporary or permanent injunction if he engages in the practice of veterinary medicine without a license, as such a license is required under § 71-1,155.

An injunction is properly used for the protection of public rights, property, or welfare. *State ex rel. Meyer v. Weiner*, 190 Neb. 30, 205 N.W.2d 649 (1973). Obviously, the Legislature enacted the Uniform Licensing Law, and specifically the Nebraska Veterinary Practice Act, to provide for the health, safety, and welfare of the citizens of Nebraska and in the interest of consumer protection, as is stated in § 71-1,152.01. An injunction in this case prohibits Jeffrey from injuring animals and protects consumers who wish to obtain proper dental care for their horses from a licensed veterinarian who knows the complications of injury that may occur during the filing and cutting of a horse's teeth. An injunction is proper, as it protects the welfare of Nebraska horse owners. We hold that the issuance of an injunction was the proper remedy in this case.

Jeffrey claims in his sixth assignment of error that the district court's order is too vague and fails to specify a standard against which Jeffrey can gauge his conduct. The order defines veterinary medicine, defines equine dentistry, and prohibits Jeffrey from practicing either. Jeffrey need only look to the order and to the statutes regulating animal dentistry to find a standard by which to measure his conduct. Jeffrey is prohibited from practicing equine dentistry by statute and by order of the district court. The order and the statutes provide guidance to Jeffrey, and as such, his sixth assignment of error is meritless.

Having found that none of Jeffrey's assignments of error have merit, we affirm the order of the district court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. THOMAS R. JACOBSEN, RESPONDENT.

525 N.W.2d 35

Filed December 30, 1994. No. S-94-1028.

Original action. Judgment of disbarment.

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

PER CURIAM.

Thomas R. Jacobsen was admitted to the practice of law in Nebraska in 1989. On October 25, 1994, Jacobsen entered a plea of no contest to one count of the Class IV felony of theft by deception in the Howard County District Court. The court accepted Jacobsen's plea, and he was found guilty.

On November 4, Jacobsen voluntarily surrendered his license. He admitted that his conduct violated Canon 1, DR 1-102(A)(1), (3), and (4), of the Code of Professional Responsibility as adopted by this court. Jacobsen has admitted that his conduct violated his oath of office as an attorney.

Jacobsen waived his right to notice, appearance, or hearing prior to entry of this order. We accept Jacobsen's surrender and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

White, J., not participating.

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LONNIE NICKELL, APPELLEE, V. JOHN RUSSELL, INDIVIDUALLY, APPELLANT, AND JOHN RUSSELL AND DENNIS PESTAL, A PARTNERSHIP, REAL NAME UNKNOWN, APPELLEE.

525 N.W.2d 203

Filed January 6, 1995. No. S-93-018.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only

when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.

2. **Directed Verdict: Appeal and Error.** The party against whom a verdict is directed is entitled to have every controverted fact resolved in his favor and the benefit of every inference which can reasonably be drawn from the evidence.
3. ____: ____. An appellate court may reverse a directed verdict if evidence exists sustaining a finding for the party against whom the judgment was made.
4. **Motor Vehicles: Negligence.** A motorist is deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object or obstruction in the motorist's path within his or her range of vision.
5. **Trial: Motor Vehicles: Negligence: Juries.** When the facts of a case fall within the exception to the range of vision rule, then the determination of negligence becomes a question for the jury.
6. **Motor Vehicles: Negligence.** An exception to the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and relatively indiscernible.
7. **Negligence: Proximate Cause.** A plaintiff is contributorily negligent if (1) the plaintiff fails to protect himself or herself from injury, (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence, and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause.
8. **Pleadings: Negligence: Jury Instructions: Appeal and Error.** When the defendant pleads the affirmative defense of contributory negligence without relevant or competent evidence to support the defense, it is prejudicial error to submit the issue to a jury.
9. **Negligence: Evidence: Proof.** Negligence must be proved by direct evidence or by facts from which such negligence can reasonably be inferred.
10. **Negligence: Highways: Pedestrians.** Generally, it is negligent to lie down on or beside a road, oblivious to the dangers of traffic.
11. **Negligence: Evidence: Juries.** When substantial evidence shows that the plaintiff contributed to the collision, the issue of contributory negligence should be considered by the jury.

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

Stephen L. Ahl and Gary L. Dolan, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellant.

David M. Geier and William A. Wieland, of Healey & Wieland Law Firm, for appellee Nickell.

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

PER CURIAM.

This case involves an accident in which the defendant John Russell, while operating a pickup truck close to midnight on June 28, 1986, on West Princeton Road in Lancaster County, Nebraska, struck and injured the plaintiff, Lonnie Nickell. Nickell was lying down in the middle of the gravel road. Following a directed verdict as to both Russell's negligence and the absence of contributory negligence on the part of Nickell, the jury returned a verdict for Nickell in the amount of $600,000. Russell appeals, assigning as error generally the trial court's ruling that he was negligent as a matter of law and that Nickell, as a matter of law, was not negligent.

## STANDARD OF REVIEW

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993). The party against whom the verdict is directed is entitled to have every controverted fact resolved in his favor and the benefit of every inference which can reasonably be drawn from the evidence. *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). An appellate court may reverse a directed verdict if evidence exists sustaining a finding for the party against whom the judgment was made. See, *Macholan v. Wynegar*, 245 Neb. 374, 513 N.W.2d 309 (1994); *Marple v. Sears, Roebuck & Co.*, 244 Neb. 274, 505 N.W.2d 715 (1993).

## FACTS

Nickell filed a petition in the district court for Lancaster County against Russell individually, and Russell and Dennis Pestal as a partnership. There is no issue on appeal as to the matter of partnership liability. Nickell alleged that on June 28, 1986, Russell failed to maintain a proper lookout and failed to keep his pickup truck under reasonable control when he ran over Nickell on West Princeton Road. As a result of Russell's alleged negligence, Nickell suffered a traumatic amputation of

his right arm, a fractured right leg, a fractured pelvis, a closed head injury, abrasions, contusions, lacerations, and psychological injury. Nickell sought medical and prosthetic expenses as well as damages for pain and suffering, disability, and disfigurement.

As an affirmative defense, Russell alleged that Nickell's own negligent acts and omissions proximately caused and contributed to Nickell's injuries. Specifically, Russell alleged that Nickell lay down in the road after dark, failed to maintain a proper lookout, and knew or should have known that a motorist traveling on the road would have difficulty seeing a reclining person. Russell also alleged that Nickell was tired when he lay down, which contributed to his negligence. In addition, Russell alleged that Nickell assumed the risk of being struck by a vehicle because he knew and appreciated the danger of reclining on the road while tired, that he voluntarily and deliberately exposed himself to the danger, and that his actions proximately caused his injury.

The events of June 28 are based on testimony adduced at trial from Sgt. Paul Jacobsen of the Lancaster County sheriff's office, who investigated the accident; Nickell; and Russell, from a reading of his deposition and his live testimony at trial.

On June 28, around 10:30 p.m., Nickell, age 17, sneaked out of his parents' farmhouse. According to Nickell, he walked out of the west side of the house, then south through a milo field and on across West Princeton Road. He stood in the south ditch waiting for two friends to pick him up. Nickell waited "maybe 10 or 15 minutes," then became tired of standing and sat down on the side of the road where he noticed that the gravel "sloped up . . . like a pillow." Thus, according to Nickell's statement to Jacobsen, Nickell then lay down on the south shoulder of the road in such a position that he could observe his parents' driveway and the road.

Jacobsen testified that he had the impression that Nickell lay "with his feet facing towards the center of the road or middle of the road, basically pointing in a general direction of his residence, which was north and east, assuming that he was using the gravel pile for a pillow." According to Jacobsen, Nickell had a quarter-mile view of westbound traffic.

Nickell testified that he lay facing east with his feet "partially going to the south . . . They might have been in the ditch there on the south side of the gravel pile." Nickell also testified that he pointed his legs more to the east than to the south. Nickell emphasized that he did not lie down on the road because he "thought about" traffic from the west "just before I can't remember nothing." The next event Nickell recalled after lying down on the south shoulder of West Princeton Road was waking up in the hospital.

According to his deposition, on the day of the accident, Russell had worked in his dental clinic in Beatrice until the afternoon. During the afternoon, he drove to Lincoln and had lunch with a friend, visited with a tenant, went to a movie, had dinner, and then started out to return to Beatrice at about 11 p.m. The record is clear that at no time did Russell consume alcohol.

Russell decided to take a back country route to Beatrice because he wanted to see the Hallam powerplant. He eventually drove westbound on West Princeton Road at a speed of 35 to 40 miles per hour. Jacobsen measured West Princeton Road as 30 feet in width with soft shoulders and loose gravel. The travelable portion of the road was 25 feet wide. At approximately 11:50 p.m., Russell saw an object on the road.

Russell told Jacobsen that he first observed the object when "he started up a rather long hill," but testified at trial that he observed the object while "going up the incline." During cross-examination, Russell testified that he did not intend a discrepancy between "started up" the hill and "going up" the incline. Russell was then asked:

> Q. Sure. You told the sheriff, "As I started up a long hill." Your first deposition you said, "Went up a long hill, went over the top and saw the object," and then we took your second deposition and said, "Okay. Which way is it? Is it what you told the sheriff that's accurate or did you drive up over the top of the long hill and then see the object?"
>
> And then in the second deposition you said, "I think what I told the sheriff was more accurate."
>
> A. I would agree with that.

Russell testified that when he crested the hill, he had the impression the object was either a plank, a piece of board, a rag, or hay fallen off a truck. Russell's attention was not particularly drawn to the object, which, at first, did not appear so large that he could not drive over it or around it. Russell estimated during his deposition that the object lay 30 to 40 feet from him when he first observed it. Russell continued to drive at 35 to 40 miles per hour, and as he became more aware of the object, he noticed its large size. Russell told Jacobsen that he contemplated straddling the object, because he did not want to drive around the object on his left while nearing the crest of a hill and did not feel he had room to get around it on the right. Russell gradually slowed down as he approached the object and "suddenly discerned" that it had human form. Russell decided to straddle the form because he believed he did not have time to avoid the object and if he attempted to stop, his brakes would lock and slide into the object. Russell realized the form was a person that lay faceup, perpendicular across the travel lane, "just as he lost sight of the form over the top of his hood." At trial, Russell described the incident as follows:

> I kept driving. As I got closer the object in front of me grabbed my attention more. It seemed to just kind of almost come out of nowhere. As I got to it, just as it was very close to me I had the impression that it was — or it could've been a person or a dummy; and I swerved trying to miss the biggest part of it, trying to keep from getting my wheels on the head and the thorax or upper body of it.

Russell had the impression that just prior to impact, Nickell curled into a fetal position or rolled away from the truck in an attempt to protect himself. Russell applied the brakes as his truck went over the body, and he heard two thumps. Russell stopped the truck "as soon as he could" and turned the truck around. Russell then observed, illuminated by the truck's headlights, a teenage boy, Nickell, lying on the road with his right arm completely severed from his body. Russell put Nickell and his severed arm in the bed of the pickup truck and began driving eastbound on West Princeton Road, when he immediately observed the two teenagers, Bradley Pomajzl and Gaynor Burianek, for whom Nickell had waited, parked in the

Nickells' driveway. Russell requested their assistance, and they helped direct Russell to the Crete hospital.

Jacobsen, as a part of his investigation, in addition to talking to Russell at the Crete hospital, drove to the scene of the accident with Burianek, one of the two teenagers earlier mentioned. At the scene of the accident, Jacobsen observed tire marks on the gravel road indicating a rapid deceleration with locked tires. Jacobsen also observed drag marks with body fluid, flesh, and blood on the gravel road. Jacobsen did not know how Nickell ended up on the traveled part of the road, "but there's no indication that he was still lying on the edge of the road when the accident occurred." Jacobsen testified that it would surprise any motorist to find a person on the road. In his report, however, Jacobsen noted that Russell had adequate time to stop or take evasive action.

Regarding the accident scene, Jacobsen testified as to his observations made with help from Burianek. He made certain measurements and then prepared exhibit 29, a diagram of the accident scene. He located a particular power pole as a point of reference. He located the Nickells' driveway. He then measured the point of impact as 100 feet 10 inches west of the point of reference, a large pool of blood as being 152 feet west of the point of reference, and the final resting place of the victim as 177 feet 6 inches west of the point of reference.

Dr. James Summers, a consulting engineer for R.L. Large and Associates, prepared an accident reconstruction study for Nickell. In that connection, he carried out a land survey, locating various points, including the point of impact, on exhibit 42. The bottom of the hill or the start of the incline was found to be 400 feet east of the point of impact.

Summers then testified that for an average driver, it would take 73.4 feet to stop a vehicle traveling at 35 miles per hour. Assuming Russell's perception time of the object was $^3/_4$ to $1^1/_2$ seconds, 150 feet represents the distance from perceiving the object to stopping the vehicle. Summers also testified that an average driver at 40 miles per hour can stop a vehicle at 96 feet and that the distance from perceiving an object to stopping the vehicle is 184 feet. Summers took into consideration detection of an object as opposed to actually determining the nature of the

object. Assuming that Russell first observed the object when starting up the hill, Summers determined that Russell started to react 400 feet from the object. Summers testified that from 400 feet, Russell could have stopped his truck 280 to 290 feet from Nickell. Assuming that Russell only perceived the object at 400 feet as opposed to reacting, then Summers determined that Russell could have stopped his truck 250 feet from Nickell.

Dr. Ted Sokol, a registered civil engineer specializing in accident reconstruction, testified for Russell. Sokol testified that the 3/4-second perception time to which Summers referred assumed a well-defined stimulus, and absent a well-defined stimulus, perception time is uncertain. Sokol disputed Summers' testimony by suggesting that mere detection of an object does not necessarily alert a driver. Sokol assumed that Russell drove 30 miles per hour and determined that Russell was 80 feet from Nickell at the time he made the steering maneuver to straddle. Sokol also assumed a minimum perception time of 7.75 seconds and, thus, determined that at 30 miles per hour, Russell began to react 113 feet from Nickell. Assuming that Russell traveled at 35 miles per hour, Sokol determined that he began to react 129 feet from Nickell.

During cross-examination, Nickell's counsel offered an acetate overlay to Sokol's diagram regarding reaction time. The overlay applied braking distance to Sokol's determination of reaction time. When asked to confirm that the overlay showed that had Russell applied the brakes to stop as opposed to attempting a steering maneuver, the truck would have stopped 22 feet from Nickell, Sokol replied, "It appears that way." Nickell's counsel also applied an acetate overlay to depict braking time at 35 miles per hour, which Sokol also agreed "appears" to show that if Russell had attempted to stop rather than straddle the object, he would have come to a complete stop before striking Nickell.

After defense rested, Nickell moved for a directed verdict. Nickell argued that as a matter of law, Russell failed to keep a proper lookout, failed to keep his vehicle under reasonable control, failed to avoid running over Nickell, and operated the vehicle at an excessive rate of speed. Nickell also contended that Russell's negligence proximately caused Nickell's injuries. As

to contributory negligence, Nickell argued that Russell did not introduce evidence to support contributory negligence and, thus, failed to meet his burden of proof.

Russell also moved for a directed verdict, arguing that Nickell failed to prove that Russell could or should have identified the object as a danger, that Nickell failed to prove that Russell caused Nickell's injuries or acted in the scope of a partnership, and that Nickell's contributory negligence was more than slight. Regarding contributory negligence, Russell argued that Nickell knew he placed himself in danger when he lay on the side of the road, that a jury could reasonably infer that Nickell placed himself on the traveled part of the road, and that Nickell was awake and alert at the time of the accident.

The district court denied Russell's motion for directed verdict as to negligence and contributory negligence. The court also denied Nickell's motion for directed verdict as to the defendant partnership's liability.

The court granted Nickell's motion for directed verdict as to Russell's negligence and claim of contributory negligence. The court held that Russell had a duty to keep a proper lookout. The court found that Russell observed an object at 400 feet and at 200 feet chose to straddle the object rather than take evasive action. The court ruled that it was irrelevant whether Russell thought the object was a person and held Russell negligent as a matter of law. Regarding contributory negligence, the court found that Russell did not present "one scintilla of evidence, direct or circumstantial," explaining how Nickell got from the south shoulder of the road to the westbound lane. The court ruled that to submit the issue to the jury would require the jury to base its finding on speculation and conjecture and, therefore, granted Nickell's motion. Afterwards, Russell moved for judgment notwithstanding the verdict or for a new trial, which the district court overruled.

## ANALYSIS

This court has long held that a motorist is deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object or obstruction in the motorist's path within his

or her range of vision. See, *Horst v. Johnson*, 237 Neb. 155, 465 N.W.2d 461 (1991); *Edgerton v. Lawry*, 235 Neb. 100, 453 N.W.2d 743 (1990); *Roth v. Blomquist*, 117 Neb. 444, 220 N.W. 572 (1928). When the facts of a case fall within the exception to the range of vision rule, then the determination of negligence becomes a question for the jury. *Converse v. Morse*, 232 Neb. 925, 442 N.W.2d 872 (1989). An exception to the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and relatively indiscernible. *Edgerton v. Lawry, supra*; *Burkey v. Royle*, 233 Neb. 549, 446 N.W.2d 720 (1989).

According to evidence adduced at trial, Russell observed an object in the road, chose to straddle the object, and when realizing that the object was a human, decided to continue the straddling maneuver. Russell observed the object at the start of the hill 400 feet from Nickell or while going up the incline at a distance of something less than 400 feet. In any event, agreement exists as to when Russell reacted to the observed object.

Russell concurred with the sheriff's report that he traveled at a rate of speed of between 35 and 40 miles per hour. Sokol, Russell's own witness, determined that at 35 miles per hour, Russell began to react 129 feet from Nickell. Nickell's counsel accepted this, and Sokol testified that it appeared that Russell could have stopped before striking Nickell had he chosen to apply the brakes as opposed to straddling the object. Furthermore, the sheriff's report observed that Russell had adequate time to take evasive action. Russell might have been unable to precisely identify what lay in the road, but he observed a large object in his path and chose to straddle that object even when it appeared to have human form. The range of vision rule was triggered when Russell observed the object in his path. Therefore, the range of vision rule applies, unless the facts of the situation trigger the exception.

In *Guynan v. Olson*, 178 Neb. 335, 133 N.W.2d 571 (1965), a driver observed an object in the road at a distance of between 300 and 400 feet. The driver applied the brakes to the vehicle

and skidded into a man on horseback, injuring the rider and killing the horse. This court noted that the exception to the range of vision rule applies when the motorist cannot see the object in time to avoid it. We held that where a motorist observed an object from approximately 315 feet, then the motorist had time to take evasive action.

In *Allen v. Kavanaugh*, 160 Neb. 645, 71 N.W.2d 119 (1955), a motorist observed a vehicle in his path at 300 feet, at 100 feet he thought the observed vehicle was moving, at 50 feet he became aware that the observed vehicle was stationary, and at 30 feet he applied the brakes too late and collided with the vehicle. We held that the range of vision rule applied because the motorist observed the vehicle within time to make decisions and take evasive action.

Thus, for the exception to the range of vision rule to apply, it is essential that the motorist not see the object. See, *Bartosh v. Schlautman*, 181 Neb. 130, 147 N.W.2d 492 (1966) (exception applied when the color of the struck vehicle blended into the night, rendering it not visible in time to avoid); *Heeney v. Churchill*, 154 Neb. 848, 50 N.W.2d 72 (1951) (exception applied when motorist did not see any obstruction or object prior to running over a body lying in the road). In the present case, Russell observed an unusual object in the road at some point near or slightly less than 400 feet away. At approximately 129 feet from the object, he noted the danger of the situation and decided to straddle the object. Rather than applying the brakes to stop the truck, Russell unsuccessfully tried to run over Nickell without injury. Russell saw an object in his path within time to avoid it; thus, the exception does not apply and Russell is negligent as a matter of law.

Russell relies on this court's holding in *Weisenmiller v. Nestor*, 153 Neb. 153, 43 N.W.2d 568 (1950), to support his argument that he is not negligent as a matter of law. In *Weisenmiller*, the victim walked on the side of the highway and for reasons unknown, ended up in the ditch beside the road with an injured leg. The victim crawled out of the ditch to the edge of the road and blacked out. A motorist spotted the victim lying on the road and attempted to assist, when another vehicle approached. The assisting motorist flashed a spotlight across the

victim's body to enable the oncoming vehicle to see the injured pedestrian. The vehicle did not slow down and ran over the victim. The driver claimed he did not see an object in his path and denied hitting the pedestrian. The trial court granted the driver's motion for a directed verdict. We held that sufficient evidence existed to find the driver negligent based upon the range of vision rule and remanded the issue to the jury. We stated in *Weisenmiller* that if a motorist drives at a speed at which he or she cannot avoid colliding with an object lighted by headlights, then the motorist is negligent as a matter of law. In *Weisenmiller*, however, the issue went to the jury because the trial court erred in granting the defendant's motion for a directed verdict and a dispute existed over the material fact of whether the motorist ran over the victim, who was apparently injured by a previous driver.

Russell also relies on *Sink v. Sumrell*, 41 N.C. App. 242, 254 S.E.2d 665 (1979), and *Hayes v. State*, 80 Misc. 2d 385, 362 N.Y.S.2d 994 (1974). In *Sink* and *Hayes*, the respective courts did not find motorists who ran over persons lying on the road negligent, because the motorists could not reasonably foresee that a person would lie on the road. The Court of Appeals of North Carolina and the Court of Claims of New York, however, do not apply the range of vision rule which governs this issue in Nebraska.

We find that the trial court was correct in directing a verdict in favor of the plaintiff, Nickell, as to defendant Russell's negligence.

Russell's second assignment of error concerns Nickell's alleged contributory negligence. A plaintiff is contributorily negligent if (1) the plaintiff fails to protect himself or herself from injury, (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence, and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause. *Mix v. City of Lincoln*, 244 Neb. 561, 508 N.W.2d 549 (1993). However, when the defendant pleads the affirmative defense of contributory negligence without relevant or competent evidence to support the defense, it is prejudicial error to submit the issue to a jury. *Kappenman v. Heule*, 241 Neb. 54, 486 N.W.2d 27 (1992).

Nickell relies on this court's decision in *Weisenmiller v. Nestor, supra*, regarding contributory negligence. In *Weisenmiller*, we held: "In the record before us, we find no competent evidence from which it could be reasonably concluded that plaintiff was placed in a position of peril by his own negligence. . . . True, plaintiff was in a position of peril, but how he got there is not shown." *Id.* at 155, 43 N.W.2d at 570. The facts of *Weisenmiller*, however, differ significantly from the case at bar. In that case, the plaintiff was injured and had possibly been struck by a previous automobile, crawled out of a ditch, and then blacked out. In the present case, a tired Nickell voluntarily lay down on the shoulder and suddenly, without explanation, appeared lying in the middle of the road. Nickell was not injured prior to the accident and did not appear in a position of peril due to intervening events.

Nickell had a duty to act with reasonable care while using the county road. See *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987). Nickell contends he acted lawfully in lying down on the shoulder of the road. He points out that a Nebraska statute allows pedestrians to walk along the shoulder where a sidewalk is unavailable. See Neb. Rev. Stat. § 39-646 (Reissue 1988) (currently Neb. Rev. Stat. § 60-6,156(2) (Reissue 1993)). We similarly held that merely walking along a roadway or on a roadway, without knowledge of approaching danger, does not assume the risk of an accident involving injuries. See *Vanek v. Prohaska*, 233 Neb. 848, 448 N.W.2d 573 (1989). These rules, however, pertain to walking and do not address a pedestrian who chooses to lie down and sleep on the side of the road.

Russell cannot sustain his position as to Nickell's negligence if a jury can arrive at that conclusion only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another. See *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992).

Negligence must be proved by direct evidence or by facts from which such negligence can reasonably be inferred. *Vilas v. Steavenson*, 242 Neb. 801, 496 N.W.2d 543 (1993). Evidence does exist for a reasonable mind to conclude that there

was negligence on Nickell's part. The record does not show how Nickell moved from the shoulder of the road to the middle of the road, but the record does show that in the middle of the night, he became tired, propped up a pillow made from gravel, and voluntarily lay down on the shoulder of a narrow, unlit gravel road. He stated that at least he was concerned about a vehicle coming from the opposite direction. This evidence allows a jury to make a reasonable inference as opposed to speculation that he realized the potential of harm to him resulting from his actions.

In *Williamson v. McNeill*, 8 N.C. App. 625, 175 S.E.2d 294 (1970), a motorist allegedly ran over three young men lying on the highway. The motorist alleged that the young men were contributorily negligent in lying on the road. The North Carolina Court of Appeals, in relevant part, held:

> All three boys had severe head injuries, but there is no evidence of any other injuries, or any impact prior to that with the car driven by the defendant. Defendant has speculated that they were playing "chicken," or in view of the evidence that the asphalt was warmer than the unseasonably cool air, that they lay down to get warm and fell asleep. Plaintiff has speculated that someone injured or drugged them and placed them there. A reasonable inference is valid on nonsuit but speculations are not; the only reasonable inference which we may draw in the absence of evidence more compelling than that which is before us now is that intestate, for whatever reason, voluntarily placed himself on the highway. In so doing, he failed to exercise for his own safety the care of an ordinarily prudent person and his negligence was a proximate cause of his unnecessary death.

*Id.* at 628, 175 S.E.2d at 296. Applying Nebraska law, the U.S. Court of Appeals for the Eighth Circuit made a similar conclusion in *Sherman v. Lawless*, 298 F.2d 899 (8th Cir. 1962). In *Sherman*, the motorist was sued in a wrongful death action for fatally injuring a man lying on the traveled path of the road. The trial court found against the motorist, and the Eighth Circuit reversed, holding that substantial evidence on the record supported the conclusion that the decedent's fatal injuries

were inflicted before the defendant's accident. The court also stated:

> Here the evidence conclusively establishes that decedent, as defendant approached, was lying on the traveled path of traffic on a primary highway, on a dark night, in dark clothing. Decedent's action in assuming such a hazardous position, if done voluntarily, would manifest a very high disregard for his own safety, and such conduct, in the absence of any reasonable explanation or excuse therefor, would in our view establish contributory negligence more than slight as a matter of law.

*Id.* at 904. Similarly, given the evidence in this case, a jury did not need to speculate, but could reasonably infer that Nickell acted negligently in lying down on the side of a narrow gravel road.

This court has not directly addressed the negligence of voluntarily lying on the road, but other jurisdictions have found actions analogous to Nickell's to be contributorily negligent. See, *Clemons v. Williams*, 61 N.C. App. 540, 300 S.E.2d 873 (1983) (voluntarily lying on highway held presumptively negligent); *Sink v. Sumrell*, 41 N.C. App. 242, 254 S.E.2d 665 (1979) (quoting *Barnes v. Horney*, 247 N.C. 495, 101 S.E.2d 315 (1958)) (lying asleep on highway or on side of dirt road held negligent as a matter of law); *Hayes v. State*, 80 Misc. 2d 385, 362 N.Y.S.2d 994 (1974) (mere presence of person lying on highway suggestive of contributory negligence); *Duncan v. Dunevant*, 368 F. Supp. 524 (W.D. Ky. 1973) (lying prostrate on paved highway held negligent as a matter of law); *Heffelfinger v. Lane*, 239 Ala. 659, 196 So. 720 (1940) (voluntarily placing self in position of peril on road held contributorily negligent).

Given the facts of the present case, Nickell acted negligently when he voluntarily and knowingly placed himself in a position of peril by lying on the shoulder of a narrow gravel county road at nighttime. Although we do not know how he moved from the shoulder to the traveled part of the road, a jury could reasonably infer, based on the adduced evidence, that only by his own negligence did he find himself in such a dangerous position.

We have held it negligent as a matter of law to cross a road

without looking for oncoming traffic. See *Hennings v. Schufeldt*, 222 Neb. 416, 384 N.W.2d 274 (1986). Common sense dictates that generally it is also negligent to lie down on or beside the road, oblivious to the dangers of traffic. When substantial evidence shows that the plaintiff contributed to the collision, the issue of contributory negligence should be considered by the jury. *McQueen v. Navajo Freight Lines, Inc.*, 293 F.2d 590 (8th Cir. 1961) (citing Neb. Rev. Stat. § 25-1151 (Reissue 1956)). Thus, the district court erred in granting a directed verdict dismissing Russell's claim of contributory negligence.

The judgment of the district court is affirmed in part and in part reversed, and the cause is remanded for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

HASTINGS, C.J., dissenting.

I respectfully dissent. It would seem almost impossible to find a more egregious act evidencing a disregard for one's own safety than to voluntarily lie down in or alongside the traveled portion of a highway at night. One need not go beyond the cases cited by the majority to support that conclusion.

In *Williamson v. McNeill*, 8 N.C. App. 625, 628, 175 S.E.2d 294, 296 (1970), a case involving injuries and death to a young man who was lying on the pavement and was struck by a motorist, that court said:

> A reasonable inference is valid on nonsuit but speculations are not; the only reasonable inference which we may draw in the absence of evidence more compelling than that which is before us now is that intestate, for whatever reason, voluntarily placed himself on the highway. In so doing, he failed to exercise for his own safety the care of an ordinarily prudent person and his negligence was a proximate cause of his unnecessary death.

Similarly, in *Sherman v. Lawless*, 298 F.2d 899, 904 (8th Cir. 1962), the court stated:

> Here the evidence conclusively establishes that decedent, as defendant approached, was lying on the traveled path of traffic on a primary highway, on a dark night, in dark clothing. Decedent's action in assuming

> such a hazardous position, if done voluntarily, would manifest a very high disregard for his own safety, and such conduct, in the absence of any reasonable explanation or excuse therefor, would in our view establish contributory negligence more than slight as a matter of law.

*Weisenmiller v. Nestor*, 153 Neb. 153, 43 N.W.2d 568 (1950), also cited in the majority opinion, is distinguishable. In *Weisenmiller*, the victim apparently had been in an earlier accident, was injured, and found himself in a ditch with an injured foot or leg. He could not walk, and crawled out of the ditch and blacked out. There was no evidence as to how he came to be on the driving portion of the highway.

I would have sustained Russell's motion for a directed verdict.

CAPORALE, J., and BOSLAUGH, J., Retired, join in this dissent.

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STEVEN RICHARDSON, APPELLEE, V. AMES AVENUE CORPORATION, DOING BUSINESS AS PHIL'S FOODWAY, A NEBRASKA CORPORATION, APPELLANT.

525 N.W.2d 212

Filed January 6, 1995. No. S-93-218.

1. **Negligence: Liability: Invitor-Invitee: Proximate Cause.** A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.
2. **Negligence: Liability: Invitor-Invitee: Proof.** The liability of a possessor of land is predicated on proof of the possessor's superior knowledge, actual or constructive, of dangers to which the invitee is subjected and of which the invitee is unaware.

3. **Negligence: Liability: Invitor-Invitee: Notice.** In cases involving a slip and fall as the result of a slippery or foreign substance on the floor of a business, a plaintiff must establish either actual or constructive notice of the condition which caused the fall; to constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded with direction.

Lisa M. Meyer and David D. Ernst, of Gaines, Mullen, Pansing & Hogan, for appellant.

Timothy J. Cuddigan and Abigail A. Duffy, P.C., of Marks & Clare, for appellee.

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

CAPORALE, J.

Plaintiff-appellee, Steven Richardson, claims that his fall and resulting injuries were the proximate result of the negligence of the defendant-appellant occupant of the premises, Ames Avenue Corporation, doing business as Phil's Foodway. In accordance with the verdict, the district court entered judgment in Richardson's favor. Phil's Foodway appealed to the Nebraska Court of Appeals, asserting as its operative error that the district court erred in overruling its motion for a directed verdict made at the close of all the evidence. On our own motion, we removed the matter to this court in order to regulate the caseloads of the two appellate courts. For the reasons hereinafter set forth, we reverse the judgment of the district court and remand the matter with the direction that the cause be dismissed.

When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

The record establishes that on January 21, 1991, Richardson and his daughter were shopping in Phil's Foodway between 7 and 7:30 p.m. Sending his daughter to the produce aisle, Richardson headed with a cart toward the canned goods aisle. When Richardson arrived at the canned goods aisle, he glanced down the aisle and saw nothing that would be hazardous or dangerous. While he was looking for a can of clam chowder, his daughter appeared at the end of the canned goods aisle and yelled to him that the store was out of the item she had been sent to get. Richardson told her to help him look for the chowder. The daughter then joined Richardson in the search. As Richardson took two or three steps, he slipped and fell. When attempting to stand up, he continued to slide on some material; as he did so, the material began to foam, revealing for the first time the presence of a clear, soapy liquid. An off-duty police officer employed by Phil's Foodway to patrol the aisles found Richardson and helped him to his feet.

Richardson had no knowledge of how long the liquid soap had been on the floor or who had put it there, but he had expected the store to be safe and clean. Although he had no complaint as to the cleanliness of the store, he was concerned about safety. While there was testimony that, as a prank, substances had been spilled on the floor, Richardson conceded that the store was normally both clean and safe.

Having received a report of Richardson's fall from a customer, the night manager, Robert Aiello, proceeded to the site and offered to call a rescue squad, which Richardson refused. Aiello examined the locale and discovered the soap on the floor. The soap was in a puddle about 6 inches in diameter with a trail 10 to 15 feet long extending down the aisle. He found no soap containers in the aisle in which Richardson had fallen and failed to find any cracked or broken containers that could have leaked the soap. No customers or employees had reported any spills, and Richardson did not have soap in his shopping cart.

Although there was no written record of when the floors were mopped, Aiello testified that on the average, the aisles were mopped between four and eight times per day. On the day of Richardson's fall, they were last mopped sometime between 4

and 6 p.m. Aiello also testified that another manager, three to five checkers, three sackers, a floor man whose responsibilities were to stock displays and generally "pick up" the store, and a security guard were working the evening of Richardson's fall.

While Aiello conceded that a store employee could have left the soap in the aisle, he also pointed out it was possible that someone other than a store employee could have done so. While, according to this witness, there was no regular timetable for discussing customer safety with employees, there was an informal safety program consisting of managers teaching employees how to look for spills and areas of hazard. Managers, the security guard, and employees working the floor constantly move through the store looking for spills. When an employee finds a spill, the manager is alerted, who then designates someone to clean it up immediately.

Ron Beck testified that he had been the store manager for 11 years and had a total of 30 years' experience in the grocery business. He stated that five cashiers, two sackers, two assistant managers, one office employee, and an off-duty police officer were working the evening of Richardson's fall. Beck normally arrived at the store at 6:30 a.m. and left at 5:50 p.m. On the evening of Richardson's fall, he had left the store at the usual time after having first toured the store looking for problems so that he could instruct the night crew as to what needed to be done.

Beck also testified that new clerks are taught to keep things clean and picked up and are trained as to how to properly sweep, mop, and clean up spills. Employees are instructed to have someone guard the area of a spill or restrict the area of a spill while another employee retrieves a mop to clean it up. They are also trained to change the water after mopping up a spill in order to mop the area again to remove any film left on the floor.

With those facts in mind, we recall that a possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an

unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

That liability is predicated on proof of the possessor's superior knowledge, actual or constructive, of dangers to which the invitee is subjected and of which the invitee is unaware. *Collins v. Herman Nut & Supply Co.*, 195 Neb. 665, 240 N.W.2d 32 (1976). Stated another way, it is the superior knowledge the invitor has or should have which is the foundation of liability; absent such superior knowledge, no liability exists. *Widga v. Sandell*, 236 Neb. 798, 464 N.W.2d 155 (1991). As recently summarized by another court, in cases involving a slip and fall as the result of a slippery or foreign substance on the floor of a supermarket, a plaintiff must establish either actual or constructive notice of the condition which caused the fall. "'[T]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it[.]' " *Benware v. Big V Supermarkets, Inc.*, 177 A.D.2d 846, 847, 576 N.Y.S.2d 461, 462-63 (1991). Thus, although a storekeeper has a duty to use due care to keep the premises reasonably safe for use of an invitee, a storekeeper is not an insurer of the safety of customers patronizing the place of business. *Bahe v. Safeway Stores, Inc.*, 186 Neb. 228, 182 N.W.2d 202 (1970); *Lund v. Mangelson*, 183 Neb. 99, 158 N.W.2d 223 (1968).

Accordingly, in *Taylor v. J. M. McDonald Co.*, 156 Neb. 437, 56 N.W.2d 610 (1953), we affirmed a judgment on a verdict in favor of a customer because the evidence was sufficient to sustain the jury's implied finding that the customer had slipped on a gum deposit which had been left on the floor for at least 2 weeks. In so ruling, we quoted from *Hudson v. F. W. Woolworth Co.*, 275 Mass. 469, 176 N.E. 188 (1931), in which that court reasoned:

> "A finding that the plaintiff's injury was caused by a piece of candy on the floor of the store was warranted. The evidence of the appearance of the candy and its sticking to the floor, and of the appearance of the floor under and around it, warranted a finding that the candy had been on the floor such a period of time that in the exercise of reasonable, (sic) care to keep the premises in safe condition for use by customers, the defendant should have found and removed it. There was something on which to base a conclusion that the candy had not been dropped a moment before by a customer."

*Taylor*, 156 Neb. at 444, 56 N.W.2d at 614.

In contrast, however, in the absence of evidence to support an inference of the possessor's actual or constructive knowledge of the hazardous condition, we have refused to allow the jury to speculate as to the possessor's negligence. In *Jeffries v. Safeway Stores, Inc.*, 176 Neb. 347, 125 N.W.2d 914 (1964), it had recently snowed, and the storekeeper had applied a mixture of calcium chloride and Zorball to the sidewalk to melt the ice, absorb the moisture, and prevent refreezing. Zorball is a coarse, gritty substance used to prevent slipping and skidding. A customer slipped on the mixture when she entered the store.

While there was evidence that there had been some tracking of Zorball, dirt, and moisture into the store, there was no evidence that the manager or any employee knew of the condition before the customer fell. There also was no evidence as to when the Zorball had been tracked in and become dangerous. In reversing the district court's judgment on the verdict in favor of the customer, we noted that there was no evidence that the store or its employees knew of the tracking in of snow, dirt, or Zorball in excessive quantities prior to the accident. We also observed that there was no evidence as to the length of time the condition had existed from which the jury might infer negligence on the part of the storekeeper in not discovering it and taking steps to eliminate it or warn of its existence. We thus reasoned that even assuming the customer fell on the floor that was made slippery by Zorball tracked in by other customers, that fact alone was insufficient to support a judgment in favor of the customer. In order for such recovery,

there must be evidence that "defendant's employees or servants had knowledge of the condition prior to the time of plaintiff's fall, or that the condition had existed for such a period of time that they should have known of it and corrected it." 176 Neb. at 353, 125 N.W.2d at 917. In the absence of such evidence, there is no proof of negligence.

A similar situation was presented in *Williams v. Bedford Market, Inc.*, 199 Neb. 577, 260 N.W.2d 316 (1977). Therein, the plaintiff was on her way to obtain some steak sauce when she turned a corner and fell. The steak sauce was in the same aisle as the produce section. The plaintiff did not see anything in the aisle before she fell, but after the accident she noticed a spot of water which was a couple of inches in size. As there was water on her shoe, the plaintiff concluded that it was the water that had caused her to slip.

In *Williams*, the area was well lighted, and the plaintiff testified that the floor was clean. A store employee testified that the floors were swept and mopped nightly and that, in his experience, if there was any water or breakage on the floor, it was not left there for more than 4 or 5 minutes. Another store employee testified that the floor was always clean and was kept as clean as possible during the day. This employee also testified that the store manager was "all over the store during the day and that he would clean things up from the floor if he saw something spilled." 199 Neb. at 579, 260 N.W.2d at 318. The *Williams* store manager testified that there was no water or loose items on the floor after the plaintiff had fallen. He also testified that he kept the floor surfaces in a very clean condition at all times.

The *Williams* plaintiff contended that the water sprayed on the produce to keep it fresh might have fallen to the floor, thereby causing the spot. We, however, ruled that there was no issue of fact to be tried by the jury, for all reasonable inferences to be deduced from the evidence supported the judgment in favor of the store.

In the instant case, Richardson alleges that Phil's Foodway failed to adequately staff the store, failed to adequately maintain the store, and failed to discover and clean up the liquid soap. However, Richardson has failed to prove any of these claims.

He produced no evidence that the level of staffing was

inadequate or unreasonable under the circumstances. In point of fact, the record reflects that at least 10 people were working on the evening of Richardson's fall, several of whom were directly responsible for keeping the premises safe and clean as they had been trained to do.

Nonetheless, Richardson argues the fact that these employees were walking through the store and failed to find the soap on the floor infers negligent conduct. But this argument assumes the soap was already on the floor and discoverable when these employees were circulating throughout the premises. Yet, unlike the situation in *Taylor v. J. M. McDonald Co.*, 156 Neb. 437, 56 N.W.2d 610 (1953), Richardson presented no evidence from which it can be inferred how long the soap had been on the floor before he fell. Richardson's argument clearly assumes facts not in evidence.

Richardson also failed to produce any evidence to support his second allegation, that Phil's Foodway failed to adequately maintain the store and clean up debris. On the contrary, the record reflects evidence that employees mopped the store frequently and that it had been mopped within not more than $3^1/_2$ hours prior to Richardson's fall and inspected not more than $1^5/_6$ hours before. Moreover, Richardson produced no evidence that the store was dirty or poorly maintained and no evidence that the employees had failed to properly complete their duties.

As to Richardson's third and final allegation, that Phil's Foodway was negligent in failing to remove the liquid soap from the store floor when it knew or should have known of the dangerous condition created by the liquid soap, there is no evidence that Phil's Foodway had actual or constructive knowledge of the condition. There were no reported spills by customers or employees, and the store manager had toured the store before he left for the day at 5:50 p.m., but discovered no spills.

In order to withstand a motion for directed verdict, Richardson was required to have produced some evidence upon which a jury could reasonably infer that Phil's Foodway failed to exercise reasonable care to discover and remedy the hazardous condition. Conjecture, speculation, or choice of possibilities are not proof; there must be something more which

would lead a reasoning mind to one conclusion rather than to the other. *Mustion v. Ealy*, 201 Neb. 139, 266 N.W.2d 730 (1978). Based on the available evidence, the jury here could only speculate as to how long the soap had been on the floor, for there is nothing in the record to make it more probable or less probable that the soap had been on the floor for almost 2 hours or less than 2 minutes.

Where in a civil case several inferences are deducible from the facts presented, which inferences are opposed to each other but equally consistent with facts proved, the plaintiffs do not sustain their position by reliance alone on inferences which would entitle them to recover. *Anderson v. Farm Bureau Ins. Co.*, 219 Neb. 1, 360 N.W.2d 488 (1985). The burden of proving a cause of action is not sustained by evidence from which a jury can arrive at its conclusions only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another. *Shibata v. College View Properties*, 234 Neb. 134, 449 N.W.2d 544 (1989).

Before evidence is submitted to a jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it and upon whom the burden is imposed. *Novotny v. McClintick*, 206 Neb. 99, 291 N.W.2d 252 (1980); *Lund v. Mangelson*, 183 Neb. 99, 158 N.W.2d 223 (1968).

There was no evidence here upon which the jury could properly proceed to find in favor of Richardson. Where a properly pled issue affords no basis for recovery under the evidence adduced in the case, the trial court's submission of such an issue to the jury constitutes error. See *Era v. Sapp Bros. GMC, Inc.*, 189 Neb. 366, 202 N.W.2d 750 (1972). Therefore, the district court erred in denying the motion for directed verdict of Phil's Foodway at the close of all the evidence and submitting the case to the jury.

Accordingly, as noted earlier, the judgment of the district court is reversed and the cause remanded with the direction that the cause be dismissed.

REVERSED AND REMANDED WITH DIRECTION.

WHITE, J., dissenting.

In slip and fall cases we have said that "[t]he plaintiff has the burden to prove by the greater weight of the evidence that the defendant either created the condition, knew of the condition, or, by the exercise of reasonable care, would have discovered the condition." *Russell v. Board of Regents*, 228 Neb. 518, 520, 423 N.W.2d 126, 128 (1988).

The evidence clearly establishes that at the least, no mopping or inspection of spills took place in the defendant store between 5:50 and 7 p.m. It is further established that liquid soap was present on the floor of the aisle and was the cause of the fall and injury. The plaintiff thus clearly was entitled to have submitted to the jury whether by reasonable care the defendant ought to have discovered the condition.

The majority has expanded the plaintiff's burden to include a duty to offer evidence of how the hazardous condition occurred and its duration. This was not the law in this State prior to this decision. I dissent.

LANPHIER, J., joins in this dissent.

LANPHIER, J., dissenting.

I agree with the dissent of Justice White. However, I write separately because I wish to add that I believe the majority failed to give Richardson the benefit of the reasonable inferences deducible from the evidence as required by precedent. It is well settled that upon review of a motion for directed verdict, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. See *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). Since Phil's Foodway made the motion for a directed verdict, Richardson is entitled to have the benefit of every reasonable inference.

Richardson adduced evidence showing that there had been a problem at Phil's Foodway with people intentionally breaking or spilling items on the floor. There was evidence that a large amount of liquid soap, readily visible to the assistant store manager, was present on the floor of the store. The evidence

showed that Phil's Foodway had no written safety program. Additionally, the evidence showed that the management could not determine precisely when or who had last mopped the floor of Phil's Foodway. The reasonable inference deducible from this evidence is that had Phil's Foodway exercised reasonable care, the dangerous condition would have been discovered. Because the majority failed to give Richardson the benefit of this inference and follow well-established rules concerning the standard of review of a motion for a directed verdict, I respectfully dissent.

WHITE, J., joins in this dissent.

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GENE GERDES, APPELLANT, V. KLINDT'S, INC., A MINNESOTA CORPORATION, ET AL., APPELLEES.

525 N.W.2d 219

Filed January 6, 1995. No. S-93-384.

**Trial: Records.** It is not the trial court's prerogative to decide what the trial record shall be. Upon request, a litigant is entitled to a verbatim record of anything and everything which is said by anyone in the course of judicial proceedings; it is the duty of the court reporter to make such a record, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty.

Appeal from the District Court for Perkins County: DONALD E. ROWLANDS II, Judge. Reversed and remanded for a new trial.

John W. DeCamp and Stanford L. Sipple, of DeCamp Legal Services, P.C., for appellant.

George M. Zeilinger, of Zeilinger Law Office, for appellee Marvin Stumpf.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and HOWARD, D.J., Retired.

WRIGHT, J.

Gene Gerdes obtained a default judgment against Melvin Klindt and Klindt's, Inc. (Klindt), for the value of seed grain

allegedly delivered to a third party, Marvin Stumpf. The default judgment was awarded after Klindt issued an insufficient-fund check to pay for the seed grain. Gerdes then attempted to collect on the default judgment by instituting garnishment proceedings against Stumpf. The garnishment was quashed, and a verdict was directed in Stumpf's favor. Gerdes appeals. We reverse the judgment, and remand the cause for a new trial.

## SCOPE OF REVIEW

It is not the trial court's prerogative to decide what the trial record shall be. Upon request, a litigant is entitled to a verbatim record of anything and everything which is said by anyone in the course of judicial proceedings; it is the duty of the court reporter to make such a record, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty. *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994).

## FACTS

Gerdes filed a petition in Box Butte County District Court, alleging that Klindt delivered to Stumpf registered seed grain valued at $28,550. Klindt's check for that amount, issued on July 10, 1992, was returned for insufficient funds. In his petition, Gerdes alleged that Klindt refused to make payment for the amount of the check and that, as a result, Gerdes had incurred banking and other costs. Gerdes also alleged that Stumpf had been and was in possession of the seed grain and that Stumpf had planted and cultivated it in contract with Klindt. Gerdes sought judgment in the amount of $28,550 plus interest, special damages, and an injunction against the sale of crops which resulted from the seed grain in question. The district court granted Gerdes' motion for a default judgment against Klindt on November 10, 1992. In an attempt to collect the judgment, Gerdes filed a motion seeking garnishment against Stumpf. Subsequently, the case was transferred to Perkins County District Court. On April 2, 1993, the district court sustained Stumpf's motion for a directed verdict quashing the garnishment. Gerdes filed a notice of appeal and praecipes for a transcript and a bill of exceptions.

## ASSIGNMENT OF ERROR

Gerdes alleges that the district court erred when it found that the garnishee, Stumpf, was not indebted to or in possession of property of the judgment debtor, Klindt.

## ANALYSIS

Gerdes' praecipe for a bill of exceptions requested a transcript of the testimony taken on April 2, 1993, and all exhibits received at that hearing. However, the bill of exceptions does not contain a record of the April 2 hearing, at which the district court sustained Stumpf's motion for a directed verdict. The bill of exceptions contains only three exhibits, none of which is a transcript of the actual court proceedings. The district court has filed with this court a certificate noting that neither party requested a court reporter prior to the date of the hearing and that it is the policy in that judicial district that a court reporter is not available unless specifically requested in advance. Nothing in the record establishes that Gerdes affirmatively waived recording of the proceeding.

The rules relating to official court reporters provide that the court reporter shall make a verbatim record of "[t]he testimony or other oral proceedings," regardless of whether a request has been made by the court, counsel, or any party. See Neb. Ct. R. of Official Ct. Rptrs. 4b(2) (rev. 1992). "[B]y providing in rule 4b(2) that the court reporter shall make a verbatim record of '[t]he testimony or other oral proceedings,' we intend that any portion of the proceedings . . . shall be recorded by the court reporter." *Kennedy v. Kennedy*, 221 Neb. 724, 730, 380 N.W.2d 300, 304 (1986). Rule 4b does not limit the making of verbatim records to trial proceedings; however, records of pretrial and posttrial matters are made only at the request of counsel.

In *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 789, 523 N.W.2d 510, 514 (1994), we held:

> [I]t is not the trial court's prerogative to decide what the trial record shall be. Upon request, a litigant is entitled to a verbatim record of anything and everything which is said by anyone in the course of judicial proceedings; it is the duty of the court reporter to make such a record, and it is

the obligation of the trial court to see to it that the reporter accurately fulfills that duty.

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, *Terry v. Duff*, 246 Neb. 11, 516 N.W.2d 591 (1994); Neb. Ct. R. of Prac. 5C(3) (rev. 1992). In the present case, no bill of exceptions was prepared or certified by the trial judge.

The rules relating to official court reporters do not allow the exercise of discretion in recording testimony or other oral proceedings. No request for a recording is required. Heretofore, we held that it was the responsibility of the trial court to ensure that all testimony or other oral proceedings are recorded by a court reporter, unless both parties affirmatively waive recording and such waiver is consented to by the trial court. See, *Holman, supra*; Neb. Ct. R. of Official Ct. Rptrs. 4c (rev. 1992). The record does not indicate that the parties waived recording of the hearing. Henceforth, all evidentiary proceedings shall require the presence of a court reporter who shall make a verbatim record of the proceedings, and such recording may not be waived by the court or the parties.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

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KIMBERLY K. JIRKOVSKY, APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE, V. DAVID P. JIRKOVSKY, APPELLANT AND CROSS-APPELLEE, AND ALLAIRE JIRKOVSKY, PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMAN JIRKOVSKY, DECEASED, INTERVENOR-APPELLEE AND CROSS-APPELLANT.

525 N.W.2d 615

Filed January 6, 1995. No. S-93-487.

1. **Property Division.** The general rule is to award a spouse one-third to one-half of the marital property, but the division of property is not subject to a precise mathematical formula.

2. **Appeal and Error.** Errors assigned and not argued are generally not considered.
3. ____. To be considered by an appellate court, an error must be both assigned and discussed in the brief of one claiming that prejudicial error has occurred.
4. ____. In the absence of plain error, where an issue is raised for the first time in a higher appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
5. ____. When an assignment of error has been made in the Nebraska Court of Appeals and is not decided by that court because such assignment of error was not discussed or argued in the proponent's brief filed in that court, the Nebraska Supreme Court will not consider such assignment of error.
6. **Attorney Fees.** 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.

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 York County, BRYCE BARTU, Judge. Judgment of Court of Appeals affirmed as modified.

John R. Brogan, of Brogan & Brogan, for appellant.

Michael J. Murphy, of Angle, Murphy, Valentino & Campbell, P.C., for appellee.

Kevin V. Schlender for intervenor-appellee.

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

FAHRNBRUCH, J.

In this dissolution of marriage proceeding, David P. Jirkovsky complains that (1) his wife, Kimberly K. Jirkovsky, should not receive one half of the parties' net marital property, and (2) in dividing the couple's property, the lower courts considered the market value of the cattle and grain he was awarded without reduction for the potential income tax that might become due when these items are sold. We find both of these complaints to be without merit.

Kimberly, in her "cross-appeal" in this court, claims that the Nebraska Court of Appeals erred when it reduced the $92,500 judgment entered in her favor by the district court for York County. Kimberly claims the Court of Appeals reduced the

judgment by $6,787.47 because of anticipated taxes on an IRA and Keogh account. We find that Kimberly's contention is partially correct and modify the Court of Appeals' opinion on this point. Kimberly also contends that the Court of Appeals erred in failing to allow her fees for services rendered by her attorney in that court. We find this contention has no merit.

## FACTS

David and Kimberly were married February 18, 1979, at ages 28 and 20, respectively. Two children were born of the marriage: Beth Anne, on February 6, 1980, and Steven Derek, on August 26, 1982.

In 1972, David graduated from a Texas college with a liberal arts degree. His major was in business administration. From 1972 until 1974, David worked in a beekeeping business. In 1974, he began to drive a truck for Sunflower Beef Packers. He continued to drive a truck until May 1984. While still employed as a truck driver, David also assisted his father, Herman Jirkovsky, with Herman's farming and livestock operations.

In the spring of 1984, David began to farm full time. His father leased to David 240 acres in 1984 for cash rent of $19,560. For the years 1985 through 1990, David paid his father $15,000 cash rent per year. David's father died in 1992. At the time of trial, David had not yet paid his father's estate the 1991 cash rent.

The trial court found that David's father allowed David to use the father's farm equipment without payment of rent. David testified that he had agreed orally to pay for maintenance of the equipment. David also testified that his father had worked daily at David's farming operation from 1984 until his death. David said that his father was to be compensated by receiving all the heifer calves born during and after 1984. David further testified that all female cattle born from 1984 until his father's death were owned by his father's estate at the time of the trial. David admitted that he had not informed anyone, including his wife, of any such agreement with his father. Kimberly testified she had never heard David or his father mention anything about an agreement for compensation to David's father nor had she heard that her father-in-law owned any interest in the parties' cattle.

Kimberly testified that she was the primary care provider for the parties' children and did not work outside the home until the oldest child was 5 years old. She also testified that in 1985, she worked as a desk clerk and a hostess. She stated that she drove a school bus for 3 years. At the time of trial, Kimberly was working for the Nebraska Department of Roads, earning $6.92 per hour in the maintenance department.

Additionally, Kimberly testified that she assisted with the parties' cattle by checking fence and making certain the cattle had water. Kimberly also stated that in the evenings she assisted in separating and herding cattle and in putting up and taking down electric fence. The record reflects that Kimberly also assisted in laying and picking up irrigation pipe and that she worked in the fields disking and cultivating.

The trial court entered its decree dissolving the parties' marriage. Custody of the parties' children was awarded to Kimberly. David was ordered to pay Kimberly $720 per month child support which is to be reduced to $480 per month when the eldest child reaches majority age, is self-supporting, is emancipated, marries, or dies, or until further order of the court. David was ordered to pay Kimberly alimony in the amount of $500 per month for 49 months.

David and Kimberly were each awarded the property he or she brought into the marriage. Thereafter, the trial court deducted $96,000 from the gross marital estate and ordered David to assume and pay all the parties' debts. The court then computed the net value of the marital estate to be $257,000. This net value of the marital estate was divided equally between Kimberly and David, each to receive $128,500 in property or cash or a combination thereof.

To satisfy the $128,500 in value set over to Kimberly, the trial court awarded her a $21,000 IRA account, an $11,000 Honda automobile, and $4,000 in miscellaneous property. In addition, the trial court entered a $92,500 judgment in favor of Kimberly and ordered David to pay it.

The trial court awarded David the parties' cattle, grain bins, farm equipment and machinery, grain, prepaid 1993 farm expenses, co-op deferred patronage, his own IRA and Keogh accounts, miscellaneous property in David's possession except

that specifically awarded to Kimberly, and bank accounts in David's name.

David appealed the district court's rulings to the Court of Appeals. That court generally affirmed the district court's decree, but reduced Kimberly's $92,500 judgment by $6,787.47. See *Jirkovsky v. Jirkovsky*, 94 NCA No. 22, case No. A-93-487 (not designated for permanent publication). Although Kimberly claims in her brief, under the heading "Statement of the Case," that the $6,787.47 reduction was due to future taxes on David's IRA and Keogh accounts, the court's opinion reflects that $4,724.47 of the reduction was attributable to its de novo review of the evidence and its finding that David brought into the marriage $9,448.94 more property than the $40,000 of property found by the trial court. In the Nebraska Supreme Court, Kimberly has not challenged the Court of Appeals' finding that the value of the property David brought into the marriage was $49,448.94 rather than $40,000.

The Court of Appeals held that only $2,063 of its reduction of Kimberly's judgment was due to anticipated future taxes on David's IRA and Keogh accounts.

David's father intervened in the original action because of his alleged ownership of the heifers. He also sought $23,915.74 as reimbursement for expenses he claimed he had advanced to David from 1983 or 1984 to 1992 for the parties' farming operations. While the trial was pending, David's father died and the personal representative of his estate revived the petition in intervention. The district court found that the intervenor failed to prove the existence of such agreements between David and his father. The Court of Appeals affirmed the district court's decision in this regard. The intervenor did not assign any errors to this court.

## ASSIGNMENTS OF ERROR

In this court, David argues that the Court of Appeals erred in finding that (1) it was reasonable to divide the net marital estate equally between Kimberly and David, and (2) the marital estate should not be reduced by the amount of the income tax David will have to pay upon the sale of the cattle and grain awarded to him.

In her "cross-appeal," Kimberly claims that the Court of Appeals erred in (1) not awarding her fees for services rendered by her attorney in that court and (2) discounting the IRA and Keogh accounts by 25 percent.

## STANDARD OF REVIEW

In actions for dissolution of marriage, an appellate court's review is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994); *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, 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. *Pendleton, supra*; *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

## ANALYSIS

David first argues that the Court of Appeals erred in finding that it was reasonable for the trial court to divide the parties' net marital estate equally between David and Kimberly. We have held that in a dissolution of marriage proceeding the ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Reichert, supra*; *Pendleton, supra*. The Supreme Court has recognized that the general rule is to award a spouse one-third to one-half of the marital property, but the court has also recognized that a division of property is not subject to a precise mathematical formula. See, *Reichert, supra*; *Pendleton, supra*.

The record reflects that during their 13-year marriage both parties worked to promote their family farm operation. The Court of Appeals held that the growth of the marital estate

cannot be attributed more to the efforts of one party than the other. After our de novo review of the record, we agree with that finding. Although adjustments in the trial court's decree are necessary, we find that there was no abuse of discretion by the trial court in finding that the net marital estate of parties should be divided nearly equally between David and Kimberly. David's assignment of error in this regard is without merit.

David also contends that the Court of Appeals erred in not finding that the value of the net marital estate should be reduced by reason of the income tax consequences when the cattle and grain he was awarded is sold. This error, although assigned by David in the Court of Appeals, was not discussed or argued in his Court of Appeals brief. Therefore, that court declined to consider it.

Errors assigned and not argued are generally not considered. *In re Interest of T.M.B. et al.*, 241 Neb. 828, 491 N.W.2d 58 (1992); *Carlson v. Zellaha*, 240 Neb. 432, 482 N.W.2d 281 (1992). To be considered by an appellate court, an error must be both assigned and discussed in the brief of one claiming that prejudicial error has occurred. *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993); *Regency Homes Assn. v. Egermayer*, 243 Neb. 286, 498 N.W.2d 783 (1993). In the absence of plain error, where an issue is raised for the first time in a higher appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. See *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993). We hold that when an assignment of error has been made in the Court of Appeals and is not decided by that court because such assignment of error was not discussed or argued in the proponent's brief filed in that court, the Supreme Court will not consider such assignment of error. Therefore, this court will not consider David's assignment of error that the Court of Appeals erred in failing to consider the tax consequences to David when and if he sells his cattle and grain. Neither will we note plain error on that issue.

We now turn to Kimberly's "cross-appeal" in this court. Kimberly argues that the Court of Appeals erred in discounting the IRA and Keogh accounts involved here by 25 percent because of future taxes on those accounts. As a result, the Court

of Appeals modified the trial court's decree by reducing the amount of the judgment awarded to Kimberly by $2,063 because of the anticipated tax.

In *Buche v. Buche*, 228 Neb. 624, 628, 423 N.W.2d 488, 492 (1988), this court adjusted the valuation of an IRA included in the marital estate from $17,418.24 to "approximately $13,000 for inclusion in the marital estate." This was almost a 25-percent reduction. The district court excluded the proffered testimony of a certified public accountant on the tax consequences associated with the IRA. However, this court held that the income tax, which will have to be paid eventually, is a proper consideration in determining the present value of the account. In *Buche*, the court stated:

> The controversy concerning the IRA relates to its valuation. The account amounts to $17,418.24, but if it was withdrawn at this time and divided between the parties, the proceeds would amount to only $11,418.24. The trial court refused to permit a certified public accountant, called by the respondent, to testify that both an income tax and a penalty would have to be paid if the respondent withdrew the account at this time. Since the account will not be withdrawn, the penalty may be disregarded, but the income tax will have to be paid eventually and is a proper consideration in determining the present value of the account. We find that the IRA should be valued at approximately $13,000 for inclusion in the marital estate.

*Id.* at 628, 423 N.W.2d at 492.

The Court of Appeals applied *Buche* to the present case and reduced the value of the IRA and Keogh accounts by 25 percent due to potential income tax liability. That decision is not supported by the evidence. There is no expert testimony in the record of the tax consequences associated with the IRA and Keogh accounts involved here. Nor was there testimony as to whether the accounts at any particular time would be withdrawn and thus subject to a penalty.

The *Buche* opinion does not stand for the proposition that a 25-percent reduction for taxes is appropriate in every case. The rate of income tax may vary from case to case, depending upon

the payor's circumstances. Although the *Buche* opinion states that the trial court did not allow the accountant to testify, it is inherent in the *Buche* opinion that this court found the trial court should have received the accountant's testimony concerning the income tax and penalty which would have to be paid and that this court relied upon that proffered testimony in making the 25-percent reduction in value. This court's 25-percent reduction was not based upon conjecture. It was obviously based upon the accountant's proffered testimony. In the present case, no credible evidence exists in the record as to what the tax ramifications associated with the accounts will be in the future. For the reasons stated above, we reverse the Court of Appeals' decision reducing the IRA and Keogh accounts involved here by 25 percent. Considering that the trial court erred in determining the value of property David brought into the marriage and that the Court of Appeals erred in reducing the value of the IRA and Keogh accounts involved here, the Court of Appeals should have reduced Kimberly's judgment against David only to $87,775.53.

Finally, Kimberly argues that the Court of Appeals erred in not awarding her attorney fees for services in that court. In an action for dissolution of marriage, the award of attorney fees is discretionary with a lower court and in the absence of an abuse of discretion will be affirmed. *Preston v. Preston*, 241 Neb 181, 486 N.W.2d 902 (1992). 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. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994); *Preston, supra*.

Given the almost equal division of the net marital estate of the parties and the size of the share received by each party, it was not an abuse of discretion for the Court of Appeals to overrule Kimberly's motion for attorney fees.

## CONCLUSION

The decision of the Nebraska Court of Appeals in this case is affirmed except that the $85,712.53 judgment entered by the Court of Appeals in favor of Kimberly K. Jirkovsky is increased to $87,775.53.

AFFIRMED AS MODIFIED.

# STATE OF NEBRASKA, APPELLEE, V. TODD SKALBERG, APPELLANT.

526 N.W.2d 67

Filed January 6, 1995. No. S-93-592.

1. **Judgments: 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. **Convictions: Circumstantial Evidence.** A reasonable inference from circumstantial evidence is to be taken most favorably to the accused when circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other.
3. ____: ____. When circumstantial evidence is the only basis upon which to support a conviction, the trial court must first determine whether the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and whether the inference of guilt is stronger than the inference of nonguilt.
4. **Circumstantial Evidence: Appeal and Error.** On appeal, the appellate court must first independently decide as a matter of law whether the circumstantial evidence is reasonably susceptible of two interpretations and whether the inference of nonguilt is stronger than or equal to the inference of guilt.
5. **Evidence: Appeal and Error.** If the appellate court determines that the evidence was properly submitted to the trier of fact, then on appeal the State is entitled to have all conflicting evidence and the reasonable inferences which can be drawn from the evidence viewed in its favor.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Knox County, RICHARD P. GARDEN, Judge. Judgment of Court of Appeals affirmed.

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

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

WRIGHT, J.

We granted the State's petition for further review of the decision of the Nebraska Court of Appeals which reversed the judgment of the Knox County District Court and remanded the

cause to the district court with directions that the case against Todd Skalberg be dismissed because the circumstantial evidence presented was insufficient to prove Skalberg's guilt beyond a reasonable doubt.

## 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. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *State v. Quandt*, 234 Neb. 402, 451 N.W.2d 272 (1990).

A reasonable inference from circumstantial evidence is to be taken most favorably to the accused when circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other. See, *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *State v. Mowry*, 245 Neb. 213, 512 N.W.2d 140 (1994); *State v. Covarrubias*, 244 Neb. 366, 507 N.W.2d 248 (1993).

## FACTS

Skalberg was charged with five counts of burglary, in violation of Neb. Rev. Stat. § 28-507 (Reissue 1989). At trial, Skalberg moved for a dismissal of all counts. Skalberg's motion was sustained regarding count V, but he was found guilty of committing burglaries at Kersten Auto, Pizza Kitchen, Curt's Lanes (a bowling alley), and Bloomfield Automotive (a NAPA auto parts store). All of these businesses are located within a one-block area in Bloomfield, Nebraska.

The events leading up to the investigation of the burglaries began at about 11:30 p.m. on September 23, 1992, when Bloomfield police chief Palmer Haugen went to McHenry's Saloon and talked with Skalberg and Todd Edwards about a report that a truck had been vandalized. Skalberg and Edwards denied involvement in the incident, and they subsequently left the bar within minutes of each other at approximately 12:45 a.m.

At about 1:10 a.m., as Haugen was making rounds, he found

a chair lying on the sidewalk outside Kersten Auto. Upon further investigation, he saw a person inside the building. The person disappeared when Haugen yelled, "What the hell are you doing in there?" Haugen did not see the person's face, but he described the person as being approximately 5 feet 10 inches tall and very thin and wearing dark-colored pants and a dark long-sleeved top.

Haugen called for additional help, and Deputy Sheriff James Janecek arrived at about 2:12 a.m. The two officers entered Kersten Auto and found that the interior of the building had been ransacked. Pieces of a Mr. Goodbar candy bar and part of its wrapper were found on a desk. Tow chains were missing from Kersten Auto's tow truck, which was parked in the alley behind the store. While investigating the scene of the Kersten Auto burglary, Haugen gave Janecek a description of the person he had seen inside the building.

At Pizza Kitchen, the back door was found open, and the glass in the front door and the door itself were broken. The premises had been ransacked, and approximately $200 was taken from the cash register, which had been smashed on the floor.

At Curt's Lanes, the glass was broken out of the front door, and the screen in the back door had been cut. The business had been ransacked. The freezer and beer cooler had been opened, and the cigarette and candy display had been rummaged through. Some candy was missing, including a Mr. Goodbar candy bar. The cash register had been removed from the building and was found outside. Curtis Strom, proprietor of Curt's Lanes, testified he found broken glass, candy bars, pop, mini-burritos, and beer cartons scattered outside the building. He said some Marlboro cigarettes that had been on display were missing, and he thought two cartons of cigarettes also were missing. Strom was not certain whether any beer was missing.

At Bloomfield Automotive, the front and back doors and front windows were broken. Drawers had been ransacked, and items taken from the store were spread out in an area in front of the store. Tools had been piled on the floor, and items had been ripped down from shelves. The cash register was open, and keys had been removed from it.

During the course of their investigation, Haugen and Janecek received a report that someone was hiding in the bushes by the library. Haugen saw a person wearing dark clothing, which included a dark long-sleeved top, running from the library. The person appeared to be the same size as the one who was seen inside Kersten Auto. The officers were not able to locate the person. Janecek then had the dispatcher contact the fire department for assistance.

At approximately 2:30 a.m., Janecek saw a person on foot about two blocks from Kersten Auto. Janecek then began pursuing a car he saw speeding down Main Street. The driver lost control of the car, was involved in a collision, and fled the scene on foot. Janecek was later able to identify the driver as Edwards. The car Edwards was driving had been stolen from a residence in Bloomfield. At that point, Janecek advised the fire department to be on the lookout for two people because Edwards did not match the description of the person seen inside Kersten Auto.

Janecek had no contact with any other suspects until a member of the fire department informed him that a car was parked on a county road north and east of Bloomfield. The vehicle's engine was running, but its headlights were off. Janecek proceeded to the vehicle and found Edwards in the driver's seat and Skalberg in the passenger's seat, both either asleep or passed out. Skalberg and Edwards were arrested, and the car was impounded and searched. The tow chains taken from Kersten Auto were found in the backseat. Cigarettes and two cans of Budweiser beer were also found in the car.

At the time of the arrest, Skalberg had $6.72 and a pack of Marlboro cigarettes in his pockets. He was wearing blue jeans and a gray shirt over a dark-blue or black thermal-underwear-type shirt. Edwards had $348 "wadded up" in his pocket, along with part of a Mr. Goodbar candy bar. He was wearing blue jeans, a white sweatshirt with blue three-quarter-length or long sleeves, and a medium-blue or turquoise T-shirt with "Service Master" written on the front. He was described as being 5 feet 10 inches tall and weighing about 200 pounds.

At trial, Skalberg testified that he had moved to Yankton, South Dakota, 2 days before the burglaries and that he had lived

with Scott Wilson in Bloomfield prior to that time. Skalberg and Edwards had visited Skalberg's parents in Wausa, Nebraska, during the evening prior to the burglaries. When they left, Skalberg's mother gave him a $10 bill, a box of meat, and a pack of Marlboro cigarettes. Later in the evening, Skalberg and Edwards went to McHenry's Saloon in Bloomfield. Shortly after closing time, Skalberg started his car and headed toward Standpipe Hill.

Skalberg testified that as he went down the street west of the bowling alley, he saw Edwards standing by the front door of the bowling alley. When Skalberg asked Edwards what he was doing, Edwards told him to "get the fuck out of here." Edwards then ran through the alley between Bloomfield Automotive and the rear of Pizza Kitchen. Skalberg followed in his car and saw Edwards' feet hanging out of a window in the Kersten Auto building. Skalberg testified that he parked his car and went to the door. When Edwards opened the door, Skalberg asked what he was doing. Edwards replied, "Hey, mother fucker, I own this town and don't fuck with me . . . ." Skalberg testified that he wanted to avoid a confrontation with Edwards, so Skalberg got in his car and drove away. Skalberg said he parked his car in the driveway of Wilson's home because he was tired and did not think he could drive to Yankton without falling asleep. After Skalberg pulled into the driveway, he took his keys out of the ignition, threw them on the floor, moved to the passenger's seat, and went to sleep. When Skalberg woke up, he was in the country, Edwards was in the driver's seat, and they were being arrested.

Wilson testified that he had seen Skalberg's car in the driveway when he got up to go to the bathroom during the night of the burglaries. Wilson was not curious about the car because Skalberg had only recently moved out and because Wilson had seen the car sitting there many times before when Skalberg came home at night. On those occasions, the radio would be playing and Skalberg would be in the car. This occurred as often as twice a week. Another witness testified that he had previously seen Skalberg sleeping in his car on more than one occasion.

The trial court found that the elements of burglary had been

proven in each of the four counts. The court believed that the evidence pointed to Skalberg as having been the "wheelman" driving the getaway car. The court found that Skalberg's memory was conveniently lapsing at times, but on the other hand did not lapse when he testified that he was standing at the doorway of Kersten Auto asking Edwards what he was doing there. The court stated:

> He wasn't all the way in but he wasn't all the way out. It doesn't square with the rest of the evidence. A skinny man seen running from the scene at Kersten's. I think the skinny man was the defendant. The loot was found in his car and on his co-purpetrator [sic], if you will, and I think they just simply didn't have time to split it up.

On appeal, Skalberg assigned as error the trial court's finding that the evidence was sufficient to sustain his convictions. The Court of Appeals found that the evidence supporting Skalberg's convictions was entirely circumstantial, that there was no direct evidence linking Skalberg to the burglaries, and that the circumstantial evidence was insufficient to sustain the convictions.

## ASSIGNMENTS OF ERROR

The State, in its petition for further review, asserts that review is necessary to resolve the following questions: (1) whether the Court of Appeals has announced a rule of law which infringes on the role of the fact finder in making its determination that the inference of nonguilt was as strong as the inference of guilt and (2) whether the Court of Appeals erred in finding that the inference of nonguilt was as strong as the inference of guilt under the facts of the case.

## ANALYSIS

In this case, all the evidence is circumstantial. When circumstantial evidence is the only basis upon which to support a conviction, the trial court must first determine whether the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and whether the inference of guilt is stronger than the inference of nonguilt. This is determined by the trial court in either a bench trial or a jury trial. This is a question of law which must be

determined by the trial court prior to submitting the evidence to the trier of fact. See, *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *State v. Covarrubias*, 244 Neb. 366, 507 N.W.2d 248 (1993).

In *Covarrubias*, 244 Neb. at 374, 507 N.W.2d at 253, we explained our earlier holding in *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992):

> *LaFreniere* holds that in determining the sufficiency of circumstantial evidence to support a conviction, any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. *LaFreniere* requires a reasonable inference from circumstantial evidence to be taken most favorably to the accused when circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other. See, also, *State v. Ruiz*, 241 Neb. 693, 489 N.W.2d 865 (1992); *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992).

If the inference of nonguilt is stronger than or equal to the inference of guilt, then the case should not be submitted to the trier of fact; the trial court having thus determined as a matter of law that the evidence is insufficient to sustain a finding of guilt. On the other hand, if the trial court determines that the inference of guilt is stronger than the inference of nonguilt and determines that the evidence is sufficient to sustain a conviction, then the court submits the evidence to the trier of fact for a determination of the guilt or innocence of the defendant.

On appeal, the appellate court must first independently decide as a matter of law whether the circumstantial evidence is reasonably susceptible of two interpretations and whether the inference of nonguilt is stronger than or equal to the inference of guilt. 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. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994). If the appellate court determines that the evidence was properly submitted to the trier of fact,

then on appeal the State is entitled to have all conflicting evidence and the reasonable inferences which can be drawn from the evidence viewed in its favor. See, *State v. Covarrubias, supra*; *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992).

The Court of Appeals held that the evidence must be viewed most favorably to Skalberg, "unless we can say that the inference of guilt is stronger than the inference of innocence assuming that the evidence is reasonably susceptible of two interpretations, one of guilt and one of innocence." *State v. Skalberg*, 94 NCA No. 11 at 15-16, case No. A-93-592 (not designated for permanent publication). We review this question of law to independently determine whether the inference of guilt was stronger than the inference of innocence.

Under the burglary statute, Skalberg could be found guilty only if the evidence showed that he "willfully, maliciously, and forcibly" broke into and entered "any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." See § 28-507. The Court of Appeals found that the State had not proven Skalberg's guilt beyond a reasonable doubt, but had merely proven that several burglaries were committed in Bloomfield on September 24, 1992.

Skalberg testified he parked his car in the driveway of Wilson's home and fell asleep. The police chief could not identify Skalberg as the person he saw inside Kersten Auto, but could only report that the person was wearing dark clothing. Skalberg was wearing a gray shirt over a dark-blue or black shirt, which is not necessarily dark clothing as described by the police chief. The Court of Appeals found that the evidence of the physical description provided no inference of guilt which was stronger than an inference of innocence, particularly when the police chief, who knew Skalberg, could not say that Skalberg was the person that he saw inside Kersten Auto on the night of the burglaries.

The presence of the tow chains in Skalberg's car did not establish that Skalberg had been inside Kersten Auto. Testimony received from an employee of Kersten Auto established that the company tow truck was parked in the alley behind the store on the night of the burglaries. As noted by the Court of Appeals,

"The only allowable inference from finding them in Skalberg's car is that he or Edwards had stolen them, but the evidence is uncontroverted that to steal the chains, no burglary was required." *State v. Skalberg*, 94 NCA No. 11 at 18. There was no evidence of any forcible breaking or entering of real estate or improvements erected thereon in order to steal the tow chains.

No evidence established that the beer found in the car or the money and cigarettes found on Skalberg were taken in the burglaries. Skalberg testified that he purchased the beer in Yankton and that the cigarettes were given to him by his mother. No identifiable fingerprints were found at any of the crime scenes, and a palm print found at one of the locations did not match Skalberg's palm print.

As to the State's first contention, that the Court of Appeals has announced a rule of law which infringes on the fact finder, we find that the determination by the Court of Appeals regarding the inferences presented by the circumstantial evidence does not infringe on the role of the fact finder. The determination of the inferences from the circumstantial evidence is a question of law to be decided by the trial court before the evidence is submitted to the fact finder. It is a determination of whether the evidence is sufficient to sustain a conviction for the offense with which the defendant has been charged. Such a determination is made as a matter of law and does not infringe upon the trier of fact's determination of guilt or innocence.

The State's second contention is that the Court of Appeals erred in finding that the inference of nonguilt was as strong as the inference of guilt. We view this determination as a matter of law and make our own determination independent from that of the Court of Appeals and that of the trial court. See *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994). Although the trial court could properly conclude that four burglaries had been committed, the State has not shown that the circumstantial evidence establishes beyond a reasonable doubt that Skalberg committed the burglaries. Our review of the circumstantial evidence leads us to the conclusion that the inference of nonguilt was as strong as the inference of guilt. The circumstantial evidence, taken in favor of Skalberg, was not

sufficient to overcome the presumption of innocence and did not support a finding of guilt beyond a reasonable doubt.

Therefore, we affirm the judgment of the Court of Appeals, which reversed the district court's judgment and remanded the cause with directions to dismiss.

AFFIRMED.

FAHRNBRUCH, J., concurs in the result.

LANPHIER, J., concurring.

I concur with the majority's holding that the evidence adduced was insufficient to support a guilty verdict. However, I write separately because I do not believe, as the majority concludes, that the inference of guilt was as strong as the inference of nonguilt. Additionally, the majority's adoption of new rules concerning when a trial court should not submit a case to the trier of fact is unnecessary and conflicts with our existing standard for directed verdicts.

The majority correctly concludes that all the evidence against Skalberg was circumstantial. However, the scope of review used by the majority to determine whether the evidence against Skalberg was sufficient to sustain his convictions was the wrong one.

Generally, when a criminal conviction on a claim of insufficiency of evidence is reviewed, circumstantial evidence is to be treated the same as direct evidence; and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences drawn from the evidence viewed in its favor. *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992); *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). See, *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990); *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). However, circumstantial evidence is to be taken most favorably to the accused when circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, *and neither inference is stronger than the other*. *State v. Mowry*, 245 Neb. 213, 512 N.W.2d 140

(1994); *State v. Covarrubias*, 244 Neb. 366, 507 N.W.2d 248 (1993); *State v. Ruiz*, 241 Neb. 693, 489 N.W.2d 865 (1992); *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992); *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992); *State v. Earlywine*, 191 Neb. 533, 215 N.W.2d 895 (1974); *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967); *Reyes v. State*, 151 Neb. 636, 38 N.W.2d 539 (1949).

The majority, concluding that the inference of nonguilt was as strong as the inference of guilt, applies this second scope of review. However, I disagree with this conclusion. Even if the State is given the benefit of all reasonable inferences, the evidence adduced was insufficient to support a guilty verdict. From the evidence adduced, the most that can be reasonably inferred to support Skalberg's guilt is that burglaries were committed, that Skalberg knew the burglaries had been committed by Edwards, and that after the burglaries Skalberg was found with Edwards and some stolen items. These reasonable inferences do not prove that Skalberg committed burglary—that he willfully, maliciously, and forcibly broke into and entered any real estate or improvements erected thereon with intent to commit any felony or with intent to steal property of any value. The inference of guilt was not nearly as strong as the inference of nonguilt.

Since the inferences of guilt and nonguilt are not equally as strong, this court should have reviewed the evidence under the general standard of review. *Mowry, supra*. Under the general standard of review, the evidence is insufficient to sustain a verdict of guilt.

In addition to applying the wrong scope of review, the majority has, without explanation or precedent, set a new standard for when a case should not be submitted to the trier of fact. The majority requires a trial court in either a bench or a jury trial to determine whether "circumstantial evidence is reasonably susceptible of two interpretations . . . ." Once this determination has been made, the majority requires the trial court to determine whether the inference of guilt is stronger than or equal to the inference of nonguilt. The majority opinion then provides that if the trial court determines the inference of nonguilt is stronger than or equal to the inference of guilt, then

the case should not be submitted to the trier of fact.

The majority does not explain when the trial court is supposed to make this determination. The majority does not say if a defendant must make a motion in order for the trial court to make such a determination, and the majority has not explained what type of motion must be made, if a motion is necessary. The majority opinion merely states that the determination must be made.

The determination of a trial court to not submit a case to the trier of fact is effectively a ruling on a motion for a directed verdict. However, we already have standards for when a trial court should direct a verdict. In a criminal case, a trial court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking in probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994). That is to say, a directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Id.*

The majority's new rule instructing a trial court to not submit a case to the trier of fact although reasonable minds differ is contrary to our longstanding rule for directed verdicts. As just stated, directed verdicts are only proper where reasonable minds *cannot* differ. However, the majority requires a trial court to not submit a case to the trier of fact in instances where "circumstantial evidence is reasonably susceptible of two interpretations . . . ." If evidence is reasonably susceptible to two interpretations, then it follows that reasonable minds may differ. The majority, therefore, requires trial courts to take action equivalent to directing a verdict although reasonable minds differ. The majority makes this change without reference to our prior standard or to the reason for the change. I see no reason to depart from our old rule and would not make such a change.

WHITE, J., joins in this concurrence.

# R-D INVESTMENT COMPANY, APPELLANT, V. BOARD OF EQUALIZATION OF SARPY COUNTY, NEBRASKA, APPELLEE.

525 N.W.2d 221

Filed January 6, 1995. No. S-93-903.

1. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, 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. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.
3. **Records: Appeal and Error.** A brief may not expand the evidentiary record and should limit itself to arguments supported by the record.
4. **Taxation: Valuation.** The process of equalization cannot be applied to property that is not taxed.
5. **Administrative Law: Jurisdiction: Appeal and Error.** When an administrative agency lacks subject matter jurisdiction over a claim, the courts also lack subject matter jurisdiction on appeal.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Appeal dismissed, and cause remanded with directions.

Jeffrey A. Silver for appellant.

Michael D. Wellman, Sarpy County Attorney, and Henry L. Wendt for appellee.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and GRANT, J., Retired, and HOWARD, D.J., Retired.

WRIGHT, J.

R-D Investment Company (R-D) appeals the decision of the Sarpy County District Court which affirmed the refusal by the Board of Equalization of Sarpy County, Nebraska (Board), to equalize the value of R-D's real estate to zero.

## SCOPE OF REVIEW

Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, 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. *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509

N.W.2d 618 (1994); *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).

## FACTS

The following facts were stipulated to by the parties: R-D "owns and/or leases" or is otherwise responsible for the payment of taxes on real property which was assessed and taxed in Sarpy County. The real property did not qualify for any property tax exemption for tax year 1991. For that tax year, the Board assessed and taxed the real property at its actual value, and R-D paid the taxes on the real property.

In April 1991, R-D filed a "Property Valuation Protest" with the Board. R-D offered the following rationale for its protest:

> Pursuant to the opinion of the Supreme Court of Nebraska in the case of [*Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991),] and the uniformity and proportionality requirements of Article VIII, Section 1 of the Nebraska Constitution, the taxpayer respectfully requests that all its property in the county be equalized with the lowest value [sic] property in the county (including the appellant taxpayers noted above) and therefore, be reduced to zero.

The Board rejected R-D's protest in a resolution which stated, "[T]his Board of Equalization is aware of no statute or State Supreme Court case declaring such property or class of property to be exempt or unconstitutionally taxed by its political subdivisions."

R-D appealed the Board's determination to the district court for Sarpy County on July 12, 1991. On August 11, 1993, the parties appeared before the district court, entered exhibits 1 and 2, and presented arguments. The Board's objection to exhibit 3 was sustained, and that exhibit was not made a part of the bill of exceptions. On September 23, 1993, the district court issued an "Opinion and Order" which affirmed the decision of the Board. R-D timely filed its notice of appeal.

## ANALYSIS

We note that in the protest form submitted to the Board, R-D did not specifically refer to any class of property with

which it sought equalization. R-D alluded only to "the lowest value [sic] property in the county." We infer that R-D was referring to at least one of two classes of property within Sarpy County: centrally assessed personal property or local tax-exempt property. We hold that the Board did not have jurisdiction to consider equalization of R-D's property with either class of property.

At the time R-D filed its protest, county boards of equalization were governed by Neb. Rev. Stat. § 77-1501 et seq. (Reissue 1990). The Board's duties were set forth in §§ 77-1504 and 77-1506.02. The extent of the Board's equalization jurisdiction was also defined by statute:

> For purposes of sections 77-1504 and 77-1506.02, parcels or items of property or classes of property shall mean locally assessed land, improvements, and personal property. Any property valued by the Tax Commissioner *shall not be subject to equalization* by the county board of equalization under sections 77-1504 and 77-1506.02.

(Emphasis supplied.) § 77-1503.01.

In *John Day Co. v. Douglas Cty. Bd. of Equal.*, 243 Neb. 24, 497 N.W.2d 65 (1993), we held that county boards of equalization had no jurisdiction to consider centrally assessed property when equalizing assessments within their respective counties. In *John Day Co.*, taxpayers asked that the county board equalize the taxpayers' nonexempt local personal property with the exempt property of centrally assessed taxpayers. We held that the equalization between centrally assessed property and locally assessed personal property was a power reserved to the State Board of Equalization and Assessment.

In the case at bar, the Board argues that the holding in *John Day Co.* controls and that the Board itself never had jurisdiction to consider R-D's protest. R-D counters that *John Day Co.* divested jurisdiction from county boards only when *centrally assessed* property was being equalized with *locally assessed* property. R-D claims that its protest was based merely on equalization with locally assessed property, which would have allowed the Board to take jurisdiction.

In its protest, R-D asked that its property be equalized with "the lowest value [sic] property in the county." R-D specifically

included as an example of such property the appellants' property in *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991), in which the appellants protested assessment of their centrally assessed gas pipeline property.

The bill of exceptions in this case is silent as to whether R-D differentiated between locally assessed property and centrally assessed property in its protest to the Board. Therefore, we are unable to determine whether the protest included only locally assessed property, which is the only property over which the Board had jurisdiction. A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993). Only in its briefs on appeal to the Supreme Court does R-D differentiate between locally assessed property and centrally assessed property. A brief may not expand the evidentiary record and should limit itself to arguments supported by the record. *Obermeier v. Bennett*, 230 Neb. 184, 430 N.W.2d 524 (1988). See, also, *Gables CVF v. Bahr, Vermeer & Haecker Architect*, 244 Neb. 346, 506 N.W.2d 706 (1993), *modified* 244 Neb. 613, 506 N.W.2d 706; *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993); *Scott v. Hall*, 241 Neb. 420, 488 N.W.2d 549 (1992). Because R-D referred only to centrally assessed property in its protest to the Board, the record does not establish that only locally assessed property is to be considered.

The *John Day Co.* opinion states:

> We hold that the county board did not have jurisdiction to consider the valuations of centrally assessed property in arriving at the value of appellant taxpayers' locally assessed personal property within Douglas County. By restricting the power of a county board to equalize only those assessments over which it had authority to assess the value, § 77-1503.01 took away the county board's authority to increase or decrease locally assessed property values in relation to other property located within the county whose value is centrally assessed. . . .

> In conclusion, § 77-1504 does not confer jurisdiction on the county board to decrease the challenged assessed personal property values as requested. Consequently, neither the district court nor this court acquired jurisdiction over the matter . . . .

243 Neb. at 32, 497 N.W.2d at 71. Pursuant to *John Day Co.*, the Board did not have jurisdiction to hear R-D's protest.

Although we hold that R-D failed to differentiate between locally assessed property and centrally assessed property in its protest, the outcome would be no different if such a differentiation had been made. Assuming, for the sake of argument, that we can determine from the protest that R-D intended to differentiate between centrally assessed property and local tax-exempt property, R-D still failed to invoke the jurisdiction of the Board because the protest involved local tax-exempt property. We have held:

> Equalization is the process of ensuring that all *taxable* property is placed on the assessment rolls at a uniform percentage of its actual value. . . . "The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax." . . . *The process of equalization, therefore, cannot be applied to property that is not taxed.*

(Emphasis supplied.) *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 577, 471 N.W.2d 734, 742 (1991). Since the Board had no authority to equalize R-D's property with property that was exempt from taxation, R-D's remedy did not involve equalization, and the Board could not equalize the value of R-D's property to zero.

The Board had no jurisdiction to grant the relief requested. We have held that when an administrative agency lacks subject matter jurisdiction over a claim, the courts also lack subject matter jurisdiction on appeal. See *In re Complaint of Fecht*, 224 Neb. 752, 401 N.W.2d 470 (1987). Therefore, the district court did not have jurisdiction to hear R-D's appeal from the Board's decision.

An appellate court has the power and the duty to determine

whether it has jurisdiction over the matter before it. See *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994). "If the district court lacked power to entertain the proceedings and decide the questions raised by such action, this court is equally without power to review the final judgment or order which is the subject matter of the action brought to the district court." *Glup v. City of Omaha*, 222 Neb. 355, 359, 383 N.W.2d 773, 777 (1986). This court also lacks subject matter jurisdiction to decide the case at bar.

Because this court lacks subject matter jurisdiction, the appeal is dismissed, and the cause is remanded to the district court for Sarpy County with directions that the matter be dismissed.

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, V. DARRIN McHENRY, APPELLANT.

525 N.W.2d 620

Filed January 6, 1995. No. S-93-1020.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal of an action based on a claim of erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
2. **Proof.** The State must prove beyond a reasonable doubt every element of a charged offense.
3. **Due Process: Jury Instructions.** When a court improperly defines reasonable doubt in its jury instructions, due process is not achieved.
4. **Constitutional Law: Jury Instructions: Proof: Words and Phrases.** The proper inquiry is not whether an instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it. The constitutional question is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard.

5. **Jurors.** A juror must have a reasonable doubt that the defendant is guilty in order to acquit the defendant; the jury does not have to be convinced that the defendant is not guilty in order to acquit.
6. **Constitutional Law: Convictions: Due Process: Proof.** The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires.
7. **Jury Instructions: Appeal and Error.** The instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
8. **Venue.** Neb. Rev. Stat. § 29-1301 (Reissue 1989) permits a change of venue when a defendant cannot receive a fair and impartial trial in the county in which the offense was committed.
9. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof.
10. **Juror Qualifications.** The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based on evidence presented in court.
11. **Trial: Juries.** Except when there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine a venireperson out of the presence of all other venirepersons.
12. ____: ____. The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court.
13. **Juror Qualifications.** A juror who has indicated an inability to fairly and impartially determine guilt by refusing to subordinate his or her own personal views must be excused for cause.
14. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial due to prosecutorial misconduct, a defendant must show that a substantial miscarriage of justice has actually occurred.
15. **Judgments: Motions for Mistrial: Juries.** Reversal of a judgment may be ordered for failure of the trial court to grant a mistrial when a proper admonition or instruction to the jury is not given.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for a new trial.

Richard A. Birch, of Nielsen & Birch, and Patrick B. Hays for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

WHITE, J.

Following a jury trial, Darrin McHenry was found guilty of count I, aiding and abetting first degree murder; count II, aiding and abetting attempted robbery; and count III, first degree sexual assault. McHenry was sentenced to life imprisonment for count I, $6^2/_3$ to 20 years' imprisonment for count II, and $16^2/_3$ to 50 years' imprisonment for count III. McHenry was also ordered to serve 4 days of each year in solitary confinement. McHenry appeals his convictions and sentences.

Richard Sterkel was found dead near the American Legion Club in North Platte, Nebraska. An autopsy revealed that Sterkel died from strangulation and multiple injuries to the head, neck, and chest.

McHenry, Frank Ladig, Antonio Estrada, Nordel Moore, and others were living under the South Platte River Bridge and at an encampment near the American Legion Club. Sterkel was passing by the campsite behind the legion club when the group invited him to drink with them. Sterkel stayed with the group for a few days. During that time the group drank heavily, swam in the river, and played cards. On July 28, 1993, the day of Sterkel's death, the group was encamped under the bridge because it had started to rain. According to Ladig, after drinking under the bridge and playing cards, McHenry stood up and said, "Let's do it." McHenry, Ladig, and Estrada then began beating Sterkel. McHenry asked Sterkel to give up his wallet. Sterkel claimed his wallet was at the other campsite, so the parties took Sterkel back to the campsite near the legion club, hitting and kicking him along the way. The group searched the legion club campsite for Sterkel's wallet but could not find it. Ladig testified that he and Estrada left the area, and McHenry and Moore stayed on, beating and sexually assaulting Sterkel.

McHenry claims that the district court erred in six respects. McHenry alleges in his first assignment of error that the district court failed to properly instruct the jury on the burden of proof needed to convict McHenry. McHenry claims that the judge's instructions to the jury lowered the burden of proof by which the State must prove McHenry guilty of the crimes charged.

In an appeal of an action based on a claim of erroneous

instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Gatson*, 244 Neb. 231, 505 N.W.2d 696 (1993); *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). The State must prove beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Gatson, supra*; *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992). "[W]hen a court improperly defines reasonable doubt in its jury instructions, due process is not achieved." *Garza*, 241 Neb. at 959, 492 N.W.2d at 49. See, *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990); *In re Winship, supra*.

> [T]he proper inquiry is not whether the instruction "could have" been applied in unconstitutional manner, but whether there is reasonable likelihood that the jury *did* so apply it. [Citation omitted.] The constitutional question . . . is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard.

*Victor v. Nebraska*, ____ U.S. ____, 114 S. Ct. 1239, 1243, 127 L. Ed. 2d 583 (1994). Thus, the question becomes whether there is a reasonable likelihood that the jury in McHenry's case misunderstood the reasonable doubt instruction given by the court so as to allow conviction based on insufficient proof. The district court read the following instruction before the trial began:

> A reasonable doubt is a doubt formed upon reason. It is not a fanciful doubt, a whimsical doubt or a capricious doubt. Proof beyond a reasonable doubt requires proof so compelling as to convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs. However, if you are not satisfied of the defendant's guilt to that extent, then reasonable doubt exists and the defendant must be found not guilty.

The court then stated:

> You have to read the instructions and decide whether the

> presumption has been met. I think the instruction is clear. It's a doubt that you would rely upon in your own personal affairs. *It's something that would convince you in something you do personally*. It's a heavy burden. These are not light things to set aside. They are very important. They're absolutely critical.

(Emphasis supplied.)

The judge's explanation of the reasonable doubt standard raises the level of doubt a juror needs to find McHenry not guilty, thereby lowering the State's burden to prove McHenry guilty. A juror must have a reasonable doubt that the defendant is guilty in order to acquit the defendant; the jury does not have to be *convinced* that the defendant is not guilty in order to acquit.

The trial court judge in McHenry's case explained the reasonable doubt standard so that, in order to acquit McHenry, a juror would have to be *convinced* of the fact that McHenry was not guilty instead of having a reasonable doubt as to his guilt. Thus, the judge lowered the standard by which the State had to prove McHenry guilty of the crime with which he was charged. "The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." *Victor*, 114 S. Ct. at 1251. See *Gatson, supra*. That is exactly what the trial court judge did in McHenry's case, and thus there is a reasonable likelihood that the jury did indeed convict on a lesser showing than due process requires. We note that the actual jury instruction itself meets due process requirements in that it adequately explains to the jury the level of doubt needed to find McHenry not guilty. Indeed, we approved of a very similar instruction in *Garza, supra*. It is the judge's explanation of that jury instruction that raised the level of doubt a juror must have before finding McHenry not guilty, thereby lowering the State's burden of proof.

The "instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal."

*State v. Gatson*, 244 Neb. 231, 233, 505 N.W.2d 696, 698 (1993). Accord *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992). We find that the reasonable doubt standard found in the instruction to the jury, as heightened by the trial court judge's comment, did not correctly state the law and is misleading. McHenry has met his burden and has shown that the judge's explanation of the jury instruction in question is prejudicial. Because there is a reasonable likelihood that the jury misunderstood the reasonable doubt instructions, we reverse the judgment and remand the cause for a new trial.

McHenry alleges in his second assignment of error that the district court erred in refusing to grant McHenry's motions for change of venue. McHenry argues he could not possibly receive a fair trial due to the pretrial publicity surrounding his case. The night before the trial, two television news reports disclosed that McHenry filed a motion in limine to restrict any reference to polygraph examinations. McHenry claims that the reference to polygraph examinations is inherently prejudicial and that thus he could not receive a fair trial.

Neb. Rev. Stat. § 29-1301 (Reissue 1989) permits a change of venue when the defendant cannot receive a fair and impartial trial in the county in which the offense was committed. " 'A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. . . .' " *State v. Bowen*, 244 Neb. 204, 207, 505 N.W.2d 682, 686 (1993), quoting *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992). The law regarding change of venue due to pretrial publicity is well established. In *Bowen*, 244 Neb. at 207-08, 505 N.W.2d at 686, we quoted *Phelps*, stating:

> "[M]ere jury exposure to news accounts of a crime does not presumptively deprive a criminal defendant of due process. Rather, to warrant a change of venue, a defendant must show the 'existence of pervasive misleading pretrial publicity.' *State v. Bradley*, 236 Neb. 371, 386, 461 N.W.2d 524, 536 (1990), *cert. denied* ____ U.S. ____, 112 S. Ct. 143, 116 L. Ed. 2d 109 (1991). Indeed, in order for a defendant to successfully move for a change of venue based on pretrial publicity, he or she must show that the 'publicity has made it impossible to secure a fair and

impartial jury.' *State v. Jacobs*, 226 Neb. at 190, 410 N.W.2d at 473. Accord *State v. Heathman*, 224 Neb. 19, 395 N.W.2d 538 (1986). A number of factors must be evaluated in determining whether that burden has been met, including the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire was drawn. *State v. Williams* [239 Neb. 985, 480 N.W.2d 390 (1992)]; *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991); *State v. Jacobs, supra*; *State v. Bird Head*, [225 Neb. 822, 408 N.W.2d 309 (1987)]; *State v. Kern*, [224 Neb. 177, 397 N.W.2d 23 (1986)]; *State v. Heathman, supra*; *State v. Fallis*, 205 Neb. 465, 288 N.W.2d 281 (1980); *State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976).

"As noted in *State v. Bradley, supra*, voir dire examination provides the best opportunity to determine whether venue should be changed. . . ."

"[T]he law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based on evidence presented in court." *State v. Bradley*, 236 Neb. 371, 386, 461 N.W.2d 524, 536 (1990).

After McHenry made his motion to change venue, the judge ordered that the voir dire proceed and that if it became apparent that a fair and impartial jury could not be selected, then he would consider the motion. Some of the prospective jurors had seen the newscasts the previous night. The court asked those prospective jurors who had responded that they had seen the newscasts if any of them were not capable of taking an oath and deciding the case solely on the evidence. None responded that they were incapable of deciding the case solely on the evidence. Upon questions from McHenry's attorney, none indicated they

remembered anything remarkable from the newscasts. In fact, as McHenry admits, none of the venirepersons who had seen the newscasts specifically recalled the mention of polygraph examinations. None indicated that they could not be fair and impartial. McHenry then passed the jury for cause.

If McHenry indeed thought that a fair and impartial jury could not be found, he should have challenged the whole jury panel for cause. McHenry is unable to show that he was prejudiced by the existence of pervasive and misleading pretrial publicity and that the publicity made it impossible to secure a fair and impartial jury. Accordingly, the trial court did not abuse its discretion in not granting McHenry a change of venue, and McHenry's second assignment of error is meritless.

McHenry alleges in his third assignment of error that the district court erred in failing to grant McHenry's requests that the venirepersons be sequestered during jury selection. McHenry claims that the reports on the polygraph examination matter were highly prejudicial and that he needed to question each juror individually to ascertain the amount of influence the newscasts had upon each juror. McHenry argues that he would not be able to thoroughly explore the possibility that jurors had been influenced by the newscasts without contaminating the whole venire.

"Except when there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine a venireperson out of the presence of all other venirepersons." *State v. Thompson*, 244 Neb. 375, 407, 507 N.W.2d 253, 274 (1993). Accord *Bradley, supra*. In *Bradley*, the defendant argued that he was unable to ask the "searching questions" required under the circumstances, just as McHenry now argues. We found the record in *Bradley* to be "replete with questions regarding pretrial publicity and whether such publicity had caused anyone to form an opinion as to Bradley's guilt or innocence." *Bradley*, 236 Neb. at 387, 461 N.W.2d at 537. Likewise, we also find the record in McHenry's case replete with questions regarding the effects of pretrial publicity, and we are satisfied with the measures taken to ensure that McHenry received a fair and impartial jury to hear his case.

The judge and both attorneys questioned thoroughly those

jurors who indicated that they had seen the newscasts. None of the jurors who had seen the newscasts gave any indication that the newscasts influenced their ability to be fair and impartial. McHenry has no basis on which to assert that further indepth questioning of sequestered jurors would reveal anything more than was ascertained during jury selection. Furthermore, McHenry did not object to the jury panel as a whole; he passed for cause. Indeed, this action is a strong indication that McHenry was satisfied with the jury selected and must have thought the jury to be fair and impartial. McHenry cannot show how he was prejudiced by the district court's failure to grant his motion for sequestration of the jury, and thus his third assignment of error is meritless.

McHenry claims in his fourth assignment of error that the district court erred in excluding a potential juror from the venire based on her statements of her religious beliefs. Prior to jury selection, a potential juror gave the bailiff a message indicating that the potential juror, based on her religious beliefs, could not judge her fellow human beings. Upon questioning by the court and both attorneys, the excused juror testified that she could not listen to the evidence and be impartial. McHenry argues that excusing the juror denied McHenry his right to a fair and impartial jury.

"[T]he retention or rejection of a venireperson as a juror is a matter of discretion with the trial court." *State v. Bradley*, 236 Neb. 371, 388, 461 N.W.2d 524, 538 (1990). "A juror who has indicated an inability to fairly and impartially determine guilt by refusing to subordinate his [or her] own personal views . . . must be excused for cause." *State v. Benzel*, 220 Neb. 466, 477, 370 N.W.2d 501, 510 (1985). See, also, *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982); *State v. Kirby*, 185 Neb. 240, 175 N.W.2d 87 (1970). Here, the excused juror testified that she was not able to subordinate her personal religious views and was correctly excused for cause. Therefore, we find the district court did not abuse its discretion, and McHenry's fourth assignment of error is meritless.

McHenry alleges in his fifth assignment of error that the district court erred in imposing a sentence not authorized by law. The State agrees. As part of McHenry's sentence, the

district court ordered him to spend 4 days per year in solitary confinement. Neb. Rev. Stat. § 29-2204 (Supp. 1993), effective before McHenry was sentenced, eliminated the provisions authorizing the court to impose solitary confinement as part of a sentence. We agree with McHenry and the State that the court imposed a sentence not authorized by law.

McHenry alleges in his sixth assignment of error that the district court erred in failing to grant a mistrial based upon improper comments made by the prosecuting attorney. McHenry's attorney asked the State's witness a series of questions on cross-examination relating to whether the witness was receiving any special treatment regarding the witness' own trial for a separate offense in exchange for the witness' testimony. The questions were quite confusing, and it was obvious that McHenry's attorney and the witness were not talking about the same trial. When the witness answered that he had gotten "this case" continued for 3 years, the prosecutor interjected the statement "That's not true." McHenry motioned for a mistrial. The jury was excused, and the judge admonished the prosecutor for improperly commenting on the evidence. The prosecutor was not admonished in front of the jury, nor was the jury instructed to disregard the prosecutor's statement.

Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a " 'substantial miscarriage of justice has actually occurred.' " *State v. Valdez*, 239 Neb. 453, 457, 476 N.W.2d 814, 817 (1991). "[R]eversal of a judgment may be ordered for failure of the trial court to grant a mistrial when a proper admonition or instruction to the jury . . . is not given." *State v. Fraser*, 230 Neb. 157, 162, 430 N.W.2d 512, 515 (1988). Since the judge did not admonish the prosecutor in front of the jury or instruct the jury to ignore the comment, McHenry could show that a substantial miscarriage of justice has occurred. However, since the cause has been remanded for a new trial on the first assignment of error, further discussion on this matter is not necessary as it is not dispositive of the case.

Having found reversible error in the first assignment of error, we reverse the judgment and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., concurring in part, and in part dissenting.

I concur with the majority's disposition of assignments of error Nos. 2 through 5. However, I respectfully dissent from the majority's disposition of assignments of error Nos. 1 and 6.

With respect to assignment of error No. 1, I do not think that the trial court's pretrial explanation of the reasonable doubt standard lowered the State's burden to prove McHenry guilty. The comments to which the majority objects were made to the panel of prospective jurors before the jury was selected and before commencement of the trial. When I read the comments in their entirety, it is my opinion that the court was telling the prospective jurors that they could not convict McHenry unless they were convinced of his guilt. The court emphasized the burden of proof that the State must meet in order to obtain a conviction and explained that proof beyond a reasonable doubt required proof so compelling as to convince the prospective jurors of the truth of the fact to the extent that they would be willing to act upon such belief without reservation in an important matter in their own business or personal affairs.

The court noted that

> [t]he burden is very heavy upon the [S]tate. Some people say the scales of justice have to tip almost to the bottom. Some people put it in a numerical relationship, "It's got to be 99 out of 100." I don't know what the answer is. Each jury decides that based upon the evidence and the instructions.

The jury was later selected from the panel of prospective jurors, and the trial commenced.

At the conclusion of the evidentiary phase of the trial, the court gave the following reasonable doubt instruction to the jurors:

> The defendant is presumed to be innocent of the charges contained in the information. This presumption remains with the defendant throughout the trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The fact that the State of Nebraska has charged the defendant in an information is not evidence, and the State has the burden of proving the guilt of the defendant beyond

> a reasonable doubt. This burden remains on the State throughout the trial. The defendant is not required to prove his innocence. The State is not to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence.
>
> A reasonable doubt is a doubt formed upon reason. It is not a fanciful doubt, a whimsical doubt or capricious doubt. Proof beyond a reasonable doubt requires proof so compelling as to convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs. However, if you are not satisfied of the defendant's guilt to that extent, then reasonable doubt exists[,] and the defendant must be found not guilty.

As the majority notes, the actual jury instruction met the due process requirements. All the instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *State v. Gatson*, 244 Neb. 231, 505 N.W.2d 696 (1993). As I read the instructions given at the conclusion of the evidence, I find that they correctly state the law, are not misleading, and adequately cover issues supported by the pleadings and the evidence, and I do not find any prejudicial error which would necessitate a reversal.

As to assignment of error No. 6, regarding alleged misconduct by the prosecutor, I find that McHenry has not shown that a substantial miscarriage of justice actually occurred. See *State v. Valdez*, 239 Neb. 453, 476 N.W.2d 814 (1991). On cross-examination, one of the State's witnesses was questioned regarding whether that witness was receiving any special treatment in exchange for his testimony in McHenry's trial. Defense counsel asked, "You've gotten this case continued several times, haven't you?" The witness responded, "It's been continued for three years, yes." In response to this remark, the prosecutor interjected, "That's not true." The jury was excused, and the prosecutor was admonished for improperly

commenting on the evidence. The jury was not instructed to disregard the comment.

It is obvious that the witness was not referring to the case involving McHenry, because the crimes for which McHenry was charged took place in July 1992 and the trial commenced in September 1993. The witness was referring to a matter pending in the State of Kansas, and the county attorney in Lincoln County, Nebraska, would have nothing to do with the 3-year continuance of a matter pending in Kansas. Although the prosecutor's comment was improper, I cannot say that a substantial miscarriage of justice actually occurred.

For the reasons set forth herein, I would affirm the judgment of conviction.

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COUNTY OF ADAMS ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT AND M. BERRI BALKA, TAX COMMISSIONER, APPELLEES.

COUNTY OF ADAMS ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT AND M. BERRI BALKA, TAX COMMISSIONER, APPELLEES.

525 N.W.2d 629

Filed January 6, 1995. Nos. S-94-092, S-94-093.

1. **State Equalization Board: Appeal and Error.** In an appeal from the State Board of Equalization and Assessment, an appellate court searches only for errors appearing on the record, i.e., whether the decision conforms to law; is supported by competent and relevant evidence; and was not arbitrary, capricious, or unreasonable. Questions of law nonetheless are reviewed de novo on the record.
2. **Administrative Law: Limitations of Actions: Jurisdiction.** Generally, an administrative agency may only reconsider its decisions until the aggrieved party institutes judicial review, or the statutory time for such review has expired. There is no exception for "extraordinary circumstances."

Appeal from the State Board of Equalization and Assessment. Appeal dismissed.

Patrick T. O'Brien, of Bauer, Galter, O'Brien, Allan & Butler, and Paul L. Douglas for appellants.

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

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

LANPHIER, J.

These are appeals from a determination made January 13, 1994, by the State Board of Equalization and Assessment (Board) that it does not have jurisdiction over petitions to vacate the Board's own orders entered on April 12 and June 14, 1991. The 1991 orders were made because the Board anticipated that Nebraska state law would require a reduction of the tax liability of taxpayers and resulting tax refunds. When it came about that the anticipated reduction of tax and resulting refund were not required by state law, appellants sought to set aside the orders even though no appeal of the 1991 orders had been made and the appeal time had passed. The petition in case No. S-94-092 was filed on behalf of many counties, cities, and school districts in Nebraska; the petition in case No. S-94-093 was filed on behalf of many counties in the state. The counties, cities, and school districts will be collectively referred to as "appellants." The appeals have been combined because the parties in each case are represented by the same respective attorneys, the legal issues raised are identical, and the bill of exceptions in each case is the same. Because we conclude that the Board properly determined that it lacked jurisdiction over appellants' petitions, this appeal is dismissed.

## BACKGROUND

In their petitions, appellants asked the Board to vacate its prior orders in which the values of personal property of certain centrally assessed taxpayers were recertified at zero for tax years 1989 and 1990. The orders were purportedly made pursuant to *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991), and companion cases. After the Board's action, the Tax Commissioner sent letters to

appellants recertifying the value of the centrally assessed taxpayers' property to zero. The tax liability of the taxpayers was reduced, and consequently the taxpayers were owed refunds by appellants.

Appellants assert in their petitions that the Board should vacate its prior orders because this court has subsequently held that recertification to zero is an improper remedy not allowing for equalization. See, *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 (*MAPCO II*); *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991) (*MAPCO I*). Further, appellants submit that once the Board's prior orders have been vacated, the Board should apply the appropriate remedy to alleviate the disparate treatment of the centrally assessed taxpayers. The appropriate remedy, appellants submit, is for the Board to apply the remedy approved by this court in *MAPCO II*. That is, the Board should reduce the equalized unit value of the centrally assessed taxpayers by a given ratio: the ratio of the value of personal property which had been inappropriately omitted from taxation to the value of all personal and real property which should have been subject to taxation.

The parties have stipulated that for the purposes of the petitions filed herein, "for tax year 1989 the ratio between the value of property considered exempt under Neb. Rev. Stat. § 77-202(6) through (9) plus the value of railroad rolling stock, and the value of all tangible property in Nebraska is 18.81 %."

Although no filing date appears on the petitions, the petitions were formally received by the Board during its meeting on July 7, 1993. On January 6, 1994, the Board heard evidence on the petitions and recessed. The Board reconvened on January 13, when it approved a motion to deny the petitioners' requests because of a lack of jurisdiction.

## ASSIGNMENTS OF ERROR

Appellants contend that the Board erred (1) in its conclusion that it lacked jurisdiction to consider the petitions filed by appellants, and (2) in its denial of relief requested by appellants in their petitions.

## STANDARD OF REVIEW

In an appeal from the Board, an appellate court searches only for errors appearing on the record, i.e., whether the decision conforms to law; is supported by competent and relevant evidence; and was not arbitrary, capricious, or unreasonable. *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989). Questions of law nonetheless are reviewed de novo on the record. *Id.*

## JURISDICTION

The sole issue raised by appellants is whether the Board has jurisdiction to vacate or set aside its own orders after the statutory time for judicial review has expired. Appellants acknowledge that generally an administrative agency may only reconsider its decisions until the aggrieved party institutes judicial review, or the statutory time for such review has expired. *B. T. Energy Corp. v. Marcus*, 222 Neb. 207, 382 N.W.2d 616 (1986); *Morris v. Wright*, 221 Neb. 837, 381 N.W.2d 139 (1986); *Bockbrader v. Department of Insts.*, 220 Neb. 17, 367 N.W.2d 721 (1985). Acknowledging that the time for appeal has long passed, appellants claim that because of "extraordinary circumstances" an exception to the general rule should be made in this case. Brief for appellants in case No. S-94-092 at 16. Appellants acknowledge that no such exception has heretofore been recognized in Nebraska, but urge this court to do so now.

In support of the exception, appellants cite the following cases: *Matter of Equitable Trust Co. v. Hamilton*, 226 N.Y. 241, 123 N.E. 380 (1919); *Matter of Drew v. State Liq. Auth.*, 2 N.Y.2d 624, 142 N.E.2d 201, 162 N.Y.S.2d 23 (1957); *People ex rel. Finnegan v. McBride*, 226 N.Y. 252, 123 N.E. 374 (1919); *Warburton v. Warkentin*, 185 Kan. 468, 345 P.2d 992 (1959); and *Automobile Club v. Commissioner*, 353 U.S. 180, 77 S. Ct. 707, 1 L. Ed. 2d 746 (1957). None of these cases, except for *Warburton*, merit discussion because they do not concern the issue of whether an administrative agency may revisit its prior determination after an appeal has been filed or the time for appeal has passed.

In *Warburton*, an administrative agency was permitted to

revisit a prior determination after the time for appeal. The basis for allowing the administrative agency to revisit its prior determination was the peculiar "continuing jurisdiction" of the agency. 185 Kan. at 476, 345 P.2d at 998. The Board does not have continuing jurisdiction similar to that of the agency in *Warburton*. The Board derives its powers from the Nebraska Constitution and from statute. *County of Otoe v. State Board of Equalization & Assessment*, 182 Neb. 621, 156 N.W.2d 728 (1968). The Board's powers are limited to those granted by the state Constitution and statute. Continuing jurisdiction is not one of the Board's enumerated powers. Thus, *Warburton* is inapposite and, therefore, unpersuasive. Additionally, we recognize that the State has a great interest in the finality in the Board's actions. Absent persuasive authority or a compelling reason to depart from the general rule, we decline to create an exception to the general rule.

Appellants argue that in *MAPCO I*, this court held that equalization to zero was an inappropriate remedy for taxpayers whose tangible property had been unequally and unconstitutionally taxed. Appellants, therefore, submit that the Board's orders of April 12 and June 14, 1991, equalizing appellants' property to zero are "illegal, based on erroneous conclusions of law, [and] without . . . authority." Brief for appellants in case No. S-94-092 at 11. Hence, appellants argue that the Board's orders are subject to collateral attack pursuant to *Hacker v. Howe*, 72 Neb. 385, 101 N.W. 255 (1904), in which we held actions of the Board are subject to collateral attack where the Board exercises a power not conferred upon it. However, the present case is not a collateral attack. As explained above, the Board properly concluded that it did not have jurisdiction to revisit its prior orders after the time for appeal had passed. There being no jurisdiction in the tribunal below, we have no jurisdiction. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993). Since we do not have jurisdiction of this matter, the question of whether the Board's orders of April 12 and June 14, 1991, are void because of the retroactive effect of *MAPCO I* is not properly before us. This appeal, therefore, is dismissed.

APPEAL DISMISSED.

# DAVID R. HUNTWORK, APPELLANT, V. NELLIE J. VOSS, APPELLEE.

525 N.W.2d 632

Filed January 13, 1995. No. S-93-352.

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 a 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. **Motor Vehicles: Highways.** The most dangerous movement on public streets or highways is the left-hand turn. While the left-hand turn at intersections is within the purview of this statement, the left-hand turn across a favored public highway between intersections is a particularly dangerous one.
4. **Motor Vehicles: Negligence.** The giving of the statutorily required left-hand turn signal is not enough; one must exercise reasonable care under all the circumstances.
5. ____: ____. The exercise of reasonable care includes the requirement that a left-turning motorist maintain a proper lookout by looking both to the front and to the rear before executing a left turn between intersections.
6. **Motor Vehicles.** A motorist must see what is in plain sight.
7. **Motor Vehicles: Highways: Negligence.** Where the driver of a vehicle turning across a street or highway between intersections fails to look at all at a time and place where to look would be effective, or looks and negligently fails to see that which is plainly in sight, or is in a position where he cannot see, a question for the court is usually presented. Where he looks but does not see an approaching automobile because of unusual conditions or circumstances, or sees the approaching vehicle and erroneously misjudges its speed or distance, or for some reason assumes he could safely complete the movement, the question is usually one for the jury.
8. **Motor Vehicles.** The speed of an automobile is excessive if it is found to be unreasonable or imprudent under the existing circumstances, even though it may not exceed the applicable statutory limits.
9. ____. A motorist overtaking and passing another car must exercise vigilance commensurate with the surrounding conditions.

Appeal from the District Court for Pierce County: RICHARD P. GARDEN, Judge. Reversed and remanded.

Douglas R. Milbourn, of Milbourn, Fehringer, Kessler & Peetz, P.C., for appellant.

C.J. Gatz, of Jewell, Gatz, Collins, Fitzgerald & DeLay, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and HOWARD, D.J., Retired.

PER CURIAM.

David R. Huntwork sued Nellie J. Voss to recover for personal injuries sustained when Voss' vehicle struck Huntwork's left-turning vehicle as Voss was passing another vehicle and then Huntwork's vehicle on a rural county road. The district court for Pierce County awarded summary judgment in favor of Voss and ordered Huntwork's petition dismissed. Huntwork appeals.

We reverse the district court's order of summary judgment and remand the cause for trial.

## 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 a party the benefit of all reasonable inferences deducible from the evidence. *Omega Chemical Co. v. Rogers*, 246 Neb. 935, 524 N.W.2d 330 (1994); *LaBenz Trucking v. Snyder*, 246 Neb. 468, 519 N.W.2d 259 (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

Viewing the evidence in the light most favorable to Huntwork and giving Huntwork the benefit of all reasonable inferences deducible from the pleadings and the depositions entered into evidence, we find that the facts of this case are as follows:

On July 13, 1989, at approximately 2:30 p.m., Huntwork was proceeding southbound on a rural two-lane blacktop county road. He was driving his 1977 Plymouth Volare station wagon, and his wife and three children were in the vehicle with him. Following Huntwork were a pickup, a brown car, and the Voss vehicle, a 1986 Chevrolet Cavalier. The day was clear and sunny. The road was flat and in good condition.

Huntwork slowed, preparing to turn left into a private

driveway, and began to signal his intention 150 feet before the turn. At that time, Huntwork checked his rearview mirror and noted the pickup approximately 50 to 70 feet behind him. He saw no other vehicles at that time. Huntwork then checked his side mirror and saw a brown vehicle coming past him at a "high rate of speed." Huntwork continued to slow and waited as the brown car passed.

Upon reaching the driveway, Huntwork rechecked his inside rearview mirror and then his left side mirror to verify that the pickup was continuing to honor his turn signal and that there was no northbound or southbound traffic before beginning to execute the left turn. Huntwork testified in his deposition that there was "no car of any kind" coming up behind him and that he then began to execute his turn at a speed he estimated at 5 to 10 m.p.h.

As Huntwork turned, Voss' vehicle struck the left front wheel area of Huntwork's vehicle as Voss attempted to pass the pickup and Huntwork. The impact of the collision impelled Huntwork's vehicle southward down the road where it came to rest on the left shoulder. The Voss vehicle spun and came to rest facing the opposite direction, that is, northward, in the road. The Voss vehicle received damage to a fender and the front end, and Huntwork's vehicle was declared a total loss.

Huntwork sued Voss for negligence to recover for personal injuries to himself and his daughter. In her answer, Voss affirmatively alleged that Huntwork was contributorily negligent sufficient to bar his recovery.

In her deposition entered into evidence in support of her summary judgment motion, Voss claimed that the three vehicles ahead of her were "parked" when she came upon them and that after stopping on the highway, she followed the brown car in an attempt to pass the pickup and the Huntwork vehicle. In a recorded telephone statement made to Huntwork's attorney, a transcribed copy of which was included as an exhibit to Voss' deposition, Voss claimed that she was traveling at no more than 5 to 10 m.p.h. while attempting to pass. Voss stated in her deposition that she was unable to see whether Huntwork's turn signals were on.

The trial court entered summary judgment in favor of Voss

on the basis that Huntwork was contributorily negligent as a matter of law for failing to see Voss prior to making the left-hand turn, and dismissed Huntwork's petition. Huntwork 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.

## ASSIGNMENTS OF ERROR

Summarized and restated, Huntwork claims that the district court erred in awarding summary judgment in favor of Voss and dismissing Huntwork's petition because (1) it erroneously found Huntwork to be contributorily negligent as a matter of law even though he had met the standard of care imposed upon left-turning motorists and (2) it erroneously drew the inference that Voss was free of negligently exceeding the statutory speed limit.

## ANALYSIS

We first turn to the issue of Huntwork's contributory negligence.

This court has long recognized the danger inherent in left-hand turns.

> The most dangerous movement on public streets or highways is the left-hand turn. While the left-hand turn at intersections is within the purview of this statement, *the left-hand turn across a favored public highway between intersections is a particularly dangerous one*. Legislatures have seen fit to regulate such movements and courts have required a degree of care commensurate with the danger.

(Emphasis supplied.) *Petersen v. Schneider*, 153 Neb. 815, 819, 46 N.W.2d 355, 358 (1951), *modified* 154 Neb. 303, 47 N.W.2d 863.

Accordingly, a left-turning motorist such as Huntwork has certain statutorily imposed duties, as well as the duties imposed by the common law. A left-turning motorist has the duty to continuously signal his or her intention to turn left during not less than the last 100 feet before turning. See Neb. Rev. Stat. § 60-6,161 (Reissue 1993).

A left-turning motorist also has the duty not to turn unless and until the movement can be made with reasonable safety. *Id.*

This court has held, under the predecessor to § 60-6,161, that "the giving of the statutory signal is not enough, one must exercise reasonable care under all the circumstances." *Petersen v. Schneider*, 153 Neb. at 819, 46 N.W.2d at 358. Accord *Rowedder v. Rose*, 188 Neb. 664, 199 N.W.2d 18 (1972).

The exercise of reasonable care includes the requirement that a left-turning motorist maintain a proper lookout by looking both to the front and to the rear before executing a left turn between intersections. See *Petersen v. Schneider, supra*. "One must look at a time when possible danger could be observed. The observations must be made immediately before the impending movement; otherwise . . . the observation would be completely ineffective for the accomplishment of the purpose intended." 153 Neb. at 820, 46 N.W.2d at 358-59. The failure to look at a time when looking would have been effective is negligence as a matter of law. *Circo v. Transit Auth. of City of Omaha*, 217 Neb. 497, 348 N.W.2d 908 (1984). Furthermore, a motorist must see what is in plain sight. *Burrows v. Jacobsen*, 209 Neb. 778, 311 N.W.2d 880 (1981); *Schanaman v. Ramirez*, 206 Neb. 212, 292 N.W.2d 39 (1980).

The evidence in this case is uncontroverted that Huntwork signaled his intention to turn left for the statutorily required distance. We must also accept as true that Huntwork checked repeatedly for traffic approaching from the rear, including immediately prior to executing his turn, and saw none. Moreover, giving Huntwork the benefit of all favorable inferences, we may properly infer that although Huntwork checked both his inside and outside rearview mirrors repeatedly, including immediately prior to his turn, Voss' vehicle could not be seen by Huntwork because it was obscured from Huntwork's vision behind the pickup.

Notwithstanding Voss' claim that she was traveling 5 to 10 m.p.h. when she collided with Huntwork's vehicle, it is apparent that she passed first the pickup and then Huntwork at a relatively high rate of speed. This inference is supported by the positions of the vehicles following the impact, including the fact that the Voss vehicle spun 180 degrees in the roadway. See *Flory v. Holtz*, 176 Neb. 531, 126 N.W.2d 686 (1964) (stating that, among other things, distance traveled after impact and

force of impact constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile).

This court has held that the following rule governs the negligence of left-turning motorists between intersections:

> Where the driver of a vehicle turning across a street or highway between intersections fails to look at all at a time and place where to look would be effective, or looks and negligently fails to see that which is plainly in sight, or is in a position where he cannot see, a question for the court is usually presented. *Where he looks but does not see an approaching automobile because of unusual conditions or circumstances*, or sees the approaching vehicle and erroneously misjudges its speed or distance, or for some reason assumes he could safely complete the movement, the question is usually one for the jury.

(Emphasis supplied.) *Petersen v. Schneider*, 153 Neb. at 822, 46 N.W.2d at 359-60.

We find that Voss' pulling out from behind the pickup, a place where she had been obscured from Huntwork's vision, at a relatively high rate of speed is a sufficiently unusual circumstance to create a question for the jury as to whether Huntwork was contributorily negligent for failing to see Voss' vehicle when he looked. Therefore, it was error for the district court to find Huntwork contributorily negligent as a matter of law and to enter summary judgment for Voss on that basis.

Turning now to the issue of whether Voss negligently exceeded the statutory speed limit, we judicially notice that the statutory speed limit on a hard-surfaced county road is 55 m.p.h. See Neb. Rev. Stat. § 60-6,186(1)(c) (Reissue 1993). However, the statutory speed limit does not control the issue of whether Voss was proceeding at a negligent rate of speed.

The statute does not confer upon Voss the right to proceed at 55 m.p.h. in any and all situations. "[T]he speed of an automobile is excessive if it is found to be unreasonable or imprudent under the existing circumstances, even though it may not exceed the applicable statutory limits." *Hacker v. Perez*, 187 Neb. 485, 487, 192 N.W.2d 166, 168 (1971). "[A] motorist overtaking and passing another car must exercise vigilance commensurate with the surrounding conditions." *Schwartz v.*

*Hibdon*, 174 Neb. 129, 138, 116 N.W.2d 187, 193 (1962).

Thus, the issue is not whether Voss complied with the statutory speed limit, but whether her speed in passing two vehicles, one of which was signaling a left turn, was reasonable under the circumstances. This is a question of fact for the jury, and it was error for the district court to find as a matter of law that Voss was free of negligence on the basis that there was no evidence that she was exceeding the statutory speed limit.

Therefore, we reverse the order of the district court granting summary judgment in favor of Voss and remand the cause for trial, whereupon the comparative negligence of Huntwork and Voss may properly be determined pursuant to the comparative negligence statute in existence at the time Huntwork's cause of action accrued. See Neb. Rev. Stat. § 25-21,185 (Cum. Supp. 1994) (stating that for all actions accruing prior to February 8, 1992, "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 . . .").

## CONCLUSION

Having found, after giving Huntwork the benefit of all favorable inferences, that Voss is not entitled to judgment as a matter of law, we reverse the district court's order of summary judgment and remand the cause for trial.

REVERSED AND REMANDED.

HOWARD, D.J., Retired, dissenting.

The question is whether there is fit evidence of an unusual circumstance which, if believed by a jury, would exempt plaintiff from the rigors of *Petersen v. Schneider*, 153 Neb. 815, 46 N.W.2d 355 (1951), *modified* 154 Neb. 303, 47 N.W.2d 863, which bars the left-turner's recovery when he fails to look at a time when it would be effective to do so or negligently fails to see that which is in plain sight. I respectfully dissent because in my view, the majority opinion supplies the glaring deficiency in such evidence of an unusual circumstance with the same speculation it would deny to a jury.

The opinion elevates plaintiff's failure to see defendant's passing car until he turns into it to the status of evidence that

defendant's car was concealed. That may be a proper inference for the time that defendant's car was wholly out of the passing lane. But there is nothing unusual about that. The leap into speculation is the unstated but necessary premise of the opinion that defendant's vehicle was hidden from view as plaintiff began his turn and at the same time was approaching at a high rate of speed so as to disable the effectiveness of plaintiff's lookout, if any. Two elements are necessary to construct this scenario: first, that defendant's vehicle was close behind the pickup, and second, that it suddenly pulled out at a high rate of speed. There was no evidence whatever that defendant lurked close behind the pickup. The only evidence is that in normal fashion, defendant moved into the passing lane, as did the brown car in passing. Nor is there any evidence of excessive speed on the paved road carrying a 55-mile-per-hour speed limit. And, of course, the two elements of suddenly pulling out from close behind the pickup and attaining excessive speed are contradictory.

The majority opinion ignores the fact that when defendant's vehicle moved into the passing lane in normal fashion, it was in plain sight. Plaintiff never saw defendant's vehicle until he struck its right front corner with the left front corner of his own vehicle. Had he looked before making the turn, he would have seen the car attempting to pass. As plaintiff stated, the car "seemed to come from nowhere." But it did not come from nowhere; it came in the normal passing situation, for all that the actual evidence shows, not in a train of unusual circumstances. Assuming any negligence on the part of defendant, the trial judge, in fashioning instructions, will now have the unenviable task of reconciling the facts of the case with the speculation bestowed upon him here.

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

# STATE OF NEBRASKA, APPELLEE, V. BILL D. NULL, APPELLANT.

526 N.W.2d 220

Filed January 13, 1995. No. S-93-364.

1. **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 courts below.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence. Such matters are for the finder of fact, and the verdict must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Pretrial Procedure: Appeal and Error.** A trial court is vested with broad discretion in considering discovery requests of defense counsel, and error can be predicated only upon an abuse of discretion.
4. **Statutes.** A statute may be repealed by implication when a new law contains provisions which are contrary to, but do not expressly repeal, the provisions of the former law.
5. ____. While repeals of statutes by implication are not favored and a statute will not be considered so repealed unless the repugnancy between the new enactment and the former statute is plain and unavoidable, where such a repugnancy exists, the new enactment will be deemed to have repealed the former statute by implication.
6. **Statutes: Legislature: Intent.** A construction of a statute which, in effect, repeals another statute will not be adopted unless such a construction is made necessary by the evident intent of the Legislature.
7. **Criminal Law: Prosecuting Attorneys.** When a single act violates more than one statute, a prosecutor is free to choose to prosecute under any applicable statute so long as the selection is not deliberately based upon any unjustifiable standard such as race, religion, or other arbitrary classification.
8. **Criminal Law: Lesser-Included Offenses: Directed Verdict.** Where the State fails to demonstrate a prima facie case on the crime charged, but does so on a lesser-included offense, the trial court in its discretion may direct a verdict on the crime charged and submit the evidence to the trier of fact for consideration on the lesser-included offense.
9. **Lesser-Included Offenses.** To constitute a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. In determining whether a lesser offense is indeed a lesser-included one, a court initially does not look to the evidence in a particular case, but looks only to the elements of the criminal offense.
10. **Jury Instructions: Lesser-Included Offenses.** It is the duty of the trial court to instruct the jury as to the law applicable to the case. The trial court may instruct a jury, over a defendant's objection, on any lesser-included offenses supported by the evidence and the pleadings.

11. **Criminal Law: Public Officers and Employees.** Neb. Rev. Stat. § 28-917 (Reissue 1989) prohibits conferring or offering to confer "any benefit" upon a public servant with the intent to influence that public servant and thereby influencing the public servant's actions in his official capacity.
12. **Conspiracy.** The principal element of a conspiracy is an agreement or understanding between two or more persons to commit a wrong.
13. ____. It is immaterial to the guilt of a conspirator whose culpability has been established that the other person or all of the other persons with whom he conspired have not been or cannot be convicted. A person can be found guilty of conspiracy when his or her sole coconspirator has not even been charged with conspiracy. Only the defendant need agree with another person; the second party can feign the agreement.
14. **Conspiracy: Proof.** Under Neb. Rev. Stat. § 28-202 (Reissue 1989), proof of an overt act is required, but successful commission of the felony is not.
15. **Conspiracy: Intent.** A person shall be guilty of criminal conspiracy if he or another person with whom he conspired commits an overt act in pursuance of the conspiracy. An overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act.
16. **Circumstantial Evidence: Conspiracy: Intent.** Circumstantial evidence may establish the existence of a conspiracy or the criminal intent necessary for a conspiracy. Intent may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct.
17. **Pretrial Procedure: Prosecuting Attorneys: Evidence.** A prosecutor's duty to disclose evidence in response to a very general discovery request arises if the evidence contains obvious exculpatory characteristics.
18. ____: ____: ____. Whether a prosecutor's failure to disclose evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.

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 Sarpy County, RONALD E. REAGAN, Judge. Judgment of Court of Appeals affirmed.

James P. Miller, of Miller & Addison, for appellant.

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

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

LANPHIER, J.

Bill D. Null was convicted of attempted bribery and conspiracy to commit bribery following a jury trial in the district court for Sarpy County. The issue was whether Null and an accomplice, Barry Vogel, tried to bribe Papillion's mayor to obtain the city's keno operation. Null and Vogel were tried together. Null appealed to the Nebraska Court of Appeals, which affirmed his convictions. Null asserted that the Court of Appeals erred with respect to his bribery conviction by applying the wrong bribery statute, in determining that the trial court correctly determined that misdemeanor attempted bribery is a lesser-included offense of bribery, and in finding that Null offered to confer any benefit on Mayor Pete Goodman. With respect to his conspiracy conviction, Null asserts the Court of Appeals erred in overturning his coconspirator's conviction and not his, leaving a "conspiracy of one," and in affirming the trial court in (1) not dismissing the felony conspiracy charge against Null when the bribery charge was reduced to a misdemeanor and (2) finding there was an overt act in furtherance of the conspiracy. Lastly, Null contends that he should have been granted a continuance by the trial court because of the late production of evidence. We granted Null's petition for further review and affirm the holdings of the Court of Appeals.

## I. BACKGROUND

On May 12, 1992, citizens of Papillion, Nebraska, voted to allow the city of Papillion to initiate a keno-type lottery in the city. During April and May 1992, Bill D. Null and Barry Vogel allegedly attempted to influence Papillion Mayor Pete Goodman to award the city's keno operation. Null and Vogel were charged with bribery in violation of Neb. Rev. Stat. § 28-917(1)(a) (Reissue 1989), a Class IV felony, and with conspiracy to commit bribery in violation of Neb. Rev. Stat. § 28-202(1) (Reissue 1989), also a Class IV felony. Null and Vogel were jointly tried in the district court for Sarpy County, Nebraska. At the close of the State's case, the trial court determined as a matter of law that the crime of bribery had not been committed because the evidence failed to establish that Mayor Goodman had actually been influenced by Null and Vogel. However, the

trial court submitted to the jury what it determined to be the lesser-included offense of attempted bribery, a misdemeanor. The jury found Null guilty of attempted bribery and conspiracy to commit bribery. Vogel was found not guilty of attempted bribery, but guilty of conspiracy to commit bribery. Null and Vogel each timely perfected an appeal to the Court of Appeals, and the cases were consolidated for argument and disposition. The Court of Appeals affirmed Null's convictions. *State v. Null*, 94 NCA No. 20, case No. A-93-364 (not designated for permanent publication). In a separate opinion, the Court of Appeals reversed Vogel's conviction and remanded the cause for further proceedings because the trial court improperly refused to allow Vogel to present character evidence on his own behalf. *State v. Vogel*, 94 NCA No. 20, case No. A-93-365 (not designated for permanent publication). Null petitioned this court for further review of the Court of Appeals' affirmance of his convictions. We affirm. Additionally, the State petitioned for further review of the Court of Appeals' reversal of Vogel's conviction. We address the State's assignments of error in *State v. Vogel, post* p. 209, 526 N.W.2d 80 (1995).

## II. ASSIGNMENTS OF ERROR

### 1. Bribery Conviction

Null asserts that the Court of Appeals erred in affirming his attempted bribery conviction by (1) concluding that § 28-917, a felony, was the applicable bribery statute, rather than Neb. Rev. Stat. § 49-14,101 (Reissue 1993), a misdemeanor; (2) failing to overturn the trial court's reduction of the felony bribery charge to attempted bribery as a lesser-included offense and continuing with trial; and (3) finding that Null offered to confer a benefit upon Mayor Goodman in exchange for his influence as required by § 28-917.

### 2. Conspiracy Conviction

Null further asserts that the Court of Appeals erred in affirming his conspiracy conviction by (1) overturning the conviction of Null's coconspirator, Vogel, leaving Null "with the felony conviction of conspiracy of one"; (2) concluding that the trial court was not required to dismiss the felony conspiracy charge when it reduced the felony bribery charge to attempted

bribery, a misdemeanor; and (3) finding that Null committed an overt act in furtherance of the conspiracy.

### 3. Refusal to Grant a Continuance

Finally, Null assigns as error the Court of Appeals' order affirming the trial court's refusal to grant a continuance due to the State's failure to disclose certain tapes of conversations involving Null and Vogel until just prior to trial.

## III. STANDARDS OF REVIEW

The question of whether the felony bribery statute was repealed by implication by the enactment of the misdemeanor bribery statute is a question of statutory interpretation. Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the courts below. *Rigel Corp. v. Cutchall*, 245 Neb. 118, 511 N.W.2d 519 (1994); *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

In reviewing a criminal conviction, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence. Such matters are for the finder of fact, and the verdict must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994); *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994); *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993).

In considering Null's assignment of error regarding delayed disclosure of the tape-recorded conversations, we recognize that a trial court is vested with broad discretion in considering discovery requests of defense counsel, and error can be predicated only upon an abuse of discretion. See, *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

## IV. ASSIGNMENTS OF ERROR REGARDING BRIBERY CONVICTION

### 1. Is Bribery a Misdemeanor or a Felony?

Nebraska has enacted two bribery statutes: §§ 28-917 and 49-14,101. Both statutes criminalize the act of offering

something of value in order to influence a public official's actions. However, violation of § 28-917 is a Class IV felony, while violation of § 49-14,101 is a Class III misdemeanor.

Null was charged with bribery in violation of § 28-917(1)(a). Null argues that § 28-917 was repealed by implication by the subsequent enactment of § 49-14,101 and that, therefore, he cannot be guilty of an offense greater than a misdemeanor.

A statute may be repealed by implication when a new law contains provisions which are contrary to, but do not expressly repeal, the provisions of the former law. 1A Norman J. Singer, Statutes and Statutory Construction § 23.09 (5th ed. 1993).

> While repeals of statutes by implication are not favored and a statute will not be considered so repealed unless the repugnancy between the new enactment and the former statute is plain and unavoidable, where such a repugnancy exists, the new enactment will be deemed to have repealed the former statute by implication. *State v. Retzlaff*, 223 Neb. 811, 394 N.W.2d 295 (1986); *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986). However, a construction of a statute which, in effect, repeals another statute will not be adopted unless such a construction is made necessary by the evident intent of the Legislature. *State v. Roth, supra*; *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985). Nonetheless, a legislative act which is complete in itself and is repugnant to or in conflict with a prior law repeals the prior law by implication to the extent of the repugnancy or conflict. *American Fed. S., C. & M. Emp. v. County of Lancaster*, 200 Neb. 301, 263 N.W.2d 471 (1978).

*State v. Fellman*, 236 Neb. 850, 857-58, 464 N.W.2d 181, 187 (1991).

In addressing Null's argument, the Court of Appeals stated correctly that the doctrine of repeal by implication requires an initial determination of which statute is the former enactment and which is the new enactment. We note that the doctrine of repeal by implication also requires a determination of whether the provisions of the new statute are plainly and unavoidably repugnant to the provisions of the former statute. *Fellman, supra*. In determining whether the new enactment is repugnant,

we look at the new enactment for any indication of an evident legislative intent to repeal the former statute.

The misdemeanor bribery statute, § 49-14,101, is part of the Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. § 49-1401 et seq. (Reissue 1993). Section 49-14,101 provides in pertinent part:

> (1) No person shall offer or give to the following persons anything of value, including a gift, loan, contribution, reward, or promise of future employment, based on an agreement that the vote, official action, or judgment of any public official, public employee, or candidate would be influenced thereby . . . .

For the purposes of the Nebraska Political Accountability and Disclosure Act, a public official is defined to mean an elected official in the executive or the legislative branch, or an elected or appointed official in the judicial branch of the state government or a political subdivision thereof. § 49-1443. Therefore, § 49-14,101 could be applicable to the alleged conduct of Null and Vogel.

The felony bribery statute, § 28-917, provides in pertinent part:

> (1) A person commits bribery if:
>
> (a) He offers, confers, or agrees to confer any benefit upon a public servant or peace officer with the intent to influence that public servant or peace officer to violate his public duty, or oath of office, thereby influencing the public servant's or peace officer's vote, opinion, judgment, exercise of discretion, or other action or inaction in his official capacity . . . .

The term "public servant" as used in the Nebraska Criminal Code includes any officer or employee of government, whether elected or appointed. Neb. Rev. Stat. § 28-109(18) (Reissue 1989). Therefore, § 28-917 is also applicable to Null and Vogel's alleged conduct.

In its opinion, the Court of Appeals determined that § 28-917 is the newer statute. The misdemeanor statute, § 49-14,101, was enacted in 1976. The felony statute, § 28-917, was enacted in 1977. However, § 49-14,101 has been amended four times since its enactment in 1976. The first amendment involved the

substitution of the words "Class III misdemeanor" for specific penalty language. 1977 Neb. Laws, L.B. 41, § 55. The second amendment applied only to county purchasing agents. 1983 Neb. Laws, L.B. 370, § 22. The third amendment partially removed members of the Legislature from exposure to criminal sanctions under § 49-14,101. 1986 Neb. Laws, L.B. 548, § 14. Finally, and subsequent to Null's trial, § 49-14,101 has been revised in a manner not relevant to this case. 1994 Neb. Laws, L.B. 1243, § 13.

These amendments may make § 49-14,101 the newer statute for purposes of the doctrine of repeal by implication, but the amendments to that statute do not indicate that the Legislature intended to repeal § 28-917. We agree with the Court of Appeals. Both statutes criminalize an individual's offering a benefit of something of value to attempt to influence a mayor's conduct in the course of his or her official duties. However, there are important differences between the statutes. For example, § 28-917 requires that a public servant or peace officer be actually influenced by a defendant's attempt, whereas § 49-14,101 does not. Section 49-14,101 applies to candidates, while § 28-917 applies only to those already in office.

Repeals by implication are strongly disfavored. *State v. Retzlaff*, 223 Neb. 811, 394 N.W.2d 295 (1986); *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986). There is nothing in the plain meaning of either § 28-917 or § 49-14,101 to indicate that the Legislature intended to bring about a repeal by implication as urged by Null. The statutes are not so repugnant to each other as to cause the type of conflict which requires a court to determine that a statute has been repealed by implication. Both bribery statutes are in effect.

### 2. Null Was Properly Charged with Felony Bribery Rather Than Misdemeanor Bribery

The fact that two statutes, one a felony statute and the other a misdemeanor, may apply to Null's alleged conduct does not provide grounds for reversal of Null's convictions. "It is not uncommon for an act to constitute a violation of more than one crime, some of which may be lesser-included offenses and some of which may be separate and distinct." *Roth*, 222 Neb. at 122,

382 N.W.2d at 351. As in *Roth*, this is simply a situation wherein a set of facts is sufficient to constitute the violation of one of several crimes. When a single act violates more than one statute, a prosecutor is free to choose to prosecute under any applicable statute so long as the selection is not deliberately based upon any unjustifiable standard such as race, religion, or other arbitrary classification. *State v. Willett*, 233 Neb. 243, 444 N.W.2d 672 (1989); *Roth, supra*; *State v. Loschen*, 221 Neb. 315, 376 N.W.2d 792 (1985).

As noted by the Court of Appeals, neither Null nor Vogel alleges that the prosecution relied upon any unjustifiable standard in determining to charge under the felony statute, § 28-917. Therefore, no error can be predicated on the fact that Null was charged with felony bribery. We therefore can find no error in the State's charging of Null with felony bribery rather than misdemeanor bribery.

### 3. Trial Court Acted Properly by Reducing Charge to Attempted Bribery and Continuing with Trial

At the close of the State's case, Null moved to dismiss because of the prosecution's failure to prove a prima facie case establishing bribery and conspiracy to commit bribery. Vogel also moved to dismiss both counts for the reason that the State failed to introduce evidence on each and every element. The trial court took the motions under advisement after indicating that it was inclined to agree that the bribery charge would probably "go out the window" because of the lack of evidence showing that Mayor Goodman had actually been influenced in some fashion by Null or Vogel. The trial court stated that the lesser-included offense of attempted bribery still remained. Ultimately, the trial court submitted the case to the jury on the basis of attempted bribery as a lesser-included offense over Null's objections. Null argued that the case had been tried before the jury on the issue of bribery. He therefore urges that to have it changed by the trial court to attempted bribery was a disadvantage because he was far more likely to be convicted of attempted bribery than bribery.

Null assigns as error the trial court's reduction of the felony bribery charge to attempted bribery as a lesser-included offense

and continuance of the trial. Null's argument is premised on Neb. Rev. Stat. § 29-2018 (Reissue 1989). Section 29-2018 provides:

> When it shall appear at any time before the verdict that a mistake has been made in charging the proper offense, the accused shall not be discharged if there appears to be good cause to detain him in custody; but the court must recognize him to answer to the offense on the first day of the next term of such court, and shall, if necessary, likewise recognize the witnesses to appear and testify.

Section 29-2018 permits a trial judge to discharge a defendant or recognize him to appear at the next term of court in the event of a formal defect in the information which cannot be remedied in conformity with the evidence. See *State v. Kendall*, 38 Neb. 817, 57 N.W. 525 (1894). Null argues that the trial court was required to drop the charge and recognize him to answer to the offense of attempted bribery at its next term.

In *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988), we addressed the question of what happens when the State fails to submit enough evidence to make a prima facie case for the crime charged. In *Foster*, the defendant argued that the trial court must direct a verdict as a matter of law. We disagreed and held that where the State fails to demonstrate a prima facie case on the crime charged, but does so on a lesser-included offense, the trial court in its discretion may direct a verdict on the crime charged and submit the evidence to the trier of fact for consideration on the lesser-included offense.

To constitute a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). In determining whether a lesser offense is indeed a lesser-included one, a court initially does not look to the evidence in a particular case, but looks only to the elements of the criminal offense.

It is the duty of the trial court to instruct the jury as to the law applicable to the case. *White, supra*. The trial court may instruct a jury, over a defendant's objection, on any lesser-

included offenses supported by the evidence and the pleadings. *Id.*; *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986). The trial court acted properly by continuing with trial and by instructing the jury on the lesser-included offense of attempted bribery.

4. OFFER OF VALUABLE CONSIDERATION

Section 28-917 prohibits conferring or offering to confer "any benefit" upon a public servant with the intent to influence that public servant and thereby influencing the public servant's actions in his official capacity. Null argues that the trial court erred in finding that he offered to confer a benefit upon Mayor Goodman in exchange for his influence.

Null argues in his brief that he gave no money to Mayor Goodman, but merely offered him an interest in a corporation to be formed that would bid on the Papillion city keno lottery. Null and Vogel offered to sell the mayor a one-third share of the corporation in exchange for $1 and his influence over the award of the keno franchise.

Null states that § 49-14,103.01(3) allows a city servant to have an interest in a contract to which the city is a party provided he makes a declaration on the record to the governing body responsible for approving the contract. In essence, Null argues that because it would be possible for Mayor Goodman to obtain a legal interest in the keno business, the offer of a share of that business was not an offer to confer a benefit upon the mayor.

Even if § 49-14,103.01(3) applied and it would have been possible for Mayor Goodman to have "legalized" his interest in the keno corporation, it would not deprive Null's offer to the mayor of its character as an attempted bribe. Null's offer of something of benefit was intended to influence the mayor in his official capacity. Such offer was an attempted bribe. § 49-14,103.01(3) cannot be read to condone, legalize, or sanitize attempted bribery of a public official. Null offered something of value in exchange for the mayor's influence and thereby violated § 28-917.

## V. ASSIGNMENTS OF ERROR REGARDING CONSPIRACY CONVICTION

### 1. Conspiracy of One

The Court of Appeals reversed Vogel's conspiracy conviction and remanded the cause for further proceedings. *State v. Vogel*, 94 NCA No. 20, case No. A-93-365 (not designated for permanent publication). In his petition for further review, Null asserts that he is now left with a felony conspiracy of one, relying on *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982).

The Court of Appeals reversed Vogel's conviction because the trial court refused to allow two character witnesses to testify on Vogel's behalf. Null argues that the character evidence on behalf of Vogel would have created doubt as to whether Vogel was a party to any agreement. Null further argues that if Vogel was not a party to an agreement, then there could have been no conspiracy because conspiracy requires an agreement between two or more persons, but not a conviction of two or more persons. Null goes on to argue that if Vogel did not make an agreement, then Null had no other person with whom to agree, and without such an agreement, there can be no conspiracy.

The principal element of a conspiracy is an agreement or understanding between two or more persons to commit a wrong. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). In *John, supra*, we determined that in adopting § 28-202 in 1977, the Legislature adopted the unilateral approach to conspiracy. We noted that one consequence of the unilateral approach is to make it immaterial to the guilt of a conspirator whose culpability has been established that the other person or all of the other persons with whom he conspired have not been or cannot be convicted. In fact, a person can be found guilty of conspiracy when his or her sole coconspirator has not even been charged with conspiracy. *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991). Under the unilateral approach, only the defendant need agree with another person; the second party can feign the agreement. When the person with whom the defendant conspired secretly intends not to go through with the plan, the culpable party's guilt is not affected by the fact that the other party feigned agreement with the conspiracy. *John, supra*.

Even if we assume that the Court of Appeals' reversal of Vogel's conviction negates any proof of an agreement between Null and Vogel, Null is not left with a conspiracy of one. Null ignores the presence of a third party: Mayor Goodman. Under the unilateral approach to conspiracy, Null's conspiracy conviction could rest on his own actions coupled with Mayor Goodman's feigned agreement. Therefore, Null's argument that he stands convicted of a conspiracy of one necessarily fails.

2. Failure to Prove Predicate Felony Does Not Require Dismissal of Conspiracy Charge

Section 28-202 states that a person shall be guilty of criminal conspiracy if he or she acts with intent to promote or facilitate the commission of a *felony*. Null asserts that if he had been properly charged with a misdemeanor under § 49-14,101, no conspiracy charge could have been filed because no felony would have been charged. We have already determined that Null was properly charged with felony bribery. Therefore, his conspiracy charge was predicated upon a felony charge.

Alternatively, Null argues that the trial court was required to dismiss the felony conspiracy charge when it reduced the felony bribery charge to attempted bribery, a misdemeanor. The trial court did so because the State failed to establish one of the requisite elements of felony bribery, which is a showing that the public servant was actually influenced by the bribe. See § 28-917.

Bribery in violation of § 28-917 is a Class IV felony. When the crime attempted is a Class IV felony, the crime of attempting to commit such Class IV felony is a Class I misdemeanor. Neb. Rev. Stat. § 28-201(4)(d) (Reissue 1989). Accordingly, when the trial court indicated that it was considering reducing the felony bribery charge to attempted bribery, a misdemeanor, Null and Vogel argued that the felony conspiracy charge failed as well because it was predicated upon a misdemeanor.

The Court of Appeals rejected Null's argument and noted that the point of the conspiracy statute is to strike at an agreement to commit a felony. Under § 28-202, proof of an overt act is required, but successful commission of the felony is not. The fact that Mayor Goodman was not actually influenced

by Null's actions precluded Null's conviction for felony bribery, but not necessarily Null's conviction for conspiracy to commit felony bribery.

3. Overt Act in Furtherance of the Conspiracy

A person shall be guilty of criminal conspiracy if he or another person with whom he conspired commits an overt act in pursuance of the conspiracy. § 28-202(1)(b). Null asserts that the evidence was not sufficient to support a finding that he committed an overt act in furtherance of a conspiracy to commit bribery. In regard to the overt act requirement of § 28-202, we have stated:

> " '[A]n overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. . . . An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act.' "

*State v. Anderson*, 229 Neb. 427, 435, 427 N.W.2d 764, 770 (1988), quoting *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987).

As here, conspiracies frequently involve intricate situations and complex acts which make it difficult to establish by direct proof a conspiracy or conspiratorial intent. See *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Circumstantial evidence may establish the existence of a conspiracy or the criminal intent necessary for a conspiracy. *Id.* Intent may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct. *Anderson, supra*; *State v. Ladehoff*, 228 Neb. 812, 424 N.W.2d 361 (1988).

The overt act necessary to prove an intent to conspire can be silence which is designed to conceal the conspiracy. *Copple, supra*. In *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982), we determined that the defendant's acts of giving a business card to a person whom he believed could find a hit man for him, in meeting with the hit man, and in furnishing him with the proposed victim's itinerary were overt acts with respect to a charge of conspiracy to commit a murder.

As the Court of Appeals noted, the bill of exceptions in this

matter consists of over 600 pages of testimony and many hours of tape-recorded conversations. The evidence clearly established that Null approached Mayor Goodman and offered one-third of all profits and income of the keno operation in Papillion in exchange for the mayor's assistance in making Null and Vogel the keno franchisors. The mayor was to accomplish this by appointing people to a nine-member keno committee that he could "control" or "manipulate." The mayor would "put out the word" that Null and Vogel were the ones with the "right ideas" for the keno operation. Null and Vogel planned to establish a corporation to run the keno operation, and the mayor would be able to purchase a one-third share of the corporation for $1. These overt acts are more than sufficient to establish that Null acted pursuant to a conspiracy and manifest Null's intent to bribe Mayor Goodman in order to ensure that he would be awarded Papillion's keno operation.

## VI. LATE-DISCLOSED EVIDENCE

Finally, Null assigns as error the Court of Appeals' order affirming the trial court's refusal to grant a continuance due to the State's failure to disclose evidence until the first day of his trial. All of the evidence objected to was in the form of tape-recorded conversations between Null, Vogel, and Mayor Goodman.

The tape recordings were a subject of discussion in chambers on Monday, January 25, 1993, the date the trial began. Null's counsel stated that he had understood that tape recordings of three separate incidents would be introduced and protested the introduction of a fourth set of tape recordings. The county prosecutor stated that the existence of the tapes could have been determined from the police reports and that defense counsel had failed to ask for them during discovery. Defense counsel asked for a continuance in order to gain time to listen to the tapes and formulate a defense. The trial court denied the motion and ordered the State to furnish copies of the tapes to the defendants by 3 o'clock that afternoon. If the defendants determined that the contents of the tapes justified a continuance or suppression, then the trial court agreed to conduct a hearing the next morning before resuming trial. Counsel proceeded to select a jury and

made their opening statements.

The next morning, Tuesday, another meeting was had in chambers regarding the tape recordings. Null's attorney stated that he had received 14 audiotapes at 5 o'clock Monday and that he had been able to listen to most of them. Null himself had not been able to listen to the tapes due to the time constraint. Counsel argued that it was virtually impossible to assess and digest the information on the tapes adequately and requested a continuance or, alternately, a mistrial. The trial court noted Null's "boilerplate" discovery requests and refused to grant a mistrial or a continuance. The trial court ordered the prosecutor to specifically identify the tapes that he intended to use and further ordered the prosecutor to avoid using any tapes prior to affording the defense the opportunity to listen them. The trial court instructed defense counsel to request continuances if they deemed it necessary after listening to any tape. No such continuances were requested. Further, Null offered no objection to the introduction of any of the tapes during trial on the basis of their late disclosure.

In his brief to the Court of Appeals, Null asserted that the trial court erred in refusing to grant a continuance. Null asserted that Neb. Rev. Stat. § 29-1912 (Reissue 1989) requires that the State make all evidence available to the defendant, upon request, prior to trial.

A prosecutor's duty to disclose evidence in response to a very general discovery request arises if the evidence contains obvious exculpatory characteristics. *State v. Tweedy*, 224 Neb. 715, 400 N.W.2d 865 (1987). The Court of Appeals stated that § 29-1912 provides the procedure for discovery in criminal cases. Under § 29-1912, the test for whether nondisclosure is prejudicial is whether the information sought is material to the preparation of the defense, meaning that there is a "strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal." *State v. Brown*, 214 Neb. 665, 674-75, 335 N.W.2d 542, 547 (1983).

Without condoning the State's failure to timely disclose the tapes, the Court of Appeals noted that Null had made no

showing, or even argument, of how his preparation for his own testimony or cross-examination of the State's witnesses was harmed by the late disclosure. Therefore, the Court of Appeals found no abuse of discretion in the trial court's denial of Null's motion to continue.

In his brief in support of his petition for further review, Null argues that he was in fact harmed by the late-disclosed tapes. Null states that the jury was selected before the defense had the opportunity to hear the tapes. Null claims that the new tapes contained much more profanity and sexist language than the previously disclosed tapes and that the county attorney had an advantage during the jury selection because he knew of their potentially prejudicial effect.

However, any prejudicial effect of the profanity and sexist language contained in the late-disclosed tapes was curable at trial. For example, defense counsel moved to suppress exhibit 12, one of the tapes, for the reason that it contained an offensive reference to African-Americans. One of the jurors was an African-American. The trial court ordered the offensive statement to be excised from the tape prior to its being played to the jury. At trial, Null did not offer any other objections or request that profane or sexist statements be excised from the tapes. On review from the Court of Appeals, we will not entertain such objections for the first time.

The trial court did not abuse its discretion in denying Null's motion to continue. The court ensured that defense counsel had the opportunity to hear the tape recordings prior to their use at trial. The trial court invited defense counsel to request a continuance if the need arose during the trial. The court ordered the excision of an offensive statement when requested. Therefore, Null fails to establish any prejudice due to the late disclosure.

## VII. CONCLUSION

Each of Null's assignments of error being without merit, the judgment entered by the Court of Appeals in affirming Null's convictions was proper, and it is, thereby, affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. BARRY VOGEL, APPELLANT.

526 N.W.2d 80

Filed January 13, 1995. No. S-93-365.

1. **Trial: Evidence: Appeal and Error.** The admission of character evidence is largely left to the discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion.
2. **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.
3. **Rules of Evidence: Proof.** Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except, evidence of a pertinent trait of his or her character offered by an accused, or by the prosecution to rebut the same. Neb. Evid. R. 404(1)(a), Neb. Rev. Stat. § 27-404(1)(a) (Reissue 1989).
4. **Rules of Evidence: Criminal Law: Trial.** A defendant can only introduce evidence of a pertinent character trait or traits, not his general character or reputation. In a criminal action, pertinent traits are those involved in the crime on trial, e.g., honesty in theft cases or peacefulness in murder cases. Neb. Evid. R. 404(1)(a), Neb. Rev. Stat. § 27-404(1)(a) (Reissue 1989).
5. **Rules of Evidence: Witnesses.** Evidence of good character for truthfulness is not admissible until the witness' character as to truthfulness has been attacked.
6. **Criminal Law: Conspiracy: Words and Phrases.** Honesty is a more expansive concept than truthfulness and is a character trait pertinent to the crimes of bribery and conspiracy to commit bribery.
7. **Trial: Evidence.** The defense may offer evidence on any trait reasonably related to the elements of the charged offense; however, the trial court has the responsibility to determine the competence of the proffered character evidence and to prevent the trial from straying into collateral matters.
8. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** Relevancy of offered evidence and exclusion of relevant evidence involve an exercise of a trial court's discretion. In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to the defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
9. ____: ____: ____: ____: ____. Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidential ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant. If the evidence properly admitted at trial overwhelmingly establishes a defendant's guilt, any error in excluding admissible evidence is harmless error beyond a reasonable doubt.

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 Sarpy County, RONALD E. REAGAN, Judge. Judgment of Court of Appeals affirmed.

James E. Schaefer and Glenn A. Shapiro, of Gallup, Schaefer, Riha, Dornan, Jabenis & Shapiro, for appellant.

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

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

LANPHIER, J.

Barry Vogel was found not guilty of attempted bribery but guilty of conspiracy to commit bribery, following a jury trial in the district court for Sarpy County. The issue was whether Vogel and an accomplice, Bill D. Null, had conspired to bribe Papillion's mayor to obtain the city's keno operation. Vogel appealed to the Nebraska Court of Appeals. The Court of Appeals held that the district court erred in excluding evidence of Vogel's good character and that such error was not harmless beyond a reasonable doubt. *State v. Vogel*, 94 NCA No. 20, case No. A-93-365 (not designated for permanent publication). The Court of Appeals therefore reversed Vogel's conviction and remanded the cause for further proceedings. We granted the State's petition for further review and affirm the Court of Appeals' holding.

## BACKGROUND

Barry Vogel and Bill D. Null were charged with bribery and conspiracy to commit bribery of Papillion Mayor Pete Goodman in connection with the introduction of a keno-type lottery in the city. The defendants were jointly tried in the district court for Sarpy County, Nebraska. The facts of this case are fully stated in *State v. Null, ante* p. 192, 526 N.W.2d 220 (1995).

At the time of his trial, Vogel was a longtime resident of Papillion, Nebraska, and had held a variety of security and law enforcement positions. In his defense, Vogel called Steven Sunday, the chief of police of David City, Nebraska, for whom Vogel had worked since November 1989 as a part-time police

officer. If he had been allowed to take the stand, Sunday would have testified as to Vogel's reputation for honesty and truthfulness. Vogel also sought to call a neighbor, and that neighbor would have testified regarding Vogel's reputation for honesty and truthfulness.

After Sunday took the stand on behalf of Vogel, the State objected to questions to Sunday, which were apparently to elicit testimony regarding Vogel's reputation for truthfulness and honesty. After the jury was excused, defense counsel stated that he was offering Sunday's testimony under Neb. Evid. R. 404(1)(a), Neb. Rev. Stat. § 27-404(1)(a) (Reissue 1989). The prosecution objected to Sunday's testimony and argued that Vogel's credibility had not been placed under attack, and therefore, testimony regarding his reputation for truthfulness was not admissible under Neb. Evid. R. 608, Neb. Rev. Stat. § 27-608 (Reissue 1989). Defense counsel reiterated that the witnesses' testimony was offered under rule 404(1)(a) (evidence of a pertinent trait of character by an accused).

The trial court accepted rule 404(1)(a) as controlling the admissibility of the character evidence, but raised the question of whether the character trait of honesty was pertinent to the crimes charged of bribery and conspiracy. Vogel's counsel argued that such testimony was always admissible to support a defendant's reputation for truth and honesty in the community. The trial court disagreed and stated it did not believe the trait of honesty is placed in issue by the charge of bribery or conspiracy to commit bribery. The court agreed that honesty would be an issue if the charge were perjury or theft, but stated that an honest person may very well commit the crime of bribery, just as an honest person may commit the crime of sexual assault.

Accordingly, counsel for Vogel made an offer of proof with respect to what Sunday and the second witness, Vogel's neighbor, were allowed to testify to. Counsel stated that the testimony of both witnesses would be that Vogel was an honest and truthful person. The trial court sustained the State's relevancy objections, and the witnesses were not allowed to so testify.

The jury found Vogel not guilty of attempted bribery but

guilty of conspiracy to commit bribery. Both Vogel and Null timely perfected an appeal to the Court of Appeals, and the cases were consolidated for argument and disposition. We address Null's assignments of error in a separate opinion, of even date.

In his assignments of error, Vogel included the district court's refusal to allow him to present character evidence on his behalf. The Court of Appeals reversed Vogel's conviction and remanded the cause for further proceedings for the reason that the trial court improperly refused to allow Vogel to present relevant character evidence on his behalf. *State v. Vogel*, 94 NCA No. 20, case No. A-93-365 (not designated for permanent publication). The State petitioned for further review of the Court of Appeals' reversal of Vogel's conviction. We granted further review on the issue of an accused so offering evidence of honesty to rebut a charge of bribery. We affirm the Court of Appeals' holding that the evidence of Vogel's good character with respect to truthfulness and honesty was relevant and pertinent in this case and that the trial court erred in sustaining the relevancy objection to the proffered evidence of Vogel's good character.

## ASSIGNMENTS OF ERROR

In his appeal to the Court of Appeals, Vogel assigned four errors. Vogel asserts the district court erred (1) in refusing to allow him to present character evidence on his behalf, (2) in applying Neb. Rev. Stat. § 28-917 (Reissue 1989) and in giving a jury instruction pursuant to that statute, (3) in applying Neb. Rev. Stat. § 28-202 (Reissue 1989) and in giving a jury instruction pursuant to that statute, and (4) in failing to grant his motion for a new trial.

In its petition for further review of the Court of Appeals' holding, the State requests that we address the following issues: (1) whether the Court of Appeals erred in determining that Vogel's honesty was a trait of his character pertinent to the particular offense charged for purposes of rule 404(1)(a) and (2) whether the Court of Appeals erred in determining that the exclusion of such character evidence was not harmless.

## SCOPE OF REVIEW

The admission of character evidence is largely left to the discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion. *State v. Garcia*, 235 Neb. 53, 453 N.W.2d 469 (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. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994); *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989).

## ANALYSIS

Rule 404(1)(a) states:

> Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except:
>
> . . . Evidence of a pertinent trait of his or her character offered by an accused, or by the prosecution to rebut the same.

The origin of rule 404(1)(a) is the common-law rule permitting an accused to offer character evidence in his behalf. Under the common-law rule, a defendant could "introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged." *Michelson v. United States*, 335 U.S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 168 (1948). "When one is accused of crime[,] evidence of his previous good character is admissible, in his behalf, upon the theory that being of good character it is improbable that he would have committed the crime with which he is charged . . . ." *Latimer v. State*, 55 Neb. 609, 619, 76 N.W. 207, 210 (1898).

"Under § 27-404(1)(a), defendant can only introduce evidence of a pertinent character trait or traits, not his general character or reputation. In a criminal action, pertinent traits are

those involved in the crime on trial, e.g., honesty in theft cases or peacefulness in murder cases." *State v. Hortman*, 207 Neb. 393, 398, 299 N.W.2d 187, 190 (1980). See, also, *State v. Garcia, supra* (holding that a defendant's testimony that he had never been convicted of a felony was an attempt to introduce general character or reputation evidence and was therefore inadmissible). "A *pertinent trait* is 'one that relates to a trait involved in the offense charged or a defense raised.' " *Wiggins v. State*, 778 S.W.2d 877, 893 (Tex. Crim. App. 1989) (quoting *Spector v. State*, 746 S.W.2d 946 (Tex. Crim. App. 1988)). Rule 404 forbids introduction of a character trait unless the trait is pertinent to the crime charged. Therefore, the character traits of honesty or truthfulness would not be admissible to the charge of sexual assault or murder. See *State v. Hortman, supra*.

Although rule 404(1)(a) permits a defendant to introduce evidence of his character traits pertinent to the crime charged, the admissibility of one character trait is subject to another rule of evidence. Rule 608 states that evidence of good character for truthfulness is not admissible until the witness' character as to truthfulness has been attacked. Only when a defendant's reputation for truthfulness is challenged by evidence that his reputation for truth is bad is evidence admissible regarding his truthfulness. An exception to the rule is when such trait is in issue. See *State v. Hortman, supra*.

Under rule 404(1)(a), Vogel was permitted to introduce evidence of a pertinent character trait or traits to the crimes of bribery and conspiracy to commit bribery, but not his general character or reputation. See *State v. Hortman, supra*. However, under rule 608, Vogel was precluded from introducing evidence regarding his reputation for being a truthful person because his credibility had not been attacked.

Accordingly, we are faced with three questions: (1) Is the trait of honesty equivalent to the trait of truthfulness and therefore inadmissible in this case under rule 608? (2) If the trait of honesty is different from the character trait of truthfulness, is the character trait of honesty pertinent to the crimes of bribery and conspiracy to commit bribery? (3) If the character trait of honesty is pertinent, was it harmless error for the trial court to exclude its introduction?

The trial court determined that the character trait of honesty was not pertinent to the crimes of bribery and conspiracy and stated that an honest person was capable of committing the crime of bribery, just as an honest person might commit the crime of sexual assault. The Court of Appeals disagreed. In its view, "bribery seems to be the epitome of dishonesty, at least as far as it relates to how citizens interact with their government. Truthfulness means telling the truth. However, it appears that honesty is a more expansive concept which includes not only truthfulness, but also integrity and trustworthiness." *State v. Vogel*, 94 NCA No. 20 at 45, case No. A-93-365 (not designated for permanent publication).

Other courts have also concluded that the trait of truthfulness is but one component of the trait of honesty. "[T]here is a certain breadth to the term 'honesty.' " *State v. Costa*, 139 N.J. Super. 588, 592, 354 A.2d 691, 693 (1976). The Texas Court of Appeals noted that an honest person is defined as one which " 'will not lie, cheat, or steal; truthful; trustworthy.' " *Wiggins v. State*, 778 S.W.2d at 889. That court noted that truth means " 'telling the truth; presenting the facts; veracious; honest.' " *Id.*

We conclude that honesty is a more expansive concept than truthfulness and is a character trait pertinent to the crimes of bribery and conspiracy to commit bribery. Under rule 404(a)(1), the term "pertinent" is apparently synonymous with the term "relevant." *United States v. Hewitt*, 634 F.2d 277 (5th Cir. 1981) (citing 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5236 (1978)). The crime of bribery does impugn the defendant's reputation for honesty. See, *United States v. Hewitt, supra*; *United States v. Darland*, 626 F.2d 1235 (5th Cir. 1980); *State v. Costa, supra*. The characteristic of honesty is incompatible with offering a bribe to an elected official. Evidence of Vogel's reputation for honesty was relevant and admissible under rule 404(1)(a).

Having determined that evidence regarding Vogel's reputation for honesty was admissible, we conclude that the trial court erred in sustaining the relevancy objection to the offer of the character evidence. We hold that such error was not harmless.

As stated above, the defense may offer evidence on any trait

reasonably related to the elements of the charged offense. However, the trial court has the responsibility to determine the competence of the proffered character evidence and to prevent the trial from straying into collateral matters. *Cooper v. United States*, 353 A.2d 696 (D.C. App. 1975). Few rights are more fundamental than that of an accused person to present witnesses in his own defense. The fundamental right to present witnesses is subject however to the rules of relevancy. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994); *State v. McSwine*, 231 Neb. 886, 438 N.W.2d 778 (1989). Relevancy of offered evidence and exclusion of relevant evidence involve an exercise of a trial court's discretion. See, rule 401; *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992). In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to the defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993); *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993); *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

Vogel's defense is his lack of criminal intent surrounding his attempt to win the keno franchise in Papillion. As noted by the Court of Appeals:

> [T]here is nothing illegal about a discussion between a public official such as the mayor and a citizen of Papillion such as Vogel about keno. Generally, a citizen may attempt to influence a public official's decision, such as who should or will serve on the keno committee. This is the essence of representative government.

*State v. Vogel*, 94 NCA No. 20 at 44. What is illegal is offering or agreeing to offer a valuable benefit to a public official with the intent to influence the official with respect to his judgment or other action taken in his official capacity. See § 28-917.

In this case, there are hours of tape-recorded conversations between the mayor and the defendants in which they discuss the introduction of keno lottery and how they might profit from it. The intent behind Vogel's words was a question for the jury. Evidence regarding his reputation for honesty was relevant to

the question of intent, and it was error to exclude it.

Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidential ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989). If the evidence properly admitted at trial overwhelmingly establishes a defendant's guilt, any error in excluding admissible evidence is harmless error beyond a reasonable doubt. See *id.*

We cannot conclude that the tape-recorded conversations overwhelmingly established Vogel's guilt and can only speculate as to the effect of the excluded testimony on the jury's verdict. Therefore, the exclusion of the character evidence was not harmless error.

## CONCLUSION

The Court of Appeals' reversal of Vogel's conviction and remand of the cause to the district court for a new trial is affirmed. As stated by the Court of Appeals, certain holdings in *State v. Null, ante* p. 192, 526 N.W.2d 220 (1995), are germane to this case for further proceedings.

AFFIRMED.

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# MARION WAGNER AND LIBERTY MUTUAL INSURANCE COMPANY, AN INSURANCE CORPORATION, APPELLANTS, V. UNICORD CORPORATION, APPELLEE.

526 N.W.2d 74

Filed January 13, 1995. No. S-93-421.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is a matter of law. Therefore, an appellate court reaches a conclusion independent from that of the trial court on the jurisdictional issue.
2. **Jurisdiction: Proof.** The burden of proof rests upon the plaintiff to demonstrate the court's personal jurisdiction over the defendant.
3. **Due Process: Jurisdiction: States.** The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum

contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.

4. **Jurisdiction: States.** If the defendant established minimum contacts with the forum state, then a court must consider the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.
5. ____: ____. Whether the forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with the forum state are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself or herself acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state.
6. **Jurisdiction.** Unilateral contact initiated by a third party normally is simply too remote to invoke personal jurisdiction over a defendant.
7. **Jurisdiction: States.** To subject itself to jurisdiction, the defendant must purposefully direct its conduct toward the forum state. The placement of a product into the stream of commerce, without more, generally is not proof of purposefully directed conduct toward the forum state.
8. **Due Process: Jurisdiction.** Foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.
9. **Jurisdiction.** Purposeful contact by the defendant is a threshold requirement. Thus, jurisdiction is not permissible without such contact, no matter how strong the plaintiff's interest.

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

Michael T. Brogan, of Brogan & Stafford, P.C., for appellants.

J. Joseph McQuillan and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and HOWARD, D.J., Retired.

HASTINGS, C.J.

Marion Wagner and Liberty Mutual Insurance Company (collectively Wagner) appeal from the judgment of the district court sustaining the special appearance of Unicord Corporation, an Illinois corporation, and dismissing Wagner's petition against Unicord for lack of personal jurisdiction.

A jurisdictional question that does not involve a factual

dispute is a matter of law. Therefore, we reach a conclusion independent from that of the trial court on the jurisdictional issue. *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

Wagner assigns that the district court erred in holding that it cannot exercise personal jurisdiction over Unicord under Neb. Rev. Stat. § 25-536(1)(d) (Reissue 1989) or, alternately, under § 25-536(2), and erred in failing to consider whether sufficient minimum contacts existed between Unicord and Nebraska in order to exercise personal jurisdiction.

Wagner and his employer's insurance carrier, Liberty Mutual, filed a petition against Unicord for negligence and strict liability in tort. In the petition, Wagner contended that the district court for Stanton County had personal jurisdiction over Unicord because Unicord transacted business in Nebraska, contracted to supply "services or things" in Nebraska, and caused tortious injury in Nebraska.

Wagner alleged that, in 1988, his employer purchased from Precision Sewing Company three 1,500-foot spools of polyester rope manufactured by Unicord. The rope served to secure tarps to truck trailers prior to transporting freight. Wagner further alleged that during the course and scope of his employment he attempted to secure a tarp by using the rope manufactured by Unicord, but the rope broke apart causing Wagner to fall backward and fracture his left wrist. Wagner alleged that Unicord caused his injuries by its failure to properly splice the rope segments, failure to warn, and failure to properly test and inspect its product.

Wagner also alleged strict liability against Unicord on the ground that the defect existed at the time it left Unicord's control. Furthermore, according to Wagner, Unicord knew or should have known that the consumer would not inspect the rope prior to use and that the defect made the rope unreasonably dangerous.

Unicord filed a special appearance claiming that the Nebraska court lacked personal jurisdiction over it. The facts, furnished by way of pleadings, affidavits, interrogatories, and deposition, are not in dispute. Unicord is an Illinois corporation that manufactures rope. The alleged defective rope was sold by

Unicord to Waterbury Rope Mills, invoiced to that company at Deerfield Beach, Florida, which in turn had directed delivery to be made to Precision Sewing in Des Moines, Iowa. Unicord had no idea as to what happened to the rope after that time until the filing of this action.

Unicord had delivered products into Arkansas, California, Florida, Illinois, Iowa, Louisiana, Michigan, Minnesota, Missouri, and Pennsylvania. Unicord was unable to state whether its products were sold to wholesalers, retailers, or private consumers. It had no business offices in Nebraska; did not solicit business, sell products, or manufacture with the anticipation of selling products in Nebraska; and did not engage in a distribution system that brought products into Nebraska.

Unicord was listed in the Chicago yellow pages telephone directory as a manufacturer of rope. These directories had been shelved in the Norfolk City Library, as well as libraries in Bellevue, Columbus, Fremont, Grand Island, Lincoln, and Omaha.

Michael Brogan, Wagner's counsel, attested that Illinois' 2-year statute of limitations for personal injury barred Wagner from filing any action against Unicord in Illinois. Brogan stated that "an Illinois action was barred as of November 8, 1990, which was prior to plaintiffs learning that Unicord Corporation, an Illinois corporation, is the alleged manufacturer." Thus, Wagner filed the petition in Nebraska, which has a 4-year statute of limitations for personal injuries.

The district court sustained the special appearance of Unicord. The court held that subsection (1)(d) of the Nebraska long-arm statute, § 25-536, was not satisfied because a Chicago yellow pages telephone directory, obtained solely through the efforts of Norfolk library personnel, did not meet the statute's solicitation requirements. The court did not address whether Unicord had sufficient minimum contacts with Nebraska. However, it appears from the record that Unicord had no contacts with Nebraska apart from the present case.

Nebraska's long-arm statute, § 25-536, provides:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of

action arising from the person:

(a) Transacting any business in this state;

(b) Contracting to supply services or things in this state;

(c) Causing tortious injury by an act or omission in this state;

(d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;

(e) Having an interest in, using, or possessing real property in this state; or

(f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or

(2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

In addressing the special appearance, it is necessary to consider the breadth of the long-arm statute. Section 25-536(2) explicitly extends Nebraska's jurisdiction as far as the U.S. Constitution permits. *Barone v. Rich Bros. Interstate Display Fireworks*, 25 F.3d 610 (8th Cir. 1994), *cert. denied, Hosoya Fireworks Co., Ltd. v. Barone*, ____ U.S. ____, 115 S. Ct. 359, 130 L. Ed. 2d 313; *Aaron Ferer & Sons Co. v. American Compressed Steel*, 564 F.2d 1206 (8th Cir. 1977); *Vergara v. Aeroflot "Soviet Airlines"*, 390 F. Supp. 1266 (D. Neb. 1975); *State ex rel. Gurnon v. Harrison*, 245 Neb. 295, 512 N.W.2d 386 (1994); *York v. York*, 219 Neb. 883, 367 N.W.2d 133 (1985); *Stucky v. Stucky*, 186 Neb. 636, 185 N.W.2d 656 (1971). As a result, we need only address whether Unicord has minimum contacts with Nebraska such that the exercise of personal jurisdiction would not offend traditional notions of fair play and substantial justice. See, *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987). Confronted with a special appearance, the burden of proof rests upon Wagner to demonstrate the court's personal jurisdiction over Unicord. See *Williams v. Gould, Inc.*, 232

Neb. 862, 443 N.W.2d 577 (1989).

The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *24th and Dodge Ltd. v. Commercial Nat. Bank*, 243 Neb. 98, 497 N.W.2d 386 (1993). If the defendant established minimum contacts with Nebraska, then a court must consider the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Wagner argues that Unicord's listing in the Chicago yellow pages telephone directory warrants the exercise of personal jurisdiction because "manufacturers in metropolitan areas, like Chicago, should know that their Yellow Page solicitations will be far-reaching." Brief for appellants at 7.

In *Williams v. Gould, Inc., supra*, Gould operated a smelter in Omaha, but was not a Nebraska corporation. Gould employed a nonresident as a medical consultant to protect its Omaha employees from exposure to toxic substances. Gould also employed a Nebraska citizen as a medical consultant and health care provider for its Omaha employees. Gould employees filed a petition against Gould and its two medical consultants regarding injuries caused by exposure to lead, cadmium, and arsenic at Gould's Omaha smelter. The nonresident filed a special appearance objecting to personal jurisdiction by a Nebraska court. The record indicated that the two medical consultants communicated telephonically to discuss medical care of Gould employees. Furthermore, there was no dispute that a contract existed between Gould and the nonresident regarding compensation for services relative to Gould's Omaha smelter operation. We held that § 25-536 applied to the nonresident's contractual conduct and activities and that, through his contract with Gould, the nonresident purposefully

directed his activities toward Nebraska and purposefully availed himself of the privilege of conducting activities within Nebraska. In analyzing the due process issue, we stated:

> [W]hether a Nebraska court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with Nebraska are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself acted in a manner which creates substantial connections with Nebraska, resulting in the defendant's "purposeful availment" of the benefits and protections of Nebraska law.

232 Neb. at 878, 443 N.W.2d at 588.

In the case at bar, the asserted contact with Nebraska is a Chicago telephone directory to which certain Nebraska libraries subscribe. We do not accept Wagner's premise that Nebraska can exercise personal jurisdiction over any corporation listed in a telephone directory of a major city in the United States. Unicord did not take any actions directed toward Nebraska. Thus, Wagner relies on the unilateral action of library personnel. Such unilateral contact initiated by a third party normally is simply too remote to invoke personal jurisdiction.

Wagner also argues that Unicord placed its product into the stream of commerce and that "it is reasonable to expect that the ultimate distribution would be widespread." Brief for appellants at 11. Again, the defendant must purposefully direct its conduct toward the forum state. The placement of a product into the stream of commerce, without more, generally is not proof of purposefully directed conduct toward the forum state. *Asahi Metal Industry Co. v. Superior Court, supra*; *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987). The defendant must have some knowledge and expectation that the product would reach the forum state. *Burger King Corp. v. Rudzewicz, supra*; *Stoehr v. American Honda Motor Co., Inc.*, 429 F. Supp. 763 (D. Neb. 1977).

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), the U.S. Supreme Court considered whether Oklahoma may exercise personal jurisdiction over a nonresident automobile dealer and its distributor. The defendants' only connection with Oklahoma

was an automobile sold in New York to New York residents which became involved in an Oklahoma accident. The Court stated:

> [W]e find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.
>
> It is argued, however, that because an automobile is mobile by its very design and purpose it was "foreseeable" that the . . . Audi would cause injury in Oklahoma. Yet "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.

444 U.S. at 295.

In *Falkirk Min. Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990), the plaintiff, an Ohio corporation, purchased from Marion, a Delaware corporation, a dragline to strip mine coal. The defendants, a Japanese corporation and its subsidiary, manufactured a component part of the dragline and shipped them to Marion which in turn sent the parts on to North Dakota where they were incorporated into the machine and where the damage occurred. The plaintiff filed a federal diversity action in North Dakota, alleging that the component part manufactured and shipped by the defendants cracked due to improper welding and casting. The U.S. Court of Appeals for the Eighth Circuit held that North Dakota did not have personal jurisdiction over the defendants. The court stated:

> Unless it can be shown that appellees purposefully directed their activities towards North Dakota, the mere fact that Marion brought two of the cams it purchased from Japan Steel into North Dakota does not justify the exercise of personal jurisdiction over appellees. . . . By selling the cams to Marion, Japan Steel did nothing more than place its products in the stream of commerce. . . . [A]ppellees' placement of a product into the stream of commerce, without more, does not constitute an act of the defendant purposefully directed toward the forum State.

*Id.* at 375-76.

In *Blum v. Kawaguchi, Ltd.*, 331 F. Supp. 216 (D. Neb. 1971), the defendant Kawaguchi, Ltd., a Japanese manufacturer, sold its product to a buyer in Omaha. The buyer then sold the product to the plaintiff. The plaintiff alleged that the defendant negligently designed and constructed the defective product. The U.S. District Court for the District of Nebraska held that the defendant had sufficient contacts for Nebraska to invoke personal jurisdiction. Of significance to the present case, the court held:

> It is a fair statement that a sale of machinery would be classified a transaction of business in Nebraska and it does not follow that an indirect sale would necessarily alter the nature of the transaction. *It might be a different situation had the defendant made a sale elsewhere with the expectation that it was to be a final sale* [*that is, not for resale*].

(Emphasis supplied.) *Id.* at 220.

In terms of the contacts between Unicord and Nebraska, Unicord shipped its product to Iowa, and Wagner failed to establish that Unicord had any expectation that the Iowa delivery was not a final sale. Furthermore, Unicord did not maintain an office or agent or solicit business in Nebraska. None of the agreements between Unicord, Waterbury Rope Mills, and Precision Sewing were executed or performed in Nebraska. The rope in question did not originate in Nebraska nor was it destined for Nebraska. Unicord did not create, control, or employ the distribution system that brought the rope to Nebraska. Essentially, Wagner seeks to base jurisdiction on an isolated circumstance in contrast to evidence on the record

indicating that Unicord did not invoke the benefits and protections of Nebraska law by reason of any activities connected with the manufacture, sale, and delivery of the rope. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

Unicord's lack of contacts with Nebraska divests Nebraska of jurisdiction regardless of issues of convenience and state interest. In *World-Wide Volkswagen Corp. v. Woodson, supra*, the Court stated:

> Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington, supra*, at 319. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

444 U.S. at 294. See, also, *Falkirk Min. Co. v. Japan Steel Works, Ltd., supra*. Under the facts presented, the invoking of personal jurisdiction over Unicord by a Nebraska court would offend traditional notions of fair play and substantial justice.

Lastly, Wagner argues that traditional notions of fair play and substantial justice demand personal jurisdiction over Unicord because Wagner is time barred from filing a petition in Illinois. However, Wagner cannot subject Unicord to a forum that Unicord has no contacts with merely because Wagner failed to act within Illinois' statute of limitations. Also, purposeful contact by the defendant is a threshold requirement. Thus, jurisdiction is not permissible without such contact, no matter how strong the plaintiff's interest. See *World-Wide Volkswagen Corp. v. Woodson, supra*.

The judgment of the district court is affirmed.

AFFIRMED.

LANPHIER, J., concurs in the result.

# LARRY FIESE, DOING BUSINESS AS GOTHENBURG FLYING SERVICE, APPELLANT, V. GEORGE SITORIUS, ALSO KNOWN AS GEORGE R. SITORIUS, AND MARCIA E. SITORIUS, HUSBAND AND WIFE, APPELLEES.

526 N.W.2d 86

Filed January 13, 1995. No. S-93-630.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court.
2. **Aviation: Easements.** An avigation easement grants the holder of the easement the right to navigate aircraft in the designated airspace overlying another's land.
3. **Aviation: Injunction.** The United States Code prohibits landowners from obtaining injunctive relief against aircraft using the navigable airspace of the United States. 49 U.S.C. app. §§ 1301(29) and 1304 (1988).
4. **Aviation.** The statutory right of freedom of transit through the navigable airspace of the United States is, in effect, a license.
5. **Easements.** A permissive use of the land of another is not adverse and cannot give an easement by prescription no matter how long it may be continued.
6. ____. The use and enjoyment which will create an easement by prescription must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement for the full prescriptive period.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS II, Judge. Affirmed.

Steve Windrum for appellant.

P. Stephen Potter for appellees.

David T. Schroeder for amicus curiae Nebraska Aviation Trades Association.

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

LANPHIER, J.

Plaintiff-appellant, Larry Fiese, who operates an airport, brought this action in the district court for Dawson County to enjoin defendants-appellees, George R. and Marcia E. Sitorius, who own land next to the airport, from placing any obstruction in airspace over Sitoriuses' land. Fiese claimed he has acquired an avigation easement by prescription to take off and land over Sitoriuses' farm. After a trial, the district court dismissed the

action with prejudice, concluding that an avigation easement by prescription has never been recognized in Nebraska. Fiese then filed a motion for new trial, which was denied. Fiese appeals from the judgment of the district court overruling his motion. We affirm the judgment of the district court because we conclude that under the circumstances of this case, Fiese could not obtain an avigation easement by prescription. To obtain an easement by prescription, use must be *adverse*, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement for the full prescriptive period. Federal law prohibits landowners from interfering with aircraft flying in the navigable airspace of the United States. Since Sitoriuses had no right to prohibit flights in the navigable airspace overlying their property, Fiese's use of the navigable airspace was not adverse for the purpose of obtaining an easement by prescription.

## BACKGROUND

Fiese alleged in his second amended petition that he and his predecessor in interest, his father, have operated a private airstrip on his property continuously since 1969. The grass airstrip, roughly 160 feet wide and 2,400 feet long, runs from the south to the northernmost edge of Fiese's property. At the northernmost edge of Fiese's property, where the airstrip ends, is a county road. Across the county road, to the north, lies Sitoriuses' farm and dwelling.

The evidence adduced at trial showed that Fiese's father commenced the operation of the airstrip in 1969. Fiese testified that his father typically took off toward and landed from the north, except when wind conditions required doing otherwise. In 1981, Fiese bought the airstrip and the agricultural spraying business from his father. Fiese testified that during the time his father owned the business, and continuously since 1981, there has never been a year during which they have not taken off and landed on the north end of the airstrip. Fiese testified that neither he nor his father ever received permission from Sitoriuses to fly over their land.

Fiese alleged that on August 6, 1992, Sitoriuses placed on

their own property a stack of hay, approximately 30 feet wide and 15 feet high, to prevent Fiese and others from safely using the airstrip. The hay was admittedly placed directly on the other side of the road, approximately 60 feet from the northern end of Fiese's airstrip. Fiese also alleged that Sitoriuses had previously erected a pole 20 to 25 feet tall directly across the road from the northern end of his airstrip.

On February 5, 1993, Fiese filed a lawsuit in which he sought an injunction to prevent Sitoriuses from placing any obstruction in the airspace overlying Sitoriuses' land. He claimed an avigation easement and contended that he and his predecessor in interest, his father, used the airspace overlying Sitoriuses' land since 1969. Fiese alleged that he and his father had used the airspace "openly, notoriously, adversely, continuously, and under claim of right and without interruption, all with the knowledge and acquiescence of Defendants and Defendants' predecessors in interest." After the trial, the suit was dismissed, and this appeal followed.

## ASSIGNMENTS OF ERROR

On appeal, Fiese asserts in summary that the trial court erred in dismissing his petition. This issue raises a question of law.

## STANDARD OF REVIEW

Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court. *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994).

## AVIGATION EASEMENT

The primary issue raised by this appeal is whether Nebraska law allows a private party to obtain by prescription an avigation easement. An avigation easement grants the holder of the easement the right to navigate aircraft in the designated airspace overlying another's land. *Johnson v. Airport Authority*, 173 Neb. 801, 115 N.W.2d 426 (1962). The Legislature has acknowledged the existence of avigation easements and the right of certain political subdivisions to acquire such easements through eminent domain. See Neb. Rev. Stat. § 3-204 (Reissue 1991). This court has ruled that the condemnation of an

avigation easement is a taking, as that term is defined within the context of Fifth Amendment jurisprudence. *Johnson v. Airport Authority, supra*. However, we have never ruled on whether a private party may obtain an avigation easement by prescription.

There is no clear trend among the jurisdictions which have considered the issue. Though no court has apparently ever upheld an avigation easement, some have determined that an avigation easement may be acquired by prescription under the right circumstances. *Petersen v. Port of Seattle*, 94 Wash. 2d 479, 618 P.2d 67 (1980); *Drennen v. County of Ventura*, 38 Cal. App. 3d 84, 112 Cal. Rptr. 907 (1974); *Shipp v. Louisville and Jefferson County Air Board*, 431 S.W.2d 867 (Ky. 1968), *cert. denied* 393 U.S. 1088, 89 S. Ct. 880, 21 L. Ed. 2d 782 (1969). In other jurisdictions, courts have held that an avigation easement may not be acquired by prescription. *Sticklen v. Kittle*, 168 W. Va. 147, 287 S.E.2d 148 (1981); *Hinman v. Pacific Air Transport*, 84 F.2d 755 (9th Cir. 1936), *cert. denied* 300 U.S. 654, 57 S. Ct. 431, 81 L. Ed. 865 (1937).

The issue has been addressed most recently by the Supreme Court of Connecticut. In *County of Westchester, N.Y. v. Town of Greenwich*, 227 Conn. 495, 629 A.2d 1084 (1993), the plaintiff, Westchester County, owned and operated an airport. The defendants owned land beneath the air approach zone for one of the airport's runways. Trees on the defendants' land had grown into the air approach zone. Their growth reduced the buffer of airspace around the airport referred to as a "clear zone." Due to the reduction in the clear zone, the Federal Aviation Administration reduced the usable length of the airport's runway. Consequently, the plaintiff asserted that it had acquired, by prescription, an avigation easement. Additionally, the plaintiff sought an injunction authorizing it to top or cut down, as necessary, the defendants' trees which had penetrated into the clear zone.

The Connecticut Supreme Court refused to decide generally whether an avigation easement may be acquired by prescription. Relying on federal law, 49 U.S.C. app. §§ 1301(29) and 1304 (1988), the Connecticut Supreme Court concluded that the defendants had no right to stop the plaintiff's overflights. In relevant part, § 1304 provides that "[t]here is recognized and

declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." " 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." § 1301(29). The Connecticut Supreme Court determined that since the defendants could not prevent the overflights, the plaintiff's use of the airspace could not be considered adverse. It therefore held that the use could not ripen into a prescriptive easement.

In this, we are controlled by the advancing juggernaut of seemingly ubiquitous preemptive federal legislation.

> "It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation." American Airlines, Inc. v. Town of Hempstead, 272 F.Supp. 226, 232 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017, 89 S.Ct. 620, 21 L.Ed.2d 561 (1969). In particular with respect to the regulation of "navigable airspace," Congress has legislated so pervasively that state provisions inhibiting that regulation, whether in the form of legislation or judicial decision, must be declared invalid under the supremacy clause.

*United States v. City of New Haven*, 367 F. Supp. 1338, 1340 (D. Conn. 1973), *aff'd* 496 F.2d 452 (2d Cir. 1974), *cert denied* 419 U.S. 958, 95 S. Ct. 218, 42 L. Ed. 2d 174 (1974).

When Congress legislated "navigable airspace," it was apparently not done with a "soft hand" with due regard in mind for the rights of those owning property adjoining or near airports. Relevant federal law dictates the answer as to whether the private airstrip which is the subject of this litigation can obtain an easement of prescription over adjoining land. Sections 1301(29) and 1304 of the United States Code prohibit landowners from obtaining injunctive relief against aircraft using the navigable airspace of the United States. See *United States v. City of New Haven, supra*; *Town of East Haven v. Eastern Airlines, Inc.*, 331 F. Supp. 16 (D. Conn. 1971), *aff'd* 470 F.2d 148 (2d Cir. 1972), *cert. denied* 411 U.S. 965, 93 S.

Ct. 2144, 36 L. Ed. 2d 685 (1973). Therefore, Sitoriuses could not enjoin Fiese from using the airspace above Sitoriuses' property to safely take off and land. Fiese had a right to use the airspace overlying Sitoriuses' land to safely take off and land. The right was not granted by Sitoriuses, but by the U.S. government. The statutory right of freedom of transit through the navigable airspace of the United States is, in effect, a license. See *County of Westchester, N.Y. v. Town of Greenwich, supra*. See, also, *Antonik v. Chamberlain*, 81 Ohio App. 465, 78 N.E.2d 752 (1947) (license granted to private party pursuant to federal law). Fiese's use of the airspace, therefore, was not adverse, but permissive. See *Drennen v. County of Ventura*, 38 Cal. App. 3d 84, 112 Cal. Rptr. 907 (1974) (no prescriptive easement where overflights did not interfere with owner's actual use and enjoyment of land); *City of Statesville v. Credit and Loan Co.*, 58 N.C. App. 727, 294 S.E.2d 405 (1982) (flights over land of another were not adverse for purpose of obtaining prescriptive easement where state law prohibited owner from preventing overflight).

A permissive use of the land of another is not adverse and cannot give an easement by prescription no matter how long it may be continued. *Chalen v. Cialino*, 206 Neb. 106, 291 N.W.2d 256 (1980). The use and enjoyment which will create an easement by prescription must be *adverse*, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement for the full prescriptive period. *Id.* Since Fiese's use of the airspace necessary to safely take off and land was permissive, pursuant to a license from the U.S. government, it could not ripen into an easement by prescription. Fiese has no easement.

Fiese also seeks an injunction, and since this is a suit in equity, we must determine whether Fiese has any other legal basis entitling him to enjoin Sitoriuses from placing obstructions on their own land. An injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate. *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994). Although Congress has granted Fiese a right of freedom of transit through the navigable

airspace of the United States pursuant to 49 U.S.C. § 1304, Congress has not provided an attendant remedy for protection of that right. The section of the Federal Aviation Act recognizing a public right of freedom of transit through navigable airspace of the United States, 49 U.S.C. § 1304, does not create a private right of action in favor of airport owners. *County of Westchester v. Town of Greenwich, Conn.*, 745 F. Supp. 951 (S.D.N.Y. 1990). Hence, Fiese cannot base his request for an injunction on the provision of federal law granting him the right of freedom of transit through navigable airspace. The Federal Aviation Act merely permits the filing of a complaint with the Secretary of Transportation or the Civil Aeronautics Board for acts or omissions in contravention of the provisions of the act. 49 U.S.C. app. § 1482(a) (1988). As explained above, since the federal government has comprehensively occupied the field of navigable airspace regulation, our determination is controlled by federal law. See *United States v. City of New Haven*, 367 F. Supp. 1338 (D. Conn. 1973).

## CONCLUSION

In light of the foregoing, the judgment of the district court dismissing the action was proper and is, therefore, affirmed.

AFFIRMED.

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TOM WAGONER, APPELLANT, V. CENTRAL PLATTE NATURAL RESOURCES DISTRICT, A BODY POLITIC, ET AL., APPELLEES.

526 N.W.2d 422

Filed January 20, 1995. No. S-93-881.

1. **Administrative Law: Final Orders: Appeal and Error.** The district court reviews an administrative agency's final decision without a jury de novo on the record of the agency.

2. ____: ____: ____. An aggrieved party may appeal any judgment rendered or final order made by the district court under the Administrative Procedure Act. An appeal under the Administrative Procedure Act 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.
3. **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.
4. ____: ____. When reviewing an order 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.
5. **Administrative Law: Presumptions: Proof.** A rebuttable presumption of validity attaches to the actions of administrative agencies. The burden of proof rests with the party challenging the agency's actions.
6. **Administrative Law: Appeal and Error.** An appellate court will accord deference to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.
7. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law; accordingly, an appellate court reaches a conclusion independent of the decision reached by the trial court.
8. **Administrative Law: Statutes.** The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.
9. ____: ____. In order to be valid, a rule must be consistent with the statute under which it is promulgated.
10. **Statutes: Legislature.** A statute may have a specific meaning which is not necessarily changed because of the Legislature's attempt by amendment to clarify that meaning. However, this jurisdiction is committed to the doctrine that in a case where the proper interpretation of the statutory terms is involved, in order to ascertain the proper meaning of a statute, later as well as earlier legislation upon the same subject may be referred to. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.
11. **Administrative Law: Legislature: Intent.** In order to ratify a rule promulgated by an administrative agency for future application, it is necessary that the Legislature express an intent to do so, either by specifically appropriating funds, when necessary, to implement the rule or by making specific reference to the administrative rule in subsequently passed legislation.
12. **Natural Resources Districts: Political Subdivisions: Legislature.** A natural resources district, as a political subdivision, has only that power delegated to it by the Legislature, and a grant of power to a political subdivision is strictly construed.
13. **Natural Resources Districts.** A natural resources district possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers

expressly granted: and third, those essential to the declared objects and purposes of the district—not simply convenient, but indispensable.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded with directions.

Thomas A. Wagoner and John A. Wagoner for appellant.

Randall L. Goyette and Brenda S. Spilker, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and GRANT, J., Retired, and HOWARD, D.J., Retired.

HASTINGS, C.J.

Plaintiff, Tom Wagoner, appeals the June 18, 1993, order of the district court which affirmed the cease and desist orders of the defendant Central Platte Natural Resources District (CPNRD). The court consolidated the two petitions for review and appeal regarding cease and desist orders issued to Wagoner for failing to comply with a ground water maintenance program rule. That rule required him to submit to CPNRD samples of soil from his farmland for nitrate testing and analysis. The first order, dated July 8, 1991, related to the crop year 1991, and the order dated September 14, 1992, related to the crop year 1992 and anticipated crop year 1993.

## STANDARD OF REVIEW

The district court reviews an administrative agency's final decision without a jury de novo on the record of the agency. *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 522 N.W.2d 417 (1994). An aggrieved party may appeal any judgment rendered or final order made by the district court under the Administrative Procedure Act. An appeal under the Administrative Procedure Act 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. *Lee v. Nebraska State Racing Comm.*, 245 Neb. 564, 513 N.W.2d 874 (1994); *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993). 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. *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994). When reviewing an order 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.*

A rebuttable presumption of validity attaches to the actions of administrative agencies. The burden of proof rests with the party challenging the agency's actions. *In re Application of United Tel. Co.*, 230 Neb. 747, 433 N.W.2d 502 (1988); *Haven Home, Inc. v. Department of Pub. Welfare*, 216 Neb. 731, 346 N.W.2d 225 (1984). An appellate court will accord deference to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

Last, the constitutionality of a statute is a question of law; accordingly, an appellate court reaches a conclusion independent of the decision reached by the trial court. *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993).

## ISSUES ON APPEAL

Wagoner asserts that the district court erred in (1) affirming CPNRD's orders when the transcript furnished by CPNRD did not include the ground water quality management plan, the testimony of a Department of Water Resources representative, and results of tests conducted by CPNRD; (2) holding that CPNRD has statutory authority to order landowners within its district to provide deep soil samples; (3) failing to hold that CPNRD's regulations violate the Equal Protection Clause and Due Process Clause of the 14th Amendment to the U.S. Constitution and Neb. Const. art. I, §§ 1 and 3; and (4) failing to hold that CPNRD's regulations amounted to a taking of property without just compensation in violation of the 5th and 14th Amendments to the U.S. Constitution.

## FACTS

Wagoner owns and operates a farm which is within the area making up the natural resources district. Wagoner's farm was in

turn within the Phase II ground water quality management area of the district. The ground water management program rule 4 for Phase II areas requires an operator in a Phase II ground water management area to conduct "[a]n annual deep soils analysis for residual nitrate/nitrogen on each field of [sic] 40 acre tract, whichever is smaller, with the analysis to be conducted by a laboratory participating in the University of Nebraska Soil Testing Program."

According to the complaints filed against Wagoner, he was an operator of agricultural land in the Phase II ground water quality management area in both 1990 and 1991 on which irrigated corn or sorghum was grown and in both of which years he failed to comply with CPNRD's regulations, which required that he furnish and have tested deep soil samples (3 feet deep) taken from his land. After notice and hearings which Wagoner attended and in which he participated, CPNRD ordered that he cease and desist the operation of any agricultural land within the district in a manner contrary to or out of compliance with the rules. The cease and desist orders were to remain in force and effect until Wagoner furnished the necessary soil samples and otherwise complied with CPNRD's rules. Wagoner had furnished water samples and made various reports as to use of fertilizer, as required by the rules. He also offered to allow CPNRD's employees to come onto his land for the purpose of taking the soil samples or agreed to furnish the samples if CPNRD would pay him the cost of sampling and testing, which amounted to about $200.

According to the record, CPNRD held public hearings in May 1987 in Buffalo, Dawson, Hall, and Merrick Counties concerning proposed rules which required, among other regulations, landowners and operators in Phase II areas to submit annual water and deep soil analyses for nitrate content. On May 28, 1987, CPNRD adopted the ground water management program and its requirement that landowners and operators in Phase II areas submit annual water and deep soil analyses for nitrate content. Newspapers in Buffalo, Dawson, Hall, and Merrick Counties published the adopted text of the ground water management program rules. On August 26, 1987, Wagoner was informed by CPNRD that the adopted rules

required him to submit water and soil analyses to the administrative body.

In 1990, CPNRD informed those not complying with soil analysis requirements of a December 31, 1990, deadline; the need to turn in samples by February 1, 1991, to avoid noncompliance; and that the rules, having existed for 3 years, would be strictly enforced and cease and desist orders would be issued.

## ANALYSIS

We deal first with Wagoner's claim that CPNRD did not have statutory authority to order landowners within the district to provide deep soil samples. Neither party deals in an exhaustive manner with this question, although it is a pivotal issue.

The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute. *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). In order to be valid, a rule must be consistent with the statute under which it is promulgated. *Id.*

The Nebraska Legislature codified the State's interest in water conservation and control in the Nebraska Ground Water Management and Protection Act, Neb. Rev. Stat. §§ 46-656 to 46-674.20 (Reissue 1988). Section 46-656 provides:

> The Legislature finds that ground water is one of the most valuable natural resources in the state and that an adequate supply of ground water is essential to the general welfare of the citizens of this state and to the present and future development of agriculture in the state. The Legislature recognizes its duty to define broad policy goals concerning the utilization and management of ground water and to ensure local implementation of those goals. . . .
>
> The Legislature further recognizes and declares that the management, protection, and conservation of ground water and the beneficial use thereof are essential to the economic prosperity and future well-being of the state and that the public interest demands procedures for the implementation of management practices to conserve and protect ground water supplies and to prevent the *contamination* or

inefficient or improper use thereof. . . .

Nothing in the Nebraska Ground Water Management and Protection Act relating to the contamination of ground water is intended to limit the powers of the Department of Environmental Contol provided in Chapter 81, article 15.

(Emphasis supplied.)

Section 46-658 of the act provides in part:

(1) An area may be designated a control area by the director following a hearing initiated in accordance with subsection (3) of this section if it shall be determined, following evaluation of relevant hydrologic and water quality data, history of developments, and projection of effects of current and new development, that development and utilization of the ground water supply has caused or is likely to cause within the reasonably foreseeable future the existence of either of the following conditions:

(a) An inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply; or

(b) Dewatering of an aquifer, resulting in a deterioration of the quality of such ground water sufficient to make such ground water unsuitable for the present purposes for which it is being utilized.

Section 46-663 provides:

[I]n order to administer and enforce the Nebraska Ground Water Management and Protection Act and to effectuate the policy of the state to conserve ground water resources, a district may:

(1) Adopt and promulgate rules and regulations necessary to discharge the administrative duties assigned in the act;

(2) Require such reports from ground water users as may be necessary;

. . . .

(4) Report to and consult with the Department of Environmental Control on all matters concerning the entry of contamination or contaminating materials into ground water supplies; and

(5) Issue cease and desist orders, following ten days'

> notice to the person affected . . . to initiate suits to enforce the provisions of orders issued pursuant to the act, and to restrain the construction of illegal wells or the withdrawal or use of water from such wells.

Section 46-673.01 provides:

> Prior to January 1, 1986, each district shall prepare a ground water management plan based upon the best available information . . . .
>
> The plan shall include, but not be limited to, the identification to the extent possible of:
>
> . . . .
>
> (7) Past, present, and potential ground water use within the area;
>
> (8) Ground water quality concerns within the area.

Section 46-673.09 provides:

> A district may manage the use of water in a management area by any of the following means:
>
> (1) Allocating the total permissible withdrawal of ground water;
>
> (2) Rotation of use of ground water;
>
> (3) Well-spacing requirements pursuant to section 46-673.12. A district may also require the use of flow meters on wells;
>
> (4) Best management practices; or
>
> (5) Educational programs designed to protect water quality.

Effective September 6, 1991, § 46-673.09 was amended to add the following subsections: "(6) Requiring the analysis of water or deep soils for fertilizer and chemical content; or (7) Educational programs designed to protect water quality."

Wagoner argues that because the Legislature in 1991 added the above provisions, this demonstrates that it recognized that it had not given the authority to require that deep soil samples be provided to CPNRD. A statute may have a specific meaning which is not necessarily changed because of the Legislature's attempt by amendment to clarify that meaning. As stated in *May Broadcasting Co. v. Boehm*, 241 Neb. 660, 665, 490 N.W.2d 203, 206 (1992), "The changes in the statute did not materially affect the meaning of the statute for the purposes of these cases.

Each amendment was an effort to clarify the meaning of the statute, but the essential thrust of [the statute] has not changed." However,

> this jurisdiction is committed to the doctrine that, in a case where the proper interpretation of the statutory terms is involved, in order to ascertain the proper meaning of a statute, later as well as earlier legislation upon the same subject may be referred to. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.

*Ancient and Accepted Scottish Rite v. Board of County Commissioners*, 122 Neb. 586, 598, 241 N.W. 93, 97 (1932).

Wagoner also argues that the 1991 amendment did nothing to change the status of CPNRD's rules because the particular rule was not repromulgated by CPNRD. He is correct. In order to ratify a rule promulgated by an administrative agency for future application, it is necessary that the Legislature express an intent to do so, either by specifically appropriating funds, when necessary, to implement the rule or by making specific reference to the administrative rule in subsequently passed legislation. See *Muller Optical Co. v. E.E.O.C.*, 574 F. Supp. 946, 953 (W.D. Tennessee 1983), citing *Isbrandtsen-Moller Co. v. U.S.*, 300 U.S. 139, 57 S. Ct. 407, 81 L. Ed. 562 (1937): "Such Congressional ratification may occur when both Houses of Congress either pass legislation appropriating funds to implement the executive order or make reference to the executive order in subsequently passed legislation." Therefore, we must look to the legislation which was in effect before the 1991 amendment to determine whether CPNRD possessed authority to require deep soil sample analysis.

A natural resources district, as a political subdivision, has only that power delegated to it by the Legislature, and a grant of power to a political subdivision is strictly construed. *In Re Applications A-15145, A-15146, A-15147, and A-15148*, 230 Neb. 580, 433 N.W.2d 161 (1988) (power to acquire and dispose of water rights did not grant power to a natural resources district to transfer from one entity to another an application pending before it for water diversion).

A natural resources district possesses and can exercise the

following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the district—not simply convenient, but indispensable. See *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993).

Until the 1991 amendment to § 46-673.09, which specifically authorized the requiring of deep soil samples, the Nebraska Water Management and Protection Act seemed primarily, if not exclusively, concerned with the quantity of available water supplies. Section 46-673.09 spoke in terms of authorizing the district to allocate the total permissible withdrawal of ground water, the rotation of ground water, well spacing, flow meters, best management practices, and educational programs to protect water quality. However, beginning with Neb. Rev. Stat. § 46-674.02 (Reissue 1988), which is still a part of the act and which neither party cited or discussed, the Legislature seemed to change gears. That section provides:

> The Legislature finds that:
>
> (1) The levels of nitrate nitrogen and other contaminants in ground water in certain areas of the state are increasing;
>
> (2) Long-term solutions should be implemented and efforts should be made to prevent the levels of ground water contaminants from becoming too high and to reduce high levels sufficiently to eliminate health hazards;
>
> (3) Agriculture has been very productive and should continue to be an important industry to the State of Nebraska;
>
> (4) Natural resources districts have the legal authority to regulate certain activities and, as local entities, are the preferred regulators of activities which may contribute to ground water contamination in both urban and rural areas;
>
> (5) The Department of Environmental Control should be given authority to regulate sources of contamination when necessary to prevent serious deterioration of ground water quality;
>
> (6) The powers given to districts and the Department of

Environmental Control should be used to stabilize, reduce, and prevent the increase or spread of ground water contamination; and

(7) There is a need to provide for the orderly management of ground water quality in areas where available data, evidence, and other information indicate that present or potential ground water conditions require the designation of such areas as special ground water quality protection areas.

The act continues, in § 46-674.03: "Each state agency and political subdivision shall promptly report to the Department of Environmental Control any information which indicates that contamination is occurring." Section 46-674.04 provides:

> If, as a result of information provided pursuant to section 46-674.03 or studies conducted by or otherwise available to the Department of Environmental Control and following preliminary investigation, the Director of Environmental Control has reason to believe that contamination of ground water is occurring or likely to occur in an area of the state in the reasonably foreseeable future, the department shall, in cooperation with any appropriate state agency and district, conduct a study to determine the source or sources of the contamination and the area affected by such contamination and shall issue a written report within one year of the initiation of the study. The department shall consider the relevant water quality portions of the management plan developed by the district pursuant to section 46-673.01 during the study required in this section.

The plan referred to, made pursuant to § 46-673.01, was to include "[g]round water quality concerns within the area."

Until the 1991 amendment, it is apparent that the Legislature did not expressly grant to CPNRD the power to require landowners to furnish deep soil samples and analysis. Furthermore, it would be stretching our powers of analogy to declare that such authority was necessarily implied in or incident to any express powers, or was indispensibly essential to the declared objects and purposes of CPNRD. See *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498

N.W.2d 325 (1993).

It is unnecessary for us to consider the other assigned errors. The judgment of the district court must be reversed and the cause remanded with directions to order the cease and desist orders previously entered by CPNRD to be vacated and the proceedings dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

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FREEMAN SYNACEK, APPELLEE AND CROSS-APPELLANT, V. OMAHA COLD STORAGE TERMINALS, INC., APPELLANT AND CROSS-APPELLEE.

526 N.W.2d 91

Filed January 20, 1995. No. S-93-1021.

1. **Actions: Pleadings.** Whether an action is legal or equitable is determined from its main object as disclosed by the averments of the petition and the relief sought.
2. **Equity: Jurisdiction: Pleadings.** Equity acquires jurisdiction over an action when the averments of the pleadings and the relief sought indicate that the main object of the action is equitable in nature.
3. **Equity: Jurisdiction.** Where a court of equity has acquired jurisdiction of a case, it will make a complete adjudication of all matters properly presented and involved in the case and will ordinarily grant such relief, legal or equitable, as may be required and thus avoid unnecessary litigation.
4. **Equity: Pleadings.** Where a petition states facts entitling the plaintiff to both legal and equitable relief, the pleader has invoked the equitable powers of the court.
5. **Equity: Trial: Juries.** A jury empaneled in an equitable action serves only in an advisory role, and its findings are not binding on the trial court.
6. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries the factual issues de novo on the record and reaches its conclusion independent of the factual findings of the trier of fact; provided, however, that where the credible evidence is in conflict on a material issue of fact, it considers and may give weight to the circumstance that the trier of fact heard and observed the witnesses and accepted one version of the facts rather than another.
7. **Judgments: Courts.** A trial court should limit itself to entering but one final determination of the rights of the parties.
8. **Fair Employment Practices: Discrimination: Proof.** Although in an action brought under Neb. Rev. Stat. §§ 48-1001 through 48-1010 (Reissue 1993) the

burden of persuasion by a preponderance of the evidence at all times remains with the plaintiff, the method of proof is for the plaintiff to prove a prima facie case; if the plaintiff succeeds in so doing, the defendant has the burden of articulating some legitimate, nondiscriminatory reason for its action; should the defendant succeed in so doing, the plaintiff must establish by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but a pretext for discrimination.

9. **Motions to Dismiss: Waiver: Appeal and Error.** A defendant who, after the overruling of a motion for dismissal made at the close of the plaintiff's evidence, adduces evidence on its own behalf waives any error on the motion for dismissal.
10. **Fair Employment Practices: Discrimination: Trial.** Once a case brought under the provisions of Neb. Rev. Stat. §§ 48-1001 through 48-1010 (Reissue 1993) has been fully tried on the merits, the focus is on the ultimate question of whether the employer intentionally discriminated against the employee and not on the adequacy of a party's showing at any particular stage of the trial.
11. **Fair Employment Practices: Discrimination: Proof: Words and Phrases.** For the purpose of analyzing employment discrimination cases, the term "pretext" means pretext for discrimination; to establish that the proffered reason for the action taken by the employer was a pretext for discrimination, the employee must show both that the proffered reason was false and that discrimination was the real reason.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded with direction to dismiss.

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

Thomas F. Hoarty, Jr., and Leanne R. Kullenberg, of McGowan & Hoarty, for appellee.

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

CAPORALE, J.

## I. STATEMENT OF CASE

Averring that his employment had been terminated in violation of Nebraska's age discrimination act, Neb. Rev. Stat. §§ 48-1001 through 48-1010 (Reissue 1993), the plaintiff-appellee, Freeman Synacek, obtained a judgment for past damages and a separate judgment for future damages, as well as an award of an attorney fee against his former employer, the defendant-appellant, Omaha Cold Storage Terminals, Inc. After filing its notice of appeal, Omaha Cold Storage

successfully petitioned for leave to bypass the Nebraska Court of Appeals. Omaha Cold Storage asserts, among other things, that the trial court erred in failing to dismiss the case on the ground that the evidence is insufficient and in awarding an attorney fee. Synacek cross-appealed, claiming that the fee awarded is inadequate, and has moved for an attorney fee in this court. We reverse the judgments of the trial court and remand the cause for dismissal, dismiss Synacek's cross-appeal, and overrule his motion for an attorney fee in this court.

## II. SCOPE OF REVIEW

The scope of our review is necessarily determined by whether this action is one at law or in equity. *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994). We begin that study by noting the language of § 48-1009:

> In any action brought to enforce the provisions of sections 48-1001 to 48-1009, the court shall have jurisdiction to grant such legal or equitable relief as the court may deem appropriate to effectuate the purposes of sections 48-1001 to 48-1009, including judgments compelling employment, reinstatement, or promotion, or enforcing liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation.

Inasmuch as under that provision of the act a plaintiff may invoke either the legal or equitable powers of the court, we next look at Synacek's petition, for whether an action is legal or equitable is determined from its main object as disclosed by the averments of the petition and the relief sought. *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988). Equity acquires jurisdiction over the action when the averments of the pleadings and the relief sought indicate that the main object of the action is equitable in nature. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988); *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry, supra*; *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982); *Nebraska Engineering Co. v. Gerstner*, 212 Neb. 440, 323 N.W.2d 84 (1982). Moreover, where a court of equity has acquired jurisdiction of a case, it will make a complete adjudication of all matters properly presented and

involved in the case and will ordinarily grant such relief, legal or equitable, as may be required and thus avoid unnecessary litigation. *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *Ames v. Ames*, 75 Neb. 473, 106 N.W. 584 (1906) (where petition states facts entitling plaintiff to both legal and equitable relief, pleader has invoked equitable powers of court). Thus, in *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988), we held that the age discrimination causes which sought mandatory injunctions as well as damages were equitable in nature. Cf. *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993) (action under act treated as one at law).

Synacek's petition alleges that he was discriminatorily discharged at 59 years of age and that as a result, he "has suffered and will continue to suffer lost wages, lost fringe benefits, and lost opportunities for advancement . . . ." Such "lost opportunities" may be such that the only effective remedy would be through equity in the form of a mandatory injunction ordering that Synacek be reinstated to his former employment. See, *Maxfield v. Sinclair Intern.*, 766 F.2d 788 (3d Cir. 1985), *cert. denied* 474 U.S. 1057, 106 S. Ct. 796, 88 L. Ed. 2d 773 (1986); *Blim v. Western Elec. Co., Inc.*, 731 F.2d 1473 (10th Cir. 1984), *cert. denied* 469 U.S. 874, 105 S. Ct. 233, 83 L. Ed. 2d 161; *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir. 1982).

Thus, the lost opportunities allegation, coupled with Synacek's prayer that in addition to awarding past and future damages the court grant "such other and further relief" as it "shall deem equitable and just," compels the conclusion that the action was pled in equity. See, also, *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985); *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984) (prayer for equitable relief has no place or role in law action).

Accordingly, the jury empaneled to consider some of the issues in this case served only an advisory role, and its findings were not binding on the trial court. *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982); *Farmers Coop. Assn. v. Klein*, 196 Neb. 180, 241 N.W.2d 686 (1976); *Alter v. Bank of Stockham*, 53 Neb. 223, 73 N.W. 667 (1897). Neither is the

verdict binding on this court, for, in an appeal of an equitable action, an appellate court tries the factual issues de novo on the record and reaches its conclusion independent of the factual findings of the trier of fact; provided, however, that where the credible evidence is in conflict on a material issue of fact, it considers and may give weight to the circumstance that the trier of fact heard and observed the witnesses and accepted one version of the facts rather than another. See, *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994); *Allen v. AT&T Technologies, supra.*

We also observe that while it was entirely appropriate for the trial court to have submitted the issues of the legality of the discharge and the amount of claimed past damages to the advisory jury and to have reserved the remedy as to the claimed future harm to itself, the better practice would have been to have entered but one judgment. See *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986) (trial court should limit itself to entering but one final determination of rights of parties).

## III. FACTS

Omaha Cold Storage operates a refrigerated warehouse and hired Synacek in 1953 as a fireman responsible for firing the steam boilers. Through taking classes, he obtained an engineer's license and in 1965 was promoted to the position of chief engineer, a supervisory position making him responsible for all maintenance, including the refrigeration system.

Omaha Cold Storage became incorporated in 1979, at which time Roy Mattson, who had managed the predecessor entity for approximately 2 years, became president and a shareholder.

On October 16, 1989, Steven William Tomlinson was hired to serve as vice president and chief operating officer and to succeed Mattson as president when Mattson concluded that Tomlinson was ready. It was Tomlinson's duty to go through the operation and decide what changes needed to be made in order to make it "run more efficiently, cost effective and . . . profitable."

At a meeting of the board of directors of Omaha Cold Storage held on Friday, November 17, 1989, Tomlinson asked Mattson

when he planned to retire. Mattson, who was then approximately 64 years old, replied he would retire when he thought Tomlinson was ready to take over as president. The board, however, voted to have Mattson retire immediately, as Tomlinson would be running the company from that point on.

On the following Monday morning, November 20, Tomlinson called a meeting of supervisors, at which time Synacek's duties were changed. Although his salary remained the same, Synacek was no longer to be responsible for general plant maintenance, but was to be responsible for only maintaining the refrigeration system. Responsibility for general plant maintenance was assigned to Mike Anderson, who became Synacek's boss. When Synacek was told that if he needed any people or materials to complete a job he should go to Anderson, Synacek replied that if Anderson was to be his boss, then Anderson would have to tell Synacek everything that needed to be done, as the boss is supposed to know more than the employee.

There is a great deal of dispute over what transpired immediately following that meeting. Synacek claims that Tomlinson asked Synacek to remain behind and that they then had a private talk, during which, after a discussion concerning the cost of raising children, Tomlinson asked when Synacek planned to retire. According to Synacek, he replied that he had not given the matter any thought, but that if he retired at age 62, it would be 2½ years away. Tomlinson denies that such a conversation ever took place, and the other evidence offered in support of either position is inconclusive.

However, there is no disagreement that the next morning, November 21, Anderson talked with Synacek while the latter was changing clothes in front of his locker. After exchanging greetings, Anderson told Synacek that Anderson was " 'not going to fuck with you, because I do not know nothing about refrigeration.' " Synacek replied that was good, but that the " 'little asshole upstairs don't want to fuck with me either.' " Neither is there any disagreement that Tomlinson was the object of Synacek's concern. What is in disagreement is the manner in which Synacek delivered his thought.

Synacek claims that he neither raised his voice, threatened, pointed his finger, nor shook his fist. Anderson, on the other

hand, claims that when he addressed Synacek, Synacek had his back to Anderson and was 8 or 9 feet away. Synacek turned around and walked toward Anderson; it was not until the two were about a foot apart that Synacek delivered his brief oration. Anderson described Synacek as being "[v]ery angry, very upset," "shaking his finger . . . [r]ight in front of [Anderson's] face." Anderson said "okay" and walked out.

According to Anderson, he went upstairs later that day to do some paperwork and saw Tomlinson, who asked about Anderson's conversation with Synacek. Anderson responded that " '[w]e'll work it out' " or " '[w]e'll handle it,' " meaning that he and Synacek would work out whatever differences they had.

However, each of the two or three times that Anderson saw Tomlinson later that day, Tomlinson asked about the conversation, wanting to know exactly what was said. After the third or fourth time he was asked, Anderson later in the afternoon related to Tomlinson exactly what happened.

Tomlinson testified he was "extremely upset" about what Anderson had reported and wanted to get verification. Accordingly, he contacted Jerome Vincent Hytrek, who had been in the area at the time of the incident. According to Tomlinson, Hytrek went to Tomlinson's office when paged between 9:30 and 10 o'clock in the morning and "told me verbatim the way the incident went down that . . . Anderson had related to me earlier."

However, Hytrek, who had since left Omaha Cold Storage and had settled a claim against his former employer, denied hearing the conversation between Anderson and Synacek, denied meeting with Tomlinson, and denied giving Tomlinson any report of the incident.

Tomlinson thereafter testified that while Anderson was initially reluctant to tell him what had happened, Anderson did in fact report the details at 9 o'clock in the morning, and that Hytrek verified Anderson's report at 10 o'clock.

Having determined to discharge Synacek, Tomlinson called Synacek in for a meeting with Anderson and the general manager and did discharge Synacek. According to Tomlinson, Synacek at this time admitted his conversation with Anderson,

but denied calling Tomlinson an asshole. Tomlinson testified that age was not a factor in his decision, maintaining that he considered Synacek's conduct and conversation with Anderson insubordinate and discharged Synacek for that reason and that reason only. Tomlinson explained that the insubordination was reflected not in Synacek's choice of language (indeed, the evidence is that such language was common in the employment environment), but in Synacek's attitude. It was not the language used, but the way it was used.

Tomlinson also testified it was the questioning of both his authority and the authority of Anderson, Synacek's direct supervisor, that constituted insubordination. However, at his earlier deposition, Tomlinson indicated it was only the questioning of Anderson's authority which comprised the offense. Synacek was not replaced; his duties were transferred to a 33-year-old employee.

During the period of October through December 1989, Omaha Cold Storage had a total of 67 employees. Of those employees, 30 of them, or 45 percent, were between 40 and 70 years of age. Of those 30 employees, 10 were 40 to 50; 13 were 50 to 60; and 7 were 60 to 70 years of age.

During that same period, four employees over 40 years of age left their employment at Omaha Cold Storage; Synacek and one other employee were discharged for insubordination, another was discharged because his work was of poor quality, and the last retired.

A total of three employees were terminated for insubordination during those months. Thus, two of the three employees terminated for insubordination after Tomlinson took charge were more than 40 years old. The employee who was under 40 years of age was discharged, before Tomlinson took charge, for coming to work drunk.

## IV. ANALYSIS

Synacek's action is grounded in the provisions of §§ 48-1003 and 48-1004 of the act, which make it unlawful to discharge because of age one who is at least 40 but less than 70 years of age, unless the reasonable demands of the position require such an age distinction.

We have held that although in an action brought under the act the burden of persuasion by a preponderance of the evidence at all times remains with the plaintiff, the method of proof is for the plaintiff to prove a prima facie case; if the plaintiff succeeds in so doing, the defendant has the burden of articulating some legitimate, nondiscriminatory reason for its action; should the defendant succeed in so doing, the plaintiff must establish by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but a pretext for discrimination. *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993); *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988). However, a defendant who, after the overruling of a motion for dismissal made at the close of the plaintiff's evidence, adduces evidence on its own behalf waives any error on the motion for dismissal. See, *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994); *Mack v. Parkieser*, 53 Neb. 528, 74 N.W. 38 (1898). Thus, once an age discrimination case has been fully tried on the merits, the focus is on the ultimate question of whether the employer intentionally discriminated against the employee and not on the adequacy of a party's showing at any particular stage of the trial. See, *St. Mary's Honor Center v. Hicks*, ____ U.S. ____, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) (race discrimination); *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983) (race discrimination); *Bethea v. Levi Strauss & Co.*, 827 F.2d 355 (8th Cir. 1987) (age discrimination). Since Omaha Cold Storage adduced evidence on its own behalf after it unsuccessfully moved for dismissal at the close of Synacek's case, it waived any error in that regard, and this case was thus fully tried on the merits. As a consequence, the question is whether all the evidence establishes that Omaha Cold Storage intentionally discriminated against Synacek because of his age.

We accept as true Synacek's statement that shortly before he was discharged, he was asked when he intended to retire. However, that fact alone does not establish that he was discharged because of his age. It is entirely appropriate for an employer to inquire as to an employee's thoughts in that regard; an employer, too, must plan for the future. Moreover, an

employer might be willing to tolerate for a short time but not for a long time an employee whom the employer finds undesirable for some nondiscriminatory reason. In view of the fact that Tomlinson was brought in to make the operation profitable, Mattson's having been asked the same question immediately before he was removed as president does not persuade us that Omaha Cold Storage had thereby demonstrated a desire to purge itself of older workers.

Likewise, the statistical evidence concerning the number of employees, by age group, and the number of types of discharges in the over-40 age group does not establish anything of significance.

Because of the inconsistencies between the testimony of Tomlinson, Anderson, and Hytrek concerning when and how Tomlinson went about confirming the November 21 conversation between Synacek and Anderson, we conclude that Tomlinson's proffered reason for discharging Synacek was not entirely truthful. Nonetheless, the evidence does not persuade us that Omaha Cold Storage discriminated against Synacek because of his age. In this regard, we hold that for the purpose of analyzing employment discrimination cases, the term "pretext" means pretext for discrimination; to establish that the proffered reason for the action taken by the employer was a pretext for discrimination, the employee must show both that the proffered reason was false and that discrimination was the real reason. *St. Mary's Honor Center v. Hicks, supra*; *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994).

Accordingly, there is merit in Omaha Cold Storage's claim that the evidence is insufficient.

## V. JUDGMENT

The trial court's judgments in Synacek's favor are reversed and the cause remanded for dismissal. By virtue of the foregoing, it follows that even if there otherwise were a basis for awarding Synacek an attorney fee, a matter we do not decide, his cross-appeal must be, and hereby is, dismissed, and his motion for an attorney fee in this court must be, and hereby is, overruled.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

LANPHIER, J., dissenting.

This case arises under the Act Prohibiting Unjust Discrimination in Employment Because of Age, Neb. Rev. Stat. § 48-1001 et seq. (Reissue 1993). In age discrimination cases brought under our state law, we have held that

> "although the ultimate burden of persuasion by a preponderance of the evidence at all times remains with the plaintiff, the method of proof is for the plaintiff to prove a prima facie case; if the plaintiff succeeds in so doing, the defendant has the burden of articulating some legitimate, nondiscriminatory reason for its action. Should the defendant succeed in so doing, the plaintiff must establish by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."

*Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 878, 503 N.W.2d 211, 217 (1993). See, also, *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988).

Thus, if the defendant articulates some allegedly legitimate, nondiscriminatory reason for its action, the plaintiff must establish, by a preponderance of the evidence, that the proffered reason was pretextual. Now, the majority holds that a plaintiff must not only show that the reason proffered by the employer is false but also establish that the employee's age was the real reason for the employer's action. In so doing, the majority relies on *St. Mary's Honor Center v. Hicks*, ____ U.S. ____, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). However, the majority does not, in my opinion, set out the full holding of the Supreme Court of the United States in *St. Mary's Honor Center*. In reliance on *St. Mary's Honor Center* in its entirety, I dissent.

In *St. Mary's Honor Center*, the Court addressed the issue of whether the trier of fact's rejection of the employer's asserted reasons for the employer's actions mandates a finding for the plaintiff. In that case, the majority held that rejection of the defendant's proffered reasons does not compel judgment for the plaintiff. A finding that the employer's explanation of its action is not believable is not the equivalent of finding that the employer's action was the product of unlawful discrimination. *Id.*

However, *St. Mary's Honor Center* also holds that the "factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the [plaintiff's] prima facie case, suffice to show intentional discrimination." 113 S. Ct. at 2749. "[R]ejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" without any additional proof of discrimination. *Id.*

In this case, the majority concludes that the defendant's proffered reason for terminating Synacek was not entirely truthful. However, the majority would require Synacek to show both that the proffered reason was false and that discrimination was the real purpose. The majority ignores the possibility that a finding of discrimination could be based solely upon the plaintiff's prima facie case and the inferences arising from the fact that the defendant's proffered reason was proven to be less than fully truthful.

The evidence establishes that the day Tomlinson took over as president, he asked 59-year-old Synacek when he planned to retire; that the next day a conversation took place between Synacek and Anderson during which alleged insubordination occurred; that two of the three persons present during that conversation testified that no threats, abuse, or shouting occurred; and that 4 days earlier, Tomlinson asked the 64-year-old president, Mattson, when he planned to retire, after which the board voted to remove Mattson. Based on this evidence, a jury concluded that Omaha Cold Storage had discriminated against Synacek on the basis of his age. The trial court, sitting in equity, accepted the findings of the jury and awarded front pay and attorney fees in addition to the jury's damage award.

In an appeal of an equitable action, an appellate court tries the factual issues de novo on the record and reaches its conclusion independent of the factual findings of the trier of fact. However, where the credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstance that the trier of fact heard and observed the witnesses and accepted one version of the facts rather than another. *Upah v. Ancona Bros. Co.*, 246 Neb. 585,

521 N.W.2d 895 (1994); *County of Dakota v. Worldwide Truck Parts & Metals*, 245 Neb. 196, 511 N.W.2d 769 (1994); *Rigel Corp. v. Cutchall*, 245 Neb. 118, 511 N.W.2d 519 (1994).

The elements of Synacek's prima facie case, coupled with the inference arising from the lack of credibility contained in the employer's evidence, suggest that we should give weight to the fact finder's determination that Omaha Cold Storage intentionally discriminated against Synacek because of his age. Accordingly, I would affirm the judgment of the district court in this regard.

WHITE, J., joins in this dissent.

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

526 N.W.2d 420

Filed January 20, 1995. No. S-94-474.

1. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically held otherwise.
2. **Criminal Law: Sentences: Judgments.** In criminal cases, it is the sentence which is the judgment.
3. **Convictions: Sentences: Judgments: Appeal and Error.** A conviction and sentence are not considered final judgments until after an appeal, if there indeed is an appeal.
4. **Actions.** Generally speaking, a suit against a state agency is a suit against the state itself.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

Don Stenberg, Attorney General, James H. Spears, and William L. Howland for appellant.

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

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

WHITE, J.

Daniel D. Schrein was convicted by a jury of five counts of sexual assault of a child. This court upheld Schrein's convictions in *State v. Schrein*, 244 Neb. 136, 504 N.W.2d 827 (1993). The trial judge found Schrein to be a mentally disordered sex offender and sentenced Schrein to a term of not less than 15 months' nor more than 3 years' imprisonment on each of the five counts, with all sentences to run consecutively.

In 1992, the Nebraska Legislature passed 1992 Neb. Laws, L.B. 523, codified as Neb. Rev. Stat. § 29-2922 et seq. (Cum. Supp. 1994), which is known as the Convicted Sex Offender Act. Under the act, specifically § 29-2934, each person convicted and committed as a mentally disordered sex offender shall be returned to the court which sentenced the person so that the court may review the person's sentence to ensure that the disposition of the case is consistent with the provisions of the new act.

The district court reviewed the disposition of Schrein's case and found that Schrein was not amenable to treatment and could not, in a manner consistent with public safety, be placed in an aftercare program. The judge ordered Schrein to serve the remainder of his sentence at a facility of the Department of Correctional Services (DCS), in accordance with § 29-2934(7), and also ordered the DCS to calculate the amount of good time Schrein should be credited in accordance with the new good time provisions found in 1992 Neb. Laws, L.B. 816, § 2, codified as Neb. Rev. Stat. § 83-1,107 (Cum. Supp. 1992). L.B. 816 became effective while Schrein's appeal was pending, and increases the amount of good time that may be credited to an offender's sentence. The State appeals the determination that Schrein should be given the benefit of the new good time law instead of the previous good time law that was in effect when Schrein was sentenced.

The State argues that the date of a defendant's initial incarceration is the date which determines which good time law applies, and that a defendant who is convicted and starts his

sentence before the effective date of a new good time law cannot benefit from the new good time provisions. The State cites *Boston v. Black*, 215 Neb. 701, 340 N.W.2d 401 (1983); *SapaNajin v. Johnson*, 219 Neb. 40, 360 N.W.2d 500 (1985); and *Johnson v. Bartee*, 228 Neb. 111, 421 N.W.2d 439 (1988), as support for this analysis of Nebraska's good time law.

While it is true that *Boston*, *SapaNajin*, and *Johnson* concern analyses of the application of Nebraska's good time laws, none of the cases consider the issue of what law applies when the good time law is revised *during the pendency of a defendant's appeal*. *Boston* considered which good time law applied to those persons who were serving consolidated sentences and is thus inapplicable to the facts and issue now before this court. The offenders' judgments in *SapaNajin* and *Johnson* were final before the good time issue arose in those cases, and the cases are therefore also inapplicable.

Since the rule was first enunciated in *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971), *cert. denied* 403 U.S. 909, 91 S. Ct. 2217, 29 L. Ed. 2d 686, we have consistently held that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act *but before final judgment*, the punishment is that provided by the amendatory act unless the Legislature has specifically held otherwise. See, *State v. Peiffer*, 212 Neb. 864, 326 N.W.2d 844 (1982); *State v. Warner*, 192 Neb. 438, 222 N.W.2d 292 (1974); *State v. Ambrose*, 192 Neb. 285, 220 N.W.2d 18 (1974); *State v. Waldrop*, 191 Neb. 434, 215 N.W.2d 633 (1974). In criminal cases, it is the sentence which is the judgment. *State v. Beverlin*, 244 Neb. 615, 508 N.W.2d 271 (1993); *State v. Foster*, 239 Neb. 598, 476 N.W.2d 923 (1991). In *Warner, supra*, we found that the defendant's conviction and sentence became a *final judgment* on the date that this court entered its mandate concerning the defendant's appeal. Thus, a conviction and sentence are not considered final judgments until after an appeal, if there indeed is an appeal.

By analogy, the new good time law should apply. Schrein was sentenced in 1991. Schrein's convictions were upheld by this court in 1993. See *Schrein, supra*. L.B. 816 became effective on July 15, 1992, during the time that Schrein's case was on

appeal. As stated above, L.B. 816 increased the amount of good time that may be granted to an offender. Clearly, this case is governed by the law established in *Randolph, supra*, and the cases which follow *Randolph*. Since the judgment against Schrein did not become final until after his appeal, or September 1993, L.B. 816 governs the amount of good time Schrein may receive. The trial court therefore correctly determined that the DCS should calculate the amount of good time Schrein could receive under the new good time provisions set forth in L.B. 816.

The State also argues that the district court had no jurisdiction to order the DCS to calculate Schrein's good time under the new law, since the DCS was not made a party to the hearing. This argument is meritless. The State would have this court believe that while it is a proper party in the case, the DCS is not. The DCS is an agency of the State. Generally speaking, a suit against a state agency is a suit against the state itself. *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985). The State, in this case, cannot admit that the State itself is a proper party and then argue that its own agency is not, absent some statutory provision providing otherwise. No such statutory provision exists in this case.

Having found that the district court did not err in its determination that Schrein should receive the benefits of the new good time provision passed while Schrein's case was on appeal, we affirm the decision of the district court.

AFFIRMED.

# ASHLYN KAI BREANNE FLORA, BY AND THROUGH HER NEXT FRIEND AND FATHER, ERIC FLORA, APPELLEE, V. LORI ESCUDERO, APPELLANT.

526 N.W.2d 643

Filed January 27, 1995. No. S-93-402.

1. **Judgments: Appeal and Error.** An appellate court has an obligation to reach a conclusion independent from a trial court's conclusion as to questions of law.
2. **Constitutional Law: Legislature: Supreme Court: Appeal and Error.** Article I, § 24, of the Nebraska Constitution does not prevent the Legislature or the Nebraska Supreme Court from making reasonable rules and regulations for a review of a case on appeal.
3. **Courts: Jurisdiction: Appeal and Error.** Lower courts are divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected.
4. **Jurisdiction: Affidavits: Appeal and Error.** An in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty.
5. ____: ____: ____. Although jurisdiction is vested in the appellate court upon timely filing of a notice of appeal and an affidavit of poverty, Neb. Rev. Stat. §§ 25-2301 and 25-2308 (Reissue 1989) require the lower court to act if it determines that the allegations of poverty are untrue or if it determines that the appeal is not taken in good faith.
6. **Affidavits: Appeal and Error.** Generally, appellants are entitled to the benefits of an in forma pauperis appeal when the affidavit of poverty and notice of appeal are filed and stand uncontradicted and unobjected to. If there is no hearing on the poverty affidavit and the appeal, or when there is a hearing and the evidence is uncontradicted, the trial court has a duty to allow the appellant to proceed in forma pauperis.
7. ____: ____. On a trial court's own motion or on objection, a trial court may inquire into the truthfulness or good faith of the litigant's poverty affidavit and notice of appeal.
8. ____: ____. A trial court's decision regarding the truthfulness or good faith of a litigant's poverty affidavit and notice of appeal will not be disturbed on appeal unless it amounts to an abuse of discretion.
9. **Judgments: Appeal and Error.** When it appears that a trial court may deny an appellant leave to proceed in forma pauperis, a hearing shall be held. As required by Neb. Rev. Stat. § 25-2301 (Reissue 1989), the trial court must certify in writing if, in its judgment, an appeal lacks good faith. A written statement of the trial court's reasons, findings, and conclusions for denial of the appellant's leave to proceed in forma pauperis must accompany its certification that an appeal is frivolous.
10. **Constitutional Law: Habeas Corpus: Child Custody.** The writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of liberty, including the custody and best interests of a minor when in the physical

custody of one not acquiring such under a court order or decree.

11. **Habeas Corpus: Child Custody.** Habeas corpus is an appropriate action to test the legality of custody and best interests of a minor, including the rights of fathers of children born out of wedlock.
12. **Habeas Corpus: Words and Phrases.** Habeas corpus is a special proceeding, civil in character, which provides a summary remedy open to persons illegally detained. The remedy is not demandable as a matter of course; legal cause must be shown in order to entitle a petitioner to the remedy of habeas corpus.
13. **Habeas Corpus.** A writ of habeas corpus ordinarily will not be granted where another adequate remedy exists.

Appeal from the District Court for Red Willow County: JOHN J. BATTERSHELL, Judge. Reversed and remanded with directions to dismiss.

Sally A. Rasmussen, of Mousel Law Firm, P.C., for appellant.

Eric Flora, pro se.

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

PER CURIAM.

This is an appeal from a habeas corpus proceeding brought by Ashlyn Kai Breanne Flora, a minor, by and through her next friend and father, Eric Flora, in the district court for Red Willow County. Flora alleged he was the child's natural father and sought the writ in order to obtain specific visitation rights with Ashlyn Kai, who was in the care and custody of her mother, Lori Escudero. Flora and Escudero have never been married. From an order setting specific visitation, Escudero appealed. Habeas corpus is a special proceeding which provides persons illegally detained a summary remedy. Here, the legality of the mother's custody was not placed in issue, and there is no basis for the issuance of a writ. Therefore, the judgment of the district court must be reversed and the cause remanded with directions to dismiss.

Our review of Escudero's appeal discloses a procedural obstacle that is likely to reoccur, and we take this opportunity to resolve the problem. After the district court issued its order, Escudero sought leave to proceed in forma pauperis on appeal. Leave was denied because the district court deemed Escudero's

appeal to be frivolous, but there is nothing in the record stating the basis for that determination. In the future, when it appears that a trial court may deny an appellant leave to proceed in forma pauperis, a hearing shall be held. As required by Neb. Rev. Stat. § 25-2301 (Reissue 1989), the trial court must certify in writing if, in its judgment, an appeal is frivolous. A written statement of the trial court's reasons, findings, and conclusions for denial of appellant's leave to proceed in forma pauperis must accompany its certification.

## BACKGROUND

On October 29, 1992, a petition for a writ of habeas corpus was filed in the district court for Red Willow County, Nebraska, by Ashlyn Kai Breanne Flora, by and through her next friend and father, Eric Flora. In the petition, Flora stated that he was the natural father of Ashlyn Kai. Flora alleged that Lori Escudero refused to allow him reasonable access to the child for visitation. Flora asked the court to set a date for a hearing, establish reasonable visitation, and set child support.

In her answer, Escudero admitted that Flora was the natural father of her daughter. Escudero cross-claimed and requested that the court determine the child's paternity, change the child's surname from Flora to Escudero, and set visitation and child support.

The matter went to trial on April 19, 1993. By an order dated April 20, the court decreed that Flora was the natural and lawful father of Ashlyn Kai. Custody of the child was placed in Escudero, subject to reasonable rights of visitation, including overnight visits. Flora was ordered to pay child support in the amount of $50 per month. The court declined to change the surname of the minor child. Flora was ordered to pay the costs of the action, and each party was ordered to pay his or her own attorney fees.

On May 10, 1993, Escudero timely filed a notice of appeal to the Nebraska Court of Appeals and submitted to the district court for Red Willow County a motion to proceed in forma pauperis on appeal. In her motion, Escudero stated that because of her poverty, she was unable to prepay the costs of pursuing an appeal, including the cost of having a transcript prepared, the

payment of the docket fee, and the expense of copying appellate briefs. Escudero further stated that she was taking the appeal in good faith and that she believed she was entitled to the relief sought.

On May 13, 1993, the district court filed a journal entry, dated May 12, denying Escudero leave to proceed in forma pauperis on appeal because, in the opinion of the court, Escudero's appeal was not taken in good faith.

On May 28, 1993, Escudero filed a motion with the Nebraska Court of Appeals requesting an order directing the district court for Red Willow County to grant her leave to proceed in forma pauperis. On June 21, by order of the Nebraska Supreme Court, this case was removed from the Court of Appeals docket to the Supreme Court docket.

On October 27, 1993, this court granted Escudero's motion to proceed in forma pauperis and directed the District Court for Red Willow County to order Red Willow County to pay the costs for the preparation of the bill of exceptions.

## STANDARD OF REVIEW

An appellate court has an obligation to reach a conclusion independent from a trial court's conclusion as to questions of law. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *Bell Abstract & Title v. Caro, Inc.*, 243 Neb. 576, 500 N.W.2d 834 (1993).

Article I, § 24, of the Nebraska Constitution does not prevent the Legislature or this court from making reasonable rules and regulations for a review of a case on appeal. *Nebraska State Bank v. Dudley*, 203 Neb. 226, 278 N.W.2d 334 (1979); *Barney v. Platte Valley Public Power and Irrigation District*, 144 Neb. 230, 13 N.W.2d 120 (1944); *Schmidt v. Boyle*, 54 Neb. 387, 74 N.W. 964 (1898).

## IN FORMA PAUPERIS APPEALS

As stated below, the district court lacked the basis for the issuance of a writ, and the judgment of the district court must be reversed and the cause remanded with directions to dismiss. However, Escudero's difficulties in pursuing her appeal prompt us to exercise our power to make reasonable rules and regulations for a review of a case on appeal. See, *Nebraska*

*State Bank, supra*; *Barney, supra*; *Schmidt, supra*. We use this opportunity to clarify the proper procedure lower courts must follow when denying leave to proceed in forma pauperis and to provide a mechanism for an appellate court to review such a denial.

Section 25-2301 provides:

> Any court of the State of Nebraska, except the Nebraska Workers' Compensation Court, or of any county shall authorize the commencement, prosecution, or defense of any suit, action, or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security, by a person who makes an affidavit that he or she is unable to pay such costs or give security. Such affidavit shall state the nature of the action, defense, or appeal and affiant's belief that he or she is entitled to redress. An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

Neb. Rev. Stat. § 25-2306 (Reissue 1989) provides that the trial court shall order transcripts to be furnished without cost if an appeal is not frivolous, but presents a substantial question, and if the transcript is needed to prepare, present, or decide the issue presented by the appeal. Neb. Rev. Stat. § 25-2308 (Reissue 1989) provides, "The court may dismiss the case or permit the affiant to proceed upon payment of costs if the allegation of poverty is untrue, or if the court is satisfied that the action is frivolous or malicious."

We have uniformly held that lower courts are divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected. *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *State v. Battershaw*, 220 Neb. 661, 371 N.W.2d 313 (1985). In *In re Interest of N.L.B*, 234 Neb. 280, 450 N.W.2d 676 (1990), we held that an in forma pauperis appeal is perfected when the appellant timely filed a notice of appeal and an affidavit of poverty.

Although jurisdiction is vested in the appellate court upon timely filing of a notice of appeal and an affidavit of poverty, some duties are still required of the lower court. See, e.g., § 25-1912(4) and (5) (Cum. Supp. 1994); Neb. Ct. R. of Prac. 1 (rev. 1993). For example, the lower court must forward to the

appellate court the notice of appeal, requests for the transcript and the bill of exceptions, and the docket fee or poverty affidavit. Sections 25-2301 and 25-2308 require the lower court to act if it determines that the allegations of poverty are untrue or if it determines that the appeal is not taken in good faith.

Generally, appellants are entitled to the benefits of an in forma pauperis appeal when the affidavit of poverty and notice of appeal are filed and stand uncontradicted and unobjected to. If there is no hearing on the poverty affidavit and the appeal, or when there is a hearing and the evidence is uncontradicted, the trial court has a duty to allow the appellant to proceed in forma pauperis. *State v. Eberhardt*, 179 Neb. 843, 140 N.W.2d 802 (1966). However, on the court's own motion or on objection, a trial court may inquire into the truthfulness or good faith of the litigant's poverty affidavit and notice of appeal. *Id.*

Here, the district court summarily denied Escudero's motion to proceed in forma pauperis because, in the court's opinion, Escudero's appeal was frivolous. No hearing was held, and the district court provided no findings in support of its holding that Escudero's appeal was frivolous.

Escudero appealed the district court's denial of her motion to proceed in forma pauperis to this court via a motion for order authorizing appellant to proceed in forma pauperis pursuant to Neb. Ct. R. Prac. 6 (rev. 1992). Given her indigency, Escudero was unable to pay the costs of pursuing a direct appeal and was unable to provide a transcript or a bill of exceptions from the trial below. Accordingly, our review of Escudero's appeal from the denial of her in forma pauperis motion was based entirely on her brief in support of her motion to proceed and on her attached poverty affidavit. Ordinarily, a trial court's decision regarding the truthfulness or good faith of a litigant's poverty affidavit and notice of appeal will not be disturbed on appeal unless it amounts to an abuse of discretion. See *Eberhardt, supra*. We could not determine whether the trial court acted within its discretion or abused its discretion without a statement of why the court deemed Escudero's appeal to be frivolous.

In the future, when it appears that a trial court may deny an appellant leave to proceed in forma pauperis, a hearing shall be held. As required by § 25-2301, the trial court must certify in

writing if, in its judgment, an appeal lacks good faith. However, a written statement of the trial court's reasons, findings, and conclusions for denial of the appellant's leave to proceed in forma pauperis must accompany its certification that an appeal is frivolous.

## WRIT OF HABEAS CORPUS AND VISITATION

We have described the writ of habeas corpus as a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of liberty, including the custody and best interests of a minor when in the physical custody of one not acquiring such under a court order or decree. *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992). Habeas corpus is an appropriate action to test the legality of custody and best interests of a minor, including the rights of fathers of children born out of wedlock. *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986).

Habeas corpus is a special proceeding, civil in character, which provides a summary remedy open to persons illegally detained. *Neudeck v. Buettow*, 166 Neb. 649, 90 N.W.2d 254 (1958). The remedy is not demandable as a matter of course; legal cause must be shown in order to entitle a petitioner to the remedy of habeas corpus. *Nicholson v. Sigler*, 183 Neb. 24, 157 N.W.2d 872 (1968), *cert. denied* 393 U.S. 876, 89 S. Ct. 174, 21 L. Ed. 2d 148. Moreover, a writ of habeas corpus ordinarily will not be granted where another adequate remedy exists. *In re Application of Dunn*, 150 Neb. 669, 35 N.W.2d 673 (1949).

Here, the petition alleges that Flora is the natural father and Escudero is the natural mother and custodial parent of the minor child. The petition further alleges that no judicial determination of the custodial rights had been made, that the child was living with Escudero, and that Escudero refused to allow Flora reasonable access to visitation or to share in the custody or control of the child. The petition's prayer requested that "upon hearing, the court determine that Eric Flora should have definite visitation rights with the child" and that "reasonable child support be determined by the court along with such other relief as may be just and equitable." Flora did not request custody in

his prayer for relief. Further, Flora's prayer for equitable relief plays no role in this legal proceeding. See, *Synacek v. Omaha Cold Storage Terminals, ante* p. 244, 526 N.W.2d 91 (1995); *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984) (prayer for equitable relief has no place or role in law action).

Thus, while the petition notes that the mother refuses to share custody or control of the child, it does not challenge the mother's physical custody of the child. Flora's primary purpose, as stated in the petition, is to obtain visitation rights rather than custody. In child custody cases, a writ of habeas corpus is proper to test the legality of custody although in a case of a writ sued out for the detention of a child, the law is more concerned about the best interests of the child than the illegality of the detention. *Christopherson v. Christopherson*, 177 Neb. 414, 129 N.W.2d 113 (1964).

Since Flora's petition did not contest the legality of the mother's custody of the child, Flora was not entitled to a writ of habeas corpus. We reverse, and remand the cause with directions to dismiss the petition for writ of habeas corpus.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

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## HEATH CONSULTANTS, INC., APPELLEE, V. PRECISION INSTRUMENTS, INC., APPELLANT, AND KATHERINE WALDMANN AND TIM WALDMANN, AS INDIVIDUALS, APPELLEES.

527 N.W.2d 596

Filed January 27, 1995. No. S-93-412.

1. **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.
2. **Vendor and Vendee.** A tying arrangement is an agreement by a party to sell one product, but only on the condition that the buyer also purchase a different, or tied,

product, or at least agree that it will not purchase that product from another supplier.

3. **Vendor and Vendee: Contracts.** A tying arrangement need not be expressly embodied in written contracts; such an arrangement may be deduced from a course of conduct.
4. **Vendor and Vendee.** A tying arrangement unlawfully restrains trade or commerce if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.
5. **Vendor and Vendee: Evidence.** A plaintiff alleging an unlawful tying arrangement must produce some evidence of the following elements: (1) the existence of two distinct products or services; (2) sufficient economic power on the part of the defendant in the tying market to appreciably restrain competition in the tied product market, combined with the exercise of such power to coerce the purchaser to buy both items; and (3) that the amount of commerce affected is not insubstantial.
6. **Vendor and Vendee: Words and Phrases.** Appreciable economic power in the tying market concerns market power, which is the power to force a purchaser to do something that the purchaser would not do in a competitive market.
7. **Sales: Words and Phrases.** Market power is the ability of a single seller to raise price and restrict output.
8. **Vendor and Vendee.** Tie-ins are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected.
9. **Words and Phrases.** Monopolization consists of two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.
10. **Vendor and Vendee.** A tying arrangement which affects consumers in Nebraska by denying them the advantage of parts sold in a freely competitive market establishes anticompetitive and monopolistic restraint of trade and commerce within the State of Nebraska.
11. **Constitutional Law: Sales: Statutes: States.** The Commerce Clause of the U.S. Constitution does not necessarily preclude the application of state antitrust laws to interstate commerce.
12. **Sales: Statutes: States.** Where a state statute regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, the statute will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

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

Jeffrey A. Silver for appellant.

Dan H. Ketcham and Amy Sherman LaFollette, of Hansen, Engles & Locher, P.C., for appellee Heath Consultants.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and GRANT, J., Retired, and HOWARD, D.J., Retired.

CAPORALE, J.

## I. STATEMENT OF CASE

Through its counterclaim, the defendant-appellant, Precision Instruments, Inc., asserts that it has been damaged as the result of the unlawful anticompetitive and monopolistic restraint of trade or commerce practiced by the plaintiff-appellee, Heath Consultants, Inc. Concluding that the record failed to so establish, the district court sustained Heath's motion for summary judgment and dismissed Precision's counterclaim. Precision appealed to the Nebraska Court of Appeals, assigning the ruling as error. 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 the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

## II. SCOPE OF REVIEW

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. *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994).

## III. FACTS

Heath is a Delaware corporation in the business of manufacturing, selling, and repairing leak detection equipment primarily used by the utilities industry. It maintains its principal office in Massachusetts, its operations and manufacturing headquarters in Texas, and its repair facilities in California, Massachusetts, Pennsylvania, and Texas. Until sometime in 1989, it also maintained an office in Omaha. The record further establishes that Heath operates in at least a 15-state area extending from the Mexican border to the Canadian border and

from Hawaii and Alaska to the Missouri River.

Precision is an Iowa corporation in the business of repairing leak detection equipment, maintaining its office in Iowa. Both corporations service customers in Nebraska and have Nebraska customers in common, which include Precision's two largest accounts.

Precision claims that because Heath is the exclusive manufacturer and distributor of the equipment bearing its name and because it refuses to sell replacement parts for use in repairs to be made by Precision, Precision cannot repair Heath equipment and is thereby damaged.

Precision can replicate some of Heath's parts by reference to Heath schematics, which Precision has obtained from a variety of sources, and the use of generic components. However, other Heath parts cannot be replicated either because the particular parts are specific to Heath or because the specifications require the use of the manufacturers' parts. Moreover, a number of parts specific to Heath are not interchangeable with parts made by other manufacturers.

Precision ordered parts from Heath in order to make repairs on three separate occasions. Apparently because of an inadvertent error, Heath sent Precision all the parts requested on the first order. However, Heath sent only some of the parts that Precision requested on its second order and failed to send any of the items that Precision requested on its third order.

Heath advised Precision that it would not supply Precision with parts until the litigation between them was resolved. However, Heath admits that its policy is to sell parts only to end users of its equipment and that the repair service market for Heath equipment is limited because of Heath's control of the parts.

Nonetheless, Heath contends that several competitors exist which are capable of repairing Heath equipment and that end users of its equipment can obtain parts to repair their own equipment, employ Heath's repair service, or employ any other repair service.

At times, Precision has been able to obtain Heath parts through end users of Heath equipment. However, on one occasion, Heath failed to fill a parts order for an Iowa end user

which wanted to avail itself of Precision's repair service. At least one of the parts could not be duplicated; ultimately, Precision sent the equipment to a Heath repair center. Although the record does not expressly explain Heath's refusal to send parts to the end user, it does contain a letter in which the end user advised Heath that it elected to employ Precision rather than Heath because Precision had submitted a lower bid.

A Michigan repair service which has access to Heath parts and advertises the repair of Heath equipment also refused to sell Heath parts to Precision. The repair service indicated, however, that it would repair Heath equipment for Precision.

## IV. ANALYSIS

Precision relies on Nebraska's unlawful restraint of trade act, Neb. Rev. Stat. §§ 59-801 through 59-831 (Reissue 1993). Section 59-801 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a Class IV felony.

Section 59-802 reads: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce, within this state, shall be deemed guilty of a Class IV felony."

In addition to imposing criminal penalties, the act provides for the recovery of damages by one injured as the result of forbidden or unlawful conduct. § 59-821.

Precision's position, in essence, is that although there is no formal written agreement between Heath and its end users requiring the latter to purchase parts and service only from Heath, Heath's policies nonetheless create such a tying arrangement, which results in the unlawful restraint and monopolization of trade or commerce.

### 1. Tying Arrangement

Section 59-829 declares: "When any provision of . . . Chapter 59 is the same as or similar to the language of a federal

antitrust law, the courts of this state in construing . . . any provision of Chapter 59 shall follow the construction given to the federal law by the federal courts."

Assuming without deciding that this provision raises no distribution of powers issue, the legal reality is that with or without that statutory provision, federal cases interpreting federal legislation which is nearly identical to the Nebraska act constitute persuasive authority. Having rendered no prior decisions concerning tying arrangements, we look to federal law for guidance, at the least.

(a) Existence of Arrangement

A tying arrangement has been defined as an agreement by a party to sell one product, but only on the condition that the buyer also purchase a different, or tied, product, or at least agree that it will not purchase that product from another supplier. *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). A tying arrangement " 'need not be expressly embodied in written contracts. Such arrangements may be deduced from a course of conduct.' " *Associated Press v. Taft-Ingalls Corporation*, 340 F.2d 753, 765 (6th Cir. 1965), *cert. denied* 382 U.S. 820, 86 S. Ct. 47, 15 L. Ed. 2d 66. Accord *Osborn v. Sinclair Refining Company*, 286 F.2d 832 (4th Cir. 1960), *cert. denied* 366 U.S. 963, 81 S. Ct. 1924, 6 L. Ed. 2d 1255 (1961).

Although Heath professes its willingness to sell parts to its end users for repairs to be made either by the user or any repair service the user desires, it may be inferred from the instance in which Heath refused to deliver parts for repairs to be made by Precision that Heath does not always act as it claims.

To the contrary, the record reasonably supports an inference that Heath compels its end users who do not wish to make repairs themselves to resort either to Heath's repair services or to one or more particular non-Heath service providers. Thus, the record reasonably supports an inference that there exists a tying arrangement or contract requiring that in order to obtain parts, purchasers of Heath equipment either perform their own repairs or purchase Heath repair services or a repair service specified by Heath.

(b) Unlawful Nature of Arrangement

Not unlike § 59-801, the Sherman Antitrust Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988). Section 2 of the act, much like § 59-802, declares: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2.

A tying arrangement violates § 1 of the Sherman Antitrust Act if the seller has " 'appreciable economic power' " in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992). See *Fortner Enterprises v. U. S. Steel*, 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969), *appeal after remand* 452 F.2d 1095 (6th Cir. 1971), *cert. denied* 406 U.S. 919, 92 S. Ct. 1773, 32 L. Ed. 2d 119 (1972). Therefore, a plaintiff alleging an unlawful tying arrangement must produce some evidence of the following elements: (1) the existence of two distinct products or services; (2) sufficient economic power on the part of the defendant in the tying market to appreciably restrain competition in the tied product market, combined with the exercise of such power to coerce the purchaser to buy both items; and (3) that the amount of commerce affected is not insubstantial. See *Eastman Kodak Co., supra.* (It should perhaps be noted at this point that although the U.S. Supreme Court has approved several elements of this test, it has never articulated a complete test of its own. The circuit courts have assembled their tests from various statements contained in different Supreme Court opinions. These courts have developed a five-part test; however, some circuits combine some of the elements to consider a three-part test. In operation, the tests are virtually identical in that both require that (1) there must be separate tying and tied products, (2) there must be evidence of actual coercion by the seller that in fact forced the buyer to accept the tied product, (3) the seller

must possess sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product, (4) there must be anticompetitive effects in the tied market, and (5) there must be involvement of a not insubstantial amount of interstate commerce in the tied product market. Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice § 10.1 (1994).)

The recent case of *Eastman Kodak Co., supra*, in which the U.S. Supreme Court affirmed the reversal of a summary judgment to Eastman Kodak, provides helpful insight as to the analysis to be used here. The record therein established that Eastman Kodak manufactured and sold high-volume photocopiers and also sold replacement parts and service for its equipment, some of which were produced by Eastman Kodak and others of which were made by outside fabricators. Eastman Kodak parts were not interchangeable with parts made by other copying equipment manufacturers. In the early 1980's, independent service organizations began servicing Eastman Kodak equipment.

Eastman Kodak did not sell a complete system of machines, lifetime service, and lifetime parts for a single price. Instead, it provided service after the initial warranty period either on a per-call basis or through annual service contracts which included all necessary parts. Eastman Kodak negotiated different prices with its customers and provided 80 to 95 percent of the service required by its machines.

Some of the independents' customers purchased their own parts and hired the independents for service only. Others chose the independents to supply both parts and service. The independents kept an inventory of parts which they purchased from Eastman Kodak, outside manufacturers of original Eastman Kodak equipment, parts brokers, or Eastman Kodak customers. In other instances, the independents stripped used Eastman Kodak equipment for parts.

Eastman Kodak later implemented a policy of selling replacement parts for its machines only to buyers of its equipment who either repaired their own machines or used Eastman Kodak service. In addition, Eastman Kodak sought to limit the independents' access to other sources of its parts.

Eastman Kodak and the outside fabricators of its original equipment agreed that the latter would not sell parts that fit Eastman Kodak equipment to anyone other than Eastman Kodak. Eastman Kodak also pressured its equipment owners and parts brokers not to sell Eastman Kodak parts to the independents. In addition, Eastman Kodak took steps to restrict the availability of its used machines. As a result, the independents sued Eastman Kodak, alleging that it had, among other things, unlawfully tied the sale of service for its machines to the sale of parts, in violation of § 1 of the Sherman Antitrust Act, and had unlawfully monopolized and attempted to monopolize the sale of parts and service for such machines, in violation of § 2 of the act.

With *Eastman Kodak Co.* in mind, we turn our attention to the three elements of an unlawful tying arrangement set forth earlier. First, service and parts must be such that they can be considered to be two distinct products. In order to be such, there must be sufficient consumer demand that it is feasible for a seller to provide one separately from the other. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984). The *Eastman Kodak Co.* Court concluded that because service and parts had been sold separately to self-service owners, the two were separate and distinct products. Here, Heath sold service and parts separately to its end users. In addition, Heath testified that others compete with Heath to repair its equipment, a matter further illustrated by the fact the Michigan repair service has access to Heath parts notwithstanding that it is not an end user. Thus, the record reasonably raises an inference that Heath service and parts are two distinct products.

Second, Heath must be shown to have sufficient economic power over parts and repairs as to appreciably restrain competition in that market and be shown to have exercised that power so as to coerce purchasers to buy both items from it.

"Appreciable economic power" in the tying market concerns market power, which is the power "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hospital Dist. No. 2*, 466 U.S. at 14. Market power is " 'the ability of a single seller to raise price and

restrict output.' " *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 464, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992). Accord *Fortner Enterprises v. U. S. Steel*, 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969), *appeal after remand* 452 F.2d 1095 (6th Cir. 1971), *cert. denied* 406 U.S. 919, 92 S. Ct. 1773, 32 L. Ed. 2d 119 (1972). The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market. *Jefferson Parish Hospital Dist. No. 2, supra.*

The evidence is that Heath is the only manufacturer of Heath parts. While there is evidence that some of these parts may be replicated through the configuration of generic parts, some repair work cannot be accomplished without buying Heath assemblies, and the record demonstrates that Heath has exercised its power so as to coerce its end users to purchase Heath service.

Moreover, the *Eastman Kodak Co.* Court concluded it was not significant that there are other makers of photocopying equipment. There is no immutable physical law, no basic economic reality, insisting that competition in the equipment market cannot coexist with market power in the aftermarkets. *Eastman Kodak Co., supra.* Therefore, competition in Heath's primary or equipment market does not mean that it lacks market power in the parts and service aftermarket. Consequently, the record supports an inference that the second element of an unlawful tying arrangement existed.

Third, the amount of commerce affected must not be insubstantial. Tie-ins are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected. *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). In *Fortner Enterprises, supra*, the U.S. Supreme Court stated that the relevant figure is the total volume of sales tied by the sales policy under challenge, that is, the total amount of sales by all parties affected by the sales policy and not just the portion of the total sales accounted for by the particular plaintiff.

Given the extent of Heath's operation, it cannot be said as a

matter of law that the record does not raise at least an inference that a substantial amount of commerce is involved.

2. MONOPOLIZATION

Although the foregoing determination necessarily means that Heath is not entitled to judgment as a matter of law, we, in the interest of completeness, also consider Precision's monopolization claim. It has been held that under the Sherman Antitrust Act, monopolization consists of two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Eastman Kodak Co., supra*; *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966).

(a) Relevant Market

The first step in determining whether Heath has monopoly power is to determine the area in which its market share is to be measured. The relevant market has been defined as the "area of effective competition" within which the defendant operates. *Tampa Electric Co. v. Nashville Co.*, 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961). Accord, *United States v. du Pont & Co.*, 353 U.S. 586, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957); *Standard Oil Co. v. United States*, 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949). The objective in defining the relevant market is to identify those that compete with each other in a given product and geographic area in order to determine whether others can effectively constrain the prices of the alleged monopolist. 1 ABA Antitrust Section, Antitrust Law Developments (Third) 198 (1992). See, *Grinnell Corp., supra*; *Tampa Electric Co., supra*; *du Pont & Co., supra*. Normally, the relevant market must be identified in terms of two dimensions: the products or services affected, the relevant product market, and the geographic areas involved, the relevant geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962).

The relevant product market is composed of products that have reasonable interchangeability. *United States v. du Pont & Co.*, 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). As

noted earlier, the *Eastman Kodak Co.* Court held that a manufacturer might have substantial market power in the market for its own replacement parts, notwithstanding that it lacked market power in the market for the photocopiers themselves. The Court determined that the relevant product market for antitrust purposes was determined by the choices available to Eastman Kodak equipment owners, reasoning that because service and parts for Eastman Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Eastman Kodak equipment owners' perspective is composed of only those companies that service Eastman Kodak machines. The Court noted that a " 'market is composed of products that have reasonable interchangeability.' " 504 U.S. at 482. Therefore, the *Eastman Kodak Co.* Court concluded that the proper market definition in that case could be determined only after a factual inquiry into the " 'commercial realities' " faced by consumers. *Id.*

The relevant geographic market is the geographic area in which sellers of the particular product or service operate and to which purchasers can practicably turn for such products or services. *Tampa Electric Co., supra.*

> The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. . . . Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both "correspond to the commercial realities" of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.

*Brown Shoe Co.*, 370 U.S. at 336–37.

The record implies that Heath is the only supplier of specific Heath assemblies necessary for the repair of Heath equipment throughout the nation. If only Heath equipment owners who agree to use Heath's repair service or a repair service Heath designates are able to get parts to complete the repair, Heath is the only market participant.

(b) Acquisition and Maintenance of Monopoly Power

By far the major factor in determining the existence of monopoly power, once the relevant market has been established, is the percentage of the share of that market maintained by a party. Monopoly power under § 2 of the Sherman Antitrust Act requires something greater than market power under § 1. See *Fortner Enterprises v. U. S. Steel*, 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969), *appeal after remand* 452 F.2d 1095 (6th Cir. 1971), *cert. denied* 406 U.S. 919, 92 S. Ct. 1773, 32 L. Ed. 2d 119 (1972). Generally, market shares in the upper brackets have been the basis for finding monopoly power. See, *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966) (87 percent); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *affirmed* 347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954) (75 percent); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (90 percent).

In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992), the independents presented evidence that Eastman Kodak controlled nearly 100 percent of the parts market and 80 to 95 percent of the service market, with no readily available substitutes. Similarly, in the instant case, Precision has produced evidence that Heath is the exclusive manufacturer for some Heath parts that cannot be replicated. Therefore, with regard to some parts, Heath has 100 percent of the parts market.

Although there may be other repair organizations capable of servicing Heath equipment, without the necessary Heath parts, these organizations offer no competition for the Heath repair centers.

However, monopoly power alone does not establish the offense of monopolization. *Paschall v. Kansas City Star Co.*, 727 F.2d 692 (8th Cir. 1984), *cert. denied* 469 U.S. 872, 105 S. Ct. 222, 83 L. Ed. 2d 152, *reh'g denied* 469 U.S. 1001, 105 S. Ct. 406, 83 L. Ed. 2d 340. But allegations of monopoly power coupled with anticompetitive conduct are sufficient to withstand a motion to dismiss. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919 (9th Cir. 1980), *cert. denied* 450 U.S. 921, 101 S. Ct. 1369, 67 L. Ed. 2d 348 (1981). A

firm monopolizes when it achieves or maintains monopoly power by a course of deliberate market conduct which has the tendency to keep other firms which might have done so from entering or expanding. Lawrence A. Sullivan, Handbook of the Law of Antitrust § 7 (1977).

The second element of a § 2 claim is the use of monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor . . . ." *United States v. Griffith*, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948). In *Eastman Kodak Co., supra*, the Court found that the independents presented evidence that Eastman Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Eastman Kodak service market. The *Eastman Kodak Co.* Court therefore determined that liability turned on whether " 'valid business reasons' " could explain Eastman Kodak's actions. 504 U.S. at 483. Accord *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985). See *Aluminum Co. of America, supra*.

Eastman Kodak contended that it had three business justifications for its actions: (1) to promote interbrand equipment competition by allowing Eastman Kodak to stress the quality of its service; (2) to improve asset management by reducing Eastman Kodak's inventory costs; and (3) to prevent the independents from free riding on Eastman Kodak's capital investment in equipment, parts, and service. However, the Court determined that there were triable issues of fact on each of Eastman Kodak's possible justifications. Specifically, the Court noted that Eastman Kodak's willingness to allow self-service cast doubt on its quality control claim.

Although Heath proposed the same justifications for its policy of only selling parts to end users, the record supports the inference that Heath's failure to fill an order for repair parts is a manifestation of its exclusionary action.

### 3. Applicability of Nebraska Act

While the ultimate inferences raised by the record disclose genuine factual issues as to the existence of an unlawful tying arrangement and unlawful monopolization of the service and

parts market, there exists a more basic question—whether the unlawful conduct has resulted in the restraint of trade or commerce "within this state." If not, the Nebraska act does not apply.

In that regard, we, a century ago, determined that a company receiving and delivering telegrams in the City of Fremont which were transmitted over lines to and from other points within the state was doing business within the city. *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692, 58 N.W. 415 (1894). Similarly, the court in *State v. American Railway Express Co.*, 183 Minn. 244, 236 N.W. 321 (1931), determined that a company originating shipments in Minnesota which, upon crossing the Canadian border, were transferred to a Canadian entity for delivery in Canada was doing business within the State of Minnesota. Under a statute taxing the premiums of foreign insurance companies earned from business done within the commonwealth, the court in *Com. v. Equitable L. A. Soc. of U. S.*, 239 Pa. 288, 86 A. 787 (1913), determined that all premiums received from policyholders residing within the commonwealth were taxable even though paid directly to a home office or agencies outside the commonwealth.

While there is no showing that any of the conduct about which Precision complains occurred within the territorial limits of this state, the record nonetheless inferentially establishes that the tying arrangement affected end users of Heath equipment in Nebraska by denying them the advantage of parts sold in a freely competitive market. Accordingly, the record inferentially establishes that Heath has unlawfully engaged in anticompetitive and monopolistic restraint of trade and commerce within this state and that the Nebraska act applies.

### 4. Interstate Implications

But our review is not yet completed, for there remains the question as to whether, notwithstanding all of the foregoing, the fact that Heath engages in interstate commerce precludes enforcement of the Nebraska act.

It is clear that some applications of state antitrust statutes are not permissible. See, *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975) (state

antitrust laws used to regulate union activities aiding union organization clearly preempted by federal labor laws); *Flood v. Kuhn*, 443 F.2d 264 (2d Cir. 1971), *aff'd on other grounds* 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972) (state's interest in antitrust regulation, when compared with its interest in health and safety regulation, not of particular urgency); *Robertson v. National Basketball Association*, 389 F. Supp. 867 (S.D.N.Y. 1975) (New York antitrust law inapplicable to professional basketball league); *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983), *cert. denied* 466 U.S. 904, 104 S. Ct. 1678, 80 L. Ed. 2d 153 (1984) (California Cartwright Act generally concurrent with federal antitrust laws, but inapplicable to National Football League due to burden on interstate commerce of nonuniform state policies); *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966), *cert. denied* 385 U.S. 990, 87 S. Ct. 598, 17 L. Ed. 2d 451 (state antitrust law preempted as to national baseball league); *HMC Management v. New Orleans Basketball Club*, 375 So. 2d 700 (La. App. 1979), *cert. denied* 379 So. 2d 11 (La. 1980) (undue burden on league bars application of Louisiana antitrust law).

However, those cases concern state regulation of national organizations already subject to federal legislation or national governing bodies. The present case concerns private enterprise conducting business within Nebraska. Although the U.S. Supreme Court has not explicitly held that state antitrust statutes may apply to matters involving both intrastate and interstate commerce, it has upheld application of state antitrust laws in cases in which those laws clearly affected interstate commerce. See, *California v. ARC America Corp.*, 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989); *U. S. v. Underwriters Assn.*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944); *Watson v. Buck*, 313 U.S. 387, 61 S. Ct. 962, 85 L. Ed. 1416 (1941).

Moreover, several lower federal courts have expressly determined that the Commerce Clause of the U.S. Constitution does not necessarily preclude the application of state antitrust laws to interstate commerce. *Shell Oil Co. v. Younger*, 587 F.2d 34 (9th Cir. 1978), *cert. denied* 440 U.S. 947, 99 S. Ct. 1425, 59 L. Ed. 2d 635 (1979); *Woods Exploration & Pro. Co. v.*

*Aluminum Co. of Amer.*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied* 404 U.S. 1047, 92 S. Ct. 701, 30 L. Ed. 2d 736 (1972); *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943).

Indeed, several state courts have reasoned that neither federal antitrust legislation nor the Commerce Clause precludes application of state antitrust laws to all interstate commerce. *Younger v. Jensen*, 26 Cal. 3d 397, 605 P.2d 813, 161 Cal. Rptr. 905 (1980); *State v. Sterling Theatres Co.*, 64 Wash. 2d 761, 394 P.2d 226 (1964); *State v. Southeast Tex. Chap. of Nat. Elec. Con. Ass'n*, 358 S.W.2d 711 (Tex. Civ. App. 1962), *cert. denied* 372 U.S. 969, 83 S. Ct. 1094, 10 L. Ed. 2d 131 (1963); *Peoples Savings Bank v. Stoddard*, 359 Mich. 297, 102 N.W.2d 777 (1960); *State v. Allied Chemical & Dye Corp.*, 9 Wis. 2d 290, 101 N.W.2d 133 (1960); *Commonwealth v. McHugh*, 326 Mass. 249, 93 N.E.2d 751 (1950); *C. Bennett Bldg. Supplies v. Jenn Air*, 759 S.W.2d 883 (Mo. App. 1988); *State v. Coca Cola Bottling Co. of Southwest*, 697 S.W.2d 677 (Tex. App. 1985), *appeal dismissed* 478 U.S. 1029, 107 S. Ct. 9, 92 L. Ed. 2d 764 (1986).

State courts upholding the application of state antitrust law as applied to interstate commerce have reviewed the issue with regard to the test promulgated by the U.S. Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). " 'Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . .' " *Coca Cola Bottling Co. of Southwest*, 697 S.W.2d at 681-82. Accord *Pike, supra*.

In *State v. Allied Chemical & Dye Corp., supra*, the Wisconsin Supreme Court held that the fact that the Federal Trade Commission had filed a complaint against defendants who neither owned, operated, nor maintained any manufacturing plant, sales, or other office within the state did not preclude the State of Wisconsin from seeking an injunction against those corporations under the state antitrust statutes. In rejecting the defendants' contention that the Federal Trade

Commission having taken jurisdiction over the business practices in question, the state was precluded from enforcing the state statutes, the Wisconsin Supreme Court reasoned:

> The Wisconsin statutes were enacted in the exercise of the police powers of the state. The public interest and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted as the result of an illegal combination or conspiracy. The people of Wisconsin are entitled to the advantages that flow from free competition in the purchase of calcium chloride and other products, and if the state is able to prove the allegations made in its complaint it is apparent that the acts of the defendants deny to them those advantages.

9 Wis. 2d at 295, 101 N.W.2d at 135.

Inasmuch as the Nebraska act is consistent with federal law and there are ultimate inferences that the tying arrangement and monopolization had an impact upon local residents, the burden on interstate commerce cannot, at least at this point, be said to outweigh the interest of this state.

## V. JUDGMENT

Accordingly, as first noted in part I, the judgment of the district court is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., dissenting.

I respectfully dissent. Heath Consultants, Inc., which manufactures leak detection equipment and underground locating equipment, has a policy of selling replacement parts only to end users of its products. Precision Instruments, Inc., has just one employee, a former Heath employee, who repairs leak detection units. Precision is not an end user of Heath products, but on two occasions Precision was permitted to purchase Heath replacement parts. Subsequent orders placed by Precision were refused. It is not disputed that Heath has competitors in the manufacturing and repairing of leak detection equipment or that Precision is one of those competitors.

As the majority points out, to succeed in its claim, Precision must prove that Heath had sufficient economic power over parts and repairs to appreciably restrain competition in the market and that Heath exercised such power to coerce purchasers to obtain both parts and service from Heath. Appreciable economic power in the tying market concerns market power, which is the power to force a purchaser to do something that he would not do in a competitive market. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984). The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market. *Id.* The majority defines the relevant market for purposes of this case as being composed of only those companies that can service Heath equipment.

As I review the record, I cannot find any evidence of actions by Heath that would constitute an unlawful tying arrangement. Although Heath has refused to sell replacement parts directly to Precision, there is absolutely no evidence that Heath has refused to sell parts to end users who did not promise to use Heath's repair service or repair services designated by Heath.

Although Katherine Waldmann, Precision's president, testified that she knew of one instance in which Heath had "refused" to sell parts to Midwest Gas, an end user which wanted to use Precision's repair service, she admitted that she was speculating about the end user's dealings with Heath. No evidence was presented as to why the order was not filled. Waldmann testified that she had spoken to a Michigan company, Midwest Instrument Services Corporation, to see if it could repair an item that Precision could not repair. When Waldmann inquired about purchasing parts from Midwest Instrument, she was told that Midwest Instrument did not want to bother with selling parts. Waldmann did not know where Midwest Instrument got its Heath parts, but assumed Midwest Instrument ordered them from Heath. Waldmann did not know whether Midwest Instrument was an authorized Heath distributor. Waldmann had no knowledge of Heath's entering into any kind of agreement with a parts manufacturer not to distribute parts to Precision.

The majority finds it significant that Heath did not ship a part

to Midwest Gas after Midwest Gas sent a letter to Heath stating that Midwest Gas would use Precision's repair services. I fail to see the significance of this occurrence. The letter from Midwest Gas to Heath was dated February 9, 1990. Waldmann stated that the nonshipment occurred during November 1991, 21 months after the letter was sent. Waldmann admitted that she did not know if Midwest Gas contacted Heath regarding the nonshipment, and she did not know why the part was not shipped. There is no evidence that Heath refused other orders from Midwest Gas, nor did anyone positively state that Heath had ever refused to sell a part to Midwest Gas. I cannot conclude that there is a reasonable inference that the letter caused the nonshipment or that the nonshipment creates an inference of an illegal tying arrangement. Therefore, I conclude that there is no reasonable inference that Heath has refused to sell parts to any end user.

The record does not create an inference that Heath conditioned the sale of its parts on an end user's agreement to make such parts unavailable to Precision or any other repair service. Waldmann testified that Precision continued to make repairs on Heath products by having the end users order parts from Heath. Precision was able to obtain many parts through independent manufacturers. Waldmann had encountered no restrictions on the independent manufacturers of Heath parts. Furthermore, Precision has been able to replicate certain Heath schematics.

The majority relies upon *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992), but I do not think that *Eastman Kodak Co.* is applicable to the facts in the case at bar. In *Eastman Kodak Co.*, there was ample evidence that Kodak was carrying on a broad-based campaign to eliminate independent service organizations from the market for repair of Kodak photocopiers. In the case at bar, there is a unilateral refusal to sell parts to one independent service organization. There are neither allegations nor evidence of agreements between Heath and independent parts manufacturers. There is no evidence that Heath pressured its end users to use only Heath repair services. There is no evidence that Heath was discriminating against end

users that used independent service organizations or that Heath was engaging in a broad-based attempt at a tying arrangement or an exclusion of all independent service organizations. Here, the evidence establishes that Heath has several competitors who manufacture leak detection equipment. Precision is able to do some repairs with generic electronic parts, and Precision concedes that it has been able to obtain parts for Heath products from independent parts manufacturers, as well as obtaining Heath parts through end users.

Under the Sherman Antitrust Act, monopolization consists of two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. See *Eastman Kodak Co., supra*. Although Heath is the exclusive manufacturer of some Heath parts that cannot be replicated, and therefore Heath would have 100 percent of that parts market, the refusal to sell such parts to Precision does not create a monopolistic practice on the part of Heath. The fact that only a Heath part can repair Heath equipment, with no further evidence, does not establish that Heath has engaged in monopolistic practices by refusing to sell parts to Precision.

The question becomes: Does Heath's refusal to sell parts to one competitor constitute the existence of monopoly power and the willful acquisition or maintenance of that power? I cannot conclude that one isolated instance supports any such inference of monopolistic behavior on the part of Heath. Therefore, I cannot say that the refusal to sell parts to Precision constitutes a monopolistic practice or an unlawful restraint of trade or commerce within the State of Nebraska.

In my opinion, the facts of this case do not square with the facts in *Eastman Kodak Co*. The facts recited in the majority opinion do not set forth a reasonable inference that Heath's behavior has risen to the level of unlawful anticompetitive and monopolistic restraint of trade. Summary judgment was properly entered in favor of Heath, and I would affirm the decision of the district court.

HOWARD, D.J., Retired, joins in this dissent.

# COUNTY OF SHERMAN, NEBRASKA, APPELLEE, V. MELVIN L. EVANS ET AL., APPELLEES, AND DONALD D. GLINSMANN AND RACHEL A. GLINSMANN, APPELLANTS.

526 N.W.2d 232

Filed January 27, 1995. No. S-93-422.

**Judgments: Final Orders.** Because conditional orders are void, such orders do not mature into a judgment when the conditions specified therein are not met.

Appeal from the District Court for Sherman County: RONALD D. OLBERDING, Judge. Appeal dismissed.

John S. Mingus, of Mingus & Mingus, for appellants.

Mark L. Eurek, Sherman County Attorney, for appellee County of Sherman.

Rodney M. Wetovick, of Wroblewski Law Office, for appellee Robin A. Bochart.

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

FAHRNBRUCH, J.

Donald D. Glinsmann and Rachel A. Glinsmann, husband and wife, appeal from an in futuro order of the district court for Sherman County confirming two sheriff's tax certificate foreclosure sales conditioned upon the Glinsmanns' failure to redeem the property within a specified time.

We dismiss the appeal because the record fails to disclose that final orders of confirmation were ever entered by the trial court. As a result, we do not discuss the Glinsmanns' assignments of error on appeal.

The County of Sherman petitioned in district court to foreclose tax sale certificates on various tracts of real estate, including two properties owned by the Glinsmanns. The county's fourth cause of action alleged that the Glinsmanns owned the northwest quarter of Section 9, Township 14 North, Range 13 West of the 6th P.M., in Sherman County, Nebraska, and owed $29,562.87 in taxes on the real estate. The fifth cause of action alleged that Donald Glinsmann owned the southwest quarter of Section 9, Township 14 North, Range 13 West of the 6th P.M., in Sherman County, Nebraska, and owed $30,928.89

in taxes on that real estate. Various creditors also had interests in both tracts, including the Farmers Home Administration by virtue of a mortgage which the court found to have second priority on both quarters.

On January 7, 1993, the sheriff sold the northwest quarter and the southwest quarter to the highest bidder at $87,700 and $67,900, respectively. On April 2, the district court entered an "Order to Confirm," in regard to the Glinsmanns' foreclosure sales. The confirmation was conditional. It stated:

> IT IS THEREFORE CONSIDERED BY THE COURT that if property is not redeemed by buyer by Monday, April 5, 1993 at 12:00 noon, that said sale be confirmed and that the Sheriff of Sherman County is hereby ordered and directed upon payment of the full purchase price as hereinafter set forth to execute a deed conveying the premises described in the Fourth and Fifth Causes of Action as follows . . . .

The court did not issue any further order confirming the sales. On April 5, 1993, the Glinsmanns moved for a new trial, which the court, on April 16, overruled. The Glinsmanns appealed from the court orders of April 2 and 16.

Conditional orders purporting to automatically dismiss an action upon a party's failure to act within a set time are void as not performing in praesenti, and thus have no force or effect. *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992); *Iowa State Bank v. Trail*, 234 Neb. 59, 449 N.W.2d 520 (1989); *Building Systems, Inc. v. Medical Center, Ltd.*, 228 Neb. 168, 421 N.W.2d 773 (1988). Because conditional orders are void, such orders do not mature into a judgment when the conditions specified therein are not met. *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991).

The order of the district court conditioned confirmation of the sheriff's sales upon the Glinsmanns' failure to redeem property within a specified date. Such an order is in futuro and, thus, void.

Because the record does not contain any final appealable order of confirmation, the appeal is dismissed. See *In re Interest of C.D.A.*, 231 Neb. 267, 435 N.W.2d 681 (1989).

APPEAL DISMISSED.

# K CORPORATION, DOING BUSINESS AS THE WESTROADS CLUB, APPELLANT, V. PATRICK K. STEWART, APPELLEE.

526 N.W.2d 429

Filed January 27, 1995. No. S-93-431.

1. **Pleadings: Words and Phrases.** A narrative of events, acts, and things alleged in the petition to have been done or omitted which shows legal liability on the part of a defendant to a plaintiff states a cause of action.
2. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
3. **Libel and Slander: Words and Phrases.** There are two types of libel: Words may be actionable per se, that is, in themselves, or they may be actionable per quod, that is, only on allegation and proof of the defamatory meaning of the words used and of special damages.
4. **Libel and Slander: Corporations.** A corporation may suffer libel per se.
5. **Libel and Slander.** Whether a communication is libelous per se is a threshold question of law for the court.
6. ____. Spoken or written words are slanderous or libelous per se only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform the duties of an office or employment, or if they prejudice one in his or her profession or trade or tend to disinherit one.
7. ____. In determining whether a communication is libelous or slanderous per se, the court must construe the questioned language in its ordinary and popular sense.
8. **Libel and Slander: Proof: Damages.** Where a communication is ambiguous or meaningless unless explained, or prima facie innocent, but capable of defamatory meaning, it is necessary to specially allege and prove the defamatory meaning of the words used and to allege and prove special damages.
9. **Demurrer: Pleadings.** In considering a demurrer, a court must assume the pleaded facts to be true as alleged.
10. **Libel and Slander.** Defamatory words falsely spoken or written of a party which prejudice such party in his or her occupation or trade are actionable per se.
11. **Libel and Slander: Corporations.** Falsely stating that a private corporation is in a precarious financial position, is unable to meet its obligations, and is nearing the end of its existence is libel per se.
12. **Constitutional Law: Libel and Slander.** Although the false assertion of a fact may be libelous even though couched in terms of an opinion, statements which cannot be interpreted as stating actual facts are entitled to First Amendment protection.
13. **Libel and Slander.** The test in determining whether a statement constitutes an expression of fact is whether a reasonable fact finder could conclude that the statement implies a provably false factual assertion.
14. ____. In assessing the objectivity and verifiability of a statement, all surrounding circumstances are to be considered, examining first the language of the statement and then the context in which it was made.
15. ____. In determining whether a statement is libelous, a court looks at the nature

and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed, considering the specificity of the statement, its verifiability, the literary context, and the broader setting in which the statement appears.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for further proceedings.

Jere M. Knoles for appellant.

Timothy J. Pugh, of McGrath, North, Mullin & Kratz, P.C., for appellee.

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

CAPORALE, J.

## I. STATEMENT OF CASE

The plaintiff-appellant, K Corporation, doing business as The Westroads Club, alleges in its operative petition that it was libeled by the defendant-appellee, Patrick K. Stewart. The district court sustained Stewart's demurrer and, upon Westroads' election to stand on its petition as pled, dismissed the same. Westroads thereafter appealed to the Nebraska Court of Appeals, whereupon we, in the exercise of our authority to regulate the caseloads of the two appellate courts, removed the matter to this court on our own motion. We now reverse, and remand for further proceedings.

## II. SCOPE OF REVIEW

The question is whether Westroads' petition states a cause of action, that is, whether the events, acts, and things alleged in the petition to have been done or omitted show legal liability on the part of Stewart to Westroads. See, *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994); *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 1835, 128 L. Ed. 2d 463 (1994). Whether a petition states a cause of action is a question of law regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Vanice v. Oehm, post* p. 298, 526 N.W.2d 648 (1995); *Gibb v. Citicorp*

*Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994).

## III. FACTS AS ALLEGED

Westroads asserts that it is in the business of providing a recreational, fitness, and exercise facility for its members and their guests.

According to the petition, Stewart wrote the following letter to Westroads and published the same to certain of Westroads' customers and to one or more members of the public:

> Thank you for your letter outlining the terms under which Dawn and I can renew our membership in the Westroads Club. Before doing so, I would like to gain a little more information about the present status and future possibilities of the club.
>
> A critical consideration is the physical deterioration of the club itself. It seems to me very little is being done to improve the quality of the equipment, the furnishing or the general appearance. As a for instance, I would call your attention to the poor condition of the outdoor tennis courts. I have difficulty understanding why it wouldn't be in the best interest of the club and its members to have these courts in first class condition. I think the same can be said for the indoor courts. They barely meet minimum standards.
>
> Another issue is the cleanliness of the club. I was particularly disturbed by the notice from the Omaha Board of Health concerning the pool and hot tub. Most importantly, however, any casual observer of the public rooms, locker rooms or exercise areas can easily note poor sanitary conditions and generally below the minimum acceptable standards of most members.
>
> Finally, there is the question of the financial condition of the club. The best information available to me is that the club is in serious danger of bank foreclosure and barring that may be sold. If it is true, it would certainly explain the lack of investment in improving the club.
>
> My wife and I certainly enjoy the convenience of the club and what it has to offer. I guess our problem is one

31 of confidence that the club can continue to operate in its
32 present manner and whether indeed in a few months we care
33 to visit. Possibly, one avenue to investigate here is a
34 month to month membership. In that way, the club can
35 benefit from our dues while we can be protected from the
36 clear possibility that the club is about to fail.

(Line numbers supplied.)

The petition further avers that the statements in the foregoing letter are false; that Stewart knew, or should have known, that they were such; and that notwithstanding Westroads' demand, Stewart has failed to correct them. Westroads claims that as a consequence, it has suffered general damages.

## IV. ANALYSIS

There are two types of libel: Words may be actionable per se, that is, in themselves, or they may be actionable per quod, that is, only on allegation and proof of the defamatory meaning of the words used and of special damages. See *Knapp v. Post Co.*, 111 Colo. 492, 144 P.2d 981 (1943). See, also, *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991); *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988); *Bigley v. National Fidelity & Casualty Co.*, 94 Neb. 813, 144 N.W. 810 (1913); *Boldt v. Budwig*, 19 Neb. 739, 28 N.W. 280 (1886); *Geisler v. Brown*, 6 Neb. 254 (1877).

Having alleged neither the defamatory meaning of the words used nor special damages, Westroads' petition fails unless the contents of Stewart's letter are libelous per se, it having long been the law in Nebraska that a corporation may suffer such injury. See *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713, 82 N.W. 28 (1900), *reversed on other grounds* 62 Neb. 732, 87 N.W. 945 (1901). Whether a communication is libelous per se is a threshold question of law for the court. *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 1835, 128 L. Ed. 2d 463 (1994).

More than a century ago, we established that "any 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, is actionable of itself." *World*

*Publishing Co. v. Mullen*, 43 Neb. 126, 131-32, 61 N.W. 108, 109 (1894). In *Heckes v. Fremont Newspapers, Inc.*, 144 Neb. 267, 271, 13 N.W.2d 110, 112 (1944), we recited the above standard and then quoted *Williams v. Fuller*, 68 Neb. 354, 94 N.W. 118 (1903), for another definition of libel per se: " 'Any false and malicious writing published of another is libelous *per se*, when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or hinder virtuous men from associating with him.' "

More recently, in *Matheson*, 239 Neb. at 553, 477 N.W.2d at 160-61, we wrote:

> Spoken or written words are slanderous or libelous per se only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform the duties of an office or employment, or if they prejudice one in his or her profession or trade or tend to disinherit one. . . . In determining whether a communication is libelous or slanderous per se, the court must construe the questioned language "in its ordinary and popular sense." . . . Moreover, where a communication is "ambiguous or . . . meaningless unless explained, or . . . *prima facie* innocent, but capable of defamatory meaning, it is necessary to specially allege and prove the defamatory meaning of the words used, and to allege and prove special damages." . . . Further, the circumstances under which the publication of an allegedly defamatory communication was made, the character of the audience and its relationship to the subject of the publication, and the effect the publication may reasonably have had upon such audience must be taken into consideration.

Because in considering a demurrer a court must assume the pleaded facts to be true as alleged, *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994), the falsity of the contents of the letter is assumed for the purpose of this analysis. However, it is clear Stewart's letter does not impute to Westroads the commission of a crime involving moral turpitude or an infectious disease, nor does the letter tend to disinherit Westroads.

Thus, the ultimate question is whether the letter imputes to Westroads an unfitness to operate a recreational fitness and exercise facility or otherwise prejudices its business operation. As noted in *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 410, 243 N.W.2d 745, 752 (1976), quoting *McLaughlin v. Woolworth Co.*, 125 Neb. 684, 251 N.W. 293 (1933):

> "As applied to libel of one in his business or occupation, it is elementary in the law of libel and slander that defamatory words falsely spoken (or written) of a party which prejudice such party in his occupation or trade are actionable per se. . . . The law guards most carefully the credit of all merchants and traders. Any imputation on their solvency, any suggestion that they are in pecuniary difficulties, is therefore actionable; also where any language is used of merchants and tradesmen which imputes a want of credit or responsibility or insolvency, or of common honesty. . . ."

We have also written that falsely stating that a private corporation is in a precarious financial position, is unable to meet its obligations, and is nearing the end of its existence is libel per se. *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713, 82 N.W. 28 (1900), *reversed on other grounds* 62 Neb. 732, 87 N.W. 945 (1901).

However, it is the natural and obvious meaning of the language which must be libelous per se. *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991); *Hennis v. O'Connor*, 223 Neb. 112, 388 N.W.2d 470 (1986); *Rhodes v. Star Herald Printing Co.*, 173 Neb. 496, 113 N.W.2d 658 (1962), *cert. denied* 371 U.S. 822, 83 S. Ct. 39, 9 L. Ed. 2d 62; *Tennyson v. Werthman*, 167 Neb. 208, 92 N.W.2d 559 (1958); *Rimmer v. Chadron Printing Co.*, 156 Neb. 533, 56 N.W.2d 806 (1953); *Barry v. Kirkland*, 149 Neb. 839, 32 N.W.2d 757 (1948); *Mullen, supra*. If innuendo or explanation is necessary to make a statement clear and understandable, then it is not per se actionable. *Rhodes, supra*; *Hudson v. Schmid*, 132 Neb. 583, 272 N.W. 406 (1937). Further, if the language is meaningless or ambiguous, or prima facie innocent, but capable of defamatory meaning, then it is not actionable per se, and one

must allege and prove special damages. *Hudson, supra*. The language must be naturally and presumably understood in its defamatory meaning. *Id.*

It also becomes appropriate at this point to recall that although the false assertion of a fact may be libelous even though couched in terms of an opinion, statements which cannot be interpreted as stating actual facts are entitled to First Amendment protection. *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 1835, 128 L. Ed. 2d 463 (1994). The test in this regard is whether a reasonable fact finder could conclude that the statement implies a provably false factual assertion. *Wheeler, supra*. In assessing the objectivity and verifiability of a statement, all surrounding circumstances are to be considered, examining first the language of the statement and then the context in which it was made. *Id.* See, also, *Matheson, supra*. Thus, a court looks at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed, considering the specificity of the statement, its verifiability, the literary context, and the broader setting in which the statement appears. *Wheeler, supra*. See, also, *Matheson, supra*.

With that background, we proceed to a consideration of the Stewart letter, the relevant portions of which fall into two broad categories, one dealing with Westroads' fitness to operate its facility and the other with its financial condition.

### 1. Fitness to Operate Facility

Lines 6 through 22 of the letter comment unfavorably on Westroads' fitness to operate its facility.

Construed in their ordinary sense, the statements in lines 6 through 15 are critical of the facility and disparaging of Westroads' business methods and management. But not entirely so, for in the end, Stewart concludes that although they barely do so, the conditions of the club do meet minimum standards, whatever those standards may be. Indeed, the fact that the letter does not attempt to objectively define what constitutes an unacceptable level of deterioration, what constitutes acceptable quality, or what distinguishes first class condition from any

other kind of condition makes the statements in that regard not expressions of verifiable facts, but only expressions of Stewart's subjective impressions. Just as the subjective evaluations of a judge's qualifications were not libelous per se, *Wheeler, supra*, neither can the subjective evaluations of Westroads' condition be libelous per se.

While the same analysis applies to much of the statements dealing with the cleanliness of the facility made in lines 16 through 22, the analysis does not apply to all that is written in those lines. By referring to the reactions of a casual observer and the minimum acceptable standards of most members, Stewart has taken all but the statements concerning the notice from the Omaha board of health out of the realm of verifiable factual statements and made them nothing more than subjective evaluations.

However, read in the literary context of the entire letter, the statement about the notice from the board of health can only be understood to mean that the pool and hot tub were found by the board to have been unclean. Neither Westroads' members nor the public at large can be assumed at this point to have knowledge about contacts between the board and Westroads. Thus, if the statement about the notice is false as alleged, then the statement is libelous per se, for it imputes to Westroads an unfitness to operate its facility.

### 2. Financial Condition

Although that determination necessarily means that the judgment of the trial court is erroneous and must be reversed, because we order further proceedings, we also consider the remainder of the letter, lines 23 through the first two words of line 33. All that is there written about Westroads' financial condition is predicated by Stewart on the truthfulness of what he describes as the best information available to him. By thus calling the truthfulness of that information into question, the statements become nothing more than expressions of Stewart's subjective concern. Those statements thus cannot be libelous per se.

## V. JUDGMENT

For the foregoing reasons, the judgment of the district court

is reversed and the matter remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LANPHIER, J., not participating.

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KAER P. VANICE III, APPELLANT, V. GARY L. OEHM AND LESLIE OEHM, HUSBAND AND WIFE, ET AL., APPELLEES.

526 N.W.2d 648

Filed January 27, 1995. No. S-93-447.

1. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Contracts: States: Public Policy.** A contract made in another state and valid under the laws of that state is valid in Nebraska and will be enforced, unless such enforcement would violate the positive law or the settled public policy of this state or would work an injury to this state or its citizens.
3. **Contracts: States: Statutes.** It is competent for persons residing in different states to select the law of either state to govern their contract; when by the terms of the contract they have fixed and determined the place for performance, the law of that place will govern.
4. **Real Estate: Mortgages: Foreclosure.** The foreclosure of a mortgage on land situated in Nebraska is governed exclusively by the law of Nebraska, no matter what the parties may agree upon in that regard.
5. **Real Estate: Limitations of Actions: Words and Phrases.** For the purposes of Neb. Rev. Stat. § 25-202 (Reissue 1989), a subsequent encumbrancer is one who acquires one's encumbrance for value after the statute has run against a prior encumbrance.
6. **Real Estate: Mortgages: Liens: Limitations of Actions.** Under the first 37 words of Neb. Rev. Stat. § 25-202 (Reissue 1989), a mortgage on real estate continues as a lien thereon for only 10 years from the maturity of the debt secured unless a payment has been made thereon or the statute of limitations has otherwise been tolled.
7. **Statutes: Presumptions.** In the absence of a showing to the contrary, the common and statutory law of a foreign jurisdiction is presumed to be the same as the law of Nebraska.
8. **Loans: Limitations of Actions.** Money loaned without agreement as to the time of repayment is due immediately, and the statute of limitations against the lender

begins to run at once.

9. **Pleadings: Limitations of Actions: Demurrer.** A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute.
10. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend, unless it is clear that no reasonable possibility exists that amendment will correct the defect.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for further proceedings.

Edward H. Tricker and David A. Hecker, of Woods & Aitken Law Firm, for appellant.

John R. Doyle for appellees Oehm.

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

CAPORALE, J.

## I. STATEMENT OF CASE

Plaintiff-appellant, Kaer P. Vanice III, seeks in his operative petition to foreclose a real estate mortgage. Finding that the petition failed to state a cause of action, the district court sustained the demurrer of the defendants-appellees husband and wife, Gary L. Oehm and Leslie Oehm, and dismissed the action. Vanice thereafter appealed to the Nebraska Court of Appeals, asserting, in summary, that in ruling the petition failed to state a cause of action, the district court applied the wrong period of limitations. In the exercise of our authority to regulate the caseloads of the two appellate courts, we removed the matter to this court on our own motion. We now reverse, and remand for further proceedings.

## II. SCOPE OF REVIEW

Whether a petition states a cause of action is a question of law regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *K Corporation v. Stewart, ante* p. 290, 526 N.W.2d 429 (1995); *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994).

## III. FACTS AS ALLEGED

According to the operative petition, which relates back to an earlier petition filed September 10, 1992, in order to enable the Oehms to acquire an interest in an automobile dealership in Missouri, Vanice lent them $60,000 under a written agreement executed in Missouri on April 1, 1980.

The agreement incorporated into the operative petition provides no date by which the loan is to be paid, but provides that it is to "be governed and interpreted by the laws of the State of Missouri." Without any further reference to any note, the agreement reads: "Such note shall accrue interest at the rate of 13.5% per annum and shall be payable as follows . . . ." However, the agreement provides no payment schedule for any such note, nor is any note incorporated into the operative petition.

The operative petition further alleges that the loan was secured to the extent of $47,500 by a duly recorded second mortgage on the Oehms' Nebraska real estate, that the mortgage was executed at the same time as was the underlying agreement, and that the parties agreed it too would be governed by Missouri law. The mortgage document incorporated into the operative petition specifies no maturity date.

According to the operative petition, no payments have been made on the loan, the Oehms are in default, and the whole debt has become due and payable immediately.

The operative petition further acknowledges that the Oehms' real estate is subject to a prior mortgage in favor of the defendant-appellee American Charter Federal Savings and Loan Association and that any right, title, or interest of American Charter is first and paramount to Vanice's claims.

## IV. ANALYSIS

Vanice claims the district court erred in finding his action time barred because Missouri law applies and it provides a 20-year period of limitations, but that even if Nebraska law were to apply, the appropriate period of limitations likewise is 20 years.

It is true that under Nebraska law, a contract made in another state and valid under the laws of that state is valid in Nebraska and will be enforced, unless such enforcement would violate the

positive law or the settled public policy of this state or would work an injury to this state or its citizens. *Dunlop Tire & Rubber Corp. v. Ryan*, 171 Neb. 820, 108 N.W.2d 84 (1961). We have also held that it is competent for persons residing in different states to select the law of either state to govern their contract; when by the terms of the contract they have fixed and determined the place for performance, the law of that place will govern. *Farm Mortgage & Loan Co. v. Beale*, 113 Neb. 293, 202 N.W. 877 (1925).

But Vanice is not here seeking to enforce the agreement under which he made the loan; rather, he is attempting to foreclose the mortgage partially securing the Oehms' debt.

While we have neither been cited to nor found a case in which we have addressed what law governs the foreclosure of a mortgage on Nebraska land, we have recently reaffirmed that in the context of inheritance rights, the law of the situs of the land governs exclusively the rights to the land and the methods of its transfer. See *In re Estate of Hannan*, 246 Neb. 828, 523 N.W.2d 672 (1994). Accord, *In re Estate of Schram*, 132 Neb. 268, 271 N.W. 694 (1937); *In re Heirship of Robinson*, 119 Neb. 285, 228 N.W. 852 (1930). Moreover, we have held that a loan on Nebraska land, negotiated in Nebraska through a foreign loan company and resulting in a mortgage executed and delivered in Nebraska, created a Nebraska contract, notwithstanding that the note contained a clause reading that the note was " 'understood to be made with reference to and under the laws of the territory of Dakota, and all payments hereon payable at the office of the association in Aberdeen, Dakota.' " *Building & Loan Ass'n of Dakota v. Bilan*, 59 Neb. 458, 459-60, 81 N.W. 308, 309 (1899). See, also, *People's Building, Loan & Savings Ass'n v. Parish*, 1 Neb. (Unoff.) 505, 96 N.W. 243 (1901) (notes and mortgages executed in state where mortgaged land lies to be construed by laws of that state, notwithstanding that documents drawn in favor of foreign building association).

Accordingly, we hold that the foreclosure of a mortgage on land situated in Nebraska is governed exclusively by the law of Nebraska, no matter what the parties may agree upon in that regard.

That being so, we look to the provisions of Neb. Rev. Stat. § 25-202 (Reissue 1989):

> An action for the recovery of the title or possession of lands, tenements or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of action shall have accrued . . . . For the purposes of this section so far as relates only to the rights and interests of subsequent purchasers and encumbrancers for value, a cause of action for the foreclosure of a mortgage shall be deemed to have accrued at the last date of the maturity of the debt or other obligation secured thereby, as stated in, or as ascertainable from the record of such mortgage, or in an extension thereof duly executed and recorded, and if no date for any maturity be stated therein or be ascertainable therefrom, then no later than twenty years from the date of said mortgage . . . .

Vanice contends that as he filed his mortgage after the American Charter mortgage was filed, he is a "subsequent encumbrancer," entitled to the 20-year period of limitations.

This position, however, ignores this court's definition of a subsequent encumbrancer as one who acquires one's encumbrance for value after the statute has run against a prior encumbrance. *Alexanderson v. Wessmann*, 158 Neb. 614, 64 N.W.2d 306 (1954); *O'Connor v. Power*, 124 Neb. 113, 245 N.W. 417 (1932), *vacated on other grounds* 124 Neb. 594, 247 N.W. 414 (1933); *Tynon v. Bliss*, 121 Neb. 80, 236 N.W. 184 (1931); *Bliss v. Redding*, 121 Neb. 69, 236 N.W. 181 (1931).

Here, the American Charter mortgage was executed and recorded in 1974. The agreement and second mortgage were executed on April 1, 1980. Thus, Vanice did not acquire his encumbrance after the statutory limitations period had run against the American Charter mortgage, as he acquired his mortgage within 10 years of the American Charter mortgage. Therefore, Vanice is not a subsequent encumbrancer under § 25-202.

Accordingly, it is the first 37 words of § 25-202 which control this action, and we have held that under that language, a mortgage on real estate continues as a lien thereon for only 10 years from the maturity of the debt secured unless a payment

has been made thereon or the statute of limitations has otherwise been tolled. *Alexanderson v. Wessmann, supra.*

Having determined that the appropriate period of limitations is 10 years, the question becomes, 10 years from what? The answer is, 10 years from the date the debt secured by the mortgage matured. *Herbage v. McKee*, 82 Neb. 354, 117 N.W. 706 (1908).

Under the present state of the record, the debt is created by the agreement, and it is thus that document which determines when the debt matured. Under the terms thereof and the rules set forth in *Dunlop Tire & Rubber Corp. v. Ryan, supra*, and *Farm Mortgage & Loan Co. v. Beale, supra*, that question is to be determined by the law of Missouri. However, as we have not been presented with that law, it is presumed to be the same as that of this state. *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985) (in absence of showing to contrary, common and statutory law of foreign jurisdiction presumed to be same as law of Nebraska). Accord, *State ex rel. Beck v. Associates Discount Corp.*, 168 Neb. 298, 96 N.W.2d 55 (1959), *modified on other grounds*, 168 Neb. 803, 97 N.W.2d 583, *overruled on other grounds, Dailey v. A. C. Nelsen Co.*, 178 Neb. 881, 136 N.W.2d 186 (1965); *Abramson v. Abramson*, 161 Neb. 782, 74 N.W.2d 919 (1956).

The controlling law is thus found in *Grant v. Williams*, 158 Neb. 107, 62 N.W.2d 532 (1954). Therein, the plaintiff loaned money under an oral agreement which did not specify when repayment was to be made. In determining that the action was time barred, we announced that money loaned without agreement as to the time of repayment is due immediately, and the statute of limitations against the lender begins to run at once.

Thus, the statute of limitations expired 10 years after April 1, 1980, more than 29 months prior to the filing of this action. A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute. *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994). As pled, Vanice's foreclosure action is time

barred; consequently, the operative petition fails to state a cause of action.

However, when a demurrer to a petition is sustained, a court must grant leave to amend, unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Id.* Since the agreement makes reference to a note, the operative petition raises a possibility that there exists a document which sets forth a payment schedule which might change the maturity date of the debt secured by the mortgage. That being so, the district court erred by failing to grant Vanice a further opportunity to amend.

## V. JUDGMENT

Accordingly, the judgment of the district court is reversed and the matter remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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# GLADYS W. SCHARMANN, APPELLANT, V. DAYTON HUDSON CORPORATION, DOING BUSINESS AS TARGET STORES, DOING BUSINESS AS TARGET, APPELLEE.

526 N.W.2d 436

Filed January 27, 1995. No. S-93-500.

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: Appeal and Error.** A jury instruction is not reversible error if it, taken as a whole, correctly states the law, is not misleading, and adequately covers the issues.
3. **Negligence: Liability: Invitor-Invitee: Proximate Cause.** A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the

condition: (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee: (3) the defendant should have expected that a business invitee such as the plaintiff, either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger: (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger: and (5) the condition was a proximate cause of damage to the plaintiff.

4. **Jury Instructions: Appeal and Error.** It is an instruction's meaning, not its phraseology, that is the crucial consideration, and a claim of prejudice will not lie when the instruction's meaning is reasonably clear.
5. ____: ____. It is not error to refuse to give a requested instruction if the substance of the request is in the instructions already given.

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

Thomas A. Gleason and Kenneth W. Pickens for appellant.

Ronald F. Krause, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

WHITE, J.

Plaintiff-appellant Gladys W. Scharmann appeals from a jury verdict entered in Douglas County District Court in favor of defendant-appellee Dayton Hudson Corporation, doing business as Target Stores. Scharmann contends that the district court erred in its jury instructions. We affirm.

On September 24, 1991, Scharmann was struck by a shopping cart while on the premises of Target's store at 90th and Maple Streets in Omaha, Nebraska. The shopping cart knocked Scharmann to the ground, causing physical injuries. Consequently, Scharmann filed a negligence action against Target.

In its jury instructions, the district court informed the jury that Target had admitted that Scharmann's injuries had occurred on Target's property. The district court's instruction No. 2, relying heavily on NJI2d Civ. 8.22, which Scharmann challenges in this appeal, provided:

> In her petition, the plaintiff claims that on September 24, 1991, the plaintiff was struck by a wind-blown

shopping cart under the care and control of the defendant while she was on a walkway adjacent to the parking lot in front of the east side entrance to the defendant's store at 90th and Maple Streets in Omaha, Douglas County, Nebraska.

The plaintiff alleges that the defendant was negligent in one or more of the following particulars:

(a) By leaving unattended shopping carts on the adjoining walkway and/or parking lots surrounding defendant's store;

(b) By failing to make timely inspection of the area around the store to bring in all unattended shopping carts.

The plaintiff claims in her petition that as a proximate cause of the defendant's negligence she was injured, and prays for judgment against the defendant for her damages.

The defendant admits in its answer to the plaintiff's petition that the plaintiff fell on the defendant's property, that a shopping cart was involved, and that the plaintiff sustained injuries and underwent medical treatment.

**BURDEN OF PROOF**

Before the plaintiff can recover against the defendant, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

(1) That the defendant either created the condition complained of by the plaintiff in her petition, knew of the condition, or, by the exercise of reasonable care would have discovered the condition;

(2) That the defendant should have realized that the condition involved an unreasonable risk of harm to the plaintiff;

(3) That the defendant should have expected that plaintiff either:

(a) would not discover or realize the danger;

(b) would fail to protect herself against the danger;

(4) *That the defendant failed to use reasonable care to protect the plaintiff against the danger*;

(5) That the defendant's failure to use reasonable care was the proximate cause of the incident complained of;

(6) That the incident complained of was a proximate

cause of damage to the plaintiff; and

(7) The nature and extent of that damage.

**EFFECT OF FINDINGS**

If the plaintiff has not met this burden of proof, then your verdict must be for the defendant.

On the other hand, if the plaintiff has met this burden of proof, then your verdict must be for the plaintiff.

(Emphasis supplied.)

Furthermore, the district court instructed the jury that Scharmann had alleged that Target was negligent by (1) leaving unattended shopping carts in the parking lot or (2) failing to timely inspect the area around the store to bring in all unattended shopping carts. However, the district court did not instruct the jury that Scharmann had alleged that Target was negligent by failing to erect barriers or some sort of barricades to prevent shopping carts from rolling into customers entering or leaving its store.

The jury returned a verdict for the defense. Scharmann thereafter filed a motion for a new trial, which the district court denied. Scharmann has appealed, assigning two errors.

Scharmann's first assignment of error is that the district court erred in failing to expressly use the term "duty" when instructing the jury about the obligation owed by Target to its business invitees. In essence, Scharmann challenges NJI2d Civ. 8.22 as an incorrect statement of a landowner's premises liability. 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); *Macholan v. Wynegar*, 245 Neb. 374, 513 N.W.2d 309 (1994). In the case at bar, the district court's instruction taken as a whole correctly states the law, is not misleading, and adequately covers the issues. See, *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988); *Gilbert v. Archbishop Bergan Mercy Hospital*, 228 Neb. 148, 421 N.W.2d 760 (1988). Therefore, the district court's instruction does not constitute reversible error.

In *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 856, 438 N.W.2d 485, 493 (1989), we stated that a correct statement of the law regarding premises liability for a possessor of land is:

> A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff, either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) *the defendant failed to use reasonable care to protect the plaintiff invitee against the danger*; and (5) the condition was a proximate cause of damage to the plaintiff.

(Emphasis supplied.) In all material aspects, this statement from *Burns* is exactly the same as NJI2d Civ. 8.22. In both *Burns* and NJI2d Civ. 8.22, subpart (4) contains the landowner's duty—the landowner must use reasonable care to protect business visitors against danger—and mere failure to use the legal term "duty" does not render the instruction or statement of law ineffectual. As we have long held, it is an instruction's meaning, not its phraseology, that is the crucial consideration, and a claim of prejudice will not lie when the instruction's meaning is reasonably clear. *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990). We are therefore compelled to conclude that the district court did not err when it instructed the jury pursuant to NJI2d Civ. 8.22.

Scharmann's second assignment of error is that the district court erred in failing to include all of her allegations of negligence that were supported by the evidence. She contends that the district court erred by failing to instruct the jury that she had alleged that Target was negligent by failing to erect barriers or some sort of barricades to prevent shopping carts from rolling into customers entering or leaving its store. However, we have previously held that "[i]t is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given." *Carnes*, 229 Neb.

at 646, 428 N.W.2d at 497. Accord *Bishop v. Farm Bureau Life Ins. Co.*, 228 Neb. 74, 421 N.W.2d 423 (1988). Since the district court properly instructed the jury that Target could be held liable if it did not use reasonable care to protect its business visitors against danger, the jury could have reasonably found that the failure to build such barriers was itself one of those unreasonable actions for which Target could be held liable.

In the case at bar, the trial court's instructions to the jury clearly reflect in substance Scharmann's allegations of negligence, including the failure to have a barrier. The instruction given would have allowed the jury to find Target liable for negligence, provided the requisite facts were present.

We affirm the district court's decision and the jury's verdict in favor of Target.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. TIMOTHY J. CLAUSEN, ALSO KNOWN AS TIMOTHY L. CLAUSEN, ALSO KNOWN AS TIMOTHY CLAUSEN, APPELLANT.

527 N.W.2d 609

Filed January 27, 1995. No. S-94-299.

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 and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) 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.
2. **Trial: Evidence: Testimony.** Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant.

3. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, or fairness of the judicial process.
4. **Effectiveness of Counsel: Proof.** To prove ineffective assistance of counsel, a defendant must establish that his attorney failed to perform at least as well as a lawyer with ordinary training and experience in criminal law and must demonstrate how he was prejudiced in the defense of the case as a result of the attorney's actions or inactions.

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

Mark A. Weber, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Timothy J. Clausen, pro se.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and GRANT, J., Retired, and NORTON, D.J., Retired.

WRIGHT, J.

Timothy J. Clausen appeals his convictions for first degree murder, use of a firearm in the commission of a felony, and possession of a firearm by a felon. A three-judge panel sentenced Clausen to life imprisonment for the murder conviction. He was also sentenced to concurrent terms of 10 to 12 years in prison for the firearm convictions. The sentences for the firearm convictions were ordered to be served consecutively to the life sentence.

## SCOPE OF REVIEW

To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) 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. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994); *State v. Reichert*, 242 Neb. 33, 492 N.W.2d 874 (1992).

## FACTS

The events which led to the conviction of Clausen for the death of Kenneth Dove began when Clausen and Kenneth Terrell met Dove and Helicia Hickerson outside a bar in Council Bluffs, Iowa, in the early morning hours of December 10, 1992. Clausen, who allegedly believed that Dove was a woman, invited Dove and Hickerson to Terrell's house. On the way to the house, Terrell told Clausen that Dove "looked like a fag."

After drinking and listening to music for a time, Clausen and Dove went into the west bedroom together and locked the door. After about 10 to 15 minutes, they came out and left the house, returning with additional beer and whiskey.

When Clausen and Dove returned, Clausen began flirting with Hickerson. Dove became upset and wanted to leave. Clausen then grabbed Dove by the hand and said that he wanted to talk to Dove, and the two went back into the bedroom. Once in the bedroom, Clausen and Dove engaged in what Clausen described as "safe sex." Clausen stated that he believed Dove was a woman until after they engaged in anal intercourse. When Clausen asked if Dove was a man acting like a woman, Dove said yes.

Clausen said he refused to engage in sexual intercourse a second time and began opening the bedroom door to leave. Clausen stated Dove attacked him with what Clausen originally thought was a razor. Clausen was cut from the temple, across his face, through his lip, and three times on the neck. Clausen testified that he attempted to take a gun away from Dove and that all the shots were fired as he and Dove struggled for control of the gun.

The autopsy revealed three wounds: a grazing bullet wound to the right lateral chest, a grazing bullet wound to the right arm, and an entrance gunshot wound to the top of the head. The pathologist testified that the arm and chest injuries could have been caused by a single bullet which was fired from a muzzle which was more than 8 inches from the wounds. The pathologist also stated that the angle of the bullet which caused the head wound was straight down from the top to the bottom of the skull and that the blood spatter patterns on the wall were consistent

with Dove's having been seated against the wall and "shot from the top of the head."

Terrell's testimony concerning the incident was inconsistent. At the preliminary hearing, Terrell claimed that he heard two gunshots, pushed open the bedroom door, and saw Dove and Clausen struggling over a gun. At trial, Terrell recanted and said he had not entered the bedroom until after the struggle was over. Terrell stated that after Clausen and Dove went into the bedroom, he heard a scuffle, which lasted about 3 minutes, and then heard gunshots. Terrell went to the bedroom and found it locked. When the gunfire stopped, the door was opened from the inside. Terrell observed that Clausen was holding a rag to his face, which was bleeding. Clausen had a gun in his hand, and Dove was slumped against a wall. Terrell checked Dove and found no pulse. On direct examination, Terrell explained the recantation by stating that Julianne Dunn, Clausen's attorney at the preliminary hearing, had asked Terrell if he would lie for Clausen. Terrell told Dunn that he would lie if he had to. He said Dunn told him he might have to lie.

Dunn testified that she had never directed or asked Terrell to lie for Clausen and that just prior to the preliminary hearing, she had talked to Terrell, but he had declined to provide her with details of his discussion with the prosecuting attorney. She said that Terrell told her that he would not say anything which could hurt "TJ," which she interpreted to mean Clausen. The State called Officer Felands Marion, who testified that he had heard Dunn ask Terrell whether he knew what to say and that he saw Terrell nod affirmatively in response to the question before Terrell entered the courtroom.

## ASSIGNMENTS OF ERROR

Clausen makes three assignments of error: (1) The trial court committed plain error in allowing into evidence testimony relating to Dunn's alleged attempts to influence Terrell to testify falsely, without presentation of any evidence tending to show that Clausen governed Dunn's actions; (2) the trial court committed plain error in accepting the jury's verdict, as the circumstantial evidence was insufficient to support a finding of guilt on the charge of first degree murder; and (3) Clausen's

Sixth Amendment rights were violated at trial in that his trial counsel's performance fell below the standard of a lawyer with ordinary training and skill in the defense of a criminal case, but for which there is a reasonable probability that the result of the proceedings would have been different.

## ANALYSIS

We begin by addressing Clausen's first and third assignments of error, which are interrelated. Three attorneys have represented Clausen in this matter: Dunn, who was Clausen's counsel at the preliminary hearing; trial counsel; and counsel on appeal. Clausen asserts on appeal that the trial court erred in allowing Dunn and Terrell to testify regarding Dunn's alleged attempt to influence Terrell's testimony and that trial counsel's failure to object to this testimony resulted in ineffective assistance of counsel, which violated Clausen's Sixth Amendment rights.

Clausen's trial counsel failed to object to the State's examination of Terrell regarding Dunn's alleged attempt to suborn perjury:

> Q. And did you tell the truth when you testified at the preliminary hearing?
>
> A. No, I didn't.
>
> Q. You lied about opening the door and seeing a struggle of some kind?
>
> A. Right.
>
> Q. Okay. That didn't happen?
>
> A. No, it didn't.
>
> Q. Between the time this happened and the time that — the preliminary hearing, did you talk to Mr. Clausen at all?
>
> A. Yes, I did. I had talked to him a few times on the phone.
>
> Q. How many times?
>
> A. Maybe five or six.
>
> Q. Okay. When you got to the preliminary hearing, was he represented by another lawyer?
>
> A. Yes, he was.
>
> Q. Were you told by that lawyer it was okay to lie about what happened?

A. She didn't tell me it was okay to lie but she asked me would I lie.

Q. What did you say?

A. I told her if I had to.

Q. What did she say?

A. She said I might have to.

Q. And after that you lied at the preliminary hearing, didn't you?

A. Yes.

Clausen's trial counsel was ineffective because he failed to object to this testimony, and he exacerbated the error when he proceeded to have Terrell repeat the testimony on cross-examination.

Q. You're telling this jury that some lawyer here in town told you that you're going to have to lie on a first degree murder case? Is that what you're telling us?

A. No. She asked me would I lie.

Q. And you said?

A. If I had to.

Q. So she's condoning you getting up and lying at a preliminary hearing, is that what's going on?

A. That's what she told me.

Up to this point in the trial, the State had not established that Clausen had authorized the alleged attempt to have Terrell lie about the struggle or that the alleged effort occurred in the presence of Clausen. However, Clausen's trial counsel proceeded to ask Terrell if Clausen asked Terrell to lie about the struggle between Clausen and Dove.

Q. And do you recall telling Mr. Cooper that you had heard shots and that you saw a struggle take place and that you also saw a weapon?

. . . .

Q. . . . Do you remember saying that?

[Terrell:] Uh-huh.

Q. And now you're telling us today that's a lie?

A. Yes, it is.

Q. That was — you were told to lie?

A. I was told to say that.

Q. Okay. That's by my client?

A. Right.

Q. Okay. And his lawyer?

A. Well, his lawyer didn't say that directly to say that. She just asked me would I lie for him.

We can think of no instance where defense counsel would elicit the fact that the defendant had requested a witness to lie for the defendant at trial. This line of questioning could only result in a prejudicial effect upon the defendant's case.

Clausen correctly asserts that he received ineffective assistance of counsel. The evidence of Dunn's alleged attempt to suborn perjury was highly prejudicial, and trial counsel should have objected to the testimony. In *People v. Weiss*, 50 Cal. 2d 535, 554, 327 P.2d 527, 538 (1958), the court stated:

> "Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. . . . However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant." . . . If the attempt is made by a third person, not in the presence of a defendant or shown to have been authorized by him, it should at once be suspect as a mere purporting attempt to suppress evidence and in truth an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily . . . . The wilful offering of such evidence might well form the basis for declaring a mistrial instanter, or for granting a new trial, or for reversal on appeal . . . .

The State raised the issue of Dunn's alleged attempt to suborn perjury on direct examination of Terrell, and trial counsel did not object. Ordinarily, our rule provides that one who fails to object to or move to strike testimony may not predicate error on its admission. *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991). However, plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, or fairness of the judicial process. See, *State v. Dawn*, 246 Neb.

384, 519 N.W.2d 249 (1994); *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994).

We have adopted the two-part test for proving a claim of ineffective assistance of counsel set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) 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. Dawn, supra*; *State v. Reichert*, 242 Neb. 33, 492 N.W.2d 874 (1992). The defendant must establish that his attorney failed to perform at least as well as a lawyer with ordinary training and experience in criminal law and must demonstrate how he was prejudiced in the defense of the case as a result of the attorney's actions or inactions. *State v. Navrkal*, 242 Neb. 861, 496 N.W.2d 532 (1993).

In *State v. Hawthorne*, 230 Neb. 343, 353, 431 N.W.2d 630, 636 (1988), we stated that the conduct of defense counsel in eliciting testimony from the defendant about a prior felony conviction, which was otherwise inadmissible as evidence, "was performance which fell below a standard of reasonableness required in the defense of a criminal charge, namely, conversance with the rules of evidence." Similarly, Clausen's trial counsel's performance fell below the required standard of reasonableness when trial counsel allowed the State to elicit testimony from Terrell concerning an attempt to suborn perjury. Clausen's defense was tainted when the jury heard allegations that Dunn had attempted to suborn perjury by obtaining false testimony. This prejudice makes it reasonably probable that the result of the trial would have been different. See *State v. Dawn, supra*. As noted in *People v. Weiss*, 50 Cal. 2d 535, 554, 327 P.2d 527, 538 (1958), such evidence is "an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily." The reason for exclusion of such testimony is apparent. Evidence of alleged attempts by

a defendant's lawyer to suborn perjury indicate a consciousness of guilt and impermissibly and prejudicially impress upon the jury the idea that the defendant is guilty or the witness would not have to lie for him.

The second element for establishing a claim of ineffective assistance of counsel is that there is a reasonable probability that but for his trial counsel's deficient performance, the result of the proceeding would have been different. See *State v. Dawn, supra*. The record shows that the allegation that Dunn attempted to suborn perjury at the preliminary hearing became a substantial issue in Clausen's trial. The State's attorney commented on the alleged falsification of evidence by Terrell in his closing argument by telling the jury, "What matters is what was in [Terrell's] mind, the witness's mind, and why he lied." Had Terrell's testimony regarding Dunn's alleged attempt to suborn perjury been excluded, the jury would not have been given the opportunity to speculate as to whether Clausen's consciousness of guilt was evidenced by an attempt to suborn perjury. This speculation may have diverted the jury's attention from the real issue of the case—Clausen's guilt or innocence. The cross-examination of Terrell by Clausen's trial counsel only exacerbated the error. The error was further compounded when Clausen's trial counsel elicited Dunn's testimony, which was rebutted when the State called a police officer who overheard a portion of the conversation between Dunn and Terrell at the preliminary hearing.

We find that Clausen has demonstrated there is a reasonable probability that but for his trial counsel's deficient performance, the result of the proceeding would have been different. Therefore, we reverse the judgment and remand the cause for a new trial.

Clausen also assigns as error the trial court's acceptance of the jury verdict, which he claims was based on circumstantial evidence that was insufficient to support a finding of guilty of first degree murder. Because we find that Clausen's Sixth Amendment right to counsel was violated by the ineffective assistance rendered to him, we do not reach this assignment of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

# HAROLD M. RUCH, APPELLANT, V. JACK C. CONRAD, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

526 N.W.2d 653

Filed February 3, 1995. No. S-92-975.

1. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Implied Consent: Blood, Breath, and Urine Tests: Police Officers and Sheriffs.** A refusal to submit to a blood alcohol test occurs when the licensee, after being asked to submit to such a test, so conducts himself or herself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he or she was asked to submit to a test and manifested an unwillingness to take it.
3. **Implied Consent: Blood, Breath, and Urine Tests: Licenses and Permits.** If a licensee's refusal to submit to a test is reasonable under the circumstances, there can be no revocation of the licensee's license.
4. **Implied Consent: Blood, Breath, and Urine Tests.** The fear of needles or AIDS does not in and of itself provide a justifiable basis for refusing to submit to testing.
5. **Statutes: Blood, Breath, and Urine Tests: Licenses and Permits.** Under Neb. Rev. Stat. § 39-669.14 (Cum. Supp. 1990), no particular license or permit establishes whether one is qualified to draw blood, such being a matter of training and experience.
6. **Statutes: Blood, Breath, and Urine Tests.** Under Neb. Rev. Stat. § 39-669.14 (Cum. Supp. 1990), if a licensee questions the qualifications of the technician who is to draw blood, the licensee shall be orally or otherwise informed of the technician's training and experience.

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 Buffalo County, JOHN P. ICENOGLE, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Greg C. Harris, Michael D. Carper, and Bernard J. Glaser, Jr., for appellant.

Don Stenberg, Attorney General, and Paul N. Potadle for appellee.

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

CAPORALE, J.

Defendant-appellee, Jack C. Conrad, director of the

Department of Motor Vehicles, ordered the revocation of plaintiff-appellant Harold M. Ruch's license to operate a motor vehicle because of the latter's refusal to submit to a blood alcohol test, contrary to the provisions of the then-applicable statutes, as hereinafter set forth. Ruch appealed to the district court, which affirmed the director's order. Ruch then appealed to the Nebraska Court of Appeals, which affirmed the judgment of the district court. *Ruch v. Conrad*, 94 NCA No. 25, case No. A-92-975 (not designated for permanent publication). Ruch thereupon successfully petitioned this court for further review, claiming, among other things, that the Court of Appeals erroneously upheld the district court's finding that his refusal to submit to testing was unreasonable. We now reverse the judgment of the Court of Appeals and remand the cause with direction.

As provided in then Neb. Rev. Stat. § 39-669.18 (Reissue 1988), Ruch instituted his appeal from the director's order to the district court on April 22, 1992, under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 through 84-920 (Reissue 1987 & Cum. Supp. 1992). Although Administrative Procedure Act appeals instituted on or after July 1, 1989, are reviewed by the district court de novo on the record, the district court's decision is reviewed by the appellate tribunals of this state for error on the record. §§ 84-917(5)(a) and 84-918. Thus, the inquiry here necessarily is whether the decision of the Court of Appeals conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Crawford v. Department of Motor Vehicles*, 246 Neb. 319, 518 N.W.2d 148 (1994). Whether a decision conforms to the law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. See *Fiese v. Sitorius, ante* p. 227, 526 N.W.2d 86 (1995).

After being arrested on November 14, 1991, for driving while under the influence of alcohol, Ruch was transported to a local hospital for a blood alcohol test. Upon arrival, the arresting officer instructed a laboratory technician to draw two vials of blood. Ruch rolled up his sleeve and said, "[O]kay," whereupon the technician placed a tourniquet on Ruch's arm.

Ruch then asked to "see the credentials of the person that was going to administer the test." The officer told Ruch that the technician was "not required to by law, by our department, or by an organization to carry any" and that if Ruch did not allow the blood to be drawn, Ruch would be considered to have refused to submit to the test. Ruch replied that he was "not refusing to take the test, [he] would be happy to do so upon seeing the credentials of the person that was going to put a needle into [his] arm." Ruch explained he wanted to know the technician's credentials because he was concerned about getting AIDS.

Although the technician attempted to locate a document to show she was qualified to draw blood, none was found.

Ruch claimed he was not told anything about her qualifications to draw blood other than the fact that the officer said she was a "lab tech," but the officer did not explain what such a person does. According to the officer, the technician at one point stated that she did not have a document but that she "is licensed and that she's got some . . . ." However, she did not say by whom she was licensed, nor did she produce any credential. Neither did anyone explain the technician's training or experience in drawing blood.

Ruch did recall that while in the hallway, the officer waved a piece of blue plastic and asked, "[I]s this good enough?" Ruch believed the item to be a name tag and responded, "No," as it was too far away to be read.

The officer also testified that while he and Ruch were located inside a room with the door open, the nursing supervisor happened to be walking down the hallway, met the lab technician, reminded the technician that she was such, and told her that this was "procedure." However, there is no evidence that Ruch heard the nursing supervisor's statements.

Ruch did not permit any blood to be drawn.

The statutes in force at the time of Ruch's arrest and subsequent February 26, 1992, hearing before the director deemed one arrested for driving while under the influence of alcohol to have consented to submit to a blood alcohol test, Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1990), and empowered the director to revoke the motor vehicle operator's

license of one who refused to submit to such a test and who failed to show that "such refusal . . . was reasonable," Neb. Rev. Stat. § 39-669.16 (Reissue 1988), provided that blood could be drawn by a "qualified technician acting at the request of a law enforcement officer," Neb. Rev. Stat. § 39-669.14 (Cum. Supp. 1990).

A refusal to submit to a blood alcohol test occurs when the licensee, after being asked to submit to such a test, so conducts himself or herself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he or she was asked to submit to a test and manifested an unwillingness to take it. *Hoyle v. Peterson*, 216 Neb. 253, 343 N.W.2d 730 (1984); *Martinez v. Peterson*, 212 Neb. 168, 322 N.W.2d 386 (1982); *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979).

There is no such thing as conditional or qualified refusal; anything short of an unqualified, unequivocal assent to an officer's request that the arrested licensee take the test constitutes a refusal to do so. *Clontz v. Jensen*, 227 Neb. 191, 416 N.W.2d 577 (1987); *Hoyle, supra*; *State v. Pandoli*, 109 N.J. Super. 1, 262 A.2d 41 (1970).

However, if a licensee's refusal to submit to a test is reasonable under the circumstances, there can be no revocation of the licensee's license. *Hoyle, supra*. Justifiable refusal of the test depends upon some illegal or unreasonable aspect in the nature of the request, the test itself, or both. *Id.*

We agree with those courts which have held that the fear of needles or AIDS does not in and of itself provide a justifiable basis for refusing to submit to testing. E.g., *State v. Krause*, 168 Wis. 2d 578, 484 N.W.2d 347 (Wis. App. 1992); *Com., D.O.T., Bur. of Dr. Lic. v. Mease*, 148 Pa. Commw. 14, 610 A.2d 76 (1991); *Franko v. Commissioner of Public Safety*, 432 N.W.2d 469 (Minn. App. 1988).

However, here, because of Ruch's fear of contracting AIDS if the blood were not drawn by a qualified technician, presumably because an unqualified person might not employ sterile and otherwise safe techniques, Ruch wanted assurance that the technician who was going to invade his body was qualified to do so. Thus, his refusal rested not on his fear of

contracting AIDS per se, but on the failure of being assured that the technician was qualified.

As noted earlier, § 39-669.14 required that the technician be "qualified" to draw blood. While we have held that under that statute no particular license or permit establishes whether one is so qualified, such being a matter of training and experience, *State v. Stein*, 241 Neb. 225, 486 N.W.2d 921 (1992), we have not heretofore considered under what circumstances and how a technician's qualifications must be made known, if at all, to one who is about to have one's body invaded for the purpose of having blood withdrawn.

In those respects, *Ross v. Department of Motor Vehicles*, 219 Cal. App. 3d 398, 268 Cal. Rptr. 102 (1990), is instructive. Therein, the motorist was taken to a local jail for the purpose of having a blood alcohol sample drawn. The technician who was to draw the blood arrived in Levi's, a wrinkled shirt, and a plaid coat. He wore a beard and looked tired and disheveled, as if he had just gotten out of bed. The motorist asked to see some identification, and the police officer stated that the technician was not required to show any. The motorist insisted on seeing the technician's identification, saying, " 'Your [sic] not going to stick a needle in my arm.' " *Id.* at 400, 268 Cal. Rptr. at 103.

In concluding that the motorist had not refused to submit to the test, the *Ross* court reasoned that as the California statute required that blood be drawn by only licensed, qualified individuals in a medically approved manner, the motorist was merely insisting on a statutorily imposed condition to the test.

The court reasoned that even though there was no evidence that unclean needles would be used or that the technician was unqualified, the motorist need not rely solely on the existence of the qualifications statute or on the fact that the police officer directed the technician. Once the motorist questioned the identity of the technician, he was entitled to actual assurances that the technician was qualified by statute to draw blood in a proper manner, explaining:

> Expecting one who is acting in an official capacity to produce proper identification is neither novel nor burdensome. Where that person intends to intrude into the

> body with a needle, it is not only reasonable, but prudent to require identifying information clearly displayed. In the wake of the public's legitimate anxiety over the transmission of the AIDS virus intravenously, it is understandable that an arrestee could entertain an honest concern.

*Ross*, 219 Cal. App. 3d at 403, 268 Cal. Rptr. at 105.

While the blood-drawing setting involved here is far different from that presented in *Ross*, and while in *Ross* the technician's identity was in question rather than his qualifications, the *Ross* reasoning nonetheless remains persuasive. We thus hold that if a licensee questions the qualifications of the technician who is to draw blood, the licensee shall be orally or otherwise informed of the technician's training and experience.

Inasmuch as that was not done, Ruch's refusal to have his blood drawn was reasonable.

That determination makes consideration of Ruch's other assignments of error unnecessary.

Accordingly, the judgment of the Court of Appeals is reversed and the cause remanded to that court with the direction that it reverse the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

FAHRNBRUCH, J., participating on briefs.

CONNOLLY, J., not participating.

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MERTISHA KROEGER, APPELLANT, V. FORD MOTOR COMPANY, APPELLEE.

527 N.W.2d 178

Filed February 3, 1995. No. S-93-334.

1. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the

evidence. In order to sustain a motion for directed verdict, the 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.

2. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
3. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
4. **Principal and Agent: Compromise and Settlement.** Settlement with an agent constitutes settlement with the principal, no matter what the parties may have intended.
5. **Circumstantial Evidence: Verdicts.** Circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom.
6. **Circumstantial Evidence.** When there is direct evidence sufficient to refute all theories of the cause of damage except the one established solely by circumstantial evidence, there then remains but one inference deducible from the facts under the circumstances, and it is within the province of the trier of fact to make this determination. However, where several inferences are deducible from the facts presented, a plaintiff does not sustain her position by reliance on only the inferences which would entitle her to recover.
7. **Circumstantial Evidence: Directed Verdict.** A directed verdict is required if more than one conclusion can reasonably be drawn from the circumstantial evidence presented.
8. **Rules of Evidence: Hearsay: Records: Words and Phrases.** Compilations prepared by private entities at the direction of a federal agency do not constitute the "facts required to be observed and recorded pursuant to a duty imposed by law" contemplated by Neb. Rev. Stat. § 27-803(7) (Reissue 1989).
9. **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.
10. **Trial: Expert Witnesses.** The soundness of a trial court's decision regarding the admissibility of expert testimony 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.
11. ____: ____. Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value.

Appeal from the District Court for Douglas County: KEITH HOWARD, District Judge, Retired. Affirmed.

James E. Schaefer, of Gallup & Schaefer, for appellant.

William J. Brennan and Joseph A. Jordano, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., and John M. Thomas for appellee.

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

CONNOLLY, J.

Mertisha Kroeger appeals the directed verdict entered against her by the Douglas County District Court in her product liability action against the appellee, Ford Motor Company (Ford). Kroeger's claim arose out of a one-car accident in which she was seriously injured while driving an automobile manufactured by Ford. Kroeger sued Ford under the theories of strict liability, negligence, breach of express warranty, and breach of implied warranty. At the end of Kroeger's case in chief, Ford made a motion for directed verdict, which the trial court sustained. For the reasons stated below, we affirm the trial court's decision.

## I. FACTUAL BACKGROUND

### 1. THE VEHICLE

Kroeger purchased a new 1986 Ford Taurus automobile on January 8, 1986, from Atchley Ford in Omaha. The Taurus was manufactured by the appellee, Ford. Kroeger began experiencing mechanical problems with the vehicle almost immediately. She took the car back to Atchley on several occasions for repairs. After each repair, Kroeger testified, she was assured by Atchley that the car had been repaired, that nothing was wrong with the car when she brought it in, or that whatever she was complaining of either could not be repaired or constituted a regular characteristic of the Ford Taurus.

After 4 months and several repairs by Atchley mechanics, Kroeger began experiencing problems with the power steering belts. Kroeger complained to the mechanics at Atchley that something was cutting or breaking the power steering belts and that when Kroeger executed a right turn in the vehicle, she would have to pull hard on the steering wheel to get it to come

back after the turn. Various mechanics at Atchley adjusted and replaced the power steering belts on several occasions. They also replaced the pulley at least twice and attempted to adjust the pulley and align it with the power steering belts. During this period of time, Atchley mechanics also performed numerous other repairs, including aligning the front end and repairing the brakes, catalytic converter, air conditioner, and dashboard lights.

Despite the repeated trips to Atchley, Kroeger continued to experience problems with her car. In October 1986, when the car had been driven approximately 12,000 miles, Kroeger began taking the vehicle to McFayden Ford for service. During the month of October, McFayden's mechanics performed a number of repairs on Kroeger's Ford Taurus, including checking and adjusting various belts and disassembling the steering wheel to service the cruise control.

On November 18, McFayden's mechanics installed a new power steering rack. One of Kroeger's expert witnesses, Roy Burdick, concluded that whoever replaced the steering rack "hadn't finished his job and sent the car out with what I would say [was] faulty workmanship." Burdick believed, among other things, that the mechanics had reassembled the vehicle improperly using air wrenches instead of torque wrenches. He believed that McFayden's mechanics had failed to tighten various bolts and locknuts, creating a dangerous condition.

In late November, the car began making a "clunking" noise under the hood. Kroeger's husband, Robert Kroeger, opened the hood while his brother-in-law turned the steering wheel. Kroeger's husband saw the engine move from side to side. He contacted McFayden, which sent two mechanics, Keith Kruse and Robert Fredlund, to pick up the vehicle. Kruse testified in his deposition that he heard the clunking noise and saw the unusual movement of the engine. The vehicle was taken back to McFayden, where the mechanics tightened some of the bolts and replaced the power steering belts and the pulley.

### 2. The Crash

After driving the Ford Taurus home from the last repair, Kroeger testified, she refused to drive the vehicle again.

However, on January 19, 1987, Kroeger agreed to pick up her mother-in-law and take her to a doctor's appointment at Immanuel hospital. Kroeger used the Ford Taurus on that occasion, and it was during the trip to the hospital that the accident in the instant case occurred.

Kroeger picked up her mother-in-law in Blair, Nebraska, and brought her to Omaha. The crash occurred on 72d Street in Omaha as Kroeger was driving toward the hospital. At the point where the accident occurred and in the surrounding area, 72d Street is a four-lane street, with two lanes containing northbound traffic and two lanes containing southbound traffic. Kroeger was traveling southbound on 72d Street in the west (right) lane. As the vehicle approached the hospital, Kroeger began to move toward the east (left) southbound lane so that she could execute a left turn to enter the hospital parking lot. At the point where Kroeger began to move the vehicle into the left lane and where the front left wheel was in the left lane, the steering wheel whipped out of her hands. Kroeger sensed that she had lost control of the vehicle and pressed the brake pedal to the floor. The brake was ineffective.

An eyewitness to the accident, Loyal Bridges, noticed the Kroeger vehicle as he was traveling northbound in the right-hand lane on 72d Street. Bridges testified that his attention was drawn to the Kroeger vehicle because he noticed that Kroeger was moving her hands erratically. Bridges saw the Kroeger vehicle move toward the west curb on 72d Street. Both tires on the passenger side of the Kroeger vehicle climbed up onto the curb. The Ford Taurus traveled a short distance with the passenger side tires over the curb and then came back onto 72d Street and headed toward Bridges' vehicle. Bridges testified that he brought his automobile to a stop because he was unsure where the Kroeger vehicle was going. The Kroeger vehicle reached the left-hand southbound lane of 72d Street near the median, then turned to the right and went over the embankment on the west side of 72d Street. Bridges testified that he radioed his employer and instructed the people there to call for help.

### 3. The Trial

Kroeger brought the instant action against Atchley,

McFayden, and Ford individually, without alleging an agency relationship between Ford and the other defendants. Prior to trial, Kroeger reached a settlement agreement with Atchley and McFayden. At trial, with Ford as the only remaining defendant, Kroeger presented the testimony of Bridges and two expert witnesses, Burdick and Dr. William Weins. Burdick was of the opinion that some of the repairs performed by Atchley and McFayden were inadequate and constituted potential causes of the accident in the instant case. Dr. Weins was called by Kroeger to testify as to another potential cause of the accident—a phenomenon known as temporary loss of assist (TLA). However, Dr. Weins was not allowed to offer his opinion as to causation because the trial court found that there was insufficient foundation for Dr. Weins' opinion.

In addition to Bridges, Burdick, and Dr. Weins, Kroeger also called a number of mechanics from Atchley and McFayden to testify about the repairs performed on Kroeger's Ford Taurus. Police officers who investigated the accident scene testified as to their observations. Kroeger herself testified regarding the accident and the injuries she sustained.

At the end of Kroeger's case in chief, Ford made a motion for directed verdict, which the trial court granted. Kroeger appeals from that decision.

## II. ASSIGNMENTS OF ERROR

Kroeger argues that the trial court erred in (1) not submitting her case to the jury based on Kroeger's own testimony that her Ford Taurus was defective, (2) sustaining Ford's motion in limine and refusing to admit evidence collected by the National Highway Transportation Safety Administration (NHTSA) concerning TLA, (3) failing to admit into evidence TLA complaints verified by Ford, and (4) refusing to allow Dr. Weins to offer an opinion as to causation.

## III. STANDARD OF REVIEW

In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have

every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. In order to sustain a motion for directed verdict, the 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. *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994); *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993).

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d 550 (1994); *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). The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994); *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994).

## IV. ANALYSIS

### 1. Directed Verdict Improper Based on Kroeger's Testimony

As her first assignment of error, Kroeger contends that the trial court erred in directing a verdict in Ford's favor. Kroeger argues that her testimony and the testimony of other witnesses, without the opinion of Dr. Weins, were enough to raise genuine questions of fact that should have been submitted to the jury. At trial, Kroeger testified that in spite of her efforts to control her vehicle, she was unable to do so because the vehicle's steering wheel was inexplicably ripped from her hands while she was driving down 72d Street. All the other witnesses, except Dr. Weins, testified with regard to the events at the accident scene, the repairs conducted by Atchley and McFayden, and the various mechanical failures which may have caused the instant accident.

Without Dr. Weins' expert opinion, the cause of the failure of the steering system was based entirely upon circumstantial evidence. According to the testimony of Kroeger's expert witness Burdick, a number of the potential causes of this accident could be attributed to the mechanical repair work performed by Atchley and McFayden. However, the record reflects that Kroeger reached a settlement agreement with Atchley and McFayden. It is established law in Nebraska that settlement with an agent constitutes settlement with the principal, no matter what the parties may have intended. *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993). Thus, as to any liability which may have been attributed to Atchley or McFayden, Ford has effectively been released by Kroeger.

Circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. *Rohde v. Farmers Alliance Mut. Ins. Co., supra.* When there is direct evidence sufficient to refute all theories of the cause of damage except the one established solely by circumstantial evidence, there then remains but one inference deducible from the facts under the circumstances, and it is within the province of the trier of fact to make this determination. *Id.* However, where several inferences are deducible from the facts presented, a plaintiff does not sustain her position by reliance on only the inferences which would entitle her to recover. *Anderson v. Farm Bureau Ins. Co.*, 219 Neb. 1, 360 N.W.2d 488 (1985); *Popken v. Farmers Mutual Home Ins. Co.*, 180 Neb. 250, 142 N.W.2d 309 (1966). A directed verdict is required if more than one conclusion can reasonably be drawn from the circumstantial evidence presented. See *Anderson v. Farm Bureau Ins. Co., supra.*

Clearly, the record in the instant case reasonably supports more than one conclusion as to the cause of Kroeger's accident. Kroeger presented abundant evidence which tended to prove that the crash may have been caused by Atchley's or McFayden's negligence. As a result of the settlement agreement between

Kroeger and Atchley and McFayden, Ford cannot be held liable for the negligence of either Atchley or McFayden. Thus, Kroeger failed to provide direct evidence refuting all the potential causes of the accident for which Ford cannot be held liable. The trial court did not err in refusing to submit Kroeger's case to the jury based on the evidence Kroeger presented.

2. TRIAL COURT'S REFUSAL TO ALLOW EVIDENCE COLLECTED BY THE NHTSA AND TLA COMPLAINTS VERIFIED BY FORD

Kroeger's second and third assignments of error appear to refer to the same piece of evidence: the last three pages of what was offered as exhibit 105. Those three pages contained nine brief summaries of accidents which were allegedly caused by locking or binding in the steering system of 1986 Ford Taurus or Sable automobiles. Kroeger attempted to introduce the accident summaries as part of a "concern analysis report" produced by Ford which identified and addressed the company's concerns over the TLA problem. The trial court admitted into evidence as exhibit 105 the bulk of the concern analysis report, but excluded the accident summaries pursuant to Ford's motion in limine and objection at trial.

Ford contends that the trial court properly excluded the accident summaries because they constituted inadmissible hearsay. In response, Kroeger implicitly concedes that the accident summaries are hearsay, but argues that they were admissible under the hearsay exception in Neb. Rev. Stat. § 27-803(7) (Reissue 1989):

> Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (7) Upon reasonable notice to the opposing party prior to trial, records, reports, statements or data compilations made by a *public official or agency of* facts required to be observed and recorded pursuant to a duty imposed by law, unless the sources of information or the method or circumstances of the investigation are shown by the opposing party to indicate a lack of trustworthiness.

(Emphasis supplied.)

From the record, it is clear that the accident summaries in question were prepared by Ford, not the NHTSA. The fact that the NHTSA requested Ford to compile the accident summaries is of no consequence. Compilations prepared by private entities at the direction of a federal agency do not constitute the "facts required to be observed and recorded pursuant to a duty imposed by law" contemplated by § 27-803(7). Nothing in the accident summaries indicates that representatives of the NHTSA observed anything in compiling the summaries. Rather, it appears that the NHTSA received notice of a problem with certain Ford automobiles and requested Ford to conduct its own investigation and report the results to the NHTSA. The information compiled by Ford does not fall within the hearsay exception in § 27-803(7), and the trial court properly excluded the accident reports.

### 3. Trial Court's Refusal to Allow Dr. Weins to Offer an Opinion as to Causation

In her final assignment of error, Kroeger contends that the trial court erred in refusing to allow Kroeger's expert witness Dr. Weins to render his opinion regarding the cause of Kroeger's accident. The trial court afforded Kroeger several opportunities to lay the proper foundation for Dr. Weins' opinion, including allowing Kroeger to recall Dr. Weins the day after her first unsuccessful attempt to elicit his opinion. However, Kroeger failed to establish sufficient foundation, and the trial court refused to allow Dr. Weins to state his opinion. Had Dr. Weins been allowed to give his opinion, he would have stated that the accident was caused by the TLA defect.

The trial court found that the foundation for Dr. Weins' testimony was inadequate because Dr. Weins attempted to base his opinion on a factual scenario which was substantially different from what occurred during Kroeger's accident. During direct examination, Dr. Weins stated that an important factor in his analysis of the instant case was the effect that TLA would have on a vehicle that struck a curb at the time that the TLA effect manifested itself. Soon after that testimony was elicited, Kroeger's trial counsel asked Dr. Weins to offer an opinion as to the cause of the accident. The trial court sustained Ford's

objection as to lack of foundation and noted that nothing in the record reflected that Kroeger had struck a curb.

Later in the trial, Kroeger recalled Dr. Weins in an attempt to lay the proper foundation for Dr. Weins' opinion. During that direct examination, Dr. Weins stated that he had relied on an assortment of testimony and exhibits in arriving at his conclusion. When asked if he could correlate the facts of the accident to the TLA defect, Dr. Weins stated, "Yes, I believe I can." However, Dr. Weins continued to assert his opinion based on the theory that the Kroeger vehicle struck a curb at the time that the TLA defect manifested itself. As support for that factual conclusion, Dr. Weins cited the testimony of eyewitness Bridges.

The flaw in the foundation for Dr. Weins' opinion is that when Kroeger's testimony is compared with Bridges' eyewitness account, Dr. Weins' "TLA-curb" theory becomes inapplicable to the instant case. Kroeger testified that the steering wheel jumped out of her hands as she began to execute a lane change to the *left*. Nothing in the record supports an inference that Kroeger struck the curb on her right prior to beginning the move to the left lane. In fact, Kroeger testified that she had full control of her vehicle when she began to move toward the left lane. As the vehicle entered the left lane, the steering wheel began to move back and forth uncontrollably. Bridges testified that he saw the Kroeger vehicle move from the road onto the curb in the right lane. That move to the right, given the facts presented by the record in the instant case, occurred *after* Kroeger had already lost control of the vehicle.

The record does not support a theory based on the premise that the TLA effect coincided with Kroeger's vehicle striking the curb. According to Dr. Weins' testimony, the TLA defect would have caused Kroeger to oversteer to the left (since she was moving the vehicle in that direction), not to the right. Oversteering to the left would clearly not cause a vehicle to jump onto the curb bordering the right-hand lane. The only reasonable reading of the record reveals that Kroeger had already lost control of the vehicle when it ran onto the curb.

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. *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994). The soundness of a trial court's decision regarding the admissibility of expert testimony 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. *Coppi v. West Am. Ins. Co., ante* p. 1, 524 N.W.2d 804 (1994). Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. *Latek v. K Mart Corp.*, 224 Neb. 807, 401 N.W.2d 503 (1987); *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979). Since there was no basis in fact to support Dr. Weins' opinion, the trial court properly refused to accept it. See *Green v Jerome-Duncan Ford*, 195 Mich. App. 493, 491 N.W.2d 243 (1992). See, also, *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985).

## V. CONCLUSION

Kroeger's circumstantial evidence, without the expert opinion of Dr. Weins, was insufficient to overcome Ford's motion for directed verdict because Kroeger failed to refute with direct evidence the other potential causes of the accident for which Ford could not be held liable. The trial court properly excluded the accident summaries submitted to the NHTSA by Ford because those summaries constituted inadmissible hearsay. Likewise, the trial court did not abuse its discretion in finding that there was insufficient foundation to allow Dr. Weins to state his expert opinion as to the cause of the accident.

AFFIRMED.

WHITE and LANPHIER, JJ., not participating.

# STATE OF NEBRASKA, APPELLEE, v. ONE 1985 MERCEDES 190D AUTOMOBILE, NEBRASKA LICENSE 2-S153, VIN WDBDB22C6FF120226, APPELLEE, AND KEVIN BALLARD, INTERESTED PARTY, APPELLANT.

526 N.W.2d 657

Filed February 3, 1995. No. S-93-519.

1. **Criminal Law: Penalties and Forfeitures: Appeal and Error.** Appellate review concerning the sufficiency of the evidence to forfeit a motor vehicle to the State under Neb. Rev. Stat. § 28-431 (Reissue 1989) should not be treated differently than review of the sufficiency of the evidence in a criminal case.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a finding of guilty in a criminal case where the finding is supported by relevant evidence; only when the evidence lacks sufficient probative force as a matter of law may the appellate court set aside a finding of guilty as unsupported by the evidence beyond a reasonable doubt.
4. **Criminal Law: Circumstantial Evidence: Evidence: Appeal and Error.** In a criminal case, when there is both circumstantial and direct evidence, the circumstantial evidence is to be treated the same as direct evidence, and upon review, the State is entitled to have all conflicting evidence, both direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor.
5. **Penalties and Forfeitures: Equity.** In rem actions for forfeiture of property to the State are generally considered to sound in equity.
6. **Intent: Words and Phrases.** The intent involved in an actor's conduct is a mental process and may be inferred from the conduct itself; the actor's language, if any, in reference to the conduct; and the circumstances surrounding an incident.
7. **Constitutional Law.** A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion before a tribunal having jurisdiction to determine it.
8. ____. A constitutional question should be raised at the earliest opportunity.
9. **Constitutional Law: Appeal and Error.** Generally, a constitutional question not properly raised in the trial court will not be considered on appeal.
10. **Trial: Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.

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

Patrick T. O'Brien, of Bauer, Galter, O'Brien, Allan & Butler, for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee State.

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

FAHRNBRUCH, J.

Kevin Ballard appeals a district court order forfeiting to the State his 1985 Mercedes Benz 190D, vehicle identification number WDBDB22C6FF120226, after Lincoln police stopped it and found crack cocaine in the backseat.

It is inherent in the district court's order that the trial judge found, beyond a reasonable doubt, that Ballard's Mercedes was used or was intended for use to facilitate a violation of chapter 28, article 4, of the Nebraska Revised Statutes, which addresses certain illegal drug activities, and that Ballard had knowledge of such use or intended use prior to the time the police stopped and searched the vehicle.

Ballard appealed the forfeiture to the Nebraska Court of Appeals. The State asked to bypass that court and have this case decided by this court. We granted the State's request.

We affirm the judgment of the district court for Lancaster County.

## ASSIGNMENTS OF ERROR

Summarized and restated, Ballard's assignments of error claim that the district court erred in (1) finding there was sufficient evidence to find beyond a reasonable doubt that the motor vehicle was used or intended for use to facilitate a violation of chapter 28, article 4, and (2) ordering a forfeiture disproportionate to the alleged underlying offense.

## STANDARD OF REVIEW

Appellate review concerning the sufficiency of the evidence to forfeit a motor vehicle to the State under Neb. Rev. Stat. § 28-431 (Reissue 1989) should not be treated differently than review of the sufficiency of the evidence in a criminal case. See, *State v. 1987 Jeep Wagoneer*, 241 Neb. 397, 488 N.W.2d 546

(1992); *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989).

In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993).

On a claim of insufficiency of the evidence, an appellate court will not set aside a finding of guilty in a criminal case where the finding is supported by relevant evidence; only when the evidence lacks sufficient probative force as a matter of law may the appellate court set aside a finding of guilty as unsupported by the evidence beyond a reasonable doubt. See, *Russell, supra*; *State v. Martin*, 242 Neb. 116, 493 N.W.2d 191 (1992).

In the forfeiture case under review here, the evidence is both direct and circumstantial. In a criminal case, when there is both circumstantial and direct evidence, the circumstantial evidence is to be treated the same as direct evidence, and upon review, the State is entitled to have all conflicting evidence, both direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor. *1987 Jeep Wagoneer, supra*; *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992). Cf., *State v. Skalberg, ante* p. 150, 526 N.W.2d 67 (1995); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994) (both cases holding that *when only circumstantial evidence exists* to support a criminal conviction and the evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger, for the purpose of determining whether the State has made a prima facie case, and for that purpose only, the inferences are to be viewed most favorably to the accused).

## FACTS

When the properly admitted relevant evidence is viewed most

favorably to the State, the facts of the case are as follows:

On November 21, 1992, at approximately 3:15 p.m., Jon Sundermeier, a Lincoln Police Department narcotics officer, was notified of a Crimestoppers telephone call advising police that a newer forest-green Mercedes Benz with tinted windows and Nebraska license plate number "2-5152 [sic]" was en route from Lincoln to Omaha. The caller said the vehicle was occupied by a dark-complected male named "Ballard" and a younger, light-complected male named "Chris." The caller further related that the occupants had $2,000 to purchase crack cocaine which they intended to obtain in Omaha and bring back to Lincoln to sell.

Lincoln police officers spotted Ballard's Mercedes shortly after 9 p.m. traveling westbound from Omaha toward Lincoln. The license plate carried number 2-S153, which was virtually the same number supplied by the Crimestoppers caller. The police attempted to stop the vehicle as it was coming into Lincoln on Cornhusker Highway about one-quarter mile east of Highway 77. The driver did not stop the Mercedes immediately. However, he did decrease its speed. Eventually, the driver turned the Mercedes north onto Highway 77 and stopped alongside that highway just north of Cornhusker Highway.

There were three occupants in Ballard's Mercedes when it was stopped. Ballard was sitting in the front passenger seat, Chris Gant was driving, and Ronald Hoskins occupied the backseat. The three men were removed from the vehicle and patted down. A loaded .25-caliber semiautomatic pistol was found in Hoskins' pocket. Sundermeier found a warm crack cocaine pipe on the ground a few feet from where Ballard was standing after he was removed from the Mercedes. There was burnt residue on both ends of the pipe.

Police searched Ballard's vehicle and found an ammunition box containing a few loose rounds of ammunition. The police also found an empty plastic sandwich baggie inside a brown paper sack in the backseat of the Mercedes. A similar baggie was found stuffed between two sections of the backseat where Hoskins had been sitting. This baggie contained a large, single rock of suspected crack cocaine. Later testing disclosed that the rock consisted of 5.67 grams of crack cocaine. A drug detection

search dog "hit" solely on the front seat passenger area of Ballard's car where Ballard had been seated.

During the roadside investigation, police officers intercepted several incoming calls to a cellular telephone seized from the backseat of Ballard's vehicle. Each caller asked to speak to "Ronald." Sundermeier testified that one caller indicated he knew Ronald was coming to Lincoln and would have crack cocaine and that the caller had an individual with him who wanted to buy crack cocaine. The vehicle was taken to a police garage, where it was more thoroughly searched. There, police found rolling papers and trace amounts of marijuana.

Ballard has not questioned the legality of the police's stopping his vehicle or their search of it. However, in the district court, he did contest the forfeiture of his Mercedes to the State, and he did seek to have it returned to him.

On November 23, 1992, Ballard went to the Lincoln police station. In response to a suggestion by police that he had knowledge that crack cocaine was in his vehicle, Ballard said:

> I really, sir[,] maybe I probably, I probably, *I probably figured he* [*Hoskins*] *had some, I didn't know he had that much* but I didn't know what he, I don't, yea *I figured he probably was gonna sell it, but I didn't care about that, that, you know I figured that's his business, I didn't care about, I was gonna drop him off and I was goin*[']*home.*

(Emphasis supplied.) Ballard was not in custody at the time he made the response.

On November 25, 1992, the State, pursuant to § 28-431, filed a petition in the district court for Lancaster County for forfeiture and disposition of Ballard's vehicle. In answer to the State's petition, Ballard claimed he at no time had any knowledge that his vehicle was used or would be used in violation of chapter 28, article 4. On December 8, 1992, Ballard filed his own petition in the district court asking the court to return his Mercedes to him.

The district court held that the Mercedes was used or was intended for use to facilitate a violation of chapter 28, article 4, and ordered the vehicle forfeited to the State. The trial judge ordered that the vehicle be put to official use by the Lincoln Police Department for not more than 1 year. It was then to be

sold and the proceeds disbursed according to law.

## ANALYSIS

Ballard claims that (1) he had no knowledge that his Mercedes was used or intended for use to facilitate a violation of chapter 28, article 4, and (2) the evidence at the forfeiture trial was insufficient for the district court to find that his vehicle was used or intended for use to facilitate a violation of chapter 28, article 4.

Section 28-431 provides in pertinent part:

> (1) The following shall be seized without warrant by an officer of the Division of Drug Control *or by any peace officer and the same shall be subject to forfeiture*: . . . (f) all conveyances including, but not limited to, . . . vehicles . . . which are used, or intended for use, in transporting any controlled substance with intent to . . . *distribute* [or] *deliver* . . . such controlled substance in violation of this article.

(Emphasis supplied.)

When property is seized pursuant to § 28-431, the person seizing it must file a petition for disposition of such property in the district court of the county in which the seizure took place. § 28-431(4). In this case, that was accomplished through a deputy of the Lancaster County Attorney's office.

The Legislature has furnished an owner who claims that he or she was without knowledge of such a use or intended use of his or her vehicle two avenues to avoid forfeiture. Firstly, § 28-431(4) provides that at any time after seizure and prior to court disposition of the property seized, the owner of such property may petition "the district court of the county in which seizure was made to release such property, and the court shall order the release of the property upon a showing by the owner that he or she had no knowledge that such property was being used in violation" of chapter 28, article 4.

Secondly, the statute provides that any person having an interest in the seized property or any person against whom civil or criminal liability would exist if such property is in violation of § 28-431 may appear and file an answer or demurrer to the State's petition within 30 days after the seizure. Section

28-431(4) further provides:

> If the claimant proves by a preponderance of the evidence that he or she (a) *has not used or intended to use the property to facilitate an offense in violation of this article,* (b) *has an interest in such property as owner or lienor or otherwise, acquired by him or her in good faith, and* (c) *at no time had any knowledge that such property was being or would be used in, or to facilitate, the violation of this article, the court shall order that such property or the value of the claimant's interest in such property be returned to the claimant.* If there are no claims, *if all claims are denied,* or if the value of the property exceeds all claims granted and *it is shown beyond a reasonable doubt* that such property was used in violation of this article, *the court shall order disposition of such property at such time as the property is no longer required as evidence in any criminal proceeding.*

(Emphasis supplied.)

To have his Mercedes returned to him by the district court, Ballard was required to prove by a preponderance of the evidence that (1) his vehicle was not used or intended to be used to transport crack cocaine from Omaha to Lincoln for delivery in violation of chapter 28, article 4, or (2) if his vehicle was used or intended to be used for that purpose, prior to the time his vehicle was stopped by police he had no knowledge that his Mercedes was being used or was intended to be used to facilitate a violation of chapter 28, article 4.

As set forth in his petition for return of seized property and in his answer to the State's forfeiture petition, the cornerstone of Ballard's claim for return to him of his Mercedes is his alleged lack of knowledge that his vehicle was being used or was intended to be used to facilitate a violation of chapter 28, article 4.

Although the trial judge made no specific finding, it is inherent in the trial court's order that as a fact finder, the trial court did not believe Ballard's testimony that he had no knowledge before his Mercedes was stopped by the Lincoln police that his vehicle was used or intended to be used to facilitate a violation of chapter 28, article 4. In his statement to

the police, Ballard said he "figured" Hoskins possessed some crack cocaine and "figured" Hoskins was "gonna sell it, but I didn't care about that . . . you know I figured that's his business . . . ."

Because Ballard's testimony was the only evidence of his "no knowledge" claim, and because the trial court obviously did not believe Ballard's protestations that he had no knowledge that his vehicle was being used or was intended to be used to transport an illegal drug which was to be delivered and sold, Ballard failed to prove by a preponderance of the evidence that he was entitled to have his Mercedes returned to him.

The next step in the appellate review of this case is to determine whether there was sufficient evidence from which the trial court, as the finder of fact, could conclude that the State proved beyond a reasonable doubt that Ballard's Mercedes was used or intended for use in transporting a controlled substance, in this instance crack cocaine, with intent to deliver in violation of chapter 28, article 4, and that Ballard had knowledge of such illegal use and intent before the Lincoln police stopped his Mercedes as it approached Lincoln.

In *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991), this court held that in rem actions for forfeiture of property to the State are generally considered to sound in equity. As such, they are civil actions, and the required burden of proof on the State is less than the State's "beyond a reasonable doubt" burden of proof in a criminal trial. The *Two IGT Video Poker Games* action was brought under Neb. Rev. Stat. § 28-1111 (Reissue 1989). For forfeiture under § 28-1111, Nebraska's statutes do not require that the State prove beyond a reasonable doubt that it is entitled to the forfeiture of gambling devices which are possessed in violation of chapter 28, article 11.

In *State v. 1987 Jeep Wagoneer*, 241 Neb. 397, 488 N.W.2d 546 (1992), this court noted that § 28-431 provides that to support a forfeiture of a vehicle used to convey illegal drugs for delivery, the State is required to prove beyond a reasonable doubt that the vehicle was used or was intended for use in violation of chapter 28, article 4, of Nebraska's statutes and that the owner had knowledge of such use.

"The intent involved in an actor's conduct is a mental process and may be inferred from the conduct itself; the actor's language, if any, in reference to the conduct; and the circumstances surrounding an incident." 241 Neb. at 400, 488 N.W.2d at 548.

Lincoln police found 5.67 grams of crack cocaine in Ballard's vehicle. This was direct evidence. Sundermeier, who has been involved in several hundred drug investigations, gave expert testimony that such an amount of crack cocaine is consistent with possessing crack cocaine with intent to deliver. He further testified that generally, in Lincoln, crack cocaine is sold for individual use in small rocks of .1 to .3 gram.

Sundermeier said an "eightball," the street term for one-eighth of an ounce of crack cocaine, would be the amount a person who intended to sell cocaine at retail would possess. An eightball is the equivalent of 3.25 grams. In Lincoln, the retail price of an eightball that is broken and sold in individual rocks is about $750, according to Sundermeier. Sundermeier also testified that dealers usually use electronic communications and frequently have weapons and items to smoke and package cocaine. In this case, the police found in the backseat of Ballard's vehicle a cellular phone, a semiautomatic gun, ammunition, rolling papers, and sandwich baggies, one of which contained the crack cocaine found in Ballard's vehicle. As earlier stated, a warm crack pipe was found near Ballard after he was removed from his vehicle. Sundermeier also testified that it has been his experience that there is drug trafficking activity between Lincoln and Omaha and that Interstate 80 is used as an avenue to drive to Omaha to purchase crack cocaine. Ballard's vehicle was spotted by the police traveling west toward Lincoln on Interstate 80.

From all the properly admitted relevant direct and circumstantial evidence in this case and the inferences to be drawn therefrom, including but not limited to Ballard's statement to the police and the evidence that crack cocaine was found in the backseat of Ballard's car and could be sold and delivered to individuals in smaller pieces, that a drug detection dog "hit" upon an area where Ballard had been seated, and that in 20-degree weather a warm crack cocaine pipe was found near

Ballard after he was removed from his vehicle, a fact finder could find, beyond a reasonable doubt, that Ballard's Mercedes was being used or was intended to be used to transport crack cocaine from Omaha to Lincoln with the intent of selling it and that Ballard had knowledge that his Mercedes was being used as a conveyance to transport and facilitate the sale and delivery of crack cocaine, a controlled substance.

We recognize that when the police stopped Ballard's car, they did not find the $2,000 the police informant told them the occupants took with them to Omaha to purchase drugs and that the rock cocaine found in Ballard's car had a value of less than $2,000. However, Sundermeier testified that the term "fronting" refers to the common practice of drug dealers in giving drugs to another individual without charge at the time, the supplier expecting payment at a later date. According to Sundermeier, individuals who are drug dealers occasionally take money and pay for the drugs they have previously purchased at the same time they pick up a new supply, which is again fronted. The wholesale value of the crack cocaine found in Ballard's vehicle was far less than $2,000, but based on Sundermeier's testimony, it was reasonable for a fact finder to conclude that the $2,000 was used to pay for a previous purchase of drugs.

We need not address Ballard's second assignment of error because it was not properly raised in the trial court. In his second assignment of error, Ballard contends that the forfeiture in this case is disproportionate to the alleged underlying offense and runs afoul of the Eighth Amendment's Excessive Fines Clause. Ballard admits in his brief that this issue was not raised in the district court, but he asks this court to apply its plain error rule to reach the merits.

> It is well settled that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion before a tribunal having jurisdiction to determine it. [Citation omitted.] A constitutional question should be raised at the earliest opportunity. [Citation omitted.] Generally, a constitutional question not properly raised in the trial court will not be considered on appeal. [Citations omitted.] 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. 1987 Jeep Wagoneer*, 241 Neb. 397, 401, 488 N.W.2d 546, 549 (1992). Ballard's request that this court note plain error is rejected.

## CONCLUSION

In this case, there exists sufficient evidence for a fact finder to conclude beyond a reasonable doubt that Ballard's Mercedes, with Ballard's knowledge, was used or was intended to be used to facilitate a violation of chapter 28, article 4. The forfeiture of Ballard's Mercedes to the State was proper in all respects.

The judgment of the trial court is affirmed.

AFFIRMED.

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GAYLORD DUFF, APPELLANT, V. HAROLD CLARKE, DIRECTOR OF DEPARTMENT OF CORRECTIONAL SERVICES, AND DEPARTMENT OF CORRECTIONAL SERVICES, AN AGENCY OF THE STATE OF NEBRASKA, APPELLEES.

526 N.W.2d 664

Filed February 3, 1995. No. S-93-617.

1. **Sentences.** For purposes of good time computations, an offender's sentence is the sum of all sentences he receives, regardless of whether additional sentences are imposed after the effective date of the new good time law.
2. **Convicted Sex Offender: Sentences.** The good time law applicable at the time the offender starts serving his sentence controls good time computation, regardless of whether the offender incurs an additional sentence or whether the offender is resentenced pursuant to the Convicted Sex Offender Act.
3. ____: ____. The new good time law embodied in Neb. Rev. Stat. § 83-1,107 (Reissue 1994) is inapplicable to those offenders who start serving their sentences before the effective date of the statute, absent approval of the Board of Pardons, even if the offenders are resentenced pursuant to the Convicted Sex Offender Act.

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

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellant.

Don Stenberg, Attorney General, and Laurie Smith Camp for appellees.

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

WHITE, J.

Gaylord Duff pled guilty in September 1988 to first degree sexual assault on a child. Duff was sentenced to 12 to 20 years' incarceration, and upon being found to be a treatable mentally disordered sex offender, Duff was committed to the Lincoln Regional Center for treatment. Duff was ordered to finish the remainder of his sentence at the Department of Correctional Services if he was later found to be no longer mentally disordered, or if he had received the maximum benefit of treatment available at the regional center.

While Duff was committed to the regional center, two laws were enacted which have relevance to this case. L.B. 523, codified as Neb. Rev. Stat. §§ 29-2922 to 29-2936 (Cum. Supp. 1994), and known as the Convicted Sex Offender Act, became effective July 15, 1992. L.B. 816, the relevant part of which is codified as Neb. Rev. Stat. § 83-1,107 (Reissue 1994), and commonly referred to as the new good time law, also became effective July 15, 1992.

In August 1992, Duff elected to be resentenced pursuant to § 29-2934(4) of the Convicted Sex Offender Act. The district court reviewed Duff's sentence and, upon finding that he had reached the maximum benefit of treatment in an inpatient treatment program and that he could not be placed in an aftercare treatment program under conditions consistent with public safety, ordered Duff to serve the remainder of his sentence at the Department of Correctional Services. Duff appealed that judgment to the Nebraska Court of Appeals, which affirmed the district court's order. See *State v. Duff*, 4 NCA 341 (1993) (not approved for permanent publication). Duff then filed a declaratory judgment action in the district court asking the court to determine whether he was entitled to the

new, more lenient good time law set forth in § 83-1,107, since he was resentenced pursuant to the Convicted Sex Offender Act. The district court found that the new good time provisions set forth in § 83-1,107 do not apply to Duff and that the good time law in effect at the time Duff started his sentence controlled his good time computation. Duff appealed the district court's determination to the Court of Appeals, and pursuant to our authority to regulate the caseloads of the appellate courts, we removed this case from the Court of Appeals docket to the Supreme Court docket.

In his first assignment of error, Duff claims that the district court improperly denied him the benefits of § 83-1,107, hereafter known as the new good time law. Duff contends that since he was resentenced, he ought to be given the benefit of the law in effect at the time of his resentencing, which was the new, more lenient good time law.

In *Boston v. Black*, 215 Neb. 701, 340 N.W.2d 401 (1983), we held that the new good time law then in effect was inapplicable to offenders who started their sentences *before* the effective date of the new law, absent the Board of Pardons' approval, even if the offenders had or had not incurred additional sentences *after* the effective date. *Boston* concerned which law applied when an offender began serving his sentence before the good time law changed and incurred additional sentences after the law changed. We said that "[s]ection 83-1,110 (Cum. Supp. 1974 and Reissue 1981) defines an offender's sentence, for the purpose of good time computations, to be the sum of all sentences he receives, regardless of when incurred." *Boston*, 215 Neb. at 709-10, 340 N.W.2d at 407. Neb. Rev. Stat. § 83-1,110 (Reissue 1994) has not changed in substance since *Boston*. Thus, the law still remains that, for purposes of good time computations, an offender's sentence is the sum of all sentences he receives, regardless of whether additional sentences are imposed after the effective date of the new good time law.

The appellant in *SapaNajin v. Johnson*, 219 Neb. 40, 360 N.W.2d 500 (1985), was sentenced and incarcerated prior to the effective date of the new good time law. He was paroled after the effective date and subsequently broke parole, for which he

was reincarcerated. SapaNajin wanted the benefit of the new good time law which was passed after he was sentenced, but before he was reincarcerated. Relying on *Boston*, we again held that the new good time law was inapplicable to a parolee who started his sentence prior to the effective date of the statute, absent approval of the Board of Pardons. See, also, *Johnson v. Bartee*, 228 Neb. 111, 421 N.W.2d 439 (1988).

We find the rules set forth in *Boston* and *SapaNajin* applicable in Duff's case. Duff's resentencing under the Convicted Sex Offender Act is comparable in effect, for good time computation purposes, to receiving an additional sentence after the effective date of the new law as in *Boston*. The good time law applicable at the time the offender starts serving his sentence controls good time computation, regardless of whether the offender incurs an additional sentence or whether the offender is resentenced pursuant to the Convicted Sex Offender Act. Duff started serving his sentence in 1988. The new good time law became effective in July 1992. In August 1992, Duff asked the district court to resentence him pursuant to the new Convicted Sex Offender Act. The district court accordingly resentenced Duff pursuant to § 29-2934(7). For good time computation purposes, Duff's resentencing after the effective date of the new good time law has the same effect of receiving an additional sentence after the effective date. Thus, in accordance with what we have previously held in *Boston* and *SapaNajin*, we find the new good time law embodied in § 83-1,107 inapplicable to those offenders who start serving their sentences before the effective date of the statute, absent approval of the Board of Pardons, even if the offenders are resentenced pursuant to the Convicted Sex Offender Act.

In *State v. Schrein, ante* p. 256, 526 N.W.2d 420 (1995), we found the new good time provisions set forth in § 83-1,107 applicable to an offender who was convicted and sentenced before the effective date of the statute, but whose conviction and sentence were not *final* until after the effective date of the statute. Schrein thus received the benefit of the new good time law. Schrein's case differs from the case now before us. Schrein's conviction was not considered to be a final judgment until *after* his appeal was final, and thus after the effective date

of the new good time law. Duff's conviction was considered to be a final judgment in 1988, 4 years before the effective date of the new good time law. We found *Boston*, *SapaNajin*, and *Johnson* inapplicable in *Schrein*, but find those cases applicable to Duff's case. We refuse to extend our holding in *Schrein* to encompass proceedings subsequent to a final judgment.

Duff claims in his second assignment of error that since the repealed good time law was used to compute Duff's good time, he was denied his rights under the Equal Protection and Due Process Clauses of the Nebraska and U.S. Constitutions. We addressed this same issue in *Boston, supra*. In *Boston*, we found that the *application* of the good time law to compute the offenders' good time benefits occurred when the offenders started serving the initial sentences, not when the offenders were convicted of subsequent offenses necessitating additional sentences. Thus, the court did not apply a repealed good time law when it computed good time, and the due process claims of the offenders in *Boston* did not have merit. We find the same to be true in Duff's case. The application of the good time law in Duff's case occurred when Duff began serving his sentence, not when he was resentenced pursuant to the Convicted Sex Offender Act, and thus the district court did not apply a repealed law to determine Duff's good time benefits.

Duff also claims that the district court unreasonably and arbitrarily classified Duff differently than all other criminals sentenced after the effective date of the new good time law so that he was thus denied the equal protection of the laws. As we stated in *Boston*, 215 Neb. at 711, 340 N.W.2d at 408, "[T]he standard of review in equal protection cases involving denial of good time is not that of strict scrutiny . . . ." We held that an application of the new good time law to offenders who were sentenced prior to the effective date of the new law without the Board of Pardons' approval was impermissible under Nebraska's Constitution because it amounted to a commutation of a sentence by legislative action in violation of the separation of powers clause.

"Preservation of our government's constitutional separation [of powers] is a rational, if not compelling, reason for the different treatment accorded those first sentenced prior to and

those first sentenced subsequent to the effective date of [the new good time law]." *Boston*, 215 Neb. at 712, 340 N.W.2d at 408. We find that the same is true in Duff's case. Duff was not denied the equal protection of the law, since the preservation of Nebraska's separation of powers is a rational reason for classifying Duff differently than the other criminals sentenced after the effective date of the new good time law. Duff's second assignment of error is meritless for these reasons.

Having found that neither of Duff's two assigned errors has merit, we affirm the district court.

AFFIRMED.

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TRI-COUNTY LANDFILL, INC., APPELLANT, V. BOARD OF COUNTY COMMISSIONERS OF SIOUX COUNTY, NEBRASKA, APPELLEE.

526 N.W.2d 668

Filed February 3, 1995. No. S-93-1010.

1. **Administrative Law: Appeal and Error.** When the Administrative Procedure Act is inapplicable because another method of appeal has been prescribed and the standard of review has not otherwise been specified, the standard of review will be to search only for errors appearing in the record; i.e., whether the decision conforms to law, is supported by competent and relevant evidence, and was not arbitrary, capricious, or unreasonable.
2. **Judgments: Final Orders: Appeal and Error.** A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.
3. **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 Sioux County: PAUL D. EMPSON, Judge. Affirmed.

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

John H. Skavdahl, Sioux County Attorney, for appellee.

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

WRIGHT, J.

In accordance with Neb. Rev. Stat. § 13-1702 (Reissue 1991), Tri-County Landfill, Inc. (Tri-County), filed an application with the Board of County Commissioners of Sioux County, Nebraska (Board), requesting siting approval for a solid waste landfill site. The Board denied the request, and Tri-County filed a petition for hearing with the district court for Sioux County. The district court rendered a decision in favor of the Board, and Tri-County appeals. We granted Tri-County's petition to bypass the Nebraska Court of Appeals.

## SCOPE OF REVIEW

When the Administrative Procedure Act is inapplicable because another method of appeal has been prescribed and the standard of review has not otherwise been specified, the standard of review will be to search only for errors appearing in the record; i.e., whether the decision conforms to law, is supported by competent and relevant evidence, and was not arbitrary, capricious, or unreasonable. See, *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), *overruled on other grounds*, *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991), *cert. denied* ____ U.S. ____, 113 S. Ct. 2930, 124 L. Ed. 2d 681 (1993); *In re Application A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987).

The siting approval procedures, criteria, and appeal procedures provided for in Neb. Rev. Stat. §§ 13-1701 to 13-1714 (Reissue 1991 & Cum. Supp. 1994) shall be the exclusive siting procedures and appeal procedures. Local zoning ordinances, other local land-use requirements, and other ordinances or resolutions shall be considered in such siting decisions. § 13-1709.

A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on

the record. Neb. Rev. Stat. § 25-1911 (Cum. Supp. 1994).

An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction. *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994). 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. *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994).

## FACTS

Tri-County sought approval for a solid waste landfill site in the west half of Section 32, Township 24 North, Range 55 West of the 6th P.M., in Sioux County, Nebraska. This site is one-half mile north of the Scotts Bluff County-Sioux County line and is approximately 8 1/2 miles north and 3 miles west of the city of Scottsbluff. At a hearing held on December 8, 1992, the Board received evidence presented by Tri-County and heard testimony from opponents to the site. Additional evidence was accepted by the Board in the 30-day period following the hearing. On February 12, 1993, the Board voted unanimously to deny the application, for failure to meet all the criteria set forth in § 13-1703.

Thereafter, Tri-County filed a petition in the district court, asserting that the Board's denial of the application was not based on the law or the evidence presented and that the Board did not have the authority to deny the application. After a hearing, the court wrote to counsel for both parties on September 22, 1993, setting forth its findings. At the court's request, counsel for the Board prepared a document entitled "Findings, Conclusions and Final Order," which was filed with the court on October 5. The court found that the Board's decision that Tri-County had failed to submit information demonstrating compliance with § 13-1703(1) was not arbitrary, capricious, or unreasonable and that the denial of the application by the Board should be affirmed.

## ASSIGNMENTS OF ERROR

Tri-County assigns as error that the district court erred in (1) using a scope of review which applies to administrative agencies, rather than conducting a de novo review; (2) failing to

make its own determination as to whether the statutory criteria were proven; (3) finding that Tri-County failed to submit information to demonstrate compliance with the criteria stated in § 13-1703(1), (3), and (4); and (4) applying criteria that were not specified in § 13-1703.

## ANALYSIS

We first address a jurisdictional question raised by the Board in its appellate brief. The Board asserts that this court does not have jurisdiction because the notice of appeal filed on November 2, 1993, was not timely. An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction. *Manske v. Manske, 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 motion for new trial. *Mason v. Cannon, supra*.

Following a July 21, 1993, hearing, the matter was taken under advisement. On September 22, the court made a docket entry which stated: "Decision made. Co. board affirmed & fee of Snyder approved." On the same day, the court wrote a letter to counsel for both parties informing them of the court's findings and directing the Board's attorney to prepare the journal and order. The record does not show that an oral pronouncement of the judgment was made in open court. A docket entry dated October 5 reads: "Findings, Conclusions and Final Order." A document entitled "Findings, Conclusions, and Final Order," which contains the court's judgment, was filed with the clerk of the district court on October 5.

A notice of appeal must be filed "within thirty days after the rendition of such judgment or decree or the making of such final order." Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1994). To answer the question regarding jurisdiction, we must determine the starting point for that 30-day period. In *In re Interest of J.A.*, 244 Neb. 919, 921-22, 510 N.W.2d 68, 71 (1994), we held:

> With respect to final orders, this court has never explicitly stated when the time for filing an appeal begins to run. Nevertheless, we believe that the answer is implicit

within our statutes and case law: When an appeal is taken from a final order, the time for appeal begins to run when the order is entered on the journal of the court.

"All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action." Neb. Rev. Stat. § 25-1318 (Reissue 1989). Orders which are not announced in open court are not formalized until they have been entered on the journal. Cf. *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992). The journal of the trial court is the official record of the judgments and orders of that court. Accord *Midwest Laundry Equipment Corp. v. Berg*, 174 Neb. 747, 119 N.W.2d 509 (1963). A notice of appeal, therefore, must be filed within 30 days of the date the order was entered on the journal of the trial court.

We note that this rule is in harmony with the rules concerning rendition of judgment. Rendition of judgment occurs when the court makes an oral pronouncement and accompanies that pronouncement with a notation on the trial docket. Neb. Rev. Stat. § 25-1301 (Reissue 1989). Failing a notation on the trial docket, a judgment is rendered when some written notation of the judgment is filed in the records of the court. *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986); *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984).

Thus, there are two occurrences which may begin the 30-day period in which a notice of appeal must be filed: (1) the rendition of the judgment, which occurs when an oral pronouncement of the judgment is made in open court and a notation of the judgment is made on the trial docket, or (2) the entry of a judgment, which is the act of the clerk of the court in spreading on the court's journal both the proceedings had and the relief granted or denied.

The Board argues that the district court's letter to counsel qualifies as a rendition of judgment under Neb. Rev. Stat. § 25-1301 (Reissue 1989). We disagree. The letter of September 22, 1993, was not the equivalent of an oral pronouncement of the judgment in open court, and the record does not establish

that the court orally pronounced the judgment in open court. See *In re Interest of J.A., supra*. The final order was not entered until October 5, when the written notation was entered on the docket of the trial court. Since the notice of appeal was filed November 2, we find that the appeal was timely filed. Therefore, this court has jurisdiction to consider the merits of the action.

We next consider the assignments of error raised by Tri-County. Tri-County argues that the district court erred in using a scope of review which applies to administrative agencies and in failing to consider the matter de novo on the record before the Board. We disagree. We have held that when the Administrative Procedure Act is inapplicable because another method of appeal has been prescribed and the standard of review has not otherwise been specified, the standard of review will be to search only for errors appearing in the record. See, *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), *overruled on other grounds, MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991), *cert. denied* ____ U.S. ____, 113 S. Ct. 2930, 124 L. Ed. 2d 681 (1993); *In re Application A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987).

The Legislature has provided a method of appeal other than the Administrative Procedure Act in cases related to solid waste disposal. Section 13-1709 provides that the siting approval procedures, criteria, and appeal procedures provided for in §§ 13-1701 to 13-1714 shall be the exclusive siting procedures and appeal procedures. Section 13-1712 provides:

> If the . . . county board of commissioners . . . does not approve a request for siting approval pursuant to sections 13-1701 to 13-1714 and 76-2,119, the applicant . . . may petition for a hearing before the district court of the county . . . to contest the decision. . . . At the hearing, the burden of proof shall be on the petitioner. In making its orders and determinations under this section, the district court shall consider the written decision and reasons for the decision of the . . . county board and the transcribed record of the hearing held pursuant to section 13-1706.

Since another method of appeal is prescribed, the district court was required to search only for errors appearing in the record and to determine whether the decision conforms to law, is supported by competent and relevant evidence, and was not arbitrary, capricious, or unreasonable.

The district court stated that it examined the written decision of the Board, the reasons for that decision, and the applicable statutory law. The court also considered the evidence before the Board, including the exhibits submitted at the hearing and the written comments filed with the Board. The district court applied the correct standard of review in this case. This assignment of error has no merit.

Tri-County also argues that the district court erred in finding that Tri-County failed to submit information to demonstrate compliance with the criteria set forth in § 13-1703(1), (3), and (4). Section 13-1703 states that siting approval shall be granted only if the proposed area meets all of the criteria set forth therein. The criteria at issue in this case are as follows:

> (1) The solid waste disposal area . . . is necessary to accommodate the solid waste management needs of the area which the solid waste disposal area . . . is intended to serve;
>
> . . . .
>
> (3) The solid waste disposal area . . . is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property. The . . . county board shall consider the advice of the appropriate planning commission regarding the application;
>
> (4) The plan of operations for the solid waste disposal area . . . is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents.

§ 13-1703.

Tri-County's application stated that the city of Scottsbluff's landfill, which served all of Scotts Bluff County and portions of surrounding counties except the city of Gering and the village of Morrill, planned to cease operations in October 1993 and that no alternative disposal site had been approved or was likely

to be built to serve residents of southern Sioux County, Scotts Bluff County, and the surrounding counties. Tri-County claimed that a proposed Scotts Bluff County landfill might not allow disposal of waste from outside the county.

At the public hearing before the Board on December 8, 1992, Tri-County offered testimony from the owner of a sanitation service which serviced the rural parts of Scottsbluff, the southern part of Sioux County, and the village of Henry. The owner testified that waste collected by his service was taken to the Scottsbluff landfill, but would have to be taken to another site in the future because the Scottsbluff site would be closed in 1993. Another witness, who services the communities of Broadwater, Bridgeport, Bayard, Minatare, Melbeta, and McGrew, stated that the waste from Minatare, Melbeta, and McGrew had been taken to the Scottsbluff landfill and that no site for the southern Panhandle had been proposed.

Tri-County's president stated that he intended to provide service in southern Sioux County, Scotts Bluff County, western Morrill County, and Banner County and that it was not feasible for the Scottsbluff landfill to remain open beyond October 1993 because of new regulations. He did not indicate the amount of solid waste that would be generated on a daily basis in the proposed service area. An engineer who had studied solid waste management issues testified that the proposed site would probably accommodate a population of 30,000 over a 20- to 30-year period. Other testimony established that about 7,000 tons of waste would be deposited at the proposed site per year.

At a special meeting held on February 12, 1993, for the purpose of voting on the site application, the Board concluded that the evidence presented by Tri-County and by others on its behalf did not demonstrate compliance with the requirements set forth in § 13-1703. The Board noted that Sioux County had "entered into an agreement with other counties to accommodate solid wastes from all of Sioux County with other counties."

Section 13-1703 provides that siting approval shall be granted only if the proposed area meets all of the criteria set forth therein. Upon our review of the record for error, we find that there was sufficient competent evidence to support the district court's determination that Tri-County failed to establish that the

solid waste landfill site was necessary to accommodate the solid waste management needs of the area. The fact that the Board had entered into an agreement with other counties to accommodate solid waste from all of Sioux County is sufficient evidence to support the district court's determination. Since the first criterion of § 13-1703 has not been met, we need not consider whether the remaining criteria were satisfied, and we need not consider Tri-County's other assignments of error.

## CONCLUSION

The district court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. The judgment of the district court affirming the determination of the Board is affirmed.

AFFIRMED.

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## STATE OF NEBRASKA EX REL. DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. JOHN P. MURPHY, RESPONDENT.

527 N.W.2d 185

Filed February 3, 1995. No. S-94-382.

1. **Quo Warranto.** Quo warranto will not lie where there is another adequate remedy at law or equity.
2. **Judgments.** The language of a judicial opinion must be read in the context of facts under consideration and its meaning limited by those facts.
3. **Collateral Attack.** The proper method of questioning the validity of legislative action is by collateral attack, that is, by injunction, quo warranto, or other suitable equitable action.
4. **Quo Warranto.** Quo warranto is intended to prevent the exercise of powers that are not conferred by law.
5. ____. Quo warranto lies to challenge the legal existence of a statutory position created by legislation, the constitutionality of which has been questioned, and to oust the incumbent of an unconstitutional office.
6. **Parties: Pleadings: Words and Phrases.** A necessary party is one who may be compelled to respond to the prayer of the plaintiff's petition, and where there is

nothing such a one is called upon to do, or can be compelled to do as a duty, one is not a necessary party.

7. **Constitutional Law.** The purpose of the distribution of powers clause found in Neb. Const. art. II, § 1, is to establish the permanent framework of our system of government, to assign to the three departments their respective powers and duties, and to establish certain fixed principles upon which our government is to be conducted.
8. ____. The distribution of powers clause found in Neb. Const. art. II, § 1, prohibits one department of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives.
9. ____. The distribution of powers clause found in Neb. Const. art. II, § 1, prohibits one who exercises the powers of one department of government from being a member of the other departments.
10. **Constitutional Law: Statutes.** An unconstitutional statute is a nullity, void from its enactment, and is incapable of creating any rights or obligations.
11. ____: ____. Constitutionally invalid legislation confers no rights; imposes no duties or obligations; and is, in legal contemplation, as inoperative as though it had never been composed or enacted.
12. **Public Officers and Employees: Judges.** A district court judge is a state officer who exercises the power of the judicial department of government.
13. **Quo Warranto: Public Officers and Employees.** For the purposes of quo warranto, a public office is a governmental position, the duties of which invest the incumbent with some aspect of the sovereign power.
14. **Administrative Law.** By empowering members of the Nebraska Commission on Law Enforcement and Criminal Justice to accept and administer funds and decide matters relating to the administration of criminal justice, Neb. Rev. Stat. § 81-1423 (Reissue 1987) invests members of the commission with aspects of the State's sovereign powers.
15. ____. Administrative agencies are not courts, even though they may be called such.
16. ____. As a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties.
17. **Constitutional Law: Administrative Law: Legislature: Courts.** Unless permitted by the Constitution, the Legislature may not authorize administrative officers or bodies to exercise powers which are essentially judicial in nature or to interfere with the exercise of such powers by the court.
18. **Administrative Law.** An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.
19. ____. State agencies may perform functions of a judicial, quasi-judicial, or factfinding character; however, such agencies are extrajudicial bodies, not courts, judges, judicial bodies, or officers.
20. ____. The Nebraska Commission on Law Enforcement and Criminal Justice is an executive agency, and a member thereof is a member of the executive department of government.

21. **Constitutional Law: Administrative Law: Judges.** The provision of Neb. Rev. Stat. § 81-1417 (Reissue 1987) which requires that the membership of the Nebraska Commission on Law Enforcement and Criminal Justice include a district court judge violates the distribution of powers clause found in Neb. Const. art. II, § 1, and is thus void and unenforceable.
22. ____: ____: ____. A district court judge who serves as a member of the Nebraska Commission on Law Enforcement and Criminal Justice occupies an unconstitutional and thus a nonexisting commission office.
23. ____: ____: ____. The provision of Neb. Rev. Stat. § 81-1417 (Reissue 1987) which mandates that the Governor appoint a district court judge as a member of the Nebraska Commission on Law Enforcement and Criminal Justice violates the distribution of powers clause found in Neb. Const. art. II, § 1, and is thus void and unenforceable.
24. **Constitutional Law: Statutes.** Constitutional language controls legislative language.
25. **Constitutional Law: Statutes: Legislature: Intent.** An unconstitutional portion of a statute may be severed if (1) absent the unconstitutional portion, a workable statutory scheme remains; (2) the valid portions of the statute can be enforced independently; (3) the invalid portion was not an inducement to the passage of the statute; and (4) severing the invalid portion will not do violence to the intent of the Legislature.
26. **Constitutional Law: Statutes.** A severability clause, while indicating that the Legislature contemplated the possible judicial partitioning of the statute and passed it anyway, is not necessary for severability.
27. **Statutes.** To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.

Original action. Judgment of ouster.

Don Stenberg, Attorney General, L. Steven Grasz, and Dale A. Comer for relator.

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

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

PER CURIAM.

The State, through its Attorney General, relator Don Stenberg, brought this original action in quo warranto to oust respondent, John P. Murphy, a duly qualified and acting judge of the district court, from membership on the Nebraska Commission on Law Enforcement and Criminal Justice. The State alleges that respondent's dual service as a judge and member of the commission violates the distribution of powers

clause found in Neb. Const. art. II, § 1. Respondent has counterclaimed for an attorney fee and costs. For the reasons detailed hereinafter, we rule for the State on relator's pleading and for respondent on his counterclaim.

## BACKGROUND

The statutes governing the commission are found at Neb. Rev. Stat. §§ 81-1415 through 81-1429 (Reissue 1987 & Cum. Supp. 1992). Section 81-1416 makes the commission "an agency of the state" and provides that "the exercise by the commission of the powers conferred by the provisions of sections 81-1415 to 81-1426 shall be deemed to be an essential governmental function of the state." Section 81-1417 requires that the commission consist of at least 17 members, composed in part of specified officials and in part of designated categories of persons, including "a district court judge," and members of the public at large, to be appointed by the Governor.

Respondent, who became a district court judge in 1983, was first appointed to the commission in 1991 and was reappointed for a 6-year term beginning in January 1994.

## APPROPRIATENESS OF REMEDY

Neb. Rev. Stat. § 25-21,121 (Reissue 1989) permits the filing of an action in quo warranto against, among others, "any person unlawfully holding or exercising any public office . . . within this state . . . ."

Nonetheless, observing that his membership on the commission is mandated by statute, respondent urges that quo warranto does not lie, as relator has an adequate remedy at law, namely, an action seeking to declare unconstitutional that portion of § 81-1417 which requires the membership of a district court judge on the commission.

It is true we have held that quo warranto will not lie where there is another adequate remedy at law or equity. *State, ex rel. Johnson, v. Consumers Public Power District*, 143 Neb. 753, 10 N.W.2d 784 (1943). But if the legislative requirement that a district court judge be a member of the commission contravenes the Constitution, an action resulting in such a declaration alone would not provide a remedy for ousting one holding the position and exercising its powers. In contrast, a quo warranto action

which contemplates the constitutional validity of the position and the ouster of one unconstitutionally holding the position and exercising the powers and duties thereof provides a complete remedy.

In that regard, respondent calls our attention to the language in *Stasch v. Weber*, 188 Neb. 710, 715-16, 199 N.W.2d 391, 395 (1972), reading that the "legality of the official action or the constitutionality of the statutes under which the officer purports to act may not be litigated in a quo warranto action" and declaring that the only issue which may be litigated in a quo warranto action is the right to hold public office and that the action must be strictly confined to that issue. It is important to understand, however, that *Stasch* was resolved on the basis that the claimants failed to show they were properly elected to the offices they sought to occupy. It is axiomatic that the language of a judicial opinion must be read in the context of the facts under consideration and its meaning limited by those facts. *Bradley v. Hopkins*, 246 Neb. 646, 522 N.W.2d 394 (1994). Thus, the language on which respondent relies is mere obiter dictum.

In developing the law in this area, we have held that quo warranto is the exclusive means of challenging the legal existence of a public entity. *Chimney Rock Irr. Dist. v. Fawcus Springs Irr. Dist.*, 218 Neb. 777, 359 N.W.2d 100 (1984). Moreover, the proper method of questioning the validity of legislative action is by collateral attack, that is, by injunction, quo warranto, or other suitable equitable action. *K N Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 447 N.W.2d 227 (1989). We have also held that under our quo warranto statute, the action is intended to prevent the exercise of powers that are not conferred by law. *State, ex rel. Wright, v. Lancaster County Rural Public Power Dist.*, 130 Neb. 677, 266 N.W. 591 (1936); *State, ex rel. Gantz, v. Drainage District*, 100 Neb. 625, 160 N.W. 997 (1916).

We have further held that quo warranto is the proper means by which to inquire whether a municipal corporation was legally created and to oust one exercising the privileges and powers of a corporate office which has no legal existence. *Osborn v. Village of Oakland*, 49 Neb. 340, 68 N.W. 506 (1896). Because

the right to occupy and exercise the duties and powers of a constitutionally suspect position cannot be decided in the absence of determining the validity of the position, it logically follows that quo warranto lies to challenge the legal existence of a statutory position created by legislation, the constitutionality of which has been questioned, and to oust the incumbent of an unconstitutional office.

For example, the Supreme Court of Alabama has held that statutory quo warranto is the appropriate remedy to test the existence of a de jure office, the same as to oust a usurper intruding into an office; in adjudicating the existence of such office vel non, the court may determine the constitutionality of the act purporting to create the same. *Corprew v. Tallapoosa County*, 241 Ala. 492, 3 So. 2d 53 (1941). Similarly, the Supreme Court of Illinois has held that a quo warranto action was the proper proceeding to question the right of individuals to serve as commissioners of a hospital authority established pursuant to a state statute and to effect the ouster of such individuals on the ground that the enabling legislation was unconstitutional. *The People v. Spaid*, 401 Ill. 534, 82 N.E.2d 435 (1948). The Supreme Court of South Dakota has also held that quo warranto was an appropriate action to challenge the legal existence of an office. *Hurley v. Coursey*, 64 S.D. 131, 265 N.W. 4 (1936).

Consequently, under the circumstances presented, there is no other adequate remedy at law or equity, and quo warranto is the proper means of testing whether respondent's membership on the commission is constitutionally proper.

## NECESSARY PARTIES

Respondent next argues that having enacted the statute in question, the Legislature is a necessary party to this action. There is no merit in that contention. A necessary party is one who may be compelled to respond to the prayer of the plaintiff's petition, and where there is nothing such a one is called upon to do, or can be compelled to do as a duty, one is not a necessary party. See *Wats Mktg. of America v. Boehm*, 242 Neb. 252, 494 N.W.2d 527 (1993). Nothing sought in this proceeding calls upon the Legislature to do anything, nor can it

do anything; its product either withstands constitutional scrutiny or it does not.

## CONSTITUTIONALITY OF DUAL SERVICE

We thus reach the core issue, whether respondent's dual service is prohibited by our Constitution. The distribution of powers clause is found in Neb. Const. art. II, § 1, and reads:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

The purpose of the clause is to establish the permanent framework of our system of government, to assign to the three departments their respective powers and duties, and to establish certain fixed principles upon which our government is to be conducted. *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994). The clause prohibits one department of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives. *Id.*; *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991). See, also, *State ex rel. Meyer v. State Board of Equalization & Assessment*, 185 Neb. 490, 176 N.W.2d 920 (1970); *McDonald v. Rentfrow*, 176 Neb. 796, 127 N.W.2d 480 (1964). The clause also prohibits one who exercises the powers of one department of government from being a member of the other departments. *Conway, supra*. The clause thereby provides a check against the concentration of power and guards against conflicts of interest which arise when one serves two masters. *Id.*

The present case differs from *Conway*, which held that one could not while serving as a state legislator also serve as a professor at an executive department college, in that here a statute mandates dual service. It is thus necessary to consider whether the statute requiring such dual service, § 81-1417, passes constitutional muster and, if not, whether respondent is subject to ouster.

Addressing that second aspect of the matter first, we note that

an unconstitutional statute is a nullity, void from its enactment, and is incapable of creating any rights or obligations. *State v. Bardsley*, 185 Neb. 629, 177 N.W.2d 599 (1970), *overruled on other grounds, State v. Rosenberger*, 187 Neb. 726, 193 N.W.2d 769 (1972). Constitutionally invalid legislation confers no rights; imposes no duties or obligations; and is, in legal contemplation, as inoperative as though it had never been composed or enacted. *Board of Commissioners v. McNally*, 168 Neb. 23, 95 N.W.2d 153 (1959). Thus, if the requirement of § 81-1417 that the commission include a district court judge is unconstitutional, there is no right to membership on that body or obligations which arise therefrom, and respondent would be subject to ouster from such position.

We therefore return to the first aspect of the matter, whether the requirement violates the distribution of powers clause. The answer to that question depends upon whether a district court judge simultaneously serving as a member of the commission is exercising the power of one department of government while a member of another department.

The judicial power of the state is vested in a Supreme Court, an appellate court, district and county courts, and such other courts inferior to the Supreme Court as may be created by law. Neb. Const. art. V, § 1. Therefore, it is clear that as a district court judge, respondent is a state officer, see *Garrotto v. McManus*, 185 Neb. 644, 177 N.W.2d 570 (1970), who exercises the power of the judicial department of government. The questions which remain are whether his service on the commission also makes him a member of another department of government and whether that membership constitutes a "public office," as contemplated by the quo warranto statute, § 25-21,121.

Electing once again to consider the second question first, we look to *Conway, supra*, and thereby recall that for the purposes of quo warranto, a public office is a governmental position, the duties of which invest the incumbent with some aspect of the sovereign power. By empowering members of the commission to accept and administer funds and decide matters relating to the administration of criminal justice, § 81-1423 invests those members with aspects of the State's sovereign powers.

That leaves the question as to whether the commission belongs to some department of government other than the judiciary.

As noted earlier, § 81-1416 provides that the commission is an agency of the State authorized to exercise specified powers conferred as an essential governmental function of the State.

Although it is not always clear whether a state agency is part of the executive or legislative department, it is clear that a state agency is not part of the judicial department of government. Administrative agencies are not courts. *Dickinson v. United States*, 346 U.S. 389, 74 S. Ct. 152, 98 L. Ed. 132 (1953) (draft boards held not to be courts); *In re Groban*, 164 Ohio St. 26, 128 N.E.2d 106 (1955), *aff'd* 352 U.S. 330, 77 S. Ct. 510, 1 L. Ed. 2d 376 (1957); *Hoover Motor Exp. v. R.R. & Pub. Util.*, 195 Tenn. 593, 261 S.W.2d 233 (1953); *Straube v. Bowling Green Gas Co.*, 360 Mo. 132, 227 S.W.2d 666 (1950); *Special Indemnity Fund v. Prewitt*, 201 Okla. 308, 205 P.2d 306 (1948); *State ex rel. Rockwell v. State Board of Education*, 213 Minn. 184, 6 N.W.2d 251 (1942); *Red Rover Copper Co. v. Industrial Com.*, 58 Ariz. 203, 118 P.2d 1102 (1941). State agencies may be called courts; however, this alone does not change their nature. *Ex parte Bakelite Corp'n*, 279 U.S. 438, 49 S. Ct. 411, 73 L. Ed. 789 (1929).

As a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties. Moreover, unless permitted by the Constitution, the Legislature may not authorize administrative officers or bodies to exercise powers which are essentially judicial in nature or to interfere with the exercise of such powers by the court. *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979). An administrative agency has been said to be a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.

> "The primary function of administrative agencies is to advance the will and weal of the people as ordained by their representatives — the Legislature. These agencies are created in order to perform activities which the Legislature

> deems desirable and necessary to forward the health, safety, welfare and morals of the citizens of this State. While these agencies at times perform some activities which are legislative in nature and thus have been dubbed as quasi-legislative duties, they in addition take on a judicial coloring in that frequently, within the exercise of their power, they are called upon to make factual determinations and thus adjudicate, and it is in that sense that they are also recurrently considered to be acting in a quasi-judicial capacity. This dual role which administrative agencies play has long been accepted in this State as being constitutionally permissible. [Citations omitted.] However, this authority is not the same and, therefore, is distinguishable from the exercising of the 'judicial powers' of this State . . . ."

*Bowman v. City of York*, 240 Neb. 201, 209-10, 482 N.W.2d 537, 543 (1992), quoting *Dep't of Nat. Res. v. Linchester*, 274 Md. 211, 334 A.2d 514 (1975).

State agencies may perform functions of a judicial, quasi-judicial, or factfinding character; however, such agencies are extrajudicial bodies, not courts, judges, judicial bodies, or officers. See *Green et al. v. Milk Control Com. et al., Aplnts.*, 340 Pa. 1, 16 A.2d 9 (1940), *cert. denied* 312 U.S. 708, 61 S. Ct. 826, 85 L. Ed. 1140 (1941). The proceedings of such agencies are not judicial and are without judicial effect.

According to the legislative history, the commission was originally established by the Governor to assist with the administration of law enforcement approximately 2 years prior to the enactment of the legislation creating it. Floor Debate, L.B. 1352, Government Committee, 80th Leg. (June 9, 1969). L.B. 1352 was a reaction to the federal crime control and safe streets act, which encouraged states to prepare and adopt comprehensive law enforcement plans in order to receive federal funds for their programs. Government Committee Hearing, L.B. 1352, 80th Leg. (April 25, 1969). The federal legislation required states to establish and maintain a state planning agency in order to receive a federal grant. The federal legislation provided that such agency "shall be created or designated by the chief executive of the state and shall be subject to his

jurisdiction." *Id.* at 15.

Not only does the Governor appoint the executive director, but the commission is authorized to do a host of things designed to improve the administration of criminal justice and thereby promote the efficient and economic administration of state affairs. Such power is specifically granted to the Governor. Neb. Const. art. IV, § 6. The inescapable conclusion from all the foregoing is that the commission is an executive agency, and a member thereof is a member of the executive department of government.

Consequently, the provision of § 81-1417 which requires that the membership of the commission include a district court judge violates the distribution of powers clause found in Neb. Const. art. II, § 1, and is thus void and unenforceable. It necessarily follows that a district court judge who serves as a member of the commission occupies an unconstitutional and thus a nonexisting commission office. Moreover, the provision of § 81-1417 which mandates that the Governor appoint a district court judge as a member of the commission also violates the distribution of powers clause and is thus void and unenforceable.

In so ruling, we are not unmindful that § 81-1420 provides: "Notwithstanding any provision of law, ordinance, or charter provision to the contrary, membership on the commission shall not disqualify any member from holding any other public office or employment, or cause the forfeiture thereof." However, that language by its own express terms does not undertake to overcome a constitutional provision, nor could it do so, for constitutional language controls legislative language, not the other way around. See *State ex rel. Caldwell v. Peterson*, 153 Neb. 402, 45 N.W.2d 122 (1950) (Legislature cannot lawfully act beyond limits of Constitution).

Those determinations compel us to consider whether the offending provisions may be severed and the remainder of § 81-1417 and the other statutes relating to the commission be preserved.

An unconstitutional portion of a statute may be severed if (1) absent the unconstitutional portion, a workable statutory scheme remains; (2) the valid portions of the statute can be enforced

independently; (3) the invalid portion was not an inducement to the passage of the statute; and (4) severing the invalid portion will not do violence to the intent of the Legislature. *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). A severability clause, while indicating that the Legislature contemplated the possible judicial partitioning of the statute and passed it anyway, is not necessary for severability. *Id.*

The membership of a district court judge is not mentioned in any other provision of the relevant statutes. Thus, absent the unconstitutional portions of § 81-1417, a workable statutory scheme still remains. By removing the language reading "a district court judge" from § 81-1417 and removing the mandate that the Governor appoint such a personage, it is only necessary for the Governor to appoint another member of the public at large to serve on the commission.

Nothing in the record shows that the language requiring that the membership of the commission include a district court judge was an inducement to passage of the statute. The legislative history makes no mention of the specification of a district court judge as a member. Moreover, the act fails to designate any specific duties to be carried out by the district court judge as a member of the commission.

Additionally, severing the invalid portion of the statute will not do violence to the intent of the Legislature. As already noted, the legislative history establishes that the purpose of the commission was to create a commission to provide a state plan in order to receive federal money. Section 81-1416 reveals that the commission was created to educate the community about the problems encountered by law enforcement authorities, promote respect for the law, and encourage community involvement in the administration of criminal justice. This purpose can be accomplished without a district court judge serving as a member.

It is clear that the requirement of § 81-1417 that the membership of the commission include a district court judge is severable and that the remainder of that statute and the other statutes relating to the commission remain independently enforceable.

## ATTORNEY FEE

Left for consideration is respondent's counterclaim for an attorney fee and costs. Neb. Rev. Stat. § 25-21,132 (Reissue 1989) provides that if through quo warranto one is "found guilty of unlawfully holding or exercising any office . . . judgment shall be rendered that such [respondent] be ousted, and altogether excluded from such office . . . and also . . . pay the costs of the proceedings." However, the situation presented here is unusual, for respondent was appointed to the commission under the color of statutory law precisely because he lawfully held another office, that of a duly qualified and acting district court judge. Under this peculiar circumstance, § 25-21,132 is the more general statute and must yield to the more specific and conflicting Neb. Rev. Stat. § 24-204.01 (Reissue 1989). See *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993) (to extent there is conflict between two statutes on same subject, specific statute controls over general statute). Section 24-204.01 reads 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:
>
> . . . .
>
> (3) The action is brought by a real party in interest and raises a justiciable issue or issues.
>
> . . . .
>
> The Supreme Court, upon finding that the conditions set forth in this section exist, shall allow reasonable attorney fees and costs in such amounts and for such parties as the court shall determine. Such fees and costs shall be taxed to the Attorney General and paid out of such appropriation as the Legislature shall make for that purpose.

There is no question that this quo warranto action was brought as an original action in this court by the State against an officer of the State, that it was brought by a real party in

interest, and that it raised justiciable issues involving the constitutionality of an act. This court is therefore authorized to allow a reasonable attorney fee and costs.

## CONCLUSION

Accordingly, it is ordered, adjudged, and decreed that respondent be, and he hereby is, ousted, removed, and excluded from membership on the commission and that he be, and hereby is, awarded costs and a reasonable attorney fee in an amount to be determined in accordance with the procedure set forth in Neb. Ct. R. of Prac. 9F (rev. 1992).

JUDGMENT OF OUSTER.

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# DEBORAH LEE THILTGES, APPELLANT, V. FREDERICK JOHN THILTGES, APPELLEE.

527 N.W.2d 853

Filed February 10, 1995. No. S-92-811.

1. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witness and accepted one version of the facts rather than another.
2. **Property Division: Alimony: Appeal and Error.** The division of property and the awarding of alimony is a matter entrusted to the discretion of the trial judge and, on appeal, will be reviewed de novo on the record and will be affirmed in the absence of an abuse of the trial judge's discretion.
3. **Property Division: Words and Phrases.** Present value is the current worth of a certain sum of money due on a specified future date after taking interest into consideration.
4. **Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. The division of property is not subject to a precise mathematical formula, but the general rule is to award a spouse one-third to one-half of the marital estate.
5. **Property Division: Interest: Time.** Neb. Rev. Stat. § 45-103 (Reissue 1993)

does not require that a marital property distribution payable in installments be entitled to interest running from the date of the entry of judgment.

6. **Property Division: Interest.** A district court can exercise its discretion and award interest on deferred installments payable as part of a marital property distribution.
7. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
8. ____. Although alimony is not to be used simply to equalize the income of the parties, a court may consider the relative economic circumstances of the parties when awarding alimony. Disparity in income or potential income may partially justify an award of alimony.
9. ____. The condition of a spouse's business is not the sole factor in determining proper alimony. Rather, the earning capacity of a spouse operating a business is an element which is to be considered in determining alimony.

Petition for further review from the Nebraska Court of Appeals, HANNON and MILLER-LERMAN, Judges, and HOWARD, District Judge, Retired, on appeal thereto from the District Court for Richardson County, WILLIAM B. RIST, Judge. Remanded with directions.

Dana L. Leach and Louie M. Ligouri, of Ligouri Law Office, for appellant.

Patricia A. Lamberty, of Zweiback, Hotz & Lamberty, P.C., for appellee.

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

LANPHIER, J.

We granted further review of a decision of the Nebraska Court of Appeals, *Thiltges v. Thiltges*, 94 NCA No. 24, case No. A-92-811 (not designated for permanent publication). Deborah Lee Thiltges appealed to that court from certain orders contained in the decree entered by the district court for Richardson County dissolving her marriage to the respondent-appellee, Frederick John Thiltges. Appellant argues that the district court did not equitably divide the parties' marital estate because it failed to require the payment of interest on appellant's deferred property award, which was payable over 12 years. Finding that an award of interest will not impose an undue burden on appellee, we modify the decree of the district court to require interest to be paid from the date of the decree.

Secondly, with regard to the Court of Appeals' failure to award alimony, appellant asserts that the Court of Appeals failed to consider appellee's actual earning capacity rather than the profitability of his farming operations in determining the propriety of an award of alimony. Although we agree that the Court of Appeals erred in failing to consider both spouses' actual earning capacities, we hold that the record does not support an award of alimony. We remand the cause with directions to modify the division of property as hereinafter stated.

## BACKGROUND

Deborah and Frederick Thiltges were married on August 18, 1976, and have one child, John, born October 20, 1979. On February 7, 1992, appellant filed a petition for the dissolution of the marriage of the parties.

Appellee is a farmer and works primarily in partnership with his brother. At trial, evidence regarding the land, equipment, and cash owned by the parties was adduced. Some of the farm-related assets were purchased by the parties during their marriage, and others were inherited from appellee's relatives.

Appellant is a registered nurse, and during the parties' marriage, she worked intermittently as a nurse and earned approximately $80,000 over the term of the marriage. She also helped with the farmwork by cooking for hayers and sheep shearers, walking beans, cutting thistles, taking care of lambs, mowing, et cetera. At the time of the divorce decree, appellant was 3 hours short of obtaining a teaching certificate. Two weeks prior to the trial of this matter, appellant began full-time employment at a nursing home and was earning $13.50 per hour or approximately $27,000 per year. However, she planned to seek employment as a teacher upon obtaining her teaching certificate. Appellant testified that she wanted to be a teacher so that she could spend time with her 12-year-old son and avoid the evening and weekend hours required by her nursing position. Appellant testified that a teacher's starting salary is approximately $18,000.

In its decree, the district court set off several parcels of land as appellee's nonmarital property. The court decreed four

parcels of land, valued at a total of $194,000, to be marital property. Other assets, including individual retirement accounts, automobiles, and household goods, were also deemed to be marital assets. The asset value of the total marital estate equaled $292,997.

Appellee testified that he owned approximately $39,000 in machinery, equipment, and livestock at the time of the parties' marriage in 1976. Stating there was no clear showing of which of these assets remained or their value, the court deemed them to be marital assets.

The parties' land was mortgaged to the extent of $127,000. Other marital debt totaled $56,482. Therefore, the net value of the marital estate equaled $109,515.

The district court awarded personal property and household goods valued at $6,005 to appellant. The real property and the remaining assets, valued at $286,992, were awarded to appellee. All indebtedness was assigned to appellee, and he was ordered to hold appellant harmless with respect to the debts.

At trial, appellant testified that she preferred a cash award rather than any part of the farming operation. She stated that she was agreeable to an order that would provide for a sum to be paid over a period of time. The district court decreed:

> That in order to equitably adjust the difference in net value of the property awarded the parties herein, respondent receiving the greater portion and value thereof, and to provide support for petitioner, respondent should pay alimony to petitioner in the amount of $300 a month for a period of 12 years, the first such payment being due September 1, 1992, and a like amount on the first day of each month thereafter until paid in full. Such alimony shall be deemed vested and not terminable on the death of either party or remarriage of petitioner.

The monthly payments total $43,200. Accordingly, the net value of the marital estate awarded to appellee equaled $60,064. The total net value of the deferred property settlement and the $6,005 of personal property awarded to appellant equaled $49,205.

In her arguments to the Court of Appeals, appellant asserted that the district court's order directing appellee to pay her a sum

of $43,200 in monthly increments for a period of 12 years fails to equitably divide the marital estate when the net present value of the award is considered. Appellant asserted that the present value of the award was less than one-third of the marital estate.

She did not challenge the district court's attempt to award alimony for the dual purposes of maintenance and a division of property. However, appellant contended that the district court failed to separately consider each purpose to arrive at an equitable settlement award. Appellant asserted that the circumstances dictated an award reflecting a property division of one-third to one-half in addition to a sufficient amount for her support and maintenance.

The Court of Appeals affirmed the district court's order directing appellee to pay a sum of $43,200 to appellant, that amount to be paid in $300 monthly increments for a period of 12 years. However, the Court of Appeals decreed that the amounts to be paid appellant were to be considered a division of property, rather than alimony. The Court of Appeals concluded that the evidence did not support an award of alimony to appellant. We granted appellant's petition for further review.

## ASSIGNMENTS OF ERROR

Appellant asserts that the Court of Appeals erred in (1) treating $300 a month payable over a period of 12 years the same as $43,200 net worth; (2) considering solely the earning capacity of appellant in denying alimony and changing the district court's alimony award which was, in part, to provide support for appellant; and (3) failing to consider appellee's actual earning capacity rather than the profitability of appellee's personal farming operations in determining the propriety of an award of alimony.

## STANDARD OF REVIEW

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. *Jirkovsky v. Jirkovsky, ante* p. 141, 525 N.W.2d 615 (1995); *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994); *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994). In a review de novo on the record, we reappraise the evidence as

presented by the record and reach our own independent conclusions with respect to the matters at issue. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witness and accepted one version of the facts rather than another. *Jirkovsky, supra*; *Reichert, supra*.

The division of property and the awarding of alimony is a matter entrusted to the discretion of the trial judge and, on appeal, will be reviewed de novo on the record and will be affirmed in the absence of an abuse of the trial judge's discretion. *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988).

## ANALYSIS

*Disposition of Property.*

Appellant asserts that the district court erred by failing to award her an equitable share of the marital estate. She does not contest the district court's valuation of the marital estate, nor does she contest the court's order awarding the farming operation to appellee and cash to herself. Appellant contends that the present value of her cash award is less than one-third of the marital estate.

Present value is "[t]he current worth of a certain sum of money due on a specified future date after taking interest into consideration." Glenn G. Munn, Encyclopedia of Banking and Finance 773 (F.L. Garcia ed., 8th ed. 1983). Appellant asserts that the current worth of $43,200 payable without interest over a period of 12 years is clearly worth less than a lump-sum payment of $43,200.

The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. The division of property is not subject to a precise mathematical formula, but the general rule is to award a spouse one-third to one-half of the marital estate. *Jirkovsky, supra*; *Reichert, supra*. The threshold question is not the present value of appellant's deferred marital property. The first question must be whether the amount of that settlement as made is fair and reasonable.

As stated above, the net value of the Thiltges' marital estate

was $109,515. Appellee was awarded $60,064, and appellant was awarded $49,205. Ignoring for the moment appellant's "present value" argument, we note that appellee received approximately 55 percent of the marital property and appellant received approximately 45 percent of the marital property. In our de novo review of the record, we find that there was no abuse of discretion by the district court in determining that the net marital estate should be divided almost evenly between the parties.

We now address the question of whether the marital estate was, in fact, evenly divided when the present value of the deferred property settlement is considered.

We have specifically rejected the contention that our statute providing for interest on judgments, Neb. Rev. Stat. § 45-103 (Reissue 1993), requires that a marital property distribution payable in installments is entitled to interest running from the date of the entry of judgment. *Dryden v. Dryden*, 205 Neb. 666, 289 N.W.2d 525 (1980). Section 45-103 requires that when a judgment is to be paid in installments, interest begins to accrue on each individual installment only from the date it becomes due and payable. *Dryden, supra*; *Cumming v. Cumming*, 193 Neb. 601, 228 N.W.2d 296 (1975).

However, this court has previously held that a district court can exercise its discretion and award interest on deferred installments payable as part of a marital property distribution. *Seemann v. Seemann*, 225 Neb. 116, 402 N.W.2d 883 (1987); *Johnson v. Johnson*, 209 Neb. 317, 307 N.W.2d 783 (1981); *Nickel v. Nickel*, 201 Neb. 267, 267 N.W.2d 190 (1978). When exercising its discretionary power, one factor the district court should consider when determining whether a property settlement payable in installments should draw interest from the date of judgment is the burden on the payor-spouse. *Johnson, supra*; *Nickel, supra*.

In *Nickel*, the parties had been married 6½ years. The husband operated a farm in equal partnership with a brother, and that farming partnership had liabilities of some $311,000 on assets of approximately $565,000. The husband's share of the net worth of that partnership was $126,367. The trial court decreed that the wife should receive $48,000 as her property

settlement, payable in 180 equal monthly installments of $266.66 each, without interest. The wife was satisfied with the division of the property but argued that § 45-103 provided for interest at the rate of 8 percent per annum on all decrees and money judgments. At the statutory rate, an additional $3,000 in annual interest would be added to the wife's property settlement. Although we rejected the argument that § 45-103 required interest to be paid, we held that it was in the discretionary power of the trial court to order interest on installment payments. We concluded that the trial court had not abused its discretion by refusing to award interest because to do so would create an intolerable burden upon the husband.

In *Johnson*, the marital assets consisted primarily of farmland, farm machinery, and crops. The wife was awarded, in addition to other property, annual cash installments of $15,000 for 12 years. We noted that had the trial court awarded interest on the installment payments at the requested 8 percent per annum, the first year's interest would have been $12,000. Given that the wife's income after the divorce was anticipated to be $27,000, including all distribution and support payments, and the husband's prospective income was only projected to be $18,307, we held that an imposition of interest on the installment payments would have created an undue burden upon the husband.

As shown on his federal income tax forms, appellee's 1991 income from farm partnerships was $49,456. This income was reduced by $19,121 in losses in the personal farming operation, for an income of $30,335. In 1990, appellee's income from the farm partnership was $48,162 in income and the personal farming losses reduced that income by $9,952, resulting in an income of $38,210. For this 2-year period, appellee's average income was approximately $34,272.

Appellee testified that as of December 31, 1991, he and appellant owned 70 percent of the Thiltges Brothers Partnership. Kenneth Thiltges, appellee's brother, owned the remaining 30 percent. Appellee testified that he and his brother had decided to amend the partnership agreement in December 1991 or January 1992 in order to reflect a 50-50 arrangement. Therefore, appellee estimated that his 1992 partnership income

would be $36,898 and that his monthly income, after taxes, would be between $2,072 and $2,200.

At trial, appellee testified that his monthly living expenses, including child support and payments on debt, totaled $5,046.57. If true, appellee is operating with a $3,000 monthly deficit, and any additional expenses would certainly constitute an undue burden. However, we agree with the trial court's determination to disallow several of appellee's claimed expenses or debts.

Appellee claims that he owes money to his mother and brother and that the monthly payments on these debts total $1,331.10. However, the trial court noted that much of the evidence of the debts appeared on the eve of the dissolution proceedings and allowed only half of the alleged debt to be offset against the marital estate. We further note that appellee failed to list these debts on a balance sheet that he submitted to the Farmers Home Administration on January 15, 1991. Appellee also claims as a monthly expense a $607.50 debt payment to Ilene Good. However, by comparing the principal balance of this debt as stated on the Farmers Home Administration balance sheet to the principal balance appellee claimed he owed at trial in June 1992, it can be seen that appellee had made no payments to Good for over 1½ years. Excluding these disallowed debt payments from appellee's estimated monthly living expenses and adjusting for the amount of child support actually ordered by the court, appellee's estimate of his monthly expenses can be reduced to approximately $3,000.

When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witness and accepted one version of the facts rather than another. *Jirkovsky v. Jirkovsky, ante* p. 141, 525 N.W.2d 615 (1995); *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). Our review of the record indicates the district court disregarded some of appellee's statements of his financial situation. We will do likewise.

Appellee has been awarded all of the parties' income-producing property. In comparison, the interest-free installment award to appellant is the kind of asset which is most

susceptible to the ravages of inflation. As a result, the property division fell substantially short of the trial court's manifest attempt to effect an approximately equal division of the assets. See *In re Marriage of Conley*, 284 N.W.2d 220 (Iowa 1979). In evaluating the method chosen by the court to accomplish its objective, we recognize that equality need not be achieved with mathematical exactness. *Jirkovsky, supra*; *Reichert, supra*. However, equality can be more nearly approached with an award of interest on the cash award to appellant.

In our prior cases, when a trial court awarded a deferred property division payable in cash, it generally ordered annual principal payments. Accordingly, the amount of interest was addressed as an amount of annual interest on the remaining unpaid balance. See, *Seeman v. Seeman*, 225 Neb. 116, 402 N.W.2d 883 (1987); *Johnson v. Johnson*, 209 Neb. 317, 307 N.W.2d 783 (1981); *Nickel v. Nickel*, 201 Neb. 267, 267 N.W.2d 190 (1978). Here, appellee has been ordered to make monthly principal payments of a fixed amount over a relatively long period of time. Uniform monthly payments over a long term call for monthly payments of interest in addition to principal, similar to the type of payments made on most home mortgages, commonly referred to as "amortized loans." Glenn G. Munn, Encyclopedia of Banking and Finance 47 (F.L. Garcia ed., 8th ed. 1983). Payments made on amortized loans are of a fixed amount, such payments allocated first to interest and then to principal. Early in the loan, most of the fixed payment is allocated to interest, but as the principal is paid down, a greater portion of each payment is allocated to principal. *Id.*

In light of the facts and circumstances of this case, we exercise our equitable discretion and modify the decree of the district court to award interest on the deferred property division and order such interest to accrue at the rate of 8 percent amortized over the 12-year period. Although this matter is before us for a review de novo and we are called upon to render the judgment that should have been rendered by the trial court, we are unable to do so for several reasons.

Firstly, it is inappropriate for us to issue an amortization schedule to the parties. We believe that such an amortization

schedule will be beneficial to the parties. Secondly, we are unable to determine from the record whether appellee has made the monthly principal payments as ordered in the original decree. If we were to issue an amortization schedule, it would not reflect any nonpayment by the appellee.

Finally, the original decree of the district court ordering the monthly principal payments was dated August 21, 1992, with the first payment due September 21, 1992. Today's decree requires payment of interest from the date of the original decree, and as such, a certain sum of interest is now owed. It would probably be burdensome to require the appellee to pay the interest owing from the date of the original decree until present in a lump sum. However, it would be unfair to appellant for her to forego this unpaid interest. Therefore, we order the amount of the unpaid interest from the date of the original decree to be added to the amount of unpaid principal.

*Alimony.*

Appellant asserts that the Court of Appeals failed to consider the general equities of the case, including the fact that the trial court had deemed that the $300 monthly payments discussed above were intended to equalize the property settlement, as well as to provide support. Secondly, appellant argues that the Court of Appeals failed to consider appellee's actual earning capacity, rather than the profitability of his personal farming operations, in determining the propriety of an award of alimony.

Appellant holds a bachelor's degree in nursing, and at the time of the trial, she was 3 hours short of obtaining a teaching certificate. Two weeks prior to trial, she began full-time employment at a nursing home and was earning $13.50 per hour. Therefore, her annual earning capacity if she continued her employment as a nurse was $27,000. However, she planned to seek employment as a teacher upon obtaining her teaching certificate. Appellant testified that she wanted to be a teacher so that she could spend time with her 12-year-old son and avoid the evening and weekend hours required by her nursing position. She testified that a teacher's starting salary is approximately $18,000.

As stated above, the deferred property settlement in the

amount of $43,200 with interest is intended to evenly divide the Thiltges' marital estate between the parties. Accordingly, the Court of Appeals decreed that the amounts to be paid appellant were to be considered a division of property rather than alimony. See *Ruhnke v. Ruhnke*, 218 Neb. 355, 355 N.W.2d 339 (1984). We agree that the award was intended to be a division of property.

The Court of Appeals then addressed the issue of alimony and concluded that the evidence did not support an award of alimony to appellant. The Court of Appeals stated that there was no evidence to indicate that appellant required assistance for a period of time to get further training for employment or that the marriage adversely affected her employment chances. However, the Court of Appeals also acknowledged appellant's testimony that she intended to change careers in order to spend time with her son and that such change would result in lower earnings. *Thiltges v. Thiltges*, 94 NCA No. 24, case No. A-92-811 (not designated for permanent publication).

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991); *Murrell v. Murrell*, 232 Neb. 247, 440 N.W.2d 237 (1989). Regarding the payment of alimony, Neb. Rev. Stat. § 42-365 (Reissue 1993) provides in 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.

As the Court of Appeals correctly stated, the trial court should consider what effect, if any, the marriage has had upon the ability of the supported spouse, if any, to secure employment in the future. § 42-365; *Stuczynski, supra*; *Murrell, supra*.

However, the trial court should also consider all of the enumerated factors identified in § 42-365, including the earning capacity of both spouses. *Stuczynski, supra*; *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984).

Although alimony is not to be used simply to equalize the income of the parties, a court may consider the relative economic circumstances of the parties when awarding alimony. *Murrell, supra*; *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988). Disparity in income or potential income may partially justify an award of alimony. *Ziebarth v. Ziebarth*, 238 Neb. 545, 471 N.W.2d 450 (1991).

Appellee earned nearly $50,000 annually from his partnership farming operations. However, his personal farming ventures resulted in losses of $19,121 in 1991 and $9,952 in 1990. Although these losses are a factor to consider in determining the amount of alimony, " 'the condition of a spouse's business is not the sole factor in determining proper alimony. Rather, the earning capacity of a spouse operating a business is an element which is to be considered in determining alimony.' " *Ritz*, 229 Neb. at 866-67, 429 N.W.2d at 711 (quoting *Gleason, supra*).

Appellant argues that the Court of Appeals erred by considering her actual earning capacity but failing to consider appellee's actual earning capacity. Although appellant is correct, the record still does not adequately support an award of alimony to her.

In this case, the nearly equal division of property reflects the duration of the marriage and the contributions of both parties. Appellant partially interrupted her nursing career in order to take care of the parties' son, but that career interruption does not appear to have adversely affected her ability to engage in gainful employment as evidenced by the fact that she had become so just prior to trial. Given the facts and circumstances of this case, alimony is denied.

## CONCLUSION

We remand the cause with directions to modify the division of property in accordance with the foregoing opinion.

REMANDED WITH DIRECTIONS.

# STATE OF NEBRASKA EX REL. ARTHUR J. SCHERER AND SHARREL M. SCHERER AND FOR ALL OTHER PERSONS SIMILARLY SITUATED, APPELLANTS, V. MADISON COUNTY COMMISSIONERS OF MADISON COUNTY, NEBRASKA, ET AL., APPELLEES.

527 N.W.2d 615

Filed February 10, 1995. No. S-93-129.

1. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
2. **Mandamus: Proof.** In an action in mandamus, the relator has the burden of proof and must show clearly and conclusively that he is entitled to the particular thing he asks and that the respondent is legally obligated to act.
3. **Counties: Legislature.** A county has only those powers and duties conferred upon it by the Legislature.
4. **Statutes: Legislature: Intent.** In construing a statute, a 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.
5. ____: ____: ____. Statutes relating to the same subject matter are in pari materia, and a court will construe them together so as to determine the intent of the Legislature and to maintain a consistent and sensible scheme.
6. **Counties: Sanitary and Improvement Districts: Highways.** Under the definition of "public roads" provided in Neb. Rev. Stat. § 39-1401 (Reissue 1993), the statutory obligations which sanitary and improvement districts and counties have over public roads do not depend upon who constructs or owns those roads.
7. ____: ____: ____. Neb. Rev. Stat. § 39-1402 (Reissue 1993) does not impose upon a county a ministerial duty to maintain public roads located within a sanitary and improvement district.
8. **Sanitary and Improvement Districts.** For the purposes of Neb. Rev. Stat. § 39-1405(1) (Reissue 1993), a sanitary and improvement district does not constitute an "unincorporated village."
9. **Statutes: Words and Phrases.** Generally, the word "may" when used in a statute will be given its ordinary meaning unless the meaning would manifestly defeat the object of the statute, and when used in a statute, it is permissive and discretionary, not mandatory.
10. ____: ____. As used in Neb. Rev. Stat. § 39-1405(2) (Reissue 1993), "may" is permissive and discretionary, not mandatory.
11. **Counties: Sanitary and Improvement Districts: Highways: Mandamus.** Neb. Rev. Stat. § 39-1405(2) (Reissue 1993) permits, but does not obligate, a county to remove snow and ice from public streets located within sanitary and improvement districts. Section 39-1405(2) does not create a ministerial duty for the purposes of obtaining a writ of mandamus.

Petition for further review from the Nebraska Court of Appeals, HANNON and MILLER-LERMAN, Judges, and WARREN, District Judge, Retired, on appeal thereto from the District Court for Madison County, ROBERT B. ENSZ, Judge. Judgment of Court of Appeals affirmed.

Lynn D. Hutton, Jr., of Hutton, Freese & Einspahr, P.C., for appellants.

Joseph M. Smith, Madison County Attorney, for appellees.

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

LANPHIER, J.

The relators prayed in the district court for Madison County for an alternative or peremptory writ of mandamus against the Madison County Board of County Commissioners. The relators sought to require the respondents to expend Madison County tax funds for the improvement and maintenance of public roads in the sanitary and improvement district (S.I.D. No. 3) in which the relators reside. The county had maintained the roads in the past, but stopped in 1992, claiming that it was the duty of S.I.D. No. 3 to so maintain these roads. The district court denied the writ, and the relators appealed to the Nebraska Court of Appeals. The Court of Appeals concluded that Madison County did not have a legal duty to maintain the roads in S.I.D. No. 3 and affirmed the judgment of the district court. See *State ex rel. Scherer v. Madison Cty. Comrs.*, 94 NCA No. 27, case No. A-93-129 (not designated for permanent publication). We agree that Madison County did not have a legal duty to maintain the roads within S.I.D. No. 3 and, therefore, affirm.

## BACKGROUND

The relators live in and own a residence situated in S.I.D. No. 3 in Madison County. They live on a platted street in the Eastern Heights First Addition called Jo Deb Drive.

The Eastern Heights First Addition was surveyed and platted in 1967. On August 7, 1967, John, Letitia, and Adelia Maurer, who apparently then owned the land, dedicated Jo Deb Drive and the other streets in the plat to the use and benefit of the

public. S.I.D. No. 3's articles of incorporation were filed on July 11, 1968. S.I.D. No. 3 was organized under Neb. Rev. Stat. §§ 31-727 to 31-762 (Reissue 1968). S.I.D. No. 3 has never received title to any public streets in the Eastern Heights First Addition.

Madison County controlled, maintained, and repaired Jo Deb Drive and the other streets in S.I.D. No. 3 until June 16, 1992. Madison County also listed the roads in S.I.D. No. 3 on its inventory for obtaining money allocated to the county road-bridge fund. On June 16, the county commissioners passed a resolution providing that the county immediately discontinue all road maintenance services and snow removal in S.I.D. No. 3 and other sanitary and improvement districts in the county.

## ASSIGNMENTS OF ERROR

In their petition for further review, the appellants-relators assign five errors, which all raise the same issue: whether Madison County has a ministerial duty to maintain the roads in S.I.D. No. 3 such that a court may compel the county to fulfill its duty by means of a writ of mandamus.

## STANDARD OF REVIEW

Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994).

## ANALYSIS

In an action in mandamus, the relator has the burden of proof and must show clearly and conclusively that he is entitled to the particular thing he asks and that the respondent is legally obligated to act. *State ex rel. Goetz v. Lundak*, 199 Neb. 585, 260 N.W.2d 589 (1977). Thus, in order to prevail, the relators

must establish that Madison County has a ministerial duty to maintain the subject roads within S.I.D. No. 3.

A county has only those powers and duties conferred upon it by the Legislature. *Rock Cty. v. Spire*, 235 Neb. 434, 455 N.W.2d 763 (1990). Madison County, therefore, only has a duty to maintain the roads within S.I.D. No. 3 if there is a statutory duty. Numerous sections in various chapters of our statutes are related to the issue of public roads and the maintenance thereof. However, there is no coherent statutory scheme.

In construing these various sections, we will endeavor, as we must, to give each section its intended effect as shown by the statutory language. In construing a statute, a 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. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). Statutes relating to the same subject matter are in pari materia, and a court will construe them together so as to determine the intent of the Legislature and to maintain a consistent and sensible scheme. *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 481 N.W.2d 165 (1992).

§ 39-1402

Relators rely on Neb. Rev. Stat. § 39-1402 (Reissue 1993) to establish Madison County's duty. Section 39-1402 provides:

> General supervision and control of the public roads of each county is vested in the county board. The board shall have the power and authority of establishment, improvement, maintenance and abandonment of public roads of the county and of enforcement of the laws in relation thereto as provided by the provisions of Chapter 39, articles 14 to 20, except sections 39-1520.01 and 39-1908.

In *SID No. 1 v. County of Adams*, 209 Neb. 108, 306 N.W.2d 584 (1981), we addressed this statute and whether under its provisions a county could be compelled to maintain roads created and owned by a sanitary and improvement district. We determined that § 39-1402 was a statute of general application. However, we also determined that chapter 31, article 7, of the

Nebraska Revised Statutes, which covers the entire subject of sanitary and improvement districts within the state, was a specific act. The specific act, which in part conveyed to sanitary and improvement districts the authority and power to construct and maintain roads, among other powers, created an exception to the general legislation. The exception, we held, removed from the county the obligation of maintaining the roads.

Relator argues that *SID No. 1* is inapplicable, since the roads in the case at hand were not built or owned by S.I.D. No. 3. The veracity of relator's assertion cannot be verified based upon the evidence before us. However, because we conclude that construction and ownership of the roads is of no consequence, we deem that *SID No. 1* is dispositive.

Section 39-1402 outlines a county's authority over the "public roads of each county." Neb. Rev. Stat. § 31-740 (Reissue 1993) provides, in pertinent part, the following with respect to a sanitary and improvement district: "The board of trustees or the administrator of any district organized under sections 31-727 to 31-762 shall have power to provide . . . for establishing, *maintaining*, and constructing sidewalks, *public roads*, streets, and highways . . . ."

"Public roads" are defined in Neb. Rev. Stat. § 39-1401 (Reissue 1993) as "all roads within this state which have been laid out in pursuance of any law of this state, and which have not been vacated in pursuance of law, and all roads located and opened by the county board of any county and traveled for more than ten years." Under this definition of "public roads," neither the obligations of a sanitary and improvement district nor those of a county depend upon construction or ownership. Since the respective entities' statutory obligations are not dependent upon construction or ownership of the roads, the relationship between the statutes is unchanged. *SID No. 1* is therefore dispositive. Accordingly, § 39-1402 is insufficient under these circumstances to impose a ministerial duty upon the respondents.

The Court of Appeals noted that other sections within chapter 39 concern a county's authority and obligations over certain classification of roads: Neb. Rev. Stat. §§ 39-1405(1) and (2), 39-1501(5), and 39-2001 to 39-2003 (Reissue 1993).

Because a county's ministerial duty may arise from these statutes, each will be discussed seriatim.

§ 39-1405(1)

Section 39-1405(1) provides: "All public streets of unincorporated villages are a part of the public roads and shall be worked and maintained by the respective county or township authorities."

This section was not discussed in *SID No. 1*. Section 39-1405(1) requires counties to maintain the public roads within unincorporated villages. Thus, at issue is whether a sanitary and improvement district constitutes an unincorporated village. The phrase "unincorporated village" is not defined in our statutes or in any Nebraska cases. The phrase appears to have been used only very seldom in the law.

The phrase has been defined by the courts of Michigan and New York in the context of banking law. *Wyandotte Bank v. Banking Comr.*, 347 Mich. 33, 78 N.W.2d 612 (1956); *Putnam County Nat. Bank of Carmel v. Albright*, 87 Misc. 2d 391, 384 N.Y.S.2d 669 (1976). The definitions used in those cases are domain specific and so not applicable under these circumstances. The Wisconsin Supreme Court has defined the term in a broader context. In *Handlos v. State Line*, 233 Wis. 145, 288 N.W. 748 (1939), it concluded that a community fulfilling the requirements for incorporation as a village, but which had not been incorporated, was an unincorporated village.

Under Nebraska law, a village is one of the two types of political subdivisions of the smallest size. See Neb. Rev. Stat. § 17-306 (Reissue 1991). Additionally, a sanitary and improvement district, being a "body corporate and politic," cannot be considered unincorporated. Neb. Rev. Stat. § 31-732 (Reissue 1993). Considering the meaning of "village" in Nebraska law and given the ordinary meaning of "unincorporated," we find the legislative intent of an "unincorporated village" in § 39-1405(1) to be that described by the Wisconsin Supreme Court in *Handlos*. Finally, the next paragraph of § 39-1405 addresses a county's authority to remove snow and ice in sanitary and improvement districts. It

thus appears that the Legislature intended an unincorporated village to be an entity entirely different from a sanitary and improvement district. For all these reasons, we conclude that S.I.D. No. 3 is not an unincorporated village for the purposes of § 39-1405(1).

§ 39-1405(2)

Next, we consider § 39-1405(2). It provides:

> The county board . . . *may*, after the clearance of snow and ice from the county road system, clear snow and ice from all public streets of incorporated sanitary and improvement districts in the same manner as if such streets were part of the county road system.
>
> Any county board performing such snow and ice clearance in a sanitary and improvement district shall not be held liable for any damages arising from such snow and ice clearance, unless damages arise as a result of gross negligence.

(Emphasis supplied.)

The operative word of the statute is "may." Generally, the word "may" when used in a statute will be given its ordinary meaning unless the meaning would manifestly defeat the object of the statute, and when used in a statute, it is permissive and discretionary, not mandatory. *Roy v. Bladen School Dist. No. R-31*, 165 Neb. 170, 84 N.W.2d 119 (1957). The use of the word "may" in this statute would not defeat the object of the statute, but on the contrary seems to effectuate the main purpose of the statute. "May" as used in § 39-1405(2) is permissive and discretionary, not mandatory. Section 39-1405(2) merely permits, but does not obligate, the county to act. Because of its permissive nature, this statute does not create a ministerial duty for the purposes of obtaining a writ of mandamus.

§ 39-1501(5)

Section 39-1501 provides in pertinent part:

> The county board, in commissioner type counties having a county highway superintendent and in township type counties having adopted a county road unit system as provided in sections 39-1513 to 39-1518, shall:

. . . .

(5) Maintain roads in unincorporated areas if such roads are dedicated to the public and are first improved to minimum standards as established by the county board. In a zoning area of a municipality such standards shall be the higher of those established either by the county or the municipality. Further improvements may be undertaken pursuant to the provisions of Chapter 39, article 16.

We are unable to deduce from the evidence contained in the record whether this statute is applicable in this case. By its own terms, this statute applies to commissioner-type counties which have a county highway superintendent. Although Madison County is a commissioner-type county, the record makes no mention of the existence of a county highway superintendent. Assuming, without now deciding, that this section creates an obligation on the part of Madison County, the relators would still be denied a writ of mandamus in this case because they failed to meet their burden of proving clearly and convincingly that respondents are legally obligated to act. See *State ex rel. Goetz v. Lundak*, 199 Neb. 585, 260 N.W.2d 589 (1977).

§§ 39-2001 to 39-2003

Finally, §§ 39-2001 to 39-2003 provide that county roads "designated" as "primary" shall be maintained at the expense of the county. However, there is no evidence in the record regarding whether the roads in question have been designated as "primary" pursuant to §§ 39-2001 to 39-2002. With respect to these sections, the relators have thus failed to meet their burden of proving clearly and convincingly that respondents are legally obligated to act. See *State ex rel. Goetz v. Lundak, supra*.

CONCLUSION

In light of the foregoing, the Court of Appeals correctly determined that there is no statutory basis for requiring Madison County to maintain the roads that the relators seek to require it to maintain. The judgment of the Court of Appeals, therefore, is affirmed.

AFFIRMED.

# IVA MAE HAMERNICK, APPELLANT, AND AETNA LIFE AND CASUALTY CO., APPELLEE, V. ESSEX DODGE LTD. AND THE LUND COMPANY, APPELLEES.

527 N.W.2d 196

Filed February 10, 1995. No. S-93-399.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
2. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
3. **Jury Instructions.** A party's right to a fair trial may be substantially impaired by jury instructions that contain inconsistencies or confuse or mislead the jury.
4. **Jury Instructions: Appeal and Error.** Conflicting instructions are erroneous unless it appears that the jury was not misled.
5. **Negligence: Invitor-Invitee.** A plaintiff may recover even where the plaintiff has knowledge comparable to that of the defendant, where the dangerous condition is of an open and obvious nature, and where the possessor should expect that the invitee will fail to protect herself from the hazard.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Reversed and remanded for further proceedings.

Ronald J. Palagi and, on brief, Jean V. Faulconbridge for appellant.

J. Michael Coffey and Ronald H. Stave, of Stave & Coffey, P.C., for appellees.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and HOWARD, D.J., Retired.

LANPHIER, J.

The plaintiff-appellant, Iva Mae Hamernick, brought this suit against The Lund Company and Essex Dodge Ltd. for personal injuries sustained after slipping and falling in the lobby of a building maintained by Lund and owned by Essex, who are the defendants-appellees. After the jury returned a verdict for the defendants, Hamernick moved for a new trial. The district court for Douglas County overruled her motion for a new trial,

and Hamernick appeals from that ruling. Hamernick contends that the jury was improperly instructed. The instruction complained of stated that if the evidence showed that her knowledge of the dangerous condition was comparable to that of the defendants, then the defendants must prevail. We agree that this was an improper instruction. We therefore conclude that the district court erred in overruling Hamernick's motion for a new trial.

## BACKGROUND

On December 12, 1988, while on her way to work, Hamernick fell in the lobby of The Mark Building. Hamernick was employed by Cornhusker Casualty Co., located on the third floor of The Mark Building. At that time, The Mark Building was owned by defendant Essex and maintained by defendant Lund.

Evidence was adduced showing that the lobby floor was made of marble. On the floor were a series of floormats and runners leading from the building entrance to the elevators. However, the mats and runners did not cover the entire floor. Hamernick testified that as she stepped off one mat on her way to another, she slipped and fell. She testified that she had walked on the floor previously and had not fallen. However, on this occasion she felt her foot slip out from under her as she fell. She also testified that in her opinion the floor was slick.

Sharon Clatterbuck, an employee of Cornhusker Casualty Co., served as liaison between her company and the building management. Clatterbuck testified that she slipped on the marble floor almost every day she entered the building. In Clatterbuck's opinion, "The floor was very slick." Clatterbuck testified that during the period between November 1987 and December 1988, 75 people complained to her about the floor in the lobby being slick and about how they almost slipped and fell. She also testified that she relayed these complaints to the building management.

## ASSIGNMENT OF ERROR

On appeal, Hamernick claims that the district court erred in giving jury instruction No. 8, which stated:

> If you find by the greater weight of the evidence that the

> alleged conditions and circumstances are such that the Plaintiff had knowledge of the condition in advance, or should have had knowledge comparable to that of the Defendants, then it may not be said that the Defendants are guilty of actionable negligence and you must find for the Defendants.

## STANDARD OF REVIEW

In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Id.*

## ANALYSIS

The sole issue in this appeal is whether the district court erred in giving jury instruction No. 8. Hamernick submits that jury instruction No. 8 was improper because it conflicts with the law as stated in another jury instruction and because it essentially directs a verdict for the defendants.

A party's right to a fair trial may be substantially impaired by jury instructions that contain inconsistencies or confuse or mislead the jury. *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993). Conflicting instructions are erroneous unless it appears that the jury was not misled. *Juniata Feedyards v. Nuss*, 216 Neb. 29, 342 N.W.2d 1 (1983).

Jury instruction No. 5 states the following:

> Before the Plaintiff can recover against the Defendants on her claim of negligence, the Plaintiff must prove, by the greater weight of the evidence, each and all of the following:
>
> 1. That the Defendant either created the condition, knew of the condition, or, by the exercise of reasonable care, would have discovered the condition;
>
> 2. That the Defendant should have realized that the

condition involved an unreasonable risk of harm to such business visitors;

3. That the Defendant should have expected that business visitors such as the Plaintiff either:

(a) would not discover or realize the danger; or

(b) *would fail to protect themselves against the danger*;

4. That the Defendant failed to use reasonable care to protect business visitors against the danger;

5. That the condition was a proximate cause of some damage to the Plaintiff; and

6. The nature and extent of that damage.

(Emphasis supplied.)

Under jury instruction No. 5, a plaintiff may recover despite knowledge of the dangerous condition, if the defendant should have expected that the plaintiff would fail to protect herself against the danger. See, *Corbin v. Mann's Int'l Meat Specialties*, 214 Neb. 222, 333 N.W.2d 668 (1983); *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982). However, jury instruction No. 8 would not permit a plaintiff with knowledge of a dangerous condition to recover, regardless of whether the defendant should have expected that the plaintiff would fail to protect herself against the danger.

Thus, as Hamernick contends, the jury instructions are inconsistent. There being no evidence that the jury was not misled by the inconsistent instructions, we conclude that Hamernick suffered prejudice and is, therefore, entitled to a new trial. See *Juniata Feedyards v. Nuss, supra*.

In addition to being inconsistent with another instruction, jury instruction No. 8 is an incorrect statement of the law. Jury instruction No. 8 provides that if the plaintiff had knowledge of the dangerous condition in advance, then the defendants must prevail. In *Carnes v. Weesner*, 229 Neb. 641, 649, 428 N.W.2d 493, 498 (1988), we stated:

> In *Tichenor* and *Corbin*, this court expanded the potential for finding a duty owed by possessors to invitees in the area of known or obvious dangers. Prior to these cases, possessors normally had no duty to invitees if the dangers were known and apparent to the invitees. However, in *Tichenor*, we adopted the rationale of the

> Restatement, *supra*, § 343 A, and comment *f.* of this section.
>
> Section 343 A at 218 states: "(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*"

(Emphasis in *Carnes.*) The Restatement (Second) of Torts § 343 A, comment *f.* at 220 (1965), states:

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Thus, contrary to the statement contained in jury instruction No. 8, the current state of the law in Nebraska is that a plaintiff may recover even where the plaintiff has knowledge comparable to that of the defendant, where the dangerous condition is of an open and obvious nature, and where the possessor should expect that the invitee will fail to protect herself from the hazard. *Carnes v. Weesner, supra*; *Corbin v. Mann's Int'l Meat Specialties, supra*; *Tichenor v. Lohaus, supra.*

## CONCLUSION

The inconsistent instructions given in this case deprived Hamernick of a fair trial. The district court, therefore, should have sustained Hamernick's motion for a new trial. The judgment of the district court is reversed, and this action is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# BLUE TEE CORPORATION, A MAINE CORPORATION, DOING BUSINESS AS BROWN STRAUSS STEEL, APPELLANT, V. CDI CONTRACTORS, INC., ET AL., APPELLEES.

529 N.W.2d 16

Filed February 10, 1995. No. S-93-411.

1. **Equity: Mechanics' Liens: Foreclosure.** An action to foreclose a mechanic's or construction lien is one grounded in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable 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. **Mechanics' Liens.** The Nebraska Construction Lien Act allows a supplier to a subcontractor to file a construction lien. The act does not afford protection to the supplier of a supplier or materialman.
4. **Mechanics' Liens: Proof.** A claimant of a construction lien has the burden of proving that the statute providing for such procedure to perfect the same is intended to protect the claimant.
5. **Construction Contracts: Words and Phrases.** The essential feature which constitutes one a subcontractor rather than a materialman is that in the course of performance of the prime contract he constructs a definite, substantial part of the work of improvement in accord with the plans and specifications of such contract, not that he enters upon the jobsite and does the construction there.
6. **Mechanics' Liens: Words and Phrases.** One who furnishes materials without performing any work or labor in installing them or putting them in place is a materialman and is given a lien under the provisions of the Nebraska Construction Lien Act because the materials furnished were used in the construction of a building or other structure.
7. **Mechanics' Liens: Claims.** The object of a mechanic's lien being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.
8. **Prejudgment Interest: Mechanics' Liens: Foreclosure.** Prejudgment interest is recoverable upon the foreclosure of a mechanic's lien.
9. **Prejudgment Interest: Claims.** Prejudgment interest is available only when a claim is liquidated, that is, when there is no reasonable controversy either as to the plaintiff's right to recover or as to the amount of such recovery. There must be no dispute either as to the amount or as to the plaintiff's right to recover.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded with directions.

Walter R. Metz, Jr., of Schmid, Mooney & Frederick, P.C., for appellant.

Dwight E. Steiner, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee CDI Contractors.

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

CONNOLLY, J.

Blue Tee Corporation (Blue Tee) seeks $108,070.09 plus interest as consideration for structural steel supplied to Northwestern Steel & Supply Co. (Northwestern). Northwestern fabricated the steel for CDI Contractors, Inc. (CDI), the general contractor in the construction of a department store. Blue Tee sought foreclosure upon a bond issued by CDI in lieu of collateral to secure a construction lien filed by Blue Tee. CDI claimed that Blue Tee was not entitled to protection under the Nebraska Construction Lien Act, Neb. Rev. Stat. § 52-125 et seq. (Reissue 1993). The district court for Douglas County agreed and dismissed Blue Tee's petition with prejudice. Blue Tee appealed. For the reasons stated below, we reverse the judgment of the district court.

## FACTUAL BACKGROUND

The issue in this case is whether Northwestern was a subcontractor or a materialman for the purposes of the Nebraska Construction Lien Act. If Northwestern was a subcontractor for CDI, Blue Tee is entitled to protection under the Nebraska Construction Lien Act as a supplier to a subcontractor; if Northwestern was a materialman to CDI, Blue Tee is not entitled to a lien.

CDI was the general contractor for the construction of a department store—Dillard's at Oakview Mall in Omaha. CDI accepted Northwestern's bid to provide structural steel for the project. Northwestern ordered raw steel from Blue Tee. Blue Tee delivered the steel and billed Northwestern $108,070.09 for the material. The date of the last delivery was on or about November 1, 1990. The steel was fabricated by Northwestern off the construction site and was installed by Davis Erection Company.

According to Blue Tee's expert witness, John Rupprecht, steel fabrication is the process of cutting, drilling, plating, and

otherwise altering raw steel sections to exact specifications such that the sections may be assembled into the framework of a building. Rupprecht also stated that, as in this case, fabrication must be done in a steel fabrication facility and cannot be done at a jobsite. He testified that, after steel has been fabricated for a particular project, it has only scrap value if it is not incorporated into that project or an identical project. Rupprecht also stated that the work completed by Northwestern constituted a definite and substantial portion of the project. Upon cross-examination, Rupprecht admitted that fabrication of steel could be as simple as cutting a piece of steel to a certain length.

At trial, CDI introduced documents, such as Northwestern's contract bid proposal and joint checking authorizations, which stated that Northwestern was a materialman, not a subcontractor. CDI employees testified that CDI treated Northwestern as a materialman rather than as a subcontractor. As examples of this treatment, CDI cited the lack of not only insurance but also payment retainage agreements and workplace safety standards normally associated with subcontractor contracts. CDI also adduced evidence that CDI was not contacted by Blue Tee until more than 3 months after the last major delivery of steel from Blue Tee to Northwestern. By that time, CDI had paid to Northwestern all but $18,517 for the steel.

Northwestern failed to pay Blue Tee and filed for bankruptcy protection. Blue Tee filed a construction lien on the real estate. The district court found that Northwestern was a materialman and dismissed Blue Tee's petition for foreclosure with prejudice.

## ASSIGNMENTS OF ERROR

In appealing, Blue Tee assigns as error, in sum, the following acts of the district court: the dismissal of the petition, the finding that Northwestern was a materialman, and the failure to grant the requested relief including prejudgment interest.

## STANDARD OF REVIEW

An action to foreclose a mechanic's or construction lien is one grounded in equity. In an appeal of an equitable action, the 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. *Evans v. Engelhardt*, 246 Neb. 323, 518 N.W.2d 648 (1994); *Hulinsky v. Parriott*, 232 Neb. 670, 441 N.W.2d 883 (1989).

## ANALYSIS

The Nebraska Construction Lien Act allows the supplier to a subcontractor to file a construction lien. The act does not afford protection to the supplier of a supplier or materialman. A claimant of such a lien has the burden of proving that the statute providing for such procedure to perfect the same is intended to protect the claimant. *Id.*

This court has previously attempted to define the differences between a subcontractor and a materialman. We have stated:

> "[T]he essential feature which constitutes one a subcontractor rather than a materialman is that in the course of performance of the prime contract he constructs a definite, substantial part of the work of improvement in accord with the plans and specifications of such contract, not that he enters upon the jobsite and does the construction there."

(Emphasis omitted.) *Ideal Basic Industries v. Juniata Farmers Coop. Assn.*, 205 Neb. 611, 615, 289 N.W.2d 192, 195 (1980) (quoting 53 Am. Jur. 2d *Mechanics' Liens* § 72 (1970)). In *Chicago Lumber Co. v. Horner*, 210 Neb. 833, 836, 317 N.W.2d 87, 89 (1982), we said:

> We have held that one who furnishes materials without performing any work or labor in installing them or putting them in place is a materialman and is given a lien under the provisions of [the Nebraska Construction Lien Act] because the materials furnished were used in the construction of the building or other structure.

If we were to apply the rule in *Chicago Lumber Co.* to this case, Northwestern would be entitled to a lien as a materialman but Blue Tee would be considered a supplier to a materialman, and would not be granted protection under the Nebraska

Construction Lien Act.

The trial court held, and CDI argues, that the ruling in *Paxton & Vierling Steel Co. v. Barmore*, 187 Neb. 54, 187 N.W.2d 590 (1971), is controlling. In that case we held, without explanation, that a steel fabricator is a materialman. That the steel fabricator was held to be a materialman was not significant to the outcome of that case and was not contested by the parties. *Paxton & Vierling Steel Co.*, therefore, is instructive, but not binding, precedent.

In *Ideal Basic Industries, Inc.*, also relied on by the trial court, we held that a concrete manufacturer who did not install the concrete but only supplied the concrete to a general contractor who installed it was a materialman, not a subcontractor. In that case, the status of the middleman was in issue. However, the middleman produced concrete, a fungible commodity not specifically manufactured for a particular job.

Other jurisdictions have dealt directly with the question of whether a fabricator of unique building material is a subcontractor or materialman. The trial court cited *Weyerhaeuser Co. v. Twin City Millwork Co.*, 291 Minn. 293, 191 N.W.2d 401 (1971), in its order. In *Weyerhaeuser Co.*, the Supreme Court of Minnesota stated that, in determining the status of a middleman who fabricates specialized material for a construction project but does not install the material, "each case must hinge on the totality of the surrounding circumstances and none lends itself to hard-and-fast rules which may be inflexibly applied." *Id.* at 294-95, 191 N.W.2d at 402. The court also stated that a prime contractor should not be liable to suppliers when the contractor has no notice of the supplier's participation in the project. The court held that a manufacturer of unique doors was a subcontractor because the prime contractor, by the nature of the plans for the project, had notice that the doors would require custom fabrication.

More recently, the Supreme Court of New Mexico stated four factors that it would consider in determining the status of a middleman. In *Vulcraft v. Midtown Business Park, Ltd.*, 110 N.M. 761, 800 P.2d 195 (1990), a case nearly identical to the case before this court, the trial court granted a prime contractor's motion for summary judgment in defense of a steel

supplier's claimed materialman's lien. The appellate court found that the status of the steel fabricator was a genuine issue of material fact and reversed the trial court. In its ruling, the appellate court found that the status of the fabricator could be determined by weighing (1) whether the fabrication was built according to specific plans, (2) whether the actual labor performed was substantial in relation to the material supplied, (3) whether the custom in the trade denotes the fabricator as a subcontractor or a materialman, and (4) the intent of the parties to the contract regarding subcontractor status.

The object of the mechanic's lien being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions. *Vince Kess, Inc. v. Krueger Constr. Co.*, 202 Neb. 673, 276 N.W.2d 669 (1979).

The rules thus far developed, in *Chicago Lumber Co. v. Horner*, 210 Neb. 833, 317 N.W.2d 87 (1982) (material), and *Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn.*, 205 Neb. 611, 289 N.W.2d 192 (1980) (concrete), while helpful, did not deal with unique goods which had to be customized as in the instant case.

As proof of Northwestern's status as a subcontractor, Blue Tee argues that Northwestern meets the definition of a subcontractor described in *Ideal Basic Industries, Inc.* Blue Tee elicited expert testimony that Northwestern's work on the steel framework was a definite and substantial part of the building. This point was undisputed. Blue Tee also made repeated references to the exact standards required by CDI in its specifications for the fabricated steel. Expert testimony showed that fabricated steel is a unique product and, once fabricated, has only scrap value if not incorporated into the planned project.

The evidence, considered with the mandate that the law favors protection of those who contribute labor to an improvement, supports a finding that Northwestern was a subcontractor for purposes of the Nebraska Construction Lien Act.

We acknowledge that the evidence shows that Northwestern fabricated steel and supplied it to CDI, which had it installed

by Davis Erection Company. We do not find the fact that Northwestern did not install the steel dispositive of Northwestern's status. In *Chicago Lumber Co.*, this court stated that installation of materials was the criterion that separated subcontractors from suppliers. The supplier of materials in *Chicago Lumber Co.*, however, did not custom-manufacture the material which was supplied to the prime contractor in accord with the prime contractor's plans. The purposes of the Nebraska Construction Lien Act would not have been furthered in *Chicago Lumber Co.* by a finding that a supplier of stock-in-trade material was a subcontractor.

Additionally, CDI argues that uncontradicted testimony stated that the custom in the trade designates steel fabricators as materialmen and that the documents in evidence show that the parties intended Northwestern to be considered a materialman. While the intent of the parties and the custom in the trade are factors to be considered in determining status, neither factor is so compelling that we are willing to minimize the value of the labor Northwestern contributed to the project.

In the instant case, Northwestern cut, drilled, welded, and otherwise fabricated raw steel to the exact specifications required by CDI. Expert testimony established that Northwestern's work on the project constituted a substantial share of the construction of the department store. Despite the evidence that Northwestern was a materialman, we recognize the contribution of labor as the foremost indicium of subcontractor status.

Blue Tee has the burden of proving that Blue Tee is afforded protection under the Nebraska Construction Lien Act. We find that Blue Tee has met this burden by proving that Northwestern was a subcontractor and not a supplier. Therefore, we find that Blue Tee is entitled to a lien.

Because we find that Blue Tee is entitled to a lien, we must consider Blue Tee's claim that it is entitled to interest on the amount due it from the date 30 days after Blue Tee's last steel delivery. The trial court did not address this issue. Blue Tee claims that, under § 52-136, it should be awarded interest as described in its contract with Northwestern. CDI argues that Blue Tee should not receive interest because Blue Tee's claim

was disputed, and therefore unliquidated, and because Blue Tee failed to claim prejudgment interest in the manner dictated by Neb. Rev. Stat. § 45-103.02 (Reissue 1993).

Prejudgment interest is recoverable upon the foreclosure of a mechanic's lien. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993). However, such interest is available only when the claim is liquidated, that is, when there is no reasonable controversy either as to the plaintiff's right to recover or as to the amount of such recovery. *Id.* There must be no dispute either as to the amount or as to the plaintiff's right to recover. *Id.*

The issue in this case, whether Northwestern was a subcontractor, presented a reasonable controversy regarding Blue Tee's right to recovery. The controversy rendered Blue Tee's claim unliquidated and precludes an award of prejudgment interest. We need not address the other issues presented by the request for the interest.

The judgment of the trial court is reversed and the cause remanded with directions to enter judgment in favor of Blue Tee in its foreclosure proceeding, in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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TIM GRAVEL, APPELLANT, V. ROBERTA SCHMIDT AND WILLIAM TOMEK, APPELLEES.

527 N.W.2d 199

Filed February 10, 1995. No. S-93-485.

1. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom judgment is granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment.** Summary judgment is to be granted only when the

pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

4. **Negligence: Actions.** Merely because a cause of action is couched in terms of a cause of action other than negligence does not make it so.
5. **Negligence: Actions: Attorney and Client.** While it is true that an attorney-client relationship rests in contract, an attorney's alleged professional misconduct does not give rise to a breach of contract action, but, rather, gives rise to a professional negligence action.
6. **Malpractice: Attorney and Client: Proof.** In order to recover in an action for legal malpractice, the plaintiff must allege and prove (1) a duty, (2) breach of that duty, (3) proximate cause, and (4) resulting damage.
7. **Attorney and Client.** A lawyer's duty is to his or her client and does not extend to third parties absent some facts which establish a duty.
8. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the moving party is entitled to judgment as a matter of law.
9. ____: ____. 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 judgment as a matter of law for the moving party.

Appeal from the District Court for Butler County: EVERETT O. INBODY, Judge. Affirmed.

David L. Kimble for appellant.

Kristine K. Kluck and Milton A. Katskee, of Katskee, Henatsch & Suing, for appellee Tomek.

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

WHITE, J.

Tim Gravel sued attorney William Tomek for breach of contract, alleging that Tomek promised Gravel that he would inherit a sum of money that was substantially more than what Gravel actually inherited. Tomek filed a motion for summary judgment arguing that no contract ever existed between Tomek and Gravel. The district court granted Tomek's motion, and Gravel appeals.

Helen V. Gravel died in August 1985. She was survived by

her husband, Robert; two sons, Mark and Tim; and one daughter, Roberta Schmidt. Helen Gravel named Schmidt as personal representative of the estate. Schmidt retained Tomek as attorney for the estate. Robert Gravel died in 1988, and shortly thereafter, heirs Mark, Tim, and Roberta met with Tomek to discuss settling the estate.

In his affidavit, Tomek states that he contacted Securities Management & Research, Inc. (SMR), a mutual fund manager and distributor, which informed Tomek that Helen Gravel had approximately 20,000 shares in her account with SMR. Believing that information to be true, Tomek calculated the value of her shares to be in excess of $400,000.

Tim Gravel alleges in his fourth amended petition that Tomek promised Gravel that he would inherit somewhere between $50,000 and $100,000 from the estate. Relying on Tomek's alleged promise, Gravel entered into a contract for the purchase of real property.

Gravel actually received approximately $15,000 upon receipt of the final report of the estate and alleges that he subsequently defaulted on the land purchase contract. Gravel claims that Tomek breached a contract formed between Tomek and Gravel, because Gravel inherited substantially less than Tomek promised. Gravel appealed the district court's granting of Tomek's motion for summary judgment to the Nebraska Court of Appeals, and pursuant to our authority to regulate the caseloads of the appellate courts, we removed this case from the Court of Appeals docket to the Nebraska Supreme Court docket.

Gravel claims that the district court erred in granting Tomek's motion for summary judgment and in overruling Gravel's motion for new trial. To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. *Jirkovsky v. Jirkovsky, ante* p. 141, 525 N.W.2d 615 (1995); *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). Gravel assigned but did not discuss in his brief the error concerning the motion for new trial, so we will only consider Gravel's first assignment of error.

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom judgment is granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *New Light Co. v. Wells Fargo Alarm Servs., ante* p. 57, 525 N.W.2d 25 (1994); *Schlake v. Jacobsen*, 246 Neb. 921, 524 N.W.2d 316 (1994); *Rath v. Selection Research, Inc.*, 246 Neb. 340, 519 N.W.2d 503 (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. *New Light Co., supra*; *Double K, Inc. v. Scottsdale Ins. Co.*, 245 Neb. 712, 515 N.W.2d 416 (1994); *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994). With this in mind, we turn to whether or not the district court erred in granting summary judgment in Tomek's favor.

In a series of cases concerning professional negligence, we have held that a plaintiff cannot separate a cause of action which arises primarily out of the professional's alleged negligence and label it something else in hopes of creating a different theory of recovery for the same act of negligence in order to receive the benefit of a longer statute of limitations than the statute of limitations for professional negligence allows. Merely because a cause of action is couched in terms of a cause of action other than negligence does not make it so.

In *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994), we found that even though Schendt grounded her second cause of action in terms of fraud, it remained one of medical malpractice. " '[P]rofessional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is "malpractice" and comes within the professional or malpractice statute of limitations.' " *Id.* at 581, 520 N.W.2d at 548, quoting *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982). Indeed, we found in *Schendt* that "[f]raudulent representations by a physician as to previous negligence . . . do not convert the cause of action from one of malpractice to one of deceit." 246 Neb. at 581, 520 N.W.2d at 548.

In *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 704, 523 N.W.2d 27, 29 (1994), we "again refused to separate 'a single professional relationship into various parts and appl[y] to one part of that relationship the general fraud period of limitations . . . and to another part the malpractice period of limitations . . . .' " Quoting *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). See, also, *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989) (patient could not overcome the more restrictive 2-year statute of limitations which governs professional negligence by alleging that the physician committed ordinary negligence when the cause of action arose out of negligence that occurred during the patient's treatment); *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987) (patient could not escape the application of the professional negligence statute of limitations by suing the doctor for battery); *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964) (patient could not sever her fraud claim from her negligence claim for statute of limitations purposes).

Although the aforementioned cases all hold that a negligence claim cannot be severed into a separate claim when the claim arises out of professional negligence for purposes of the statute of limitations, we find the reasoning in those cases applicable to the case now before us. Even though Gravel frames his cause of action as a breach of contract case, it arises out of Tomek's conduct as an attorney and, therefore, cannot be labeled as anything other than a professional negligence action.

While it is true that an attorney-client relationship rests in contract, see *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991), an attorney's alleged professional misconduct does not give rise to a breach of contract action, but, rather, gives rise to a professional negligence action. Gravel cannot, by framing his petition in such terms that appear to present a breach of contract action, escape the fact that what he alleges in his fourth amended petition indicates conduct that is within the purview of professional negligence.

"In order to recover in an action for legal malpractice, the plaintiff must allege and prove (1) a duty, (2) breach of that duty, (3) proximate cause, and (4) resulting damage." *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 801,

523 N.W.2d 254, 257 (1994). See *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987). A lawyer's duty is to his or her client and does not extend to third parties absent some facts which establish a duty. See *Earth Science Labs., supra*; *St. Paul Fire & Marine Ins. Co., supra*; *McVaney, supra*.

Arguably, Schmidt as personal representative is Tomek's client, not Gravel. However, even assuming, without deciding, that Tomek owed a duty as an attorney to Gravel, Gravel has failed to allege and prove that Tomek acted negligently in relying on SMR's information that Helen Gravel had 20,000 shares in her SMR account or that Tomek negligently calculated the amount of money to be received from those shares. Indeed, Tim Gravel does not even allege that the amount in the SMR account was not accurate or that Tomek's calculations were wrong. Gravel alleges in his fourth amended petition that Tomek assured him he would receive a certain amount of money and that Gravel did not receive that amount, but he does not allege that any negligence on Tomek's part proximately caused the diminution of the amount Gravel was to inherit.

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the moving party is entitled to judgment as a matter of law. *Howard v. State Farm Mut. Auto. Ins. Co.*, 242 Neb. 624, 496 N.W.2d 862 (1993). 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 judgment as a matter of law for the moving party. *Double K, Inc. v. Scottsdale Ins. Co.*, 245 Neb. 712, 515 N.W.2d 416 (1994); *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994).

Tomek presented evidence, in the form of his affidavit, as to the number of shares SMR told him Helen Gravel had in her account with SMR and as to his calculations regarding the money available from those shares. That evidence remains uncontroverted as true by Tim Gravel. Gravel does not present any evidence suggesting, nor does Gravel even allege, that

Tomek was negligent either in relying on the information from SMR or on Tomek's calculations. Tomek produced evidence demonstrating that no genuine issue of material fact existed, and since that evidence remained uncontroverted by Gravel, Tomek was entitled to judgment as a matter of law. Therefore, we hold that the district court properly granted Tomek's motion for summary judgment.

AFFIRMED.

LANPHIER, J., not participating.

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DAN DOLAN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE, V. JEFFERY J. SVITAK, APPELLEE, AND CHIEF INDUSTRIES, INC., APPELLANT.

527 N.W.2d 621

Filed February 10, 1995. No. S-93-543.

1. **Employment Security: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to a district court regarding unemployment benefits, that court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Final Orders: Appeal and Error.** When reviewing an order 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.
3. **Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling.
4. **Administrative Law: Presumptions: Proof.** A rebuttable presumption of validity attaches to the actions of administrative agencies. The burden of proof rests with the party challenging the agency's action.
5. **Employment Security.** In order for a violation of an employer's rule to constitute misconduct, the rule must bear a reasonable relationship to the employer's interests.
6. **Employment Security: Controlled Substances.** A worker who knowingly and deliberately violates a work rule that unquestionably seeks to enhance the employer's reputation in the community for taking a stand against illegal drug use

on the job, has been guilty of wanton and willful disregard of the employer's interests, deliberate violation of rules, as well as disregard of standards of behavior which the employer can rightfully expect from the employee.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded with directions.

Timothy D. Loudon, of Berens & Tate, P.C., for appellant.

John F. Sheaff for appellee Dolan.

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

HASTINGS, C.J.

Chief Industries, Inc., appeals from the judgment of the district court reversing the decision of the Nebraska Appeal Tribunal and restoring unemployment compensation benefits to Jeffery J. Svitak without disqualification.

## STANDARD OF REVIEW

In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, that court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. §§ 48-638 (Reissue 1993) and 84-917 and 84-918 (Reissue 1994). When reviewing an order 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.*, 245 Neb. 564, 513 N.W.2d 874 (1994). However, when reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling. *Hausse v. Kimmey, ante* p. 23, 524 N.W.2d 567 (1994).

A rebuttable presumption of validity attaches to the actions of administrative agencies. The burden of proof rests with the party challenging the agency's action. *In re Application of United Tel. Co.*, 230 Neb. 747, 433 N.W.2d 502 (1988); *Haven Home, Inc. v. Department of Pub. Welfare*, 216 Neb. 731, 346 N.W.2d 225 (1984).

## ASSIGNMENTS OF ERROR

Chief Industries assigns that the district court erred in not finding that a positive drug test result alone constitutes misconduct under the Nebraska Employment Security Law and erred in refusing to take judicial notice of statutes, regulations, and studies establishing a nexus between one's employment and a positive drug test result.

## FACTS

Chief Industries adopted a drug-free workplace policy, effective August 1, 1992, requiring its employees to submit to drug testing. The policy specified that violations would lead to disciplinary action up to and including discharge. A positive drug test result was listed as one of the policy violations. Chief Industries adopted the policy as an attempt to improve job safety, to ensure quality production for its customers, and to demonstrate to the community its stand against chemical abuse. On May 5, 1986, Bonavilla Homes, a division of Chief Industries, employed Svitak on a full-time basis as a roof setter. Svitak, pursuant to the drug-free workplace policy, submitted a urine sample for the purpose of drug testing on September 1, 1992. On September 9, Chief Industries discharged Svitak due to positive test results for marijuana.

Svitak applied to the Nebraska Department of Labor for unemployment insurance benefits. The Nebraska Department of Labor allowed benefits, finding that Chief Industries did not discharge Svitak for misconduct in connection with work. Chief Industries appealed to the Nebraska Appeal Tribunal.

On October 29, 1992, the Nebraska Appeal Tribunal held a hearing regarding Chief Industries' appeal. At the hearing, Milton F. Ehly, personnel development manager for Chief Industries, testified that Chief Industries based its discharge of Svitak solely on the positive drug test results. Ehly also testified that he did not know of Svitak ever performing his job under the influence of marijuana.

On November 4, 1992, the Nebraska Appeal Tribunal reversed the Department of Labor's determination and ruled that a positive drug test result for the presence of illegal drugs constitutes misconduct under the Nebraska Employment

Security Law regardless of the lack of evidence showing impairment in the workplace. As a result, the Nebraska Appeal Tribunal disqualified Svitak from receiving unemployment benefits for 7 weeks.

Dan Dolan, Commissioner of Labor for Nebraska, filed a petition in district court to review the Nebraska Appeal Tribunal decision. The district court reversed the Nebraska Appeal Tribunal decision and restored Svitak's benefits without disqualification. The court held that in order to disqualify a discharged employee from unemployment compensation, the misconduct must be connected with work performance. The court found that Chief Industries did not prove a connection with work performance and did not prove that Svitak's off-duty conduct was reasonably related to the employer's interest. Chief Industries appeals. Pursuant to our authority to regulate the caseloads of the appellate courts, we have transferred the case to the Supreme Court's docket.

Chief Industries adopted a "Drug-Free Workplace Policy" to be effective September 10, 1992, which policy included some minor revisions to the August 1 policy. Svitak was furnished a copy of that policy on August 6, as indicated by his signature attached to the policy statement. According to a memorandum also attached to the policy statement, Chief Industries declared that it had as its purpose to give employees 30 days' notice of intent to test and to enforce the policy so that any employee could rid his or her system of any chemical traces.

Chief Industries declared further in the policy statement:

> It is our hope and intent that by adopting this policy we will improve our plant in the following ways:
>
> 1) Improve the safety of all employees by assuring all of us that we are working without the influence of chemicals which may impair our physical skills or judgment for ourselves or toward our co-workers;
>
> 2) Insure that the product we produce for our customers will be produced with the utmost skill and quality available; and,
>
> 3) That our reputation internally and in the community shows we have taken a stand against the detrimental effects associated with chemical abuse out of respect for our

employees and customers.

II. Prohibited Conduct

Violations of the following prohibited conduct will subject the offending employee to disciplinary action up to and including discharge.

1) Using, being under the influence of, or possessing alcohol or illegal drugs while performing Company business or while in or about a Company facility or worksite.

. . . .

VI. Positive Results Defined

Being "under the influence of a chemical substance" which will result in a positive test result shall be determined by having contained within the body a minimum of the limits of one or more chemicals listed on Attachment A.

Attachment A reads as follows:

SEVEN DRUG PANEL
Plus Alcohol

| Drug | Screening Level |
|---|---|
| . . . . | |
| 5. Cannabinoids | 100 ng/mL |

Svitak's urine test results were as follows:

| Test Name | Results | Initial Test Level (ng/mL) | Confirm Test Level (ng/mL) |
|---|---|---|---|
| . . . . | | | |
| Marijuana Metabolites (THC) | **POSITIVE** | 100 | 15 |

Initial screen performed by Enzyme Immunoassay.
MARIJUANA METABOLITE QUAL
THC-COOH **POSITIVE**

Dolan states in his petition and Chief Industries admits in its answer that "Svitak was discharged on September 9, 1992, for violating the employer's Drug Free Workplace policy by testing positive for marijuana use." Dolan's argument, to rebut Chief Industries' claim that benefits should have been denied Svitak, is Dolan's statement in his brief that there was not any evidence of impairment, of on-the-job use, of Svitak's having placed himself or others at risk, or of a level of drugs in Svitak's

system equal to impairment. All of Dolan's statements are true. Therefore, we must decide whether Svitak's admitted violation of the policy which was promulgated for the avowed salubrious and salutary purposes sought by Chief Industries and agreed to by Svitak, constitutes "discharged for misconduct connected with his or her work." Neb. Rev. Stat. § 48-628(b) (Reissue 1993).

Chief Industries' first assignment of error contends that violation of an employer's drug test policy constitutes misconduct sufficient to disqualify a discharged employee from unemployment compensation. The standards for disqualification are established in § 48-628, which states:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (b) For the week in which he or she has been discharged for misconduct connected with his or her work, if so found by the commissioner, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner in each case according to the seriousness of the misconduct, except that if the commissioner finds that such individual's misconduct was gross, flagrant, and willful, or was unlawful, the commissioner shall totally disqualify such individual from receiving benefits with respect to wage credits earned prior to such misconduct.

## ANALYSIS

We define misconduct, pursuant to § 48-628(b), as behavior evidencing (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. *Caudill v. Surgical Concepts, Inc.*, 236 Neb. 266, 460 N.W.2d 662 (1990); *Stuart v. Omaha Porkers*, 213 Neb. 838, 331 N.W.2d 544 (1983).

This court has not addressed whether discharge for a positive drug test result disqualifies an employee from unemployment

compensation. A review of other states' decisions displays a split among jurisdictions. Some states hold that a positive drug test result, without proof of impaired work performance, does not suffice for disqualification of benefits. *Stone Forest Industries, Inc. v. Employment Div.*, 127 Or. App. 568, 873 P.2d 474 (1994) (positive drug test result does not disqualify discharged employee from benefits without proof that employee was under the influence of drugs at work); *Weller v. Arizona Dept. of Economic Sec.*, 176 Ariz. 220, 860 P.2d 487 (Ariz. App. 1993) (positive drug test result alone does not show work-related misconduct); *Crain v. Employment Security*, 65 Wash. App. 51, 827 P.2d 344 (1992) (employee disqualified from unemployment compensation due to failed drug test in conjunction with adverse job performance); *Blake v. Hercules, Inc.*, 4 Va. App. 270, 356 S.E.2d 453 (1987) (positive drug test result does not prove willful disregard of employer rules). Other states, however, hold that a positive drug test result not only evidences some influence of controlled substances while at work, but also proves an intentional violation of drug-free work policies. *Farm Fresh Dairy, Inc. v. Blackburn*, 841 P.2d 1150 (Okla. 1992) (employer not required to show on-the-job impairment when employee failed drug test); *Grace Drilling Co. v. Director of Labor*, 31 Ark. App. 81, 790 S.W.2d 907 (1990) (positive drug test result constitutes misconduct, deliberately violates employer's rules, and disqualifies employee from unemployment benefits); *Clevenger v. Employment Security Dep't*, 105 Nev. 145, 770 P.2d 866 (1989) (continual positive drug test results showed disregard of employer rules constituting misconduct in connection with work); *Eugene v. Adm'r, Div. of Emp. Sec.*, 525 So. 2d 1185 (La. App. 1988) (positive drug test result sufficient to deny benefits for misconduct connected with employment); *Overstreet v. Dep't of Employment Security*, 168 Ill. App. 3d 24, 522 N.E.2d 185 (1988) (positive tests for cocaine constituted deliberate violation of policy constituting disqualifying misconduct).

Chief Industries relies upon our holding in *Jensen v. Mary Lanning Memorial Hosp.*, 233 Neb. 66, 443 N.W.2d 891 (1989), where the hospital discharged Jensen, a nursing assistant, for reporting to work with the odor of alcohol on her

breath despite having received a written warning of termination if she again arrived at work under those circumstances. We held that it was misconduct, under the Employment Security Law, for Jensen to report to work with the odor of alcohol on her breath when warned not to do so. Specifically, we held that in an employment position which requires close personal contact with persons served by the employer, the employer can require employees to report to work without the odor of alcohol on their breath and that a violation of such a rule is misconduct connected with work. *Id.*

In the case at bar, Svitak had notice of the drug-free workplace policy 30 days prior to taking the drug test. See *Glide Lumber Products Co. v. Emp. Div.*, 86 Or. App. 669, 741 P.2d 907 (1987) (drug test underwent detects marijuana traces for approximately 30 days after its use). Svitak's case is distinguished from *Jensen, supra*, to the extent that Svitak, as a roof setter, does not come in close personal contact with persons served by the employer. The positive drug test result, however, sufficiently proves that Svitak deliberately violated Chief Industries' rules regarding a drug-free workplace. In order for a violation of an employer's rule to constitute misconduct, the rule must bear a reasonable relationship to the employer's interests. *Smith v. Sorensen*, 222 Neb. 599, 386 N.W.2d 5 (1986).

The record indicates that Chief Industries adopted the policy in order to improve work safety, to ensure quality production for customers, and to enhance its reputation in the community by showing that it has taken a visible stand against chemical abuse and the associated detrimental effects. On appeal, Chief Industries contends that the drug-free policy is related to the employer's interest in job safety, absenteeism, productivity, morale, and health costs.

At the very least, Chief Industries sought to take a stand against illegal conduct by its employees. Neb. Rev. Stat. § 28-416(11)(a) (Cum. Supp. 1992) provides that anyone who possesses marijuana weighing less than 1 ounce shall for the first offense be guilty of an infraction, receive a citation, be subject to a fine of $100, and be required to take a course as provided by law. It would seem beyond dispute that a worker

who knowingly and deliberately violates a work rule that unquestionably seeks to enhance the employer's reputation in the community for taking a stand against illegal drug use on the job, has been guilty of " '(1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, [as well as] (3) disregard of standards of behavior which the employer can rightfully expect from the employee . . . .' " *Jensen*, 233 Neb. at 69, 443 N.W.2d at 893.

It is unnecessary for us to address the other assignments of error of Chief Industries.

The judgment of the district court is reversed, and the cause is remanded with directions to affirm the decision of the Nebraska Appeal Tribunal.

REVERSED AND REMANDED WITH DIRECTIONS.

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## MARVIN WINSLOW, APPELLANT, V. CHAD D. HAMMER AND JOHN HAMMER, APPELLEES.

527 N.W.2d 631

Filed February 17, 1995. No. S-93-356.

1. **Verdicts: Appeal and Error.** A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
2. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
3. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. In order to sustain a motion for directed verdict, the 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.
4. **Negligence: Joint Ventures: Proof.** In order to allege a joint enterprise or joint venture defense in a negligence case, a defendant must prove (1) an agreement,

express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

5. **Joint Ventures: Words and Phrases.** The Nebraska Supreme Court officially adopts the definition of "joint enterprise" set forth in the Restatement (Second) of Torts § 491, comment *c*. (1965).
6. **Negligence: Pleadings: Proof: Trial.** 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.
7. **Negligence: Evidence: Trial.** Before the issue of assumption of risk may be submitted to the jury, evidence must show that the plaintiff knew of the danger, understood the danger, and voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's injury.
8. **Negligence.** A defendant may assert the assumption of risk defense only when the facts indicate that the plaintiff has knowingly assumed the risk of a dangerous situation created by the negligence of the defendant.
9. ____. One does not assume the risk of unknown or hidden dangers.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Reversed and remanded for a new trial.

Vincent M. Powers for appellant.

John W. Ballew, Jr., of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

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

CONNOLLY, J.

This case involves an appeal by the plaintiff, Marvin Winslow, from a jury verdict which found that Marvin was not entitled to damages in his negligence action against the defendants, Chad D. Hammer and John Hammer. Marvin argues that the trial court erred in overruling Marvin's motion for directed verdict as to Chad Hammer's negligence and that the trial court should not have instructed the jury on the defenses of joint enterprise, assumption of risk, and contributory negligence. For the reasons stated below, we reverse the jury's verdict and remand the cause for a new trial.

## I. FACTUAL BACKGROUND

This case involves an automobile collision which occurred on

June 4, 1991. A 1979 Monte Carlo driven by defendant Chad Hammer collided head on with a vehicle driven by Mary Winslow in which the plaintiff, Marvin Winslow, was a passenger. The collision occurred on Highway 112, a two-lane highway containing one lane of eastbound traffic and one lane of westbound traffic. Chad was driving his Monte Carlo in the westbound lane. The collision occurred when Chad attempted to pass a westbound vehicle driven by Dennis York and collided with the Winslow vehicle, which was traveling eastbound. The collision occurred in the eastbound lane of traffic.

1. THE WINSLOWS' ACTIVITIES PRIOR TO THE COLLISION

Marvin and Mary Winslow had spent the afternoon and early evening of June 4 at the residence of Eva Stover, Mary Winslow's sister. Marvin had agreed earlier in the day to help Stover with some gardening. After Marvin got off work that afternoon, he and the Winslows' son transported a tiller in the son's pickup truck to Stover's residence. Mary and the Winslows' daughters arrived a short time later in the Winslows' Plymouth Voyager minivan, which Marvin and Mary owned jointly.

Marvin spent the afternoon and evening working in Stover's garden. The Winslows' children got tired before Marvin finished, so the children left in the son's pickup. After Marvin finished the garden work, he and Mary left the Stover residence in the Winslows' minivan. Mary was driving.

2. COLLISION WITH THE DEER

On the trip home, the Winslows collided with a deer just east of a cemetery outside the town of Fairbury. The Winslows proceeded to the next farmhouse, located approximately one-half mile away, and requested that a resident of the farmhouse call the police and inform them that the Winslows had hit a deer. The Winslows then returned to the site of the accident. Jefferson County Deputy Sheriff John E. Schmuck arrived at the accident scene shortly thereafter. Deputy Schmuck spoke with the Winslows about the accident, and Marvin and the deputy visually inspected the front of the minivan. The passenger side of the minivan had been heavily damaged, and the right headlight was not working. There was

also some damage to the grille of the vehicle, but the left (driver's side) headlight appeared to be working properly. No one checked to see if the left headlight had been jarred loose.

The Winslows left the accident scene and continued on Highway 112 toward Wymore. Mary and Marvin testified that they had no problem seeing the road with the left headlight, even though the area they were driving through was very dark. The Winslows were traveling at approximately 25 to 35 miles per hour, because Marvin was worried about the radiator overheating.

### 3. Westbound Vehicles

Defendant Chad Hammer was driving his Monte Carlo westbound on Highway 112, returning home from a baseball game that had ended sometime between 10 and 10:30 p.m. Chad proceeded at a speed of approximately 56 or 57 miles per hour until he caught up to a vehicle driven by Dennis York. The York vehicle was traveling at approximately 50 miles per hour.

Dennis testified that as he was driving westbound on Highway 112 toward Fairbury, he noticed a light in the distance. The record reflects that the light Dennis spoke of emanated from the Winslow minivan's left headlight. Dennis asked his wife, Nancy, if she thought it was a motorcycle headlight. Up to that point, Nancy had not noticed the light. Dennis testified that he saw the light for approximately 10 seconds before the Winslow minivan collided with Chad's Monte Carlo.

Chad had been following the York vehicle for about three-quarters of a mile when he decided to pass it. Chad testified that he peeked around the York vehicle a couple of times and, seeing nothing, pulled into the left lane and began to pass the York vehicle.

### 4. Collision with Chad Hammer

Dennis and Nancy York had noticed Chad's car when it came up behind the York vehicle. Nancy testified that at about the time Chad pulled into the passing lane, the light that Dennis had inquired about a few seconds before disappeared, but only for a fraction of a second. Apparently, there were some small dips in the highway, and the Winslow minivan had entered the trough of one of those dips. When Dennis realized that Chad was going

to attempt to pass him, he said aloud something to the effect of, "Don't try it." Sensing the impending collision, Nancy tried to put her seatbelt on. When Chad's car had reached the front driver's side door of the York vehicle, Chad collided head on with the Winslow minivan.

Chad testified that when he realized that he was going to hit the oncoming vehicle, he swerved to the left to try to avoid the collision. Chad stated that he could not pull back into the right lane behind the York vehicle because his Monte Carlo was going too fast. Chad testified that he had been about one car length behind the York vehicle when he attempted to pass it. Chad's car and the Winslow minivan collided, with the right front side of Chad's car striking the right front side of the Winslow minivan.

### 5. Lawsuit

Marvin brought this negligence action against Chad and his father, John Hammer. John was named a party to the lawsuit under the family purpose doctrine. Both Chad and John answered Marvin's petition by asserting the affirmative defenses of joint enterprise, assumption of risk, and contributory negligence. The case was tried before a jury, which returned a general verdict in favor of the Hammers and against Marvin.

## II. ASSIGNMENTS OF ERROR

Marvin assigned five errors on appeal: (1) The trial court erred in failing to grant Marvin's motion for directed verdict as to Chad's negligence; (2) the trial court erred in instructing the jury on the joint enterprise theory; (3) the trial court erred in instructing the jury on assumption of risk; (4) the trial court erred in instructing the jury on contributory negligence; and (5) even if the contributory negligence instruction was properly given, the instruction given by the trial court was improper because it misstated the law.

## III. STANDARD OF REVIEW

A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d

550 (1994); *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993). As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994); *National Acct. Sys. of Lincoln v. Vergith*, 246 Neb. 604, 521 N.W.2d 910 (1994); *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994).

## IV. ANALYSIS

### 1. Directed Verdict

In his first assignment of error, Marvin contends that the trial court erred in overruling Marvin's motion for directed verdict as to Chad's negligence. Marvin argued that the uncontradicted evidence disclosed that Chad was negligent as a matter of law in failing to keep a proper lookout, trying to pass the York vehicle when it was unsafe to do so, driving too fast for the conditions, failing to have his vehicle under reasonable control, and failing to yield the right-of-way.

In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. In order to sustain a motion for directed verdict, the 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. *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994); *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993).

Having reviewed the record and having resolved any controverted facts and reasonable inferences which can be drawn therefrom in Chad's favor, we find this assignment of error to be without merit.

### 2. Joint Enterprise Theory

As his second assignment of error, Marvin contends that the

trial court erred when it instructed the jury on the joint enterprise theory because the facts in the instant case could not have supported a finding of joint enterprise. The trial court instructed the jury that Chad was presenting a defense wherein Chad alleged that "at the time of the accident [Marvin and Mary] were engaged in a joint enterprise and that by virtue of that fact, any negligence of Mary [was] imputed to [Marvin] as his negligence." The trial court defined joint enterprise as follows:

> Two or more persons are said to be engaged in a joint enterprise when the following elements are found to exist:
>
> 1. An agreement, expressed or implied, between such persons to enter into an undertaking;
>
> 2. A common purpose to be carried out by such undertaking;
>
> 3. A common interest in that purpose among such persons, and
>
> 4. An equal right in each of such persons to control the manner of performance and the agencies used therein although such performance may be entrusted to one or fewer than all of such persons. Such equal right of control may arise when the nonperforming person makes or joins in making affirmative decisions with the performing person as to the operation of the means of carrying out the common purpose.

The trial court's jury instruction defined joint enterprise in accordance with the definition stated in *Strother v. Herold*, 230 Neb. 801, 433 N.W.2d 535 (1989). Accord, *Kremlacek v. Sedlacek*, 190 Neb. 460, 209 N.W.2d 149 (1973); *Kleinknecht v. McNulty*, 169 Neb. 470, 100 N.W.2d 77 (1959); *Bartek v. Glasers Provisions Co., Inc.*, 160 Neb. 794, 71 N.W.2d 466 (1955). However, our review of the language in *Strother* now leads us to believe that an additional element is necessary to properly define joint enterprise under Nebraska law.

The Restatement (Second) of Torts § 491, comment *c*. at 548 (1965), defines joint enterprise as follows:

> The elements which are essential to a joint enterprise are commonly stated to be four: (1) an agreement, express or implied, among the members of the group; (2) a common

> purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

The jury instruction administered by the trial court in the case at bar, as dictated by *Strother*, was consistent with the elements set forth in the Restatement, except for the third element. The trial court did not include language indicating that the jury had to find a common *pecuniary* interest between Marvin and Mary. Rather, from the instruction administered by the trial court, the jury could have applied the joint enterprise theory to any common interest shared by Marvin and Mary, pecuniary or not.

While this court has never specifically held that the joint enterprise defense in negligence cases should be limited to situations where the parties share a pecuniary interest, we believe that such a rule is preferable.

> The doctrine of "joint enterprise" derives from the principles of agency and partnership law. [Citation omitted.] It is an undertaking to carry out a small number of acts or objectives, which is entered into by associates under such circumstances that all have an equal voice in directing the conduct of the enterprise. The law then considers that each associate is the agent or servant of the others, and that the act of any one within the scope of the enterprise is to be charged vicariously against the rest. [Citation omitted.] Vicarious liability means that, by reason of some relation existing between two parties, the negligence of the first is to be charged against the second, although the second has played no part in it, and has done nothing whatever to aid or encourage it, or indeed has done everything he can to prevent it. The justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. [Citation omitted.]
>
> . . . "By limiting the application of the doctrine to an enterprise having a business or pecuniary purpose, we will be avoiding the imposition of a basically commercial concept to non-commercial situations which are more often matters of friendly or family cooperation and

> accommodation." [*Easter v. McNabb*, 97 Idaho 180, 182, 541 P.2d 604, 606 (1975)], *citing* PROSSER, THE LAW OF TORTS § 72 (4th Ed.1971).

*Maselli v. Ginner*, 119 Idaho 702, 705, 809 P.2d 1181, 1184 (Idaho App. 1991). See, also, *Campanella v. Zajic*, 62 Ill. App. 3d 886, 379 N.E.2d 866 (1978) (limiting application of the joint enterprise defense in negligence actions to business enterprises); *Popejoy v. Steinle*, 820 P.2d 545 (Wyo. 1991) (same).

We now hold that in order to allege a joint enterprise or joint venture defense in a negligence case, a defendant must, in addition to proving the elements set forth in *Strother*, provide evidence of a common pecuniary interest between the parties alleged to be involved in the joint enterprise. In doing so, we officially adopt the definition of joint enterprise set forth above from the Restatement. Our holding promotes the more desirable policy of limiting the joint enterprise defense to its business and commercial roots. See *Maselli v. Ginner, supra*.

In the case at bar, there was no evidence of a pecuniary relationship between Marvin and Mary. The situation in the instant case was a normal family outing interrupted by a collision with a deer, and not the joint enterprise contemplated by the rule we have stated. See *Bartek v. Glasers Provisions Co., Inc., supra*. See, also, *Maselli v. Ginner, supra*. Therefore, it was error for the trial court to instruct the jury regarding the joint enterprise defense.

Our finding that the trial court erred in instructing the jury as to the joint enterprise theory necessitates that we reverse the jury's verdict and remand the instant case for a new trial. However, we must address Marvin's contention regarding the assumption of risk defense in the event that the issue arises on retrial.

### 3. Assumption of Risk

As his third assignment of error, Marvin argued that the trial court should not have instructed the jury on the assumption of risk defense. The challenged jury instruction read, in part:

> A. Issues
>
> In defense to the plaintiff's claim, the defendants claim

that the plaintiff assumed the risk of any injury or damages he suffered by reason of his assuming the risk of riding in a motor vehicle at night with a defective or damaged headlight.

. . . .

B. Burden of Proof

In connection with this defense of assumption of risk, the burden is upon the defendants to prove by the greater weight of the evidence each and all of the following:

1. That the plaintiff knew of and understood the specific danger of riding in an automobile with a defective or damaged headlight.

2. That the plaintiff voluntarily exposed himself to that danger; and

3. That the plaintiff's injury and damages occurred as a result of exposure to that danger.

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. *Storjohn v. Fay*, 246 Neb. 454, 519 N.W.2d 521 (1994). Before the issue of assumption of risk may be submitted to the jury, evidence must show that the plaintiff knew of the danger, understood the danger, and voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's injury. *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994).

In *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 970, 485 N.W.2d 748, 757–58 (1992), this court stated:

> " 'Before the defense of assumption of risk is submissible to a jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage. [Citations omitted.] "[E]xcept where he expressly so agrees, a plaintiff does not assume a risk of harm *arising from the defendant's conduct* unless he then knows of the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and

> voluntarily accepts the risk." . . .' "

(Emphasis supplied.) (Quoting *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991)). Accord *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988). In reference to assumption of risk, Prosser and Keeton stated:

> [T]he plaintiff is aware of a risk *that has already been created by the negligence of the defendant*, yet chooses voluntarily to proceed to encounter it—as where he has been supplied with a chattel which he knows to be unsafe, yet proceeds to use it anyway; or where he proceeds to walk over debris on the sidewalk carelessly strewn and left there by a construction contractor. If these are voluntary choices, the plaintiff may be found to have accepted the situation, and consented to relieve the defendant of his duty.

(Emphasis supplied.) W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 68 at 481 (5th ed. 1984).

> A plaintiff who voluntarily exposed himself or his property to a known and appreciated danger *due to the negligence of defendant* may not recover for injuries sustained thereby . . . . On the other hand, recovery will be defeated only when the negligence causing the injury can reasonably be considered as having been included in the risk to which his position exposed him. *The doctrine of assumption of risk is inapplicable . . . where, apart from the assumed risk, defendant or a third person was negligent, and such negligence was the proximate cause of the injury suffered, unless plaintiff participated in such negligent acts or knew or had reason to believe that they were being committed or were about to be committed.*

(Emphasis supplied.) 65A C.J.S. *Negligence* § 174(4) at 299-300 (1966).

As indicated by the cited propositions, a defendant may assert the assumption of risk defense only when the facts indicate that the plaintiff has knowingly assumed the risk of a dangerous situation created by the negligence of the *defendant*. See the Restatement, *supra*, § 496A. In the case at bar, Chad argues that Marvin assumed the risk of riding in the minivan when it

had only one headlight. However, that danger, if it was a danger, was not created by Chad. Rather, it was created when the minivan struck a deer.

One does not assume the risk of unknown or hidden dangers. *Vanek v. Prohaska*, 233 Neb. 848, 448 N.W.2d 573 (1989); *Mandery v. Chronicle Broadcasting Co., supra*. Marvin could not have assumed the risk of the danger created by Chad, because that danger was unknown to Marvin. Thus, it was improper for the trial court to instruct the jury on the assumption of risk defense.

### 4. Contributory Negligence

In his fourth and fifth assignments of error, Marvin contends that the trial court erred when it instructed the jury on the contributory negligence defense and that the instruction administered by the trial court misstated the law. A review of the jury instructions and the arguments set forth in the parties' appellate briefs reflects that the only contributory negligence alleged by Chad was directed at Mary's act of driving with a missing headlight. No contributory negligence was alleged to have arisen directly from any act performed by Marvin. We held above that any negligence on Mary's part could not be imputed to Marvin. Therefore, we must also hold that it was error for the trial court to instruct the jury on contributory negligence. Our decision makes it unnecessary to address Marvin's contention that the trial court's contributory negligence instruction misstated the law.

## V. CONCLUSION

Construing the evidence most favorably to Chad, we determine that the trial court did not err in refusing to direct a verdict in Marvin's favor with regard to Chad's alleged negligence. However, the trial court did err when it instructed the jury on the affirmative defenses of joint enterprise, assumption of risk, and contributory negligence.

Reversed and remanded for a new trial.

White, J., concurs.

# JIM'S, INC., APPELLANT, V. JOHN M. WILLMAN, JR., APPELLEE.

527 N.W.2d 626

Filed February 17, 1995. No. S-93-585.

1. **Summary Judgment: Appeal and Error.** In review of 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 granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts.
3. **Summary Judgment: Proof.** A party moving for summary judgment must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted.
4. ____: ____. After the moving party has shown facts entitling it to summary 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.
5. **Judges: Recusal: Waiver.** A party may be said to have waived his or her right to obtain a judge's disqualification when the alleged basis therefor has been known to the party for some time, but the objection is raised in an untimely fashion, well after the judge has participated in the proceedings.
6. **Actions: Equity: Judges: Recusal: Appeal and Error.** Generally, a ruling of the trial court on a motion to disqualify the trial judge is immaterial on appeal where the case is an action in equity triable de novo.
7. **Judges: Trial.** A judge must be impartial, his or her official conduct must be free from even the appearance of impropriety, and a judge's undue interference in a trial may tend to prevent the proper presentation of the cause of action.
8. **Judges.** A judge must be careful not to appear to act in the dual capacity of judge and advocate.
9. **Judges: Recusal: Appeal and Error.** As a general rule, a motion requesting a judge to recuse himself or herself is addressed to the discretion of that judge, and an order overruling such motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded with directions.

David A. Domina and, on brief, Thomas E. Stine, of Domina & Copple, P.C., and Kathryn L. Mesner, of Mesner & Mesner Law Firm, for appellant.

James A. Beltzer, of Luebs, Beltzer, Leininger, Smith & Busick, for appellee.

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

HASTINGS, C.J.

This was an action in conversion brought by Jim's, Inc., against John M. Willman, Jr., a former employee. Jim's appeals from the order of the district court which sustained Willman's motion for summary judgment.

## STANDARD OF REVIEW

In review of 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. *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994). Summary judgment is granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts. *Id.*

A party moving for summary judgment must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). 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. *Double K, Inc. v. Scottsdale Ins. Co.*, 245 Neb. 712, 515 N.W.2d 416 (1994).

## ASSIGNMENTS OF ERROR

Jim's assigns as error that the trial judge erred in (1) sustaining Willman's second motion for summary judgment, (2) overruling Jim's motion for the judge to recuse himself, and (3) reinstating himself without explanation as to how he resolved any prior prejudice.

## FACTS

Jim's, a retail grocery and variety store, filed a second

amended petition alleging that Willman, an employee of Jim's from November 1986 to November 1989, converted inventory on a weekly basis from Jim's grocery store to Willman's Bottle Market and sold or utilized the inventory for personal gain. Jim's claimed $176,271 in damages based upon the calculated difference in gross profit margins from the time period Willman worked for Jim's and the time period after Jim's fired Willman.

On August 19, 1992, prior to trial, the Honorable James Livingston, judge of the district court for Hall County, recused himself from the case without explanation. On September 4, Judge Livingston, without an express reinstatement order, scheduled a pretrial conference and continued to preside over the case. Neither party objected to Judge Livingston's continuing involvement despite the earlier recusal order.

On December 9, Willman moved for summary judgment. The evidence introduced in connection with that motion was voluminous and consisted of affidavits, depositions, answers to interrogatories, tax returns, canceled checks, ledgers, and other documents, 100 exhibits in all.

On January 14, 1993, the trial court overruled Willman's motion for summary judgment, but directed the case to proceed only upon direct evidence of conversion of property or circumstantial evidence showing that conversion was not merely possible but reasonably probable.

On March 31, Willman filed a motion in limine seeking an order requiring that Jim's not refer to any evidence of boxes placed into Willman's vehicle where the inventory inside the box could not be identified. At a hearing on Willman's motion in limine, several additional exhibits were filed. The court overruled the motion in limine on grounds that the evidence was admissible to prove motive, opportunity, and intent. The court also stated that it would entertain a second motion for summary [illegible] because the exhibit offered by Jim's proved Willman

The judge overruled the motion, explaining that he denied Willman's previous motion for summary judgment because Jim's could trace approximately 67 cartons of cigarettes allegedly converted by Willman from Jim's inventory. According to the judge, however, the new exhibit showing that restitution had been made in regard to the approximately 67 cartons of cigarettes negated any cause of action. The judge stated: "I have prejudged this, but solely based upon the facts of what's been presented by argument of both counsel on the record." The judge further stated that "it's been prejudged because it's been preargued, pretried, prebriefed and everything else." In opposition to Willman's motion for summary judgment, Jim's offered Willman's Bottle Market's income tax returns and financial records.

On June 23, 1993, the district court entered orders denying Jim's motion for recusal and sustaining Willman's second motion for summary judgment.

## ANALYSIS

We address assignments of error Nos. 2 and 3 because they are interrelated and are dispositive of this appeal.

Jim's first argues that the court erred because the trial judge recused himself and then, without explanation or order lifting the recusal, continued to hear the case. In *Drainage District No. 1 v. Suburban Irrigation District*, 139 Neb. 460, 467, 298 N.W. 131, 134–35 (1941), this court stated:

> In addition, in the instant proceeding, it is disclosed that the case was regularly set down for trial at the regular May, 1940, term of the court; the district court regularly convened; the case was called; the issues completed in open court; both parties announced themselves ready for trial; the defendant then presented no challenge to the competency of Judge Tewell to preside and hear this contest, and no question was raised in reference thereto until after the trial was had and the decree rendered. If there was a valid objection to Judge Tewell's right to preside, it certainly had been waived by this conduct of the defendant.
>
> [illegible] conclude that a party may be said to have

waived his or her right to obtain a judge's disqualification when the alleged basis therefor has been known to the party for some time, but the objection is raised in an untimely fashion, well after the judge has participated in the proceedings. See, *In re Disqualification of Pepple*, 47 Ohio St. 3d 606, 546 N.E.2d 1298 (1989); *Singleton v. State*, 173 Ind. App. 606, 364 N.E.2d 1041 (1977).

However, in the second circumstance, the trial judge openly invited the defendant to file an additional motion for summary judgment and for all intents and purposes indicated how he would rule. Jim's timely moved to recuse the trial judge, which motion was overruled.

"We are aware that generally a ruling of the trial court on a motion to disqualify the trial judge is immaterial on appeal to the Supreme Court where the case is an action in equity triable de novo." *Franks v. Franks*, 181 Neb. 710, 715, 150 N.W.2d 252, 255 (1967). However, we are more concerned with how the litigant perceives the practice which was employed by the trial judge in this instance.

We recognize that in an effort to expedite litigation, a trial judge may on occasion hasten the process along by suggesting to one party that he or she will favorably entertain a particular pleading. Nevertheless, that practice is to be discouraged. A judge must be impartial, his or her official conduct must be free from even the appearance of impropriety, and a judge's undue interference in a trial may tend to prevent the proper presentation of the cause of action. *Id.* A judge must be careful not to appear to act in the dual capacity of judge and advocate. *State v. Brown*, 124 Ariz. 97, 602 P.2d 478 (1979).

Although it is generally true that a motion requesting a judge to recuse himself or herself is addressed to the discretion of that judge and an order overruling such motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law, *State v. Richter*, 240 Neb. 913, 485 N.W.2d 201 (1992), nevertheless, in this instance and under these circumstances, the judge should have recused himself from hearing the second motion for summary judgment.

The judgment of the district court is reversed, and the cause is remanded for further proceedings with directions that the trial

judge recuse himself from the case.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., concurring.

Although I agree with the judgment reached by the majority, I write separately because experience has taught that the use of soft and ambiguous language more often than not leads to confusion and the need to answer even more difficult questions later on.

The practice of a judge suggesting to one party that a particular pleading will be entertained favorably must not only "be discouraged," it is to be condemned and prohibited. As the majority opinion itself acknowledges, a judge must not only be impartial but must appear to be so. *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984) (actions of trial judge should never be such as to warrant any assertion that judge assisted party).

It is worth remembering that Canon 2 of the Nebraska Code of Judicial Conduct requires that a judge avoid impropriety and the appearance of impropriety in all activities and that Canon 3 thereof requires that a judge perform judicial duties impartially. How either the reality or the appearance of impartiality can be achieved when a judge joins forces with a party by telling it how to try the case so as to achieve a favorable ruling completely escapes me.

As observed in *Franks v. Franks*, 181 Neb. 710, 715-16, 150 N.W.2d 252, 256 (1967):

> "A proper administration of the law demands not only that judges refrain from actual bias but also that they avoid all appearance of unfairness. All doubt or suspicion of bias should be jealously guarded against and, if possible, completely eliminated; and, when the circumstances and conditions surrounding a litigation are of such nature that they might cast doubt on the impartiality of any judgment the judge may pronounce, the judge should certify his disqualification. Thus disqualification of a particular judge for bias or prejudice, although not technically required by the circumstances, is sometimes proper in order to dispel any thought or suspicion that the litigants may not be receiving impartial justice . . . ."

"[T]he right to a fair trial is the 'foundation stone upon which our present judicial system rests,' and . . . there is an indispensable right to trial presided over by a judge who is 'impartial and free of bias or prejudice.' " *State v. Brown*, 124 Ariz. 97, 99, 602 P.2d 478, 480 (1979). Accordingly, a "judge must be careful never to act in the dual capacity of judge and advocate." *Id.* at 100, 602 P.2d at 481.

Once facts have been set forth that create a reasonable inference that a judge has a particular bent of mind which will prevent the judge from dealing fairly with the party seeking recusal, it is incumbent upon the trial judge to recuse himself or herself. *Wright v. District Court*, 731 P.2d 661 (Colo. 1987).

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FUTURE MOTELS, INC., A NEBRASKA CORPORATION, APPELLANT, V. CUSTER COUNTY BOARD OF EQUALIZATION, APPELLEE.

527 N.W.2d 861

Filed February 24, 1995. No. S-93-369.

1. **Taxation: Valuation: Evidence: Proof: Appeal and Error.** While an appeal from a county board of equalization is heard de novo in the district court, Neb. Rev. Stat. § 77-1511 (Reissue 1990) requires that the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the appellant is assessed too low. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.
2. **Taxation: Service of Process: Records: Appeal and Error.** No proceedings shall be held on the appeal of the taxpayer until the summons has been served and the transcript has been filed in district court.
3. **Taxation: Records: Appeal and Error.** In an appeal made pursuant to Neb. Rev. Stat. § 77-1510 (Cum. Supp. 1992), it is the responsibility of the taxpayer to file with the clerk of the district court a transcript of the proceedings held before the county board of equalization.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Appeal dismissed.

Steven O. Stumpff and Cheryl C. Pollard, of Stumpff Law Office, for appellant.

Glenn A. Clark, Custer County Attorney, for appellee.

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

WRIGHT, J.

Future Motels, Inc., appeals a judgment of the Custer County District Court which affirmed a decision of the Custer County Board of Equalization (Board). The district court found (1) that Future Motels had not met its burden of proof by showing that the value of its property had been arbitrarily or unlawfully fixed by the Board in an amount greater than its actual value, or by showing that the value had not been fairly and proportionately equalized with all other property in Custer County, and (2) that the valuations placed on the subject properties were correct. Under the authority granted us by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1994) to regulate the caseloads of the appellate courts of this state, we removed the appeal to this court.

## SCOPE OF REVIEW

While an appeal from a county board of equalization is heard de novo in the district court, Neb. Rev. Stat. § 77-1511 (Reissue 1990) requires that the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the appellant is assessed too low. *Helvey v. Dawson Cty. Bd. of Equal.*, 242 Neb. 379, 495 N.W.2d 261 (1993). The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board. *Id.*

## FACTS

Future Motels is the owner of a Super 8 Motel located in Broken Bow, Nebraska. The Custer County assessor valued Future Motels' land and improvements at $596,850 for 1992 taxation purposes. Future Motels received a notice of valuation and filed a written property valuation protest with the Board, requesting that Future Motels' land and improvements be valued at $150,000. Future Motels' protest specifically claimed that (1) the property was not valued properly with other assessed valuations of similar properties in Broken Bow, (2) the property

was not valued properly with other Super 8 Motels located in western Nebraska, (3) the appraisal was done by a Lincoln appraiser rather than a "western Nebraska appraiser," and (4) the excess appraisal caused Future Motels to pay more than its proportional share of taxes.

It is assumed for purposes of the facts herein that the Board did not grant the relief Future Motels requested in its protest, because Future Motels filed a petition with the district court for Custer County, asking for relief from the Board's determination. In its petition, Future Motels alleged that on or about May 26, 1992, the Board adjusted the valuation of Future Motels' property by decreasing the value of the improvements by 20 percent. Future Motels also filed a document entitled "Notice of Appeal, Deposit of Bond, and Request for Transcript." However, nowhere in the record do we find the transcript of the proceedings held before the Board. The district court affirmed the decision of the Board in all respects, and Future Motels timely filed its notice of appeal.

## ANALYSIS

At the time of Future Motels' appeal to the district court, the procedure for appeal was governed by Neb. Rev. Stat. § 77-1510 (Cum. Supp. 1992), which stated:

> Appeals may be taken from any action of the county board of equalization to the district court in the following manner:
>
> . . . .
>
> (2) The appeal shall be deemed to be filed for purposes of granting jurisdiction with the filing of the petition and praecipe for summons in the district court and the filing of a request for a transcript with the county clerk. The county clerk shall prepare the transcript as soon as practicable after requested and shall deliver the same to the taxpayer for filing with the clerk of the district court upon receipt from the taxpayer of the appropriate fees for its preparation. No proceedings shall be held on the appeal of the taxpayer until the summons has been served and the transcript has been filed in district court . . . .

In accordance with § 77-1510, Future Motels invoked the

jurisdiction of the district court by filing a petition and a praecipe for summons in the district court and a request for transcript with the Custer County clerk. On July 8, 1992, Future Motels filed with the district court a copy of the request filed with the Custer County clerk. The document stated: "The undersigned requests that a complete transcript be prepared and filed with the District Court Clerk."

In *United Way of the Midlands v. Douglas County Board of Equalization*, 199 Neb. 323, 259 N.W.2d 270 (1977), we held that it was the responsibility of the clerk of the board to file the transcript with the district court. However, the statutory language which governed that case stated: " 'The clerk of the board, upon such appeal being taken . . . shall make out a complete transcript of the proceedings of the board relating to the matter . . . and shall deliver the same to the clerk of the district court . . . .' " *Id.* at 326, 259 N.W.2d at 271. The statute governing Future Motels' case, however, directed the county clerk to deliver the Board transcript to "*the taxpayer* for filing with the clerk of the district court." (Emphasis supplied.) See § 77-1510(2).

The Legislature is presumed to know language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended. *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994); *Jeter v. Board of Education*, 231 Neb. 80, 435 N.W.2d 170 (1989). Pursuant to § 77-1510, the responsibility for filing the Board transcript with the district court rested with the taxpayer, Future Motels. The record does not contain a Board transcript that was to have been filed in the district court.

In an appeal to the district court from the board of equalization, § 77-1510(2) directed that "[n]o proceedings shall be held on the appeal of the taxpayer until the summons has been served and the [Board] transcript has been filed in district court." In the absence of the Board transcript, the district court should not have held proceedings in this case. Therefore, the appeal is dismissed.

APPEAL DISMISSED.

WHITE, J., concurs in the result.

# STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. POPCO, INC., SIGN OWNER AND LANDOWNER, APPELLANT.

528 N.W.2d 281

Filed March 3, 1995. No. S-93-184.

1. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
2. **Constitutional Law: Statutes: Ordinances: Appeal and Error.** The constitutionality of a statute or ordinance is a question of law; accordingly, the Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Constitutional Law: Statutes: Proof.** In addressing a constitutional challenge to a statute, the issue is whether the statute impinges on some fundamental constitutional right or whether the statute creates a suspect classification. When a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate governmental purpose.

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

Tim B. Streff and J. Patrick Green, of Wintroub, Rinden & Sens, for appellant.

Don Stenberg, Attorney General, and K. Osi Onyekwuluje for appellee.

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

WRIGHT, J.

Popco, Inc., appeals the judgment of the Douglas County District Court which ordered Popco to remove the contents (the two advertisements) of a billboard from its property and enjoined Popco from maintaining on its property any sign which violates state law and the regulations of the Nebraska Department of Roads.

## SCOPE OF REVIEW

The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994); *Henry v. Rockey*, 246 Neb. 398, 518 N.W.2d 658 (1994).

The constitutionality of a statute or ordinance is a question

of law; accordingly, the Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993).

## FACTS

In 1980, Popco, Inc., erected a sign within 660 feet of the south side of Interstate 80 at or near mile post 448.5 in Douglas County on land owned by Popco. The Nebraska Department of Roads (State) brought this action, seeking a permanent injunction (1) requiring Popco to remove the sign, which is visible from the Interstate, and (2) enjoining Popco from maintaining a sign which violates state law and the regulations of the Department of Roads.

At the commencement of the action, the sign advertised the soft drink Dr Pepper and Little King sandwich shops. At the time of trial, the sign advertised Dr Pepper and Ideal Pure Water. Popco owns a building that is located on the same tract of land as the sign. The building is leased to a leather-tanning business. A machine on the premises offers soft drinks, including Dr Pepper, but Ideal Pure Water is not available on the premises.

Interstate 80 is designated as a part of the National System of Interstate and Defense Highways and/or federal-aid primary road system of the State of Nebraska. The State claimed in its amended petition that the erection and maintenance of Popco's sign violated the highway laws of the State of Nebraska set forth in Neb. Rev. Stat. § 39-1320.06 (Reissue 1993) and 410 Neb. Admin. Code, ch. 3, § 002 (1983). The State alleged that by refusing to remove the sign, Popco had caused irreparable injury to the welfare and safety of the general public in that the state was subject to loss of a substantial portion of its federal highway funds if the state failed to adequately control advertising along the Interstate. The State also asserted that there was no adequate remedy at law.

Popco alleged in its answer that the State sought to remove Popco's property without just compensation, in violation of the 5th and 14th Amendments to the U.S. Constitution and in violation of article I, § 21, of the Nebraska Constitution; that

§ 39-1320.06 is unconstitutionally vague; and that the prohibition of off-premises advertising is not reasonably related to any valid governmental objective or consideration falling within the police power of the State of Nebraska. Popco contended that § 39-1320.06 and the rules and regulations promulgated thereunder violate the Nebraska Constitution and the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. In the trial court, Popco made no direct assertion that the statute in question violates article III, § 18, of the Nebraska Constitution.

Following a trial on the issues, the district court for Douglas County found that the constitutional issues raised as affirmative defenses by Popco had no merit and, relying upon *State v. Mayhew Products Corp.*, 204 Neb. 266, 281 N.W.2d 783 (1979), found that the statutes governing highway advertising signs were constitutional. The court ordered Popco to remove the contents (the two advertisements) of the billboard within 60 days and enjoined Popco from maintaining any sign on the property which was contrary to the statutes of the State of Nebraska and the rules and regulations of the Department of Roads. Popco appeals; we affirm.

## ASSIGNMENT OF ERROR

Popco's sole assignment of error is that the district court erred in failing to find § 39-1320.06 in violation of article III, § 18, of the Nebraska Constitution.

## ANALYSIS

We have stated that in addressing a constitutional challenge to a statute, the issue is whether the statute impinges on some fundamental constitutional right or whether the statute creates a suspect classification. *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). "When a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate governmental purpose." *State v. Two IGT Video Poker Games*, 237 Neb. 145, 149, 465 N.W.2d 453, 458 (1991). Accord *Robotham v. State, supra*. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *State ex rel. Stenberg v. Douglas Racing*

*Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994); *Henry v. Rockey*, 246 Neb. 398, 518 N.W.2d 658 (1994).

In this case, we focus on whether § 39-1320.06 creates a suspect classification. Popco's argument on appeal is apparently based upon the theory that statutes prohibiting off-premises signs are unconstitutional because they create two classes of advertising, in violation of the constitutional guarantee of equal protection. Article III, § 18, of the Nebraska Constitution provides that the Legislature shall not pass local or special laws "[g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise . . . ." This constitutional provision "concerns itself with disparate treatment in much the same manner as does the language of [the 14th Amendment to the U.S. Constitution], which prohibits a state from making or enforcing any law which denies any person within its jurisdiction 'the equal protection of the laws.' " *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 849, 443 N.W.2d 566, 570 (1989).

A legislative act can violate 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). A legislative classification, in order to be valid, must be based upon some reason of public policy—some substantial difference of situation or circumstances—that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified. *Id.* Classification is proper if the special class has some reasonable distinction from other subjects of like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. *Id.*

Popco argues that the primary difference between on-premises signs and off-premises signs is their impact on federal highway funding. The statutes governing highway advertising signs were enacted in order to obtain financial incentives provided by the federal Highway Beautification Act of 1965. *State v. Mayhew Products Corp.*, 204 Neb. 266, 281 N.W.2d 783 (1979). One of the "state highway purposes" is "[t]he control of outdoor advertising which is visible from the

nearest edge of the right-of-way of the National System of Interstate and Defense Highways and all federal-aid primary roads, to the end that this state may comply with the provisions of 23 U.S.C. 131, as amended." Neb. Rev. Stat. § 39-1320(2)(m) (Reissue 1993).

The statute under attack, § 39-1320.06, provided in part:

> Except as provided in this act, the erection or maintenance of any advertising sign, display, or device which is visible from the main-traveled way of the National System of Interstate and Defense Highways and the system of federal-aid primary roads of the State of Nebraska is hereby prohibited. On-premise [sic] signs, directional and official signs, and notices as defined and controlled in the department's rules and regulations shall be permitted.

The State alleged that Popco's sign is not an on-premises sign, which is a sign that consists solely of the name of the establishment or identifies the establishment's principal or accessory products or services offered on the property on which the sign is located. Signs for which the property owner receives compensation are not considered on-premises signs. See 410 Neb. Admin. Code, ch. 3, § 002.01J (1983). Off-premises signs are not allowed in the "bonus area," which is "[t]hat area along the Interstate System in which the State has controlled outdoor advertising in order to be eligible for an increase in the Federal share of one half of one per centum of the total cost thereof as provided for in Title 23, U.S.C. Section 131." See 410 Neb. Admin. Code, ch. 3, § 002.01A (1983).

Popco's sign cannot be considered an on-premises sign for two reasons. First, the sign is located on the same property as a leather-tanning operation, but the sign itself advertised soft drinks, water, and a sandwich shop. Although evidence was received that a soft-drink machine was located on the premises which houses the leather-tanning business, that does not support a finding that Dr Pepper was a principal or accessory product of the business. Second, evidence was received which showed that Popco was paid $1,000 per month for advertising the soft drink on the sign.

We disagree with Popco's claim that there is no substantial

difference between on-premises signs and off-premises signs. An on-premises sign's purpose is to inform the traveling public as to the location of a business on the property. The distinction between on-premises signs and off-premises signs is necessary to limit the number of signs erected. It is not difficult to predict the extensive proliferation of signs which would occur along the Interstate if off-premises signs were allowed without regulation. The classification of on-premises signs and off-premises signs is a reasonable method of controlling the number of signs along the Interstate and bears a rational relationship to the goal of public health and safety. The classification also bears a rational relationship to the legislative intent that the state comply with federal regulations concerning highway advertising.

In *State v. Mayhew Products Corp., supra*, the State sought an injunction requiring the removal of an outdoor advertising sign located within 660 feet of the right-of-way of an interstate highway. We affirmed the trial court's entry of an injunction and order for removal of the sign. The defendant had contended that the statutes governing highway advertising signs were unconstitutional because they constituted a taking of property without just compensation, deprived the defendant of property without due process of law, impaired the obligation of contracts, and imposed retroactive provisions constituting ex post facto laws. We noted that virtually all judicial opinions have upheld the constitutionality of legislative restrictions on highway advertising structures as a valid exercise of the police power. We held that "the provisions of sections 39-1320 to 39-1320.11, R. R. S. 1943, constitute a reasonable and valid exercise of the police power which bears a substantial relation to the public health, safety, and general welfare, and that the statutes are constitutional." *State v. Mayhew Products Corp.*, 204 Neb. 266, 270, 281 N.W.2d 783, 786 (1979).

It was the Legislature's intent that the state comply with federal regulations concerning highway advertising in order to receive federal funding for highway projects. In this instance, the opportunity to receive federal funding is a reasonable basis for limiting the number of signs which are visible from an interstate highway and is in the interest of the public welfare. The Department of Roads' regulations do not proscribe all

off-premises signs. It is only those signs within the bonus area of the interstate highway which are regulated, and the purpose of the regulation is related to public health and safety.

## CONCLUSION

Popco has not sustained its burden to demonstrate that § 39-1320.06 violates article III, § 18, of the Nebraska Constitution. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

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# IN RE APPLICATION OF CITY OF GRAND ISLAND, NEBRASKA. CITY OF GRAND ISLAND, NEBRASKA, APPELLEE, V. SOUTHERN NEBRASKA RURAL PUBLIC POWER DISTRICT, APPELLANT.

527 N.W.2d 864

Filed March 3, 1995. No. S-93-511.

1. **Nebraska Power Review Board: Appeal and Error.** A decision of the Nebraska Power Review Board will be affirmed on appeal if it is supported by evidence in the record and is not arbitrary, capricious, or otherwise illegal.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Statutes: Legislature: Intent.** When asked to interpret a statute, a 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.
4. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **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.
6. **Nebraska Power Review Board: Municipal Corporations: Public Utilities:**

**Annexation.** A municipally owned electric system, serving such municipality at retail, shall have the right, upon application to and approval by the Nebraska Power Review Board, to serve newly annexed areas of such municipality.

7. **Municipal Corporations: Public Utilities: Annexation: Time.** Neb. Rev. Stat. § 16-120 (Reissue 1990) requires a city to furnish city services to newly annexed areas within 1 year after annexation.

Appeal from the Nebraska Power Review Board. Affirmed.

Kenneth H. Elson for appellant.

Keith Sinor, Grand Island City Attorney, for appellee.

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for amicus curiae Norris Public Power District.

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

FAHRNBRUCH, J.

Southern Nebraska Rural Public Power District (Southern) claims that the Nebraska Power Review Board (Board) erred when it denied Southern compensation for a part of Southern's power service area which was transferred to the City of Grand Island (City).

We affirm the denial of compensation to Southern.

This appeal was originally filed with the Nebraska Court of Appeals. It was removed to this court pursuant to our authority to regulate the caseloads of the appellate courts.

## STATEMENT OF THE FACTS

Ponderosa Lake Estates subdivision was platted as an addition to the City. On November 7, 1991, the subdivision was included within the incorporated limits of the City. A portion of the subdivision was located within Southern's power service area.

On October 27, 1992, the City filed an application with the Board to have that portion of the subdivision located within Southern's power service area transferred to the City's power service area. On April 21, 1993, a hearing was held before the Board. Southern conceded the City's right to have the annexed property in Southern's power service area transferred to the City's power service area. However, Southern contended that

the City must pay compensation for the taking of the service area transferred to the City.

It is undisputed that Southern has no powerlines, facilities, or customers located within the area annexed by the City. Nevertheless, Southern contends that it should be compensated for the loss of its right to serve such area. C. J. Hoke, Southern's general manager, testified that Southern, for the next 10 years, should receive 25 percent of the gross revenue the City will receive from providing electrical service to the inhabitants in that portion of the subdivision transferred to the City. This request was based upon a formula developed by the South Dakota Legislature.

The Board granted the City's request to transfer Southern's service area in the subdivision to the City and denied Southern's request for compensation. Southern timely filed this appeal.

## ASSIGNMENTS OF ERROR

Restated, Southern claims that the Board acted arbitrarily and unreasonably (1) in refusing to determine the total economic impact on Southern by the transfer of a portion of Southern's service area to the City, and (2) in failing to establish the amount of compensation the City should pay to Southern for the loss of Southern's right to serve the power needs within the area transferred to the City.

## STANDARD OF REVIEW

A decision of the Nebraska Power Review Board will be affirmed on appeal if it is supported by evidence in the record and is not arbitrary, capricious, or otherwise illegal. *In re Application of City of Lexington*, 244 Neb. 62, 504 N.W.2d 532 (1993).

## ANALYSIS

The first of Southern's assignments of error claims that the Board acted arbitrarily and unreasonably in refusing to determine the total economic impact on Southern by the transfer of the portion of Southern's certified service area to the City.

Southern argues that even though it had no facilities or customers located within the portion of property annexed by the City, under Neb. Rev. Stat. § 70-1010(2) (Reissue 1990), it is

entitled to compensation for the taking of its loss of right to serve within such area. Essentially, Southern is claiming that the Board misinterpreted the applicable statutes.

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. *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994); *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994). When asked to interpret a statute, a 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. *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994); *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994).

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *No Frills Supermarket, supra*; *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994).

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. *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993). See *Grady, supra*.

The City is a municipality that owns and operates its own electric system that serves the inhabitants of the municipality. The City has a statutory right to serve areas within its corporate limits, which includes newly annexed areas. Neb. Rev. Stat. § 70-1008(2) (Reissue 1990) provides in part: "A municipally owned electric system, serving such municipality at retail, shall have the right, upon application to and approval by the [Nebraska Power Review Board], to serve newly annexed areas of such municipality."

Neb. Rev. Stat. § 16-120 (Reissue 1991) *requires* a city to furnish city services to newly annexed areas within 1 year after

annexation. Section 16-120 provides:

> The inhabitants of territories annexed to such city shall receive substantially the services of other inhabitants of such city as soon as practicable. Adequate plans and necessary city council action to furnish such services shall be adopted not later than one year after the date of annexation, and such inhabitants shall be subject to the ordinances and regulations of such city, except that the one-year period shall be tolled pending final court decision in any court action to contest such annexation.

Thus, Nebraska statutes grant a right to, and impose an obligation upon, a municipal electric system to furnish electric service to the inhabitants within the corporate limits of the municipality and the territory it annexes.

Under § 70-1008, a municipality is authorized to acquire the electric distribution facilities and customers of any other supplier within an area annexed by the municipality. If the municipality wishes to make such acquisition, then it must do so in accordance with the criteria set forth in § 70-1010(2) and make payment for the acquired facilities and customers within 1 year after annexation. Section 70-1008 does not require the municipality to make payment for the value of a rural power district area transferred to a city when there are no facilities or customers for a city to acquire.

If the parties to a transfer of customers and facilities cannot agree upon the value of the transfer, the Board shall determine the total economic impact on the selling supplier. Section 70-1010(2) provides:

> *In the event of a proposed transfer of customers and facilities from one supplier* to another in accordance with this section or section 70-1008 or 70-1009, the parties shall attempt to agree upon the value of *the certified service area and distribution facilities and customers being transferred.* If the parties cannot agree upon the value, then the board shall determine the total economic impact on the selling supplier and establish the price accordingly based on, but not limited to, the following guidelines: *The supplier acquiring the certified service area, distribution facilities, and customers shall purchase the electric*

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

(Emphasis supplied.)

Southern contends that § 70-1010(2) imposes a duty upon the Board to determine the compensation the City should pay Southern for loss of its right to provide electrical service within the area transferred. Section 70-1010(2) clearly provides that the Board shall determine economic impact on the selling supplier when a proposed *transfer of customers and facilities* from one supplier to another is involved and the parties are unable to agree upon the value of the certified service area, distribution facilities, and customers being transferred. In the present case, there were no transfers of customers or facilities from Southern to the City because Southern had none. The area transferred to the City was undeveloped.

In this case, Southern urged the Board to adopt South Dakota's legislative formula to determine economic impact on Southern because of the transfer of its undeveloped area to the City. It would be improper for the Board to do so because South Dakota's formula has not been adopted by Nebraska's Legislature. Having determined that the Board had no statutory authority to determine the economic impact of the transfer upon Southern, the Board could not have erred in failing to establish

the cash consideration to be paid by the City to Southern.

## CONCLUSION

In the case at bar, the Board (1) acted properly in transferring that portion of the subdivision located in Southern's power service area to the City, and (2) did not act arbitrarily, capriciously, or illegally in declining to award Southern compensation on account of the transfer.

AFFIRMED.

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# SLACK NURSING HOME, INC., APPELLEE, V. DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEBRASKA, AND MARY DEAN HARVEY, DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEBRASKA, APPELLANTS.

528 N.W.2d 285

Filed March 3, 1995. No. S-93-643.

1. **Constitutional Law: Statutes: Presumptions: Proof.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. The burden is upon the party claiming a statute is unconstitutional to establish its unconstitutionality. The unconstitutionality of a statute must be clearly established before a court may declare it void.
2. **Administrative Law: Words and Phrases.** Under the Administrative Procedure Act, a contested case is a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing. Neb. Rev. Stat. § 84-901(3) (Reissue 1994).
3. **Administrative Law: Notice.** Each agency subject to the Administrative Procedure Act adopts its own rules and regulations for notice and hearing in contested cases. Neb. Rev. Stat. § 84-913 (Reissue 1994).
4. **Administrative Law: Appeal and Error.** Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the Administrative Procedure Act. Neb. Rev. Stat. § 84-917(1) (Reissue 1994).
5. ____: ____. When a petition instituting proceedings for review under the Administrative Procedure Act was filed in the district court before July 1, 1989, the review shall be conducted by the court without a jury on the record of the

agency, and review may not be obtained of any issue that was not raised before the agency unless such issue involves one of the grounds for reversal or modification enumerated in Neb. Rev. Stat. § 84-917(6)(a) (Reissue 1994).

6. ____: ____. When a petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency.
7. **Administrative Law: Judgments: Final Orders: Appeal and Error.** An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act. Neb. Rev. Stat. § 84-918 (Reissue 1994).
8. **Administrative Law: Appeal and Error.** When the petition instituting proceedings for review under the Administrative Procedure Act was filed in the district court before July 1, 1989, the appeal from the district court's order is taken in the manner provided by law for appeals in civil cases and is heard de novo on the record. Neb. Rev. Stat. § 84-918(2) (Reissue 1994). Appeals involving petitions filed on or after July 1, 1989, are reviewed for errors appearing on the record. § 84-918(3).
9. **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.
10. **Administrative Law: Appeal and Error.** In a true de novo review, an appellate court is not limited to considering whether there was sufficient evidence to support an agency director's findings nor whether the district court erred in its determination. Rather, in a true de novo review, the court uses the assignments of error as a guide to the factual issues in dispute and makes an independent factual determination based upon the record.
11. **Administrative Law: Records: Rules of Evidence: Judicial Notice: Appeal and Error.** In a de novo review on the record of an agency, the record consists of the transcripts and bill of exceptions of the proceedings before the agency and facts capable of being judicially noticed pursuant to Neb. Evid. R. 201.
12. **Constitutional Law.** The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as expressly directed or permitted in Neb. Const. art. II, § 1.
13. **Administrative Law: Constitutional Law.** An administrative agency can have duties of a quasi-judicial nature in addition to its rulemaking duties. The conferring upon state agencies or officers of executive or administrative functions requiring the exercise of quasi-judicial powers does not conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred, particularly where provision is made for appeal from decisions of such officers or agencies to the courts.
14. **Administrative Law: Courts: Jurisdiction: Appeal and Error.** Courts have no jurisdiction to review wholly legislative acts, but some agency determinations possess quasi-judicial characteristics and are appealable.

15. **Administrative Law.** Contested cases are quasi-judicial in nature and involve determination of a party's rights.
16. **Administrative Law: Appeal and Error.** Ordinarily, deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent. However, agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
17. **Administrative Law: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed.

Don Stenberg, Attorney General, and Royce N. Harper for appellants.

Lavern R. Holdeman, of Nelson Morris Holdeman & Titus, for appellee.

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

LANPHIER, J.

The Department of Social Services (Department) appeals a finding and order of the district court for Lancaster County, dated June 22, 1993. Slack Nursing Home, Inc., appealed to the district court from the finding and order of the director of the Department dated May 29, 1992. The district court conducted its review de novo on the record of the Department. The Department contends that the district court should have limited its review to a determination of whether the Department's order was supported by substantial evidence, whether the Department acted within the scope of its authority, and whether the Department's decision was arbitrary, capricious, or unreasonable. The Department asserts that the district court's broader review violated Nebraska's separation of powers doctrine. See Neb. Const. art. II, § 1. We hold that the legislatively mandated de novo standard of review in contested case proceedings under the Administrative Procedure Act (APA) does not violate the separation of powers doctrine. However, in this case the district court erred in rejecting the Department's interpretation of its own regulation absent a showing that the Department's interpretation was plainly erroneous or

inconsistent. We, therefore, reverse the decision of the district court and reinstate the finding and order made by the Department dated May 29, 1992.

## STATEMENT OF FACTS

Slack Nursing Home is a long-term-care facility owned by Richard D. Slack and is located in Gothenburg, Nebraska. Slack Nursing Home is certified by the Department as a provider of medicaid long-term-care services. As a long-term-care provider, Slack Nursing Home is subject to the rules and regulations of the Department and the federal medicaid rules and regulations. See, 471 Neb. Admin. Code, ch. 12, § 011 (1990); *Bethesda Found. v. Nebraska Dept. of Soc. Servs.*, 243 Neb. 130, 498 N.W.2d 86 (1993).

In 1965, the State of Nebraska became a participant in the medicaid program pursuant to Neb. Rev. Stat. § 68-1018 (Reissue 1990). The Department administers the program in Nebraska. As a certified provider of medicaid long-term-care services, Slack Nursing Home may apply for reimbursement of direct care expenses subject to the provisions of the Nebraska state plan. To obtain reimbursement under the program, Slack Nursing Home is required to submit its costs by filing a "Long Term Care Cost Report." According to § 011.10, the Long Term Care Cost Report is subject to a desk audit by the Department. If the Department determines that the reimbursement calculated by the facility is incorrect or not allowed by the rules and regulations, the Department is empowered to adjust the Long Term Care Cost Report. § 011.11.

On September 27, 1991, Slack Nursing Home submitted its Long Term Care Cost Report for the fiscal year ending June 30, 1991. The desk audit determined that some of the nursing home's cost claims were incorrect, and the Department completed the necessary adjustments reducing the claims. Slack Nursing Home was notified of these adjustments by a letter dated December 20, 1991.

Slack Nursing Home appealed the adjustments at an administrative hearing held on April 28, 1992. The specific adjustments appealed were claims regarding the nursing home's administrator's salary and for an interest expense on delinquent

property taxes. Only the claim regarding the administrator's salary is before us on appeal.

From the agency hearing, the Department issued a finding and order on May 29, 1992, which found that the Department had applied the methodology provided by state and federal regulations in determining a reasonable rate of compensation for Slack Nursing Home's administrator. Slack Nursing Home timely filed for a review of the agency decision in the district court pursuant to Neb. Rev. Stat. § 84-917 (Reissue 1994).

The district court stated its review of the agency determination under § 84-917 was to be conducted de novo on the record of the Department. In so doing, the district court rejected the Department's argument that the separation of powers doctrine limited the scope of its review to a determination of whether the Department's decision was supported by substantial evidence; whether the Department acted within the scope of its authority; or whether the Department's decision was arbitrary, capricious, or unreasonable.

The district court overturned the Department's interpretation of § 011.06K. This regulation states:

> Compensation received by an administrator, owner, or directly-related parties is limited to a reasonable amount for the services provided. Medicare regulations and administrator salary surveys for the Kansas City Region, adjusted for inflation by the Department of Health and Human Services, are used in determining reasonable salaries for administrators. All compensation received by an Administrator is included in the Administration Cost Category, unless an allocation has prior approval from the Department. The regulations and surveys are used as a guideline in determining reasonable salaries for owners or related parties holding other positions at the facility.

The district court interpreted this regulation as providing that the salary surveys for the Kansas City region were to be used only as a guideline in determining reasonable salaries. The Department argues that § 011.06K, when taken in its entirety and with due note of the key words "are used," dictates that salary surveys for the Kansas City region must be used to

determine the maximum amount of reimbursement a facility can receive for an administrator's salary. The maximum reimbursement allowed by the Kansas City salary surveys was less than the amount claimed by Slack Nursing Home. Therefore, the Department adjusted Slack's claim downward.

In accordance with its interpretation of § 011.06K, the district court held that the Kansas City salary surveys were merely a guideline. The court held that the salary claimed by Slack Nursing Home was reasonable and that the Department should not have adjusted Slack Nursing Home's claim for its administrator's salary downward.

## SCOPE OF REVIEW

We have stated that a statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. The burden is upon the party claiming a statute is unconstitutional to establish its unconstitutionality. *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994); *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992); *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 473 N.W.2d 428 (1991). Moreover, the unconstitutionality of a statute must be clearly established before a court may declare it void. *State v. Philipps, supra*.

## ANALYSIS

### STANDARD OF REVIEW UNDER THE APA

The APA provides general principles governing agency rulemaking and promulgation. See Neb. Rev. Stat. §§ 84-901 through 84-920 (Reissue 1994). The APA is intended to establish minimum administrative procedures applicable to all agencies and provides for judicial review of agency determinations. §§ 84-916 through 84-918. However, the Legislature has removed some appeals from administrative agencies from the APA, and the appellate procedures and standards of review may differ in those cases from the provisions discussed below. See, e.g., *County of Adams v. State Bd. of Equal., ante* p. 179, 525 N.W.2d 629 (1995); *Clayton v. Nebraska Dept. of Motor Vehicles, ante* p. 49, 524 N.W.2d 562 (1994).

Parties affected by the rules or regulations of a state agency

can obtain a hearing before the agency. Under the APA, a contested case is "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." § 84-901(3). Each agency adopts its own rules and regulations for notice and hearing in contested cases. § 84-913. Contested case proceedings are conducted by hearing officers who may admit and give probative effect to evidence. The rules of privilege and evidence may be applicable. § 84-914(1).

"Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the Administrative Procedure Act." § 84-917(1). Section 84-917(5) and (6) govern the scope of that review:

> (5)(a) When the petition instituting proceedings for review was filed in the district court before July 1, 1989, the review shall be conducted by the court without a jury on the record of the agency, and review may not be obtained of any issue that was not raised before the agency unless such issue involves one of the grounds for reversal or modification enumerated in subdivision (6)(a) of this section. When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency.
>
> (b) If the court determines that the interest of justice would be served by the resolution of any other issue not raised before the agency, the court may remand the case to the agency for further proceedings.
>
> (6)(a) When the petition instituting proceedings for review was filed in the district court before July 1, 1989, the court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is:
>
> (i) In violation of constitutional provisions;
>
> (ii) In excess of the statutory authority or jurisdiction of the agency;
>
> (iii) Made upon unlawful procedure;

(iv) Affected by other error of law;

(v) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or

(vi) Arbitrary or capricious.

(b) When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings.

An aggrieved party may obtain review of any judgment or final order entered by a district court under the APA. § 84-918. Section 84-918 provides the standard of review for the appellate court. When the petition instituting proceedings for review was filed in the district court before July 1, 1989, the appeal from the district court's order is taken in the manner provided by law for appeals in civil cases and is heard de novo on the record. § 84-918(2). Appeals involving petitions filed on or after July 1, 1989, are reviewed for errors appearing on the record. § 84-918(3). 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).

At issue is the effect of the 1989 amendments upon the district court's standard of review. The Department states that the Legislature was simply trying to place a broader standard of review with the district court and a narrower one with the appellate courts in order to rectify problems identified by this court in *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). The Department argues that the Legislature failed to consider the effect of its 1989 amendments upon the separation of powers doctrine. Further, the Department asserts that the Legislature failed to define the meaning of "de novo review" and that the term has been given different meanings in different contexts.

In *Haeffner, supra*, we examined §§ 84-917 and 84-918 as those sections existed prior to the 1989 amendments. We held that § 84-917(6) limited a district court's review to a

determination of whether the agency's decision violated constitutional provisions; exceeded the agency's statutory authority; was made upon unlawful procedure; was affected by other error of law; was unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or was arbitrary or capricious.

In *Haeffner*, we further held that the appropriate standard of review for this court was prescribed by § 84-918. This court's review under § 84-918 was conducted without the limitations imposed on district courts by § 84-917(6)(e) and (f). Our review was de novo on the record. *Haeffner, supra* (*overruling, The 20's, Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 212 N.W.2d 344 (1973), and *Weiner v. State ex rel. Real Estate Comm.*, 214 Neb. 404, 333 N.W.2d 915 (1983)).

Subsequently, the Nebraska Legislature enacted 1989 Neb. Laws, L.B. 213, and amended § 84-917 to require district courts to review appeals from agency determinations in contested cases de novo on the record. The Statement of Intent for L.B. 213 indicates:

> Under current law [pre-1989 amendment], the district court which first reviews an agency decision on appeal applies the narrow criteria found in section 84-917. On appeal to the Supreme Court under current section 84-918, the Supreme Court reviews the district court's judgment de novo on the record, which is a much broader standard of review. LB 213 would place the broader standard of review (de novo on the record) in the district court, and then a narrower standard of review in the Supreme Court will be applied (errors appearing on the record). This change would take place with appeals filed in the district court on or after July 1, 1989.
>
> LB 213 would reduce the time required by the Supreme Court in its reviews under the Administrative Procedures [sic] Act. Rather than reviewing the record of the agency and making a decision anew as is currently required, the Court will review the district court's action and decide whether that court made any error.

Committee on Government, Military, and Veterans' Affairs, 91st Leg., 1st Sess. (Feb. 23, 1989).

We have had several occasions to address the judicial scope of review since the 1989 amendments to §§ 84-917 and 84-918. First, in *Department of Soc. Servs. v. Person*, 234 Neb. 865, 453 N.W.2d 390 (1990), we affirmed our understanding of the APA's pre-1989 standards of review. *Person* involved an appeal from the Department's denial of an application for public medical assistance to a 5-year-old child suffering from multiple disabilities. In *Person*, the petition had been filed before the July 1, 1989, effective date of the amendments. The parents of the child, as his guardians, appealed the Department's finding and order to the district court pursuant to § 84-917. The district court, comporting with the limitations found in § 84-917(6)(a), held that the director's findings were totally unsupported by the evidence. The district court reversed the Department's determination denying assistance to the disabled child. The Department appealed and contended that its determination was, in fact, supported by the evidence. We again noted that the legislative mandate found in § 84-918, albeit incongruous, permitted us to conduct a true de novo review, although the district court had been bound by the standards discussed in *Haeffner*. We then defined a true de novo review. In a true de novo review, we are not limited to considering whether there was sufficient evidence to support the director's findings nor whether the district court erred in its determination. Rather, in a true de novo review, we use the assignments of error as a guide to the factual issues in dispute and make an independent factual determination based upon the record.

In *Bell Fed. Credit Union v. Christianson*, 237 Neb. 519, 466 N.W.2d 546 (1991) (*Bell Fed. Credit Union I*), the 1989 amendments were controlling. Bell Federal filed an appeal to the district court from the Nebraska Appeal Tribunal's determination to award unemployment compensation benefits to striking workers. In affirming the decision of the appeal tribunal, the district court stated, " 'The standard for review on appeal of such an issue requires that the decision of the appeal tribunal should be affirmed unless it is unsupported by competent and substantial evidence, or is arbitrary or capricious, or the result of an error of law.' " *Id.* at 522, 466

N.W.2d at 548.

Bell Federal appealed to this court. We held that, as amended in 1989, § 84-918(3) permitted us to reverse, vacate, or modify the district court's judgment or final order if error appeared on the record. We stated:

> It is a logical impossibility for this court to review the district court judgment for errors appearing on the record if the district court incorrectly limited its review and, thus, failed to make factual determinations, as it must under a de novo on the record review. The district court's and this court's standards of review are interdependent.

*Bell Fed. Credit Union I*, 237 Neb. at 522-23, 466 N.W.2d at 549.

Therefore, in *Bell Fed. Credit Union I*, we stated that under the 1989 amendments to the APA, district courts were required to conduct a true de novo review, as defined in *Person*, of agency determinations. Such review is to be conducted on the record of the agency. The record consists of the transcripts and bill of exceptions of the proceedings before the agency and facts capable of being judicially noticed pursuant to Neb. Evid. R. 201. *Dairyland Power Co-op v. State Bd. of Equal.*, 238 Neb. 696, 472 N.W.2d 363 (1991).

In summary, our case law, the plain language of §§ 84-917 and 84-918, and the legislative history, are in complete agreement. Pursuant to the 1989 amendments to § 84-917, a district court is required to conduct a de novo review of agency determinations on the record of the agency. The district court is not limited to a review subject to the narrow criteria found in § 84-917(6)(a) but is required to make independent factual determinations based upon the record. The district court's decision is to be made independently of the agency's prior disposition. Therefore, the district court is not required to give deference to the findings of fact by the agency hearing officer and to the decision of the director of the Department. See, *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986); *Person, supra* (defining de novo review). Upon review to this court, we are required to conduct a review for errors appearing on the record. See § 84-918(3).

SEPARATION OF POWERS

In this case, the Department contends that § 84-917, which compels district courts to determine facts anew, violates the separation of powers doctrine. The Department states that the separation of powers doctrine limits the extent of judicial review in the district court to whether the agency decision is supported by sufficient evidence; whether it acted within the scope of its statutory authority; and whether its action was arbitrary, capricious, or unreasonable. The Department further argues that the separation of powers doctrine requires courts to give deference to the determinations of the agency's hearing officer and director.

The separation of powers doctrine provides:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Neb. Const. art. II, § 1.

The separation of powers doctrine prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives. *State ex rel. Stenberg v. Murphy, ante* p. 358, 527 N.W.2d 185 (1995); *Clemens v. Harvey, ante* p. 77, 525 N.W.2d 185 (1994); *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992); *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991). However, in *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245, 147 N.W.2d 674 (1914), we noted that the last clause of article II, § 1, implies that some of the provisions of the Nebraska Constitution expressly direct or permit one department of government to exercise powers belonging to another department. See, also, *State ex rel. Stenberg v. Murphy, supra*.

An administrative agency can have duties of a quasi-judicial nature in addition to its rulemaking duties. *Id.*; *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967). The conferring upon state agencies or officers of executive or administrative functions requiring the exercise of quasi-judicial

powers does not conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. This is particularly true where provision is made for appeal from decisions of such officers or agencies to the courts. *Id.*

Although courts have no jurisdiction to review wholly legislative acts, some agency determinations possess quasi-judicial characteristics and are appealable. *Hooper Telephone Co, supra.* Therefore, the character of a particular function as quasi-judicial or legislative in nature is an essential factor in determining the scope of judicial power and the extent to which a court may, with or without express authorization, review action of an administrative agency.

We have recognized that a true de novo review on the record, as mandated by the amended § 84-917, could violate the separation of powers doctrine. In dicta, we stated that a true de novo review of administrative decisions of an agency may transform a court into a super-agency. See *Department of Health v. Columbia West Corp.*, 227 Neb. 836, 420 N.W.2d 314 (1988). In *Columbia West Corp.*, we deemed this possibility to be beside the point, followed the legislative mandate, and proceeded to review the matter before us de novo, which required us to reach a decision independent of all dispositions that had gone before. Here, we are confronted with the issue of whether a true de novo standard of review violates the separation of powers doctrine. For the reasons stated below, we hold that a de novo review from appeals involving the exercise of an agency's quasi-judicial powers is constitutional.

In *Lux v. Mental Health Board of Polk County*, 202 Neb. 106, 274 N.W.2d 141 (1979), we considered whether a legislatively prescribed de novo standard of review violated the separation of powers doctrine. Appeals from final orders of the mental health board were, and still are, governed by Neb. Rev. Stat. § 83-1043 (Reissues 1976 & 1994) rather than the APA. However, like the APA, § 83-1043 provides that appeals from the mental health board to a district court shall be conducted de novo on the record.

In *Lux*, the district court affirmed the mental health board's finding that the appellant was a mentally ill dangerous person

and affirmed the board's order committing him to a regional center for treatment. The district court stated the function of the mental health board was a legislative function. The district court limited its review to a determination of whether the order was supported by substantial evidence; whether the board acted within the scope of its authority; and whether its action was arbitrary, capricious, or unreasonable. We stated:

> The District Court apparently assumed that, because the function of the board is prescribed and regulated by statute, the board was exercising a legislative function, and that the appropriate standard of review was therefore the limited one enunciated in recent cases such as Haller v. State ex rel. State Real Estate Commission, 198 Neb. 437, 253 N. W. 2d 280, Herink v. State ex rel. State Real Estate Commission, 198 Neb. 241, 252 N. W. 2d 172; American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N. W. 2d 1; and Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N. W. 2d 683.
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> Those cases do hold that if a court is reviewing an exercise of authority which is in its nature legislative, then the Legislature may not prescribe a de novo standard of review, because that would constitute a violation of the constitutional requirement of separation of powers. Art. II, § 1, Nebraska Constitution; Keller v. Potomac Elec. Co., 261 U. S. 428, 43 S. Ct. 445, 67 L. Ed. 731. However, the District Court erred in assuming that merely because the board's function is prescribed by statute the board was therefore exercising a legislative function. None of the above-cited cases so held. . . .
>
> We have not heretofore attempted to define precisely the line between the judicial function and power and the legislative one. Probably we cannot do so. See Prendergast v. Nelson, 199 Neb. 97, 256 N. W. 2d 657 (concurring opinion of Clinton, J.). We must necessarily proceed upon a case-by-case basis. Utility ratemaking, for example, is a legislative function and subject only to limited judicial review. Keller v. Potomac Elec. Co., *supra*. The licensing and regulation of the professions dealing with health is a legislative function, and there is a similar limitation upon

> judicial review. Scott v. State ex rel. Board of Nursing, *supra*. The initial determination of terms and conditions of employment is also a legislative function, Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N. W. 2d 172, as is the regulation and licensing of businesses. Haller v. State ex rel. State Real Estate Commission, *supra*; Herink v. State ex rel. State Real Estate Commission, *supra*. See, also, 16 C. J. S., Constitutional Law, § 107, p. 493. On the other hand, the determination of whether a party's statutory rights have been violated is clearly a judicial function and a legislature [sic] mandate requiring de novo review is proper. Snygg v. City of Scottsbluff Police Dept., 201 Neb. 16, 266 N. W. 2d 76.

202 Neb. at 108–09, 274 N.W.2d at 143–44.

Sections 84-917 and 84-918 deal only with appeals from contested cases. As stated above, a contested case is "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." § 84-901(3). Contested cases are quasi-judicial in nature and involve determination of a party's rights. According to our holding in *Lux*, the legislative mandate of § 84-917 requiring de novo review by the district court of agency determinations is proper and does not necessarily violate the separation of powers doctrine.

### District Court Erred in Interpreting the Department's Regulations

In conducting its de novo review, the district court overturned the Department's interpretation of § 011.06K. That regulation states, "Medicare regulations and administrator salary surveys for the Kansas City Region, adjusted for inflation by the Department of Health and Human Services, are used in determining reasonable salaries for administrators."

The district court interpreted this regulation as providing that the salary surveys for the Kansas City region were to be used only as a guideline in determining reasonable salaries for administrators. The district court rejected the Department's

purely mathematical application of salary surveys as a methodology of determining whether an administrator's salary was reasonable.

The Department argues that § 011.06K, when taken in its entirety and with due note of the key words "are used," dictates that salary surveys for the Kansas City region must be used to determine the maximum amount of reimbursement a facility can receive for an administrator's salary. In this case, Dale Shallenberger testified on April 28, 1992, regarding the salary survey. Shallenberger, a Department auditor, testified that the Nebraska Health Care Association had accepted the use of the Kansas City salary survey. Shallenberger testified that very few nursing homes' claims for administrative salary expenses exceed the maximum salary set by the Kansas City survey.

Recently, we were required to review a court's interpretation of another section of the same medicare regulations that are before us in this case. See *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994). In *Sunrise Country Manor*, we stated:

> Ordinarily, deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). However, agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994); *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989).
>
> The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994). This court is obligated to reach an independent conclusion as to whether the Department's interpretation of its regulations was plainly erroneous or inconsistent, as was the district court.

246 Neb. at 735, 523 N.W.2d at 504-05.

The Department's interpretation of § 011.06K does not

appear to be plainly erroneous or inconsistent. The Department has clearly adopted the use of salary surveys as the method for determining the reasonability of an individual nursing home's claim for administrative salary expenses. We have previously declined to substitute our judgment for an administrative agency's methodology absent a showing that the agency's methodology exceeded the scope of its statutory authority. See, *Bethesda Found. v. Nebraska Dept. of Soc. Servs.*, 243 Neb. 130, 498 N.W.2d 86 (1993); *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985). We agree with the Department that § 011.06K mandates the use of the Kansas City salary surveys in determining the maximum amount of reimbursement a facility can receive for an administrator's salary.

## CONCLUSION

For the foregoing reasons, the finding and order of the district court dated June 22, 1993, with respect to the administrative salary adjustments is reversed, and the Department's finding and order dated May 29, 1992, is reinstated.

REVERSED.

FAHRNBRUCH, J., concurs in the result.

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NEBRASKA PUBLIC EMPLOYEES LOCAL 251, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

528 N.W.2d 297

Filed March 3, 1995. No. S-93-691.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.

2. **Declaratory Judgments.** Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute.
3. **Contracts.** When a dispute sounds in contract, the action is to be treated as one at law.
4. **Commission of Industrial Relations: Wages.** The Commission of Industrial Relations has statutory authority to establish wage-step progression schedules.

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

Thomas F. Dowd, of Dowd & Dowd, for appellants.

Kent N. Whinnery, Deputy Omaha City Attorney, for appellee.

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

WRIGHT, J.

Members of a collective bargaining unit which represents employees of the City of Omaha (City) brought this action for an accounting of alleged underpayment of wages. The action was brought after the Commission of Industrial Relations (Commission) issued a decision which resulted in the implementation of a pay plan that reduced the wages of some of the employees.

## SCOPE OF REVIEW

In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993).

## FACTS

The plaintiffs, Nebraska Public Employees Local 251, American Federation of State, County and Municipal Employees; Janis R. Thomas; and 99 other individuals, hereinafter referred to collectively as the employees, filed a petition in equity requesting an accounting individually and on behalf of all similarly situated former and current employees of the City who allegedly sustained an underpayment of wages as a result of the City's alleged improper placement of the

employees on a pay plan.

During the 1970's, the City's six-step pay plan was revised to three steps. Under the three-step pay plan, a new employee could reach the top step and the maximum wage in a period of 1 year. The first step was entry level, the second step was reached after a 6-month probationary period, and the top step was reached after 1 year of employment. In 1988, the City and the employees attempted to negotiate a new collective bargaining agreement for the fiscal year beginning December 26, 1988, but when the negotiations failed, the City filed a petition with the Commission.

On February 6, 1990, the Commission issued its findings and order, which directed that the employees be placed on a six-step pay plan that required 5 years of employment to reach the top step. The Commission's order established the minimum and maximum wage of each job classification. The result was that some of the employees received decreases in wages, while others received increases.

On or about May 13, 1990, the City placed the employees on the six-step, 5-year pay plan according to each employee's years of employment as of December 26, 1988. This placement was retroactive to January 1, 1990. The employees did not object to the application of the new pay plan for employees hired on or after December 26, 1988, but they objected to the implementation of the pay plan as it affected the status of employees who were hired prior to December 26, 1988.

The employees alleged that the City's failure to give them credit for "their relative and proportionate position between the minimum and maximum on the previous pay plan they occupied prior thereto" had resulted in underpayment of wages since January 1, 1990. The employees filed claims for underpayment of wages with the City on March 21, 1991. The claims were denied by the city council on October 8. The employees then filed their petition in the district court, requesting that the City be required to make an accounting for underpayment of wages, to pay all compensation due, and to advance the employees to the appropriate step on the new pay plan. The district court approved the City's actions, finding that the implementation of the six-step, 5-year pay plan was in compliance with the

Commission's order of February 6, 1990, and the petition was dismissed. The employees appeal.

## ASSIGNMENT OF ERROR

The employees claim the district court erred in ruling that the City's implementation of the six-step, 5-year pay plan was in compliance with the order of the Commission.

## ANALYSIS

In its order of February 6, 1990, the Commission made no findings concerning the method to be used by the City to place the employees on the new pay plan. The record does not indicate that any party appealed from the order of the Commission or requested clarification regarding implementation of the pay plan. It was not until after the City implemented the order by placing the employees on the new pay plan that the employees sought to challenge the City's interpretation of the Commission's order.

The employees requested an accounting based upon what they claimed was an underpayment of wages resulting from the City's placement of the employees on the six-step, 5-year pay plan without giving them credit for their "relative proportional position on the preceding pay step plan." We find that the relief requested is in the nature of an action for declaratory judgment. The basis for the relief requested is the six-step, 5-year pay plan, which is the contractual agreement between the parties. The status of the employees in relation to the pay plan is the issue which was presented to the district court. Any person interested under a written contract or other writings constituting a contract may have determined any question of construction arising under the contract and may obtain a declaration of rights, status, or other legal relations thereunder. See Neb. Rev. Stat. § 25-21,150 (Reissue 1989).

Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute. *Struve Enter. v. Travelers Ins. Co.*, 243 Neb. 516, 500 N.W.2d 580 (1993). When a dispute sounds in contract, the action is to be treated as one at law. *Id.* Since the dispute between the employees and the City arises from the implementation of the new pay plan, we treat the case as an

action at law and, therefore, reach our conclusion independent from the conclusion reached by the trial court. See *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993).

The parties stipulated that the City implemented the Commission's order without regard to the employees' status on the previous pay plan. The point of contention is the method used by the City to place the employees on the new pay plan. In implementing the Commission's order, the City examined each employee's tenure as of December 26, 1988. The City then placed the employee at a step equivalent to the employee's number of years of employment. The employees argue that an employee who was at the top step of the previous pay plan after 1 year of employment should have been placed at the top step of the newly created pay plan notwithstanding the fact that the employee might not have worked in that position for 5 or more years as required by the new pay plan.

The employees claim that the City's implementation of the new pay plan was a retroactive application of the Commission's order. We disagree. The City placed each employee at a step equivalent to the number of years of employment as of December 26, 1988. This placement did not result in a retroactive application merely because placement on the new pay plan was related to the number of years an employee had been employed as of December 26, 1988.

The employees also argue that they had a vested right to placement on the new pay plan based on their status with the City prior to the Commission's order. The Commission has statutory authority to establish wage-step progression schedules. See *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988). Neb. Rev. Stat. § 48-818 (Reissue 1993) provides that "the findings and order or orders [of the Commission] may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same." As the Commission noted, this statute mandates that the Commission shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar

skills and under the same or similar working conditions for the contract year in dispute, regardless of whether the order entails an increase or decrease in wages. The order of the Commission expressly recognized that some employees would receive decreases in wages while others would receive increases.

When the parties submitted the dispute to the Commission, one of the issues identified by the parties was "wages and total compensation." The Commission established the six-step, 5-year pay plan, and the City implemented the plan based upon the number of years of employment with the City. We conclude that the employees had no vested right to placement on the top step of the new pay plan based upon 1 year of employment prior to December 26, 1988, and we find that the City did not act arbitrarily or capriciously in its placement of the employees on the six-step, 5-year pay plan according to each employee's years of employment as of December 26, 1988.

The employees' arguments have no merit, and the judgment of the district court is affirmed.

AFFIRMED.

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DAVID E. BOLL, APPELLEE, V. DEPARTMENT OF REVENUE, STATE OF NEBRASKA, APPELLANT.
LISA M. BOLL, APPELLEE, V. DEPARTMENT OF REVENUE, STATE OF NEBRASKA, APPELLANT.

528 N.W.2d 300

Filed March 3, 1995. Nos. S-93-1105, S-93-1106.

1. **Constitutional Law: Statutes: Appeal and Error.** The alleged unconstitutionality of a statute presents a question of law which must be determined by an appellate court independently from the conclusion reached by a trial court.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Constitutional Law: Statutes: Proof.** The burden of establishing that a statute is unconstitutional rests upon the party claiming a statute to be unconstitutional.

4. ___: ___: ___. The unconstitutionality of a statute must be clearly demonstrated before the statute will be declared unconstitutional.
5. **Due Process: Property.** The protections of procedural due process attach when there has been a deprivation of a significant property interest.
6. **Due Process.** Due process does not guarantee an individual any particular form or method of state procedure.
7. **Due Process: Notice.** The requirements of due process are satisfied if the individual has reasonable notice and reasonable opportunity to be heard appropriate to the nature of the proceedings and the character of the rights which may be affected by it.
8. **Due Process: Property.** If a person has access to the courts for the protection of his or her rights, it cannot be said that this person has been deprived of his or her property without due process of law.
9. **Due Process: Costs.** When restrictions, such as cost requirements, are placed upon one's access to the courts, they may offend due process because they operate to foreclose one's opportunity to be heard.
10. **Legislature.** It is fundamental that the Legislature may not delegate legislative power to an administrative or executive authority.
11. **Constitutional Law: Statutes: Legislature: Taxes: Controlled Substances.** Neb. Rev. Stat. § 77-4312 (Cum. Supp. 1994), in not setting forth clear and definite standards for determining what constitutes a suitable security for the tax assessed in each case, is an unconstitutional and invalid delegation of legislative authority and power to an executive or administrative officer of the state.

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

Don Stenberg, Attorney General, and Joseph P. Loudon for appellant.

O. William VonSeggern, of Grimminger & VonSeggern, for appellees.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and GRANT, J., Retired, and HOWARD, D.J., Retired.

HOWARD, D.J., Retired.

The Department of Revenue (Department) appeals a district court's holding that Neb. Rev. Stat. § 77-4312(4) (Cum. Supp. 1994), in requiring payment of an unpaid marijuana and controlled substances tax or the posting of security therefor as a prerequisite to a hearing on the redetermination of such tax, violates due process as applied to David E. Boll and Lisa M. Boll.

The Bolls sought a redetermination of the drug tax assessed

against them by the Tax Commissioner, but the Department denied the request for a hearing because their petition for redetermination was not accompanied by either payment of the drug tax or a security in the amount of $18,800. These cases were consolidated at the departmental and district court levels. Likewise, this court has consolidated them for the purposes of briefing, oral argument, and proof.

Since this matter involves the constitutionality of a statute, the Department properly appealed directly to this court. We affirm the decision of the district court for Lancaster County.

## STATEMENT OF FACTS

Neb. Rev. Stat. § 77-4303 (Cum. Supp. 1994) imposes a tax based on weight or dosage unit of marijuana or controlled substances. The tax is due and payable immediately upon acquisition or possession of a controlled substance. Neb. Rev. Stat. § 77-4305 (Reissue 1990). The Tax Commissioner is required to assess the appropriate tax and penalties on individuals who fail to pay the drug tax. Neb. Rev. Stat. § 77-4310 (Reissue 1990). This is considered a jeopardy determination. Neb. Rev. Stat. § 77-4311 (Cum. Supp. 1994). Section 77-4310 also requires the Tax Commissioner to notify such individual of the jeopardy determination, demand immediate payment, and if payment is not immediately made, collect the tax and penalties by any method prescribed by the Uniform State Tax Lien Registration and Enforcement Act as set forth in Neb. Rev. Stat. § 77-3901 et seq. (Reissue 1990 & Cum. Supp. 1994).

On October 25, 1991, the Department issued separately to each of the Bolls a notice of jeopardy determination and assessment for unpaid marijuana and controlled substances tax in the amount of $18,800, plus an $18,800 penalty, and $151.43 in interest for the total amount of $37,751.43, due pursuant to § 77-4303. Each notice advised the Bolls that they were jointly and severally liable for the amount with a third party, Jeffery Dadey. Each notice also stated that the determination would become final unless a petition for redetermination and security in the amount of $18,800 was filed with the Tax Commissioner within 10 days from the postmark date of the notice.

On November 1, 1991, the Bolls jointly filed with the Department a petition for redetermination. The Bolls' petition denied the allegations set forth in each notice of jeopardy determination and assessment and stated that the attempted assessment of taxes and penalties denied the Bolls due process, equal protection, and other constitutional rights. The petition also requested a hearing and redetermination of the drug tax, but it was not accompanied by payment of such tax or the security in the amount of $18,800. On July 31, 1992, the Department filed a motion with the Tax Commissioner to dismiss the petition, alleging that the Department was without jurisdiction to hear the matter without payment of the tax or suitable security for such tax.

On August 25, 1992, the Bolls filed separate affidavits indicating that they were each without sufficient funds to pay the $18,800 tax and penalty or post security therefor, nor could they borrow funds due to the tax lien filed against their real estate by the Department. A hearing was held on August 26 before a designated hearing officer on the Department's motion to dismiss. On October 22, the hearing officer found that filing the petition for redetermination without payment of the tax or posting suitable security for the tax rendered the tax assessment final. Thus, the hearing officer found the Tax Commissioner was without authority to hear and decide the merits of the Bolls' petition. The hearing officer further found that the Tax Commissioner was without authority to decide the constitutionality of a revenue law. On October 23, the Tax Commissioner accepted the hearing officer's findings and dismissed the petition.

The Bolls each appealed the Tax Commissioner's order to the district court for Lancaster County pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 through 84-920 (Reissue 1987, Cum. Supp. 1992, & Supp. 1993). Both petitions stated that the Bolls had filed poverty affidavits alleging that they were without funds to pay the tax or security necessary to obtain a redetermination hearing. Section 77-4312(4) provides that "[t]he petition for redetermination shall be accompanied by the payment of the tax or suitable security for the payment of the tax." The Bolls each contend in

their petitions that § 77-4312(4) as applied to an indigent party deprives him or her of due process under both the U.S. and Nebraska Constitutions by requiring the payment of tax and security as a jurisdictional prerequisite for a redetermination hearing.

On November 9, 1993, a hearing was held in district court on both petitions. On November 17, the district court held that § 77-4312(4) as applied to indigent persons violated due process and remanded the cause to the Department for further proceedings on the Bolls' petition for redetermination.

The Department timely appealed to this court.

## ASSIGNMENTS OF ERROR

Summarized and restated, the Department contends that the district court erred in finding that § 77-4312(4), as applied, unconstitutionally deprives indigent taxpayers of due process.

## SCOPE OF REVIEW

The alleged unconstitutionality of a statute presents a question of law which must be determined by an appellate court independently from the conclusion reached by a trial court. *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994); *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993).

However, a statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Philipps, supra*; *Henry v. Rockey*, 246 Neb. 398, 518 N.W.2d 658 (1994). The burden of establishing that a statute is unconstitutional rests upon the party claiming a statute to be unconstitutional. *Id.* The unconstitutionality of a statute must be clearly demonstrated before the statute will be declared unconstitutional. *Id.*; *In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993), *modified* 243 Neb. 419, 499 N.W.2d 548.

## ANALYSIS

The Department argues that the district court erred in finding that the Bolls carried their burden of overcoming the presumption of a statute's constitutionality and that they clearly demonstrated that § 77-4312(4) as applied deprives indigents of due process.

The Constitutions of the State of Nebraska and the United States provide that no person shall be deprived of property without due process of law. See, Neb. Const. art. I, § 3; U.S. Const. amends. V and XIV. "The protections of procedural due process attach when there has been a deprivation of a significant property interest." *Howard v. City of Lincoln*, 243 Neb. 5, 12, 497 N.W.2d 53, 58 (1993). See *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). In the present case, the jeopardy determination and assessment imposes a significant liability upon the Bolls in the amount of $37,751.43.

This court has stated that due process does not guarantee an individual any particular form or method of state procedure. *Hroch v. City of Omaha*, 226 Neb. 589, 413 N.W.2d 287 (1987). The requirements of due process are satisfied if the individual has reasonable notice and reasonable opportunity to be heard appropriate to the nature of the proceedings and the character of the rights which may be affected by it. *Howard, supra*; *Hroch, supra*. If a person has access to the courts for the protection of his or her rights, it cannot be said that this person has been deprived of his or her property without due process of law. *Howard, supra*. However, when restrictions, such as cost requirements, are placed upon one's access to the courts, they may offend due process because they operate to foreclose one's opportunity to be heard. *Boddie, supra*.

Section 77-4312 provides:

> (1) Any person who receives a notice of jeopardy determination of the tax imposed by section 77-4303 may petition the Tax Commissioner for a redetermination of the amount of the assessed deficiency.
>
> . . . .
>
> (4) *The petition for redetermination shall be accompanied by the payment of the tax or suitable security for the payment of the tax.*
>
> . . . .
>
> (6) The determination of the amount of the deficiency shall become final and the amount shall be deemed to be assessed on the date provided in subsection (2) of this section if the person fails to file the petition for the redetermination *and the appropriate security* within the

ten-day time period.

(Emphasis supplied.)

In the present case, the Bolls must pay the assessed drug tax or post a security of $18,800 before a redetermination hearing will be granted. The determination of the amount of the assessed drug tax becomes final upon failure of the person to file a petition for redetermination. There is no dispute as to the Bolls' inability to pay the drug tax or post the $18,800 security. The affidavits in the record establish that the Bolls are without sufficient funds to pay the tax. Nor do they have the ability to post a suitable security. Due to a tax lien against their real estate by the Department, the Bolls are unable to borrow the necessary funds to meet the statutory requirement.

The U.S. Supreme Court has addressed the question of when certain fees or costs necessary to initiate a legal proceeding deprive indigent citizens of due process. In *Boddie, supra*, the Court held that a Connecticut statute requiring the payment of fees as a prerequisite to a divorce action was unconstitutional as applied to the indigents. The Court said that given the basic position of the marriage relationship in our society and the state monopolization of the means for dissolving the relationship, due process of law prohibits a state from denying access to its courts to indigents solely because of the inability to pay court fees and costs. *Boddie, supra*. See, also, *Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981) (holding that a statute which provided cost of blood grouping tests be paid by the party requesting them denied due process when applied to deny the tests to an indigent defendant in a quasi-criminal paternity action).

The Department argues that the U.S. Supreme Court decisions in *Ortwein v. Schwab*, 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973), and *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973), should control the present case. In *Ortwein*, the appellant contended that the Oregon appellate court filing fee, when applied to indigent persons seeking to appeal an adverse welfare decision, violated the Due Process Clause of the 14th Amendment. The Court held that the appellate filing fees did not violate due process and distinguished *Boddie* on the grounds that the interest in

increased welfare payments had far less constitutional significance than the interest of the *Boddie* appellants in dissolving a marriage. The Court stated that, even in criminal cases, due process does not require a state to provide an appellate system. *Ortwein, supra*. However, unlike the Bolls, the appellant in *Ortwein* had a hearing at the departmental level that was not conditioned on payment of any fee. Therefore, we do not find *Ortwein* to be applicable to the present case, in which no hearing was afforded at the departmental level.

In *Kras*, the U.S. Supreme Court rejected the indigent appellee's argument that the bankruptcy court's filing fee requirement violated due process as it applied to him. The Court said that access to the courts was not the only means of resolving his debts and that the elimination of his debts did not rise to the same constitutional level as the right involved in *Boddie* of dissolving a marriage. We find this case is inapplicable as well. *Kras*, unlike the present case, involves the claimant's affirmative actions for a benefit, the benefit being release from his debts.

Section 77-4312(4) requires the payment of the assessed drug tax or posting of a suitable security for the tax as a jurisdictional prerequisite for a redetermination hearing without furnishing other means for indigents to obtain a hearing. It cannot be said that the requirements of due process were met when the Bolls were denied access to a redetermination hearing simply because they were unable to post the $18,800 security required by § 77-4312(4). The Bolls' right to the redetermination hearing was conditioned on requirements so harsh as to effectively deny them access to the courts. The denial of a redetermination hearing prevented the Bolls from exhausting all administrative remedies, a necessary preliminary step in seeking judicial review of the assessed tax. Thus, we find that § 77-4312(4) as applied to indigent individuals is unconstitutional. The Department's assignment of error is without merit.

Our review of § 77-4312(4) also reveals that the statute is an unconstitutional and invalid delegation of legislative authority and power to an executive or administrative officer of the state. Section 77-4312(4) provides that the petition for redetermination shall be accompanied by the payment of the tax

or *suitable security* for the payment of the tax. There are no standards, rules, or criteria provided in the statute for determining what a "suitable security" for the tax will be. The statute places the determination of the amount of security for each petition at the discretion of the Tax Commissioner permitting arbitrary treatment of parties petitioning for redetermination of the drug tax.

> " 'It is fundamental that the Legislature may not delegate legislative power to an administrative or executive authority. [Citation omitted.] The Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. Such authority is administrative in its nature and its use by administrative officers is essential to the complete exercise of the powers of all departments. [Citation omitted.] . . .
>
> " 'The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act.' "

*Kwik Shop v. City of Lincoln*, 243 Neb. 178, 186, 498 N.W.2d 102, 108 (1993), quoting *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988). "Such standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available." *Bosselman, Inc.*, 230 Neb. at 476, 432 N.W.2d at 229-30.

Therefore, we find that § 77-4312, in not setting forth clear and definite standards for determining what constitutes a suitable security for the tax assessed in each case, is an unconstitutional and invalid delegation of legislative authority and power to an executive or administrative officer of the state.

## CONCLUSION

Having found that § 77-4312 as applied unconstitutionally deprives indigent taxpayers of due process and having found that § 77-4312(4) is an unconstitutional and invalid delegation of legislative authority, we affirm the decision of the district court.

AFFIRMED.