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REPORTS OF CASES

DECIDED BETWEEN

MAY 19, 1995 and DECEMBER 21, 1995

IN THE

Supreme Court of Nebraska

VOLUME CCXLVIII

PEGGY POLACEK

OFFICIAL REPORTER

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By Peggy Polacek, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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JOSEPH C. STEELE . . . . . State Court Administrator

[1]Until December 31, 1995
[2]Appointed January 1, 1996
[3]Until December 31, 1995
[4]As of January 1, 1996

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
		Robert R. Steinke	Columbus
		John C. Whitehead	Columbus
		Alan G. Gless	Wahoo

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
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
		Jack B. Lindner	Lincoln
		Richard H. Williams	Lincoln
		Laurie J. Yardley	Lincoln
		John V. Hendry	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		John J. McGrath	Omaha
		Robert C. Vondrasek	Omaha
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		Stephen M. Swartz	Omaha
		Lyn V. Ferer	Omaha
		Thomas G. McQuade	Omaha
		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
		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
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		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
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		James L. Macken	Gering
		G. Glenn Camerer	Gering
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		C.G. Wallace	Kimball

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County	Judges	City
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	Elizabeth G. Crnkovich	Omaha
	Wadie Thomas, Jr.	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
Sarpy	Lawrence D. Gendler	Papillion

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Judges	City
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TABLE OF CASES REPORTED

Abramson; Kirkland v. 675
Adams Bank & Trust of Madrid; Kuskie v. 18
Adoption of Kassandra B. & Nicholas B., In re 912
Adoption of Krystal P. & Kile P., In re 907
Albion et al., Cities of; K N Energy, Inc. v. 112
Alex T., In re Interest of 899
Alex T., In re Interest of 905
Anderson/Couvillon v. Nebraska Dept. of Soc. Servs. 651
Arapahoe et al., Cities of; K N Energy, Inc. v. 112

Baker's Supermarkets v. State 984
Balka; Callan v. 469
Bank of Madison; Melcher v. 793
Barfoot; State v. 335
Barnett; State ex rel. NSBA v. 601
Bartlett Partnership; ConAgra, Inc. v. 933
Ben Simon's, Inc. v. Lincoln Joint-Venture 465
Bennett; McCook Nat. Bank v. 567
Broken Bow et al., Cities of; K N Energy, Inc. v. 112
Brower; Sports Courts of Omaha v. 272
Brunzo; State v. 176
Buckingham v. Creighton University 821
Butte, Village of; Engelhaupt v. 827
Byington; Stang-Starr v. 103

CIGNA Cos.; Winfield v. 24
Calinger; State ex rel. NSBA v. 903
Callan v. Balka 469
Carlson v. Metz 139
Catholic Archbishop of Omaha; Lee Sapp Leasing v. 829
CenTra, Inc. v. Chandler Ins. Co. 844
Chandler Ins. Co.; CenTra, Inc. v. 844
Chrysler Corp. v. Lee Janssen Motor Co. 281
Chrysler Motors Corp. v. Lee Janssen Motor Co. 322
Cimfel; Winberg v. 71
Cisneros; State v. 372
Cities of Albion et al.; K N Energy, Inc. v. 112
Cities of Arapahoe et al.; K N Energy, Inc. v. 112
Cities of Broken Bow et al.; K N Energy, Inc. v. 112
Cities of Cozad et al.; K N Energy, Inc. v. 112

City of Elkhorn; SID No. 57 v. 486
City of Kearney; Gas 'N Shop v. 747
City of Lincoln v. Townhouser, Inc. 399
City of Madison; Gillis v. 873
City of Wahoo; DeCoste v. 463
Clark; Oliver v. 631
Cody; State v. 683
Columbia Nat. Ins. v. Pacesetter Homes 1
ConAgra, Inc. v. Bartlett Partnership 933
Conrad; McPherrin v. 561
Covert v. Richards 350
Cozad et al., Cities of; K N Energy, Inc. v. 112
Craven; State ex rel. NSBA v. 201
Creighton University; Buckingham v. 821
Critchfield v. McNamara 39

Davis Erection Co. v. Jorgensen 297
DeCoste v. City of Wahoo 463
Derry; State v. 260
Dietz; Village of Orleans v. 806
Dittrich v. Nebraska Dept. of Corr. Servs. 818
Driver Mgmt., Inc.; Toombs v. 1016

Eberspacher v. Hulme 202
Elkhorn, City of; SID No. 57 v. 486
Engelhaupt v. Village of Butte 827
Eona; State v. 318
Estate of Morse, In re 896
Estate of Soule, In re 878
Evenson v. Evenson 719

Farm Credit Bank v. Stute 573
FirsTier Bank; Riha v. 785
Five Points Bank; Hoeft v. 772
Floyd v. Worobec 605
Ford Motor Co.; Rose Equip., Inc. v. 344
Fowler; Lincoln Lumber Co. v 221

Garcia v. Nebraska Dept. of Motor Vehicles 251
Gardner; Krohn v. 210
Gas 'N Shop v. City of Kearney 747
George Rose & Sons v. Nebraska Dept. of Revenue 92
Gillis v. City of Madison 873
Glasford's Enter.; Keefe v. 64
Glass v. Nebraska Dept. of Motor Vehicles 501
Gleason; State ex rel. NSBA v. 1003
Guthmann; Hartley v. 131
Guyerson; State ex rel. NSBA v. 516

HEP, Inc.; Stansbury v. 706
Hartley v. Guthmann 131
Hearon v. May 887
Hoeft v. Five Points Bank 772
Hometown Communications, Inc.; Larson v. 942
Horace Mann Cos. v. Pinaire 640
Hulme; Eberspacher v. 202

In re Adoption of Kassandra B. & Nicholas B. 912
In re Adoption of Krystal P. & Kile P. 907
In re Estate of Morse 896
In re Estate of Soule 878
In re Interest of Alex T. 899
In re Interest of Alex T. 905
In re Interest of Kile P. 899
In re Interest of Kile P. 905
In re Interest of Krystal P. 899
In re Interest of Krystal P. 905
In re Interest of Lisa O. 865
In re SID No. 157 486

Jimenez; State v. 255
Jones; State v. 117
Jones v. State 158
Jorgensen; Davis Erection Co. v. 297

K N Energy, Inc. v. Cities of Albion et al. 112
K N Energy, Inc. v. Cities of Arapahoe et al. 112
K N Energy, Inc. v. Cities of Broken Bow et al. 112
K N Energy, Inc. v. Cities of Cozad et al. 112
Kassandra B. & Nicholas B., In re Adoption of 912
Kearney, City of; Gas 'N Shop v. 747
Keefe v. Glasford's Enter. 64
Kile P., In re Interest of 899
Kile P., In re Interest of 905
Kirkland v. Abramson 675
Klawitter v. Lampert 231
Koster v. P & P Enters. 759
Krings; Kuchar v. 995
Krohn v. Gardner 210
Kropf v. Kropf 614
Krystal P. & Kile P., In re Adoption of 907
Krystal P., In re Interest of 899
Krystal P., In re Interest of 905
Kuchar v. Krings 995
Kunath; State v. 1010
Kuskie v. Adams Bank & Trust of Madrid 18

Ladig; State v. 737
Lampert; Klawitter v. 231
Larson v. Hometown Communications, Inc. 942
Lee Janssen Motor Co.; Chrysler Corp. v. 281
Lee Janssen Motor Co.; Chrysler Motors Corp. v. 322
Lee Sapp Leasing v. Catholic Archbishop of Omaha 829
Lincoln, City of v. Townhouser, Inc. 399
Lincoln Joint-Venture; Ben Simon's, Inc. v. 465
Lincoln Lumber Co. v. Fowler 221
Lindsay Mfg. Co.; Molt v. 81
Linn; State v. 809
Lisa O., In re Interest of 865
Lowe; State v. 215
Lynch; State v. 234

Madison, City of; Gillis v. 873
Maly; Roemer v. 741
Marks; State v. 592
May; Hearon v. 887
May; Warning v. 887
McCook Nat. Bank v. Bennett 567
McCracken; State v. 576
McNamara; Critchfield v. 39
McPherrin v. Conrad 561
Melcher v. Bank of Madison 793
Metz; Carlson v. 139
Milwaukee Elec. Tool Corp.; Walpus v. 145
Minnesota Mut. Fire & Cas.; Proctor v. 289
Molt v. Lindsay Mfg. Co. 81
Morse, In re Estate of 896
Mullen; State ex rel. FirsTier Bank v. 384

NSBA, State ex rel. v. Barnett 601
NSBA, State ex rel. v. Calinger 903
NSBA, State ex rel. v. Craven 201
NSBA, State ex rel. v. Gleason 1003
NSBA, State ex rel. v. Guyerson 516
NSBA, State ex rel. v. Ogborn 767
NSBA, State ex rel. v. Peartree 49
NSBA, State ex rel. v. Stansel 63
Nebraska Dept. of Corr. Servs.; Dittrich v. 818
Nebraska Dept. of Motor Vehicles; Garcia v. 251
Nebraska Dept. of Motor Vehicles; Glass v. 501
Nebraska Dept. of Revenue; George Rose & Sons v. 92
Nebraska Dept. of Revenue; Omaha Pub. Power Dist. v. 518
Nebraska Dept. of Soc. Servs.; Anderson/Couvillon v. 651
Nelson; State v. 817
Neujahr; State v. 965

Ogborn; State ex rel. NSBA v. 767
Oliver v. Clark 631
Olsen v. Olsen 393
Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue 518
Orleans, Village of v. Dietz 806

P & P Enters.; Koster v. 759
Pacesetter Homes; Columbia Nat. Ins. v. 1
Peartree; State ex rel. NSBA v. 49
Pierce; State v. 536
Pinaire; Horace Mann Cos. v. 640
Plant; State v. 52
Poppleton v. Village Realty Co. 353
Potter; Seevers v. 621
Proctor v. Minnesota Mut. Fire & Cas. 289

RaDec Constr. v. School Dist. No. 17 338
Richards; Covert v. 350
Riha v. FirsTier Bank 785
Roberts v. Weber & Sons, Co. 243
Roemer v. Maly 741
Rose Equip., Inc. v. Ford Motor Co. 344
Russell; State v. 723
Ryan; State v. 405

SID No. 57 v. City of Elkhorn 486
SID No. 157, In re 486
Schmailzl; State v. 314
School Dist. No. 17; RaDec Constr. v. 338
Seevers v. Potter 621
Simants; State v. 581
Smith v. State 360
Soule, In re Estate of 878
Sports Courts of Omaha v. Brower 272
Standard Fed. Sav. Bank v. State Farm 552
Stang-Starr v. Byington 103
Stansbury v. HEP, Inc. 706
Stansel; State ex rel. NSBA v. 63
State; Baker's Supermarkets v. 984
State ex rel. FirsTier Bank v. Mullen 384
State ex rel. NSBA v. Barnett 601
State ex rel. NSBA v. Calinger 903
State ex rel. NSBA v. Craven 201
State ex rel. NSBA v. Gleason 1003
State ex rel. NSBA v. Guyerson 516
State ex rel. NSBA v. Ogborn 767
State ex rel. NSBA v. Peartree 49
State ex rel. NSBA v. Stansel 63

State Farm; Standard Fed. Sav. Bank v. 552
State; Jones v. 158
State; Smith v. 360
State v. Barfoot 335
State v. Brunzo 176
State v. Cisneros 372
State v. Cody 683
State v. Derry 260
State v. Eona 318
State v. Jimenez 255
State v. Jones 117
State v. Kunath 1010
State v. Ladig 737
State v. Linn 809
State v. Lowe 215
State v. Lynch 234
State v. Marks 592
State v. McCracken 576
State v. Nelson 817
State v. Neujahr 965
State v. Pierce 536
State v. Plant 52
State v. Russell 723
State v. Ryan 405
State v. Schmailzl 314
State v. Simants 581
State v. Sundling 732
State; White v. 977
Strasheim; Vowers & Sons, Inc. v. 699
Stute; Farm Credit Bank v. 573
Sundling; State v. 732
Sylvis v. Walling 168

Toombs v. Driver Mgmt., Inc. 1016
Townhouser, Inc.; City of Lincoln v. 399

United States F. & G. Co.; Western Sec. Bank v. 679

Village of Butte; Engelhaupt v. 827
Village of Orleans v. Dietz 806
Village Realty Co.; Poppleton v. 353
Vowers & Sons, Inc. v. Strasheim 699

Wahoo, City of; DeCoste v. 463
Walker Enter.; Walker v. 120
Walker v. Walker Enter. 120
Walling; Sylvis v. 168
Walpus v. Milwaukee Elec. Tool Corp. 145

Warning v. May 887
Weber & Sons, Co.; Roberts v. 243
Western Sec. Bank v. United States F. & G. Co. 679
White v. State 977
Winberg v. Cimfel 71
Winfield v. CIGNA Cos. 24
Worobec; Floyd v. 605

LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-93-948: **Hatcliff v. Conrad.** Affirmed. Fahrnbruch, J. Connolly, J., dissenting. Wright, J., joins in this dissent.

No. S-93-1094: **Greatway Ins. Co. v. Nunn.** Dismissed. Per Curiam.

No. S-94-665: **Hanson v. General Motors Corp.** Affirmed. Per Curiam.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-87-720: **Lisco State Bank v. Fern Acres, Ltd.** Stipulation allowed; appeal dismissed.

No. S-93-367: **Cottonwood Professional Plaza I v. KV Cottonwood Ltd.** Appeal dismissed for lack of a final order.

No. S-93-878: **H.B. Brand's v. Webb.** By order of the court, opinion withdrawn; affirmed without opinion by an equally divided court.

No. S-93-958: **Schafer v. Schafer.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-93-1009: **Kocour v. Schmidt.** Injunction expired by own terms; appeal dismissed as moot.

No. S-93-1132: **Lake Arrowhead, Inc. v. Lakeland Dev. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. S-94-067: **Ameritas Life Ins. Co. v. Misle Bros. Real Estate.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-94-147: **Montclair Inv. Co. v. Jewel Food Stores.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-94-790: **In re Equalization & Assessment of Sarpy Cty.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-94-945: **Wing v. Union Pacific R.R. Co.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-95-056: **State v. Manzer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-95-101: **Carrell v. Lamp, Rynearson & Assocs.** Stipulation allowed; appeal dimissed.

No. S-95-163: **State v. Forsberg.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-95-203: **State v. Frickel.** Appeal dismissed. See Rule 7A(2).

No. S-95-514: **State ex rel. NSBA v. Craven.** Judgment of suspension.

No. S-95-607: **State v. Secret.** Affirmed. See Rule 7A(1).

No. S-95-857: **Pratt v. Nebraska Parole Board.** Appeal dismissed. See Rule 7A(2).

No. S-95-928: **State ex rel. NSBA v. Johnston.** Order of temporary suspension entered.

No. S-95-980: **State v. Hill.** Affirmed. See Rule 7A(1)d.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-92-154: **York Equip., Inc. v. Ashwill**, 2 Neb. App. 374 (1993). Petition of appellee for further review dismissed on July 7, 1995, for failure to file brief.

No. S-92-687: **Shuck v. Jacob**, 95 NCA No. 33. Petition of appellant for further review sustained on November 15, 1995.

No. A-93-077: **Wells v. Wells**, 3 Neb. App. 117 (1994). Petition of appellant for further review overruled on May 11, 1995.

No. A-93-134: **Knapp v. Nebraska Pub. Power Dist.**, 95 NCA No. 40. Petition of appellant for further review overruled on November 15, 1995.

No. S-93-233: **Motor Club Ins. Assn. v. Bartunek**, 3 Neb. App. 292 (1995). Petition of appellant for further review sustained on July 6, 1995.

No. A-93-336: **Smidt v. Smidt**, 95 NCA No. 12. Petition of appellant for further review overruled on June 21, 1995.

No. A-93-413: **Hanus v. Sears Roebuck & Co.** Petition of appellant for further review overruled on October 25, 1995.

No. A-93-513: **Hanus v. Sears Roebuck & Co.**, 95 NCA No. 26. Petition of appellant for further review overruled on October 25, 1995.

No. A-93-521: **State v. McGurk**, 3 Neb. App. 778 (1995). Petition of appellant for further review overruled on July 19, 1995.

No. A-93-541: **Kaspar v. Kaspar**, 95 NCA No. 14. Petition of appellee for further review overruled on May 24, 1995.

No. A-93-573: **Northland Transp., Inc. v. McElhose**, 3 Neb. App. 650 (1995). Petition of appellant for further review overruled on June 1, 1995.

No. A-93-595: **Emerson v. Zagurski**, 3 Neb. App. 658 (1995). Petition of appellee for further review overruled on May 22, 1995, as being filed out of time.

Nos. A-93-600, A-93-601: **Scheibe v. Brogan**, 95 NCA No. 26. Petition of appellant for further review overruled on August 22, 1995.

No. S-93-622: **Solar Motors v. First Nat. Bank of Chadron**, 4 Neb. App. 1 (1995). Petition of appellee for further review sustained on October 25, 1995.

No. A-93-654: **Jacobsen v. Jacobsen**. Petition of appellant for further review overruled on May 11, 1995.

No. S-93-670: **Melcher v. Bank of Madison**, 3 Neb. App. 665 (1995). Petition of appellee for further review sustained on May 24, 1995.

No. A-93-696: **Allen v. Nebraska Dept. of Corr. Servs.**, 95 NCA No. 12. Petition of appellant for further review overruled on May 24, 1995.

No. A-93-718: **Finn v. Kramer**. Petition of appellant for further review overruled on June 21, 1995.

No. A-93-719: **Abboud v. Papio-Missouri Riv. Nat. Res. Dist.**, 95 NCA No. 34. Petition of appellant for further review overruled on October 17, 1995.

No. A-93-750: **In re Estate of Springer**, 95 NCA No. 20. Petition of appellant for further review overruled on June 14, 1995.

Nos. A-93-768, A-93-769: **Urban v. Kircher**, 95 NCA No. 34. Petition of appellee for further review overruled on October 17, 1995.

No. A-93-789: **Tunender v. Niobrara Valley Elec. Membership Corp.**, 95 NCA No. 24. Petition of appellant for further review overruled on July 19, 1995.

No. A-93-805: **Steiner v. Steiner**. Petition of appellant for further review overruled on June 14, 1995.

No. S-93-817: **Kubat v. Kubat**. Petition of appellant for further review sustained on June 14, 1995.

No. S-93-817: **Kubat v. Kubat**. Petition of appellant for further review dismissed on December 8, 1995, as having been improvidently granted.

No. A-93-818: **Ballentyne v. Blair**, 95 NCA No. 20. Petition of appellant for further review overruled on July 6, 1995.

No. S-93-819: **Payne v. Nebraska Dept. of Corr. Servs.**, 3 Neb. App. 969 (1995). Petition of appellant for further review sustained on October 17, 1995.

No. A-93-857: **General Fin. Servs. v. Santee Sioux Dev. Corp.**, 95 NCA No. 25. Petition of appellant for further review overruled on September 27, 1995.

No. A-93-877: **Wildcat Enter. v. Fifer**, 95 NCA No. 21. Petition of appellant for further review overruled on July 6, 1995.

No. A-93-945: **State ex rel. Albers v. Stute**, 95 NCA No. 25. Petition of appellant for further review overruled on August 22, 1995.

No. A-93-1037: **Ebke v. Ebke**, 95 NCA No. 33. Petition of appellant for further review overruled on October 13, 1995.

No. A-94-019: **Betterman & Katelman v. Pipe & Piling Supplies**, 95 NCA No. 38. Petition of appellee for further review overruled on November 22, 1995.

No. A-94-034: **State v. Krusemark**, 94 NCA No. 40. Petition of appellant for further review overruled on June 28, 1995.

No. A-94-037: **Dinsmore v. Madonna Ctrs., Inc.**, 95 NCA No. 37. Petition of appellant for further review overruled on December 13, 1995.

No. A-94-038: **Downs v. Downs**, 95 NCA No. 31. Petition of appellant for further review overruled on September 20, 1995.

No. A-94-088: **State v. Winter**, 95 NCA No. 8. Petition of appellant for further review overruled on November 29, 1995.

No. S-94-109: **State v. Cody**, 95 NCA No. 16. Petition of appellee for further review sustained on May 11, 1995.

No. S-94-117: **Koterzina v. Copple Chevrolet**, 3 Neb. App. 695 (1995). Petition of appellee Koterzina for further review sustained on June 14, 1995.

No. A-94-165: **Beaman v. Cook Family Foods**. Petition of appellant for further review overruled on June 21, 1995.

No. S-94-183: **Larson v. Hometown Communications, Inc.**, 3 Neb. App. 367 (1995). Petition of appellee for further review sustained on May 24, 1995.

No. A-94-190: **Nichols v. Nichols**, 95 NCA No. 39. Petition of appellant for further review overruled on November 15, 1995.

No. A-94-194: **Robbins v. Robbins**, 3 Neb. App. 953 (1995). Petition of appellant for further review overruled on November 22, 1995.

No. S-94-216: **Ainslie v. Ainslie**, 4 Neb. App. 70 (1995). Petition of appellee for further review sustained on November 8, 1995.

No. A-94-237: **Garrett v. Garrett**, 3 Neb. App. 384 (1995). Petition of appellant for further review overruled on May 24, 1995.

No. A-94-240: **Franzen v. Jensen Irrigation, Inc.**, 95 NCA No. 30. Petition of appellant for further review overruled on September 13, 1995.

No. A-94-267: **FirsTier Bank v. Cashler**, 95 NCA No. 29. Petition of appellants for further review overruled on September 13, 1995.

No. A-94-291: **State v. Burnett**, 95 NCA No. 7. Petition of appellant for further review overruled on June 1, 1995.

No. A-94-327: **Bennett v. Farmers Mut. Ins. Co. of Neb.** Petition of appellant for further review overruled on November 15, 1995.

No. A-94-375: **Kilmer v. Kilmer**, 95 NCA No. 13. Petition of appellant for further review overruled on June 21, 1995.

No. A-94-400: **Wahrman v. Wahrman**, 95 NCA No. 28. Petition of appellant for further review overruled on September 13, 1995.

No. A-94-405: **White v. State Farm Mut. Auto. Ins. Co.**, 95 NCA No. 35. Petition of appellant for further review overruled on October 17, 1995.

No. A-94-424: **State v. Jacob**, 95 NCA No. 15. Petition of appellant for further review overruled on June 14, 1995.

Nos. A-94-444, A-94-445, A-94-498: **Waite v. Carpenter**, 3 Neb. App. 879 (1995). Petition of appellant for further review overruled on August 22, 1995.

No. A-94-448: **State v. Sharp**, 95 NCA No. 12. Petition of appellant for further review overruled on June 14, 1995.

No. A-94-455: **State v. Poitra**, 95 NCA No. 12. Petition of appellant for further review overruled on May 17, 1995.

No. A-94-471: **Norine v. Norine**. Petition of appellant for further review overruled on August 22, 1995.

No. S-94-495: **State v. Young**, 3 Neb. App. 539 (1995). Petition of appellant for further review sustained on May 11, 1995.

No. A-94-504: **State v. Martin**, 3 Neb. App. 555 (1995). Petition of appellant for further review overruled on May 11, 1995.

No. A-94-519: **State v. Hanus**, 95 NCA No. 11. Petition of appellant for further review overruled on May 11, 1995.

No. A-94-567: **State v. Smith**, 3 Neb. App. 564 (1995). Petition of appellant for further review overruled on May 17, 1995.

No. A-94-567: **State v. Smith**, 3 Neb. App. 564 (1995). Petition of appellee for further review overruled on May 17, 1995.

No. A-94-571: **In re Interest of April P.**, 95 NCA No. 10. Petition of appellant for further review overruled on May 11, 1995.

No. A-94-595: **In re Interest of Kari F.** Petition of appellant for further review overruled on September 13, 1995.

No. A-94-595: **In re Interest of Kari F.** Petition of appellee for further review overruled on September 13, 1995.

No. A-94-602: **Kraus v. Jones Automotive, Inc.**, 3 Neb. App. 577 (1995). Petition of appellant for further review overruled on May 11, 1995.

No. A-94-612: **State v. Mann**, 95 NCA No. 12. Petition of appellant for further review overruled on May 11, 1995.

No. A-94-614: **State v. Davis**, 95 NCA No. 25. Petition of appellant for further review overruled on July 19, 1995.

No. S-94-621: **Marten v. Staab**, 4 Neb. App. 19 (1995). Petition of appellees for further review sustained on October 17, 1995.

No. A-94-625: **State v. Illig**, 95 NCA No. 39. Petition of appellee for further review overruled on November 8, 1995.

No. A-94-631: **State v. Mosley**, 95 NCA No. 13. Petition of appellant for further review overruled on May 17, 1995.

No. S-94-642: **In re Interest of Daniel W.**, 3 Neb. App. 630 (1995). Petition of appellant for further review sustained on June 1, 1995.

No. A-94-651: **Hutchison v. Mosser**. Petition of appellant for further review overruled on December 13, 1995.

No. S-94-663: **State v. Neujahr**, 95 NCA No. 20. Petition of appellee for further review sustained on June 21, 1995.

No. S-94-666: **Becker v. Nebraska Accountability & Disclosure Comm.** Petition of appellant for further review sustained on August 22, 1995, as to the demurrer of the Regents and Wood, but not as to the Commission.

No. A-94-670: **Schrad v. Schrad**. Petition of appellant for further review overruled on June 28, 1995.

No. A-94-674: **State v. Markus**, 95 NCA No. 14. Petition of appellant for further review overruled on June 14, 1995.

No. S-94-693: **Adrian v. Adrian**, 95 NCA No. 6. Petition of appellant for further review sustained on June 14, 1995.

No. A-94-710: **Jones v. Child Saving Institute**, 95 NCA No. 14. Petition of appellant for further review overruled on July 19, 1995.

No. A-94-711: **State v. Martinez**, 95 NCA No. 15. Petition of appellant for further review overruled on May 22, 1995, as being filed out of time.

Nos. A-94-719, A-94-720, A-94-721: **State v. Donlan**, 95 NCA No. 38. Petitions of appellants for further review overruled on November 8, 1995.

No. A-94-724: **State v. Green**, 95 NCA No. 23. Petition of appellee for further review overruled on August 22, 1995.

Nos. A-94-726 through A-94-729: **In re Interest of Jessica S. et al.**, 95 NCA No. 26. Petition of appellant for further review overruled on August 22, 1995.

No. A-94-735: **State v. Krogman**, 95 NCA No. 13. Petition of appellant for further review overruled on May 17, 1995.

No. A-94-783: **Eichorn v. Eichorn Trucking**, 3 Neb. App. 795 (1995). Petition of appellant for further review overruled on July 19, 1995.

No. A-94-788: **State v. DeLeon**. Petition of appellant for further review overruled on May 11, 1995.

No. S-94-794: **State v. Nelson**, 95 NCA No. 17. Petition of appellant for further review sustained on June 21, 1995.

No. S-94-797: **Pettit v. State**, 95 NCA No. 28. Petition of appellee for further review sustained on October 17, 1995.

No. A-94-801: **State v. Miller**, 95 NCA No. 18. Petition of appellant for further review overruled on June 21, 1995.

No. A-94-810: **Vorderstrasse v. Vorderstrasse**, 95 NCA No. 29. Petition of appellant for further review overruled on September 13, 1995.

No. S-94-813: **Stansbury v. HEP, Inc.**, 3 Neb. App. 712 (1995). Petition of appellee for further review sustained on June 1, 1995.

No. A-94-814: **EMC Mortgage Corp. v. Southern California Inst., Inc.** Petition of appellants for further review overruled on May 11, 1995.

No. A-94-828: **State v. Morris**, 3 Neb. App. 835 (1995). Petition of appellant for further review overruled on August 22, 1995.

No. A-94-834: **State v. Moore**, 95 NCA No. 36. Petition of appellant for further review overruled on November 8, 1995.

Nos. S-94-842, S-94-843: **In re Interest of Noelle F. & Sarah F.**, 3 Neb. App. 901 (1995). Petition of appellant for further review sustained on November 15, 1995.

No. A-94-847: **State v. Kao**, 3 Neb. App. 727 (1995). Petition of appellee for further review overruled on June 21, 1995.

No. S-94-848: **State v. Reeder**, 95 NCA No. 22. Petition of appellant for further review sustained on August 22, 1995.

No. A-94-876: **State v. Clark**, 95 NCA No. 32. Petition of appellant for further review overruled on October 17, 1995.

No. A-94-881: **Edwards v. Aero Mayflower Agency**, 95 NCA No. 19. Petition of appellant for further review overruled on July 19, 1995.

No. A-94-896: **State v. Starks**, 3 Neb. App. 854 (1995). Petition of appellant for further review overruled on August 22, 1995.

Nos. A-94-907, A-94-1033: **In re Interest of Brosius**. Petition of appellant for further review overruled on May 17, 1995.

No. A-94-914: **Schumacher v. Schumacher**. Petition of appellant for further review overruled on October 25, 1995.

No. A-94-921: **State v. Tweedy**, 95 NCA No. 13. Petition of appellant for further review overruled on June 1, 1995.

No. A-94-923: **State v. Barraza-Dominquez**, 95 NCA No. 26. Petition of appellant for further review overruled on August 22, 1995.

No. S-94-935: **State v. Hansen**, 95 NCA No. 28. Petition of appellant for further review sustained on September 27, 1995.

No. A-94-951: **State v. Tippit**. Petition of appellant for further review overruled on July 19, 1995.

No. S-94-964: **State v. Kunath**, 95 NCA No. 19. Petition of appellee for further review sustained on June 21, 1995.

No. A-94-970: **State v. Svoboda**, 95 NCA No. 34. Petition of appellant for further review overruled on November 8, 1995.

No. A-94-976: **Peck v. Northwest Airlines**, 95 NCA No. 25. Petition of appellant for further review overruled on August 22, 1995.

No. A-94-1006: **State v. Boehme**, 95 NCA No. 17. Petition of appellant for further review overruled on June 14, 1995.

No. A-94-1007: **State v. Young**. Petition of appellant for further review overruled on August 22, 1995.

No. S-94-1034: **Johnson v. Holdrege Med. Clinic**, 3 Neb. App. 894 (1995). Petition of appellant for further review sustained on August 22, 1995.

No. A-94-1056: **State v. Davis**, 95 NCA No. 31. Petition of appellant for further review overruled on September 13, 1995.

No. A-94-1058: **State v. Moore**, 95 NCA No. 28. Petition of appellant for further review overruled on September 13, 1995.

No. S-94-1070: **Kapperman v. Kapperman**, 95 NCA No. 28. Petition of appellant for further review sustained on November 15, 1995.

No. A-94-1072: **State v. Bennett**. Petition of appellant for further review overruled on August 22, 1995.

No. A-94-1081: **Simpson v. Yellow Freight Sys.**, 95 NCA No. 32. Petition of appellant for further review overruled on September 27, 1995.

No. A-94-1087: **State v. Hayes**, 3 Neb. App. 919 (1995). Petition of appellant for further review overruled on November 15, 1995.

No. A-94-1093: **State v. Smith**, 95 NCA No. 41. Petition of appellant for further review overruled on December 13, 1995.

No. A-94-1099: **State v. Snodgrass**. Petition of appellant for further review overruled on May 24, 1995.

No. S-94-1100: **State v. Sundling**, 3 Neb. App. 722 (1995). Petition of appellant for further review sustained on June 14, 1995.

No. A-94-1124: **State v. Hicks**. Petition of appellant for further review overruled on August 22, 1995.

No. A-94-1139: **In re Interest of Mickey B. & Amanda B.**, 95 NCA No. 38. Petition of appellee Allen B. for further review overruled on November 22, 1995.

No. A-94-1144: **State v. Billups**. Petition of appellant for further review overruled on June 21, 1995.

No. A-94-1177: **State v. Sweeney**, 95 NCA No. 41. Petition of appellee for further review overruled on November 8, 1995.

No. A-94-1185: **State v. Davis**. Petition of appellant for further review overruled on June 1, 1995.

No. A-94-1186: **State v. Davis**. Petition of appellant for further review overruled on June 1, 1995.

No. S-94-1193: **State v. Brozovksy**. Petition of appellant for further review sustained on September 27, 1995.

No. A-94-1204: **Geist v. Geist**, 95 NCA No. 30. Petition of appellant for further review overruled on October 17, 1995.

No. A-94-1205: **State v. Jones**, 95 NCA No. 27. Petition of appellee for further review overruled on August 22, 1995.

No. A-94-1224: **Grobe v. Food 4 Less**, 95 NCA No. 30. Petition of appellee for further review overruled on September 20, 1995.

No. S-94-1249: **State v. Dodson**, 95 NCA No. 30. Petition of appellant for further review sustained on October 17, 1995.

No. A-95-015: **State v. Rhoades**, 95 NCA No. 41. Petition of appellant for further review overruled on November 29, 1995.

No. A-95-029: **Crabb v. Bishop Clarkson Memorial Hosp.**, 95 NCA No. 33. Petitions of appellant for further review overruled on November 22, 1995.

No. A-95-050: **Wagner v. Wagner**. Petition of appellant for further review overruled on June 1, 1995.

No. A-95-068: **State v. Guiterrez**. Petition of appellant for further review overruled on October 25, 1995.

No. A-95-070: **Maw v. Heartland Co-op**. Petition of appellee for further review overruled on November 15, 1995.

No. A-95-071: **Swenson v. Furnas Cty. Farms**, 95 NCA No. 32. Petition of appellant for further review overruled on November 15, 1995.

Nos. S-95-077, S-95-082, S-95-083: **In re Interest of Troxel**. Petition of appellant for further review sustained on August 22, 1995.

No. S-95-103: **Dittrich v. Department of Corr. Servs.** Petition of appellant for further review sustained on September 20, 1995.

No. A-95-105: **Crisman v. Beef America, Inc.**, 95 NCA No. 31. Petition of appellant for further review overruled on September 20, 1995.

No. A-95-116: **State v. Zimmerman**, 95 NCA No. 29. Petition of appellant for further review overruled on September 13, 1995.

No. A-95-141: **State v. Harris**. Petition of appellant for further review overruled on November 29, 1995.

No. A-95-202: **State v. Marion**. Petition of appellant for further review overruled on November 15, 1995.

No. S-95-208: **State v. Schlund**. Petition of appellant for further review sustained on June 28, 1995.

No. A-95-215: **In re Interest of John T.**, 4 Neb. App. 79 (1995). Petition of appellee for further review overruled on December 13, 1995.

No. A-95-244: **State v. May**. Petition of appellant for further review overruled on December 11, 1995.

No. A-95-244: **State v. May**. Petition of appellant for further review overruled on November 22, 1995.

No. A-95-283: **State v. Rodriguez**. Petition of appellant for further review overruled on November 22, 1995.

No. A-95-301: **State v. Blair**. Petition of appellant for further review overruled on October 17, 1995.

No. A-95-370: **Bassinger v. Nebraska Dept. of Corr. Servs.** Petition of appellant for further review overruled on June 1, 1995.

No. A-95-484: **State v. Pixler**. Petition of appellant for further review denied on November 3, 1995, for lack of jurisdiction.

No. A-95-509: **State v. Huestis**. Petition of appellant for further review overruled on November 15, 1995.

No. A-95-563: **State v. Vice**. Petition of appellant for further review overruled on September 13, 1995.

No. A-95-671: **State v. Carter**. Petition of appellant for further review overruled on August 22, 1995.

No. A-95-849: **Pratt v. Nebraska Parole Board**. Petition of appellant for further review overruled on November 15, 1995.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

COLUMBIA NATIONAL INSURANCE, FORMERLY KNOWN AS NATIONAL AMERICAN INSURANCE COMPANY OF NEBRASKA, A DIVISION OF COLUMBIA INSURANCE GROUP, APPELLEE, V. PACESETTER HOMES, INC., A NEBRASKA CORPORATION, AND JOSEPH FINGERLIN, APPELLANTS.

532 N.W.2d 1

Filed May 19, 1995. No. S-93-311.

1. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to those questions.
2. ____: ____. Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong.
3. **Insurance: Contracts: Appeal and Error.** The construction of an insurance contract or policy is a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Insurance: Intent.** In order to determine whether the insured intended to do the specific act which caused injury or harm, the court must examine the quality and purpose of the transaction as a whole.
5. **Words and Phrases.** The term "occupancy" normally refers to the state of being inhabited. The right of "private occupancy" can only refer to those rights associated with an individual's act of inhabiting the premises, and not to rights associated with the individual's right to use and enjoy the inhabited premises.
6. ____. Ejusdem generis principles draw on the sensible notion that words such as "or other invasion of the right of private occupancy" are intended to encompass actions of the same general type as, though not specifically embraced within, "wrongful entry or eviction."
7. **Intent.** Where an intentional act results in injuries which are the natural and probable consequences of the act, the injuries as well as the act are intentional.

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

Robert J. Huck and Robert S. Lannin, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for appellants.

William J. Brennan and Joseph A. Jordano, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellee.

CAPORALE, FAHRNBRUCH, WRIGHT, and CONNOLLY, JJ., and MILLER-LERMAN, Judge, and GRANT, J., Retired.

WRIGHT, J.

I. INTRODUCTION

Columbia National Insurance (Columbia) brought this action for declaratory judgment, seeking a determination of whether it had a duty to defend Pacesetter Homes, Inc. (Pacesetter), and Joseph Fingerlin, one of Pacesetter's former employees, in three suits brought in Sarpy County (the Sarpy County actions). The district court held that Columbia had no duty to defend. Pacesetter and Fingerlin appeal.

II. SCOPE OF REVIEW

When a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to those questions. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994); *Jaksha v. Thomas*, 243 Neb. 794, 502 N.W.2d 826 (1993).

Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong. *Beatrice Nat. Bank v. Southeast Neb. Co-op*, 230 Neb. 671, 432 N.W.2d 842 (1988); *Havelock Bank v. Western Surety Co.*, 217 Neb. 560, 352 N.W.2d 855 (1984).

The construction of an insurance contract or policy is a question 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. *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994); *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994).

III. FACTS

1. BACKGROUND

In the late 1970's, Pacesetter began developing a subdivision

in Sarpy County known as Millard Highlands South. The first plat was filed in 1976. Also in the late 1970's, the Nebraska Department of Roads hired an engineering firm to design a set of proposed plans for an Interstate 80–Harrison Street interchange (126th Street).

At a public hearing held on July 7, 1980, in Ralston, Nebraska, functional plans were presented in order to allow public comment on the proposed interchange. The plans showed both the location of 126th Street in relation to the Millard Highlands South eastern property line as originally platted and the anticipated limits of construction or right-of-way that would be needed. The plans depicted the trees running along the eastern border of Pacesetter's property as falling within the limits of the proposed construction. According to the Douglas County surveyor, the trees and the hill on which they stood had to be removed to make way for 126th Street.

In 1986, the engineering firm hired by Pacesetter completed Millard Highlands South replat IV. This replat was done to accommodate the expected limits of construction for 126th Street outlined in the 1980 functional plans. The replat was accepted by the Sarpy County Board of County Commissioners on April 7, 1987. On March 9, 1988, Ralph Heavrin, as president of Pacesetter, transferred by warranty deed to the Department of Roads the portion of the subdivision which was to be included in the 126th Street right-of-way. The right-of-way property sold to the Department of Roads included the hill and trees depicted in the 1980 functional plans.

2. Real Estate Purchases

On March 11, 1986, Rayne and Cheryl Balwanz, plaintiffs in the Sarpy County actions, were induced by Fingerlin to purchase Lot 48, Millard Highlands South replat IV. In May 1986, the Balwanzes were informed that a portion of Lot 48 was to be condemned for the 126th Street right-of-way. The Balwanzes then changed their purchase to Lot 53. On July 31, 1988, David and Lisa Ammerman, plaintiffs in the Sarpy County actions, were induced by Fingerlin to purchase Lot 602, Millard Highlands South replat IV. This lot backed up to the property sold by Pacesetter to the Department of Roads for the

126th Street right-of-way. On September 21, 1988, Scott and Teri Schaefer, also plaintiffs in the Sarpy County actions, were induced by Fingerlin to purchase Lot 600, Millard Highlands South replat IV. This lot also backed up to the property sold by Pacesetter for the right-of-way.

3. Real Estate Commission Proceedings

On April 4 and May 9, 1990, respectively, the Schaefers and the Ammermans filed formal complaints with the State Real Estate Commission (Commission). The Schaefers and Ammermans alleged that Heavrin and Fingerlin, acting on behalf of Pacesetter, made material representations regarding the condition of the lots they purchased in 1988. These representations related to the ownership and permanency of the hill and trees east of their property lines, the same hill and trees deeded in 1988 to the Department of Roads. The Schaefers and Ammermans alleged that Fingerlin misrepresented the nature of 126th Street and the location of 126th Street in relation to Lots 600 and 602 by indicating that the hill and trees would be a natural buffer. The Commission conducted a formal adjudication of the complaints and, on September 24, 1990, issued an order stating specific findings of fact and conclusions of law regarding the complaints. The Commission generally found that Fingerlin knowingly and intentionally made misrepresentations. The Commission's order was not appealed.

4. The Sarpy County Actions

In March 1991, the Schaefers, Ammermans, and Balwanzes filed the Sarpy County actions against Pacesetter and Fingerlin. These plaintiffs alleged that Fingerlin knowingly made misrepresentations about their respective lots in connection with the purchase of their homes. They alleged Fingerlin represented that the hill and trees bordering Lots 600 and 602 and adjacent to Lot 53 were owned by Pacesetter, that Pacesetter intended to keep the hill and trees in place, and that Pacesetter did not intend to remove the hill or trees. The plaintiffs alleged Fingerlin told them that 126th Street would be built a sufficient distance from their lots and that 126th Street was not to be a connecting on-off ramp, just a four-lane street. They claimed that as a direct and proximate result of the actions of Pacesetter

and Fingerlin they had been damaged in the following respects: (1) diminution in the value of their property and (2) loss of enjoyment of the trees.

Pacesetter and Fingerlin denied any wrongdoing and filed a claim with Columbia requesting that it assume the defense of these lawsuits. Based upon a review of the petitions and upon Columbia's knowledge of the complaints filed with the Commission, Columbia denied the claim and declined to defend, contending (1) there was no coverage under the policy for an intentional act, (2) the conduct alleged was not an occurrence as defined by the policy, and (3) the damages claimed were not property damage as defined by the policy.

5. The Policy

Columbia issued to Pacesetter a special multiperil comprehensive general liability insurance policy covering the period from January 1, 1988, to January 1, 1989. No issue is raised as to whether the policy was in effect at the time of the misrepresentations or as to whether this fact would affect the coverage. Therefore, we do not decide that issue.

Section II of the policy addresses liability coverage. That section contains the following provisions relating to bodily injury liability and property damage liability:

> I. The [c]ompany will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> bodily injury or
>
> property damage
>
> to which this insurance applies, caused by an occurrence, and arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental to the business of the named insured conducted at or from the insured premises, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after

> the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

(Emphasis omitted.)

Under the definitions applicable to section II, an occurrence is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." (Emphasis omitted.) Property damage is defined as

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

(Emphasis omitted.)

The policy included a broad-form comprehensive general liability endorsement which contained the following personal injury and advertising injury liability coverage provisions:

> (A) The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury or advertising injury to which this insurance applies, sustained by any person or organization and arising out of the conduct of the named insured's business, within the policy territory, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such injury, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.
>
> . . . .
>
> (D) Additional Definitions
>
> "Advertising Injury" means injury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if

such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan.

"Personal Injury" means injury arising out of one or more of the following offenses committed during the policy period:

(1) false arrest, detention, imprisonment, or malicious prosecution;

(2) wrongful entry or eviction or other invasion of the right of private occupancy;

(3) a publication or utterance

(a) of a libel or slander or other defamatory or disparaging material, or

(b) in violation of an individual's right of privacy;

except publications or utterances in the course of or related to advertising, broadcasting, publishing or telecasting activities conducted by or on behalf of the named insured shall not be deemed personal injury.

(Emphasis omitted.)

6. Declaratory Judgment Action

Columbia brought this declaratory judgment action, seeking a determination that Columbia was not legally or contractually obligated under the terms of the policy to defend Pacesetter and Fingerlin or to pay any judgment rendered against them in the Sarpy County actions. The parties stipulated that Columbia is an insurance company licensed and incorporated under the laws of the State of Nebraska; that Pacesetter is the developer and seller of real estate known as the Millard Highlands South subdivision in Sarpy County, Nebraska; and that Fingerlin was a real estate broker, sales agent, and employee of Pacesetter.

The trial court found that the evidence did not show, nor did the homeowners allege in the Sarpy County actions, an invasion of the homeowners' right of private occupancy. The court stated that in each instance, the homeowners own and occupy the lots they contracted to buy and received on the dates the property was conveyed to them by warranty deed. The court found the evidence did not show, nor did the homeowners allege, any physical damage to their property or to any property they were

sold or believed they purchased from Pacesetter. The court noted the damage allegations claimed diminution in value and loss of enjoyment of the trees formerly located on the adjacent property now owned by the Department of Roads.

The trial court found that the evidence established that the structural soundness of the homes and Lots 53, 600, and 602 were unaffected by the removal of the hill and trees and that the grading for 126th Street did not affect the drainage or structural integrity of these lots. The court stated that the plain language of the policy required that the homeowners allege there was damage or loss of use to their tangible property in order to come within the meaning of the definition of property damage under the policy. The court noted that the homeowners did not allege they suffered a personal injury or an advertising injury under the policy and that there was no evidence to support such a conclusion.

A verbatim transcript of the proceedings before the Commission was received into evidence without objection. Based on the pleadings and the evidence, the trial court found that there was no coverage under the policy for the acts alleged in the Sarpy County actions. The court held that Columbia had no duty to assume the financial costs of defending Pacesetter and Fingerlin in the Sarpy County actions.

IV. ASSIGNMENTS OF ERROR

On appeal, Pacesetter and Fingerlin assign numerous errors, which we condense into three broad divisions. First, the trial court erred by determining that the liability coverage provision (section II) of Columbia's policy did not provide coverage for Fingerlin's actions. Second, the court erred by determining that the policy's broad-form comprehensive general liability endorsement did not provide coverage. Third, the court erred by prematurely determining the issue of coverage.

V. ANALYSIS

Despite the amount of evidence presented before the trial court, this case is a matter of insurance contract construction. The construction of an insurance contract or policy is a question 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. *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994); *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994).

1. Section II Liability Coverage

We first examine the liability coverage section of the policy, which has been quoted above. This section requires Columbia to pay all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage caused by an *occurrence*. The first question is, What is an occurrence?

Columbia argues its policy excludes the misrepresentations made by Fingerlin because his actions were intentional and are, therefore, excluded under the terms and conditions of the policy. The letter from Columbia to Pacesetter denying coverage and declining to defend stated:

> Under the petitions that have been forwarded to us, the conduct of Pacesetter's real estate person is alleged to be intentional; and under the policy, there is no coverage for an intentional act. Further, the conduct that was alleged is not an occurrence as defined by the policy and the damages claimed are not property damages defined by the policy.

Each of the petitions filed in the Sarpy County actions alleged that Fingerlin was acting as an agent and employee of Pacesetter and that the misstatements of material fact were known to Fingerlin and were made with the full knowledge and consent of Pacesetter. The plaintiffs alleged that Fingerlin's misrepresentations, which were imputed to Pacesetter, constituted a cause of action for fraudulent misrepresentation and that such misrepresentations induced the plaintiffs to enter into real estate purchase contracts to their damage with respect to diminution in the value of their property and loss of enjoyment of the trees.

(a) Occurrence

The policy defines an occurrence as "an accident . . . neither expected nor intended from the standpoint of the insured." Our task is to determine whether or not Fingerlin's actions were

intentional within the meaning of the definition. Pacesetter argues that *Sullivan v. Great Plains Ins. Co.*, 210 Neb. 846, 317 N.W.2d 375 (1982), holds that the word "intentional" means acting with specific intent to harm a third party and that since Fingerlin testified he did not intend to harm anyone or to misrepresent anything to anyone, his actions were covered by the policy. We do not agree.

In *Sullivan*, the insured lost control of his car, which left the road, struck a utility pole, and ended up in a pasture. The insurer argued that damage to the car was intentional because the insured was speeding. We rejected the insurer's argument. We held that the insured's intentional and reckless operation of his vehicle was covered unless there was evidence that the insured intended to do the specific act that caused the damage, i.e., striking a utility pole and driving into a pasture. *Sullivan* defines "intentional" not as the specific intent to cause injury or harm, but, rather, as the intent to do a specific act which causes injury or harm. In order to determine whether the insured intended to do the specific act which caused injury or harm, *Sullivan* requires us to examine the " 'quality and purpose of the transaction as a whole.' " *Id.* at 854, 317 N.W.2d at 380.

(i) Fingerlin's Actions

The Sarpy County plaintiffs alleged Fingerlin knowingly misrepresented that the hill and trees adjacent to the lots were owned by Pacesetter, that Pacesetter intended on keeping the hill and trees in place, that 126th Street would be built a sufficient distance from the lots, and that 126th Street would not be a connecting on-off ramp for Interstate 80. The plaintiffs alleged that during the course of their discussions with Fingerlin, he knowingly misrepresented material facts concerning the location of the 126th Street right-of-way, and that such misrepresentations resulted in the purchase of their lots and, ultimately, in their sustaining damages for diminution in the value of their property and loss of the enjoyment of the trees.

(ii) Real Estate Commission Proceedings

A verbatim transcript of the proceedings before the Commission was received into evidence by the trial court without objection. The court found that the decision of the

Commission showed that Fingerlin knowingly failed to disclose a material fact with regard to the condition of the real estate. Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong. *Beatrice Nat. Bank v. Southeast Neb. Co-op*, 230 Neb. 671, 432 N.W.2d 842 (1988); *Havelock Bank v. Western Surety Co.*, 217 Neb. 560, 352 N.W.2d 855 (1984). The evidence established that Fingerlin knowingly made these misrepresentations to induce the purchase of real estate. His conduct was not accidental.

We find that the facts disclosed in the Commission hearings and the facts adduced during the declaratory judgment proceedings clearly indicate that the misconduct involved affirmative misrepresentations and not mere negligence. Fingerlin had notarized the warranty deed which conveyed the property to the Department of Roads. We cannot say that Fingerlin negligently failed to ascertain who owned the hill and trees when he assured the purchasers that Pacesetter owned them.

(iii) Resolution

In conclusion, the quality and purpose of the transaction as a whole shows that Fingerlin knowingly misrepresented the ownership of the hill and trees in question and did so specifically to induce the purchase of Lots 53, 600, and 602. We have stated: " 'An accident, within the meaning of contracts of the kind here considered, includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby.' " *Riley v. National Auto Ins. Co.*, 162 Neb. 658, 664, 77 N.W.2d 241, 246 (1956), *overruled on other grounds, Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986). In *City of Kimball v. St. Paul Fire & Marine Ins. Co.*, 190 Neb. 152, 154, 206 N.W.2d 632, 634 (1973), we stated: "The word 'accident' as used in liability insurance is a more comprehensive term than 'negligence' and in its common signification the word means an unexpected happening without intention." Whether or not Fingerlin meant to harm anyone is immaterial. He specifically intended to induce the purchase of the lots, which purchase caused the alleged injuries. His actions

were, therefore, intentional. Under the policy, intentional acts are excluded from the definition of an occurrence. Accordingly, Fingerlin's actions, as imputed to Pacesetter, are not covered.

(b) Damages Claimed

Even if the activity was an occurrence, there was no coverage for property damage as alleged by the Sarpy County plaintiffs. The trial court found: "The evidence does not show, nor do the homeowners allege any physical damage to their property (lots 53, 600 or 602) or to any property they were told or believed they had purchased from Pacesetter." We agree. The policy's property damage definition consists of two parts. The first part refers to physical injury to or destruction of *tangible* property which occurs during the policy period, including loss of use thereof at any time resulting therefrom. The alleged diminution in value of the property and loss of enjoyment of the trees do not constitute physical injury to or destruction of tangible property under the definition of property damage in the policy issued to Pacesetter. The Sarpy County plaintiffs did not allege that there had been any physical injury to or destruction of the tangible property. The second part of the property damage definition refers to loss of use of tangible property which has not been physically injured or destroyed, provided such loss of use is caused by an occurrence during the policy period. The diminution in value or loss of enjoyment of the trees is not a loss of use covered under the policy.

Columbia cites *General Ins. Co. v. Western American Dev.*, 43 Or. App. 671, 603 P.2d 1245 (1979), in support of its position that diminution in value is not a loss of use constituting property damage under the terms of the policy issued by Columbia. In *General Ins. Co.*, the insurer brought a declaratory judgment action seeking a determination as to its duty to defend and indemnify its insured. The dispute arose from the sale of mobile home lots by Western American Development Company, Inc., and one of its officers. As a result, five separate actions were commenced by the purchasers of the lots. The complaints alleged the defendants knowingly or recklessly misrepresented the nature and extent of an easement held by the U.S. Army Corps of Engineers. The purchasers

asserted that they relied upon the misrepresentations in purchasing the lots and that they were injured because the easement allowing the corps to come onto the lots made the lots worth less than they had anticipated. At the time General Insurance Company of America brought the declaratory judgment action, one of the five cases was still pending.

The insurance policy in that case contained similar provisions to the policy issued by Columbia with regard to the obligation to pay damages because of bodily injury or property damage caused by an occurrence. Occurrence was defined as an event including continuous or repeated exposure to conditions which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured. The property damage provisions were also similar to those in the policy issued by Columbia. The court concluded that the diminution in value claimed by the purchasers was not equivalent to the loss of use of tangible property. We cite *General Ins. Co.* in support of our conclusion that the damages claimed in the Sarpy County actions are not the loss of use of tangible property under the controlling documents.

(c) Liability Coverage Under Section II

We therefore conclude that under the policy there was no covered occurrence and that the alleged diminution in value and loss of enjoyment of the trees are not property damage for loss of use of the tangible property when such property has not been physically injured or destroyed.

2. Broad-Form Comprehensive General Liability Endorsement

We now turn to the broad-form comprehensive general liability endorsement. The endorsement covers, inter alia, personal injury and advertising injury liability. Pacesetter and Fingerlin argue that the coverage extended through these provisions obligated Columbia to defend them in the Sarpy County actions.

Among the errors assigned by Pacesetter and Fingerlin is one claiming that the trial court erred in refusing to allow Pacesetter and Fingerlin to withdraw their rest and introduce three sets of interrogatories which described more clearly the type of

damages claimed by the Sarpy County plaintiffs, i.e., noise, dust, ground vibration, diminution in the value of their property, loss of trees, and increased traffic volume. The court committed no error because, as explained below, the evidence Pacesetter and Fingerlin attempted to introduce had no bearing on the question of coverage under the policy.

Pacesetter and Fingerlin claim that the Sarpy County plaintiffs have alleged a personal injury. They point specifically to the personal injury definition regarding "wrongful entry or eviction or other invasion of the right of private occupancy." Pacesetter and Fingerlin maintain that the plaintiffs' factual allegations which underlie this "invasion" are the noise, dust, lighting, and other construction activities from 126th Street. With regard to such injuries, we find that the precedents cited by Pacesetter simply do not address a factual setting such as the one now before us. It is critical to remember that the tangible property purchased by the Sarpy County plaintiffs remains unchanged. The underlying causes of action do not claim any physical invasion of the plaintiffs' own lots, nor are they based upon trespass or nuisance.

In *Decorative Center v. Employers Cas.*, 833 S.W.2d 257 (Tex. App. 1992), the insurer brought an action seeking a declaration that it was not responsible for providing coverage to the owner and the general contractor of a construction project (the insureds) in connection with a nuisance and trespass suit brought against the owner and the contractor by an adjacent property owner (the Bakers). The insureds claimed that because the Bakers' ability to use their property was interfered with, the interference was an "other invasion of the right of private occupancy." The contractor caused various forms of physical and mental harm to the Bakers and their property, including deliberately working late at night, directing water onto the Bakers' property, dropping heavy limbs onto the property, and cursing the Bakers when they complained to the workers on duty. The Bakers sued, and the insurer defended the suit, but denied coverage. The policy in question contained a provision dealing with personal injury liability coverage arising out of, inter alia, " 'wrongful entry or eviction, or other invasion of the right of private occupancy.' " *Id.* at 259.

The insureds argued that because the Bakers' ability to use their property was interfered with, the interference constituted an "other invasion of the right of private occupancy" and, therefore, triggered coverage. The court disagreed: " 'Occupancy' normally refers to the state of being inhabited. The right of 'private occupancy' can only refer to those rights associated with an individual's act of inhabiting the premises, and not to rights associated with the individual's right to use and enjoy the inhabited premises." *Id.* at 261. In other words, the right of private occupancy is the legal right to occupy premises, not the right to *enjoy* occupying those premises. In relation to this, it should be noted that none of the Sarpy County plaintiffs pled wrongful or constructive eviction from their property.

In *Decorative Center*, the court noted: " 'Ejusdem generis principles draw on the sensible notion that words such as "or other invasion of the right of private occupancy" are intended to encompass actions of the same general type as, though not specifically embraced within, "wrongful entry or eviction." Those two terms have commonly understood meanings.' " *Id.* at 262 (quoting *Martin v. Brunzelle*, 699 F. Supp. 167 (N.D. Ill. 1988)). We believe the court's reasoning in *Decorative Center* is correct.

It is therefore quite clear that with or without the information contained in the interrogatories, there was no coverage under the personal injury section of the policy. Furthermore, the claim of an advertising injury is transparently without merit. Pacesetter's own advertising activities were not shown to have caused any injury to the Sarpy County plaintiffs, nor do we find that Fingerlin's activities constitute an advertising injury under the specific definition contained in the endorsement. There is no coverage under the endorsement. The allegations of diminution in value and loss of enjoyment of the trees do not create an action under the endorsement for personal injury or advertising injury.

3. Premature Declaratory Judgment

Pacesetter and Fingerlin contend the trial court erred in entering a declaratory judgment when the Sarpy County actions

were still pending. They rely heavily upon our decision in *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). In *Novak*, the district court, via a declaratory judgment, held that the insurer was not obligated to defend the insured or to pay any judgment rendered against the insured under the terms of the policy. The insured was alleged to have struck a third party in the face.

Allstate refused to provide a defense or to pay any damages, based upon an exclusion stating that the policy did not apply " 'to bodily injury or property damage which is either expected or intended from the standpoint of the Insured.' " *Id.* at 187, 313 N.W.2d at 638. We noted there were two separate obligations under the policy, one to pay and one to defend. We determined that until the facts in the assault case were resolved, the court could not determine Allstate's obligation to pay, and that, therefore, a declaratory judgment could not be granted on that question. The insured claimed he was acting in self-defense when he struck the third party, and we stated that such an act might be negligent and not intentional, thereby bringing the act within the coverage of the policy.

In *Novak*, we recognized that there may be situations where the language of the policy is such that the insurer's obligation to pay can be determined even before the insured's liability is determined. We cited *Jones v. Norval*, 203 Neb. 549, 279 N.W.2d 388 (1979), for the proposition that where an intentional act results in injuries which are the natural and probable consequences of the act, the injuries as well as the act are intentional. In *Jones*, the evidence was undisputed that the insured intentionally hit another with his fist and rendered the person unconscious, and we held that an intent to cause bodily injury could be inferred as a matter of law.

In the present case, the totality of the facts established that Fingerlin's misrepresentations were knowingly made, and there are no factual indications to the contrary. In *Novak*, there was a question of fact as to whether Novak's actions were negligent and not intentional. Fingerlin clearly intended his actions to induce the purchase of the real estate. This was the basis of the Sarpy County actions. Regardless of Fingerlin's claim that he intended no harm, the cause of action is based upon an

intentional act which induced the purchase of the real estate. We do not base the obligation to defend solely upon the pleadings, but also upon the facts established from the Commission hearings and the evidence introduced in the declaratory judgment action. "[I]f, according to facts alleged in a petition and ascertained by an insurer, the insurer has no potential liability to its insured under the insurance agreement, then the insurer may properly refuse to defend its insured." *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 784, 502 N.W.2d 484, 487 (1993). The trial court did not err in entering the declaratory judgment.

After the trial court had entered its order in the declaratory judgment action, Pacesetter and Fingerlin moved for a new trial, alleging newly discovered evidence consisting of the second amended petition filed by the Schaefers in their Sarpy County action and the trial testimony of Rayne Balwanz in his action. In the Schaefer case, the second amended petition alleged for the first time a claim based upon negligence. In the Balwanz case, Rayne Balwanz testified with regard to the construction of the interchange and the interference with the quiet and peaceful enjoyment of his home. We find this claim of error has no merit because the evidence was not material. See Neb. Rev. Stat. § 25-1143(2) (Reissue 1989). We express no opinion as to whether the evidence qualified as newly discovered evidence. Section 25-1143 requires that any newly discovered evidence be "material for the party applying" for a new trial. Since we have determined that Fingerlin's misrepresentations were intentional and not covered by the policy, the allegations of negligence are immaterial. Since we have determined as a question of law that the dust and noise were not an invasion of the right of private occupancy, testimony about such dust and noise is also irrelevant. The construction of an insurance policy is a question of law. See *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994). Consequently, the evidence was not material, even if it qualified as newly discovered evidence. The trial court was therefore correct in refusing to grant a new trial.

VI. CONCLUSION

In construing the provisions of an insurance policy, a court

must determine from the clear language of the policy whether the insurer in fact insured against the risk involved. *Roth v. Farmers Mut. Ins. Co.*, 220 Neb. 612, 371 N.W.2d 289 (1985). When a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to those questions. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994). We conclude that the trial court correctly determined that there was no coverage under the terms of the policy and that Columbia had no duty to defend. For the reasons set forth herein, the judgment of the Douglas County District Court is affirmed.

AFFIRMED.

WHITE, C.J., and LANPHIER, J., not participating.

WALTER L. KUSKIE, DOING BUSINESS AS WALT KUSKIE CONSTRUCTION, APPELLANT, AND LINDA L. KUSKIE, APPELLEE, V. ADAMS BANK & TRUST OF MADRID, A NEBRASKA BANKING CORPORATION, APPELLEE.

531 N.W.2d 921

Filed May 19, 1995. No. S-93-784.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper 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. **Res Judicata.** The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in an earlier proceeding.
4. **Res Judicata: Judgments.** The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is

conclusive upon the parties in any later litigation involving the same cause of action.

5. **Res Judicata.** The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.

Appeal from the District Court for Perkins County: DONALD E. ROWLANDS II, Judge. Affirmed in part, and in part remanded for further proceedings.

Blaine T. Gillett, of Ruff, Nisley & Lindemeier, for appellant and for appellee Linda L. Kuskie.

Kelly Michael Hogan, of Neil E. Williams & Assoc., P.C., for appellee Adams Bank & Trust.

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

FAHRNBRUCH, J.

This lawsuit brought by the plaintiffs, Walter L. Kuskie, doing business as Walt Kuskie Construction, and Linda L. Kuskie, against Adams Bank & Trust of Madrid, Nebraska (Bank), was dismissed by summary judgment under the doctrine of res judicata at the district court level.

We affirm the ruling of the district court for Perkins County as to plaintiff Walter Kuskie. We remand the cause for further proceedings as to the plaintiff Linda Kuskie.

Walter Kuskie originally appealed the trial court's dismissal of the lawsuit to the Nebraska Court of Appeals. Pursuant to our authority to regulate the caseloads of the appellate courts, this case was removed from the Court of Appeals' docket to this court's docket.

STANDARD OF REVIEW

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995); *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995). Summary judgment is proper 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. *Jim's, Inc. v. Willman, supra*; *Gravel v. Schmidt, supra*.

FACTS

Viewing the evidence in a light most favorable to Walter Kuskie and giving him the benefit of all reasonable inferences deducible from the evidence, the facts of this case are as follows:

On September 19, 1989, Walter and Linda Kuskie filed this action against the Bank, alleging fraudulent inducement on the part of the Bank in the Kuskies' execution of a promissory note and trust deed in the Bank's favor.

In February 1984, Walter Kuskie had begun constructing a home for Joseph Vak and his wife. A dispute arose between Kuskie and the Vaks concerning the Vaks' alleged failure to make timely payments due Kuskie for the project. As a result, Kuskie pulled off the job. At the time, both the Kuskies and the Vaks were customers of Security State Bank, predecessor in interest of Adams Bank & Trust of Madrid. The Kuskies owed the Bank approximately $50,000 on a loan secured by a mortgage on their home and security interests on Kuskie's construction equipment.

Kuskie claimed he returned to work on the Vak project on the oral assurances of John Kreuscher, president of the Bank, that Kreuscher would see that Kuskie got paid for the project. In order to complete the Vak home, the Kuskies borrowed more than $40,000 from the Bank. Kuskie claimed that when the Vak project was completed, the Vaks refused to pay Kuskie, and that Kreuscher advised the Kuskies not to sue the Vaks for payment.

The Kuskies alleged that the Bank failed and refused to see that Kuskie was paid for completing the Vak project and that instead the Bank offered to refinance the construction loans with other debt owed by the Kuskies to the Bank. The Kuskies also alleged that they agreed to the refinancing plan because of an oral promise made by a vice president of the Bank to release the Bank's lien on Kuskie's construction equipment. The Kuskies alleged in their petition that the Bank induced them to execute

a promissory note and trust deed in favor of the bank in reliance upon the Bank's oral assurances. The Kuskies alleged that the Bank did not release its liens on the construction equipment.

When the Kuskies defaulted on their loan and deed of trust, the Bank began procedures to sell the Kuskies' home.

In their petition, the Kuskies asked the district court to (1) cancel a sale of their residence; (2) cancel the debt they alleged was fraudulently obtained for the construction project and all accumulated interest, including any interest already paid; (3) cancel the deed of trust in regard to the alleged loan; (4) reinstate the payment schedule existing prior to March 8, 1985, for the balance of the Kuskies' debt to the Bank; and (5) grant the Kuskies the costs of this action.

On October 2, 1989, Kuskie filed, individually without Linda, a chapter 13 bankruptcy petition in the U.S. Bankruptcy Court for the District of Nebraska. That action was later converted to a chapter 11 bankruptcy and was completed as a chapter 7 bankruptcy. On October 31, 1990, Kuskie was granted a discharge in bankruptcy.

On July 30, 1990, Kuskie filed an adversary complaint in his bankruptcy action. There, he alleged that he was fraudulently induced into the execution of a promissory note and trust deed by the Bank. In the state court petition, the Kuskies had alleged that they borrowed over $40,000 for Kuskie to complete the Vak residence. In the federal court, Kuskie claimed he borrowed over $19,000. In his federal complaint, Kuskie requested that the bankruptcy court cancel all debt fraudulently obtained by the Bank, as well as accumulated interest and the Bank lien on Kuskie's construction equipment and vehicles.

On June 4, 1991, the adversary proceeding was withdrawn from the bankruptcy court and transferred to the U.S. District Court for the District of Nebraska. On September 27, Kuskie orally requested in open court that his proceeding against the Bank be dismissed. On December 2, the U.S. District Court dismissed Kuskie's case with prejudice.

On July 27, 1993, the Bank filed a motion for summary judgment in the district court for Perkins County, seeking dismissal of the Kuskies' lawsuit. The Bank claimed that the instant action was barred under the doctrine of res judicata,

since the claim raised by Kuskie in the instant action was asserted in the U.S. District Court and was dismissed with prejudice.

On August 9, 1993, the trial court found, as a matter of law, that under the doctrine of res judicata the dismissal with prejudice of the U.S. District Court action bars Kuskie from relitigating the same issues in the state court.

Kuskie appealed to the Nebraska Court of Appeals. Linda Kuskie did not join Walter Kuskie as an appellant in this appeal, but under Neb. Ct. R. of Prac. 1C (rev. 1992) she is considered an appellee.

ASSIGNMENTS OF ERROR

Summarized and restated, Walter Kuskie's claims are that the trial court erred in finding that Kuskie was barred by the doctrine of res judicata from pursuing this action and in awarding summary judgment in favor of the Bank.

ANALYSIS

Kuskie claims that the trial court erred by finding that this state action was barred by res judicata. The record reflects that both the state and federal lawsuits were based upon the same transaction. Kuskie alleged in both actions that he was fraudulently induced by Bank officers to enter into a secured transaction with the Bank, the Bank president said that the Bank would make certain that payments due Kuskie under a construction contract with another Bank customer would be made, and a Bank vice president said the Bank would release a preexisting lien upon Kuskie's construction equipment.

The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in an earlier proceeding, *Hangman v. Bruening*, 247 Neb. 769, 530 N.W.2d 247 (1995), and *Dakota Title v. World-Wide Steel Sys.*, 238 Neb. 519, 471 N.W.2d 430 (1991), if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions, *Hangman v. Bruening, supra*, and *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994).

The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993). The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994).

Here, the record reflects that Kuskie's adversary complaint was ultimately dismissed with prejudice by the U.S. District Court for the District of Nebraska, a court of competent jurisdiction. That federal judgment was final and a judgment on the merits of the case. In *Simpson v. City of North Platte*, 215 Neb. 351, 338 N.W.2d 450 (1983), this court held that as a general rule, a dismissal with prejudice is an adjudication on the merits. See, also, *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498 (11th Cir. 1990), and *Red River Coal Co., Inc. v. Manning Coal Corp.*, 780 F. Supp. 378 (W.D. Va. 1991), holding that pursuant to Fed. R. Civ. P. 41(a), dismissal of an action with prejudice is a final adjudication on the merits, and that the terms "with prejudice" and "on the merits" are synonymous for res judicata purposes. In *Simpson*, this court found that the dismissal with prejudice of the action in federal court was tantamount to a judgment on the merits in favor of the defendants, which judgment was res judicata as to Simpson's state lawsuit. A judgment of dismissal on the merits operates to preclude subsequent relitigation of the same cause of action. *Id.*

In this case, the record shows that the U.S. District Court ordered Kuskie's federal adversary proceeding against the Bank dismissed with prejudice following an oral motion to dismiss by Kuskie. The record does not reflect any direct evidence as to whether Kuskie requested that the federal proceeding be dismissed with or without prejudice. The federal rules do, however, provide a method to object to U.S. District Court judgments.

Fed. R. Civ. P. 59(e) provides that one may file a motion to

alter or amend a judgment not later than 10 days after the entry of the judgment. Kuskie's attorney stated during oral argument that his client did not file any objection to the judgment. Kuskie's failure to do so indicates that he had no objection to the dismissal with prejudice of his federal lawsuit. Thus, the federal court's dismissal of Kuskie's lawsuit with prejudice may be considered as an adjudication on the merits.

Finally, the Bank and Kuskie were parties to the federal action as well as the state action.

CONCLUSION

Construing the evidence in a light most favorable to Kuskie and giving Kuskie the benefit of all reasonable inferences, we find that the doctrine of res judicata bars Walter L. Kuskie, doing business as Walt Kuskie Construction, from prosecuting his action in state court and that the Bank is entitled to judgment as a matter of law. We affirm the trial court's order of summary judgment as to Walter Kuskie. Our review of the record fails to reveal the district court's disposition of this cause of action as to Linda Kuskie. Because Linda Kuskie was not a party to the federal proceedings, any cause of action remaining as to her is remanded to the district court for further proceedings.

AFFIRMED IN PART, AND IN PART REMANDED FOR FURTHER PROCEEDINGS.

DAVID JOHN WINFIELD, APPELLEE, V. CIGNA COMPANIES, APPELLEE, AND LIFE INSURANCE COMPANY OF NORTH AMERICA, APPELLANT.

532 N.W.2d 284

Filed May 19, 1995. No. S-93-870.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable

inferences deducible from the evidence.

2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **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.
4. **Insurance: Contracts.** Whether an insurance contract is ambiguous and therefore in need of construction is a question of law.
5. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
7. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reason.

Appeal from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge, on appeal thereto from the County Court for Buffalo County, GERALD R. JORGENSEN, Judge. Judgment of District Court affirmed.

William T. Oakes and Michael A. Harsh, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellee Winfield.

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

LANPHIER, J.

Plaintiff-appellee, David John Winfield, initiated this action in the county court for Buffalo County to obtain medical expense benefits under an insurance contract issued by defendant-appellant, Life Insurance Company of North America (LINA). Pursuant to a motion for summary judgment filed by LINA, the county court held that the terms of the insurance contract were unambiguous. The insurance contract states that "treatment" must begin within 60 days of an injury. Winfield received only massages within 60 days. At issue is the policy definition of "treatment." The county court held that

Winfield was not entitled to benefits under the policy. Winfield appealed to the district court claiming that a condition of the insurance contract requiring that he obtain treatment not more than 60 days after an accident was ambiguous as to whether it included massages and should be construed against the insurer. On appeal, the district court held that the contract was ambiguous, reversed the county court's judgment, and remanded the case for further proceedings. From this judgment, LINA appealed to the Court of Appeals. We removed the case to this court in order to regulate the caseloads of the appellate courts. Although we find the contract unambiguous, we affirm the judgment of the district court because the county court erroneously concluded that LINA was entitled to judgment as a matter of law.

BACKGROUND

The parties do not dispute that on February 8, 1991, Winfield injured his back at work. Neither do the parties dispute that the insurance policy which is the subject of this dispute was in force and effect at that time. At issue is the coverage of the policy, particularly what is referred to as "Coverage D: Medical Expense Benefit."

Coverage D provides the following:

> If a person is injured by one of the types of accidents described in Schedule IV, which happens while he is covered for this benefit, then we will pay this benefit for the *services* listed below, which he needs as a direct result of the injury, and from no other cause, within a year of the accident.
>
> a) Stays in a hospital.
>
> b) *Medical or surgical treatment* by a doctor.
>
> c) The services of licensed or graduate nurses.
>
> d) X-Ray examinations.
>
> e) Professional ambulance service from the scene of the accident to the nearest hospital.
>
> The *treatment* must begin not more than 60 days after the accident.
>
> The amount of this benefit will be the actual cost of these services, minus the deductible amount (if any) shown

on page 3. The deductible must be satisfied once for each accident.

This benefit will be reduced to the extent that benefits are payable for the medical services under: (i) any employer sponsored health care plan; or (ii) any government program or any law, including any Worker's Compensation law.

We will not pay more than the maximum amount shown on page 3, for all *medical treatment* needed as a result of any one accident.

(Emphasis supplied.)

On February 13, 1991, Winfield sought care for his injury from a licensed masseuse. On March 21, Winfield again sought the services of a masseuse. Then, on July 29, Winfield had surgery on his back. Winfield later made a claim for benefits, but LINA refused to pay any amount for Winfield's medical care because it claimed he did not begin treatment in 60 days as the policy required. Winfield then sued CIGNA. In an amended petition, LINA was substituted for the defendant CIGNA. The county court held that the policy was clear that medical or surgical treatment was required within 60 days, and since this was not done, no coverage was provided. On appeal, the district court held that the term "treatment" was ambiguous and sent the case back for a new trial.

ASSIGNMENTS OF ERROR

On appeal, LINA asserts the district court erred (1) in failing to find that the insurance contract was not ambiguous and (2) in failing to find that the insurance contract was clear on its face and presented no genuine issue of material fact, and thereby in not affirming the judgment of the county court.

STANDARD OF REVIEW

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995). 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.* Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court. *Curtis O. Griess & Sons v. Farm Bureau Ins. Co.*, 247 Neb. 526, 528 N.W.2d 329 (1995).

ANALYSIS

The first issue in this appeal is whether the insurance contract is ambiguous. Whether an insurance contract is ambiguous and therefore in need of construction is a question of law. *Union Ins. Co. v. Land and Sky, Inc.*, 247 Neb. 696, 529 N.W.2d 773 (1995). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Id.* While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract. *Id.*

Coverage D begins by explaining that if an insured is injured by an accident described in the policy, then benefits will be paid for certain "services." A list of covered "services" follows. One of the items in that list of "services" is "Medical or surgical *treatment* by a doctor." (Emphasis supplied.) The contract then provides the following: "The *treatment* must begin not more than 60 days after the accident." (Emphasis supplied.) The word "treatment" is not defined in the policy. The term is sometimes qualified or limited as in "medical and surgical treatment" and "medical treatment." The "treatment" to begin in 60 days is not so qualified.

LINA submits the "treatment" which must begin not more than 60 days after the accident is any of the covered "services." In its brief, LINA states the following:

> Coverage D specifically enumerates the only *services* which are considered to be *treatment* and does so within the context of a single paragraph. They are as follows: Stays in a hospital, medical or surgical treatment by a doctor, the services of licensed or graduate nurses, X-ray

> examinations and professional ambulance service from the scene of the accident to the nearest hospital.

(Emphasis supplied.) Brief for appellant at 9–10. LINA's definition is not supported by a reading of the insurance contract. The insurance contract simply does not define the term "treatment" as "services" as LINA contends.

There is no reason to give "treatment" a special definition within this contract. When the drafter wished to limit "treatment," it did so. When LINA wished to limit covered services to "medical or surgical treatment by a doctor," it did so. In the questioned provision, no words qualifying or limiting "treatment" were used. Nor were they necessary. The contract is unambiguous. Under the contract, "treatment" must begin not more than 60 days after the accident if benefits are to be awarded for covered services. The contract is silent as to what type of "treatment" must begin. Therefore, if any type of "treatment" begins not more than 60 days after the accident, that condition of the policy has been met.

Thus, the next issue is whether "treatment" was begun not more than 60 days after the accident. As it is commonly used, "treatment" means "management in the application of medicines, surgery, etc." Webster's Encyclopedic Unabridged Dictionary of the English Language 1509 (1994). It is not limited to services rendered by a medical doctor. The policy recognizes this when it modifies or limits the term.

Winfield engaged the services of a masseuse only 5 days after his injury. Given the common usage of the word, a massage would constitute "treatment" for the purposes of satisfying the insurance contract's 60-day provision. A reasonable person in the place of the insured would interpret a massage to be "treatment." Thus, the 60-day provision of the insurance contract has been complied with. Therefore, Winfield would be entitled to benefits for covered services, assuming the other conditions of the contract have been met.

The county court erred in concluding that Winfield was not entitled to any benefits under the insurance contract. The district court's reversal of the county court was therefore proper, notwithstanding that the district court reversed for the wrong reason. See *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498

(1994) (a proper result will not be reversed merely because it was reached for the wrong reason).

CONCLUSION

The district court erroneously determined that the insurance contract was ambiguous. However, the district court properly reversed the judgment of the county court and remanded the case for further proceedings. We, therefore, affirm the judgment of the district court.

AFFIRMED.

[By order of the court, opinion withdrawn; affirmed without opinion by an equally divided court. See S-93-878, *H.B. Brand's v. Webb*, vol. 248, List of Cases Disposed of Without Opinion, p. xxiii. (Pages 31-38 omitted.)]

JEFFREY CRITCHFIELD, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, ALAN JOE CRITCHFIELD, APPELLEE, V. LEE F. McNAMARA, M.D., APPELLEE, AND ARCHBISHOP BERGAN MERCY HOSPITAL, APPELLANT.

532 N.W.2d 287

Filed May 19, 1995. No. S-93-973.

1. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom.
2. **Directed Verdict: Judgments: Verdicts.** In order to sustain a motion for directed verdict or judgment notwithstanding the 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.
3. **Judgments: Verdicts: Appeal and Error.** Neb. Rev. Stat. § 25-1315.02 (Reissue 1989) authorizes an appeal from the denial of a judgment notwithstanding the verdict after the jury has been discharged as the result of an inability to reach a verdict.

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

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Martin E. Spellman, of Spellman, Spellman, Spellman, Spellman, Kealhofer & Spellman, and Duane M. Katz for appellee Critchfield.

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

WRIGHT, J.

This medical malpractice action was commenced by Alan Joe Critchfield on behalf of his minor son, Jeffrey Critchfield. It is alleged that Jeffrey's pediatrician and the hospital at which Jeffrey was born were negligent in their care of Jeffrey at the time of his birth and that Jeffrey has suffered developmental delays as the result of this negligence. The jury was unable to reach a verdict, and a mistrial was declared. The hospital filed a motion for judgment notwithstanding the verdict, which was overruled, and the hospital has appealed.

SCOPE OF REVIEW

On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom. *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Pugh v. Great Plains Ins. Co.*, 239 Neb. 171, 474 N.W.2d 677 (1991).

In order to sustain a motion for directed verdict or judgment notwithstanding the 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. *Humphrey v. Nebraska Public Power Dist., supra.*

FACTS

Kathryn Critchfield gave birth to twins by a cesarean section performed by Lee F. McNamara, M.D., at Archbishop Bergan

Mercy Hospital (hospital) on November 23, 1984. Jeffrey was born at 7:20 a.m. The admission assessment conducted at 7:30 a.m. revealed that Jeffrey's lungs were retracting, his skin showed evidence of cyanosis and pallor, he had a weak cry, and his muscle tone was flaccid. He was admitted to the neonatal intensive care unit, where it was recorded that he was grunting and retracting and that he was pale. His birth weight was 4 pounds, 10 ounces, while his twin weighed 5 pounds, 15½ ounces. McNamara was the primary pediatrician for Jeffrey during his hospitalization from November 23 to December 12. At the time of Jeffrey's birth, the hospital did not have any rule or policy which required the presence of a neonatologist or other specially trained pediatrician in the delivery room in the event of a high-risk delivery. However, the hospital did have in its employ two neonatologists who maintained their offices at the hospital.

The Plaintiff's Evidence

At trial, Dr. Clark Shattuck, an obstetrician-gynecologist, testified based on his review of the records that at birth Jeffrey was a healthy baby suffering from respiratory distress syndrome, but exhibiting no evidence of brain damage. He stated that Jeffrey had mild intrauterine growth retardation, but that condition does not necessarily mean a child will be impaired. Shattuck said it was his opinion that Kathryn Critchfield's pregnancy was high risk due to the following factors: uncertainty of the due date; the lack of fetal testing, serial ultrasounds, and amniocentesis; a previous cesarean section; and a documented bleeding problem in the mother. These factors indicated that there was an extremely high probability that the smaller baby would experience respiratory distress at the time of delivery. Shattuck opined that the standard of care required that a neonatologist be present to provide care to the smaller baby from birth. In his opinion, two physicians should have been present at the delivery, and one of them should have been a neonatologist. Shattuck also stated that the hospital should have had a policy requiring a neonatologist to see a patient in Jeffrey's condition, assuming that the hospital had two neonatologists with offices in the hospital.

Dr. Ronald Gabriel, a pediatric neurologist, testified that a neurological emergency was present with respect to Jeffrey as of 7:30 a.m. on November 23, 1984, because Jeffrey suddenly experienced a lack of oxygen, probably a reduced blood flow, and almost certainly acidosis. Gabriel said that Jeffrey's brain was vulnerable to being damaged because of those conditions and that brain damage ultimately occurred. Gabriel noted that the only treatment Jeffrey received between 7:30 and 10 a.m. on November 23 was the delivery of oxygen. This therapy was inadequate because the oxygen was not delivered in a positive fashion. Gabriel stated that Jeffrey should have received ventilation and respiratory support through intubation, either endotracheal or with nasal prongs, or, at the very least, continuous positive airway pressure. This type of respiratory support would have resulted in Jeffrey receiving enough oxygen to prevent hypoxia, which in turn would have prevented brain damage. Gabriel also stated that Jeffrey should have received bicarbonate in the anticipation that he was going to be acidotic. The bicarbonate would have prevented acidosis, or diminished its impact, and reduced the impact upon the brain cells and brain fibers.

The nursing notes state that Jeffrey demonstrated lethargy at approximately 7:45 p.m. on November 23. Gabriel testified that this indicated that Jeffrey was experiencing neurological change. Beginning at 11:30 p.m., the nurses observed and recorded that Jeffrey demonstrated poor muscle tone, shallow respirations, and little movement. Between midnight and 4:30 a.m., his tone was consistently described as being poor. According to Gabriel, these findings indicated Jeffrey was neurologically abnormal. Chest retractions were recorded beginning at approximately 3:30 a.m. and continuing until about 6:30 a.m. In Gabriel's opinion, the combination of a change in Jeffrey's neurological status with the shallow respirations and retractions indicated that Jeffrey was showing clinical manifestations of acute brain damage as a consequence of lack of delivery of oxygen and probably perfusion or blood flow to the distal-most portions of the brain with respect to the arterial tree.

Gabriel testified that the nursing personnel should have reported the findings of muscle tone abnormality, lethargy, and

the presence of retractions to the attending doctor during the night of November 23 and the early morning hours of November 24. Gabriel testified that for a nurse not to bring to the attention of a physician what appeared to be a significant change in neurological condition without explanation would not be acceptable in his neonatal intensive care unit. Gabriel stated that if the neurological changes had been reported to Jeffrey's doctor, the doctor would have instituted or reinstituted measures of respiratory support to increase oxygen tension in the blood and to reverse the acidosis. Gabriel noted that no such measures were taken for Jeffrey.

Gabriel stated that Jeffrey did not have neurological impairment at the time of delivery and that any brain damage he has was sustained after his birth. According to Gabriel, it did not make sense for the hospital to have a neonatal intensive care unit for seriously or critically ill newborns and yet not have a pediatrician trained in neonatal care to supervise the unit.

Dr. Stanley Levine, a developmental pediatrician, testified that the hospital should have had a policy requiring a pediatric or neonatology consultation for Jeffrey. If Jeffrey had been properly monitored during the first day of his life, he would have received oxygen for hypoxia. Blood gases would have been monitored meticulously and corrected if necessary by means of a ventilator. Levine stated that the nursing care deviated from applicable standards in that the nurses noted that Jeffrey was having significant difficulties for prolonged periods of time on numerous occasions. Levine stated that if the nursing personnel had informed the physician of the baby's difficulties, some action could have been taken by the physician to ameliorate the brain damage. According to Levine, if the physician did not respond to the nurse's concerns, a good nurse would have contacted his or her supervisor.

Dr. Barbara Latinis-Bridges, professor of nursing at the University of Kansas, testified that the nursing care provided to Jeffrey during the first 24 hours of his life departed from applicable nursing standards in that Jeffrey needed positive pressure ventilation upon arriving at the neonatal intensive care unit. She stated that the nurses had a duty to call the physician during the evening of November 23, when Jeffrey began to

manifest further nonreassuring symptoms.

THE DEFENDANTS' EVIDENCE

Shortly after his birth, Jeffrey was taken to the neonatal intensive care unit, where a nurse administered oxygen from 7:30 to 9:50 a.m. pursuant to the hospital's written policy prepared by Dr. Paul Byrne, a neonatologist. McNamara examined Jeffrey at 8 a.m. and ordered a chest x ray and blood tests. He examined Jeffrey again at 9:10 a.m. and reviewed the x ray and test results. At 2:30 p.m., a nurse called McNamara's office and reported Jeffrey's condition, and McNamara issued orders for additional blood gases at 6 p.m.

In McNamara's opinion, Jeffrey was intrauterine growth retarded and exhibited typical transient tachypnea of the newborn. McNamara said he would have taken no other action than that taken by the nurses. McNamara testified that it was not necessary for the nurses to call him to report their observation of poor muscle tone, and he had no criticism of the nurses for failing to call him. In his opinion, it was not necessary to intubate, ventilate, or give positive pressure air to Jeffrey. Such treatment would have been "overkill" and contraindicated, McNamara said.

In 1984, the hospital's policy required consultation before cesarean sections only in specific situations. Consultation with the Department of Pediatrics was required for infants who weighed less than 4 pounds. Dr. Richert Taylor, a board-certified obstetrician-gynecologist and chairman of the hospital's Department of Obstetrics and Gynecology, participated in the creation of the department's policies. He stated that it was the policy of the hospital for the attending physician to determine who would assist with the cesarean section and who would care for the baby.

Dr. Paul Goodrich, the only neonatologist to testify, stated that Jeffrey did not have hyaline membrane disease or classical respiratory distress syndrome and that Jeffrey should not have been treated with a ventilator or any other type of positive pressure oxygen. According to Goodrich, Jeffrey suffered from intrauterine growth retardation, and there was no evidence to suggest that anything unusual occurred at the time of birth or

during Jeffrey's hospital stay. Goodrich believed the etiology of Jeffrey's problem occurred in the uterus.

Dr. Richard Andrews, a pediatric neurologist in Omaha, opined that Jeffrey did not have respiratory distress syndrome, but, rather, a short period of respiratory distress that did not require ventilator care. Andrews stated he found nothing in the chart of Jeffrey's hospitalization that would indicate a clinical condition which could cause any type of brain injury. Dr. Bruce Buehler, a pediatrician, testified that Jeffrey's problems were caused by intrauterine growth retardation.

ASSIGNMENTS OF ERROR

In summary, the hospital assigns as error the district court's denial of the hospital's motion for judgment notwithstanding the verdict. The hospital asserts that Jeffrey failed to offer evidence that any act or omission of the hospital was a proximate cause of any injury or damage to him.

ANALYSIS

This appeal comes to us following the district court's overruling of the motion for judgment notwithstanding the verdict. We note first that such an order was held to be appealable in *Ditloff v. Otto*, 239 Neb. 377, 476 N.W.2d 675 (1991). In *Ditloff*, we construed Neb. Rev. Stat. § 25-1315.02 (Reissue 1989) to authorize an appeal from the denial of the judgment notwithstanding the verdict after the jury has been discharged as the result of an inability to reach a verdict.

On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom. *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Pugh v. Great Plains Ins. Co.*, 239 Neb. 171, 474 N.W.2d 677 (1991). In order to sustain a motion for directed verdict or judgment notwithstanding the 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. *Humphrey v. Nebraska Public Power Dist., supra.*

The hospital argues that it had no duty to intervene in the treatment provided and ordered by McNamara and no duty to require that McNamara seek a consultation with a neonatologist. In *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990), we held that, as a general rule, hospital staff members lack authority to alter or depart from an attending physician's order for a hospital patient and lack authority to determine what is a proper course of medical treatment for a hospitalized patient. The hospital claims that since all hospital personnel followed the orders of McNamara as they related to the care of Jeffrey, it cannot be held liable for the course of treatment pursued by McNamara. McNamara testified that he was well aware of the baby's condition and that the nurses did not need to call him at night to tell him again.

The present case is distinguishable from *Jensen* because one of the allegations is that the hospital failed to timely report an abnormal change in Jeffrey's condition to responsible medical personnel. Gabriel testified that the nursing notes showing lethargy, poor muscle tone, and shallow respiration indicated that Jeffrey was neurologically abnormal and that this abnormality should have been reported to McNamara during the night of November 23 and early morning hours of November 24 so that appropriate measures could have been taken to address Jeffrey's respiratory difficulties. According to Gabriel, the hospital, via its nursing staff, had a duty to report the medically significant conditions. Latinis-Bridges testified that Jeffrey's records showed a departure from nursing standards in the first 24 hours of his life, when he needed additional blood gas tests and further treatment for acidosis. She testified that the nurses had a duty to call McNamara in the evening when Jeffrey began to manifest further nonreassuring symptoms and that it was the nurses' responsibility to let McNamara know of behaviors or lab studies which were outside the norm so that he could make a medical diagnosis. Latinis-Bridges stated that McNamara should have been called concerning two entries: at 7:45 p.m. on November 23, when Jeffrey was reported to be lethargic, and at 11:30 p.m., when shallow respiration and poor muscle tone

were noted. This data provided enough information for the nurses to understand that a physician should have been notified.

In our review of the evidence, we consider all of the relevant and material evidence which is favorable to Jeffrey, who is entitled to the benefit of all proper inferences which can be deduced from such evidence. *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993). The evidence offered by Jeffrey establishes that the hospital should have reported the change in Jeffrey's condition to appropriate medical personnel. Gabriel testified that the hospital, via its nursing staff, had a duty to report the abnormal conditions. The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994). " ' "A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." ' " *Id.* at 741, 523 N.W.2d at 244. Accord W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53 (5th ed. 1984).

It is obvious that the hospital, via its nursing staff, has a duty to report medically significant changes in the condition of a patient without delay to the treating physician or the physician in charge. Thus, if there were changes in Jeffrey's condition that were medically significant, there existed a duty on the part of the hospital to report such changes without delay. Such a requirement is basic to appropriate medical care.

The hospital next argues that its actions were not a proximate cause of Jeffrey's damages. Jeffrey must establish that the hospital's actions or inactions were a proximate cause of his brain damage. "The proximate cause of an injury is that cause which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 9, 459 N.W.2d 178, 183 (1990). The hospital states that even assuming some negligence by the nurses caring for Jeffrey, such conduct was not the proximate cause of his damages because the care given was at the direction and under the control of McNamara.

The expert testimony presented at trial as to the cause of

Jeffrey's impairment was conflicting. The evidence presented by Jeffrey showed that Jeffrey was healthy at birth and that he exhibited no evidence of brain damage. Gabriel testified that the nurses' notes stated that Jeffrey demonstrated lethargy at 7:45 p.m., which indicated that Jeffrey was experiencing neurological change. At 11:30 p.m., the nurses observed and recorded that Jeffrey demonstrated poor muscle tone, shallow respirations, and little movement. According to Gabriel, these findings indicated Jeffrey was neurologically abnormal. These changes indicated that Jeffrey was showing clinical manifestations of acute brain damage as a consequence of lack of delivery of oxygen. According to Gabriel, the nursing personnel should have reported these findings to the attending doctor, who would have instituted measures of respiratory support.

In order to sustain a motion for directed verdict or judgment notwithstanding the 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. *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993). The medical evidence presented by Jeffrey created an issue of fact as to whether the treatment Jeffrey received or the lack of such treatment was the proximate cause of his brain damage. Having determined as a matter of law that a hospital has a duty to report medically significant changes in the condition of a patient without delay to the treating physician or the physician in charge, we find that the same evidence creates an issue of fact as to whether the hospital failed to give Jeffrey the proper care and whether such failure was the proximate cause of Jeffrey's brain damage. As the party against whom the motion for judgment notwithstanding the verdict was directed, Jeffrey was entitled to the benefit of all proper inferences deducible from the evidence. The district court correctly overruled the hospital's motion, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PATRICK J. PEARTREE, RESPONDENT.

531 N.W.2d 925

Filed May 19, 1995. No. S-94-326.

Original action. Judgment of disbarment.

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

PER CURIAM.

Patrick J. Peartree was admitted to the practice of law in Nebraska on June 25, 1973. It appears that thereafter he became licensed to practice law in the State of Arizona.

In judgments and orders dated March 18, 1994, and December 2, 1994, the Arizona Supreme Court disbarred Peartree for conduct in violation of his duties and obligations as a lawyer as set forth in the "Judgment and Order" of the Arizona Supreme Court and in the reports of the Disciplinary Commission of the Arizona Supreme Court dated November 10, 1993, and September 1, 1994. The November 10 report states as follows:

> The complaint contains seven counts, all of which detail Respondent's abandonment of his practice in April 1992. In Count One, after handling the client's trial, Respondent failed to return the client's telephone calls, failed to notify the client that he had relocated to Indiana, and failed to comply with the court's order to file an application for costs and attorney's fees.
>
> In Count Two, Respondent left the state and abandoned the client's case before collecting the total $1,800 arbitration award for his client. Although Respondent did forward one payment on the judgment to the client after relocating, he never sent the final payment, although he told the client it was in the mail.
>
> In Count Three, after accepting $500 from the client to assist in the formulation of the client's corporation, Respondent failed to perform the work he had indicated he would do.
>
> Count Four details Respondent's retention by a client

concerning a landlord-tenant dispute, for which he was paid $3,200. After losing at arbitration, the client gave his rent payment to Respondent to deposit in his trust account pending resolution of the matter on appeal. When the matter settled, Respondent ignored repeated requests to transfer those funds to the title company.

In Count Five, Respondent was paid $300 to handle a client's dissolution. Respondent sent the client a petition for dissolution which was missing a great deal of information. The client revised the petition and returned to Respondent's office, only to discover his office had closed. Respondent later telephoned the client from Indiana and told her that he would refund $150.

In Count Six, Respondent was paid $1,350 to handle another client's dissolution. Some time after the client signed the divorce papers a court date was set, but the client was told there was no need for her to appear in court. Respondent never informed the client of what happened in court or that he was relocating to another state. When the client located Respondent in Indiana, Respondent told her that her divorce was final. This was not true, however; the client was not yet divorced.

Count Seven also concerns Respondent's retention by a client to handle a dissolution, for which he was paid $1,749. Before completing this client's dissolution, Respondent moved to Indiana and ceased communication with the client.

In five of these matters, Respondent failed to file written responses to the State Bar's inquiries into the allegations. In all seven of these matters, Respondent failed to notify the clients of his impending move to Indiana.

. . . Respondent did not object, did not file a statement on review, and did not request oral argument before the Commission.

. . . .

The Commission agrees . . . that Respondent's conduct was in violation of ER 1.2, ER 1.3, ER 1.4, ER 1.5, ER 1.15, ER 1.16, ER 3.4(c), ER 5.3, ER 8.1(b), ER 8.4, and Supreme Court Rule 51(h) and (i).

> Although the Commission generally reviews The American Bar Association's *Standards for Imposing Lawyer Sanctions* in determining the appropriate sanction for a violation of the Rules of Professional Conduct, the Commission believes the conduct in this instance is so egregious as to render a review of that guideline unnecessary. Respondent accepted representation of, and retainers from, numerous clients, then, without warning, abandoned their cases. He failed to send the balance of an arbitration award to one client. Another client was compelled to handle the details of the formation of his corporation on his own, when Respondent failed to determine whether the corporate name was available and obtain the original corporate papers and corporate seal. Respondent left three other clients with unresolved dissolutions, incorrectly informing one of them that her divorce was final. In another instance, Respondent failed to transfer a client's funds from Respondent's trust account when the client's case settled. Virtually all of his clients suffered injury as a result. Respondent's complete failure to participate in these disciplinary proceedings is another clear indication that he has abandoned his practice without notice to clients or the Bar.
>
> Respondent's violations are so numerous that nearly every Standard addresses some aspect of his misconduct. All indicate disbarment is the only appropriate sanction. The Commission agrees with the Hearing Committee that "Respondent lacks the character, ethics, and fitness to practice law in the State of Arizona. The Commission recommends disbarment.

On April 4, 1994, citing Peartree's disbarment in Arizona, the Counsel for Discipline of the Nebraska State Bar Association, pursuant to Neb. Ct. R. of Discipline 21(A) (rev. 1992), filed a motion for reciprocal discipline of Peartree in Nebraska.

Without admitting any wrongdoing, but admitting his disbarment in Arizona, Peartree has voluntarily surrendered his license to practice law in the State of Nebraska and has further freely and voluntarily consented to the entry of an order of

disbarment in the State of Nebraska.

Peartree waived his right to notice, appearance, and hearing prior to entry of this order.

We accept Peartree's surrender of his license to practice law in Nebraska and order him disbarred from the practice of law in the State of Nebraska effective immediately.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. THOMAS M. PLANT, APPELLANT.

532 N.W.2d 619

Filed May 19, 1995. No. S-94-888.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of alleging and proving that a claimed error is prejudicial.
2. **Postconviction: Proof.** A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
3. **Postconviction: Waiver: Appeal and Error.** To use a procedural default or waiver as a means of ignoring a plain error that results in an unconstitutional incarceration would place form over substance; would damage the integrity, reputation, and fairness of the judicial process; and would render the plain error doctrine and postconviction relief remedies meaningless.
4. **Postconviction: Jury Instructions: Homicide: Intent.** When the material element of malice is omitted from the second degree murder jury instruction, a defendant's conviction for second degree murder is constitutionally invalid, and postconviction relief is proper to rectify a constitutionally invalid conviction.
5. **Appeal and Error.** An appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process.
6. **Jurisdiction: Sentences: Appeal and Error.** An appellate court is compelled to accept jurisdiction when the sentence entered by the trial court is invalid due to plain error in the proceedings.
7. **Jury Instructions: Homicide: Intent: Appeal and Error.** The failure to include

the element of malice in the jury instruction on second degree murder constitutes prejudicial error.

8. **Criminal Law: Trial: Judges: Jury Instructions.** It is the duty of the trial court in a criminal case to instruct the jury on the pertinent law of the case, whether requested to do so or not.
9. **Jury Instructions: Appeal and Error.** An instruction or instructions which by omission have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.
10. **Criminal Law: Trial: Effectiveness of Counsel: Jury Instructions.** The failure of defense counsel in a criminal trial to object to an instruction which omits a material element of the crime charged cannot be considered to be within the range of professionally competent assistance and prejudices the proceeding on the crime charged.
11. **Criminal Law: Homicide: Intent.** Requiring malice as an element of second degree murder is not a new rule of law; malice has remained a material element since the adoption of the current criminal code.
12. **Indictments and Informations: Homicide: Intent.** For an information to be sufficient to charge a defendant with second degree murder, the information must allege that the accused caused the death of another purposely and maliciously.
13. **Presentence Reports: Waiver.** While a defendant has a qualified right to personally review his presentence investigation report with his counsel, subject to the district court's supervision, a defendant waives that right by failing to notify the district court that he has not personally reviewed the report and wishes to do so.
14. **Postconviction.** An evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the defendant is entitled to no relief.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with direction.

Edward F. Fogarty, of Fogarty, Lund & Gross, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and RONIN, D.J., Retired.

PER CURIAM.

Thomas M. Plant, through a pro se postconviction relief motion, asked the district court to set aside his second degree murder conviction because of prejudicial error in regard to a jury instruction and because his trial counsel provided ineffective assistance by not objecting to the jury instruction.

The district court for Douglas County overruled Plant's

postconviction relief motion, and Plant appealed. We reverse the district court's postconviction relief judgment and remand the second degree murder cause to the district court for a new trial.

ASSIGNMENTS OF ERROR

On appeal of the district court's postconviction judgment, Plant assigned four errors. We need consider only three of those assigned errors to dispose of Plant's appeal: (1) whether the original trial court erred when it failed to include in its instructions to the jury that malice is a material element of the crime of second degree murder; (2) whether Plant was denied effective assistance of counsel when his counsel, at trial and on appeal, did not object to the original trial court's omission in its jury instructions of malice as a material element of second degree murder; and (3) whether Plant was denied effective assistance of counsel when he allegedly was not given an opportunity to review his presentence investigation report before he was sentenced.

FACTS

The State charged Plant with second degree murder for the May 25, 1988, death of his 18-month-old stepson. He was also charged with first degree assault and child abuse of his 4-year-old stepson.

The jury found Plant guilty on all counts with which he was charged. Plant received a life sentence for second degree murder, $6^2/_3$ to 20 years' imprisonment for first degree assault, and 1 to 3 years' imprisonment for child abuse. The assault and child abuse sentences were to run concurrently with each other and consecutive to the second degree murder sentence.

In his direct appeal, Plant assigned that the trial court erred in failing to suppress evidence and in receiving allegedly inadmissible hearsay evidence. We affirmed the judgment of the district court. See *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990).

On July 12, 1994, Plant, acting pro se, filed a motion in the district court to set aside his conviction for second degree murder. He alleged, inter alia, that the trial court committed error by omitting malice as a material element of second degree murder in its jury instructions. The record, without refutation,

reflects that the material element of malice was omitted from the trial court's instruction on second degree murder.

Plant also alleged that he received ineffective assistance of counsel because his trial counsel failed to object to the prejudicial jury instruction. Plant further claimed that the same attorney represented him in his direct appeal and provided ineffective assistance on appeal by not assigning as error the prejudicial jury instruction. Plant also complained that he did not receive effective assistance of counsel because he was not given the opportunity to review, with the assistance of counsel, his presentence investigation report before he was sentenced.

The record before us fails to reflect that Plant had counsel in the district court on his postconviction relief motion. Following its submission, Plant's postconviction relief motion was overruled by the district court. In doing so, the district court held that *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994) (holding that it is plain error for the jury instruction on second degree murder to omit malice as a material element), should not be applied retroactively. On appeal of his postconviction relief motion, Plant was represented by counsel who prepared and filed briefs and orally presented Plant's arguments to this court.

ANALYSIS

A criminal defendant seeking postconviction relief has the burden of alleging and proving that a claimed error is prejudicial. *State v. Jones*, 246 Neb. 673, 522 N.W.2d 414 (1994). A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Sims*, 244 Neb. 771, 509 N.W.2d 6 (1993).

Plant's trial counsel, who also represented Plant in his direct appeal, never claimed that the original trial court committed error in regard to the omission of malice in its instruction on second degree murder. The issue of ineffective assistance of counsel was not raised at the trial level or on direct appeal.

The State has argued that because the issue of the erroneous jury instruction was not raised at trial or on direct appeal, Plant waived his right to raise it in postconviction proceedings. To use a procedural default or waiver as a means of ignoring a plain

error that results in an unconstitutional incarceration would place form over substance; would damage the integrity, reputation, and fairness of the judicial process; and would render the plain error doctrine and postconviction relief remedies meaningless. When the material element of malice is omitted from the second degree murder instruction, a defendant's conviction for second degree murder is constitutionally invalid, and postconviction relief is proper to rectify a constitutionally invalid conviction. See Neb. Rev. Stat. § 29-3001 (Reissue 1989).

An appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994). Moreover, an appellate court is compelled to accept jurisdiction when the sentence entered by the trial court is invalid due to plain error in the proceedings. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995).

In *State v. Williams, supra*, this court addressed whether a defendant was entitled to postconviction relief from a second degree murder conviction when the trial court omitted the material element of malice from its jury instruction on second degree murder. We held that the failure to include the element of malice in the jury instruction on second degree murder constitutes prejudicial error. In *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994), this court held that it is the duty of the trial court in a criminal case to instruct the jury on the pertinent law of the case, whether requested to do so or not. In *State v. Williams, supra*, we held in effect that an instruction or instructions which by omission have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.

We also held in *Williams* that the failure of defense counsel in a criminal trial to object to an instruction which omits a material element of the crime charged cannot be considered to be within the range of professionally competent assistance and prejudices the proceeding on the crime charged.

In Plant's case, the postconviction court erred in determining

the issue of retroactivity. Requiring malice as an element of second degree murder is not a new rule of law; malice has remained a material element since the adoption of the current criminal code. See, *id.*; *State v. Myers, supra.*

As a result of the prejudicial jury instruction and ineffective assistance of counsel, Plant's second degree murder conviction must be overturned, and he must be granted a new trial.

We further note that for an information to be sufficient to charge a defendant with second degree murder, the information must allege that the accused caused the death of another purposely and maliciously. See *State v. Ladig*, 246 Neb. 542, 519 N.W.2d 561 (1994). Upon retrial, the information, as well as the jury instruction, must state all material elements of the crime charged. See, *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); *State v. Grimes, supra.*

Plant's third assignment of error claims that the postconviction court failed to hold a hearing to determine whether he had an opportunity to review his presentence investigation report before he was sentenced on all charges.

At the sentencing hearing, Plant's attorney addressed his concerns with the probation officer's characterization of Plant's lack of remorse and the foster parents' summation in Plant's presentence investigation report. Immediately after his attorney's comments, the court asked Plant if he had "anything else" to say. Plant referred to his record as being nonviolent and told the court that the court has "seen everything." Plant never mentioned that he had not personally reviewed the presentence investigation report.

While a defendant has a qualified right to personally review his presentence investigation report with his counsel, subject to the district court's supervision, a defendant waives that right by failing to notify the district court that he has not personally reviewed the report and wishes to do so. *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994). An evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the defendant is entitled to no relief. *Id.*

As affirmatively shown by the record, Plant waived any complaint that he had not personally reviewed the presentence

investigation report by failing to inform the court when given the opportunity to do so. See, *id.*; *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990). Therefore, the postconviction court did not err in denying Plant an evidentiary hearing on this issue.

If upon retrial Plant is again convicted of causing the death of his 18-month-old stepson, the trial court should make certain that Plant is given the opportunity to review his presentence investigation report before he is resentenced. See *State v. True*, 236 Neb. 274, 460 N.W.2d 668 (1990).

CONCLUSION

We reverse the postconviction judgment of the district court by setting aside Plant's conviction of second degree murder, and grant him a new trial on that charge. Plant's convictions for first degree assault and child abuse shall remain undisturbed. This cause is remanded to the district court with direction to grant Plant a new trial on the charge of second degree murder.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., dissenting.

I dissent for the reasons set forth in my dissents to *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995); and *State v. Wilson*, 247 Neb. 948, 530 N.W.2d 925 (1995).

The majority finds that Plant was prejudiced as a matter of law because the jury was not instructed that malice is an element of second degree murder. A criminal defendant seeking postconviction relief has the burden of alleging and proving that the claimed error is prejudicial. *State v. Jones*, 246 Neb. 673, 522 N.W.2d 414 (1994). I am unable to conclude that Plant was so prejudiced when the complete record of the victim's injuries is considered.

The facts as delineated in Plant's direct appeal showed that the victim, an 18-month-old boy, died from injuries which occurred as a result of being thrown across the room by Plant. See *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990). Doctors noted bruising and swelling on the forehead and massive swelling inside the head. There were a number of bruises, an abrasion on the chin, a number of rib fractures, a fracture of the distal femur, and a shattered pubic bone. The

cause of death was traumatic head injury. *Id.*

Malice is defined as that condition of the mind which is manifested by the intentional doing of an unlawful act without just cause or excuse. See *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994). Had the jury been given an instruction which included the element of malice, I have no doubt that the result would have been the same. Plant could not have provided any reason or excuse to justify his conduct, and he did not plead that he was not responsible by reason of insanity.

Plant claims that he was denied effective assistance of counsel by counsel's failure to object to the instructions. 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. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995). To demonstrate the first requirement, 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. For the second requirement, he must demonstrate that he was prejudiced in the defense of the case as a result of the attorney's actions or inactions. *Id.*

Plant cannot satisfy either component of the test. For at least 12 years, since *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983), no lawyer in the defense of a second degree murder charge has asserted that the jury instructions were erroneous because they did not contain the element of malice. Since previous lawyers faced with similar issues did not raise any objection to allegedly erroneous jury instructions, the lawyer's performance in this case was equal to the performance of all other lawyers in a similar situation. I cannot say Plant's counsel was deficient. More importantly, Plant cannot satisfy the second requirement. He has not shown that had the malice instruction been given, a reasonable probability existed that the result of the trial would have been different. See *State v. Clausen, supra.* The majority once again fails to explain any prejudice to the

defendant other than to simply state that he was prejudiced. There has been no showing of prejudice to Plant.

A denial of a constitutional right does not always require a reversal of the conviction unless it results in prejudice to the accused. See *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In *Rose v. Clark*, 478 U.S. 570, 576–79, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), the Court stated:

> In *Chapman v. California*, 386 U. S. 18[, 87 S. Ct. 824, 17 L. Ed. 2d 705] (1967), this Court rejected the argument that errors of constitutional dimension necessarily require reversal of criminal convictions. And since *Chapman*, "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U. S. 673, 681[, 106 S. Ct. 1431, 89 L. Ed. 2d 674] (1986). That principle has been applied to a wide variety of constitutional errors. *E. g., id.*, at 684 (failure to permit cross-examination concerning witness bias); *Rushen v. Spain*, 464 U. S. 114, 118[, 104 S. Ct. 453, 78 L. Ed. 2d 267] (1983) *(per curiam)* (denial of right to be present at trial); *United States v. Hasting*, 461 U. S. 499, 508–509[, 103 S. Ct. 1974, 76 L. Ed. 2d 96] (1983) (improper comment on defendant's failure to testify); *Moore v. Illinois*, 434 U. S. 220, 232[, 98 S. Ct. 458, 54 L. Ed. 2d 424] (1977) (admission of witness identification obtained in violation of right to counsel); *Milton v. Wainwright*, 407 U. S. 371[, 92 S. Ct. 2174, 33 L. Ed. 2d 1] (1972) (admission of confession obtained in violation of right to counsel); *Chambers v. Maroney*, 399 U. S. 42, 52–53[, 90 S. Ct. 1975, 26 L. Ed. 2d 419] (1970) (admission of evidence obtained in violation of the Fourth Amendment). See also *Hopper v. Evans*, 456 U. S. 605, 613–614[, 102 S. Ct. 2049, 72 L. Ed. 2d 367] (1982) (citing *Chapman* and finding no prejudice from trial court's failure to give lesser included offense instruction). Our application of harmless-error analysis in these cases

has not reflected a denigration of the constitutional rights involved. Instead, as we emphasized earlier this Term:

" 'The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *United States v. Nobles*, 422 U. S. 225, 230 [95 S. Ct. 2160, 45 L. Ed. 2d 141] (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it").' *Delaware v. Van Arsdall, supra*, [475 U.S.] at 681."

. . . .

. . . Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U. S., at 681; *United States v. Hasting*, 461 U. S., at 508-509.

We stated in *State v. Timmerman*, 240 Neb. 74, 89, 480 N.W.2d 411, 420 (1992), that " 'it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.' " In my opinion, without a showing that the malice instruction would probably have created a different result, the omission of malice from the instruction was harmless.

The majority states that requiring malice as an element of second degree murder is not a new rule of law, but that it has remained a material element since the adoption of the revised criminal code in 1977. See, *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). The majority then states that for an information to be sufficient to charge a defendant with second degree murder, the information must allege that the accused

caused the death of another purposely and maliciously, citing *State v. Ladig*, 246 Neb. 542, 519 N.W.2d 561 (1994); *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); and *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994).

However, the court has not been entirely consistent. In *State v. Cave*, 240 Neb. 783, 789, 484 N.W.2d 458, 464 (1992), we stated: "In order to convict a person of second degree murder, the State is required to prove all three elements—the death, the intent to kill, and causation—beyond a reasonable doubt." In *State v. Blackson*, 245 Neb. 833, 515 N.W.2d 773 (1994), which was decided less than 4 months after *Myers*, we affirmed a conviction for second degree murder in which the information did not contain the element of malice. Blackson was charged with intentionally, but without premeditation, killing Richard L. Green, Jr. We affirmed the conviction and stated that although the jury instructions did not define malice and did not specifically require malice as a necessary element of second degree murder, the jury found from the evidence beyond a reasonable doubt each of the material elements of murder in the second degree. We held that a finding that the defendant killed another purposely and maliciously, but without deliberation and premeditation and without just cause or excuse, satisfies the requirement that the killing was done with malice.

Thus, until *Myers*, an instruction omitting malice was not noted as plain error, and until *Grimes*, an information charging second degree murder in the language of the statute was not noted as plain error. The only logical conclusion I can reach is that beginning with *Myers*, the court adopted a new rule of law regarding the omission of malice from the jury instructions. Beginning with *Grimes*, the court expanded the rule to include the omission of malice from the information. I continue to dissent from the position adopted by the majority in these cases.

CONNOLLY, J., joins in this dissent.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. RICHARD D. STANSEL, RESPONDENT.

531 N.W.2d 927

Filed May 19, 1995. No. S-95-487.

Original action. Judgment of disbarment.

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

PER CURIAM.

Richard D. Stansel was admitted to practice law in the State of Nebraska on September 18, 1981.

On May 8, 1995, Stansel freely, voluntarily, and knowingly (1) filed a voluntary surrender of his license to practice law in Nebraska; (2) admitted that he violated Canon 1, DR 1-102(A)(1), (4), (5), and (6), of the Code of Professional Responsibility as adopted by the Nebraska Supreme Court; (3) admitted that he violated his oath of office as an attorney; and (4) consented to the entry of an order of disbarment.

On February 27, 1995, a disciplinary complaint was filed against Stansel by the Counsel for Discipline of the Nebraska State Bar Association. The complaint alleged that Stansel practiced law during a suspension for nonpayment of bar dues; neglected to complete legal work in a timely manner for which he was retained; and misled a client as to the status of her case by telling her that her "Petition for Dissolution of Marriage" had been filed when, in fact, the petition had not been filed.

As stated, Stansel freely, voluntarily, and knowingly admitted that he violated DR 1-102(A)(1), (4), (5), and (6) of the Code of Professional Responsibility. DR 1-102(A) provides that "[a] lawyer shall not: (1) Violate a Disciplinary Rule[;] . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation[;] (5) Engage in conduct that is prejudicial to the administration of justice[; or] (6) Engage in any other conduct that adversely reflects on his [or her] fitness to practice law."

Stansel waived his right to notice, appearance, and hearing prior to entry of this order.

We accept Stansel's surrender of his license to practice law

in Nebraska and order him disbarred from the practice of law in the State of Nebraska effective immediately.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.

DOROTHY KEEFE, APPELLANT, V. GLASFORD'S ENTERPRISES, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS CLUB 89, APPELLEE.

532 N.W.2d 626

Filed May 26, 1995. No. S-93-797.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, a court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Corporations: Abatement, Survival, and Revival: Claims.** Neb. Rev. Stat. § 21-20,104 (Reissue 1991) is a survival statute, rather than a statute of limitations. As such, the statute gives life to claims which would otherwise be extinguished. Absent the survival statute, a dissolved corporation could not sue or be sued.
4. **Limitations of Actions: Abatement, Survival, and Revival.** A statute of limitations is a period of repose designed, if asserted, to prevent recovery on stale claims, while a survival statute gives life to a substantive right that but for the statute would have been destroyed.
5. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
6. ____: ____. After a moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
7. **Summary Judgment: Evidence.** A movant for summary judgment makes a prima

facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion.

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

Michael J. Poepsel for appellant.

Lane D. Edenburn and Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellee.

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

WRIGHT, J.

In this case, we address the application of Neb. Rev. Stat. § 21-20,104 (Reissue 1991), which concerns the survival of actions against a corporation following the dissolution of the corporation. In 1992, Dorothy Keefe brought a negligence action against Glasford's Enterprises, Inc. (Glasford's), a corporation which operated Club 89 in Omaha. Glasford's was dissolved as a corporation in 1989. The district court sustained Glasford's motion for summary judgment and dismissed the petition. Keefe appeals.

SCOPE OF REVIEW

In appellate review of a summary judgment, a 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. 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. *Vervaecke v. State*, 247 Neb. 707, 529 N.W.2d 779 (1995); *Lewis v. Board of Comrs. of Loup Cty.*, 247 Neb. 655, 529 N.W.2d 745 (1995).

FACTS

On February 14, 1992, Keefe filed a petition against Glasford's and Dick Glasford, individually, alleging that she

was injured as she left Club 89 on February 16, 1988. In a second amended petition, filed on July 15, 1992, only Glasford's was named as a defendant. Keefe stated that on or about February 16, 1988, she tripped and fell on a 1½-inch gap in the sidewalk of the club and that she sustained injuries to her knee and ankle. Keefe alleged that Glasford's was negligent in maintaining the premises in failing to maintain a smooth walking surface, in failing to repair the crack in the sidewalk, and in failing to properly warn of the dangerous condition.

In its answer, Glasford's admitted that on February 16, 1988, it was the owner of the premises, but it alleged that Glasford's had been dissolved for nonpayment of taxes on April 16, 1989. Glasford's affirmatively alleged that Keefe's petition was barred by the "statute of limitations" in § 21-20,104 because the petition was not filed within 2 years of the date of the corporate dissolution of Glasford's.

Glasford's filed a motion for summary judgment on June 28, 1993, attaching a copy of the summons, which was dated February 14, 1992, as well as the dissolution certification issued by the Secretary of State. The certificate states that Glasford's was dissolved for nonpayment of taxes on April 16, 1989, and that no documentation had been filed to revive Glasford's. The motion for summary judgment was sustained on August 18, 1993.

ASSIGNMENT OF ERROR

Keefe argues that the district court erred in granting summary judgment because § 21-20,104 was not intended to be used to bar tort cases such as the instant action.

ANALYSIS

At issue in this case is the interpretation of § 21-20,104, which states:

> The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, (2) by a decree of court when the court has not liquidated the assets and business of the corporation as provided in sections 21-2001 to 21-20,134, or (3) by expiration of its period of duration, shall not take away or impair any remedy available. to or against such

> corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution *if action or other proceeding thereon is commenced within two years after the date of such dissolution*. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of two years so as to extend its period of duration, and such amendment shall be deemed to relate back to such date of dissolution for all purposes.

(Emphasis supplied.)

Keefe argues that this statute was not intended or contemplated to be used to bar a tort claim such as hers. However, she provides no case law to support this position. Nor does she offer the legislative history of the statute.

In previous cases, we have analyzed § 21-20,104 and held that it is a survival statute, rather than a statute of limitations. In *Licht v. Association Servs., Inc.*, 236 Neb. 616, 463 N.W.2d 566 (1990), an employee sought to recover for accrued vacation pay and for services rendered in winding up the affairs of her former corporate employer. The articles of dissolution were filed with the Secretary of State on April 4, 1986, and on the same day the Secretary of State issued a certificate reciting that the articles had been filed with his office. The appellant's petition was filed on April 5, 1988. We stated:

> Section 21-20,104 is a survival statute, not a statute of limitations, and, as such, gives life to claims which would otherwise be extinguished. *Van Pelt v. Greathouse*, 219 Neb. 478, 364 N.W.2d 14 (1985). Absent the survival statute, a dissolved corporation could not sue or be sued. *Id.*; *Christensen v. Boss*, 179 Neb. 429, 138 N.W.2d 716 (1965). Therefore, the rights created by the statute are the right of the corporation to sue during the survival period and the right of others to sue the corporation during that same period.

Licht, 236 Neb. at 623, 463 N.W.2d at 571. We affirmed the district court's award of summary judgment on issues related to § 21-20,104.

We delineated the differences between a statute of limitations and a survival statute in *Van Pelt v. Greathouse*, 219 Neb. 478, 484, 364 N.W.2d 14, 19 (1985), in which we stated:

> If § 21-20,104 is a survival statute rather than one of limitations, not even equity could estop its application. For, while a statute of limitations is a period of repose designed, if asserted, to prevent recovery on stale claims, a survival statute gives life to a substantive right that but for the statute would have been destroyed. *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983); *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982); *Vielehr v. Malone*, 158 Neb. 436, 63 N.W.2d 497 (1954); *Canadian Ace Brewing v. Joseph Schlitz Brewing Co.*, 629 F.2d 1183 (7th Cir. 1980).

Unless a statute provides otherwise, no law action can be maintained by or against a dissolved corporation in its corporate name. *Van Pelt, supra*. If a statute provides that a corporation may be continued for a certain period in order to defend or prosecute suits, no law action can be maintained by or against it after that period expires. "In other words, while a statute of limitations relates to the remedy only and not to substantive rights . . . a survival statute operates on the right or claim itself." *Id.* at 486, 364 N.W.2d at 20, citing *Denver Wood Products Co. v. Frye*, 202 Neb. 286, 275 N.W.2d 67 (1979). Although Keefe had 4 years under the tort statute of limitations in which to seek a remedy, the survival statute limited her substantive right to recover from Glasford's to a 2-year period following Glasford's dissolution. Without the survival statute, her claim would have expired immediately upon Glasford's dissolution.

In the case at bar, Keefe filed her negligence action within the 4-year statute of limitations for tort actions, but not within the 2-year period provided by the survival statute. The survival statute provides a period of grace that extends the right to sue a dissolved corporation beyond the life of the corporation. As

we stated in *Christensen v. Boss*, 179 Neb. 429, 435, 138 N.W.2d 716, 720 (1965):

> At common law a corporation's capacity to sue or be sued terminates when the corporation is legally dissolved. . . .
>
> Where a corporation has in fact been dissolved and no longer exists as a legal entity, the rule of its incapacity to sue or be sued applies regardless of the mode of dissolution whether by judicial decree or otherwise.

In *Christensen*, an affidavit supporting a special appearance showed that the corporate defendant had been legally dissolved more than 5 years prior to the institution of the action. The corporation was therefore no longer in existence and could not be sued. We held that the dissolution could not be collaterally attacked.

Keefe argues that these cases are factually divergent because they concerned actions by shareholders or former employees and were not tort actions. However, in *Farmers Union Co-op Assn. v. Mid-States Constr. Co.*, 212 Neb. 147, 322 N.W.2d 373 (1982), one of the theories of recovery was negligent construction. Mid-States had been dissolved by the Secretary of State for nonpayment of taxes on August 3, 1970, and had not been revived. On January 3, 1979, Co-op filed suit against Mid-States for damages to a portion of an elevator which Mid-States had constructed. Although we noted that a number of states have held that a corporation whose charter is revoked for nonpayment of taxes is a de facto corporation and continues legal existence during the forfeiture period, we stated that "a corporation is a creature of the Legislature. Any change in substantive law relating to the status of such a dissolved corporation is particularly within its domain." *Id.* at 152, 322 N.W.2d at 376. We found that the petition was properly dismissed against Mid-States, since the corporation was dissolved 9 years prior to the filing of the action. *Mid-States Constr. Co.* is applicable to the case at bar.

The present case was decided on the basis of a motion for 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. *Vervaecke v. State*, 247 Neb. 707, 529 N.W.2d 779 (1995); *Lewis v. Board of Comrs. of Loup Cty.*, 247 Neb. 655, 529 N.W.2d 745 (1995). We are reminded that a party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995); *Rath v. Selection Research, Inc.*, 246 Neb. 340, 519 N.W.2d 503 (1994). Glasford's met that burden in this case.

Once Glasford's filed its motion for summary judgment and supporting documents, which showed that Glasford's was entitled to judgment as a matter of law, the burden shifted to Keefe to present evidence showing an issue of material fact which prevented a judgment as a matter of law for the moving party. See, *Roubideaux v. Davenport*, 247 Neb. 746, 530 N.W.2d 232 (1995); *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995). A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion. *Medley, supra*. We find that Keefe has not met that burden.

At the hearing on the motion for summary judgment, Glasford's offered into evidence the summons and the certificate of dissolution. Keefe offered no evidence. On appeal, she argues that an insurance policy, which provided coverage for negligence claims, should be viewed as a corporate asset which was not distributed at the dissolution of Glasford's and that the dissolution is incomplete because the policy was not distributed. Yet, there is no evidence in the record of the insurance policy.

Keefe also argues that the dissolution is inapplicable to her because of lack of proper notice. She claims that she was not a creditor per se and would not have been eligible for written notification of the pending dissolution. However, the record contains no evidence that Keefe notified Glasford's of her negligence claim prior to its dissolution. Nor is there evidence

that Glasford's failed to notify her of its dissolution. The record simply has no evidence to support the burden Keefe must meet in order to avoid summary judgment.

CONCLUSION

In our appellate review of summary judgment, the evidence must be viewed in a light most favorable to the party against whom the judgment is granted, and we must give such party the benefit of all reasonable inferences deducible from the evidence. *Union Ins. Co. v. Land and Sky, Inc.*, 247 Neb. 696, 529 N.W.2d 773 (1995); *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994). Viewing the evidence in a light most favorable to Keefe, we find that Glasford's was dissolved on April 16, 1989, and that Keefe did not file her action until February 14, 1992, more than 2 years after the dissolution. Under § 21-20,104, her action is barred. The district court was correct in awarding summary judgment to Glasford's, the dissolved corporation, which is entitled to judgment as a matter of law. The judgment of the district court is affirmed.

AFFIRMED.

LARRY L. WINBERG AND JUNE E. WINBERG, HUSBAND AND WIFE, APPELLANTS, V. RYNOLD A. CIMFEL AND PATRICIA H. CIMFEL, HUSBAND AND WIFE, AND MARVIN STERNER AND ESTHER STERNER, HUSBAND AND WIFE, APPELLEES.

532 N.W.2d 35

Filed May 26, 1995. No. S-93-810.

1. **Specific Performance: Equity.** An action for specific performance sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict

on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

3. **Contracts: Real Estate: Options to Buy or Sell: Words and Phrases.** An "option to purchase real estate" is a unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the option.
4. **Contracts: Conveyances: Real Estate: Options to Buy or Sell.** By an agreement for an option to purchase real estate, the owner does not sell the land, nor does the owner at the time contract to sell. The owner does, however, agree that the person to whom the option is given shall have the right at his election or option to demand the conveyance in the manner specified.
5. ____: ____: ____: ____. A right of first refusal, rather than an option to purchase real estate, is created by an agreement which (1) contains no terms or conditions of sale; (2) fails to indicate that the party interested in purchasing real estate has an absolute right to demand conveyance of the property at any time prior to the owner's decision to sell it; and (3) implements the word "first" to indicate that if the owner decides to sell the real estate, he or she is compelled to offer it first to the other party to the agreement.
6. **Contracts: Merger: Intent.** For a merger of agreements to take place, the same parties and the same subject matter must be involved and there must be some showing of intent to merge the two agreements.
7. **Real Estate: Vendor and Vendee: Consideration: Notice: Words and Phrases.** A "bona fide purchaser" of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent person on inquiry.
8. **Real Estate: Vendor and Vendee: Claims: Notice.** To qualify as a bona fide purchaser of land, one must actually have paid the purchase money before he or she received notice of a claim against the land.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Reversed and remanded for further proceedings.

John O. Sennett, of Sennett and Associates, for appellants.

Larry W. Beucke, of Parker, Grossart, Bahensky & Beucke, and Carlos E. Schaper, of Schaper & Steffens, for appellees.

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

CONNOLLY, J.

Larry L. and June E. Winberg filed this equity action against Rynold A. and Patricia H. Cimfel and Marvin and Esther Sterner, requesting specific performance of a right of first

refusal to purchase a certain 276-acre tract of land in Custer County. The district court for Custer County granted the Cimfels' and Sterners' motions for summary judgment. We reverse the judgment and remand the cause for further proceedings because the district court erred in finding that the Winbergs' right of first refusal merged into a subsequent warranty deed conveying a contiguous 4-acre tract of land from the Cimfels to the Winbergs and because the Sterners did not qualify as bona fide purchasers of land.

I. FACTUAL BACKGROUND

Rynold and Patricia Cimfel purchased a 280-acre farm in Custer County on or about February 21, 1959. On December 4, 1970, the Cimfels entered into a real estate sales agreement with the Winbergs, wherein the Cimfels agreed to convey a 4-acre tract of the 280-acre farm to the Winbergs in exchange for $1,600. The payment schedule in the sales agreement reflects that the Winbergs were to pay the final installment on January 1, 1976. The section of the sales agreement entitled "Special Agreements between the Seller and the Buyer" contained the following language:

> Parties of the first part [the Cimfels] will have first rights to purchase above four acres or any part thereof if parties of the second part [the Winbergs] desire to sell. Parties of the second part will be given first opportunity to purchase remaining 276 acre [sic], more or less, attached and now owned by the parties of the first part if parties of the first part desire to sell.

The Winbergs filed the sales agreement with the register of deeds in Custer County on March 3, 1971. The record reflects that the Winbergs paid off the money owed on the 4-acre tract in a timely fashion. On December 30, 1975, the Cimfels executed and delivered a warranty deed conveying the 4-acre tract to the Winbergs, which the Winbergs filed with the Custer County register of deeds on January 15, 1980. The warranty deed made no mention of the "first rights to purchase" detailed above.

During the week prior to August 17, 1992, Rynold Cimfel received an inquiry from one Arthur Sterner regarding Sterner's

interest in purchasing the 276-acre tract. Cimfel arranged to meet with Sterner in Broken Bow on August 17. At the August 17 meeting, Cimfel quoted a price of $90,000 for the land to Sterner, but the parties did not reach an agreement regarding the sale of the land.

Prior to meeting with Sterner, Cimfel stopped at the Winberg residence and informed June Winberg that the 276-acre tract was for sale. Cimfel testified in his deposition that he believed that he had a "gentleman's agreement" with the Winbergs whereby the Winbergs were to have the first opportunity to buy the 276-acre tract when it became available for purchase. Cimfel did not remember having entered into the written "first rights to purchase" agreement. Cimfel testified that the Winbergs knew that time was of the essence because he told June Winberg that the time for planting winter wheat was nearing. However, Cimfel conceded that he never expressly told the Winbergs that time was of the essence.

On August 20, 1992, the Cimfels received a postcard from the Winbergs stating that the Winbergs were interested in purchasing the 276-acre tract. In the postcard, the Winbergs inquired about the Cimfels' asking price per acre and asked how many acres of the land were pasture. Rynold Cimfel testified that he wrote a letter in response to the Winbergs' postcard the day he received it. The Winbergs received Cimfel's letter on August 22, 1992. In the letter, Cimfel provided a legal description of the land and estimated that it consisted of approximately 280 acres. Cimfel described the soil and instructed the Winbergs to obtain an aerial map of the tract at the Agricultural Stabilization and Conservation Service office in Broken Bow. Finally, Cimfel stated an asking price of $90,000. Cimfel testified, but did not state in the letter, that he expected a response from the Winbergs in 3 to 5 days.

The same day that the Winbergs received the letter from Cimfel, Cimfel received a phone call from Sterner, who informed Cimfel that he had looked at the property again and was interested in purchasing it. Cimfel arranged to meet Sterner at Sterner's residence in Broken Bow on August 25, 1992.

Without prior notice, Cimfel stopped by the Winbergs' residence on the way to his August 25 meeting with Sterner and

found no one home. Cimfel then met with Sterner, and the two parties reached an agreement for the sale of the 276-acre tract to Sterner.

After reaching the agreement with Sterner, Cimfel stopped at Larry Winberg's barbershop. Cimfel informed Winberg that he had just sold the 276-acre tract to Sterner because he assumed that the Winbergs were not interested in purchasing the land, based on the lack of a response to his letter. That same day, the Winbergs sent a letter via certified mail to the Cimfels expressing their interest in purchasing the 276 acres. The Winbergs also applied and received approval for a $90,000 loan, which the Winbergs assert was to be used to purchase the 276 acres.

The Cimfels refused to convey the 276-acre tract to the Winbergs. Subsequently, the Winbergs filed the instant action, naming the Cimfels and the Sterners as defendants, seeking specific performance of the "first rights to purchase" agreement for the 276-acre tract, and asking the court to declare the conveyance between the Cimfels and the Sterners void. The Cimfels answered, and the Sterners answered and counterclaimed, asking the court to quiet title in the Cimfels, subject to the sales agreement with the Sterners.

Each party filed a motion for summary judgment. The district court held that the "first rights to purchase" agreement in the 1970 contract merged into the 1975 warranty deed that conveyed the 4-acre tract to the Winbergs, and that because the "first rights to purchase" agreement was not specifically continued in the deed, it ceased to exist on or about January 1, 1976.

II. ASSIGNMENTS OF ERROR

The Winbergs contend that the district court erred in sustaining the Cimfels' and the Sterners' motions for summary judgment and in finding that the "first rights to purchase" in the 1970 sales agreement merged into the 1975 warranty deed and therefore did not survive past January 1, 1976.

III. STANDARD OF REVIEW

An action for specific performance sounds in equity. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). In an appeal of an equity action, an appellate court tries

factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *University Place-Lincoln Assocs. v. Nelsen*, 247 Neb. 761, 530 N.W.2d 241 (1995); *Mischke v. Mischke*, 247 Neb. 752, 530 N.W.2d 235 (1995); *Reikofski v. Bodwell*, 247 Neb. 623, 529 N.W.2d 531 (1995).

Summary judgment is proper 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. *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995); *Tompkins v. Raines*, 247 Neb. 764, 530 N.W.2d 244 (1995); *Roubideaux v. Davenport*, 247 Neb. 746, 530 N.W.2d 232 (1995). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Cimino v. FirsTier Bank, supra*; *Tompkins v. Raines, supra*; *Roubideaux v. Davenport, supra*.

IV. ANALYSIS

1. Right of First Refusal or Option?

The Cimfels and the Sterners contend that an issue in the case at bar is whether the "first rights to purchase" contained in the 1970 sales agreement formed a right of first refusal or an option. We hold that the provision clearly constituted a right of first refusal.

> While options and the so-called "right of first refusal" are sometimes confused, there is a clear and classic distinction: The option compels performance within the time limit specified, or if none is mentioned, then within a reasonable time, whereas the right of first refusal has no binding effect unless the offeror decides to sell.
>
> The right of first refusal, or first right to buy, is not a

> true option but is a valuable prerogative. It limits the right of the owner to dispose freely of his property by compelling him to offer it first to the party who has the first right to buy. Nor may the owner accept an offer made to him by a third party.

11 Samuel Williston, A Treatise on the Law of Contracts § 1441A at 948–50 (3d ed. 1968).

> [T]he word "first" has special significance in interpreting contract provisions to decide whether an option or a right of refusal is intended: "the limiting word 'First' indicates that there is no intention to create a power of acceptance in the promisee; instead it indicates that the promisee shall be the first party to be given such a power."

Landa v. Century 21 Simmons & Co., 237 Va. 374, 382, 377 S.E.2d 416, 420 (1989) (quoting 1A Arthur L. Corbin, Corbin on Contracts § 261A (1963)).

An "option to purchase real estate" is a unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the option. *In re Estate of Michels*, 223 Neb. 286, 389 N.W.2d 285 (1986); *Gleeson v. Frahm*, 211 Neb. 677, 320 N.W.2d 95 (1982). By such an agreement the owner does not sell the land, nor does the owner at the time contract to sell. The owner does, however, agree that the person to whom the option is given shall have the right at his election or option to demand the conveyance in the manner specified. *Gleeson, supra*; *Commuter Developments & Investments, Inc. v. Gramlich*, 203 Neb. 569, 279 N.W.2d 394 (1979).

The language in the 1970 sales agreement in the instant case clearly created a right of first refusal in the Winbergs. The language could not grant an option to purchase real estate because nothing in the agreement indicated that the Winbergs had an absolute right to demand conveyance of the property at any time prior to the Cimfels' decision to sell it. Likewise, the agreement contained no terms or conditions of sale. Instead, the agreement conveyed a right of first refusal, implementing the word "first" to indicate that if the Cimfels decided to sell the 276-acre tract, they were compelled to offer it first to the Winbergs.

2. MERGER?

The primary issue raised by the Winbergs is whether the district court correctly held that the right of first refusal in the 1970 real estate sales contract merged into the 1975 warranty deed conveyed by the Cimfels to the Winbergs. We hold that the district court erred in reaching that conclusion.

For a merger to take place, the same parties and the same subject matter must be involved and there must be some showing of intent to merge the two agreements. *The Nebraskans, Inc. v. Homan*, 206 Neb. 749, 294 N.W.2d 879 (1980). As we stated in *Purbaugh v. Jurgensmeier*, 240 Neb. 679, 683, 483 N.W.2d 757, 761-62 (1992):

> "Merger" does not serve to make the contract and the deed one document; it is merely a rule for the resolution of title disputes. " ' " '[U]pon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein . . . .' " ' " [Citation omitted.] "[T]hereafter the deed regulates the rights and liabilities of the parties, and evidence of contemporaneous or antecedent agreements between the parties is inadmissible *to vary or contradict the terms of the deed.*" (Emphasis supplied.) [Citation omitted.] The doctrine of merger "does not apply to those provisions of the antecedent contract which the parties do not intend to be incorporated in the deed, or which are not necessarily performed or satisfied by the execution and delivery of the stipulated conveyance." [Citation omitted.] For example, "[a] stipulation in a preliminary contract for the sale of real estate, to deliver a deed at a specified time upon a contingency fully performed, does not necessarily merge in a subsequently delivered and accepted deed." [Citation omitted.]

The district court held that the Winbergs' right of first refusal to purchase the 276-acre tract contained in the 1970 sales agreement merged into the warranty deed which conveyed the 4-acre tract to the Winbergs. That holding misconstrues the principle of merger. The 1970 sales agreement concerned both

the conveyance of the 4-acre tract and a right of first refusal to purchase the 276-acre tract. The 1975 warranty deed related only to the conveyance of the 4-acre tract. Everything in the sales agreement related to the 4-acre tract merged into the 1975 warranty deed because that portion of the sales agreement was executed by delivery of the warranty deed. However, the portion of the sales agreement concerning the right of first refusal in the 276-acre tract remained executory and survived the deed. See *Landa v. Century 21 Simmons & Co.*, 237 Va. 374, 377 S.E.2d 416 (1989). See, also, *G.G.A., Inc. v. Leventis*, 773 P.2d 841 (Utah App. 1989) (reaching the same conclusion under a "collateral rights" exception to the merger rule). The district court erroneously applied the doctrine of merger to the Winbergs' right of first refusal.

3. Are the Sterners Bona Fide Purchasers?

The Sterners argue that even if the Winbergs' right of first refusal did not merge into the 1975 warranty deed, the Winbergs cannot block the sale of the 276-acre tract to the Sterners because the Sterners are bona fide purchasers.

A "bona fide purchaser" of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent person on inquiry. *Kimco Addition v. Lower Platte South N.R.D.*, 232 Neb. 289, 440 N.W.2d 456 (1989); *Mader v. Kallos*, 219 Neb. 579, 365 N.W.2d 408 (1985). The Sterners claim that they had no actual or constructive notice of the Winbergs' right of first refusal when they signed the sales agreement to purchase the 276-acre tract from the Cimfels. Therefore, the Sterners contend that as between the Sterners and the Winbergs, the Sterners should prevail.

Even if we assume that the Sterners did not have actual or constructive notice of the Winbergs' right of first refusal when the Sterners signed the sales contract for the 276-acre tract, the Sterners' argument fails because they did not qualify for protection as bona fide purchasers. To qualify as a bona fide purchaser of land, one must actually have paid the purchase money before he or she received notice of a claim against the land. *Garmire v. Willy*, 36 Neb. 340, 54 N.W. 562 (1893);

Birdsall v. Cropsey, 29 Neb. 679, 45 N.W. 921, *modifying* 29 Neb. 672, 44 N.W. 857 (1890). Since the Sterners had not paid the purchase price for the 276-acre tract when they received notice of the Winbergs' right of first refusal, they did not qualify as bona fide purchasers of land.

The decision in *Westpark, Inc. v. Seaton Land Co.*, 225 Md. 433, 171 A.2d 736 (1961) is directly on point. The defendant in *Westpark, Inc.* learned of the plaintiff's right of first refusal to purchase a certain tract of land after the defendant had signed a contract for the sale of the land and tendered a downpayment. The *Westpark, Inc.* court held:

> The general rule is that a purchaser of real estate takes subject to outstanding equitable interests in the property, which are enforceable against him to the same extent they are enforceable against the vendor, where the purchaser is not entitled to protection as a bona fide purchaser . . . and *one who purchases the equitable title to real estate is not protected as a bona fide purchaser where he receives notice of a prior equity before he acquires the legal title . . . or where he receives notice before he has paid all or substantially all of the purchase price. . . .*
>
> In our view of the case before us, [the defendant] is not entitled to protection as a bona fide purchaser of the 5.2 acre tract, since it received notice of [the plaintiff's] equity before paying any except a small portion of the purchase money and before acquiring legal title, and therefore it is bound by that outstanding right.

(Emphasis supplied.) *Id.* at 450-51, 171 A.2d at 743.

It is uncontradicted that the Sterners did not acquire legal title to and did not pay all or substantially all of the purchase price for the 276-acre tract prior to the time the Winbergs recorded notice of their right of first refusal with the Custer County register of deeds on August 31, 1992. We hold that the August 31 recordation should have put the Sterners on notice that suspicious circumstances surrounded the title to the 276-acre tract. Given such notice, the Sterners could not claim that they were bona fide purchasers of land.

V. CONCLUSION

The Winbergs' right of first refusal in the 276-acre tract

remained in effect because it did not merge into the warranty deed which conveyed the 4-acre tract to the Winbergs. The Sterners are not bona fide purchasers of land because they received notice of the Winbergs' right of first refusal prior to paying the full purchase price for and obtaining legal title to the 276-acre tract. Since factual questions remain regarding whether the Cimfels satisfied their obligations under the right of first refusal and whether the Winbergs accepted the Cimfels' offer to sell the 276-acre tract, we remand the cause to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RONALD MOLT, APPELLANT, V. LINDSAY MANUFACTURING COMPANY, APPELLEE.

532 N.W.2d 11

Filed May 26, 1995. No. S-93-918.

1. **Evidence: Trial: Appeal and Error.** When a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence which was previously sought to be excluded by the motion is offered during trial. Error cannot be predicated on the admission of evidence to which no objection was made when the evidence was adduced.
2. **Pleadings: Appeal and Error.** The overruling of a motion in limine is not reviewable on appeal.
3. **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.
4. **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.
5. **Libel and Slander: Proof.** In an action for libel or slander, it shall be sufficient

to state, generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied, the plaintiff must prove on the trial the facts, showing that the defamatory matter was published or spoken of him.

6. **Libel and Slander.** The truth of a defamatory statement is measured by the ordinary implication of the words at the time the statement was made.
7. **Summary Judgment: Proof.** 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.
8. **Libel and Slander.** Generally, whether a publication is privileged is a question of law to be determined by the court. A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information.
9. **Libel and Slander: Proof.** Where a qualified privilege exists, there can be no recovery without proof of malice.
10. ____: ____. In order to establish malice, the plaintiff must demonstrate that the publication was made with hate, spite, or ill will.
11. **Libel and Slander.** There is no publication when the words are communicated only to the person defamed.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

John Morgan, of Morgan & Morgan, for appellant.

Margaret E. Stine, of Harding & Ogborn, for appellee.

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

WRIGHT, J.

I. INTRODUCTION

Ronald Molt filed suit against his former employer, Lindsay Manufacturing Company (Lindsay), alleging that it distributed libelous material and made slanderous statements with regard to the termination of his employment. The district court granted summary judgment in favor of Lindsay, and Molt appeals.

II. SCOPE OF REVIEW

When a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence which was previously sought to be excluded by the motion is offered during trial. Error cannot be predicated on the admission of evidence to which no objection was made when

the evidence was adduced. *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992).

The overruling of a motion in limine is not reviewable on appeal. *Marple v. Sears, Roebuck & Co.*, 244 Neb. 274, 505 N.W.2d 715 (1993).

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. *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995). 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.*

III. FACTS

Molt was employed by Lindsay as a maintenance mechanic from July 27, 1987, to June 22, 1992. In June 1992, he was working the third shift from 10:30 p.m. to 7 a.m. When he arrived for work on June 22, he was met by Dave Veach, a second-shift production manager, who took Molt to the office of Patrick Daley, director of human resources. Daley informed Molt that the company had videotape evidence of Molt's pilfering from a change machine in building No. 4. Molt was given the option of resigning or being terminated. After Molt refused to quit, Daley terminated his employment. Molt was then escorted out of the building by Veach.

On June 24, 1992, Molt's wife called Lindsay and demanded that the reason for Molt's termination be put in writing. Daley wrote a letter, which was typed by Peggy Carter, an administrative assistant in the human resources department. Carter personally delivered the letter to Molt's wife in a sealed envelope. The letter states: "As requested, this letter confirms your termination from Lindsay Manufacturing Co. on June 22, 1992. Separation information form states reason for termination, 'Lindsay has evidence of Ron's pilfering the company's change machine in the Maintenance building'. Any questions may be directed to me."

After Molt's termination, the Nebraska Department of Labor Unemployment Insurance Division sent a request for separation information to Lindsay, seeking information on Molt's termination. In response, the form, which was signed by Carter, indicated that the company had evidence of Molt's pilfering from the company's change machine. Sharon Nordhues, a Department of Labor employee, called Daley to obtain additional information. Daley told Nordhues he could not provide additional information concerning the pilfering because of pending litigation. Daley also told Nordhues he understood that Molt would be allowed benefits because there was insufficient evidence to establish misconduct.

Molt's amended petition alleged that on or about June 24, 1992, Lindsay distributed the above-described letter, which contained libelous matter. Molt alleged that at or about the same time, Lindsay falsely and maliciously accused Molt of thievery in the presence of others and that the written and spoken publications were made with malice. Molt alleged that the letter and the spoken word were widely circulated, resulting in injury to his earning capacity, as well as his personal and business reputations. Lindsay denied the allegations and affirmatively alleged that the termination letter was privileged and that the information contained in the letter was true.

The parties stipulated that Lindsay had used a video tape recorder to discover whether individuals were pilfering from the change machine in building No. 4 and that Molt was in contact with the change machine on June 22, 1992. It was further stipulated that the person appearing on the videotape was Molt, that Lindsay had a procedure to follow when an employee lost money in a change machine, and that Molt did not follow that procedure. The parties stipulated that Molt's employment was terminated on June 22 and that Molt's wife requested a letter of termination on June 24.

Molt filed a motion in limine on August 9, 1993, requesting the exclusion of the videotape. Molt asserted that no person was present at the time the videotape was made, so no witness could lay foundation for the admission of the videotape into evidence. The motion was overruled on September 8. On August 30, Lindsay filed a motion for summary judgment, offering in

support the videotape of Molt, as well as a number of affidavits and depositions. The motion was sustained on October 5.

IV. ASSIGNMENTS OF ERROR

Molt alleges that the district court erred in overruling his motion in limine and in sustaining Lindsay's motion for summary judgment.

V. ANALYSIS

1. Motion in Limine

Molt's assignment of error concerning the overruling of a motion in limine is without merit because such a ruling is not reviewable on appeal. See *Marple v. Sears, Roebuck & Co.*, 244 Neb. 274, 505 N.W.2d 715 (1993). In *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990), we stated that a motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. We noted that it is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence.

When the court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence which was previously sought to be excluded is offered during the trial. *Id.* Error cannot be predicated on the admission of evidence to which no objection was made when the evidence was adduced. *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992). The motion in limine sought to exclude videotape evidence. Molt did not object when the videotape was offered at the summary judgment hearing. Molt has therefore failed to preserve his objection to this evidence and has waived any complaint about it on appeal.

2. Summary Judgment

Molt argues that Lindsay committed libel by publishing the reason for his termination in a letter which was seen by numerous individuals at the company and by stating the reason in the communication with the Department of Labor. He also suggests that Lindsay committed slander when numerous individuals at the company told other individuals of the reason for Molt's termination. Molt claims there exist genuine issues of material fact concerning whether various employees needed

to know the reason for his termination, whether the information provided to the Department of Labor was privileged, whether the allegations were false, and whether the company acted with malice.

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. *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995). 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.*

In Nebraska, in a libel or slander action, "it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied, the plaintiff must prove on the trial the facts, showing that the defamatory matter was published or spoken of him." Neb. Rev. Stat. § 25-839 (Reissue 1989). Accord *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988).

In such an action,

> the defendant may allege the truth of the matter charged as defamatory, prove the same and any mitigating circumstances to reduce the amount of damages, or prove either. The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication.

Neb. Rev. Stat. § 25-840 (Reissue 1989).

Lindsay asserted two affirmative defenses: truth and privilege. We begin by considering Lindsay's assertion that the statements were true. We then consider whether the statements were privileged.

(a) Truth

The information disseminated by Lindsay alleged that Molt had been terminated for pilfering from a change machine. The evidence of the alleged pilfering was obtained after Lindsay

learned of a shortage in the machine. Company employees were directed to place a surveillance camera in the ceiling near the machine. The camera was aimed toward the machine and was programmed to tape from 12:10 to 6 a.m. on June 22, 1992. On the videotape, Molt is seen placing a $1 bill into the machine at about the same time he places a screwdriver or other tool into the machine. He drops the $1 bill, leans over to pick it up, looks around, and then walks away. About 20 seconds later, he returns and places some type of paper which may or may not be a $1 bill and the tool into the machine. He jimmies with the tool for about 15 seconds, stops, looks into the machine, jimmies with the tool again, and then looks around as he walks away. He returns a second time about 20 seconds later. He places a piece of paper and the tool into the machine, jimmies with it for about 25 seconds, and peers into the machine opening. He picks up something from the change compartment of the machine as he continues to look into the opening, and then he walks away.

On June 22, 1992, the videotape was retrieved and viewed by Don Cook, maintenance manager, and Gus Anderson, maintenance leadperson, the men who had installed the camera. Cook then took the videotape to company officials for viewing. The videotape was viewed by Daley, director of human resources; Cliff Loseke, vice president of manufacturing; Bruce Karsk, vice president of finance; and Gary Parker, chief executive officer and president of Lindsay. These management representatives then made the decision to terminate Molt's employment.

Lindsay claims that the statement in the termination letter and the statement provided to the Department of Labor are true. As the party moving for summary judgment, Lindsay had the burden to show that no genuine issue of material fact existed and was required to produce sufficient evidence to demonstrate that it was entitled to judgment as a matter of law. See *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995).

"The truth of a defamatory statement is measured by the ordinary implication of the words, at the time the statement was made . . . ." 53 C.J.S. *Libel and Slander* § 108 at 194 (1987). Although Molt contends that he was merely attempting to obtain

change from the change machine, the parties stipulated that Lindsay has a procedure to be followed when an employee loses money in a change machine and that Molt did not follow that procedure. The videotape shows Molt approaching the machine on three occasions, and on each occasion, he uses a tool to jimmy the machine. Only on the first trip does it appear that he actually places a $1 bill into the machine. The ordinary implication of Lindsay's words, that Lindsay had evidence that Molt was pilfering, is supported by the videotape.

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. *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995). At the hearing on the motion for summary judgment, Molt offered his own affidavit, in which he denied stealing from Lindsay and stated that he was told he would be prosecuted for theft if he did not resign.

Molt's affidavit that he did not steal from Lindsay is sufficient to raise a material question of fact as to whether the reason given for Molt's termination was true. Therefore, the affirmative defense of truth cannot be decided by summary judgment. We must then consider whether the statements made by Lindsay were privileged.

(b) Privilege

Lindsay also asserted privilege as an affirmative defense. One of the bases asserted by Molt for his libel claim is Lindsay's completion of the form requested by the Department of Labor. Carter, an administrative assistant in the human resources department, completed the form, on which she stated: "Have evidence of employee pilfering money from company's change machine." Daley declined to provide additional information to the Department of Labor because of pending litigation and stated he understood that benefits would be allowed because of insufficient evidence to establish misconduct.

We have previously addressed the question of privilege. In *White v. Ardan, Inc.*, 230 Neb. 11, 19, 430 N.W.2d 27, 32–33

(1988), we stated:

> Generally, whether a publication is privileged is a question of law to be determined by the court. . . . A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information.

Our consideration of the issue must also be based on state law, which provides in part:

> All letters, reports, communications, or any other matters, either oral or written, from an employer or his or her workers to each other or to the commissioner or any of his or her agents, representatives, or employees which shall have been written or made in connection with the requirements and administration of the Employment Security Law, or the rules and regulations thereunder, shall be absolutely privileged and shall not be made the subject matter or basis for any suit for slander or libel in any court of this state, unless the same be false in fact and malicious in intent.

Neb. Rev. Stat. § 48-612 (Reissue 1988).

Thus, information provided to the Department of Labor is privileged and cannot be the basis for a libel suit unless the information is both false and malicious. Although there remains a question of fact as to whether the statement was false, there is no evidence in this case to establish that the statement to the Department of Labor was made with malicious intent. Therefore, according to the statute, the statement made to the Department of Labor was absolutely privileged, and as a matter of law, Molt has no cause of action for libel on the basis of the statement to the department.

We next address the termination letter and the communications made to various personnel at Lindsay. Molt objects to the fact that Veach, a second-shift production manager, knew of the reason for Molt's termination. Molt argues that Veach had no reason to know. We disagree. Veach was on duty when Molt arrived at the plant. Veach was asked to escort Molt to Daley's office, and Veach escorted Molt from

the building after the termination. Daley stated in a deposition that he asked Veach, who was still on duty at the time Molt arrived for work, to meet Molt at the door and escort him to Daley's office. Veach said Daley told him the reason for Molt's termination, but Veach told no one else and did not see the termination letter. It was appropriate for Veach, as a shift manager, to be informed of the reason for an employee's termination.

Molt also asserts that Rick Eberhardt, a Lindsay employee, was told by Veach and by a security guard, Patrick Robak, that Molt had been fired for pilfering. Molt offered this testimony by way of his affidavit, which was properly objected to on the basis of hearsay. The court overruled the objection and admitted the affidavit. Neb. Rev. Stat. § 25-1334 (Reissue 1989) requires that supporting and opposing affidavits must set forth such facts as would be admissible into evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The record contains no deposition or affidavit from Eberhardt. We have not been presented with any admissible evidence as to information which was given to Eberhardt by a Lindsay employee.

Molt next argues that Cook, Loseke, Parker, Karsk, Veach, Carter, Anderson, Daley, and Dalene Purchal, a secretary in the human resources department, knew that Molt was terminated for pilfering and that at least three of these individuals had no need to know. As we review the depositions and affidavits in support of the motion for summary judgment, we find that each of these employees had a bona fide interest in the subject matter or stood in such relation that it was reasonable or proper for him or her to receive the information. The information was privileged, and where a qualified privilege exists, there can be no recovery without proof of malice. *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985).

Having determined as a matter of law that a qualified privilege existed under the facts of this case, we next consider whether there is a material question of fact as to whether the publication was made with malice. Molt contends that malice existed because Molt had offered to take a polygraph test and Lindsay officials refused. Molt further contends that there was

no need to fire him for pilfering and to place in writing the reason. He asserts that the only purpose served in accusing him of pilfering and then putting it in writing was to humiliate and frighten him. We disagree. In order to establish malice, Molt must demonstrate that the publication was made with hate, spite, or ill will. See *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987). None of the depositions or affidavits provide support for Molt's claim that Lindsay's actions were motivated by malice.

As to Molt's claim that Lindsay did not need to put the reason for termination in writing, we point out that it was Molt's wife who contacted Lindsay and requested that the reason be put in writing in a letter of termination. The letter was typed and placed in a sealed envelope. Daley stated that he did not distribute the letter to anyone other than Molt's wife, and at least 10 Lindsay employees testified that they did not see the termination letter. "[T]here is no publication when the words are communicated only to the person defamed . . . ." 53 C.J.S. *Libel and Slander* § 50 a. at 97 (1987).

VI. CONCLUSION

Although we find that a genuine issue of material fact remains as to the truth of the allegedly libelous and slanderous information, we find that the publication of the statements was privileged and was without malice. The district court properly granted summary judgment, and we affirm the order of the district court.

AFFIRMED.

GEORGE ROSE & SONS SODDING AND GRADING CO., APPELLANT, V. NEBRASKA DEPARTMENT OF REVENUE, APPELLEE.

532 N.W.2d 18

Filed May 26, 1995. No. S-93-963.

1. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
2. **Administrative Law: Judgments: Appeal and Error.** On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **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.
5. **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.
6. **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.
7. **Statutes: Legislature: Intent: Appeal and Error.** In settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
8. **Statutes.** Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
9. **Taxation: Contractors and Subcontractors: Real Estate.** A contractor who incorporates live plants, including sod, into real estate is a retailer for sales tax purposes under Neb. Rev. Stat. §§ 77-2702.05 and 77-2702.13 (Cum. Supp. 1994). The exception to the definition of "retail sale," encompassing those who conduct "sales of live plants incorporated into real estate incidental to the transfer of an improvement upon the real estate," is limited to general building contractors who perform landscaping services incidental to other home improvements.
10. **Taxation: Contractors and Subcontractors.** Under Neb. Rev. Stat. § 77-2702.05 (Cum. Supp. 1994), only contractors are allowed to elect their taxation scheme. Retailers must remit sales tax to the state in the uniform manner provided in Neb. Rev. Stat. § 77-2703 (Cum. Supp. 1994).

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

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

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

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

CONNOLLY, J.

George Rose & Sons Sodding and Grading Co. (the company) appeals the Lancaster County District Court's decision to affirm an order by the State Tax Commissioner which sustained deficiency assessments for sales and use taxes against the company. We affirm because the company is a "retailer" for the purposes of the Nebraska sales and use tax statutes.

I. FACTUAL BACKGROUND

The company is an Omaha-based landscaping partnership. In the course of its business, the company subcontracts with building contractors to cultivate sod, trees, and flowers into homeowners' land, as well as grading and installing landscaping materials such as railroad ties. The company's primary customers are general building contractors, though occasionally the company did work for individual homeowners. Generally, the company did not pay a sales tax on the sod that it purchased from its supplier and did not remit a use tax when it stored or installed the sod. The company never held a sales tax permit and does not collect or remit sales tax on any of the sod it installs.

In July 1991, the Nebraska Department of Revenue (Department) informed the company that the Department planned to conduct an audit regarding the company's tax liabilities. On July 31, 1991, the Department informed Rosie Rose, a co-owner of the company, that she needed to select one of three options regarding the information upon which the audit would be performed. Rose chose to have the Department

conduct the audit based on the company's income tax returns rather than provide the company's business records. The Department audit resulted in the company being served with a notice of deficiency determination in the amount of $61,426.

Subsequent to the first audit, the company filed a protest petition and made its business records available to the Department. Based on the business records, the Department conducted a second audit, which resulted in two notice of deficiency determinations: one in the amount of $7,094 for the period from July 1, 1986, through December 31, 1988, and a second in the amount of $5,413 for the period from January 1, 1989, through September 30, 1991, for a total deficiency of $12,507.

On June 8, 1992, the company filed a second protest petition. The Department conducted a hearing on September 15, 1992, in Lincoln, Nebraska. Rose represented the company at the hearing pro se. The Department presented updated evidence reflecting the company's total deficiency liability through September 25, 1992. The updated evidence included unpaid sales and use tax and accrued interest on the company's deficiency since the most recent notice of deficiency determination, as well as credits for sales and use taxes that the company paid. The updated deficiency information totaled $11,216.

The hearing officer issued a "recommended decision and order" finding that the Department's deficiency determination accurately reflected the company's tax liability. The hearing officer concluded that the sale and incorporation of live plants into real estate is a retail sale subject to the Nebraska sales tax. The Tax Commissioner adopted the hearing officer's findings, and the district court affirmed the Tax Commissioner's decision.

II. ASSIGNMENTS OF ERROR

The company contends that (1) the sales and use tax was unconstitutionally applied to the company and (2) the Department's assessment of sales and use tax was not supported by the evidence.

III. STANDARD OF REVIEW

Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Abbott v. Department of Motor Vehicles*, 246 Neb. 685, 522 N.W.2d 421 (1994); *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 522 N.W.2d 417 (1994). On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995); *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995); *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994). When reviewing an order of a district court under the Administrative Procedure Act 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. *Wagoner, supra*; *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994); *Abbott, supra*.

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. *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995); *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995); *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994).

IV. ANALYSIS

1. Applicable Statutes

(a) Difference Between "Retailers" and "Contractors"

The primary issue in the case at bar is whether the company is a "retailer" or a "contractor" for the purpose of the sales tax statutes.

A retailer is responsible for collecting the sales tax from consumers on each sale the retailer makes. The sales tax collected constitutes a debt owed by the retailer to the state.

Neb. Rev. Stat. § 77-2703(1)(a) (Cum. Supp. 1994). Therefore, the retailer is responsible for remitting the sales tax to the state. The gross receipts of a retailer's sales are taxed at a rate of 5 percent. Neb. Rev. Stat. §§ 77-2701.02 (Reissue 1990) and 77-2703(1).

A contractor, as opposed to a retailer, can elect to be treated in one of three ways for sales tax purposes: (1) as a retailer, (2) as a consumer of property annexed to real estate who pays the sale tax or remits the use tax at the time of purchase and maintains a tax-paid inventory, or (3) as a consumer of property annexed to real estate who issues a resale certificate when purchasing property that will be annexed to real estate and remits the appropriate use tax when the property is withdrawn from inventory. Neb. Rev. Stat. § 77-2702.05(1) through (3) (Cum. Supp. 1994). When a contractor elects to pay a use tax under either the second or third option, the rate charged is the same as the sales tax rate in effect at the time of the taxable transaction. § 77-2703(2). The ultimate consumer does not pay sales tax to the seller when the seller is a contractor who elects to pay the use tax.

(b) Expansion of Definition of "Retail Sales"

Prior to 1987, any person who incorporated tangible personal property into real estate (including sod and live plants) was considered a contractor for the purposes of the Nebraska sales and use tax. Neb. Rev. Stat. § 77-2702(3) (Reissue 1986). Apparently, due to a misunderstanding of the application of § 77-2702(3), most landscapers and nurseries that incorporated live plants into real estate in Nebraska considered themselves to be retailers and charged and collected sales tax from their customers. This practice was improper because those landscapers and nurseries were defined as contractors under the statute. In 1987, Senator Jerome Warner introduced L.B. 287 to change the law to reflect the current practices:

> The current *practice* (due to apparently a longstanding misunderstanding of what the law provided) is for nurseries to charge a sales tax on both (1) plants sold to the customer in the nurseries and (2) plants incorporated into the customer's real estate by the nursery on behalf of

> the customer. This bill would allow the practice to continue. Enforcement of what is apparently the current *law* would result in an unreasonable administrative burden for the nurseries, for they would have to keep separate inventories for plants sold in the store (where the customer would pay the sales tax as the ultimate consumer) and plants which they plant for the customer (where the nursery would pay sales tax only on the seedlings it had originally purchased from wholesalers).

Statement of Purpose, L.B. 287, Committee on Revenue, 90th Leg., 1st Sess. (Feb. 11, 1987).

The passage of L.B. 287 is reflected in the current definitions of "retail sale" and "contractor" in the sales and use tax statutes. Neb. Rev. Stat. § 77-2702.13(1)(e) (Cum. Supp. 1994) (formerly § 77-2702(10)(c)), provides the current definition of "retail sale": "Retail sale or sale at retail shall mean . . . [a] sale of live plants incorporated into real estate except when such incorporation is incidental to the transfer of an improvement upon real estate or the real estate." Neb. Rev. Stat. § 77-2702.05 (Cum. Supp. 1994) (formerly § 77-2702(3)), provides the current definition of "contractor": "Contractor or repairperson shall not include any person who incorporates live plants into real estate except when such incorporation is incidental to the transfer of an improvement upon real estate or the real estate."

In the case at bar, the company claims that it is a contractor for the purposes of §§ 77-2702.13(1)(e) and 77-2702.05, that the Department deprived it of its opportunity to elect its method of taxation, and that the Department's decision resulted in the company being taxed twice for the same materials. Furthermore, the company contends that the Department, as affirmed by the district court, unconstitutionally applied §§ 77-2702.13(1)(e) and 77-2702.05 retroactively to the company and that the Department did not give the company adequate notice of the tax consequences of those statutes.

2. "Retailer" v. "Contractor"

(a) Parties' Arguments

As stated above, the primary issue in the case at bar is

whether the company is a retailer or a contractor for the purposes of §§ 77-2702.05 and 77-2702.13. The Department contended that the company is a retailer because its business as a subcontractor consists of selling "live plants incorporated into real estate." The company responded by arguing that it is a contractor because its sales of live plants incorporated into real estate are "incidental to the transfer of an improvement upon real estate."

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. *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995); *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994); *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (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. *State ex rel. Perkins Cty. v. County Superintendent*, 247 Neb. 573, 528 N.W.2d 340 (1995); *In re Application of City of Grand Island*, 247 Neb. 446, 527 N.W.2d 864 (1995); *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994).

(b) Meaning of "Incidental to the Transfer of an Improvement Upon Real Estate."

In order to determine whether the company is a retailer or contractor under the sales tax statutes, we must decide what the Legislature intended when it excluded the sales of live plants incorporated into real estate "incidental to the transfer of an improvement upon real estate" from the definition of "retail sale." In settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995); *Anderson v. Nashua Corp.*, 246 Neb. 420, 519

N.W.2d 275 (1994); *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

We hold that the company is a retailer, not a contractor, under §§ 77-2702.05 and 77-2702.13. The company contends that it should be classified as a contractor because when it lays sod for a landscaping project, it is improving the real estate. The company's reasoning goes something like this: The company's business is incorporating sod into real estate. When the company incorporates sod into real estate, it is improving the real estate. Therefore, for the purposes of the sales and use tax statutes, the company's business involves the sale of live plants incorporated into real estate incidental to the transfer of an improvement upon real estate.

The problem with the company's reading of the statutory language is that it provides no distinction between a "sale of live plants incorporated into real estate" and a "sale of live plants incorporated into real estate *incidental to the transfer of an improvement upon the real estate*." Clearly, the latter requires more than merely incorporating live plants into real estate.

Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *State ex rel. Perkins Cty. v. County Superintendent*, 247 Neb. 573, 528 N.W.2d 340 (1995); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). The company's reading of §§ 77-2702.05 and 77-2702.13 would render at least one clause in those statutes meaningless because it provides no distinction between two types of incorporation of live plants into real estate. The only reasonable reading of §§ 77-2702.05 and 77-2702.13 which gives effect to each clause in the statutory language requires that the phrase "incidental to the transfer of an improvement upon the real estate" be limited to sales conducted by general building contractors who incorporate live plants into the real estate incidental to the other home improvements provided by the builder. The company is not a general building contractor and therefore does not incorporate live plants incidental to the transfer of an improvement upon real estate. Landscapers who specialize in incorporating live plants, like the company, are engaged in "retail sales" under the statutes.

Our decision with regard to the distinction between a "sale of live plants incorporated into real estate" and a "sale of live plants incorporated into real estate incidental to the transfer of an improvement upon the real estate" finds support in the legislative history of L.B. 287:

> LB 287 would exclude from the definition of "contractor or repairperson" any person who incorporates *live plants* into real estate, except where the incorporation is incidental to the transfer of an improvement upon the real estate. The effect of LB 287 would be to impose the retail sales tax upon landscaping performed by nurseries and sodgrowers. (Homebuilders who landscape new homes, incidental to other home improvements, would continue to be considered a "contractor" and such activities would not be a retail sale.)

Statement of Purpose, L.B. 287, Committee on Revenue, 90th Leg., 1st Sess. (Feb. 11, 1987).

> [T]he bill [L.B. 287] removes the sales tax exemptions for improvements to real estate where the improvement is a living plant, thus the people to whom the trees are sold pay the sales tax as, in fact, it is currently being done. . . . As the bill is drafted, live plants would include grass, so in case of sod installers . . . there would be a sales tax applied the same as a tree. . . . In the case of home builders who do landscaping, this problem is addressed in the bill by further limiting the new provisions so landscaping incidental to the real estate improvement is still not taxed.

Floor Debate, L.B. 287, Committee on Revenue, 90th Leg., 1st Sess. 1410-11 (Mar. 4, 1987).

We hold that a contractor, like the company, who incorporates live plants, including sod, into real estate is a retailer for sales tax purposes under §§ 77-2702.05 and 77-2702.13. The exception to the definition of "retail sale," encompassing those who conduct "sales of live plants incorporated into real estate incidental to the transfer of an improvement upon the real estate," is limited to general building contractors who perform landscaping services incidental to other home improvements.

3. Constitutional Questions

(a) Retroactive Application of Statutes

The company claims that even if it became a "retailer" with the passage of L.B. 287, the Department applied the precepts of that law retroactively in figuring the company's tax deficiency. L.B. 287 passed with the emergency clause and became operative on April 1, 1987. 1987 Neb. Laws, L.B. 287. The record clearly reflects that the Department did not charge the company with any sales tax deficiency prior to May 1987. Rather, all tax deficiency for the period from July 1986 until April 1987 was classified as use tax. As noted above, contractors are required to pay a use tax on certain inventory, depending on how they elect to have that inventory taxed. Nothing in the record indicates that the Department's use tax assessments on the company for the period from July 1986 to April 1987 were improper. Therefore, the company's arguments regarding retroactive application of the statutes are without merit.

(b) Inadequate Notice

The company contends that the Department violated the company's due process rights by construing the language of §§ 77-2702.05 and 77-2702.13 in a manner contrary to the plain language contained therein and by failing to promulgate rules and regulations explaining the new conditions imposed by the Department's allegedly contrary interpretation. Specifically, the company claims that the Department interpreted §§ 77-2702.05 and 77-2702.13 as excluding sod from the definition of "live plants" in the statutes. Such an interpretation would have constituted a direct affront to the legislative history of the statutes.

We find no support in the record for the company's contention that the Department excluded sod from the definition of "live plants." How the company came to that conclusion, given the tax deficiency assessment reached by the Department, is inexplicable. It is clear from the record that the Department treated sod as "live plants" throughout the instant proceedings. The Department is not required to issue rules and regulations in order to enforce clear statutory language. This argument is without merit.

4. Application of §§ 77-2702.05 and 77-2702.13

(a) Statutory Election

The company argues that the Department wrongfully prevented it from electing its method of taxation, as the company claims it should have been allowed to do under § 77-2702.05. We held that the company is a retailer, not a contractor, for the purposes of the sales tax statutes. Under § 77-2702.05, only contractors are allowed to elect their taxation scheme. Retailers must remit sales tax to the state in the uniform manner provided in § 77-2703. Therefore, this assignment of error is without merit.

(b) Double Taxation

Finally, the company contends that the record reflects that the Department charged the company twice for certain tax liabilities. The company refers to the testimony of Department audit supervisor Debra Gusak, who admitted that in some instances, the Department assessed both a sales tax and a use tax because the company's records were either nonexistent or inadequate to properly classify the tax liability. However, in reviewing the Tax Commissioner's decision, we note that the commissioner recommended that those items that were assessed both a use tax and a sales tax be assessed as sales tax, and ordered the corresponding use tax eliminated from the Department's assessments. That decision eliminated any merit to the company's double taxation arguments.

V. CONCLUSION

The company is a retailer for the purposes of the sales and use tax statutes. See §§ 77-2702.05 and 77-2702.13. The Department did not apply the precepts of those provisions retroactively and did not need to promulgate any regulations as a prerequisite to enforcement of the statutes. The company had no right to elect its method of taxation under § 77-2702.05(1) through (3), and the Department did not double-tax the company.

Affirmed.

TERI A. STANG-STARR, APPELLANT, V. ROBERT T. BYINGTON, APPELLEE.

532 N.W.2d 26

Filed May 26, 1995. No. S-94-355.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Trial: Witnesses: Evidence: Impeachment: Rebuttal Evidence.** Standard medical texts and other authorities may be used for the purpose of impeaching, contradicting, or discrediting a witness through cross-examination and during rebuttal testimony.
3. **Evidence.** Standard medical texts and other authorities may not be used as independent evidence of the opinions and theories advanced by the parties.
4. **Witnesses: Hearsay.** A witness who seeks merely to summarize the content of a hearsay source is acting as a summary witness, not an expert.
5. **Hearsay.** An extrajudicial statement not offered to prove the truth of the matter asserted is not hearsay.

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

William A. Wieland and Thomas K. Massey, of Healey & Wieland Law Firm, for appellant.

William M. Lamson, Jr., William R. Settles, and Charles F. Maxwell III, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

Pursuant to verdict, the district court dismissed this action wherein the plaintiff-appellant, Teri Stang-Starr, claims she was damaged by the negligent failure of the defendant-appellee, Dr. Robert T. Byington, to properly diagnose and treat abnormalities in her cervix. Stang-Starr then successfully moved to bypass the Nebraska Court of Appeals and here asserts that the district court erred by (1) refusing to permit her to question her medical experts regarding medical texts and treatises upon which they relied in their testimony and (2)

inconsistently receiving in evidence Byington's offer of the examining laboratory's explanation of its classification system upon which he relied. We affirm.

II. SCOPE OF REVIEW

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Wiekhorst Bros. Excav. & Equip. v. Ludewig*, 247 Neb. 547, 529 N.W.2d 33 (1995).

III. FACTS

1. Medical Developments

On May 23, 1986, Byington conducted an examination of Stang-Starr, which included obtaining a Pap smear. The procedure involved obtaining a scraping of cells from the cervix of the uterus and placing them on a slide, which Byington sent to the examining laboratory, International Cancer Screening Laboratories Inc., for a pathological examination for signs of cervical cancer.

Sometime between June 7 and 10, 1986, Byington received from the examining laboratory a report dated June 4, which read: "Cellular changes are present consistent with moderate dysplasia. Papanicolaou Class II. Repeat smears in two months. Estrogen effect; slight." The term "dysplasia" means abnormal growth.

On or about October 10, 1986, Stang-Starr received a telephone call from a nurse in Byington's office, informing Stang-Starr that her Pap smear report showed an abnormal finding of class II and that she should make an appointment to return to the office.

When Stang-Starr returned to Byington's office on October 27, 1986, he obtained another Pap smear and sent the sample to the examining laboratory. The laboratory's November 3, 1986, report read: "Negative for malignant cells (Class I). Additional estrogen effect; slight." On or about November 7, a nurse from Byington's office informed Stang-Starr of the reported results from this second Pap smear. The nurse

instructed Stang-Starr to contact Byington in 6 months for another Pap smear.

As she began experiencing a heavier menstrual flow, Stang-Starr scheduled an appointment for January 4, 1988. Byington's examination on this occasion revealed cervical irritation and vaginitis, for which he prescribed treatment and scheduled a return visit.

On February 3, Byington obtained a third Pap smear and performed a colposcopy, a microscope-aided visual examination of the cervix and vagina. The colposcopy revealed an abnormality, and Byington performed a biopsy of the affected area; that is, he removed a tissue sample for study. On February 5, Byington learned that the biopsy revealed the presence of cancer and notified Stang-Starr by telephone. The examining laboratory's report with respect to the third Pap smear, bearing a date of February 12 read: "Neoplastic cells are present consistent with squamous cell carcinoma, keratinizing type. Papanicolaou Class V. Follow up tissue studies. Additional findings: Endocervical cells, inflammation."

Byington's office contacted the examining laboratory to inquire about the November 3, 1986, report which had failed to report any malignant cells or abnormalities in the second Pap smear. According to the examining laboratory's Dr. Sharon Rosenthal, a mistake had been made. The report should have indicated that the sample sent was unsatisfactory because the cells were obscured by blood and could not be evaluated properly. During a meeting at his office with Stang-Starr and her husband, Byington informed them of the examining laboratory's error and of the possibility that Stang-Starr's earlier class II dysplasia might have developed into a class V cancer during the interval in which Byington relied on the faulty report.

Byington referred Stang-Starr to a cancer specialist at the University of Nebraska Medical Center, where she was diagnosed as having a stage IV carcinoma.

2. Trial Developments

During the trial, Stang-Starr called two physicians to testify on her behalf as expert witnesses: Dr. Manford Oliphant and

Dr. William Woodard.

Oliphant testified that the American College of Obstetricians and Gynecologists, the primary organization for obstetricians and gynecologists, publishes journals and a number of technical and informational bulletins. These items provide one of the sources Oliphant used to establish appropriate procedures in the practice.

When asked whether he had reviewed any technical bulletins in preparation for his testimony in this case, Oliphant responded that he had, along with reviewing other journals, textbooks, and excerpts from textbooks. Oliphant also testified that obstetricians and gynecologists develop information for their daily practices from textbooks and technical bulletins.

Based on his knowledge and information obtained from textbooks, medical literature, and personal experience, Oliphant formed an opinion, to a reasonable medical probability, as to the standard of care required of a board-certified obstetrician in May 1986 in Lincoln or similar communities. He then testified that he had read a particular technical bulletin issued by the college as a predicate to formulating some of the opinions on dysplasia to which he had testified. When Stang-Starr offered that bulletin into evidence, Byington successfully interposed a hearsay objection.

Stang-Starr then made an offer of proof of the bulletin and of material found in more than 12 textbooks concerning gynecology and colposcopy. She proposed that Oliphant would identify the text as authority in the field, identify the text as a basis of opinion, and identify and read specific passages of the material upon which Oliphant relied in testifying. The district court sustained Byington's hearsay objections to the offers.

Woodard then took the stand and testified that in forming his opinion, he had reviewed 5 or 6 textbooks, other specifically named textbooks, 15 to 18 journal articles, and the college bulletin identified earlier. In making an offer of proof, Stang-Starr represented that were Woodard allowed to respond to questions about those medical authorities, he would describe the textbooks by title, author, and date of publication, but would not attempt to quote from the actual text. Byington's hearsay objection to the offer was sustained.

During his cross-examination, Woodard was asked:

> [Byington's counsel:] Do you think — strike that. Let's talk about the length of the disease, if we can, for a moment. How long does it normally take, Doctor, from — for this disease, I'm probably using a bad word when I use normal. In the literature, let me use it that way, what does it say with regard to the number of years it takes on the average for the cancer to progress from dysplasia to true invasive cancer? How long is that span of time normally?

Woodard responded, "A number of months to several years." During cross-examination, Woodard was also asked, "Isn't it true that the literature says that this is a slowly progressing cancer in general?" Woodard responded, "In 7 to 20 percent."

On cross-examination, Woodard also testified generally as to what the medical literature suggested. When asked on cross-examination whether he had experienced a patient's cancer to progress from normal to invasive within 9 months, he replied that the "literature suggests that the original Pap smear was improper or was one of those false negatives, from 15 to 40 percent, and that the cancer doesn't go that rapidly."

Woodard was also asked during cross-examination whether "physicians are told in the literature what characteristics go into making up a high-risk patient." Woodard confirmed that such was the case.

On redirect examination, Woodard was asked whether in his opinion there existed in May 1986 diagnostic chaos as to how a gynecologist should have responded to moderate dysplasia in Pap smears. Woodard responded that there was no confusion as to what to do about dysplasia from a gynecologist's standpoint. When asked what the basis for his statement was, Woodard began to reply about the technical bulletin referred to earlier. Byington objected on the basis of hearsay and lack of foundation. Stang-Starr then withdrew the question, and the redirect examination continued with the following questions and answers:

> [Stang-Starr's counsel:] Dr. Woodard, in the [college] technical bulletin . . . did that bulletin, from your review, specifically address the issue of whether or not there was any diagnostic chaos with reference to what gynecologists

did when they obtained an abnormal Pap smear?

A. There was none.

Q. Okay. Let me hand you, Dr. Woodard, a copy — first of all, will you verify what's been marked as . . . the . . . technical bulletin . . . and refer you to page 3 under "Evaluation of Abnormalities."

First, would you take a moment and read to yourself those two paragraphs.

A. (Witness complies.) Yes.

Q. Have you had a chance to do so?

A. Yes.

Q. Do those two paragraphs address the approach to an abnormal Pap smear when the report comes back?

A. Yes, they do.

Q. Would you please give us your interpretation of those two paragraphs from that . . . bulletin?

[Byington's counsel:] To which [Byington] objects, Your Honor. The witness has already indicated that in his opinion the document indicates that there is no diagnostic chaos.

The objection was sustained.

During the presentation of his case, Byington introduced an eight-page document bearing the examining laboratory's name, which explained the classification system it used. Stang-Starr raised a hearsay objection to the document, which the district court ultimately sustained in part and in part overruled, editing the document so as to admit only those portions which define "diagnostic cytology," explain the examining laboratory's procedures in screening slides, and explain the classification of dysplasia the laboratory used.

IV. ANALYSIS

1. Rejection of Authorities

When offered to prove the truth of matters asserted in them, learned writings, such as treatises, books, and articles regarding specialized areas of knowledge, are clearly hearsay. 2 McCormick on Evidence § 321 (John W. Strong 4th ed. 1992). There was no exception for learned treatises at common law, and medical textbooks and professional articles are not

admissible to prove the substantive facts stated therein. *Hickok v. G. D. Searle & Company*, 496 F.2d 444 (10th Cir. 1974). Neither do the Nebraska Evidence Rules contain such an exception to the hearsay rule. See Neb. Evid. R. 801 and 803, Neb. Rev. Stat. §§ 27-801 and 27-803 (Reissue 1989).

We have permitted the use of standard medical texts and other authorities for the purpose of impeaching, contradicting, or discrediting a witness through cross-examination. *Fonda v. Northwestern Public Service Co.*, 138 Neb. 262, 292 N.W. 712 (1940); *Winters v. Rance*, 125 Neb. 577, 251 N.W. 167 (1933); *Hutchinson v. State*, 19 Neb. 262, 27 N.W. 113 (1886). We have also permitted the use of such materials for the foregoing purposes during rebuttal testimony. *Oliverius v. Wicks*, 107 Neb. 821, 187 N.W. 73 (1922).

We have not, however, permitted the use of such materials as independent evidence of the opinions and theories advanced by the parties. *Darnell v. Panhandle Coop. Assn.*, 175 Neb. 40, 120 N.W.2d 278 (1963); *Van Skike v. Potter*, 53 Neb. 28, 73 N.W. 295 (1897). See, also, *Hutchinson, supra*. As explained in *Van Skike*, 53 Neb. at 42, 73 N.W. at 299:

> "[E]ven if they are regarded as authoritative, [medical texts] cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated. One objection to such testimony is that it is not delivered under oath; a second objection is that the opposite party is thereby deprived of the benefit of a cross-examination; and a third and perhaps a more important reason for rejecting such testimony is that the science of medicine is not an exact science. There are different schools of medicine, the members of which entertain widely different views, and it frequently happens that medical practitioners belonging to the same school will disagree as to the cause of a particular disease, or as to the nature of an ailment with which a patient is afflicted, even if they do not differ as to the mode of treatment. Besides, medical theories, unlike the truths of exact science, are subject to frequent modification and change, even if they are not altogether abandoned. For these reasons it is very generally held that when, in a

> judicial proceeding, it becomes necessary to invoke the aid of medical experts it is safer to rely on the testimony of competent witnesses who are produced, sworn, and subjected to a cross-examination, than to permit medical books or pamphlets to be read to the jury."

Neither, contrary to the contention of Stang-Starr, does *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990), suggest otherwise. It is true that after noting in *Capps* that the "*references* to research and literature were not offered to prove the truth of their contents, but as a basis for [defendant's] testimony," we wrote that "[e]xpert witnesses quite often rely on sources of research and literature as bases of their opinions, and a *reference* to those sources during testimony does not reduce that *testimony* to hearsay." (Emphasis supplied.) *Id.* at 22, 458 N.W.2d at 746. Read carefully, *Capps* contains nothing which implies that the material referred to in the testimony at issue was even offered, let alone received, in evidence; the opinion merely recites that the material was referred to in the witness' testimony. In that regard, the *Capps* opinion stands for nothing more than that a witness' reference during testimony to research sources and literature does not convert that witness' testimony into inadmissible hearsay.

While it is likely that the practice of medicine is more of a science today than it was almost a century ago when we decided *Van Skike*, the fact remains that the *Van Skike* reasoning continues to be sound. We are thus not persuaded that we should abandon our longstanding rule in this regard.

Nor does the fact that the out-of-court statements contained in the authorities were offered in the guise of forming the bases for the testifying experts' opinions alchemically transmute them from inadmissible hearsay into admissible nonhearsay. When Stang-Starr attempted to elicit testimony from her witness concerning what a particular authority has reported about an issue, she was attempting to use her witness to recite the opinion of each authority cited instead of eliciting her witness' expert opinion derived from the witness' own knowledge and experience. The witness was merely seeking to act as a conduit for inadmissible hearsay. The recitation of a passage by a nontestifying authority, even if such is in conformity with the

opinion of the testifying expert, is hearsay.

As observed in *United States v. Williams*, 431 F.2d 1168, 1172 (5th Cir. 1970), *aff'd en banc* 447 F.2d 1285 (5th Cir. 1971), *cert. denied* 405 U.S. 954, 92 S. Ct. 1168, 31 L. Ed. 2d 231 (1972):

> "If the witness has gone to only one hearsay source and seeks merely to summarize the content of that source, then he is acting as a summary witness, not an expert. Since he is introducing the content of the extrajudicial statements or writings to prove truth, his testimony, like its source, is hearsay and is inadmissible unless the source qualifies under an exception to the hearsay rule. When, however, the witness has gone to many sources—although some or all be hearsay in nature—and rather than introducing mere summaries of each source he uses them all, along with his own professional experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as an attempt to introduce hearsay in disguise."

See, also, *Standard Oil Company of California v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied* 356 U.S. 975, 78 S. Ct. 1139, 2 L. Ed. 2d 1148 (1958); *H. & H. Supply Co. v. United States*, 194 F.2d 553 (10th Cir. 1952); *Hannan v. United States*, 131 F.2d 441 (D.C. Cir. 1942).

Accordingly, the district court did not err in sustaining Byington's objections to the proffered evidence or the offers of proof made in regard to the evidence.

2. Receipt of Explanation

Stang-Starr next contends the district court erred by inconsistently receiving in evidence as offered by Byington the examining laboratory's explanation of its classification system. Stang-Starr contends that the document duplicated information contained in the college bulletin the district court would not permit her to put in evidence.

However, as received, the Byington exhibit consists of two partial pages reciting the information set forth earlier in part III. In contrast, the bulletin consists of 4½ pages of recommendations concerning the frequency of diagnostic screening of patients with differing risk factors, techniques for

conducting the screenings, and methods of evaluation. The bulletin also reviews the terminology used in reporting pathological findings and criticizes the particular method of classification used by the examining laboratory in this case. Thus, it is disingenuous to suggest that the two items are the same.

Moreover, Byington offered the exhibit not to establish the truthfulness of its contents, but to establish the system of classification used by the examining laboratory. The document therefore was not hearsay. Rule 801(3), § 27-801(3); *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993) (extrajudicial statement not offered to prove truth of matter asserted not hearsay).

Consequently, the district court did not err in admitting the laboratory's explanation.

V. JUDGMENT

The record failing to sustain Stang-Starr's assignments of error, the judgment of the district court, as first noted in part I, is hereby affirmed.

AFFIRMED.

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

K N ENERGY, INC., APPELLEE, V. CITIES OF COZAD ET AL., APPELLANTS.

K N ENERGY, INC., APPELLEE, V. CITIES OF ALBION ET AL., APPELLANTS.

K N ENERGY, INC., APPELLEE, V. CITIES OF ARAPAHOE ET AL., APPELLANTS.

532 N.W.2d 32

Filed May 26, 1995. Nos. S-94-559, S-94-560, S-94-561, S-94-563.

1. **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 inferior court.

2. **Courts: Judgments: Appeal and Error.** When an appellate court remands a cause with directions, the judgment of the appellate court is a final judgment in the cause, and the entry thereof in the lower court is a purely ministerial act. No modification of the judgment so directed can be made, nor may any provision be engrafted on or taken from it. That order is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by it can have any effect, even though it may be such as the appellate court ought to have directed.
3. **Courts: Judgments: Jurisdiction: Appeal and Error.** The district court has no jurisdiction to grant a motion filed in a fully adjudicated cause of action in the appellate court, seeking to supplement the appellate court's order.
4. **Public Utilities: Rates.** The setting of natural gas rates is a legislative act.

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

Michael J. Shaughnessy and James D. Larson for appellants.

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

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

FAHRNBRUCH, J.

The appealing municipalities in these lawsuits claim that the trial court erred in dismissing their motions for refunds to natural gas ratepayers which the municipalities claim are due from K N Energy, Inc. (K N), because of alleged excessive interim utility rates collected by K N.

In so ruling, the district court for Lancaster County found it lacked jurisdiction to grant the municipalities' motions.

We affirm the district court's ruling.

ASSIGNMENTS OF ERROR

The appealing municipalities claim the district court erred in holding that it lacked jurisdiction to hear the municipalities' motions and in refusing to order refunds pursuant to Neb. Rev. Stat. § 19-4607(5) (Reissue 1987).

STANDARD OF REVIEW

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 inferior court. See *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995).

FACTS

In January 1991, K N sought injunctions to prevent numerous municipalities, including the municipalities involved in these appeals, from enforcing ordinances which set natural gas rates lower than the rates requested by K N. In the 1991 actions, K N alleged that the ordinances were arbitrary, unreasonable, capricious, and deprived K N of its property without due process of law.

The cases were consolidated for trial, and in August 1991, the district court for Lancaster County enjoined the municipalities from continuing enforcement of the gas rates they adopted in the challenged ordinances. The municipalities were also enjoined from preventing K N from collecting money under its proposed rates until such time as each municipality, by proper action, adopted rates that were in conformity with the court's opinion or that were just, reasonable, adequate, and compensatory.

The municipalities appealed to the Nebraska Court of Appeals, contending that K N had not met its burden of proving that the municipalities' rates were arbitrary, capricious, and confiscatory. The Court of Appeals reversed the district court's judgment and remanded the causes for a new trial. We granted K N's petition for further review. Upon de novo review, we reversed the Court of Appeals' judgment and remanded the causes with direction to reinstate the district court's judgment to enjoin the enforcement of rates prescribed by the municipalities' ordinances. *K N Energy, Inc. v. Cities of Broken Bow et al.*, 244 Neb. 113, 505 N.W.2d 102 (1993).

Thereafter, on April 22, 1994, the municipalities involved in these appeals filed in the district court for Lancaster County motions for refunds to ratepayers in the same docket and page numbers as those in the actions previously ruled upon by this court. The appealing municipalities alleged in their motions that they each had enacted a rate ordinance consistent with the

district court's order of 1991. The appealing municipalities alleged that the new municipal rates they enacted reduced the rates collected by K N from October 1, 1990, through May 1, 1993. The appealing municipalities also claimed that, because the utility's interim rates exceeded those that would have been collected under the newly enacted rates, K N was required, under § 19-4607(5), to refund, with interest, the excess funds it had received.

K N objected to the motions on jurisdictional grounds and also because the adopted ordinances were the subject of a pending lawsuit in the Lancaster County District Court.

On May 4, 1994, the district court, finding it lacked jurisdiction to entertain the municipalities' motions, dismissed them. In rendering its dismissal orders, the trial court noted that the rates adopted by the municipalities after the court's 1991 ruling had not been judicially approved, nor had they been agreed to by K N. See § 19-4607.

ANALYSIS

When an appellate court remands a cause with directions, the judgment of the appellate court is a final judgment in the cause, and the entry thereof in the lower court is a purely ministerial act. No modification of the judgment so directed can be made, nor may any provision be engrafted on or taken from it. That order is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by it can have any effect, even though it may be such as the appellate court ought to have directed. See, *Xerox Corp. v. Karnes*, 221 Neb. 691, 380 N.W.2d 277 (1986); *Gates v. Howell*, 211 Neb. 85, 317 N.W.2d 772 (1982); *Jurgensen v. Ainscow*, 160 Neb. 208, 69 N.W.2d 856 (1955). Our 1993 opinion reinstating the district court order was a final judgment in the cause. Thus, the district court has no jurisdiction to grant a motion filed in a fully adjudicated cause of action in the appellate court, seeking to supplement the appellate court's order.

In passing, we note that the appealing municipalities did not follow the procedure set forth in the Municipal Natural Gas Regulation Act for seeking refunds. See Neb. Rev. Stat. §§ 19-4601 to 19-4623 (Reissue 1987 & Cum. Supp. 1990).

The Legislature never intended for a court to set utility rates. The act was intended to provide that a court would only judge whether a municipality acted within the scope of its legislative authority. See *K N Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 447 N.W.2d 227 (1989) (quoting final statement of legislative intent of the Municipal Natural Gas Regulation Act). We continue to hold that the setting of natural gas rates is a legislative act. *Reimer v. K N Energy, Inc.*, 223 Neb. 142, 388 N.W.2d 479 (1986). Section 19-4607(5) states, in part: "In the event that the revenue actually collected by the utility through interim rates exceeds that which would have been collected had the final rates been effective throughout such period, the utility shall refund the excess with interest as provided in this section."

The record before this court does not reflect that the alleged latest rates adopted by the appealing municipalities involved here are final rates. K N successfully challenged the original rates established by the municipalities involved here, thus allowing the utility to continue collecting its interim rates. Section 19-4607(2) states:

> If the utility takes timely action to initiate judicial review of the rates adopted by a municipality . . . the utility shall be permitted to continue to collect interim rates from the date the rates are adopted by the municipality until a rate ordinance adopted by the municipality is affirmed by the district court or accepted by the utility subject to refund . . . .

As the district court for Lancaster County noted, the ordinances claimed to have been adopted by the appealing municipalities following the trial court's 1991 orders have not been affirmed by a district court or accepted by the utility. In fact, the record reflects that K N filed a lawsuit challenging the ordinances which, as far as the record before us is concerned, is still pending. Thus, the rates adopted by the appealing municipalities are not final and valid for purposes of § 19-4607(5).

CONCLUSION

The municipalities involved here moved the district court to rule upon a matter that had been fully adjudicated. As a result,

the district court for Lancaster County properly dismissed the motions for lack of jurisdiction. The judgment of the district court is affirmed.

AFFIRMED.

CONNOLLY, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE E. JONES, APPELLANT.
532 N.W.2d 293

Filed May 26, 1995. Nos. S-94-1037, S-94-1038.

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 the 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: Criminal Law: Statutes.** A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done.
4. **Constitutional Law: Statutes: Proof.** The burden to clearly demonstrate that a statute is unconstitutional rests upon the party making the claim of unconstitutionality.
5. **Constitutional Law: Sentences.** The commutation of a sentence is a power entrusted to the executive branch of Nebraska's state government.
6. **Constitutional Law.** Neb. Const. art. II, § 1, separates the powers of state government into three distinct departments, none of which shall exercise the powers belonging to the others.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and LIKES, D.J.

WHITE, C.J.

Lawrence E. Jones was convicted in 1988 of two counts of first degree sexual assault, two counts of robbery, and one count of attempted robbery and was sentenced to incarceration for a total of not less than 33 nor more than 65 years. Jones was found to be a treatable mentally disordered sex offender and was committed to the Lincoln Regional Center (LRC) for treatment. Jones' convictions and sentences were affirmed by this court in *State v. Jones*, 232 Neb. 576, 441 N.W.2d 605 (1989).

The Nebraska Legislature enacted the Convicted Sex Offender Act in 1992, while Jones was in treatment at the LRC. In December 1992, pursuant to Neb. Rev. Stat. § 29-2934 (Cum. Supp. 1994), Jones requested to be resentenced by the district court. The district court reimposed the original sentence and ordered Jones committed to the LRC for further treatment. In February 1994, the LRC submitted a report to the district court, stating that Jones had successfully completed the treatment program and recommending that Jones be released into the community while enrolled in an appropriate aftercare program.

In October 1994, Jones appeared before the district court, seeking reduction of his sentences as recommended by the LRC. Under Neb. Rev. Stat. § 29-2931 (Cum. Supp. 1994), the district court had the authority to (1) reduce Jones' sentences by placing him on probation with the condition that he enroll in an approved aftercare treatment program, (2) modify the original sentences to allow earlier eligibility for parole, or (3) deny redetermination of Jones' sentences.

The district court refused to resentence Jones under any of these options. The court ruled that based on this court's decision in *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994), § 29-2931 is unconstitutional. The district court found that the statute which purported to authorize the court to reduce or alter an otherwise valid and final sentence violated the separation of powers clause found in Neb. Const. art. II, § 1, by authorizing the judicial branch to exercise the commutation

powers of the executive branch. Jones contends that the district court erred in finding § 29-2931 unconstitutional.

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. *Philipps, supra*. See, *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993); *State v. Schmailzl*, 243 Neb. 734, 502 N.W.2d 463 (1993). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Philipps, supra*. A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done. *Id.* The burden to clearly demonstrate that a statute is unconstitutional rests upon the party making the claim of unconstitutionality. *Stott, supra*.

In *Philipps*, we found unconstitutional Neb. Rev. Stat. § 29-2308.01 (Reissue 1989), which provided that the sentencing court may reduce a sentence it had previously imposed within 120 days after (1) the sentence was imposed or probation was revoked, or (2) the court received a mandate issued upon affirmance of the judgment or dismissal of the appeal. We held in *Philipps* that "a sentencing court which chooses to substitute a milder punishment for the sentence it had originally imposed does the very thing which defines an act of commutation." *Id.* at 616, 521 N.W.2d at 917. We further held that Neb. Const. art. IV, § 13, clearly entrusts the power of commutation to the executive department board, commonly known as the Board of Pardons, and that a statute empowering the judiciary to reduce sentences already imposed violates the separation of powers clause found in article II, § 1. *Philipps, supra*.

Pursuant to § 29-2931, the district court clearly has the power to substitute a milder punishment for a sentence that it has already imposed, which, as we have previously held, amounts to the commutation of a sentence. See *Philipps, supra*. The commutation of a sentence is a power entrusted to the executive branch of our state government. Article IV, § 13. See *Philipps, supra*. Article II, § 1, separates the powers of state government into three distinct departments, none of which shall exercise the powers belonging to the others. Section 29-2931

clearly permits the judicial branch to exercise the power of commutation, which belongs to the executive branch. Section 29-2931 is therefore unconstitutional.

The district court did not err, and thus Jones' sole assignment of error is without merit.

AFFIRMED.

DENNIS P. WALKER, APPELLANT AND CROSS-APPELLEE, V. WALKER ENTERPRISES, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS

532 N.W.2d 324

Filed June 2, 1995. No. S-93-525.

1. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, but 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.
2. **Reformation: Fraud.** A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought.
3. **Reformation: Presumptions: Intent: Evidence.** To overcome the presumption that the agreement correctly expresses the parties' intent and to obtain reformation, the party seeking reformation must offer clear, convincing, and satisfactory evidence.
4. **Reformation: Intent.** A party's right to reformation of an agreement depends on whether the agreement reflects the parties' intent.
5. **Contracts.** One who signs an instrument without reading it, when he or she can read and has the opportunity to do so, cannot avoid the effect of his or her signature merely because he or she was not informed of the contents of the instrument.
6. **Corporations: Liability: Debtors and Creditors.** Generally, a corporation's officers and directors are not liable to the corporation's creditors or third persons for corporate acts or debts, simply by reason of an official relation with the corporation.
7. **Corporations: Contracts: Liability.** A corporation's officers and directors are in

the same position as agents of private individuals and are not personally liable on a corporation's contract unless the corporate officers and directors purport to bind themselves, or have bound themselves, to performance of the contract.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

Edward D. Hotz and Patrick M. Flood, of Betterman Katelman & Hotz, for appellant.

Frank F. Pospishil and Eric H. Lindquist, of Abrahams, Kaslow & Cassman, for appellees.

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

WHITE, C.J.

In 1977, Dennis P. Walker incorporated Walker Enterprises, Inc. (WEI), to engage in the direct mail business; WEI sold merchandise by placing inserts in the billing statements of oil companies, banks, and department stores. Before 1987, Walker owned all of WEI's issued and outstanding common stock. During 1987, Patrick H. Mueller, Walker's nephew, and Steven R. Dean, Mueller's business associate, approached Walker about purchasing WEI. Mueller and Dean proposed to purchase WEI through a limited partnership, Diversified Direct Mail (DDM); Mueller and Dean would be the general partners, and Miller & Paine Department Store would be the limited partner.

To assist them with structuring this transaction, DDM and Miller & Paine retained Stephen Gehring as counsel. Gehring drafted a stock purchase agreement, secured promissory note, noncompetition agreement, consulting agreement, commission agreement, and escrow agreement to accomplish DDM's purchase of Walker's interest in WEI. After all of these documents had been prepared, however, Miller & Paine declined to complete the transaction.

Mueller and Dean thereafter proposed to purchase for their private ownership Walker's interest in WEI. In their offer, Mueller and Dean proposed to allocate the purchase price among several agreements, including a commission agreement. The commission agreement was substantially similar to the

commission agreement signed by Walker, Mueller, and Dean in the unexecuted transaction between DDM and Miller & Paine. The main differences were that Mueller had made handwritten changes to the commission agreement, changing the party and dates involved. None of the parties ever re-signed this amended commission agreement.

To assist him with this transaction, Walker retained Timothy O'Brien as counsel. O'Brien drafted a stock purchase agreement, consulting agreement, noncompetition agreement, and stockholder agreement. These documents, along with the commission agreement, composed the parties' agreement to enable Walker to sell 20.5 percent of his interest in WEI to Mueller and Dean each, bringing Mueller's and Dean's interests in WEI to 30.5 percent each. Walker, Mueller, and Dean signed the stock purchase agreement, consulting agreement, noncompetition agreement, and stockholder agreement on December 16, 1987; Mueller and Dean were not represented by counsel at this time.

Shortly after the parties executed these documents, negotiations were begun to revise the transaction to boost Mueller's and Dean's interests in WEI to 33.3 percent each. Walker agreed to execute a new stock purchase agreement, consulting agreement, noncompetition agreement, and stockholder agreement, without additional consideration, to meet Mueller's and Dean's requests to increase their interests in WEI to 33.3 percent each. The parties executed these replacement documents on March 8, 1988, but the documents were dated January 1, 1988; again, Mueller and Dean were not represented by counsel at this time.

After executing these documents, Walker in 1988 formed Direct Response Wholesalers, a sole proprietorship to market by direct mail health products and travel packages. Direct Response Wholesalers was succeeded by CardMember Publishing Corporation, a corporation partially owned by Walker; CardMember Publishing began operations in July 1989 to market, by direct mail and telemarketing, membership programs and related services and merchandise through solo mailings, insert mailings, and bangtail envelopes (the extra flap on a consumer's credit card remittance envelope that includes an

offer of merchandise that the customer may purchase by charging it on his or her credit card).

During 1988, Mueller and Dean informed Walker that they considered his activities in Direct Response Wholesalers to be violative of the noncompetition agreement. At that time, Mueller and Dean also sought to purchase Walker's remaining interest in WEI. To assist them with this transaction, Mueller and Dean retained Craig Fry as counsel; Walker was still represented by O'Brien. Fry drafted a stock redemption agreement and consulting agreement. Walker, Mueller, and Dean signed these documents on December 8, 1988.

On February 27, 1990, Walker filed a petition for an accounting under the amended commission agreement. Thereafter, on May 29, Mueller and Dean terminated the December 8, 1988, consulting agreement. Consequently, on June 7, 1990, Walker filed an amended petition, seeking recovery of commissions and amounts due under the December 8 consulting agreement; and on November 13, Walker filed a second amended petition. Finally, on June 21, 1991, Walker filed a third amended petition, seeking reformation of many of the parties' agreements and an accounting for any amounts due on all agreements. Mueller and Dean filed a counterclaim, seeking money damages allegedly owed by Walker under various agreements.

After a bench trial, the district court concluded, among other things, that Mueller and Dean owed Walker $11,000 under the amended commission agreement and $116,000 plus interest under the January 1, 1988, consulting agreement. The district court denied Mueller and Dean's counterclaim.

Walker filed a motion for a new trial. The district court denied Walker's motion, but awarded him an additional $3,000 under the amended commission agreement and an additional $12,000 plus interest under the January 1 consulting agreement. Walker appealed, and Mueller and Dean cross-appealed.

On appeal, Walker assigns essentially three errors. Walker contends that the district court erred in (1) failing to determine that he is entitled to a 3-percent placement fee under the amended commission agreement; (2) failing to reform all the documents executed January 1 and December 8, 1988; and (3)

concluding that he was in violation of the noncompetition agreement. Mueller and Dean contend in their cross-appeal that the district court erred in (1) determining that the amended commission agreement was valid and binding and (2) entering judgment against Mueller and Dean personally on the January 1 consulting agreement.

This case is an equity action. In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, but 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. *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 529 N.W.2d 16 (1995); *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995); *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994).

Walker's first assignment of error is that the district court erred in failing to determine that he is entitled to a 3-percent placement fee under part III of the amended commission agreement. The amended commission agreement provided:

~~Diversified Direct Mail~~ Walker Enterprises
Commission Agreement
for
Denny Walker
~~10/14/87~~ 11/27/87

I. $40,000 base compensation towards commission for ideas, consulting, etc.

Payments to begin ~~November 1, 1988~~ February 1, 1988. Jan. 1st.

$1,000 per month for 40 months.

II. Product Development Fee

20% of Gross Profit on all new products that Denny Walker brings to D.D.M. that D.D.M. does not have access to.

To be paid on a quarterly basis.

III. Account Placement Fee

3% of Gross Sales on placement of all approved products and accounts.

Accounts for Walker to sell to:

1. Chase
2. Citibank
3. TWA
4. Colorado National
5. J.C. Penny's [sic]
6. Bank of America

Any additional accounts can be negotiated at a later date.

~~D.D.M. will assist in all above-mentioned accounts.~~

Placement fee to be paid on a quarterly basis.

/s/ Patrick H. Mueller 10-19-87 /s/ Steven R. Dean 10-19-87
Signed in Agreement Date Signed in Agreement Date

/s/ D.P. Walker 10-19-87
Signed in Agreement Date

The district court concluded that the amended commission agreement was void for lack of definiteness. However, before we reach that issue, we first must determine whether the statute of frauds, Neb. Rev. Stat. § 36-202 (Reissue 1993), barred enforcement of the amended commission agreement.

Section 36-202 provides in relevant part: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: (1) Every agreement that, by its terms, is not to be performed within one year from the making thereof." The amended commission agreement clearly was not to be performed within 1 year; the agreement's terms provided for payment over a 40-month period, or $3\frac{1}{3}$ years.

Furthermore, the parties to be charged, Mueller and Dean, had not signed the agreement—at least not at the requisite time and not with the requisite intent. Although Mueller and Dean had signed the agreement, they signed it on October 19, 1987; however, in the case at bar, Walker is attempting to enforce an

amended commission agreement allegedly entered into on November 27. Under Nebraska law, a signature on a contract, to satisfy the statute of frauds, must be made with the present intent to authenticate the writing. *Prigge v. Olson*, 154 Neb. 131, 47 N.W.2d 344 (1951). Furthermore, although the signature requirement of the statute of frauds may be satisfied by the parties to be bound in adopting their signatures on an old contract to authenticate a new agreement, there is no evidence in the record to establish that Mueller and Dean either adopted or intended to be bound by their prior signatures on the commission agreement to be used in the DDM transaction. See *id.* Walker's first assignment of error is therefore without merit.

Walker's second assignment of error is that the district court erred in failing to reform all the documents executed January 1 and December 8, 1988. The parties executed the following documents dated January 1: stock purchase agreement, consulting agreement, noncompetition agreement, and stockholder agreement. The parties executed the following documents dated December 8: stock redemption agreement and consulting agreement.

A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought. *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994); *Jelsma v. Acceptance Ins. Co.*, 233 Neb. 556, 446 N.W.2d 725 (1989); *Ridenour v. Farm Bureau Ins. Co.*, 221 Neb. 353, 377 N.W.2d 101 (1985). To overcome the presumption that the agreement correctly expresses the parties' intent and to obtain reformation, the party seeking reformation must offer clear, convincing, and satisfactory evidence. *Records, supra*; *Jelsma, supra*; *Ridenour, supra.*

However, before we reach the issue of whether the district court erred in failing to reform the January 1 and December 8, 1988, agreements, we first note that a party's right to reformation of an agreement depends on whether the agreement reflects the parties' intent. See, *Records, supra*; *Jelsma, supra*; *Ridenour, supra.*

Walker claims that the agreements he entered into with Mueller and Dean on both January 1 and December 8, 1988,

do not represent the parties' intent, thereby necessitating reformation of the parties' agreements. However, Walker's contention is perplexing in light of the evidence adduced at trial, particularly Walker's own testimony. The bill of exceptions reveals the following exchange:

> [Defendants' attorney:] Did you . . . [sign] this Consulting Agreement without reading it?
>
> [Walker:] Yes.
>
> Q. Did you sign all of the agreements [dated January 1, 1988] without reading them?
>
> A. Yes.
>
> . . . .
>
> Q. Did you sign all of the agreements [dated December 8, 1988] without reading them?
>
> A. Yes.

It is well-settled law in Nebraska that one who signs an instrument without reading it, when he or she can read and has the opportunity to do so, cannot avoid the effect of his or her signature merely because he or she was not informed of the contents of the instrument. *Five Points Bank v. White*, 231 Neb. 568, 437 N.W.2d 460 (1989); *Meek v. Gratzfeld*, 223 Neb. 306, 389 N.W.2d 300 (1986). In the case at bar, Walker was represented by counsel at the time all the January 1 and December 8, 1988, documents were signed. Consequently, because Walker failed to read the documents before signing them, he cannot now claim that he is entitled to reformation because the documents do not reflect his, or the parties', intent. Walker's second assignment of error is therefore without merit.

Walker's third assignment of error is that the district court erred in concluding that Walker was in violation of the noncompetition agreement. The noncompetition agreement provides in relevant part:

> For a period of five years from the date of this Agreement, Walker agrees that he will not, directly or indirectly, as a sole proprietor, member of a partnership, officer, director, employee, agent or consultant to or as more than five percent stockholder in a corporation, other than in connection with Walker Enterprises, Inc. ("WEI") . . . (i) solicit any business of the type engaged in by [WEI] or its

> affiliates (defined as the sale of merchandise and services, through solo mailings or insert solicitation or bang-tail envelopes in monthly credit card or account statements) from any clients, customers, former customers or clients, or prospects of WEI or its affiliates (defined as financial institutions, oil companies or retail stores) who were solicited directly by Walker or where Walker supervised or participated in, directly or indirectly, in whole or in part, the solicitation activities related to any such persons; or (ii) solicit any employee of WEI or its affiliates to terminate his/her employment.
>
> As used [herein], "affiliate" shall mean any person, firm or corporation that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, WEI, whether such control is through stock ownership, contract or otherwise.

The district court concluded that Walker was in breach of the noncompetition agreement due to his affiliation with CardMember Publishing. We agree.

The noncompetition agreement explicitly precludes Walker from "solicit[ing] any business of the type engaged in by [WEI] or its affiliates." The noncompetition agreement defines the "type" of business engaged in by WEI as "the sale of merchandise and services, through solo mailings or insert solicitation or bang-tail envelopes in monthly credit card or account statements." Both WEI and CardMember Publishing sold merchandise. Additionally, during his testimony at trial, Walker admitted that CardMember Publishing was engaged in the type of business expressly proscribed by the noncompetition agreement:

> [Plaintiff's attorney:] Does your business use any kind of mailing of any sort to go into credit card billing statements?
>
> [Walker:] Yes.
>
> Q. What do you use?
>
> A. Well, when requested, we will produce an insert, a bangtail envelope for a solo mailing piece when requested.

Walker's third assignment of error is therefore without merit.

In their cross-appeal, Mueller and Dean's first assignment of

error is that the district court erred in determining that the amended commission agreement was valid and binding. The district court concluded that the amended commission agreement was valid and binding and awarded Walker $11,000 under it; thereafter, in its order denying Walker's motion for a new trial, the district court awarded Walker an additional $3,000 under the amended commission agreement. We agree with Mueller and Dean.

As discussed previously, the amended commission agreement is void for failure to satisfy the statute of frauds, § 36–202. Because Mueller and Dean, the parties against whom Walker sought to enforce the amended commission agreement, did not sign the agreement with the present intent to authenticate the writing and therefore bring it within the statute of frauds, the amended commission agreement is void. Consequently, the district court erred in awarding Walker $14,000 under the amended commission agreement.

Finally, Mueller and Dean's second assignment of error is that the district court erred in entering judgment against Mueller and Dean personally on the January 1, 1988, consulting agreement. The recital provides: "THIS CONSULTING AGREEMENT ('Agreement') [is] made this *1st* day of January, 1988, between Walker Enterprises, Inc. ('WEI') *and* Patrick H. Mueller and Steven R. Dean ('Mueller/Dean') and Dennis P. Walker ('Walker')." (Emphasis supplied.) Walker contends that the insertion of the conjunction "and" in the recital means that Mueller and Dean, in addition to WEI and himself, also are parties to this agreement. However, Mueller's and Dean's signatures appeared on the agreement as follows:

WALKER ENTERPRISES, INC.
By /s/ Patrick H. Mueller, Pres.
Patrick H. Mueller, President

By /s/ Steven R. Dean, V. Pres.
Steven R. Dean, Vice-President

/s/ Dennis P. Walker
Dennis P. Walker

Mueller and Dean contend that they should not have been held

personally liable because they signed this agreement in their official capacities as agents of a corporation. We agree.

Generally, a corporation's officers and directors are not liable to the corporation's creditors or third persons for corporate acts or debts, simply by reason of an official relation with the corporation. *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991). A corporation's officers and directors are in the same position as agents of private individuals and are not personally liable on a corporation's contract unless the corporate officers and directors purport to bind themselves, or have bound themselves, to performance of the contract. *Id.*

In the case at bar, Mueller and Dean affixed their signatures to the consulting agreement with the intent of binding WEI, not themselves; this conclusion is evidenced by the listing of the corporation's name above their names; the term "by" appearing before their signatures, which indicates that they are acting on behalf of another person or entity (in this case, WEI); and their official titles, which appear after both their signatures and their typed names. Therefore, because Mueller and Dean were merely acting in their capacities as agents of the corporation, and not in their individual capacities, they are not personally liable to Walker under the consulting agreement, and inclusion of the conjunction "and" in the recital does not make it so. As a result, the district court erred in holding them personally liable under that consulting agreement.

The judgment of the district court is affirmed in part, and in part reversed and remanded with directions to dismiss.

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

BENJAMIN HARTLEY, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, CATHERINE HARTLEY, APPELLEE, V. LANETTE M. GUTHMANN, M.D., AND PHYSICIANS CLINIC, P.C., APPELLANTS.

532 N.W.2d 331

Filed June 2, 1995. No. S-93-546.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. ____: ____. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
3. **Motions for New Trial.** The discretion of a trial court in ruling on a motion for new trial is only the power to apply the statutes and legal principles to all facts of the case; a new trial may be granted only where legal cause exists.
4. ____. A trial court may not grant a new trial merely because it would reach a different result than did the jury.
5. **Motions for New Trial: Appeal and Error.** When the granting of a new trial requires a consideration of conflicting evidence, the findings of the trial court thereon will not ordinarily be disturbed on appeal.
6. **Motions for New Trial: Jury Misconduct: Proof.** In order for a new trial to be granted due to juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred.
7. ____: ____: ____. In a motion for new trial, allegation of misconduct by jurors must be substantiated by competent evidence.
8. **Jury Misconduct: Proof.** Extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the litigant's detriment.
9. **Rules of Evidence: Jurors.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

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

William M. Lamson, Jr., and Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for appellants.

Joseph B. Muller, of Law Offices of Ronald J. Palagi, P.C., for appellee.

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

FAHRNBRUCH, J.

Benjamin Hartley, a minor, by and through his mother and next friend unsuccessfully sued Lanette M. Guthmann, M.D., and Physicians Clinic, P.C., for permanent and severe brain damage and other personal injuries he allegedly sustained during his birth on January 11, 1988.

Based upon what it found to be juror misconduct, the district court for Douglas County granted Hartley's motion for new trial. Citing various reasons, Guthmann and Physicians Clinic appealed that order.

We affirm the district court's order granting Hartley a new trial.

STANDARD OF REVIEW

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993); *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993).

A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Wolfe, supra*. The discretion of a trial court in ruling on a motion for new trial is only the power to apply the statutes and legal principles to all facts of the case; a new trial may be granted only where legal cause exists. *Id.* A trial court may not grant a new trial merely because it would reach a different result than did the jury. *Id.*

When the granting of a new trial requires a consideration of conflicting evidence, the findings of the trial court thereon will not ordinarily be disturbed on appeal. *Kremlacek v. Sedlacek*, 190 Neb. 460, 209 N.W.2d 149 (1973).

FACTS

On January 11, 1988, Benjamin Hartley's mother, Catherine Hartley, was admitted to Omaha's Nebraska Methodist Hospital

by Dr. Guthmann, who is affiliated with Physicians Clinic. At 9:12 p.m. on that day, Benjamin Hartley was delivered by Dr. Guthmann in a midforceps vaginal delivery. Hartley alleged that Dr. Guthmann used the forceps for a period of 27 minutes. Hartley also alleged that he was depressed, meaning he was less responsive than normal to stimulation being applied in the course of care after birth. Hartley required resuscitation before he was taken to the neonatal intensive care unit.

Hartley further alleged that he suffered permanent and severe brain damage and other personal injuries as a result of negligence on the part of Guthmann and Physicians Clinic (collectively Guthmann).

On November 16, 1992, Hartley's trial began. The case was submitted to the jury on December 4. On December 8, the jury rendered a 10 to 2 verdict in favor of Guthmann.

On December 17, Hartley filed a motion for new trial based, inter alia, on jury misconduct. At a hearing on the motion, Hartley submitted affidavits of three jurors stating that a juror had taken a brochure into the jury room. Two of the affidavits, exhibits 120 and 121, stated that "the brochure dealt with smoking and its effects." The third affidavit, exhibit 122, stated that "the brochure dealt with smoking during pregnancy and its effects on the fetus." Exhibit 120 and 122 also contained statements that the juror who had taken the brochure into the jury room had "argued repeatedly that smoking was a factor in the child's injuries." The three affidavits were received into evidence over Guthmann's objection. The brochure was not offered into evidence at trial or at the hearing on Hartley's motion for a new trial.

Guthmann submitted six affidavits from jurors, exhibits 131 through 133 and 135 through 137, containing statements that a juror had taken into the jury room a brochure which the juror said pertained to the effects of smoking and that the juror was immediately admonished by the other jurors to put the brochure away, which the juror did. A seventh affidavit offered by Guthmann, exhibit 134, contained a statement by a juror that he was not aware of any brochure being taken into the jury room. These seven affidavits also contained statements that these jurors were not aware of the contents of the brochure.

Exhibits 123 through 129 are affidavits from the same jurors in exhibits 131 through 137. Exhibits 123 through 129 contain statements that the brochure played no part or factor in the jurors' deliberations. They were not received in evidence.

The supplemental bill of exceptions before the court does not reveal any testimony at trial regarding the effects of smoking on fetal development. It contains only Guthmann's opening and closing arguments; the testimony of Dr. Paul Goodrich, a defense witness; and a conference outside the jury's presence regarding proposed jury instructions. Testimony of other witnesses is not included in the record before us.

At the hearing on Hartley's motion for new trial, the juror who took the brochure into the jury room was not called to testify, nor was an affidavit of that juror offered in evidence.

On May 25, 1993, the trial court granted Hartley's motion for new trial. The trial court found that the brochure, which was not offered into evidence, "obviously was read by the juror who brought it in to the jury room and that the subject of the brochure was brought to the attention of some of the other jurors." The trial court further found that the issue of the harmful effects of smoking did relate to the injuries claimed by Hartley.

Originally, Guthmann appealed the district court's order to the Nebraska Court of Appeals. Pursuant to our authority to regulate the caseloads of the appellate courts, this case was removed to this court's docket.

ASSIGNMENTS OF ERROR

Summarized and restated, Guthmann claims that the trial court abused its discretion in (1) admitting into evidence and relying upon portions of juror affidavits describing statements by another juror during deliberations while rejecting other juror affidavits stating that the jury did not consider the brochure during deliberations, (2) finding that extraneous material or information which related to an issue submitted to the jury came to the attention of a juror, (3) finding that there is a reasonable possibility that extraneous material or information affected the verdict to Hartley's detriment, and (4) granting the motion for new trial.

ANALYSIS

In order for a new trial to be granted due to juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred. *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992). In a motion for new trial, allegation of misconduct by jurors must be substantiated by competent evidence. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

Extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the litigant's detriment. *Nichols, supra*; *Loving v. Baker's Supermarkets*, 238 Neb. 727, 472 N.W.2d 695 (1991).

Hartley's allegations of juror misconduct were based upon affidavits from three jurors. In Guthmann's first assignment of error, Guthmann argues that the trial court abused its discretion in admitting into evidence portions of juror affidavits describing statements made by another juror during deliberations, while rejecting juror affidavits stating that the jury did not consider any brochure in their deliberations.

The use of juror affidavits to inquire into the validity of a verdict is controlled by Neb. Rev. Stat. § 27-606(2) (Reissue 1989), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.* Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

(Emphasis supplied.)

This court has previously addressed the limitations § 27-606(2) places upon inquiries into the validity of jury verdicts. In *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987), this court held that § 27-606(2) permits use of a juror's affidavit to establish that the jury considered prejudicial information coming from a source other than the evidence presented at trial. However, we further held that § 27-606(2) prohibits the use of a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or *discussions during deliberations* which enter into the verdict. *Rahmig, supra.*

The record reflects that exhibits 120 and 122 were affidavits which contained statements from two jurors that the juror who brought a brochure into the jury room "argued repeatedly that smoking was a factor in the child's injuries." Section 27-606(2) prohibits the use of a juror's affidavit to impeach a verdict on the basis of jury discussions during deliberations which enter into the verdict. Thus, the trial court erred in receiving into evidence portions of these affidavits relating a juror's discussion during deliberations.

The record shows that exhibits 123 through 129 were affidavits containing statements from jurors relating to whether the brochure played a part in the jury's deliberations or verdicts. The trial court properly refused to receive these affidavits into evidence.

In her second assignment of error, Guthmann contends that the trial court abused its discretion in finding that extraneous material or information which related to an issue submitted to the jury came to the attention of any juror.

The brochure was extraneous information inasmuch as it was never received in evidence and should not have been in the jury room. Some of the affidavits received in evidence reveal that several of the jurors were aware of the presence of the brochure in the jury room.

There are conflicting statements as to the extent the jurors were aware of the contents of the brochure and when the brochure was produced. In the affidavits offered by Guthmann, several jurors state that they were unaware of the contents of the brochure. In the same affidavits, the jurors state that they were

told the brochure pertained to smoking. Although portions of two of the affidavits submitted by Hartley violate § 27-606(2), the affidavits contained in exhibits 120 and 122 were admissible, but only to show that a juror brought a brochure into the jury room. Exhibit 120 contains a juror statement that the "brochure dealt with smoking and its effects." Exhibit 122 contains a juror statement that the "brochure dealt with smoking during pregnancy and its effects on the fetus." These statements are admissible to show that extraneous information was improperly brought to the attention of the jury. Section 27-606(2) enables the parties to introduce evidence that improper information came to the attention of the jury.

Seven of the jurors' affidavits state that the juror who produced the brochure did so during the course of deliberations. The affidavits contained in exhibits 135 and 136 state that when the brochure was produced, the door to the jury room had not been closed and deliberation had not yet begun. Exhibit 134 contains an affidavit stating that no brochure on the harmful effects of smoking was ever present in the jury room during the course of deliberations.

The record reflects that the most detailed description of the contents of the brochure was that it "dealt with smoking during pregnancy and its effects on the fetus." The present case concerns allegations of negligence on the part of Guthmann and whether the alleged negligence caused the various personal injuries claimed by Hartley. The issue of the effects of smoking on the fetus does relate to the issue of causation which was submitted to the jury in this medical malpractice action.

In this case, after reviewing the conflicting evidence, the trial court properly found that the subject of the brochure was brought to the attention of some of the jurors and that the issue of the harmful effects of smoking did relate to the injuries claimed by Hartley. Guthmann's second assignment of error is without merit.

In the third assignment of error, Guthmann claims that the trial court abused its discretion in finding that there is a reasonable possibility that the extraneous material or information affected the verdict to Hartley's detriment. As we stated earlier, the party claiming juror misconduct has the

burden to show by clear and convincing evidence that prejudice has occurred. However, § 27-606(2) makes it impossible to use direct evidence to show prejudice because it excludes the consideration of jurors' testimony or affidavits concerning the jurors' motives, methods, misunderstanding, thought processes, or discussions in reaching a verdict.

This court has resolved the prejudice issue by holding that prejudice from jury misconduct in considering extraneous information, as a ground for setting aside a verdict, may be inferentially established. See *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983). We now turn to whether there is a reasonable possibility that the brochure affected the verdict to Hartley's detriment.

In the present case, the evidence properly before the trial court shows that some of the members of the jury were aware of the subject contained in the brochure. The record also contains evidence that the subject of the brochure taken into the jury room related to smoking during pregnancy and its effects on the fetus. The supplemental bill of exceptions before this court does not provide us with all of the testimony that occurred at trial. However, the record of a conference between the attorneys and the court outside the presence of the jury contains innuendo concerning the issue of tobacco use being raised during the trial. The record shows that Hartley objected to Guthmann's interjection of use of tobacco in the case.

The brochure reinforces the issue of tobacco use and raises the possibility that smoking may have been one of the causes of Hartley's brain damage. The issue of causation is at the center of this lawsuit. The jury rendered a 10 to 2 verdict in favor of Guthmann. The competent evidence in this record establishes that there exists a reasonable possibility that the brochure combined with the interjection of tobacco use during the trial affected the jury's verdict to Hartley's detriment. Guthmann's third assignment of error is meritless.

Finally, we turn to the fourth assignment of error, in which Guthmann contends that the trial court abused its discretion in granting Hartley's motion for new trial based upon jury misconduct. Having found that the properly admitted evidence does support a finding that there was a reasonable possibility

that extraneous prejudicial material or information came to the attention of the jury, we conclude that the trial court did not abuse its discretion in granting Hartley's motion for new trial.

Therefore, the trial court order granting a new trial is affirmed.

AFFIRMED.

JOHN W. CARLSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF LEROY REYNOLDS, DECEASED, APPELLANT, V. JOHN P. METZ III, DOING BUSINESS AS METZ ENGINEERING, AND INDIVIDUALLY, ET AL., APPELLEES.

532 N.W.2d 631

Filed June 2, 1995. No. S-93-704.

1. **Demurrer.** The two procedures of demurrer and dismissal are distinct. If a demurrer is sustained, the case still pends until dismissed.
2. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
3. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
4. **Demurrer: Pleadings: Words and Phrases.** A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
5. **Principal and Agent: Negligence: Liability.** An agent or employee cannot shield himself from liability solely by virtue of the fact that he is in another's employ.
6. ____: ____: ____. In employee negligence situations, the question is whether the employee owed the plaintiff a duty of reasonable care not to injure him or whether the employee owed a duty to only his employer.
7. ____: ____: ____. Before an employee can be held liable there must be some reason why he should be called upon to act and thus use proper care to prevent injury to a third person.

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

Paul R. Elofson, of McGill, Gotsdiner, Workman & Lepp, P.C., for appellant.

David M. Woodke and Susan E. Norris, of Gross & Welch, P.C., for appellee John P. Metz III.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, and CONNOLLY, JJ., and CORRIGAN, D.J.

WHITE, C.J.

John W. Carlson, personal representative of the estate of Leroy Reynolds, brought a wrongful death action against John P. Metz III, doing business as Metz Engineering; Electrical, Inc., a Nebraska corporation; and Diversified Technical Services, Inc. (DTS), an Iowa corporation.

Reynolds, an electrician and employee of Electrical, Inc., died as the result of an accident which occurred on October 27, 1989, while Reynolds was working in a trench on a construction site. Metz directed his employee Phillip Tague to trench an area with a trenching machine near where Reynolds was working. Reynolds was caught in the auger-crumber attachment of the trencher and suffered severe injuries which ultimately led to his death.

Tague was employed by DTS, which sometimes used the trade name "Metz Engineering." John P. Metz III owned and operated Metz Engineering as a sole proprietorship, first in Nebraska and then in Iowa. On January 1, 1989, Metz transferred all assets, including the trade name "Metz Engineering," to DTS. Metz is the director, secretary, and employee of DTS.

This appeal concerns the personal liability of Metz. Carlson seeks to hold Metz personally liable for Reynolds' death under common-law theories of agency and under the theory that Metz was acting as an agent for an undisclosed principal because Metz failed to register the trade name "Metz Engineering" after incorporating the business. Carlson also seeks to hold Metz liable as corporate officer of DTS for his negligent hiring, training, and supervising of his employee Tague, the operator of the trenching machine.

The district court sustained Metz' demurrer to Carlson's

amended petition, finding that Carlson failed to plead facts sufficient to support a claim that Metz was personally liable for the death of Reynolds. The court gave Carlson 10 days to file a second amended petition. On the 10th day, Carlson filed a motion for reconsideration which he later withdrew. While the court was taking that motion under advisement, and a month after the court sustained Metz' demurrer, Carlson filed a motion for leave to file a second amended petition instanter. The court denied the motion, not because the motion may not have been timely, but because the new allegations in Carlson's second amended petition did not correct the defects fatal to the amended petition. The case remains pending as to Electrical, Inc., and DTS.

Carlson alleges that the district court erred in finding that the amended petition and second amended petition failed to state a cause of action against Metz individually and as corporate director, agent, and employee of DTS.

Metz contends that this court lacks jurisdiction to decide the appeal because Carlson did not file a notice of appeal until 5 months after the district court's order sustaining the demurrer. However, the district court did not dismiss the case when the court sustained the demurrer on March 8, 1993. Rather, the district court signed an order dismissing the case on July 12. Carlson then timely filed this appeal on August 11. The two procedures of demurrer and dismissal are distinct. If a demurrer is sustained, the case still pends until dismissed. *Anderson v. Matthis*, 246 Neb. 215, 518 N.W.2d 94 (1994). Metz' argument that this court lacks jurisdiction is meritless.

In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994); *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994); *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994).

In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure

to state a cause of action is to be overruled. *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994); *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994); *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993). A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Merrick, supra*. See, *Lawyers Title Ins. Corp., supra*; *Wheeler, supra*.

We thus turn to Carlson's amended petition to ascertain whether he pleaded facts sufficient to state a cause of action against Metz personally. In summary, Carlson alleges that Metz had a duty and responsibility to adequately supervise and train Tague because (1) Metz is the director, secretary, and employee of DTS, the corporation which hired Tague; (2) Metz is "Director of Operations and Technical Services" for DTS, and in this capacity Metz hired and supervised all employees, including Tague; and (3) Metz personally hired Tague as a mechanic and then gave inadequate instructions to Tague on the operation of a trencher.

Carlson alleges that Metz was negligent (1) because Tague, while under Metz' supervision, negligently caused the trencher to engage Reynolds' clothing, thereby pulling Reynolds into the trencher and causing his death; (2) because Metz failed to ensure that Tague was certified to operate a trencher as required by Omaha ordinance and by Occupational Safety and Health Administration regulations; (3) because Metz permitted and directed Tague to operate the trencher, knowing that Tague was not qualified to operate the trencher; (4) because Metz failed to supervise and train Tague properly and failed to warn Reynolds of danger; and (5) because Metz failed to adequately train and supervise Tague and was thus the direct and proximate cause of Reynolds' death.

The district court found that Carlson failed to plead facts to support a claim that Metz was an agent acting on behalf of an undisclosed principal and failed to plead facts sufficient to show Metz' personal liability as an employee or officer of DTS. We shall examine only the latter part of the court's order as it is dispositive of the case.

In *Dieter v. Hand*, 214 Neb. 257, 333 N.W.2d 772 (1983), we held an employee of a corporation whose negligence causes injury is jointly and severally liable, with the corporation, for damages stemming from the injuries. In that case, Dieter brought a negligence action against employees of a public power district for injuries sustained by him when his truck came in contact with a sagging powerline which the defendant employees were required to maintain. *Dieter, supra*. The district court sustained the employees' demurrer, finding that Dieter failed to plead facts sufficient to state a cause of action against the employees. We reversed, and remanded. We noted that courts do not generally impose liability upon an employee when the employee was not in charge of or did not actually do the work that caused the injury. We also stated that

> " '[i]t is not the agent's contract with his principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable.' "

Id. at 260, 333 N.W.2d at 774, quoting *Fonda v. Northwestern Public Service Co.*, 134 Neb. 430, 278 N.W. 836 (1938).

We adhere to the rule that an agent or employee cannot shield himself from liability solely by virtue of the fact that he is in another's employ. In employee negligence situations, the question is whether the employee owed the plaintiff a duty of reasonable care not to injure him or whether the employee owed a duty to only his employer. *Dieter, supra*. That determination is a question of law and depends upon the circumstances of the particular case. *Id.* We stated in *Dieter* that "[b]efore the employee can be held liable there must be some reason why he should be called upon to act and thus use proper care to prevent injury to the third person . . . ." *Id.* at 262, 333 N.W.2d at 775.

We detailed in *Dieter* the four criteria for imposing personal liability on an employee or corporate officer. First, the principal or employer must owe a duty of care to a third party, breach of

which caused the resulting damage. Second, that duty is delegated by the principal or employer to the defendant officer, agent, or employee. Third, the defendant officer, agent, or employee must personally fail to use the degree of care required by ordinary prudence under the same or similar circumstances, thereby resulting in a breach of the duty owed to the third party. This criterion includes the failure to act upon the actual knowledge that others are at risk and the lack of ordinary care in discovering and avoiding risk which results from the breach of the duty. Fourth, with regard to personal fault, it is not sufficient that the defendant merely had a general administrative responsibility for the work being done, nor is it sufficient that the defendant delegated that general responsibility with due care to a responsible subordinate, unless the defendant personally knows or should have known that the subordinate failed to perform or performed negligently and the defendant nevertheless did not cure the risk of harm. The defendant officer, agent, or employee must owe a personal duty to the injured third party, breach of which specifically caused the plaintiff's damages. *Dieter, supra.*

The Restatement (Second) of Agency §§ 351 and 358(1) (1958) are also instructive on the issue of whether agents are liable to third parties when the agent directs or permits the negligent conduct of others. "An agent who directs or permits conduct of another under such circumstances that he should realize that there is an unreasonable risk of physical harm to others or to their belongings is subject to liability for harm resulting from a risk which his direction or permission creates." *Id.*, § 351 at 121. "The agent of a disclosed or partially disclosed principal is not subject to liability for the conduct of other agents unless he is at fault in appointing, supervising, or cooperating with them." *Id.*, § 358(1) at 132.

Carlson alleges in his amended petition (1) that DTS owed a duty of care to Reynolds because DTS and Metz hired Tague and directed him to work with the trenching machine in the same trench as Reynolds and that DTS breached that duty by negligently training and supervising Tague; (2) that DTS delegated the hiring, training, and supervising of Tague to Metz, since Metz was the director of operations and technical

services; (3) that Metz breached the duty of care owed to Reynolds because Metz failed to ensure that Tague was properly certified to operate a trencher, failed to properly train Tague, failed to supervise Tague after directing Tague to trench, and failed to warn Reynolds that Tague was inexperienced and uncertified; and (4) that Metz breached his duty of care when he directed Tague to trench the area near where Reynolds was located when Metz knew or should have known that Tague would perform the job negligently, thereby resulting in Reynolds' injury and subsequent death.

In light of the criteria set forth in *Dieter*, Carlson pleaded facts in the amended petition sufficient to state a cause of action for negligence against Metz personally. The district court erred in sustaining Metz' demurrer, and thus the judgment is reversed and the cause remanded.

Since we find that Carlson's amended petition states a cause of action against Metz, we need not reach the issue of whether Carlson's second amended petition was timely or if it adequately changed the amended petition to state a cause of action.

REVERSED AND REMANDED.

LANPHIER, J., not participating.

CARL R. WALPUS, APPELLANT, V. MILWAUKEE ELECTRIC TOOL CORPORATION, APPELLEE.

532 N.W.2d 316

Filed June 2, 1995. No. S-93-753.

1. **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.
2. **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.

3. **Summary Judgment: Appeal and Error.** Summary judgment is proper 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. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Employment Contracts: Breach of Contract: Proof.** In an action for breach of an employment contract, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract.
5. **Employment Contracts.** The language which forms the basis of the employment contract, whether oral or written, must constitute an offer definite in form which is communicated to the employee, and the offer must be accepted and consideration furnished for its enforceability.
6. **Employment Contracts: Termination of Employment: Evidence.** The subjective opinions of supervisors or managers regarding whether an employee may be terminated without cause, without objective evidence that those thoughts were communicated to the employee, are irrelevant to determining whether the employer is contractually limited to terminating the employee for cause.
7. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
8. **Employment Contracts.** Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee.

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

Thomas J. Young, of Young & LaPuzza, for appellant.

Robert F. Rossiter, Jr., and Lori L. Fuhrman, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

CONNOLLY, J.

Carl R. Walpus appeals the decision of the Douglas County District Court sustaining the summary judgment motion filed by Walpus' former employer, Milwaukee Electric Tool Corporation (METCO), in Walpus' wrongful termination action. Walpus also

assigns as error the district court's decision finding certain evidence irrelevant and therefore inadmissible. For the reasons cited below, we affirm.

I. FACTUAL BACKGROUND

1. Events Leading to Termination

METCO is a Wisconsin-based company which manufactures and sells portable electric tools on a worldwide basis. Walpus began working for METCO as a district manager in May 1974. Walpus' duties primarily involved selling METCO's products to purchasers in Nebraska and Iowa. Walpus is credited with developing and maintaining METCO's clientele in his region and was considered by his immediate supervisor, Jim Jenkins, to be one of the top salespersons in that region.

Walpus' employment with METCO became tenuous on January 5, 1990, when his biggest client, Kel-Welco, banned him from its property. The president of Kel-Welco, Phil Welch, banned Walpus after hearing that Walpus had discussed Kel-Welco's credit situation with representatives from Thacker Electric, a METCO client and a competitor of Kel-Welco's. Richard Randlett, the vice president of marketing for METCO, testified that Kel-Welco's decision to ban Walpus from its property would have had a negative impact on METCO's ability to do business with Kel-Welco over time. However, the record reflects that from the time Kel-Welco banned Walpus until the date of Walpus' termination, Kel-Welco continued to make regular purchases from METCO.

When Jenkins learned of the Kel-Welco situation, he telephoned Walpus and informed him that he had until February 16 to resolve his problems with Kel-Welco. A memorandum from Jenkins to Walpus dated January 13, 1990, confirmed the telephone conversation and clearly indicated that if Walpus did not resolve the Kel-Welco situation by the February 16 deadline, Walpus' employment with METCO would be terminated.

Walpus wrote a letter to Jenkins denying any wrongdoing and expressing his disappointment with the way METCO handled the Kel-Welco situation. Walpus also made numerous attempts to discuss the Kel-Welco situation with Welch after he received

the memorandum from Jenkins. However, when the February 16 deadline arrived, Walpus was still banned from Kel-Welco property. For that reason, on February 16, Jenkins informed Walpus that his employment with METCO had been terminated.

2. Factual Support for Employment Contract

In his petition, Walpus alleged that certain oral and written representations made by METCO management contractually restricted METCO's ability to terminate Walpus without cause. We will review the alleged representations in chronological order.

The first representation cited by Walpus occurred during his first job interview with METCO. Walpus claimed that during that first interview, Jenkins told him that he could only be terminated if he stole from the company or if he did not do his job. According to Walpus, Jenkins repeated the same limited grounds for termination during his third job interview with METCO.

Walpus next contends that he received a written "sales manual" on his first day of work. METCO distributed the sales manual, a booklet which outlined various terms and conditions of employment, to all its district managers. The sales manual contained the following language regarding termination of employment:

> **TERMINATION OF EMPLOYMENT**
>
> District Managers may be discharged by the Company for any of the following reasons:
>
> 1. Falsification of forms or reports. These would include employment form, expense sheet, route sheet, call reports, etc.
>
> 2. Failure to develop the sales territory after a reasonable length of time. This would be documented by a number of letters and warnings from supervisors.
>
> 3. Conduct unbecoming an employee of the Company. This could range from being convicted of a felony to drinking on the job to cashing worthless checks with customers.
>
> 4. Personally buying or selling Company merchandise, accepting distributor kickbacks, or charging for repairs or

replacement parts furnished from the service kit.

5. Insubordination, wherein a salesman fails to discharge his normal responsibilities or is habitually uncooperative with supervisors or Company department heads.

6. Excessive or unexplained absenteeism.

If it becomes necessary to terminate a District Manager, he will be given two weeks salary as severance pay. His final salary and commission checks will be held up until all the demonstration equipment, automobile, manuals and displays have been accounted for and checked in at either the Factory or Branch.

Walpus claimed that this language in the sales manual expressly limited METCO's ability to discharge employees to those instances listed therein.

Additionally, Walpus claimed that during group meetings held two to three times a year, Jenkins discussed the issue of termination for cause with the district managers. In his affidavit, Walpus testified that "[a]t a great many of these meetings Mr. Jenkins repeatedly informed all of the sales representatives, including myself, that the provisions of the Sales Manual were binding upon both the District Managers and [METCO], inclusive of the provisions with regard to termination of District Managers." That statement from Walpus' affidavit is the most detailed explanation of the alleged statements attributed to Jenkins at the group meetings.

Walpus also cited the deposition testimony of Jenkins and Randlett as evidence supporting his contention that METCO contractually limited its ability to terminate Walpus without cause. Jenkins and Randlett each testified that they believed they needed cause to terminate Walpus.

3. Procedural History

Walpus filed the instant lawsuit against METCO for wrongful termination. METCO filed a motion for summary judgment, which the district court granted.

II. ASSIGNMENTS OF ERROR

Walpus contends that the district court erred in (1) sustaining METCO's relevancy objections to portions of Walpus' evidence

and (2) granting METCO's motion for summary judgment.

III. STANDARD OF REVIEW

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *Kroeger v. Ford Motor Co.*, 247 Neb. 323, 527 N.W.2d 178 (1995); *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). 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. *Kroeger v. Ford Motor Co., supra*; *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).

Summary judgment is proper 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. *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995); *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995); *Heath Consultants v. Precision Instruments*, 247 Neb. 267, 527 N.W.2d 596 (1995). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Jim's, Inc. v. Willman, supra*; *Gravel v. Schmidt, supra*; *Huntwork v. Voss*, 247 Neb. 184, 525 N.W.2d 632 (1995).

IV. ANALYSIS

1. Excluded Evidence

At the hearing on the motion for summary judgment, METCO objected on relevancy grounds to a number of exhibits offered by Walpus. In particular, METCO objected to the admission of a favorable letter of recommendation written by

Richard Work for Walpus, a METCO company policy outlining procedures for terminating district managers, and notes made during a committee meeting which discussed Walpus' termination.

(a) Letter of Recommendation

Walpus offered into evidence a letter of recommendation authored by Work, wherein Work stated that the METCO staff held Walpus "in the very highest esteem for his diligence and work ethics." Work wrote that Walpus was exceptionally knowledgeable in his field and that Work would not hesitate to recommend Walpus for any position. Walpus contends that the letter of recommendation was relevant because it damaged Work's credibility as a witness and evidenced an employment contract between Walpus and METCO.

In an action for breach of an employment contract, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract. *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994); *Hillie v. Mutual of Omaha Ins. Co.*, 245 Neb. 219, 512 N.W.2d 358 (1994). The language which forms the basis of the employment contract, whether oral or written, must constitute an offer definite in form which is communicated to the employee, and the offer must be accepted and consideration furnished for its enforceability. *Hillie v. Mutual of Omaha Ins. Co., supra.*

We affirm the district court's decision to exclude the letter of recommendation. The only issue at the summary judgment hearing was whether any oral or written statements modified Walpus' at-will employment status. The letter of recommendation, written after METCO terminated Walpus, could not have affected Walpus' at-will status.

Likewise, the letter of recommendation did not reflect Work's opinion of whether METCO needed cause to terminate Walpus. The letter of recommendation was relevant, if at all, only to show that Work did not think that METCO had good cause to terminate Walpus. If the case at bar were to go to trial, METCO's reasons for terminating Walpus might become relevant. However, in the summary judgment motion in the

instant case, the only issue presented was whether METCO contractually modified Walpus' at-will status. Evidence related to whether METCO had cause to terminate Walpus, like the letter of recommendation, has no bearing on Walpus' at-will status.

(b) METCO Termination Procedure Policy

Walpus alleges that METCO policy No. A0450, which outlined the company procedure for terminating district managers, was consistent with a requirement for "good cause" termination and therefore relevant. The METCO policy required the approval of certain corporate executive officers before any salaried employee (including district managers) could be terminated. Walpus contends that the procedural policy created an inference that METCO needed cause to terminate those employees.

Walpus' argument is without merit. First, nothing in the record indicates that Walpus knew of the METCO policy during his employment with the company. It follows that the METCO policy did not constitute an offer definite in form which was communicated to and accepted by Walpus. Therefore, the METCO policy could not form the basis for Walpus' alleged employment contract. See *Stratton v. Chevrolet Motor Div.*, 229 Neb. 771, 428 N.W.2d 910 (1988). Second, the termination procedure could only be relevant to the instant proceedings if Walpus alleged that METCO failed to follow its termination procedures when it decided to discharge him. The record clearly indicates that METCO complied with its termination procedure policy in arriving at the decision to terminate Walpus. Thus, the district court correctly excluded the termination procedure policy as irrelevant. See *id.* See, also, *Goodlett v. Blue Cross*, 234 Neb. 5, 449 N.W.2d 9 (1989).

(c) Committee's Notes

Finally, Walpus argues that the district court erred when it excluded as irrelevant certain notes taken during the committee meeting at which METCO management discussed Walpus' termination. The relevant portion of the evidence reads:

> [W]e have grounds for termination as Kel-Welco will not accept [Walpus] as our Sales Rep (persona non grata) and

this happened to be his major account. As such, he becomes ineffective and because of misconduct, we have no alternative other than termination. Mike points out that we have given him an opportunity to resolve this issue and if he cannot, then termination is our only recourse. The customer is always right.

Mike suggests we ascertain what if anything he has done to correct the situation before termination. J. Jenkins plans to do this.

Walpus claims that the notes were relevant because they created an inference that "the committee was aware that the Defendant METCO could not terminate Plaintiff's employment except for cause." Brief for appellant at 18. We hold that the subjective thoughts of the METCO committee, without any objective evidence that those thoughts were communicated to Walpus, were irrelevant to determining whether METCO contractually modified Walpus' at-will status. See *Goodkind v. University of Minnesota*, 417 N.W.2d 636 (Minn. 1988) (whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions). Therefore, the district court properly excluded the committee's notes as irrelevant.

2. Motion for Summary Judgment

Walpus contends that the district court erroneously determined Walpus to be an at-will employee and therefore improvidently granted METCO's motion for summary judgment. This court has held on several occasions that unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994); *Hillie v. Mutual of Omaha Ins. Co.*, 245 Neb. 219, 512 N.W.2d 358 (1994). Walpus claims that METCO contractually prohibited itself from terminating him without cause.

(a) Alleged Written Contract

First, Walpus contends that pursuant to the "termination of employment" language found in the sales manual, METCO

expressly limited its ability to discharge district managers to situations where good cause for termination existed. Our decision in *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987), is dispositive. In *Johnston*, the employee claimed that provisions in his employee handbook regarding a probationary period and dismissals for cause restricted the company's right to terminate him. This court rejected the employee's claim, stating:

> [T]he language in the handbook is not definite enough to constitute an offer of a unilateral contract on job termination. The handbook does nothing more than set out six examples of dismissals for cause. Nowhere does the handbook limit the reasons for dismissal to these six provisions or state that there are any restrictions on the employer's right to discharge.

Id. at 741, 408 N.W.2d at 267-68.

Nothing in METCO's sales manual limited the company's ability to discharge its employees. Rather, the sales manual simply listed six grounds upon which district managers could be discharged. Walpus' supervisor, Jenkins, testified that the items listed in the sales manual constituted grounds for immediate dismissal, but that the list was not exclusive. Walpus failed to offer any evidence to refute Jenkins' testimony and failed to point to anything in the record that would distinguish the instant case from *Johnston*. We hold as a matter of law that the "termination of employment" language in METCO's sales manual was insufficient to create a factual dispute as to whether METCO contractually limited its ability to discharge district managers without cause. Therefore, the district court correctly sustained METCO's motion for summary judgment as to the written contract claim.

(b) Alleged Oral Contract

(i) Statements Made During Interviews

Walpus claimed that at his first interview with METCO, Jenkins told him that the only reasons he could be terminated were if he stole from the company or did not do his job. Walpus alleged that Jenkins repeated the same limited reasons for termination during Walpus' third interview with METCO.

Jenkins denied ever discussing the reasons for which district managers could be discharged during Walpus' initial interviews with METCO, and he testified that he never told Walpus that he could only be discharged for cause. However, Jenkins testified that he "probably" discussed the security of Walpus' position if Walpus did his job well. Additionally, Jenkins testified that he personally believed that he needed cause to terminate Walpus.

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995); *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995); *Huntwork v. Voss*, 247 Neb. 184, 525 N.W.2d 632 (1995). This court has held that oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee. *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994); *Hillie v. Mutual of Omaha Ins. Co.*, 245 Neb. 219, 512 N.W.2d 358 (1994). However, when we view the record in a light most favorable to Walpus, his factual allegations regarding the alleged oral representations made by Jenkins cannot support his claim for an employment contract.

Walpus alleged that pursuant to the oral representations made by Jenkins during the hiring process, Walpus could not be terminated unless he stole from the company or did not do his job. However, Walpus admits to receiving the sales manual containing the "termination of employment" language during his first day of work at METCO. It is uncontradicted that Walpus continued to work for METCO after receiving the sales manual. The nonexclusive list of reasons for termination provided in the sales manual is far more expansive than the two reasons for termination cited by Walpus in his oral contract claim.

In *Rowe v Montgomery Ward*, 437 Mich. 627, 632, 473 N.W.2d 268, 269 (1991), the Michigan Supreme Court stated:

> [U]nless the [plaintiff's] theory has some relation to the reality, calling something a contract that is in no sense a contract cannot advance respect for the law. . . . [W]e seek a resolution which is consistent with contract law relative

> to the employment setting while minimizing the possibility of abuse by either party to the employment relationship.

The court in *Rowe* faced a situation similar to the case at bar wherein the employee alleged the existence of an oral contract which limited the employer's ability to terminate the employee without cause. The *Rowe* court noted that the employee had signed a "Rules of Personal Conduct" sheet which did not contain any "just cause" language. Instead, the sheet contained a list of misconduct such as theft, destruction of property, and moral impropriety which would result in immediate dismissal. The court held that the employee's agreement to abide by those rules suggested that any subjective belief the employee maintained that she could only be terminated for cause pursuant to the alleged oral contract was not reasonable.

Walpus faces a similar circumstance. He claims that Jenkins told him that he could only be terminated for two reasons: stealing or not doing his job. On his first day of work, Walpus received a sales manual which set forth six examples of misconduct which were grounds for immediate termination. That language in the sales manual undercut any reasonable objective belief that a contract arose from the alleged oral representations attributed to Jenkins. Thus, even assuming that Jenkins made the alleged statements during his interviews with Walpus, those statements were insufficient to support his oral contract claim in light of the entire record. See, *Mooneyham v. Smith Kline & French Labs.*, 55 Fair Empl. Prac. Cas. 1777 (W.D. Mich. 1990); *Rowe v Montgomery Ward, supra.*

(ii) Statements Made at Company Meetings

Finally, Walpus claims that during group meetings which were held two to three times a year, Jenkins discussed termination for cause with the district managers. However, the record reflects that the alleged oral statements made at the group meetings were insufficient to constitute an oral modification of Walpus' at-will employment status. In his affidavit, Walpus testified that "[a]t a great many of these meetings Mr. Jenkins repeatedly informed all of the sales representatives, including myself, that the provisions of the Sales Manual were binding upon both the District Managers and

[METCO], inclusive of the provisions with regard to termination of District Managers." That statement from Walpus' affidavit is the most detailed explanation of the alleged statements made during the group meetings. We have already held that the provisions of the sales manual did not modify Walpus' at-will status. Thus, even assuming that Walpus' testimony is true and accurate, the oral representations he attributes to Jenkins are insufficient to constitute a contractual modification of his at-will status.

V. CONCLUSION

The district court properly excluded the letter of recommendation, the METCO termination procedure policy, and the committee's notes because those items were irrelevant. The district court also correctly sustained METCO's motion for summary judgment because when the evidence is viewed in a light most favorable to Walpus, METCO was entitled to judgment as a matter of law.

AFFIRMED.

WRIGHT, J., concurs in the result.

LANPHIER, J., dissenting.

Summary judgment is proper only when the evidence discloses that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts. *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995); *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995). I respectfully dissent. The evidence clearly discloses a genuine issue of fact regarding the existence of an oral or written contract with Walpus which restricted METCO's ability to terminate him as they did. Therefore, the district court erred in granting METCO's motion for summary judgment.

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

TERRY L. JONES AND PATRICIA K. JONES, APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF REVENUE, AND M. BERRI BALKA, TAX COMMISSIONER, APPELLEES.

532 N.W.2d 636

Filed June 2, 1995. No. S-94-135.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. **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.
3. **Judgments: Jurisdiction: Appeal and Error.** When no factual dispute is involved, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the issue.
4. **Injunction: Taxation.** Injunctive relief is available only where a tax is void or levied for an illegal or unauthorized purpose.
5. **Declaratory Judgments: Taxation.** Pursuant to Neb. Rev. Stat. § 25-21,149 (Cum. Supp. 1994), a declaratory judgment is available to test the constitutionality of a tax statute.
6. **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 the trial court.
7. **Constitutional Law: Statutes: Proof.** The burden of establishing that a statute is unconstitutional rests upon the party claiming the statute is unconstitutional.

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

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

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BUCKLEY, D.J.

WRIGHT, J.

Terry L. Jones and Patricia K. Jones brought this action against the State of Nebraska, Department of Revenue (Department), and State Tax Commissioner M. Berri Balka.

The Joneses sought declaratory and injunctive relief in a petition which alleged that Neb. Rev. Stat. § 77-1783 (Reissue 1990) is unconstitutional on its face and as applied to the Joneses. The district court ruled that it lacked jurisdiction to grant the requested relief and dismissed the case. The Joneses appeal.

SCOPE OF REVIEW

In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995).

FACTS

The case was tried to the court based upon the following stipulated facts: Terry Jones was the president and treasurer of Jones Oil Company, Inc. (Jones Oil), and Patricia Jones was the secretary. Jones Oil sold motor vehicle fuel products which were subject to various state and federal taxes, including Nebraska motor vehicle fuel taxes. Jones Oil ceased operations sometime after February 1, 1990, when the U.S. Internal Revenue Service seized all records of the company.

For the period of January 1 through March 31, 1990, Jones Oil filed Nebraska motor vehicle fuel tax returns with the Department, reporting sales or transfers of motor vehicle fuels upon which excise taxes were due. Jones Oil made no payment of the tax liability at the time the returns were filed, but subsequently remitted payments and credits totaling $33,474.56. The last payment made by Jones Oil was received by the Department in July 1990.

By letters dated August 24, 1990, the Department issued each of the Joneses a "Notice of Proposed Determination of Personal Liability," advising them that the Department intended to seek payment of the motor vehicle fuel taxes from them as corporate officers liable for payment under § 77-1783. On September 21, Terry Jones sent to the Department a letter which he characterized as a formal protest of the proposed determination of personal liability. On October 1, the Department notified him that

> [p]rovisions for an oral hearing do not apply to a Notice of Proposed Determination of Personal Liability until the liability is actually personally assessed and the tax, penalty, and interest is paid in full, or a bond is posted to cover the outstanding liability. The department does wish to informally hear any argument you wish to present establishing why you should not be held personally liable for these taxes.

Terry Jones then requested a meeting to discuss the personal liability for the taxes. On October 30, 1990, Terry Jones and two certified public accountants designated as his representatives met with representatives of the Department. Following the meeting, one of the accountants sent a letter to the Department "to restate our position as outlined at our meeting on October 30, 1990." The letter stated that Jones Oil did not dispute the liability as determined by the Department, but that Jones Oil wanted to "apply credits from taxes paid, within the statute of limitations, on customer accounts that have been determined to be worthless."

On June 13, 1991, the Department issued to each of the Joneses a "Notice and Demand for Payment," demanding payment of the unpaid taxes plus a penalty and interest totaling $51,451.09. The demand for payment was based upon the Department's determination that as officers of the company, the Joneses were personally liable under § 77-1783 for payment of the taxes. Terry Jones responded by a letter of June 18, reiterating the position outlined in the accountant's letter.

In July 1991, the Joneses each filed with the Department a document entitled "Administrative Appeal of Notice of Tax Liability and Demand for Hearing." The Joneses demanded a prompt hearing on the determination that they were personally liable for any corporate taxes. The documents stated that the Joneses were not financially able to pay the taxes and that it was unconstitutional to require payment of the taxes as a precondition to a hearing. In response, the Department advised the Joneses that it could not accept the "Administrative Appeal of Notice of Tax Liability and Demand for Hearing" as a properly filed refund claim and that the Department could not grant a formal hearing on the tax liability unless the statutory

requirements of § 77-1783 were timely met.

In August 1991, the Joneses instituted this action for declaratory and injunctive relief, challenging the assessment procedure set forth in § 77-1783. The Joneses' petition asserted that the district court had jurisdiction to hear the constitutional claims and stated that the Joneses were "without funds and/or resources in which to either pay the tax, or post a bond for the tax, and as such, are not able to comply with the provisions of Neb. Rev. Stat. § 77-1783."

The Joneses assert a violation of due process, claiming § 77-1783(2) and (3) is unconstitutional on its face under article I, § 3, of the Nebraska Constitution and the 14th Amendment to the U.S. Constitution because § 77-1783(1) permits the Department to make a determination of law as to personal liability without adequate and proper notice and hearing, the Joneses' right to a hearing or an appeal from the liability determination is contingent upon payment of the taxes, and § 77-1783 provides for no meaningful and timely judicial review of the Department's determination of liability.

The Joneses also assert a deprivation of their right to equal protection, as guaranteed by the 14th Amendment to the U.S. Constitution, in that they are treated differently than similarly situated taxpayers who protest income tax liability determinations under Neb. Rev. Stat. §§ 77-2776 through 77-2778 (Reissue 1990). Those taxpayers are afforded a hearing pursuant to § 77-2778 without being required to pay the disputed tax or post a bond. The Joneses allege that § 77-1783 discriminates against those who are unable to pay the taxes and those who are indigent.

The Joneses requested a determination of the constitutionality of § 77-1783 and a permanent injunction barring collection of the taxes until they are given notice and a meaningful judicial review of the Department's determination. The district court initially granted a temporary injunction. The court subsequently determined that it did not have jurisdiction to grant the requested relief, vacated the temporary injunction, and dismissed the action.

ASSIGNMENTS OF ERROR

The Joneses claim that the district court erred in finding that

it lacked jurisdiction and in failing to conclude that the provisions of § 77-1783 are unconstitutional as applied to the Joneses.

ANALYSIS

JURISDICTION

We first address the district court's determination that it did not have jurisdiction to grant the relief prayed for in the Joneses' petition. The district court referred to Neb. Rev. Stat. § 77-3908(1) (Reissue 1990), which prohibits any action to enjoin the collection of a tax. The court stated: "Even if this court did have jurisdiction it appears that Neb Rev Stat section 77-1783 (2) and (3) does not either on its face or as applied to the plaintiffs, violate plaintiffs[']' rights to due process or equal protection of the law."

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. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995). When no factual dispute is involved, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the issue. *Bradley v. Hopkins*, 246 Neb. 646, 522 N.W.2d 394 (1994). Because there is a distinction between subject matter jurisdiction and the court's power to grant the relief requested, we find that the district court had authority to hear an action for declaratory judgment as an appropriate method to challenge the constitutionality of a tax statute. See *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986).

We next consider whether the district court had the authority to grant injunctive relief on behalf of the Joneses. Neb. Rev. Stat. § 77-1727 (Cum. Supp. 1994) provides that no injunction shall be granted to restrain the collection of any tax unless the tax was levied or assessed for an illegal or unauthorized purpose. Injunctive relief is available in Nebraska where a tax is void, that is, where the taxing body does not have jurisdiction or power to impose the tax. *Id.* See, also, *Morris v. Merrell*, 44

Neb. 423, 62 N.W. 865 (1895). Thus, injunctive relief is available only where the tax is void or levied for an illegal or unauthorized purpose. See *Ganser v. County of Lancaster*, 215 Neb. 313, 338 N.W.2d 609 (1983). The Joneses did not claim that the Department did not have power to impose the taxes, resulting in a void tax, or that the taxes were levied for an illegal or unauthorized purpose. Therefore, pursuant to § 77-1727, the district court did not have authority to grant injunctive relief.

The district court also lacked the authority to grant an injunction because in attempting to collect the taxes assessed against the Joneses, the Department proceeded under § 77-1783(1), which provides:

> Any corporate officer or employee with the duty to collect, account for, or pay over any taxes imposed upon a corporation . . . shall be personally liable for the payment of such taxes . . . . Such taxes shall be collected in the same manner as provided under the Uniform State Tax Lien Registration and Enforcement Act.

The Uniform State Tax Lien Registration and Enforcement Act provides in pertinent part:

> (1) No injunction . . . shall issue in any suit, action, or proceeding in any court against this state to enjoin the collection of any tax, fee, or any amount of tax required to be collected under any tax program administered by the Tax Commissioner.
>
> (2) The methods of enforcement and collection provided in the Uniform State Tax Lien Registration and Enforcement Act . . . shall be fully independent so that pursuit of any one method shall not be conditioned upon pursuit of any other, nor shall pursuit of any one method in any way affect or limit the right of the Tax Commissioner to subsequently pursue any of the other methods of enforcement or collection.

§ 77-3908. The right of the Joneses to seek an injunction is therefore expressly prohibited by §§ 77-1727 and 77-3908. We hold that the district court correctly determined that it could not grant injunctive relief to the Joneses.

DECLARATORY JUDGMENT

We next address the second part of the district court's order. The court stated that even if it had jurisdiction, "it appears that Neb Rev Stat section 77-1783 (2) and (3) does not either on its face or as applied to the plaintiffs, violate plaintiffs[']' rights to due process or equal protection of the law."

The Joneses filed their petition as a declaratory judgment action. Pursuant to Neb. Rev. Stat. § 25-21,149 (Reissue 1989), a declaratory judgment is available to test the constitutionality of a tax statute. *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). The Uniform Declaratory Judgments Act provides for the determination of issues which if otherwise delayed might result in injury to the parties. See, *Mullendore, supra*; *Murphy v. Holt County Committee of Reorganization*, 181 Neb. 182, 147 N.W.2d 522 (1966). The act is remedial, and its sections are to be liberally construed and administered. See Neb. Rev. Stat. § 25-21,160 (Reissue 1989).

In *Mullendore*, we stated that the availability of other remedies is a factor bearing upon a trial court's discretionary decision to entertain an action for a declaratory judgment. The trial court has discretion to refuse such action where another equally serviceable remedy has been provided by law. See, *Zarybnicky v. County of Gage*, 196 Neb. 210, 241 N.W.2d 834 (1976); *Murphy, supra*.

In the present case, the Department elected to proceed under § 77-1783, which provides in part:

> (2) Within sixty days after the day on which the notice and demand are made for the payment of such taxes, any corporate officer or employee seeking to challenge the Tax Commissioner's determination as to his or her personal liability for the corporation's unpaid taxes shall:
>
> (a) Pay the full amount of the taxes or the specified minimum amount and post a bond for the remainder; and
>
> (b) File a claim for refund for the amount so paid.
>
> (3) If the requirements prescribed in subsection (2) of this section are satisfied, the Tax Commissioner shall abate collection proceedings and shall grant the corporate officer or employee an oral hearing and give him or her ten days' notice of the time and place of such hearing.

Pursuant to Neb. Rev. Stat. § 77-1781 (Reissue 1990), the denial, in whole or in part, of a claim for refund shall be considered a final action of the Tax Commissioner. The denial may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act.

In *Mullendore*, we held that the remedy found in Neb. Rev. Stat. § 77-1735 (Cum. Supp. 1984), which was premised upon payment of the tax prior to contesting the validity of the tax, was not an equally serviceable remedy to challenge the constitutionality of a tax statute. We also stated that an action for declaratory relief was an appropriate method to challenge the constitutionality of a tax statute. We find that the same reasoning applies to the Joneses' situation.

CONSTITUTIONALITY

Having determined that a declaratory judgment action is appropriate under the facts of this case, we next address the Joneses' claim that § 77-1783(2) and (3) is unconstitutional on its face and as applied to the Joneses. The bases of the Joneses' constitutional attack are that the taxes were levied without a hearing and that no administrative or judicial review was provided.

We recently addressed a similar argument in *Boll v. Department of Revenue*, 247 Neb. 473, 528 N.W.2d 300 (1995). In that case, we affirmed the district court's holding that Neb. Rev. Stat. § 77-4312(4) (Cum. Supp. 1994) violated due process as applied to the Bolls. The Bolls contended that the statute deprived indigent parties of due process by requiring the payment of tax and security as a jurisdictional prerequisite for a redetermination hearing.

The Bolls filed affidavits indicating that they were each without sufficient funds to pay the tax and penalty or post security therefor and that they could not borrow funds due to the tax lien filed against their real estate by the Department of Revenue. We held that 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, and that § 77-4312(4) as applied to indigent individuals is unconstitutional. We also found that the statute is

an unconstitutional and invalid delegation of legislative authority and power to an executive or administrative officer of the state because it did not provide definite standards for determining the amount of a suitable security for the assessed tax.

In the case at bar, § 77-1783 does not permit the Joneses to obtain further administrative or judicial review unless they either pay the full amount of the taxes, or pay a specified minimum amount and post a bond, and then file a claim for a refund. The Tax Commissioner did not specify a minimum amount for posting a bond, so we do not address that issue. The denial of a claim for a refund is, however, a prerequisite for obtaining review in accordance with the Administrative Procedure Act. See § 77-1781. Because the Joneses did not pay any part of the tax, they could not file a claim for refund and could not obtain review under the Administrative Procedure Act.

One remedy available to the Department for collection of the taxes, now found under Neb. Rev. Stat. § 66-722(4) (Cum. Supp. 1994), provides for review under the Administrative Procedure Act without payment of the tax. Section 77-1783, the method elected by the Department, does not. Thus, through arbitrary selection by the Department, the taxpayer can be denied judicial review unless the taxes are paid and a claim for a refund is sought within 60 days of the notice and demand for payment.

The Department argues that the Joneses' due process claim is in conflict with our holding in *Frye v. Haas*, 182 Neb. 73, 152 N.W.2d 121 (1967). The Department argues that under *Frye*, the availability of collateral remedies to taxpayers seeking to challenge the validity of an assessment is sufficient to constitute due process. In *Frye*, the tax in question was an ad valorem tax, meaning that the amount depended on the value of the taxpayer's property. The taxpayer was given notice of the tax by statute, and the taxpayer had a full opportunity to be heard and to appeal as to valuation and equalization. The statute under consideration bypassed the statutory procedure in which the county board of equalization set the levies for cities, school districts, and other governmental subdivisions within 14 days

after the action of the State Board of Equalization and Assessment. The taxpayer could appeal from this action, but the grounds of appeal were restricted, and the collection process could not be impeded. The plaintiffs contested this deviation from established tax procedure.

In *Frye*, we cited *Nickey v. Mississippi*, 292 U.S. 393, 54 S. Ct. 743, 78 L. Ed. 1323 (1934), for the proposition that

> "[t]here is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal *before exaction of the tax* and *before the command of the state to pay it becomes final and irrevocable*. . . ."

(Emphasis supplied.) *Frye*, 182 Neb. at 76, 152 N.W.2d at 124–25.

In the case at bar, the Joneses were not allowed to contest the assessment without first paying the taxes. Before judicial review of an assessment is available under the Administrative Procedure Act, the taxpayer must pay the taxes, or some part thereof as determined at the discretion of the Tax Commissioner and a bond, and then file a claim for a refund within 60 days, which refund must then be refused.

If the Joneses did not pay the taxes or post a bond and file a claim for a refund within 60 days, the Tax Commissioner was directed to collect the taxes under the Uniform State Tax Lien Registration and Enforcement Act. The act provides that the amount of any unpaid taxes shall be a lien in favor of the state, which shall remain in effect for 3 years from the time of the assessment or for 5 years from the filing for record. See § 77-3904(1). The Tax Commissioner may, within the same time limits, bring an action to enforce the lien and collect the taxes. § 77-3905(1). The lien may, within 5 years from the date of the filing for record, be extended for an additional 5 years. See § 77-3904(4). Thus, the taxpayer may remain in limbo while the Tax Commissioner continues to extend the lien against the property, and the taxpayer is not given an opportunity to be heard. This does not comport with procedural due process. A taxpayer who is financially unable to pay the tax should be given an opportunity for judicial review of the assessment prior to payment of the tax.

CONCLUSION

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 the trial court. *Boll v. Department of Revenue*, 247 Neb. 473, 528 N.W.2d 300 (1995); *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995). The burden of establishing that a statute is unconstitutional rests upon the party claiming the statute is unconstitutional. *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995). We find that the Joneses have met that burden. Due process of law was not afforded to the Joneses, who were effectively denied access to judicial review because they were financially unable to pay the taxes or post a bond as a prerequisite to obtaining review under the Administrative Procedure Act. We therefore conclude that § 77-1783 as applied to persons who are unable to pay the taxes or post a bond unconstitutionally deprives them of due process. The judgment of the district court is reversed.

REVERSED.

LANCE SYLVIS, A MINOR CHILD, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, CONSTANCE JEAN SYLVIS, APPELLEE AND CROSS-APPELLANT, V. CHARLES WALLING, APPELLANT AND CROSS-APPELLEE.

532 N.W.2d 312

Filed June 2, 1995. No. S-94-588.

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 conclusion irrespective of the determination made by the court below.
2. **Actions: Paternity: Child Support: Equity.** While a paternity action is one at law, the award of child support in such an action is equitable in nature.
3. **Paternity: Child Support: Appeal and Error.** A trial court's award of child

support in a paternity action will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

4. **Paternity: Child Support.** An out-of-wedlock child has the statutory right to be supported to the same extent and in the same manner as a child born in lawful wedlock; the resulting duty of a parent to provide such support may, under appropriate circumstances, require the award of retroactive child support.
5. ____: ____. A mother's authority to compel the payment of retroactive child support in a paternity action rests on the child's right to be supported pursuant to Neb. Rev. Stat. § 43-1406 (Reissue 1993).
6. ____: ____. A cause of action for the retroactive support of a child born out of wedlock belongs to the child.
7. ____: ____. Child support in a paternity action is to be determined in the same manner as in cases of children born in lawful wedlock.
8. **Paternity: Child Support: Rules of the Supreme Court.** In the setting of retroactive child support in a paternity action, the Nebraska Child Support Guidelines are presumptively applicable.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

Ronald F. Krause and Melany S. Chesterman, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

James H. Monahan for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

Filed on April 26, 1993, under the provisions of the parental support and paternity statutes, Neb. Rev. Stat. §§ 43-1401 through 43-1418 (Reissue 1988 & Cum. Supp. 1992), this suit was instituted on behalf of the plaintiff-appellee, Lance Sylvis, a minor child born out of wedlock on February 17, 1976, by his next friend and biological mother, Constance Jean Sylvis. The minor seeks retroactive and prospective child support from the defendant-appellant, Charles Walling.

Notwithstanding that at the time the district court had under submission parts of a motion filed by Walling and that Walling had therefore not yet filed an answer, the court granted the minor's motion for partial summary judgment, decreeing that Walling was the minor's biological father. Following a subsequent trial, the district court ordered Walling to make

retroactive and prospective child support payments to the minor. Walling appealed and successfully moved that the Nebraska Court of Appeals be bypassed.

In his brief thereafter filed in this court, Walling assigned errors which claimed, in summary, that the district court acted prematurely, that the minor was not the real party in interest with respect to retroactive child support, that the cause for retroactive child support was time barred, that the evidence supported neither the finding of paternity nor the amount of retroactive child support ordered, and that prospective child support was ordered beyond the period provided by law. In turn, the minor cross-appealed, asserting that the amount of retroactive child support ordered for the period prior to 1985 is inadequate.

At oral argument, Walling waived the procedural irregularities in the premature granting of the partial summary judgment, admitted paternity, and limited his challenge to the retroactive child support ordered. Thus, the issues before us on his appeal are (1) whether the minor is the real party in interest with respect to such support, (2) if not, whether the action for retroactive child support ordered is time barred, and (3) whether the record supports the amount of retroactive child support ordered. We affirm.

II. SCOPES OF REVIEW

In part, the issues present a question of statutory interpretation, a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. See *George Rose & Sons v. Nebraska Dept. of Revenue, ante* p. 92, 532 N.W.2d 18 (1995). However, as the issues also question the amount of retroactive child support ordered, questions of fact are also presented. While a paternity action is one at law, *State v. Smith*, 231 Neb. 740, 437 N.W.2d 803 (1989), the award of child support in such an action is nonetheless equitable in nature, *Lancaster v. Brenneis*, 227 Neb. 371, 417 N.W.2d 767 (1988). Thus, a trial court's award of child support in such an action will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State*

on behalf of S.M. v. Oglesby, 244 Neb. 880, 510 N.W.2d 53 (1994).

III. ANALYSIS OF WALLING'S APPEAL

1. Real Party in Interest

In urging that the action for retroactive child support was not brought by the real party in interest, Walling contends that such action belongs not to the minor, but, rather, to whoever provided the child support.

Section 43-1401 defined child as used in the statutes as being "a child under the age of eighteen born out of wedlock." Section 43-1402 requires that the father support such a child "to the same extent and in the same manner as the father of a child born in lawful wedlock" and also made the mother liable for the child's support. Section 43-1411 provided:

> A civil proceeding to establish the paternity of a child may be instituted . . . by (1) the mother or the alleged father of such child, either during pregnancy or within four years after the child's birth . . . or (2) the guardian or next friend of such child or the state, either during pregnancy or within eighteen years after the child's birth.

Section 43-1412 provided that in the event of a judgment of paternity, the court

> shall retain jurisdiction of the cause and enter such order of support, which order of support shall include the amount, if any, of any court costs and attorney's fees which the court in its discretion deems appropriate to be paid by the father, as may be proper under the procedure and in the manner specified in section 43-1406.

To the extent relevant, § 43-1406 provided:

> If the court finds that the father, the mother, or both parents have failed adequately to support the child, the court shall issue a decree directing him, her, or them to do so, specifying the amount of such support, the manner in which it shall be furnished, and the amount, if any, of any court costs and attorney's fees to be paid by the father, the mother, or both parents.

At the time we decided *Doak v. Milbauer*, 216 Neb. 331, 333, 343 N.W.2d 751, 752 (1984), the predecessor to § 43-1411

provided that a proceeding might be instituted " 'by the mother . . . either during pregnancy or within four years after [the child's] birth, or by the guardian or next friend of such child.' " We held that although that language limited the mother to bringing the action within 4 years after the child's birth, it did not so limit the child's guardian or next friend, specifically noting that the dismissal of the mother's action had "no effect upon her child's cause of action." *Id.* at 335, 343 N.W.2d at 753. We also observed that as it was not necessary that we do so, we did not determine "what is recoverable by whom once paternity is established." *Id.*

We thereafter, in *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 643, 508 N.W.2d 580, 583 (1993), recognized that an out-of-wedlock child has the statutory right to be supported " 'to the same extent and in the same manner' " as a child born in lawful wedlock and that under appropriate circumstances, this duty required the award of retroactive child support in paternity actions.

In *Dunkle*, the trial court had established paternity but specifically declined to award retroactive child support. The sole question before us was raised by the mother's cross-appeal, which asked whether § 43-1402 gave the trial court "authority to grant child support retroactive to the date that the mother began supporting a minor child who was born out of wedlock." *Id.* at 640, 508 N.W.2d at 581. Ruling that the statute granted such authority, we remanded the cause for a determination of retroactive child support in compliance with the statutes and the Nebraska Child Support Guidelines. In so doing, we wrote:

> The plain words of § 43-1402 require that an out-of-wedlock child be supported by its father "to the same extent and in the same manner" as a child born in wedlock. A parent is required to provide his or her child with the basic necessities of life. . . . It is obvious that such a requirement must begin at the time of the child's birth, for it is at that time that a child is most helpless and most dependent upon its parents for the child's very survival. . . .
>
> When paternity is legally established, there is no rational basis to distinguish the support obligations of a

> father to a child born out-of-wedlock from the support obligations of a father to a child born in wedlock, and an out-of-wedlock child should be entitled to support from its father from the time of birth under the provisions of § 43-1402. We can perceive of no other way in which an out-of-wedlock child whose paternity is legally established could be supported by its father "to the same extent and in the same manner" as a child born in wedlock.

244 Neb. at 643-44, 508 N.W.2d at 583. Thus, we determined that a mother's authority to compel the payment of retroactive child support rested on the child's right to be supported pursuant to § 43-1406.

Shortly thereafter, we applied the *Dunkle* ruling in *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994). Therein, the State sought to recover on behalf of the child retroactive support from the time the mother had been on public assistance and also the medical expenses the State had paid in connection with the child's birth. Noting that § 43-1411 extended the otherwise applicable 4-year statute of limitations only for the child, we held that the State could recover its expenditures for support but not for medical expenses, as no right to recover such expenses arose from the right of the child to be supported.

Thus, *Dunkle* and *Oglesby* establish that a cause of action for the retroactive support of a child born out of wedlock belongs not to the mother, but to the child. In arguing that the instant action for retroactive child support is in reality an action by the mother to recover a debt owed to her, much as is a claim for birth-related medical expenses, Walling not only ignores the reasoning and holdings in *Dunkle* and *Oglesby*, but ignores as well that an obligation for retroactive child support is not a debt. See *State v. Reuter*, 216 Neb. 325, 343 N.W.2d 907 (1984) (imprisonment for failure to pay child support not imprisonment on debt, since allowance of support of child not a debt).

2. Time Lapse

Inasmuch as § 43-1411 granted the next friend 18 years from

the minor's birth within which to bring this action and § 43-1412 empowered the district court to retain jurisdiction in order to establish the amount of child support, it necessarily follows that having been brought before the minor's 18th birthday, this action is not time barred.

3. Amount of Retroactive Child Support

Lastly, Walling asserts the district court erred in using the Nebraska Child Support Guidelines in setting the amount of retroactive child support and in determining that $50 per month was the appropriate amount for the first 10-year period of the minor's life, for which period there was no evidence of his parents' incomes.

We have held that child support in a paternity action is to be determined in the same manner as in cases of children born in lawful wedlock. *Oglesby, supra*; *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993).

In *Schmitt v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991), we determined that the adoption of the child support guidelines effective October 1, 1987, constituted a material change of circumstances sufficient to justify consideration of a petition for the modification of the amount of child support ordered prior to that date. Thus, it is entirely appropriate to use the after-adopted guidelines in determining the amount of retroactive support to award a child born out of wedlock. Indeed, we have previously held that the guidelines are presumptively applicable in the setting of child support in a paternity action. *Oglesby, supra* (specific circumstances overcome presumption of applicability). See, also, *Dunkle, supra* (remanded in order that trial court might comply with child support statutes and guidelines with respect to retroactive child support).

Paragraph I of the guidelines recommends that "even in very low income cases, a minimum support of $50 per month be set." It is true that the stated purpose of such minimum support is to "help to maintain information on [the] obligor . . . and . . . encourage such person to understand the necessity of supporting" his children and that such reasoning may not apply in this instance. Nonetheless, the fact remains that in the

absence of evidence establishing that $50 per month is excessive, the amount is presumptively correct.

There being no evidence that the $50 per month ordered is excessive, we cannot say the district court abused its discretion.

IV. MINOR'S CROSS-APPEAL

As first noted in part I above, the minor claims the retroactive child support ordered for the period prior to 1985 is inadequate and urges that in setting the amount of child support the district court should have taken judicial notice of the child support ordered in four district court cases in which his attorney had been involved. The analysis in part III(3) above presages the outcome here.

Not only are the records of the other four cases not in the record, the suggestion that such a method provides relevant evidence of the appropriate amount of retroactive child support in this case is as nonsensical as it is novel.

Indeed, because of the lack of evidence concerning the circumstances and needs of the minor and the circumstances, needs, and incomes of the parents, absent the guidelines there would have existed no basis for awarding any retroactive child support during that period.

There is no merit to the cross-appeal.

V. JUDGMENT

Accordingly, as observed in part I above, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY J. BRUNZO, APPELLANT.

532 N.W.2d 296

Filed June 2, 1995. No. S-94-952.

1. **Miranda Rights.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.
2. **Miranda Rights: Words and Phrases.** For purposes of the *Miranda* rule, a "custodial interrogation" takes place when questioning is initiated by law enforcement officers after one has been taken into custody or is otherwise deprived of one's freedom of action in any significant way.
3. **Miranda Rights: Arrests: Words and Phrases.** One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest.
4. **Miranda Rights: Search and Seizure.** Determinations as to whether one has been seized for *Miranda* purposes are questions of fact.
5. **Police Officers and Sheriffs: Search and Seizure.** The question of whether one's consent to accompany law enforcement officials was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined under all the circumstances.
6. **Miranda Rights: Police Officers and Sheriffs.** The fact that one who voluntarily engages in an interview with police is unaware of the consequences of one's participation does not transform a voluntary interview into a custodial one so as to require *Miranda* warnings.
7. **Immunity: Witnesses: Prosecuting Attorneys.** Absent a motion by the county attorney or other prosecuting attorney, a trial court lacks authority to grant immunity and order a witness to testify.
8. **Witnesses: Self-Incrimination.** A witness awaiting trial may invoke the privilege against self-incrimination.
9. **Trial: Joinder: Proof.** There is no constitutional right to a separate trial; the right is statutory, as set forth in Neb. Rev. Stat. § 29-2002 (Cum. Supp. 1994), and depends upon a showing that prejudice will result from a joint trial.
10. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.
11. **Trial: Joinder.** The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.
12. **Trial: Joinder: Proof: Appeal and Error.** The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.
13. **Aiding and Abetting.** The common-law distinction between a principal and an aider and abettor has been abolished; under the provisions of Neb. Rev. Stat.

§ 28-206 (Reissue 1989), one who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if one were the principal offender.

14. ____. Aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor; however, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.
15. **Criminal Law: Aiding and Abetting: Intent: Liability.** When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself or herself possessed such.
16. **Criminal Law: Aiding and Abetting: Convictions.** An aider and abettor can be convicted of any crime, even a greater offense than the principal, provided the conviction is supported by the evidence of the facts and the defendant's state of mind.
17. **Criminal Law: Aiding and Abetting: Intent: Other Acts.** One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act.
18. **Homicide: Intent.** Intent to kill is not an element of felony murder.
19. ____: ____. The intent required for felony murder is the intent to commit the underlying felony.
20. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within a jury's province for disposition.
21. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
22. ____: ____. An appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence; only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
23. **Jury Instructions: Appeal and Error.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
24. **Jury Instructions.** A trial court's obligation is to instruct correctly; so long as that is done, the source of its language is unimportant.

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

Steven M. Delaney and Patrick J. Boylan, of Hascall, Jungers, Garvey & Delaney, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and RONIN, D.J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

Pursuant to verdict, the defendant-appellant, Gary J. Brunzo, was adjudged guilty of felony murder, in violation of Neb. Rev. Stat. § 28-303(2) (Reissue 1989), that is, murder in the first degree, for killing while perpetrating or attempting to perpetrate the felonies of robbery or kidnapping. Having thereafter been sentenced to imprisonment for life, Brunzo appealed directly to this court as provided in Neb. Rev. Stat. § 24-1106(1) (Cum. Supp. 1994). He asserts, in summary, that the district court erred in (1) failing to suppress his statements to the police, (2) failing to compel certain deposition testimony and exclude trial testimony, (3) failing to sever the trial or grant a mistrial, (4) not dismissing the case for lack of sufficient evidence, and (5) erroneously instructing the jury. We affirm.

II. SCOPES OF REVIEW

On review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. See *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992). However, to the extent questions of law are presented, an appellate court is obligated to reach a conclusion independent of that of the inferior court. *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995).

III. FACTS

The issues presented by the foregoing assignments of error require a fairly detailed summary of the factual record as it relates to (1) the commission of the crime, (2) its investigation, and (3) the conduct of the trial.

1. CRIME

Michael Campbell was shot in a gang-related incident, as the result of which he died on December 5, 1993. Later that day, 40 or 50 people gathered at Angelita DeLeon's house. The

general mood of those attending the gathering was one of depression or anger over Campbell's death.

Among those attending were Brunzo, Daniel Eona, Juan Carrera, Angel Huerta, and Doug Mantich, all members or former members of the "Lomas" street gang. Prior to arrival at the gathering, Huerta had ingested LSD. Carrera had been drinking alcohol and smoking marijuana. Carrera testified that Eona and Brunzo carried guns to the gathering. Huerta was carrying an automatic handgun. Carrera also testified that he wanted to shoot a member of the gang involved in the shooting of Campbell.

As people began leaving DeLeon's house between 11:45 p.m. on December 5 and 1 a.m. on December 6, Eona, Brunzo, Huerta, Carrera, and Mantich were standing outside the house. Diane Barrientos, Mantich's girl friend, also attended the gathering and was acquainted with Eona, Brunzo, Carrera, and Huerta. She too was standing outside DeLeon's house. When she asked Eona and Carrera if they needed a ride, Eona responded that he "was going to get a G-ride." Barrientos understood "G-ride" as meaning to steal an automobile. Barrientos did not see Eona and Brunzo for approximately 10 minutes, but Huerta and Carrera remained in front of DeLeon's house. Carrera heard Eona say that he wanted to "jack somebody," which Carrera understood to mean that Eona wanted to steal an automobile. Carrera stated that he wanted a "G-ride," meaning he wanted a nice one. Before leaving the gathering, Huerta told Mantich that in retaliation for Campbell's death, Huerta would "like to do a drive-by," meaning to "go by and shoot somebody's house."

Michael Blankenau operated a cleaning business, in connection with which he employed Henry Thompson, a friend and the victim of the events at issue here. Blankenau had loaned his 1989 Dodge Caravan minivan to the victim for the victim to use in the completion of some cleaning work.

Blankenau had arranged to meet the victim on December 5 to finish a job. The victim arrived at the business at approximately 11:30 p.m., driving the minivan. Blankenau and the victim finished at approximately 11:50 p.m. and proceeded to another location, where Blankenau paid another employee.

Blankenau and the victim then went to a nearby restaurant, arriving shortly after midnight on December 6 and leaving there at approximately 2 a.m. The victim drove away in the minivan; Blankenau drove away in another automobile.

According to his deposition testimony, at approximately 2 a.m. on December 6, Timothy Washburn was in the vicinity of the apartment building in which the victim lived, located near the DeLeon house. Washburn noticed a minivan turn into an alley and observed two men step in front of it, whereupon one of the men ordered the driver to " 'get out of the van' " and yanked the door open. Washburn stopped behind the minivan to watch the car-jacking. According to Washburn, once the door was open, one of the men used his elbow to force the driver out of the driver's seat and climbed into the minivan. The second man remained in front of the minivan and yelled, "[H]urry up. That dude is watching." The second man then ran to the other side of the minivan, but found the door was locked. Someone inside the minivan opened the door, and the second man climbed inside.

Washburn then saw the two men drive off with the original driver in the minivan; he called the 911 emergency service and waited for the police.

Washburn explained that the streetlights provided light, but the darkness could have obstructed his vision of the two men whom he described as black males. Brunzo is not black, but Washburn explained that in the dark and from a distance, he might mistake Brunzo for a black man.

Sometime after the gathering broke up, Huerta and Carrera left the DeLeon house to go to a nearby convenience store to call for a ride home. After using the telephone, Huerta and Carrera walked back to the house and saw a minivan down the street. Eona and Brunzo were inside the minivan; Eona was sitting in the driver's seat and Brunzo in the passenger's seat. Huerta and Carrera climbed into the minivan through the sliding side door. Huerta sat against a box in the back, and Carrera sat behind the driver's seat.

Mantich also wanted to get into the minivan, but Barrientos was holding onto his waist in an effort to prevent him from entering. Indeed, Barrientos and Mantich were arguing;

Barrientos was trying to persuade Mantich to go home with her. Mantich nonetheless entered the minivan and sat in the back next to Huerta.

Approximately 5 minutes after driving away, Huerta noticed the victim hunched over in the front of the minivan between the two front seats with his hands behind his head. After noticing the victim, Huerta began using the names of other street gangs by saying, " 'What's up, Cuz?' " and " 'What's up, Blood?' " to make the victim believe that the others were from a different gang.

Carrera also noticed the victim between the two front seats and saw Eona poke the victim with something that could have been Eona's gun. Eona continued driving for approximately 10 minutes, when a gunshot was fired inside the minivan. Huerta and Carrera both testified that they did not see who fired the gunshot. Huerta further testified that the victim was shot and that after a couple of minutes, Huerta saw the victim's body fall out of the minivan from the front passenger door.

Carrera testified that after the gunshot, Eona pulled the minivan over and stopped. Brunzo opened the front passenger door and pulled the body from the minivan, with a helping push from Eona. Eona then drove the minivan away, whereupon Carrera said, " 'Let me go get mine,' " referring to his gun. Eona drove to Carrera's house, and Carrera then got his gun and returned to the minivan. Once Carrera climbed into the minivan, Eona drove a "block or two" and stopped.

At approximately 2:44 a.m. on December 6, Carrera and Huerta shot at a house at which Nacho Palma resided. Palma was known to be a member of the rival street gang that was allegedly involved in the shooting of Campbell.

After the drive-by shooting at Palma's house, Eona drove the minivan from the scene, and discussion ensued about putting it in the river. Eona drove the minivan to the Missouri River; Eona, Brunzo, Mantich, Huerta, and Carrera then got out, and it rolled into the river. The group next walked away from the river through the woods. Mantich and Huerta took the guns from Brunzo, Eona, and Carrera and walked to Huerta's house to hide them. Huerta was tired, so Mantich left Huerta's house. Meanwhile, Eona, Brunzo, and Carrera returned to where the

victim's body lay. After walking past the body, they continued to Huerta's house, where they stayed for the remainder of the night.

Later on December 6, Huerta gave Carrera his gun, and Huerta left his house for a couple of hours. When he returned, no one else was there, so Huerta took the two remaining guns from his backyard and threw them into the Missouri River.

2. Investigation

Scott Petersen discovered a body in the street in front of his house when he left for work sometime between 3 and 3:20 a.m. on December 6. As his telephone was not working, he drove to work as fast as he could and called the 911 emergency service to report his finding.

In the meantime, at approximately 2:30 a.m., police officer Stephen Clouse had received a report of the drive-by shooting. While investigating that incident, he received another call concerning the body Petersen had found. Clouse then went to that location, which was approximately 1½ miles from the site of the drive-by shooting, where he arrived at approximately 3:30 a.m.

Residents of an area approximately four blocks from the site of the drive-by shooting had found vehicle license plates which proved to have come from a vehicle last known to be in the victim's possession. As a consequence, on December 7, 1993, Officer Keith Harris and Det. William R. Lindsey went to the area to conduct an investigation at this "secondary crime scene," where blood-soaked items were found.

On December 30, 1993, Officer William Agnew noticed Brunzo riding in an automobile, followed him, and stopped him. Agnew walked up to the vehicle, identified himself as a police officer, and informed Brunzo that he wanted to talk about the victim's murder. Brunzo said that he "would come to the police headquarters to be questioned." At this time Brunzo was not a suspect in the homicide investigation, and there was no warrant for his arrest.

Agnew and his partner drove Brunzo to police headquarters where Brunzo, Agnew, and Officer Virgil Patlan convened in an interview room. Agnew told Brunzo that the police had

interviewed several people concerning the murder. Brunzo said he was aware the police had interviewed Carrera and that Brunzo was not sure he could help. Agnew thereupon told Brunzo that Agnew had received information that Brunzo had been present at James Parsons' house for a party on December 5. Brunzo stated that it was not a party, but that he had gone to Parsons' house after being at DeLeon's house. Agnew asked Brunzo with whom he attended the DeLeon gathering, and Brunzo explained that his girl friend, Julie Janulewicz, dropped him off at DeLeon's house at about 8 p.m. on December 5. Brunzo also stated he traveled from the area of DeLeon's house to Parsons' house with Joe Mahea and Huerta in Mahea's automobile.

Brunzo denied being with Eona, and when asked about specific details concerning the DeLeon gathering, Brunzo asked whether he was a suspect in the investigation. Agnew replied that Brunzo was not, and Brunzo ultimately terminated the interview without saying anything more about the events in question. Agnew then drove Brunzo home.

The first attempt to locate the minivan in the Missouri River was made on January 3, 1994, and proved unsuccessful. However, on this occasion the police found a .32-caliber handgun and several keys which Blankenau identified as his copies of keys to businesses for which he had cleaning contracts.

The police made a second attempt to recover the minivan on May 31, 1994. This time, it was recovered and thereafter held in the police impound lot. At the lot, the minivan was searched for physical evidence by laboratory technician Karenina Smith, who found a 9-millimeter shell casing on the floorboard of the front passenger seat.

Daniel Bredow, another laboratory technician, determined that the spent casing recovered from the minivan was fired from the same weapon as the four 9-millimeter shell casings recovered from the scene of the drive-by shooting.

Dr. Robert Bowen, the pathologist who performed an autopsy on the victim's body on December 6, 1993, noted that there was a gunshot wound in the back of the head, contusions about the upper parts of the eyelids, abrasions along the back and along

the anterior part of the chest, and what appeared to be a shoe imprint on the side of the chest. Bowen also observed several circular bruises on the back and the top of the head, which were consistent with the victim's having been poked with the barrel of a gun. Bowen determined that the gunshot to the head caused instantaneous death.

3. Trial

Brunzo unsuccessfully moved to suppress the statements he had made to the police. At the hearing on the motion, Agnew revealed that he received information from Parsons, a self-proclaimed counselor who works with the Lomas gang, that Brunzo possibly had information regarding the victim's murder. He then testified essentially as he later did at trial, as summarized in the immediately preceding subpart of this opinion.

In addition, Brunzo unsuccessfully sought an order from the district court directing Huerta and Carrera to give deposition testimony. Brunzo then, on the ground that the two had asserted their Fifth Amendment right against self-incrimination and refused to answer any deposition questions, unsuccessfully moved to prohibit the State from calling Huerta and Carrera as witnesses.

After the jury was impaneled, the plaintiff-appellee State called Clouse as its first witness. Brunzo objected to testimony regarding this witness' response to a call concerning the drive-by shooting, characterizing this evidence as relating to a subsequent uncharged crime, and requested a hearing outside the presence of the jury concerning the matter. Although the district court overruled Brunzo's objection, Clouse thereafter testified only with regard to his involvement with the investigation at the site where the body was found.

Over Brunzo's objection, Harris testified concerning the items found at the secondary crime scene. It was then stipulated that the blood samples taken from that scene were of the same type as the victim's blood.

Over Brunzo's objection, Agnew testified as to his interview with Brunzo at police headquarters. Officer Felands Marion then testified about the recovery of the minivan from the

Missouri River.

The district court next held an in-chambers hearing to determine the admissibility of the testimony of Carrera and Huerta concerning the drive-by shooting. At this hearing, Carrera admitted that he had agreed to testify in exchange for the opportunity to plead to the lesser charge of second degree murder in the future and that he waived his right against self-incrimination to testify in court. Carrera testified that he wanted to shoot someone in retaliation for Campbell's murder. He further testified that he had told Eona that he wanted a "G-ride" and that Eona, who was holding a gun, said that he wanted to "jack somebody." Carrera further testified that he later saw Eona and Brunzo in an unfamiliar minivan which he entered. Carrera then testified about the gunshot in the minivan and his participation in the drive-by shooting, stating that Eona was driving the minivan and that Brunzo was present during the drive-by shooting.

Huerta then testified, admitting to a plea arrangement and to having waived his right against self-incrimination. Huerta testified that he talked to Mantich about doing a drive-by shooting and that it was normal to use a stolen vehicle to do such. He also admitted that he anticipated doing a drive-by shooting when he entered the minivan; that he shot at the house in question; and that he was then under the influence of LSD, marijuana, and alcohol.

The district court determined that there was insufficient evidence to show that Brunzo committed the drive-by shooting and, therefore, concluded that the evidence was admissible only as to Eona and that Brunzo could request a cautionary instruction concerning the matter. Brunzo unsuccessfully moved for a separate trial.

Over Brunzo's objection, Huerta then testified before the jury essentially as he had at the in-chambers hearing. Upon Brunzo's request, a cautionary instruction was given whenever testimony concerning the drive-by shooting was adduced. Next, the deposition testimony of Washburn was read into evidence.

Thereafter, Carrera testified before the jury essentially as he had at the in-chambers hearing, adding, however, that he had assisted the police in locating the minivan in the river. Again at

Brunzo's request, the district court cautioned the jury that the drive-by shooting evidence was admissible only as to Eona. Prior to cross-examining Carrera, Brunzo renewed his objections to Carrera's testimony, arguing that he had been denied the right to properly prepare for cross-examination because Carrera's trial testimony was the first time he had learned of Carrera's involvement with the police investigation. Arguing that Carrera's testimony at trial varied from that given during the hearing in chambers, Brunzo then unsuccessfully moved for a mistrial.

John Lujano, a resident of the house that was the target of the drive-by shooting, testified as to the time of the shooting, and the district court again gave the jury the cautionary instruction relating to the evidence being admitted only with respect to Eona. Officer Louis Briganti then testified as to the shell casings recovered from the site of the drive-by shooting, and the jury was again cautioned as to the limited admissibility of that evidence.

Smith testified about the physical evidence recovered from the minivan, including the shell casing, and Bredow testified as to the caliber of weapon that fired the bullets into the house during the drive-by shooting. Again, the jury was reminded of the earlier cautionary instruction regarding the limited admissibility of the drive-by shooting evidence.

IV. ANALYSIS

With the foregoing summary of the facts and applicable scopes of review in mind, we turn our attention to the assignments of error.

1. Suppression of Statements

In the first assignment of error, Brunzo claims that the district court erred by overruling his motion in limine and subsequent objections to Agnew's testimony regarding the statements he made while being questioned at police headquarters.

We note first of all that Brunzo does not tell us what he claims injures him in the statements he made; he merely argues that as he was in custody, his statements were taken in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.

Ed. 2d 694 (1966), and were thus inadmissible.

Miranda prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). For purposes of the *Miranda* rule, a "custodial interrogation" takes place when questioning is initiated by law enforcement officers after one has been taken into custody or is otherwise deprived of one's freedom of action in any significant way. *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977); *Bronson, supra*.

In *Mathiason*, the defendant went to the police station on his own accord in response to a note that a police officer had left for him at his residence indicating that the officer wanted to discuss something with him. The officer told the defendant that he was not under arrest, but that the officer believed the defendant had been involved in a specific burglary. After the officer falsely stated that the defendant's fingerprints had been found at the scene, and within 5 minutes after arriving at the station, the defendant confessed to the burglary. The officer then read the defendant his *Miranda* warnings and obtained a taped confession.

The *Mathiason* Court found that a noncustodial situation is not converted to one in which the *Miranda* rule applies simply because a reviewing court concludes that even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a coercive environment. Police officers are not required to administer *Miranda* warnings to everyone whom they question, or simply because the questioning takes place in a police station, or because the questioned person is one whom the police suspect. *Bronson, supra*. Rather, *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody." *Bronson, supra*.

One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest. *Bronson, supra*; *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), *cert. denied* 498

U.S. 1127, 111 S. Ct. 1091, 112 L. Ed. 2d 1195 (1991). Determinations as to whether one has been seized in this context are questions of fact. *Id.* The question of whether one's consent to accompany law enforcement officials was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined under all the circumstances. *Bronson, supra.*

Brunzo seizes upon the district court's observation that the "finger of suspicion" had not yet focused upon him and argues therefrom that the district court used a subjective rather than an objective test to determine that Brunzo was not in custody.

In *Stansbury v. California*, ____ U.S. ____, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994), the Court stated that a police officer's knowledge or beliefs on the issue of custody, if conveyed by word or deed to the individual being questioned, are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of one's "freedom of action." See *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). The *Stansbury* Court noted that even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest. The weight and pertinence of any communications regarding the officer's degree of suspicion depend upon the facts and circumstances of the particular case. In sum, an officer's views concerning the nature of an interrogation or the officer's beliefs concerning potential culpability of the individual being questioned may be one among many factors that bear upon the assessment of whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive one's freedom to leave. *Stansbury, supra.* The Court emphasized that it is the objective surroundings and not any undisclosed views that control the *Miranda* custody inquiry.

In *Stansbury*, the Court reversed the California Supreme Court's decision admitting the defendant's statements because

its analysis focused on the officers' subjective beliefs regarding the defendant's status as a suspect as significant in and of themselves, rather than as relevant only to the extent they influenced the objective conditions surrounding his interrogations. The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury, supra.*

The defendant in *California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983), and his stepbrother attempted to steal hashish from an individual who resisted. The stepbrother killed the individual, and the defendant called the police and told them what had happened. The defendant voluntarily accompanied the police to the police station and was told that he was not under arrest. The defendant talked about the murder with the officers, but was not advised of his *Miranda* rights. He was permitted to leave, pending the district attorney's decision as to what charges to file, and 5 days later was arrested for aiding and abetting the murder. The U.S. Supreme Court held that *Miranda* warnings are not required if a suspect is not placed under arrest, voluntarily comes to the police station, and is allowed to leave unhindered by the police after a brief interview. The Court also stated the fact that a person who voluntarily engages in an interview with police is unaware of the consequences of his participation does not transform a voluntary interview into a custodial one so as to require *Miranda* warnings. The warnings specified in *Miranda* are required only when there has been a restriction on a person's freedom so as to render such person in custody.

Similarly, the defendant in *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993), had explicitly been told that he was not under arrest, but that the officers wanted to discuss further at the police station the matter of a murder investigation. The officers testified that the defendant appeared calm, composed, and cooperative and agreed to accompany them to the station. He was escorted to the station by officers without handcuffs in an unmarked detective's police vehicle, during which time the men talked about the defendant's job, background, and family. Although the defendant asserted that he did not feel he had a

choice, he was held to have voluntarily accompanied the officers to the station. We concluded the evidence indicated that despite the fact that the defendant was interrogated in "privacy" and in "unfamiliar surroundings," factors on which *Miranda* placed great stress, considered in light of all the circumstances, the interrogation clearly did not rise to the level defined by the U.S. Supreme Court to be custodial interrogation.

In *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984), the Court held that the initial traffic stop of a motorist's vehicle, by itself, did not render the motorist "in custody" for purposes of *Miranda* when there was no evidence that the motorist was subject to restraints comparable to those associated with a formal arrest. Therefore, the fact that the police effected a traffic stop to ask Brunzo to accompany them for questioning does not, in and of itself, provide conclusive evidence that Brunzo was in custody for purposes of *Miranda*.

Brunzo voluntarily accompanied the officers to police headquarters after the officers recognized him and stopped the vehicle in which he was a passenger. Brunzo was told that he was not a suspect and that he was not under arrest. Once at headquarters, Brunzo was allowed to leave the interview room. The interview concluded upon Brunzo's request, whereupon the officers drove him to his house. Under the circumstances, it cannot be said that Brunzo was deprived of his freedom in any significant way so as to characterize the police interview as "custodial interrogation" for purposes of *Miranda*. Thus, this assignment of error is meritless.

2. Discovery and Related Testimony

That determination brings us to the second assignment of error, in which Brunzo urges that because the district court wrongly refused to compel Carrera and Huerta to present themselves to be deposed, the district court incorrectly permitted them to testify.

More specifically, Brunzo urges that as the police reports indicated that due to his physical and mental condition at the time he made statements to the police, Huerta would not be competent to testify, the fact that the State intended to use his testimony suggested that something had changed. Brunzo then

postulates that he had a right to discover by deposition what Huerta's testimony would be.

Brunzo further claims that it was not until Carrera testified at trial that Brunzo learned of Carrera's involvement with the police in locating the minivan. He argues that the district court should have ordered Carrera and Huerta to waive their Fifth Amendment privilege and compel their deposition testimony or should have prohibited the State from calling Huerta and Carrera as witnesses.

However, the legal reality is that absent a motion by the county attorney or other prosecuting attorney, a trial court lacks authority to grant immunity and order a witness to testify. Neb. Rev. Stat. § 29-2011.02 (Cum. Supp. 1994); *State v. Starks*, 229 Neb. 482, 427 N.W.2d 297 (1988).

In *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993), we held that in order to prevent the possible enhancement of a sentence, one who has pled guilty but who is awaiting sentence may invoke the privilege against self-incrimination. It thus necessarily follows that a witness awaiting trial may invoke that privilege.

Under the circumstances, neither does the fact that Carrera and Huerta invoked their privilege against self-incrimination at their scheduled depositions mean that the State could not call them as witnesses at trial once they elected to testify. Not only does Brunzo not articulate how earlier knowledge of the trial testimony Carrera and Huerta gave would have assisted in the preparation of his defense, he made no motion for a continuance, after he learned that they would testify, so that he could depose them.

Thus, this assignment of error is also meritless.

3. Separate Trial or Mistrial

In the third assignment of error, Brunzo urges that because the evidence concerning the drive-by shooting was admissible only as to Eona, the district court erred by not severing the trials or declaring a mistrial, as its cautionary instruction that the evidence was to be used against Eona only could not overcome the prejudicial effect of the evidence.

The argument rests on Neb. Evid. R. 404, Neb. Rev. Stat.

§ 27-404 (Cum. Supp. 1994), which in relevant part reads:

> (2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> (3) When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

First of all, Brunzo argues that the hearing granted him by § 27-404(3) was not timely because it was not held until after trial commenced. The statute does not specify that the hearing must occur prior to trial; it only provides that the proof shall first be made outside the presence of the jury. The district court held the hearing before any testimony of the drive-by shooting was admitted, with the exception of Clouse's statement that he had responded to a call and arrived at the site of a drive-by shooting. Since Clouse was the first witness, the jury did not know at that time of the connection between the robbery and kidnapping and the subsequent drive-by shooting. Brunzo's argument that it was error to have delayed the hearing is without substance.

There is no constitutional right to a separate trial. The right is statutory, as set out in Neb. Rev. Stat. § 29-2002 (Cum. Supp. 1994), and depends upon a showing that prejudice will result from a joint trial. *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988); *State v. Clark*, 189 Neb. 109, 201 N.W.2d 205 (1972). A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion. *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991). Whether separate trials are required depends upon a showing by a defendant that prejudice will result from the joint trial. *Id.* The propriety of a joint trial involves two questions: whether the consolidation is proper

because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial. *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982). The burden is on the party challenging the joint trial to demonstrate how and in what manner he or she was prejudiced. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

Although the joinder statute has changed since this court's decision in *Brehmer*, the analysis is similar in that § 29-2002 still requires a trial court to first examine whether joinder was proper, and if it was, then to consider whether there was a right to severance because of prejudice. Section 29-2002 states that the court may order two or more informations to be tried together if the defendants are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. It is well settled that criminal actions may be consolidated for trial if the offenses charged are based on the same act or transaction. *Brehmer, supra*.

Here, the information against Brunzo and Eona charged both of them with first degree murder and the use of a firearm to commit a felony. While neither was found guilty of the firearm charge, the conduct upon which each of the charges was based was part of a factually related transaction or series of events in which both Brunzo and Eona participated. Although the district court subsequently found the evidence insufficient to support Brunzo's participation in the drive-by shooting, both were charged for their conduct involving the robbery and kidnapping, and the evidence of the drive-by shooting was admissible to prove Eona's motive.

While Brunzo urges that the district court's cautionary instruction did not overcome the prejudice of the evidence, he fails to articulate what that prejudice was. It must be remembered that there was both direct and circumstantial evidence that Brunzo at least aided and abetted stealing the minivan and abducting the victim. There was also direct evidence that Brunzo was present in the minivan when the

victim was shot. Furthermore, there is direct evidence that Brunzo dragged the body from the minivan. In light of all the evidence implicating Brunzo in the underlying robbery or kidnapping, it is difficult to imagine how evidence that a subsequent drive-by shooting occurred prejudiced him.

Consequently, this assignment of error is without merit as well.

4. Sufficiency of Evidence

In the fourth assignment of error, Brunzo argues that as there was no evidence that he was the principal actor, he must have been convicted as an aider and abettor and that the evidence falls short of establishing even such attempted participation in a felony murder. More specifically, Brunzo urges that the evidence fails to establish that he knew the principal actor had the requisite intent or that Brunzo himself had such intent.

First of all, the argument overlooks that in *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994), we reaffirmed that the common-law distinction between a principal and an aider and abettor has been abolished. See, *State v. Thomas*, 210 Neb. 298, 314 N.W.2d 15 (1981); *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972), *cert. denied* 430 U.S. 947, 97 S. Ct. 1584, 51 L. Ed. 2d 795 (1977). Neb. Rev. Stat. § 28-206 (Reissue 1989) provides that one "who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

Aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient. *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992); *State v. Bennett*, 219 Neb. 601, 365 N.W.2d 423 (1985); *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982).

However, when a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that

the aider and abettor himself or herself possessed such. *Secret, supra*; *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992); *State v. Dittrich*, 191 Neb. 475, 215 N.W.2d 637 (1974). An aider and abettor can be convicted of any crime, even a greater offense than the principal, provided the conviction is supported by the evidence of the facts and the defendant's state of mind. *Secret, supra*; *Thomas, supra*.

One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act. *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993); *Carter, supra*; *State v. Trackwell*, 235 Neb. 845, 458 N.W.2d 181 (1990).

Intent to kill is not an element of felony murder. *State v. Kauffman*, 183 Neb. 817, 164 N.W.2d 469 (1969), *disapproved on other grounds, State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982). The intent required is the intent to commit the underlying felony. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied* 469 U.S. 1028, 105 S. Ct. 447, 83 L. Ed. 2d 372; *Bradley, supra*.

The facts taken in the light most favorable to the State are such that a finder of fact could conclude beyond a reasonable doubt that Eona and Brunzo had guns at the DeLeon gathering when Eona stated that he wanted to "jack somebody."

The record further contains evidence that two men stepped in front of a minivan and that one used force to move the driver in the minivan. The other entered the minivan from the passenger side, and the two men drove away with the original driver. Eona and Brunzo reappeared in the area of the DeLeon gathering in an unfamiliar minivan with a man kneeling between the two front seats with his hands behind his head. Eona was poking the victim in the head with something. The pathologist testified that the injuries to the victim's head were consistent with being poked with the barrel of a gun.

The record further supports a finding that a gunshot was fired in the minivan and that Brunzo dragged the body from the minivan, leaving it in the street, and reentered the minivan to leave with Eona.

In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993).

The circumstantial evidence regarding the car-jacking and the direct evidence of Brunzo's presence in the minivan during the victim's murder and his disposal of the body, taken together, support the conclusion that Brunzo had the requisite intent to commit at least a robbery or knew that Eona had the intent to commit a robbery when they both stepped out in front of the minivan to stop it. In addition, the fact that Eona was driving the minivan and that Brunzo remained in the passenger seat supports a finding that Brunzo was the person who entered the passenger side of the minivan after Eona used force to take the minivan from the driver. Therefore, a fact finder could well conclude beyond a reasonable doubt that Brunzo had the intent to commit either a robbery or a kidnapping when he entered the minivan.

Thus, this assignment of error too is without merit.

5. Jury Instructions

In the fifth and last assignment of error, Brunzo asserts that he was prejudiced by the failure of the district court's instructions to properly state the law with respect to aiders and abettors and the material elements of felony murder.

Robbery and kidnapping require a particular intent. Neb. Rev. Stat. § 28-324 (Reissue 1989) provides: "(1) A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another

any money or personal property of any value whatever. (2) Robbery is a Class II felony."

Neb. Rev. Stat. § 28-313 (Reissue 1989) provides:

> (1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:
>
> (a) Hold him for ransom or reward; or
>
> (b) Use him as a shield or hostage; or
>
> (c) Terrorize him or a third person; or
>
> (d) Commit a felony; or
>
> (e) Interfere with the performance of any government or political function.
>
> (2) Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.
>
> (3) If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.

Therefore, as developed in the immediately preceding subpart of this opinion, an alleged aider and abettor can be held criminally liable as a principal to a robbery or kidnapping if it is shown that the aider and abettor knew that the perpetrator of the robbery or kidnapping possessed the required intent or that the aider and abettor himself or herself possessed the required intent.

With regard to felony murder, the district court first instructed the jury that depending on evidence it found that the State has proved beyond a reasonable doubt, it might find Brunzo

> (1) Guilty of Murder in the First Degree in that . . . Brunzo, either alone or while aiding and abetting another person, killed [the victim] in the perpetration of, or attempt to perpetrate a robbery or kidnapping; or
>
> (2) Not Guilty.
>
> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict . . . Brunzo of the crime of Murder in the First Degree while in the perpetration of, or attempt to perpetrate a robbery or kidnapping are:

(1) That on or about the 6th day of December, 1993, . . . Brunzo, either alone or while aiding and abetting another person, did kill [the victim] . . . .

(2) That . . . Brunzo, either alone or while aiding and abetting another person, killed [the victim] while . . . Brunzo was:

a) Perpetrating a robbery upon [the victim], to wit: did forcibly and by violence, or by putting in fear, take from the person of [the victim] money or personal property of any value whatsoever either owned by or under the personal protection of [the victim] with the intent to steal, or

b) Attempting to perpetrate a robbery upon [the victim] by engaging in conduct, which, under the circumstances as . . . Brunzo believed them to be, constituted a substantial step in a course of conduct intended by . . . Brunzo to culminate in the crime of robbery, to wit: did forcibly and by violence, or by putting in fear, take from the person of [the victim] money or personal property of any value whatsoever either owned by or under the personal protection of [the victim] with the intent to steal, or

c) Perpetrating a kidnapping upon [the victim], to wit: did abduct [the victim], or having abducted him, continued to restrain him with the intent to terrorize him, or

d) Attempting to perpetrate a kidnapping upon [the victim] by engaging in conduct, which, under the circumstances as . . . Brunzo believed them to be, constituted a substantial step in a course of conduct intended by . . . Brunzo to culminate in the crime of kidnapping, to wit: did abduct [the victim], or having abducted him, continued to restrain him with the intent to terrorize him.

The district court also instructed the jury:

Criminal intent is a material and necessary element of the crime of Murder in the First Degree in the commission of a felony as charged against each defendant. But the intent required is not an intent to kill [the victim] but is an intent to commit a robbery or kidnapping.

The intent required by [other instructions] is a material

element of the crime charged against each defendant. Intent is a mental process, and it therefore generally remains hidden within the mind where it is conceived. It is rarely —if ever— susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of each defendant and from the facts and circumstances surrounding his conduct. It is for you to determine from all the facts and circumstances in evidence whether or not each defendant committed the acts complained of and whether at such time he had the criminal intent required by [other instructions]. If you have any reasonable doubt with respect to either, you must find that defendant not guilty.

With respect to the matter of aiding and abetting, the district court instructed the jury:

To be guilty of the crime charged, it is not necessary that the State prove that the defendant himself committed the unlawful act or acts in question.

Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.

If you find from the evidence beyond a reasonable doubt that the unlawful act or acts in question were committed by another person who was:

1. Engaged by the defendant to commit the unlawful act or acts; or

2. Engaged with the defendant in a common, concerted, unlawful act or acts; or

3. Incited or encouraged by the defendant to commit the unlawful act or acts,

then the defendant is as guilty as if he himself committed the unlawful act or acts, and it is your duty to find the defendant guilty.

Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.

> On the other hand, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving the defendant guilty.

The applicable rule is that jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985). The questioned instructions, read together and taken as a whole, fairly present the law regarding felony murder and an aider and abettor's criminal liability as a principal. Under those circumstances, that they use words different than those Brunzo tendered is immaterial.

Although we have suggested that whenever an instruction contained in the Nebraska Jury Instructions is applicable and, from a consideration of the facts and prevailing law, the trial court determines that an instruction on a particular subject is appropriate, the instruction in the Nebraska Jury Instructions should be used, as a general matter a trial court retains discretion in the wording of jury instructions. *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992). Cf. *State v. Bartholomew*, 212 Neb. 270, 322 N.W.2d 432 (1982) (whenever instruction in Nebraska Jury Instructions is applicable, that instruction shall be used).

In the final analysis, a trial court's obligation is to instruct correctly. So long as that is done, the source of its language is unimportant.

Inasmuch as the instructions given properly reflect the law, this assignment of error is as meritless as those preceding it.

V. JUDGMENT

Because the record fails to sustain any assignment of error, the judgment of the district court, as first noted in part I, must be and hereby is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PATRICK J. CRAVEN, RESPONDENT.

532 N.W.2d 337

Filed June 2, 1995. No. S-95-514.

Original action. Judgment of disbarment.

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

PER CURIAM.

Patrick J. Craven was admitted to the practice of law in Nebraska on September 12, 1984.

On March 23, 1995, a nine-count complaint against Craven was filed with the Nebraska State Bar Association's Committee on Inquiry of the Fifth Disciplinary District.

Count I of the complaint charged that Craven received $300 to represent a client in a bankruptcy proceeding, that he never filed a petition in bankruptcy for the client, and that he returned to the client only half of the money paid him.

Count II of the complaint charged that Craven represented a client in the Nebraska Court of Appeals, that Craven failed to file a brief in that court although ordered by the court to do so, and that as a result, the client's appeal was dismissed.

Count III of the complaint charged in substance that a female client had employed Craven in June 1992 to file divorce proceedings against her husband, that no filing was made until December 1993, that a summons was issued, and that the court records reflect no further action in the case until December 12, 1994, when the court ordered that cause be shown why the case should not be dismissed. Allegedly the case was dismissed for lack of prosecution on January 9, 1995.

Count IV of the complaint charged Craven with failing to file an accounting for a guardian/conservator in the Lancaster County Court although such accounting was ordered by the judge.

Counts V through IX, inclusive, charged Craven with violating certain Nebraska Supreme Court Rules of Discipline which required him to respond to the charges in counts I through IV. He was charged with failing to respond as required

by the disciplinary rules.

On May 18, 1995, Craven filed a voluntary surrender of his license to practice law in Nebraska. In surrendering his license, Craven admitted the basic facts alleged in the complaint filed against him and admitted that he had violated various sections of the Nebraska Supreme Court Rules of Discipline and the lawyers' Code of Professional Responsibility. He also admitted that he had violated his oath of office as an attorney.

In surrendering his license to practice law, Craven freely, knowingly, and voluntarily consented to the entry of an order of disbarment, and freely, knowingly, and voluntarily waived his right to notice, appearance, or hearing prior to the entry of such an order.

We accept Craven's surrender of his license to practice law in Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately. We further order Craven to comply with Neb. Ct. R. of Discipline 16 (rev. 1992), and upon his failure to do so, he shall be subject to punishment for contempt of this court.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.

CARROLL E. EBERSPACHER AND MARGARET A. EBERSPACHER, APPELLANTS, V. TRICIA V. HULME AND REX A. EBERSPACHER, APPELLEES.

533 N.W.2d 103

Filed June 9, 1995. No. S-93-072.

1. **Visitation: Appeal and Error.** Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's 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 the judicial system.

Petition for further review from the Nebraska Court of Appeals, IRWIN, MILLER-LERMAN, and MUES, Judges, on appeal thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge. Judgment of Court of Appeals reversed, and cause remanded.

Gregory D. Barton, of Harding & Ogborn, for appellants.

Paul E. Galter, of Bauer, Galter, O'Brien, Allan & Butler, for appellee Hulme.

Charles M. Bressman, Jr., and Jeff C. Miller, of Young & White, for appellee Rex A. Eberspacher.

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

LANPHIER, J.

Carroll E. and Margaret A. Eberspacher, the paternal grandparents of Shane and Matthew Eberspacher, petitioned the district court for Lancaster County for visitation rights with Shane and Matthew. The district court denied them visitation. The grandparents appealed to the Court of Appeals. The Court of Appeals reversed the district court and ordered visitation, finding that the district court had abused its discretion. *Eberspacher v. Hulme*, 94 NCA No. 51, case No. A-93-072 (not designated for permanent publication). We granted the petition for further review of Tricia V. Hulme, the children's mother. Because the record before the court demonstrates that the district court did not abuse its discretion, we reverse the judgment of the Court of Appeals and remand the cause to that court with direction that it reinstate the judgment of the district court.

BACKGROUND

Tricia Hulme and Rex A. Eberspacher were married in 1983 and had two sons, Shane and Matthew, before they divorced in 1989. After the divorce, Tricia Hulme was awarded custody of the children, and Rex Eberspacher was granted visitation. Rex

Eberspacher's visitation included every other weekend, overnight each Wednesday evening, certain alternating holiday visitations, and a total of 3 weeks of summer visitation to be exercised 1 week at a time during the months of June, July, and August. Since the divorce, Tricia Hulme and Rex Eberspacher have been in nearly constant litigation regarding visitation.

At the time of the divorce, both Rex Eberspacher and Tricia Hulme lived in Omaha. Shortly thereafter, Rex Eberspacher moved to Parkville, Missouri, and Tricia Hulme moved to Grand Island, Nebraska. Carroll and Margaret Eberspacher live in Friend, Nebraska. In December 1989, Rex Eberspacher initiated a proceeding to modify the divorce decree. Rex Eberspacher's visitation rights were modified, based in part upon a stipulation and in part upon evidence adduced at trial. After the modification, Rex Eberspacher's visitation was one weekend per month, alternating holiday weekends to include the children's entire holiday vacation from school, and 35 consecutive days in the summer.

Shortly after this order became final, in April 1991, Tricia Hulme moved to Lincoln, Nebraska. Rex Eberspacher wanted expanded visitation. He then wrote Tricia Hulme, requesting that his visitation be informally modified. In this letter, Rex Eberspacher wrote the following:

> In support of my desire to work out an agreement with you, I have asked my attorney to cease all pending litigations and hold-off on filing any petitions in response to the change of circumstances that has occurred recently with your move to Lincoln. I have asked mom and dad to hold-off in their pursuit of grandparents' rights as well.

In June 1991, Rex Eberspacher again filed an application for modification. Although the record does not reveal the outcome of this application, it is clear that visitation rights were not affected.

In May 1992, Carroll and Margaret Eberspacher filed a petition in the district court for Lancaster County seeking grandparent visitation rights pursuant to Neb. Rev. Stat. § 43-1801 et seq. (Reissue 1993). The petition seeking visitation and the subsequent action are the subjects of this appeal.

In their amended petition, the grandparents allege that a significant beneficial relationship exists; that it would be in the best interests of the children to allow the relationship to continue; that the granting of grandparent visitation would not adversely interfere with the parent-child relationship; and that they have tried to reconcile their differences, but Tricia Hulme refuses to enter into an agreement on the issue.

After a trial at which each of the parents and grandparents testified, the district court denied the petition. The district court determined that there was not clear and convincing evidence that there is or has been a significant beneficial relationship between the grandparents and the children, that it is in the best interests of the children that such relationship continue, or that such visitation will not adversely interfere with the parent-child relationship.

After its thorough review of the record, the Court of Appeals came to the opposite conclusion, that "separate and reasonable visitation rights . . . would serve the best interests of Shane and Matthew and would not adversely interfere with the parent-child relationship of either Tricia or Rex with the children." *Eberspacher*, 94 NCA No. 51 at 22. The Court of Appeals reversed the judgment of the district court, finding that the district court's denial of grandparent visitation was an abuse of discretion. It is from this order that Tricia Hulme appeals.

ASSIGNMENTS OF ERROR

In her petition for further review, Tricia Hulme asserts the Court of Appeals erred (1) in failing to recognize the trial court's discretionary authority under the pertinent statutes and (2) in failing to recognize that it was within the district court's discretion to decline to grant grandparent visitation because the petition was a collateral attack by Rex Eberspacher.

STANDARD OF REVIEW

Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion. *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994).

ANALYSIS

In Nebraska, grandparent visitation is provided for by statute. § 43-1801 et seq. Section 43-1802 provides, in pertinent part, the following with respect to grandparent visitation:

> (1) A grandparent may seek visitation with his or her minor grandchild if:
>
> (a) The child's parent or parents are deceased;
>
> (b) The marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered; or
>
> (c) The parents of the minor child have never been married but paternity has been legally established.
>
> (2) In determining whether a grandparent shall be granted visitation, the court shall require evidence concerning the beneficial nature of the relationship of the grandparent to the child. The evidence may be presented by affidavit and shall demonstrate that a significant beneficial relationship exists, or has existed in the past, between the grandparent and the child and that it would be in the best interests of the child to allow such relationship to continue. Reasonable rights of visitation may be granted when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.

It is within this statutory framework that we review the record and the respective conclusions of the lower courts. The statute plainly sets out three criteria for awarding grandparent visitation: (1) There is, or has been, a significant beneficial relationship between the grandparent and the child; (2) it is in the best interests of the child that such relationship continue; and (3) such visitation will not adversely interfere with the parent-child relationship. Each of the criteria must be proven by clear and convincing evidence before a court may grant grandparent visitation rights. However, even where each of the three criteria is proven by clear and convincing evidence,

grandparent visitation is not mandated. The statute provides that reasonable rights of visitation *may* be granted when the criteria have been met. When the word "may" appears in a statute, permissive or discretionary action is presumed. Neb. Rev. Stat. § 49-802(1) (Reissue 1993). Thus, the statute gives the trial court discretion to make the determination.

At issue here is whether the district court abused that discretion in denying the Eberspachers grandparent visitation rights.

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 the judicial system. *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995).

In light of the record, we cannot agree with the Court of Appeals that the district court abused its discretion in denying the petition for grandparent visitation. The record primarily consists of the testimony of Carroll, Margaret, and Rex Eberspacher and Tricia Hulme.

At trial, Carroll Eberspacher testified that when Rex Eberspacher and Tricia Hulme were married and living in Shelton, Nebraska, the grandparents went to visit the children at least once or twice a month. Later, when Rex Eberspacher and Tricia Hulme were living in Omaha, the grandparents visited about once a month. When the grandparents visit the grandchildren, they will take them to baseball games, to see fireworks, on walks, or just play with them. Carroll Eberspacher testified that currently he sees the children only on Rex Eberspacher's scheduled visitation. Carroll Eberspacher testified that he has called Tricia Hulme seeking visitation, but has always been denied. He testified that he says nothing disrespectful about Tricia Hulme in front of the children.

Carroll Eberspacher repeatedly testified that he would not have sought grandparent visitation if Rex Eberspacher would have received more time for visitation. Carroll Eberspacher stated that he does not think grandparent visitation will interfere with the children's relationship with their mother and father. He

characterized his relationship with his grandchildren as a strong, beneficial relationship.

Margaret Eberspacher testified that she believes it would be in the children's best interests to have grandparent visitation awarded. She believes visitation will allow the children to love and trust their grandparents and get to know their extended family. She stated that she has a significant beneficial relationship with her grandsons. Margaret stated that she has not said anything derogatory about Tricia Hulme in the children's presence. She also stated that she is seeking visitation through the courts because Tricia Hulme never worked with them in any way toward agreeing to visitation.

Rex Eberspacher testified that he supports his parents' request for grandparent visitation. He stated that he believes the relationship between the children and his parents benefits the children because they learn to love others and are taught basic values of life by his parents. Rex Eberspacher testified that it was his opinion that grandparent visitation would not adversely affect the mother-child relationship.

With respect to whether he was the cause of his parents' suing for grandparent visitation, Rex Eberspacher testified that he "could have said" that he could have stopped his parents from pursuing visitation rights. Rex Eberspacher also stated that he discussed this action with his father before it was brought.

Tricia Hulme testified that she did not want the additional restrictions that court-ordered visitation would bring to her life and the lives of her children. She explained that she is willing to allow some type of visitation but does not want additional court-ordered restrictions. She testified that in her opinion the increased restrictions of grandparent visitation would not be in the best interests of her children. Tricia Hulme also testified about animosity that exists between her and the Eberspachers and also about some incidents illustrating the difficulties the animosity creates. Tricia Hulme testified that Carroll Eberspacher called her after he filed the petition for grandparent visitation and said, " 'I see you got my little birthday card, huh?' "

The undisputed evidence of record is that the grandparent-grandchild relationship here is an unremarkable,

typical, healthy relationship. The district court, however, which observed the witnesses, did not find clear and convincing evidence that the relationship was such that it would be in the best interests of the children that it continue or that court-ordered grandparent visitation would not adversely interfere with the parent-child relationship. Even assuming the Court of Appeals was correct—that there was clear and convincing evidence of the three criteria required by § 43-1802—we cannot say that the district court abused its discretion in denying the grandparents' petition, in light of the litigious relationship in this case.

There is evidence that the increased structure in the lives of Tricia Hulme and her children may be detrimental. Additionally, the adverse relationship between Tricia Hulme and Carroll and Margaret Eberspacher and the resulting incidents are evidence that ordered visitation may not be in the best interests of the children.

It is clear that the children's relationship with their grandparents will continue even though the petition is denied. There is nothing to suggest that Rex Eberspacher will not continue to share his allotted visitation with his parents. Rex Eberspacher's strong opinion of the value of his children's relationship with their grandparents seems to confirm that the relationship will continue despite denial of separate grandparent visitation.

CONCLUSION

The Court of Appeals erred in determining that the district court abused its discretion. We, therefore, 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.

REVERSED AND REMANDED.

ELVIN D. KROHN AND PHYLLIS J. KROHN, APPELLANTS, V. RANDY R. GARDNER, APPELLEE, AND FARM BUREAU INSURANCE COMPANY OF NEBRASKA, GARNISHEE-APPELLEE.

533 N.W.2d 95

Filed June 9, 1995. No. S-94-148.

1. **Summary Judgment.** Summary judgment is proper 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. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the moving party is entitled to judgment as a matter of law.
4. ____: ____. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
5. **Assignments: Words and Phrases.** An assignment is a transfer vesting in the assignee all of the assignor's rights in the property which is the subject of the assignment.
6. **Assignments: Intent.** The intention of an assignor must be to transfer a present interest in a debt or fund or subject matter; if this intent is clearly expressed, the transaction is an assignment.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Reversed and remanded with directions.

Terry K. Gutierrez, of Schmid, Mooney & Frederick, P.C., for appellants.

John W. Iliff, of Gross & Welch, P.C., for garnishee-appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and CORRIGAN, D.J.

WHITE, C.J.

Elvin D. and Phyllis J. Krohn appeal from an order of the

district court sustaining Farm Bureau Insurance Company of Nebraska's motion for summary judgment. The Krohns' garnishment proceedings in aid of execution against Farm Bureau were dismissed on the basis that the Krohns were not the real parties in interest.

The Krohns and Randy R. Gardner were involved in an automobile accident in October 1983. The Krohns obtained judgments against Gardner in the amount of $25,000 each. Farm Bureau, with whom Gardner claimed he was insured, denied coverage to Gardner, stating that the required payment for adding Gardner's car onto an existing policy was not timely received.

Gardner filed a declaratory judgment action against Farm Bureau in the district court for Pierce County to determine whether Gardner was covered under the policy in existence at the time of the accident. Gardner and Farm Bureau stipulated that no coverage existed, and the district court dismissed the action. The Krohns made claim from Farm Bureau, but Farm Bureau refused to pay the Krohns, maintaining that the automobile operated by Gardner was not an insured vehicle.

The Krohns then filed suit against their own insurance company, Farmer's Union Co-op, to collect under their automobile policy's uninsured motorist provision. In exchange for dismissal of the Krohns' suit against it, Farmer's Union agreed to pursue Gardner and Farm Bureau on behalf of the Krohns to recover payment. If unsuccessful, Farmer's Union agreed to pay the Krohns $15,000 each pursuant to the uninsured motorist provision in Krohns' automobile policy, less $2,977.05 paid by Farmer's Union for medical expenses.

Farmer's Union, in the Krohns' name, instituted garnishment proceedings against Gardner and Farm Bureau. The cases were consolidated. Farm Bureau requested summary judgment, arguing that the judgment in Gardner v. Farm Bureau, Pierce County District Court, case No. 6331, was res judicata regarding the issue of the existence of coverage in this case. This court in *Krohn v. Gardner*, 238 Neb. 460, 471 N.W.2d 391 (1991), decided that the Krohns were not bound by the results of the declaratory judgment action to which they were not parties. The judgment was reversed and the cause remanded for

a new trial.

On remand, Farm Bureau again filed a motion for summary judgment, arguing that the Krohns are not the real parties in interest in this case because they assigned all rights to pursue this case to their insurer, Farmer's Union. The district court agreed and dismissed the Krohns' garnishment proceedings. The Krohns now appeal. The Krohns contend that the district court erred in finding that they are not the real parties in interest to pursue these garnishment proceedings and in granting Farm Bureau's motion for summary judgment.

Summary judgment is proper 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. *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995). See, *Heath Consultants v. Precision Instruments*, 247 Neb. 267, 527 N.W.2d 596 (1995); *Huntwork v. Voss*, 247 Neb. 184, 525 N.W.2d 632 (1995). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Gravel, supra*. See, *Huntwork, supra*; *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 525 N.W.2d 25 (1994).

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the moving party is entitled to judgment as a matter of law. *Gravel, supra*; *Schlake v. Jacobsen*, 246 Neb. 921, 524 N.W.2d 316 (1994); *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994). After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Gravel, supra*. See, *Schlake, supra*; *In re Estate of Wagner, supra*.

Farm Bureau argues that the Krohns assigned to Farmer's

Union their rights to sue Farm Bureau by executing a settlement agreement with Farmer's Union. The agreement provided that in return for the Krohns' dismissing with prejudice the action filed by the Krohns against Farmer's Union, (1) Farmer's Union would provide legal counsel to enforce judgment against Farm Bureau; (2) Farmer's Union would be responsible for all attorney fees, regardless of the outcome of the garnishment action; (3) Farmer's Union would have authority to act on the Krohns' behalf; (4) Farmer's Union would have the option to appeal any decision made by a court with regard to the garnishment action; (5) in the event of a final judicial determination in favor of Farm Bureau, Farmer's Union would make full payment of its uninsured motorists limits ($30,000) with an offset of its subrogation interest for medical payments of $2,977.05; and (6) in the event of a final judicial determination against Farm Bureau, the $2,977.05 would be offset against whatever amount the Krohns recover from Farm Bureau.

An assignment is a transfer vesting in the assignee all of the assignor's rights in the property which is the subject of the assignment. *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993). Subrogation is the substitution of a subrogee, who is not a volunteer, for a subrogor as a result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee. *Id.* To be entitled to subrogation, one must pay the debt for which another is liable. *Id.*

We set forth the distinction between an assignment and subrogation in *Milbank Ins. Co. v. Henry*, 232 Neb. 418, 420–21, 441 N.W.2d 143, 145 (1989), where we stated that

> "[s]ubrogation involves the substitution of an insurer by operation of law to the rights of the insured because of the insurer's pre-existing duty to pay the insured for the loss. In contrast, an assignment involves a transfer of a legal claim from an injured party to a volunteer who was under no pre-existing duty to compensate the injured party. Moreover, under subrogation an insurer's recovery is limited to the amount paid to the insured, whereas there is no such limitation on an assignee's recovery. . . ."

A search of the record in the case now before us indicates that Farmer's Union, the Krohns' insurer, never paid the Krohns pursuant to the uninsured motorist provision of the Krohns' automobile policy. Indeed, the agreement between the Krohns and Farmer's Union specifically states that the Krohns *will receive* part of their payment under the uninsured motorist provision *if* Farm Bureau prevails in the garnishment action. Farmer's Union never paid the Krohns, and thus this case is not one based on subrogation. Furthermore, if Gardner was not uninsured as Farmer's Union argues, Farmer's Union had no preexisting duty to pay the Krohns under the uninsured motorist provision.

The intention of an assignor must be to transfer a present interest in a debt or fund or subject matter; if this intent is clearly expressed, the transaction is an assignment. *Tilden v. Beckmann*, 203 Neb. 293, 278 N.W.2d 581 (1979).

"Every action must be prosecuted in the name of the real party in interest . . . ." Neb. Rev. Stat. § 25-301 (Reissue 1989). "The assignee of a thing in action may maintain an action thereon in his own name and behalf, without the name of the assignor." Neb. Rev. Stat. § 25-302 (Reissue 1989). The assignee of a chose in action is the proper and only party who can maintain the suit thereon. *Crum v. Stanley*, 55 Neb. 351, 75 N.W. 851 (1898).

The agreement, in its strict sense, is nothing more than an undertaking by Farmer's Union to supply counsel and costs in the Krohns' attempt to secure payment of their judgments. No right of action is assigned to Farmer's Union. The presence of an agreement to pay the Krohns under the uninsured motorist provision does nothing more than restate the promise of payment present in the Krohns' policy of insurance. The Krohns are the real parties in interest. As such, the decision of the district court was incorrect, and the judgment must be reversed and the cause remanded for trial.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DENNIS D. LOWE, APPELLANT.

533 N.W.2d 99

Filed June 9, 1995. No. S-94-885.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of alleging and proving that a claimed error is prejudicial.
2. **Postconviction: Proof.** A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
3. **Homicide: Intent.** Malice is an element of second degree murder.
4. **Indictments and Informations: Homicide: Intent.** For an information to be sufficient to charge a defendant with second degree murder, the information must allege that the accused caused the death of another purposely and maliciously.
5. **Jury Instructions: Homicide: Intent: Appeal and Error.** The failure to include the element of malice in a jury instruction on second degree murder is prejudicial error.
6. **Jury Instructions: Appeal and Error.** 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.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded with direction.

James Martin Davis for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and RONIN, D.J., Retired.

PER CURIAM.

Dennis D. Lowe appeals the denial of his motion for postconviction relief by the district court for Douglas County. Lowe was found guilty of second degree murder on June 20, 1992, and is presently serving a life sentence. Lowe was convicted and sentenced as a result of an information and jury instructions which failed to include "malice" as an element of second degree murder. Malice is an essential element of second degree murder. The district court erred by denying postconviction relief. We reverse, and remand for a new trial.

BACKGROUND

The following statement of facts is summarized from the opinion of this court in *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993).

On the evening of January 10, 1992, Dennis D. Lowe went to a bar with some friends. Lowe had been drinking beer most of the day, and he stayed at the bar until closing time. After the bar closed, Lowe decided to go to a party, but got lost. Lowe continued to consume alcohol as he drove around searching for the party. Lowe stopped in an area known as Bum's Hollow to urinate, and then passed out or fell asleep in his truck.

Lowe testified that he was awakened by the victim, Victor Hempstead, undoing Lowe's jeans and groping his genitals. Lowe stated that he " 'freaked, got scared' " and started swinging a large flashlight that had been in the cab of his truck. *Id.* at 175, 505 N.W.2d at 666. Lowe testified that he could not recall how many times he swung the flashlight or hit the person. He stated that he could hear the man snoring, but despite the fact that he had just clubbed the man with a flashlight, he could not see the man, so he left.

Hempstead's body was found on January 11, 1992, lying faceup on the ground next to the driver's side of his pickup truck. Hempstead's jeans were unzipped, and his underwear had been stuffed down one of the legs of his jeans. An autopsy revealed that the cause of death was seven or eight blows to the head with a blunt instrument, causing very severe damage to the skull. A portion of the left side of Hempstead's skull was caved in.

Lowe turned himself in to the police on January 11 after he learned that a dead body had been found in Bum's Hollow. In the information, the State alleged that Lowe intentionally, but without premeditation, killed Hempstead. Lowe was also charged with the use of a deadly weapon to commit a felony.

Lowe was tried by a jury which found him guilty of second degree murder and the use of a deadly weapon to commit a felony. Lowe appealed his convictions to this court. We affirmed Lowe's convictions in all respects. See *State v. Lowe, supra.*

On April 14, 1994, Lowe filed a motion for postconviction

relief in the district court for Douglas County. The motion was denied without an evidentiary hearing on September 13.

ASSIGNMENT OF ERROR

Lowe asserts the district court erred in denying his motion for postconviction relief, because the failure to allege malice as an essential element of second degree murder constituted a denial or violation of Lowe's rights under the Nebraska and U.S. Constitutions.

STANDARD OF REVIEW

A criminal defendant seeking postconviction relief has the burden of alleging and proving that a claimed error is prejudicial. *State v. Plant, ante* p. 52, 532 N.W.2d 619 (1995); *State v. Eggers*, 247 Neb. 989, 531 N.W.2d 231 (1995). See *State v. Keithley*, 247 Neb. 638, 529 N.W.2d 541 (1995). A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Plant, supra*; *State v. Eggers, supra*.

ANALYSIS

Malice Is a Requisite Element of Second Degree Murder

We have stated for over a decade that malice is an element of second degree murder. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Ettleman*, 229 Neb. 220, 425 N.W.2d 894 (1988); *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986); *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983).

For an information to be sufficient to charge a defendant with second degree murder, the information must allege that the accused caused the death of another purposely and maliciously. *State v. Plant, supra*; *State v. Eggers, supra*; *State v. Ladig*, 246 Neb. 542, 519 N.W.2d 561 (1994); *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994). If the information for second degree murder did not include malice, the defendant was not charged with a crime.

The failure to include the element of malice in a jury instruction on second degree murder is prejudicial error. *State v. Plant, supra*; *State v. Eggers, supra*; *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995); *State v. Grimes, supra*; *State v. Myers, supra*.

In this case, jury instruction No. 5 informed the jury that it could find Lowe guilty of murder in the second degree, guilty of manslaughter, or not guilty. Instruction No. 5 also defined the material elements of the crimes of second degree murder. The record reflects that the material element of "malice" was omitted from the trial court's instruction on second degree murder. The record also reflects that the element of "malice" was not included in the information. Therefore, Lowe's conviction of second degree murder must be reversed.

The State argues that while malice per se was not defined or set forth in the jury instructions, the instructions nonetheless conveyed the concept of malice. 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. *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995); *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995); *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994). Here, as in *State v. Myers, supra*, the jury was instructed on the law of self-defense. The State apparently argues that the instruction regarding self-defense, when read with the instruction regarding second degree murder, correctly states the law, including the element of malice. However, in *Myers*, the failure to include the essential element of malice in the second degree murder jury instruction was prejudicial error, and such error was not cured by the presence of the instruction regarding self-defense. Therefore, the fact that the jury was instructed regarding self-defense in this case does not cure the prejudicial error resulting from the failure to instruct on malice.

Refusal to Follow Precedent

In its order, the district court noted that this court has held that malice is an element of second degree murder and that

malice must be a part of the jury instructions, citing *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994); *State v. Grimes, supra*; *State v. Manzer, supra*; and *State v. Ladig, supra*.

The district court, aware of and citing binding precedent controlling the outcome of this case, went on to decide this case contrary to that controlling law. The district court opined gratuitously that this court has been in error the past 11 years when it has read a scienter requirement into the statutory definition of the crime of second degree murder. The district court announced that this court was "legislating."

The district court went on to deny relief and held that the jury instruction for second degree murder was appropriate despite the fact that the jury instruction did not include the element of "malice."

Apparently, the district court is ignorant of an appellate court's practice to read criminal intent into a statute when necessary. "As a general rule criminal statutes are interpreted to require criminal intent." 3 Norman J. Singer, Statutes and Statutory Construction § 59.04 at 118 (5th ed. 1992). See, also, *Staples v. U.S.*, ____ U.S. ____, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994); *Ratzlaf v. U.S.*, ____ U.S. ____, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994); *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978); *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952); *U.S. v. Gendron*, 18 F.3d 955 (1st Cir. 1994); *U.S. v. Schnell*, 982 F.2d 216 (7th Cir. 1992); *U.S. v. Singleton*, 946 F.2d 23 (5th Cir. 1991); *U.S. v. Semenza*, 835 F.2d 223 (9th Cir. 1987); *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985).

We are now again asked to overrule longstanding decisions of this court requiring criminal intent for second degree murder. The fact that some lower courts and prosecutors were unaware of or ignorant of this court's decisions since 1983 should not thereby force this court to ignore stare decisis and change the law to accommodate such error in order to secure or uphold a conviction. Stare decisis is a fundamental principle of law. See *Muller v. Nebraska Methodist Hospital*, 160 Neb. 279, 70 N.W.2d 86 (1955).

Judges must be faithful to the law. Canon 3B(2) of the

Nebraska Code of Judicial Conduct. The preamble to the Code of Judicial Conduct states that the "law" denotes all court rules adopted by this court, as well as statutes, constitutional provisions, and decisional law. A judge shall respect the law and must act at all times in a manner that promotes public confidence in the integrity of the judiciary. Canon 2A of the Code of Judicial Conduct.

This is not the first time that the district court for Douglas County has ignored binding precedent. *State v. Plant, ante* p. 52, 532 N.W.2d 619 (1995); *State v. Wilson*, 247 Neb. 948, 530 N.W.2d 925 (1995); *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995). Failure to follow precedent can be a violation of the judge's sworn duty. The integrity of the judicial system dictates that courts follow binding precedent. Conscious failure to do so constitutes contempt for the system. This court is bound to act, and will when we deem it appropriate, when a judge continues to ignore decisions of this court. *In re Complaint Against Staley*, 241 Neb. 152, 486 N.W.2d 886 (1992).

As a result of the prejudicial jury instructions, we must and do grant Lowe the relief that the district court willfully and erroneously denied.

CONCLUSION

We reverse the judgment of the district court and set aside Lowe's conviction of second degree murder. Furthermore, because Lowe's conviction of use of a deadly weapon in the commission of a felony is predicated upon his conviction of a felony, it must also be reversed. *Wilson, supra*; *Williams, supra*. The cause is remanded to the district court with direction to grant Lowe a new trial.

REVERSED AND REMANDED WITH DIRECTION.

CONNOLLY, J., dissenting.

I respectfully dissent from the result reached by the majority, based on my agreement with Justice Wright's dissenting opinion in *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994).

WRIGHT, J., joins in this dissent.

LINCOLN LUMBER COMPANY, A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. KERWIN FOWLER AND MAVIS FOWLER, APPELLEES AND CROSS-APPELLANTS.

533 N.W.2d 898

Filed June 16, 1995. No. S-93-785.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a verdict and will not be set aside on appeal unless they are clearly wrong.
2. **Appeal and Error.** An appellate court has an obligation to reach conclusions on questions of law independent of the trial court's ruling.
3. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision allowing or disallowing an attorney fee under Neb. Rev. Stat. § 25-824 (Reissue 1989) will be upheld in the absence of the trial court's abuse of discretion.
4. **Res Judicata: Judgments.** The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
5. **Res Judicata: Proof: Judgments.** When different proof is required to establish a cause, a judgment in one action does not preclude another action.
6. **Res Judicata: Judgments.** Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. The judgment in a former action between the same parties is final as to every issue which could have been decided in that action.
7. **Res Judicata.** The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in an earlier proceeding.
8. ____. The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.
9. **Evidence: Records: Appeal and Error.** In a law action, before an appellate court can consider evidence bearing upon an issue of fact, evidence must have been offered at the trial court and embodied in the bill of exceptions filed with the appellate court.
10. **Debtors and Creditors: Interest.** In the absence of a contract or statute, compensation in the form of compound interest is not allowed to be computed upon a debt.
11. **Actions.** An action is frivolous or in bad faith if a party attempts to relitigate the same issue previously resolved in an action involving the same party.
12. ____. A proliferation of actions on issues already adjudicated engenders disrespect

for the law, unnecessarily adds to an overburdened judicial caseload, and will not be tolerated.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Douglas D. DeLair, of DeLair & DeLair, for appellant.

John C. Hahn, of Jeffrey, Hahn & Hemmerling, P.C., for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and RONIN, D.J., Retired.

FAHRNBRUCH, J.

Plaintiff, Lincoln Lumber Company, a Nebraska corporation, appeals a district court order dismissing its petition seeking $25,905.82 in alleged unpaid interest from the guarantors of Fowler Custom Homes, Inc., Mavis Fowler and Kerwin Fowler.

The district court for Lancaster County dismissed Lincoln Lumber's petition because the court previously held in a case against Mavis Fowler that Lincoln Lumber charged a usurious rate of interest on a promissory note. In the instant lawsuit, the trial court found that Lincoln Lumber had released the separate guaranties of Mavis Fowler and Kerwin Fowler.

In this court, the Fowlers cross-appeal, claiming they are entitled to attorney fees because Lincoln Lumber's lawsuit is "frivolous" and their counterclaim in the district court for attorney fees should have been granted.

We affirm the judgment of the trial court in part, reverse it in part, and remand the cause to the district court for further proceedings.

I. ASSIGNMENTS OF ERROR

Lincoln Lumber claims that the trial court erred in (1) finding that the rate of interest was usurious, (2) applying the court's judgment in a prior action filed by Lincoln Lumber against Mavis Fowler in dismissing Lincoln Lumber's petition, and (3) finding that Lincoln Lumber released each of the Fowlers' guaranties.

In their cross-appeal, the Fowlers assign that the trial court erred in not awarding attorney fees on the ground of a frivolous lawsuit.

II. STANDARD OF REVIEW

In a bench trial of a law action, the trial court's factual findings have the effect of a verdict and will not be set aside on appeal unless they are clearly wrong. *First Westside Bank v. For-Med, Inc.*, 247 Neb. 641, 529 N.W.2d 66 (1995). An appellate court has an obligation to reach conclusions on questions of law independent of the trial court's ruling. *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995).

On appeal, a trial court's decision allowing or disallowing an attorney fee under Neb. Rev. Stat. § 25-824 (Reissue 1989) will be upheld in the absence of the trial court's abuse of discretion. *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993).

It is necessary to discuss the action against the two Fowlers separately because Mavis Fowler and Kerwin Fowler signed separate personal guaranties. In addition, Mavis Fowler alone signed a promissory note. Different rules of law are applicable to each of the Fowlers.

III. ACTION AGAINST MAVIS FOWLER

1. FACTS

On July 26, 1990, Lincoln Lumber filed an amended petition against Mavis Fowler, individually, seeking judgment on a $60,318.24 promissory note she had personally issued to Lincoln Lumber, which equaled in amount the debt Fowler Custom Homes owed to Lincoln Lumber. Lincoln Lumber alleged that on December 12, 1989, Mavis Fowler executed a personal promissory note and failed to pay the principal of the debt owing to Lincoln Lumber. Mavis Fowler's note purportedly bore interest at the rate of 2 percent per month on the unpaid balance of the promissory note. The evidence reflects that Lincoln Lumber wanted a personal promissory note from Mavis Fowler in order to secure the Fowler Custom Homes and Kensington Park Partnership accounts. The record reflects that, at all times relevant, Kerwin Fowler held 50 percent of Fowler Custom Homes' stock and was the chief operating officer of the corporation and that Mavis Fowler was a corporate officer of Fowler Custom Homes.

After the trial in the promissory note case, the district court,

on February 19, 1992, found that the principal amount owed Lincoln Lumber on Mavis Fowler's promissory note was $31,927.24. The court also held that the interest rate of 24 percent per annum contained in the promissory note exceeded the statutory rate allowed by Neb. Rev. Stat. § 45-101.03 (Reissue 1988). The court held that a 24-percent rate of interest was usurious and was not collectible from Mavis Fowler as an individual. The judgment of the court was not appealed by Lincoln Lumber and became final. The record reflects that Mavis Fowler paid the $31,927.24 judgment to Lincoln Lumber by April 6, 1992. That payment was applied by Lincoln Lumber in satisfaction of Fowler Custom Homes' indebtedness of principal to Lincoln Lumber.

On December 12, 1989, the same date that Mavis Fowler executed the previously litigated promissory note, she also signed a guaranty with Lincoln Lumber. In the guaranty, Mavis Fowler unconditionally promised to pay any sum or balance on the account of Fowler Custom Homes with Lincoln Lumber after the debt "becomes due and is not paid within 10 days after receiving the written demand" from Lincoln Lumber. Lincoln Lumber's petition and exhibit 10 in this lawsuit reflect that the only principal indebtedness upon which Lincoln Lumber filed its lawsuits was that of Fowler Custom Homes.

It is undisputed that Lincoln Lumber charged an interest rate of 24 percent per annum on the guaranty and the previously litigated promissory note.

On June 8, 1992, slightly less than 4 months following the entering of the judgment in the action against Mavis Fowler, Lincoln Lumber filed a petition against the Fowlers, seeking $25,905.82 plus prejudgment interest. It is undisputed that the $25,905.82 represented alleged unpaid interest on only the Fowler Custom Homes account. Lincoln Lumber alleged that the debt of Fowler Custom Homes to Lincoln Lumber was payable in full by the guarantors within 10 days after the guarantors received the written demand. Lincoln Lumber alleged that Mavis Fowler was liable as guarantor for the Fowler Custom Homes debt as a result of her personal guaranty executed on December 12, 1989.

The Fowlers affirmatively alleged that Lincoln Lumber's

action was barred by res judicata due to the previous district court judgment dated February 19, 1992.

At a bench trial, Don Hamill, president of Lincoln Lumber, agreed under cross-examination that the debt alleged in the petition represented the interest that Lincoln Lumber sought in the prior action against Mavis Fowler. Beverly Hamill, the office manager in charge of books for Lincoln Lumber, testified that of the original $60,318.24 owed Lincoln Lumber by Fowler Custom Homes, the principal was paid in full and the remaining balance for which suit was instituted was for the unpaid service charge.

On August 2, 1993, the district court dismissed Lincoln Lumber's petition. The court found that Lincoln Lumber sought to collect a usurious rate of interest as determined in a prior action.

2. Analysis

The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994).

The district court for Lancaster County, a court of competent jurisdiction, entered a final judgment on February 19, 1992, regarding an action brought by Lincoln Lumber against Mavis Fowler for allegedly failing to pay the principal and interest due on a promissory note executed on December 12, 1989. The district court, ruling on the merits, awarded Lincoln Lumber only the amount owed on the principal and disallowed any interest claimed because the court found it to be usurious.

A distinction does exist, in that the first litigation against Mavis Fowler was based upon a promissory note and the second upon a guaranty. The promissory note and the guaranty, however, were executed on the same date backing up the same principal debtor for the same principal amount and the same interest rate. When different proof is required to establish a

cause, a judgment in one action does not preclude another action. See *Cockle v. Cockle*, 215 Neb. 329, 339 N.W.2d 63 (1983). In the case at bar, the proof required of Lincoln Lumber to prevail against Mavis Fowler is that Fowler Custom Homes defaulted on its indebtedness to Lincoln Lumber and that Mavis Fowler breached her contractual duty to pay in full the same debt previously litigated.

Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. *Commercial Fed. Sav. & Loan Assn. v. Matt*, 232 Neb. 26, 439 N.W.2d 463 (1989). The judgment in a former action between the same parties is final as to every issue which could have been decided in that action. *Id.* The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in an earlier proceeding. *Hangman v. Bruening*, 247 Neb. 769, 530 N.W.2d 247 (1995). The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause. *Id.*

Lincoln Lumber could have included, as a part of its first lawsuit against Mavis Fowler, its theory which it alleges in this lawsuit, that she was also liable under her guaranty. There is no reason why Mavis Fowler should be vexed by forcing her to submit to two lawsuits to satisfy a single indebtedness to Lincoln Lumber.

As a result, Lincoln Lumber is barred from bringing its current action against Mavis Fowler.

IV. ACTION AGAINST KERWIN FOWLER

1. Facts

Kerwin Fowler signed a guaranty with Lincoln Lumber on September 7, 1985. Kerwin Fowler unconditionally promised to pay any sum or balance on the accounts of "Fowler Custom Homes, Mr. & Mrs. Kerwin Fowler, &. Kensington Apts." owed

to Lincoln Lumber after the debt "becomes due and is not paid, within 10 days after receiving the written demand" from Lincoln Lumber.

The record shows that on September 8, 1988, Kerwin Fowler signed another guaranty to pay the balance on the accounts of Fowler Custom Homes and Kensington Apartments owed to Lincoln Lumber.

The 1988 guaranty differs from the 1985 guaranty in two ways. First, the 1985 guaranty obligates the debtor to pay collection costs incurred in enforcing the guaranty whereas the 1988 guaranty obligates the guarantor to pay the collection costs. Second, the 1985 guaranty granted Lincoln Lumber a security interest in the guarantor's equipment, inventory, accounts, general intangibles, and chattel paper. The 1988 guaranty granted Lincoln Lumber an additional lien against the property in the possession of "each guarantor."

It is undisputed that Lincoln Lumber charged a 24-percent rate of interest per annum on the account of the guarantor of Fowler Custom Homes. The record further reflects that Lincoln Lumber was compounding the interest.

On December 12, 1989, Lincoln Lumber released the guaranty signed by Kerwin Fowler on September 8, 1988, for debts held by Fowler Custom Homes and Kensington Apartments. The record does not, however, indicate that the guaranty signed on September 7, 1985, was released.

In the petition filed against the Fowlers, Lincoln Lumber alleged that Kerwin Fowler was liable for the unpaid interest due on the account of Fowler Custom Homes based upon his signed guaranty of September 7, 1985.

The district court dismissed the petition on the ground of res judicata, discussed above, and also found that Lincoln Lumber released the guaranty made by Kerwin Fowler.

2. Analysis

(a) Release of Guaranty

The record reflects that on December 12, 1989, Lincoln Lumber released Kerwin Fowler from only his 1988 guaranty and not the guaranty in question, signed on September 7, 1985. The language in the 1988 guaranty does not purport to act as a

substitute for the 1985 guaranty. Thus, the release from the later obligation has no effect on the earlier obligation.

The bill of exceptions contains exhibit 17, which reflects that on December 12, 1989, Lincoln Lumber released guaranties made by Fowler Custom Homes and Kensington Apartments on September 7, 1985, and September 8, 1988, regarding three lots in the Kensington Park Subdivision, Lincoln; Lot 24, Block 1, corrected Plat of Trendwood 8th addition, Lincoln; and Lot 22, Block 4, Normandy Square Replat, Lincoln. Exhibit 17 is relied upon, in part, by the district court in its finding that Lincoln Lumber released Kerwin Fowler from the guaranty. However, there is nothing in the record to show that the trial court received exhibit 17 into evidence following a foundational objection by counsel for Lincoln Lumber. In a law action, before an appellate court can consider evidence bearing upon an issue of fact, evidence must have been offered at the trial court and embodied in the bill of exceptions filed with the appellate court. See *Smick v. Langvardt*, 216 Neb. 778, 345 N.W.2d 830 (1984).

In any event, the document purports to release guaranties made by Fowler Custom Homes and Kensington Apartments and does not release the September 7, 1985, guaranty made by Kerwin Fowler, personally.

Based upon the record before this court, the district court erred in finding that Lincoln Lumber released the guaranty executed by Kerwin Fowler on September 7, 1985.

(b) Interest Rate

We next consider whether the interest rate of 24 percent per annum charged against Kerwin Fowler violates the statute on usury. We only consider this issue in regard to Kerwin Fowler, because the cause of action as it relates to Mavis Fowler is barred under the doctrine of res judicata, the trial court having previously ruled on the issue in its judgment of February 19, 1992, from which Lincoln Lumber did not appeal.

At all relevant times involved in this lawsuit, § 45-101.03 (Reissue 1993) and its predecessor set the maximum interest rate at 16 percent, subject to exceptions enumerated in Neb. Rev. Stat. § 45-101.04 (Cum. Supp. 1994) and its predecessors.

Section 45-101.04 states: "The limitation on the rate of interest provided in section 45-101.03 shall not apply to: . . . (3) The guarantor or surety of any loan to a corporation, partnership, limited liability company, or trust . . . ."

Kerwin Fowler was guarantor of an indebtedness to Lincoln Lumber, a corporation, by Fowler Custom Homes, another corporation. Because Kerwin Fowler was a guarantor of a corporate debt which included a legal interest rate between two corporations, his obligation as a guarantor could not be defeated by the statute against a usurious interest rate involving an individual. See *McCaul v. American Savings Co.*, 213 Neb. 841, 331 N.W.2d 795 (1983).

Lincoln Lumber, however, cannot seek compounded interest from Kerwin Fowler. In the absence of a contract or statute, compensation in the form of compound interest is not allowed to be computed upon a debt. *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994). The guaranty and credit application signed by Kerwin Fowler do not specify compound interest. Therefore, although Lincoln Lumber claims that the amount it seeks is increasing due to compounding interest, Lincoln Lumber's recovery is limited to simple interest on a principal that was paid in full on April 6, 1992.

V. ATTORNEY FEES

The Fowlers also filed a counterclaim alleging that Lincoln Lumber, in bad faith, filed a frivolous petition. Pursuant to § 25-824, the Fowlers sought attorney fees incurred in defending against the allegedly frivolous petition. The district court dismissed the counterclaim.

In their cross-appeal, the Fowlers assign that the district court erred in not awarding attorney fees for an allegedly frivolous lawsuit pursuant to § 25-824. Frivolous for the purposes of § 25-824 is defined as being a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit. *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994).

An action is frivolous or in bad faith if a party attempts to

relitigate the same issue previously resolved in an action involving the same party. *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993). Rather than appealing the district court finding that a 24-percent interest rate against Mavis Fowler's promissory note is usurious, Lincoln Lumber, within 4 months of the previous order, sued Mavis Fowler a second time, seeking to collect the same interest that the district court had already disallowed. A proliferation of actions on issues already adjudicated engenders disrespect for the law, unnecessarily adds to an overburdened judicial caseload, and will not be tolerated. See *Graham v. Waggener*, 219 Neb. 907, 367 N.W.2d 707 (1985).

Thus, the district court abused its discretion in not awarding Mavis Fowler attorney fees because of the frivolous action filed by Lincoln Lumber.

VI. CONCLUSION

We affirm the judgment of the district court to the extent that the action against Mavis Fowler was barred by the doctrine of res judicata. We reverse the dismissal of Mavis Fowler's counterclaim and instruct the district court to award her attorney fees pursuant to § 25-824.

We reverse the judgment of the district court as to Kerwin Fowler. Kerwin Fowler remains the guarantor of the debts held by Fowler Custom Homes to Lincoln Lumber and must pay the interest accrued upon the principal debt. We remand this cause to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROBERT KLAWITTER, APPELLANT, V. CHRIS LAMPERT, APPELLEE.
533 N.W.2d 896

Filed June 16, 1995. No. S-93-953.

1. **Negligence: Employer and Employee.** If an employer directs an employee to do work where one of the methods which could reasonably be anticipated by the employer to be utilized by the employee is dangerous, it is negligence on the part of the employer to expose an employee to such danger unless the employer gives the employee instructions or cautions sufficient to enable the employee to do his work safely by the use of proper care by the employee.
2. ____: ____. A duty rests on an employer to warn his employee of dangers not apparent which may arise in the course of the employment, which the employer knows, or ought to know about, and which he has reason to believe the employee does not know and will not discover in time to protect himself.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has a burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence.

Appeal from the District Court for Holt County: WILLIAM CASSEL, Judge. Affirmed.

Kathleen Koenig Rockey and James G. Kube, of Domina & Copple, P.C., for appellant.

J. Arthur Curtiss, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BUCKLEY, D.J.

BUCKLEY, D.J.

Plaintiff-appellant Robert Klawitter brought an action for damages against defendant-appellee Chris Lampert. Following a trial, the jury returned a verdict for defendant on September 28, 1993. Pursuant to the verdict, plaintiff's petition was dismissed, from which action plaintiff appeals. We affirm.

Plaintiff was a 35-year-old high school graduate in good physical health and with prior employment experience in a variety of trades, including construction work. Defendant, who was managing the Lampert family farm, hired plaintiff to do odd jobs on the farm, including the removal of the floorboards of a hayloft of an old barn used as a granary, which defendant

wanted to convert into a shop.

Defendant explained to plaintiff what was to be done, showed him the loft area, and gave him a hammer, crowbar, nailpuller, and 12-foot extension ladder. Plaintiff proceeded to go up into the loft, using the ladder, and using the nailpuller and hammer, began taking up the floorboards and throwing them down to the floor.

The floorboards were laid on 2-by-6 rafters spaced 24 inches apart. Plaintiff elected to stand on the floorboards as he removed them, with the result that the more boards he removed, the smaller the space remained for him to stand on. At some point, in order to remove the remaining boards, he proceeded to stand on the upper 2-inch edge of the rafters, straddling with one foot on each rafter. While doing that, and with only one or two boards left to remove, he fell to the concrete floor below, sustaining serious injuries. He has no idea how or why he fell. There was no evidence of any rafter giving way or any other external cause. He apparently simply lost his balance.

Plaintiff assigns two errors: (1) The court failed to instruct the jury of defendant's duty to warn plaintiff of dangers associated with the work he was hired to do, and (2) the evidence was insufficient to support the jury's verdict.

The trial court gave the jury the following instruction:

> If an employer directs an employee to do work, where one of the methods, which could be reasonably anticipated by the employer to be utilized by the employee, is dangerous, it is negligence on the part of the employer to expose an employee to such danger unless the employer gives the employee instructions or cautions sufficient to enable the employee to do his work safely by the use of proper care by the employee.

Plaintiff did not object to this instruction, but contends that the court should have given the jury the following additional requested instruction:

> A duty rests on an employer to warn his employees of dangers not apparent which may [a]rise in the course of the employment, which the employer knows, or ought to know about, and which he has reason to believe the employee does not know and will not discover in time to protect himself.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence. *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

Plaintiff's requested instruction is a correct statement of the law, see *Stevens v. Kasik*, 201 Neb. 338, 267 N.W.2d 533 (1978), but he was not prejudiced by the court's refusal to give it, because it was not warranted by the evidence. The requested instruction would place a duty on the defendant to warn the plaintiff only if these conditions existed: (1) A danger exists which is not apparent but which may arise during the work, (2) the defendant knows or should anticipate the danger, and (3) the defendant has reason to believe the plaintiff does not know of the danger.

The danger involved in this statement of the law would be one that either existed at the time the work began or arose during the course of the work of which the employee is not aware. In this case, the danger arose due to the method employed by plaintiff to finish removing the boards, namely to straddle the rafters, a method not required of plaintiff and the dangers of which he was fully aware.

The instruction given by the court recognized that it was the method used by plaintiff that created the danger, and not some danger plaintiff was not aware of. The instruction left it to the jury to decide if the method used by plaintiff could be reasonably anticipated by defendant to be used, thereby imposing a duty on defendant to adequately instruct or warn. The trial court's refusal to give the requested instruction and the instruction given were both correct.

As to plaintiff's second assignment of error, the evidence is more than sufficient to support the jury's verdict on the basis that defendant was not negligent in failing to warn, that plaintiff was contributorily negligent sufficient to bar recovery, or that he assumed the risk of his accident and resultant damages, all of which issues were raised by the pleadings and were submitted to the jury.

Because plaintiff's assignments of error are without merit, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICK B. LYNCH, APPELLANT.

533 N.W.2d 905

Filed June 16, 1995. No. S-94-626.

1. **Pleadings: Final Orders.** The denial of a plea in bar is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1989).
2. **Judgments: Final Orders: Appeal and Error.** A judgment rendered or final order made by the district court may be reversed, vacated, or modified on appeal for errors appearing on the record.
3. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
4. **Jurisdiction: Appeal and Error.** Whether or not a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but is the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
5. **Criminal Law: Collateral Estoppel: Double Jeopardy.** Collateral estoppel in a criminal proceeding has its basis in the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution.
6. **Criminal Law: Prisoners: Double Jeopardy.** An administrative disciplinary proceeding in which the prisoner loses good time does not place him in jeopardy. The subsequent conviction and sentence in a criminal prosecution for the same offense do not therefore constitute double jeopardy, which the federal Constitution prohibits.

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

Michael L. Jeffrey, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and RONIN, D.J., Retired.

WRIGHT, J.

Patrick B. Lynch appeals the denial of his plea in bar, in which he claimed that criminal charges of conspiracy to escape and attempted escape should be barred because he had previously been "tried" for those crimes in a prison disciplinary proceeding.

SCOPE OF REVIEW

The denial of a plea in bar is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1989). *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990).

A judgment rendered or final order made by the district court may be reversed, vacated, or modified on appeal for errors appearing on the record. Neb. Rev. Stat. § 84-918 (Reissue 1994). Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. See, *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995); *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995).

FACTS

On August 31, 1991, an escape was attempted at the Nebraska State Penitentiary. Lynch was alleged to be involved in the attempt, along with five other inmates. In January 1992, a penitentiary disciplinary committee found Lynch guilty of escape, possession of escape paraphernalia, and possession or manufacturing of weapons. He lost credit for good time earned and was placed in disciplinary segregation. The Nebraska Department of Correctional Services (DCS) Appeals Board upheld the decision of the disciplinary committee. Lynch filed an administrative appeal to the Lancaster County District Court.

The district court reversed the decision of the appeals board, finding that the board's conclusions were not supported by competent, material, and substantial evidence. The district court's order, entered September 3, 1992, states that while the record includes evidence of the presence of weapons and escape paraphernalia in the prisonyard on August 31, 1991, none of that evidence was shown to be connected with Lynch. The court found that the evidence presented by the DCS would not have been sufficient at trial to withstand a motion for a directed

verdict. The DCS appealed the district court's decision to this court, which affirmed the district court's reversal of the appeals board's decision. See *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994).

On July 23, 1993, a two-count complaint was filed against Lynch in the Lancaster County District Court, charging him with attempted escape and conspiracy to escape. The complaint alleged that Lynch conspired with other persons to escape from the penitentiary. It alleged overt acts, including (1) assaults upon an individual by stabbing or throwing flammable liquids, (2) throwing a flammable accelerant into the face of a guard, (3) entering and attempting to start a garbage truck for use in the escape, (4) obtaining and being in possession of a liquid flammable accelerant for use in the escape, (5) making and assembling flammable devices such as molotov cocktails to throw at guard towers during the escape, and (6) providing information to other coconspirators regarding keys located on a guard's belt.

The complaint charged that Lynch intentionally engaged in conduct which constituted a substantial step in a course of conduct intended to culminate in his commission of an escape by unlawfully removing himself from official detention or failing to return to official detention following a temporary leave granted for a specific purpose. The complaint also alleged that Lynch was a habitual criminal because he had twice been convicted of felonies: murder in 1982 and escape in 1987.

On August 27, 1993, Lynch filed a motion to quash and a plea in abatement. The record does not include a ruling on the motion or the plea.

On January 21, 1994, an information charging Lynch, first, with conspiracy to escape and being a habitual criminal and, second, with attempted escape and being a habitual criminal was filed in Lancaster County District Court. Lynch filed a plea in bar, alleging that the State was precluded by res judicata and collateral estoppel from proceeding with the instant action. Lynch argued that the action was barred because the decisions of the disciplinary committee and appeals board, which found Lynch guilty of escape, had been reversed by the Lancaster County District Court based on insufficient evidence and

because the current charges were based on the same facts as the earlier proceeding before the disciplinary committee.

The district court denied the plea in bar, noting that the prison disciplinary proceeding was administrative and not criminal in nature.

ASSIGNMENTS OF ERROR

In summary, Lynch claims the district court erred in overruling the plea in bar and in failing to consider the preclusive effect of the prior adjudications of the same issues brought by the State.

ANALYSIS

JURISDICTION

First, the State argues that this court has no jurisdiction because the overruling of Lynch's plea in bar is not a final order. Whether or not a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but is the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter. *State v. Miller*, 240 Neb. 297, 481 N.W.2d 580 (1992). We therefore consider this issue first.

The State asserts that although collateral estoppel and res judicata in a criminal action are related to double jeopardy, the court's overruling of Lynch's plea in bar was not a final order because it did not determine the action, prevent a judgment, or affect a substantial right made in a special proceeding. A final order is defined in § 25-1902:

> An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

Lynch bases his argument upon *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990), in which we held that the denial of a plea in bar is an order affecting a substantial right made in a special proceeding and thus a final order. Lynch argues that the State's attempted prosecution violates his

constitutional right not to be charged more than once for the same crime. He asserts that the concept of double jeopardy is clearly inherent in his claim and that he raised a double jeopardy claim by filing the plea in bar. The statute governing a plea in bar provides:

> The accused may then offer a plea in bar to the indictment that he has before had judgment of acquittal, or been convicted, or been pardoned for the same offense; and to this plea the county attorney may reply that there is no record of such acquittal or conviction, or that there has been no pardon. On the trial of such issue to the court or to a jury, if the court desires to submit such issue to a jury, the accused must produce the record of such conviction or acquittal, or the pardon, and prove that he is the same person charged in the record or mentioned in the pardon; and shall be permitted to adduce such other evidence as may be necessary to establish the identity of the offense.

Neb. Rev. Stat. § 29-1817 (Reissue 1989).

Collateral estoppel in a criminal proceeding has its basis in the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. See, *Turner v. Arkansas*, 407 U.S. 366, 92 S. Ct. 2096, 32 L. Ed. 2d 798 (1972); *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). In *Turner*, the U.S. Supreme Court held that the question of collateral estoppel is a matter of constitutional fact which the court must decide through an examination of the entire record. We have recognized that collateral estoppel may apply in a criminal case. See *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994). In *Dean*, we cited *State v. Gerdes*, 233 Neb. 528, 446 N.W.2d 224 (1989), in which we recognized that a criminal defendant relying on collateral estoppel does so in relation to the constitutional protection against double jeopardy. The defendant has the burden to prove that the particular issue sought to be relitigated is constitutionally foreclosed by the Double Jeopardy Clause. See *Gerdes, supra*.

Although Lynch argues that the State is precluded on the basis of collateral estoppel from relitigating the same facts for which Lynch was exonerated upon his appeal from the administrative disciplinary hearing, the basis of his plea in bar

is in reality the Double Jeopardy Clause. We agree that Lynch's plea in bar raised a double jeopardy claim.

We find that our holding in *Milenkovich* applies to Lynch's plea in bar. In *Milenkovich*, we cited *Abney v. United States*, 431 U.S. 651, 660, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977), in which the Court stated: "[T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." We concluded that the defendant must be granted an opportunity to raise a claim of double jeopardy prior to being subjected to a second trial.

We hold that the denial of Lynch's plea in bar was an order affecting a substantial right in a special proceeding and was a final, appealable order. This court has jurisdiction to consider the issue of whether the district court was correct in overruling Lynch's plea in bar.

DOUBLE JEOPARDY

We next address the ultimate question of whether the prior administrative disciplinary proceeding which was resolved in Lynch's favor bars a subsequent criminal prosecution of Lynch for attempted escape arising from the same conduct. The 5th Amendment to the U.S. Constitution, which is made applicable to the states through the 14th Amendment, provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Neb. Const. art. I, § 12, provides: "No person shall . . . be twice put in jeopardy for the same offense."

The established rule in this jurisdiction is that an administrative disciplinary proceeding in which the prisoner loses good time does not place him in jeopardy. *State v. Kerns*, 201 Neb. 617, 271 N.W.2d 48 (1978). The subsequent conviction and sentence in a criminal prosecution for the same offense do not therefore constitute double jeopardy, which the federal Constitution prohibits. We cited *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), in which the Court stated: " 'Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a

defendant in such proceedings does not apply.' " *Kerns*, 201 Neb. at 620, 271 N.W.2d at 50. The *Kerns* determination was subsequently upheld by the U.S. Court of Appeals for the Eighth Circuit in *Kerns v. Parratt*, 672 F.2d 690 (8th Cir. 1982). This court has reached the same conclusion in *State v. Maddox*, 190 Neb. 361, 208 N.W.2d 274 (1973), and in *State v. Mayes*, 190 Neb. 837, 212 N.W.2d 623 (1973).

We find that *U.S. v. Newby*, 11 F.3d 1143 (3d Cir. 1993), *cert. denied* ____ U.S. ____, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994), has particular application to the case at bar. While serving their sentences in a federal prison, Gene Newby and Raynaldo Barber engaged in an altercation with several prison guards. Prison authorities brought disciplinary charges against them for using intoxicants and assaulting prison guards, in violation of prison rules. Following a hearing, both defendants were found to have violated prison regulations, and Newby was deprived of 1,000 days of good time credit.

Newby was subsequently indicted for exactly the same conduct and was charged with knowingly and willfully assaulting, impeding, and interfering with a federal prison guard, in violation of federal law. Newby moved to dismiss the indictment on double jeopardy grounds, contending that the prison disciplinary sanctions barred a criminal prosecution. The district court denied the application to dismiss. Following a trial, Newby was convicted of impeding and interfering with a federal prison guard.

Newby argued that criminal prosecution after prison disciplinary sanctions had been imposed violated the Double Jeopardy Clause of the Fifth Amendment. He relied upon *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), in which the Court held that a civil penalty, imposed after a criminal penalty, can constitute a second punishment under the Double Jeopardy Clause if the criminal penalty is grossly disproportionate to the harm caused or is divorced from any remedial goal.

The court in *Newby* concluded that the prison sanctions imposed upon Newby were not so grossly unrelated to the prison authorities' remedial goal of maintaining order and discipline in the prison as to constitute punishment within the

meaning of the Double Jeopardy Clause. The ability of prison authorities to revoke good time credits was designed to encourage inmates to continue their good conduct and was, thus, rationally related to the remedial goal. The court held that a prison disciplinary hearing is not a prosecution for double jeopardy purposes. The court cited other cases for the proposition that disciplinary sanctions imposed by prison authorities for infractions of prison regulations do not bar a subsequent criminal prosecution: *United States v. Stuckey*, 441 F.2d 1104 (3d Cir. 1971), *cert. denied* 404 U.S. 841, 92 S. Ct. 136, 30 L. Ed. 2d 76; *U.S. v. Rising*, 867 F.2d 1255, 1259 (10th Cir. 1989) ("administrative punishment imposed by prison officials does not render a subsequent judicial proceeding, criminal in nature, violative of the double jeopardy clause"); and *Kerns v. Parratt, supra* (administrative sanction through loss of good time does not bar subsequent criminal prosecution).

Newby is similar to the case at bar in that prison disciplinary sanctions had been imposed prior to criminal prosecution for the same conduct. However, in *Halper*, criminal charges and a conviction and sentence preceded the civil action. The respondent, Irwin Halper, the manager of a medical laboratory service, submitted 65 separate false reimbursement claims for medical services rendered. He mischaracterized the service performed and demanded reimbursement at a rate of $12 per claim when the actual service rendered entitled the medical laboratory to only $3 per claim. The insurance carrier overpaid the claims and passed the overcharges on to the federal government. Upon discovery, the government indicted Halper on 65 counts of violating a federal criminal false-claims statute. Halper was convicted on all 65 counts and was sentenced to imprisonment for 2 years and fined $5,000. The government then brought a subsequent action against Halper under a civil false-claims statute.

Based upon the facts established by Halper's criminal conviction, the district court granted summary judgment for the government on the issue of liability. The remedial portion of the act in effect at the time provided for a civil penalty of $2,000, an amount equal to two times the amount of damages the government sustained, and costs. Thus, Halper appeared to be

subject to a statutory penalty of $2,000 multiplied by each of the 65 false claims, or $130,000. The district court concluded that because of Halper's previous criminal punishment, an additional penalty of this magnitude violated the Double Jeopardy Clause. On appeal, the Supreme Court stated that the issue for consideration was whether a civil sanction may be so divorced from any remedial goal that it constitutes punishment for the purpose of double jeopardy analysis.

The Court announced a rule to be applied in rare cases such as this one, "where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Halper*, 490 U.S. at 449.

> Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

490 U.S. at 449-50. The Court left to the trial court's discretion the determination of the civil sanction which could be imposed "without crossing the line between remedy and punishment." 490 U.S. at 450.

The factual basis in the case at bar is similar to the facts in *U.S. v. Newby*, 11 F.3d 1143 (3d Cir. 1993), *cert. denied* ____ U.S. ____, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994), and we adopt the court's reasoning in *Newby* and adhere to the rule that a prison administrative disciplinary proceeding which seeks to impose sanctions such as the loss of good time and disciplinary segregation does not place the prisoner in jeopardy, and a subsequent conviction and sentence in a criminal prosecution for the same conduct does not constitute double jeopardy. See *State v. Kerns*, 201 Neb. 617, 271 N.W.2d 48 (1978). The disciplinary proceeding against Lynch does not bar the criminal proceeding based on the same conduct. We therefore affirm the judgment of the district court.

AFFIRMED.

WHITE, C.J., concurs in the result.

THOMAS E. ROBERTS, DOING BUSINESS AS TOM ROBERTS TRUCKING, APPELLEE, V. WEBER & SONS, CO., A NEBRASKA CORPORATION, APPELLANT.

533 N.W.2d 664

Filed June 23, 1995. No. S-93-353.

1. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
2. **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.
3. **Negligence.** In a conventional negligence case, the mere occurrence of an accident which causes an injury and does damage does not create a presumption of negligence or authorize an inference of negligence.
4. ____. Res ipsa loquitur is a qualification of the general rule that negligence is not to be presumed.
5. **Negligence: Circumstantial Evidence.** The doctrine of res ipsa loquitur is not a matter of substantive law, but, as a form of circumstantial evidence, is a procedural matter.
6. **Trial: Negligence.** If res ipsa loquitur applies, an inference of a defendant's negligence exists for submission to the fact finder, which may accept or reject the inference in the factual determination of whether the defendant is negligent.
7. **Negligence: Proof.** In order that the doctrine of res ipsa loquitur may be invoked, it must be shown that the occurrence is one which would not, in the ordinary course of things, happen in the absence of negligence; the instrumentality which produces the occurrence is under the exclusive control and management of the alleged wrongdoer; and there is an absence of explanation by the alleged wrongdoer.
8. **Livestock: Highways: Negligence.** Livestock owners owe merely a duty of ordinary care to travelers using abutting highways.
9. **Livestock: Negligence.** Res ipsa loquitur can apply in escaped-livestock cases even where the owner of the animal is held to only an ordinary standard of care.
10. **Livestock: Highways: Negligence: Jury Instructions.** In certain cases wherein escaped livestock are involved in a collision with a vehicle on a public road, it might be proper for the trial court to instruct the jury regarding res ipsa loquitur.
11. **Verdicts: Appeal and Error.** Where the evidence is conflicting, an appellate court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong.

Petition for further review from the Nebraska Court of Appeals, IRWIN and MILLER-LERMAN, Judges, and NORTON, District Judge, Retired, on appeal thereto from the District Court for Saline County, ORVILLE L. COADY, Judge. Judgment of Court of Appeals reversed.

Jefferson Downing, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellant.

Carl J. Sjulin, of Rembolt Ludtke & Berger, for appellee.

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

CONNOLLY, J.

Thomas E. Roberts, doing business as Tom Roberts Trucking, brought this negligence action based on the doctrine of res ipsa loquitur against Weber & Sons, Co. (Weber), for damages suffered when a semi-tractor trailer driven by Roberts collided with several cattle owned and controlled by Weber near the intersection of Nebraska Highway 6 and Saline County Road 1300. A jury awarded Roberts $18,125.71. Weber appealed, and the Nebraska Court of Appeals, in a memorandum opinion, reversed the verdict and ordered the action dismissed, holding that the district court should have granted Weber's motion for directed verdict because res ipsa loquitur was inapplicable to the facts of the instant case. We granted Roberts' petition for further review, and we now reverse the Court of Appeals' decision.

I. FACTUAL BACKGROUND

1. ACCIDENT

Roberts is the owner and operator of Tom Roberts Trucking. During the early morning hours of October 23, 1991, Roberts was hauling a load of feed salt from Hutchinson, Kansas, to Fort Dodge, Iowa. Though it was still dark outside, the weather was dry and clear. Roberts' route took him through the town of Fairbury, Nebraska, where he got onto state Highway 15. Roberts took Highway 15 straight north until he reached a stop sign at the intersection of Highway 15 and Highway 6. Roberts turned right onto Highway 6. From the point where he entered upon Highway 6, Roberts testified that the road was level and flat for a short distance until he reached a railroad overpass. The railroad overpass consisted of a bridge which inclined and then angled down onto a level stretch of road. Roberts testified that as he crossed over the bridge and leveled out at the bottom, he saw the eyes of several cattle reflected in his low-beam

headlights. The evidence indicated that approximately 100 to 175 cattle were present on the highway. Roberts slammed on the brakes, but the semi struck four of the cattle before it came to a halt.

The cattle were owned by and under the exclusive management and control of Weber. Evidence adduced at trial indicated that the cattle escaped from "pen #7," which was located near the highway on Weber's farm. Roberts claimed that the cattle escaped through "gate #1" in pen #7. According to Weber, the cattle in pen #7 pressed up against gate #1 and broke the top hinge of that gate. The bottom hinge allegedly remained intact, as did the chain securing the side of gate #1 opposite the hinged side. Weber theorized that when the top hinge broke, the gate pivoted outward at enough of an angle to allow the cattle to crawl over the gate. Exhibits entered into evidence in the form of photographs did not show any stress or damage to the bottom hinge or to the gate itself.

Weber testified that pen #7 was constructed of $2^{5}/_{8}$–inch steel pipe sitting in concrete with a $2^{1}/_{4}$–inch top rail and a "sucker rod" welded on the inside to the pen. Weber's uncontradicted testimony reflected that of the three types of commonly used fence material—barbed wire, electric wire, and steel pipe—steel pipe was the most expensive and most secure.

Greg Sherwood, who worked for Weber as a "pen rider," also testified at trial. Sherwood stated that as a pen rider, it was his duty to ride through the cattle each day and check their health, and to check the fences and gates to make sure the cattle were secured in their pens. Sherwood testified that when he checked the pens on October 22, the day prior to the accident, pen #7 was secure.

2. Trial

In his amended petition, Roberts sought damages for property damage to his semi, towing charges, and downtime caused by the alleged negligence of Weber. Roberts alleged res ipsa loquitur as his sole basis for showing negligence on the part of Weber. The case was tried to a jury in the district court for Saline County. The district court submitted the issue of res ipsa loquitur to the jury. The jury returned a verdict in favor of

Roberts and awarded Roberts $18,125.71 in damages.

3. Court of Appeals' Decision

Weber appealed to the Nebraska Court of Appeals, which reversed the verdict and ordered the case dismissed in a memorandum opinion issued January 23, 1995. The Court of Appeals held that res ipsa loquitur was inapplicable to cases where cattle that escaped from a pen caused an accident, based on this court's holding in *Dizco, Inc. v. Kenton*, 210 Neb. 141, 313 N.W.2d 268 (1981), wherein we held that livestock owners merely owed a duty of ordinary care to travelers using abutting highways, and on the Court of Appeals' finding that "cows escaping from their pen and appearing on a public highway is not so unusual in this state that such would ordinarily not occur in the absence of negligence." Roberts successfully petitioned this court for further review.

II. ASSIGNMENTS OF ERROR

Roberts contends that the Court of Appeals erred in (1) concluding, as a matter of law, that res ipsa loquitur cannot be utilized to establish the liability of an owner of escaped livestock involved in a collision with a motor vehicle on a highway; (2) holding that the use of res ipsa loquitur requires a finding of negligence; and (3) holding that res ipsa loquitur is inapplicable to all escaped-livestock cases.

III. STANDARD OF REVIEW

In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994); *Bradley v. Hopkins*, 246 Neb. 646, 522 N.W.2d 394 (1994); *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d 550 (1994).

Roberts' assignments of error present a question of law. 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. *Ruch v. Conrad*, 247 Neb. 318, 526 N.W.2d 653 (1995).

IV. ANALYSIS

The primary issue presented by Roberts is whether the district court properly applied the doctrine of res ipsa loquitur to the facts of the instant case. This court has not previously determined whether res ipsa loquitur applies to cases involving the collision of a vehicle with escaped livestock on a public road.

1. General Res Ipsa Loquitur Principles

In a conventional negligence case, the mere occurrence of an accident which causes an injury and does damage does not create a presumption of negligence or authorize an inference of negligence. *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988). Res ipsa loquitur is a qualification of the general rule that negligence is not to be presumed. *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 62 N.W.2d 127 (1954). The doctrine of res ipsa loquitur is not a matter of substantive law, but, as a form of circumstantial evidence, is a procedural matter. *Harvey v. Metropolitan Utilities Dist.*, 246 Neb. 780, 523 N.W.2d 372 (1994); *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992). If res ipsa loquitur applies, an inference of a defendant's negligence exists for submission to the fact finder, which may accept or reject the inference in the factual determination of whether the defendant is negligent. *Harvey v. Metropolitan Utilities Dist., supra*; *Brown v. Scrivner, Inc.*, 241 Neb. 286, 488 N.W.2d 17 (1992).

In order that the doctrine of res ipsa loquitur may be invoked, it must be shown that the occurrence is one which would not, in the ordinary course of things, happen in the absence of negligence; the instrumentality which produces the occurrence is under the exclusive control and management of the alleged wrongdoer; and there is an absence of explanation by the alleged wrongdoer. *Harvey v. Metropolitan Utilities Dist., supra*.

2. Nebraska Law Regarding Res Ipsa Loquitur and Domestic Animals

As noted above, this court has never answered the question of whether res ipsa loquitur applies to cases where a vehicle collides with escaped livestock on a public road. However, the U.S. Court of Appeals for the Eighth Circuit, applying Nebraska law, did address that issue in *Nuclear Corporation of America v. Lang*, 480 F.2d 990 (8th Cir. 1973). In affirming the federal district court's decision to apply res ipsa loquitur to the facts therein, the *Lang* court stated:

> By invoking *res ipsa loquitur* . . . the Court necessarily concluded that unattended animals do not usually escape their enclosures unless someone was negligent, a conclusion which is supported by an abundance of authority. [Citations omitted.] Embodied within that conclusion is an expression of judicial attitude with respect to the *high standard of care* owed highway travellers by abutting livestock owners. [Citation omitted.] *The higher the standard of care, the more compelling is the inference that someone was negligent.*

(Emphasis supplied.) *Id.* at 993.

The Eighth Circuit in *Lang* determined that under Nebraska law, livestock owners whose property abutted public highways owed travelers using those highways a higher standard of care than normal, and rested its holding that res ipsa loquitur applied to these cases in part on that determination. However, in *Dizco, Inc. v. Kenton*, 210 Neb. 141, 313 N.W.2d 268 (1981), this court expressly held that such livestock owners owed merely a duty of *ordinary care* to travelers using abutting highways. Therefore, the holding in *Lang* was based, at least in part, on a misreading of Nebraska law.

In the case at bar, the Court of Appeals noted the flaw in the reasoning in *Lang* and held, inter alia, that since our prior decisions established that reasonable minds could differ on whether negligence caused a domestic animal to escape its confines, res ipsa loquitur was inapplicable to such cases. See, *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969); *Countryman v. Ronspies*, 180 Neb. 76, 141 N.W.2d 425 (1966); *Traill v. Ostermeier*, 140 Neb. 432, 300 N.W. 375

(1941). Accord, *Wilson v. Rule*, 169 Kan. 296, 219 P.2d 690 (1950). The Court of Appeals' reasoning in this respect was incorrect, because res ipsa loquitur can apply in escaped-livestock cases even where the owner of the animal is held to only an ordinary standard of care. See, e.g., *Mitchell v. Ridgway*, 77 N.M. 249, 421 P.2d 778 (1966).

However, the Court of Appeals articulated an alternative reason for prohibiting the use of res ipsa loquitur in the instant case: The Court of Appeals found that cattle and other domestic animals may escape from adequately constructed confines without negligence and that cows' escaping from their pen and appearing on a public highway is not so unusual that such an occurrence would not ordinarily occur in the absence of negligence.

Courts in a number of other jurisdictions have addressed the issue presented in the instant case, and those courts are nearly evenly split with regard to the result. See, generally, Annot., 29 A.L.R.4th 466–70 (1984). For courts applying res ipsa loquitur, see, *O'Connor v. Black*, 80 Idaho 96, 326 P.2d 376 (1958); *Loeffler v. Rogers*, 136 A.D.2d 824, 523 N.Y.S.2d 660 (1988); *Watzig v. Tobin*, 292 Or. 645, 642 P.2d 651 (1982); *Scanlan v. Smith*, 66 Wash. 2d 601, 404 P.2d 776 (1965). See, also, *Anderson v. McCarty*, 519 So. 2d 324 (La. App. 1988), *writ denied* 521 So. 2d 1155 (not expressly applying res ipsa loquitur, but holding that where a cow causes damages in a collision with an automobile, courts will presume negligence of the owner of the livestock). For courts refusing to apply res ipsa loquitur, see, *Vanderwater v. Hatch*, 835 F.2d 239 (10th Cir. 1987) (applying Utah law); *Barnes v. Frank*, 28 Colo. App. 389, 472 P.2d 745 (1970); *Taylor Bros., Inc. v. Sork*, 169 Ind. App. 279, 348 N.E.2d 42 (1976); *Wilson v. Rule, supra*; *Walborn v. Stockman*, 10 Kan. App. 2d 597, 706 P.2d 465 (1985); *Hughes v. W & S Construction Company*, 196 So. 2d 339 (Miss. 1967); *Reed v. Molnar*, 67 Ohio St. 2d 76, 423 N.E.2d 140 (1981); *Brauner v. Peterson*, 16 Wash. App. 531, 557 P.2d 359 (1976) (apparently contradicting *Scanlan v. Smith, supra*).

3. Holding

We hold that the Court of Appeals erred in finding that res

ipsa loquitur is inapplicable to all escaped-livestock cases. As noted above, res ipsa loquitur is a procedural, not substantive, doctrine. As such, res ipsa loquitur merely provides an evidentiary presumption which allows the jury to infer negligence on the part of the defendant when the facts of the case indicate that the injury sustained by the plaintiff would not have occurred but for the negligence of the defendant. Depending on the factual situation presented in certain cases involving escaped livestock, it might be proper for the trial court to instruct the jury regarding res ipsa loquitur. In order to determine whether the instant action is such a case, we must analyze each element of the doctrine.

(a) First Element

In order to invoke res ipsa loquitur, the plaintiff must first prove that the occurrence is one which would not, in the ordinary course of things, happen in the absence of negligence. The uncontradicted evidence indicated that pen #7 was constructed of the sturdiest and most expensive materials. Pen #7 consisted of $2^{5}/_{8}$-inch steel pipe sitting in concrete with another steel rod welded on the inside of the pen. When pen #7 was inspected the day before the accident, everything was secure. We hold that Roberts satisfied the first element of res ipsa loquitur because cattle would not ordinarily escape what was characterized by Weber as a secure, state-of-the-art cattle pen in the absence of negligence.

(b) Second Element

The second element of res ipsa loquitur requires the plaintiff to prove that the instrumentality which produced the occurrence was under the exclusive control and management of the defendant. Weber conceded that Roberts satisfied the second element.

(c) Third Element

Weber contends that even if Roberts satisfied the first two elements of res ipsa loquitur, Weber still must prevail because Roberts failed to prove the third element of the doctrine—the absence of an explanation by Weber as to how the cattle escaped. Weber argues that it offered direct evidence that the

cattle escaped from pen #7 when the top hinge on gate #1 broke, allowing the cattle to crawl over gate #1. However, Roberts presented evidence regarding the condition of the gate, the bottom hinge, and the chain securing gate #1 from which the jury could have concluded that Weber's explanation was not credible.

The credibility of Weber's explanation regarding how the cattle escaped from pen #7 constituted a question of fact for the jury. It is obvious from the verdict that the jury did not believe Weber's explanation. Where the evidence is conflicting, an appellate court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994). From our review of the record, we cannot say that the jury was clearly wrong in its determination.

V. CONCLUSION

The Court of Appeals erred in holding that res ipsa loquitur is inapplicable to all escaped-livestock cases. There are certain factual situations, as evidenced by the case at bar, wherein livestock ordinarily would not escape onto a public highway in the absence of some negligence. The decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with orders to reinstate the jury's verdict in favor of Roberts.

REVERSED.

JUVENTINO L. GARCIA, APPELLEE, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

533 N.W.2d 911

Filed June 23, 1995. No. S-93-748.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or

final order made by the district court may be affirmed, reversed, vacated, or modified for errors appearing on the record.

2. **Administrative Law: Time.** No rule or regulation of any agency shall be valid as against any person until 5 days after such rule or regulation has been filed with the Secretary of State.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Don Stenberg, Attorney General, Jay C. Hinsley, and, on brief, Lauren L. Hill for appellant.

Ralph A. Bradley, of Bradley, Maser & Kneale, P.C., for appellee.

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

CONNOLLY, J.

The Department of Motor Vehicles (Department) appeals the district court's ruling ordering the Department to reinstate the driver's license of Juventino L. Garcia. The Department failed to make a determination of the issues within 7 days of the hearing on Garcia's appeal, as required by Neb. Rev. Stat. § 39-669.15(7) (Cum. Supp. 1992). The district court found that the provision of the statute which states that the director of the Department of Motor Vehicles "shall make a determination of the issues within seven days after the conclusion of the hearing" was mandatory and ordered the Department's revocation of Garcia's driver's license reversed. The Department appealed, assigning as error the district court's finding that the 7-day rule is mandatory rather than directory. We do not reach the Department's assigned error because we conclude that the revocation was invalid due to the Department's failure to file the rules and regulations governing administrative hearings with the Secretary of State prior to Garcia's hearing. For the reasons stated below, we affirm the ruling of the district court.

BACKGROUND

Garcia was arrested by a Hall County deputy sheriff for driving under the influence of alcohol on January 31, 1993. Garcia's driver's license was subject to administrative

revocation by the Department under Neb. Rev. Stat. § 39-669.15 through § 39-669.18 (Cum. Supp. 1992). Accordingly, the arresting officer took Garcia's driver's license, and Garcia was issued a temporary license which was valid for 30 days.

On February 3, Garcia requested that an administrative hearing be held to contest the revocation. The hearing was conducted on February 17 before the director of the Department. Garcia's temporary driver's license expired on March 2. On March 6, Garcia filed a motion to dismiss the administrative proceeding due to the director's failure to issue an order within 7 days of the hearing, as required in § 39-669.15(7). That section provides, among other things, that "[t]he director shall make a determination of the issues within seven days after the conclusion of the hearing." The director issued an order on March 8, revoking Garcia's license effective March 3. On March 10, the Department denied Garcia's motion to dismiss.

Garcia filed a petition in the district court pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 through 84-920 (Reissue 1987 & Cum. Supp. 1992), seeking a review of the director's order. On April 1, 1993, the district court stayed the revocation. A hearing was conducted on July 1, and later that month the district court ruled that the revocation order should be reversed. The district court found that the language of § 39-669.15(7) was not directory, but was mandatory, and that the decision of the director did not meet the requirements of that statute. The Department appeals.

ASSIGNMENTS OF ERROR

The Department argues that the trial court erred in finding that § 39-669.15(7) created a mandatory duty and in ordering the reversal of the revocation order. We do not reach this assignment of error. Assuming, arguendo, that the Department is correct and that the 7-day rule is directory, the revocation is still invalid because the Department's rules and regulations governing its administrative hearings were not in effect at the time of Garcia's hearing.

STANDARD OF REVIEW

In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be affirmed, reversed, vacated, or modified for errors appearing on the record. *Twiss v. Trautwein*, 247 Neb. 535, 529 N.W.2d 24 (1995); *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995); *Abbott v. Department of Motor Vehicles*, 246 Neb. 685, 522 N.W.2d 421 (1994).

ANALYSIS

In his petition to the district court, Garcia claimed that the rules and regulations governing notice and hearings pursuant to the license revocation statute were not on file with the Secretary of State at the time of the hearing. Nothing in the record indicates when the rules and regulations were filed with the Secretary of State. No rule or regulation of any agency shall be valid as against any person until 5 days after such rule or regulation has been filed with the Secretary of State. *Abbott, supra*; *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 522 N.W.2d 417 (1994).

In *Gausman*, we judicially determined that, as of February 18, 1993, the rules and regulations which governed the conduct of revocation hearings had not been filed with the Secretary of State. We also determined that because the rules and regulations had not been filed, the revocation of a license following a hearing held prior to that date was invalid.

CONCLUSION

Garcia's administrative hearing was held on the day preceding the hearing held in *Gausman*. Therefore, we find, as we did in *Gausman*, that the actions of the Department did not comport with due process and that the order of revocation should be reversed.

We find that the district court reached the correct result and affirm its judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FERNANDO JIMENEZ, APPELLANT.

533 N.W.2d 913

Filed June 23, 1995. No. S-94-344.

1. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
2. **Corroboration: Witnesses: Testimony.** Corroboration is sufficient, for purposes of Neb. Rev. Stat. § 28-1439.01 (Cum. Supp. 1994), if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue.
3. **Corroboration: Controlled Substances.** Corroboration may be supplied by observation that a meeting between the subject and a cooperating individual actually took place and by searches of the cooperating individual both before and within a reasonable time after the drug purchase took place.
4. **Criminal Law: Proof.** It is the prosecution's burden in a criminal case to produce proof beyond a reasonable doubt of every element of a charged offense.
5. **Criminal Law: Convictions: Evidence: Trial.** When the evidence adduced at trial is legally insufficient to sustain the conviction, a criminal charge may not be retried, but must be dismissed.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and MUES, Judges, on appeal thereto from the District Court for Scotts Bluff County, ALFRED J. KORTUM, Judge. Judgment of Court of Appeals affirmed as modified.

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

Don Stenberg, Attorney General, and David K. Arterburn for appellee.

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

CAPORALE, J.

Pursuant to verdict, the defendant-appellant, Fernando Jimenez, was convicted in the district court of delivering a controlled substance, marijuana, in violation of the Nebraska Uniform Controlled Substances Act, Neb. Rev. Stat. §§ 28-401 through 28-445 (Reissue 1989 & Cum. Supp. 1992), more specifically §§ 28-405(c)(10) [Schedule I] and 28-416(1)(a). He then challenged his conviction in the Nebraska Court of

Appeals, which reversed the judgment of the district court and remanded the matter for a new trial. *State v. Jimenez*, 3 Neb. App. 421, 530 N.W.2d 257 (1995). Jimenez and the plaintiff-appellee, State of Nebraska, each successfully petitioned for further review, with Jimenez asserting, among other things, that the Court of Appeals wrongly ruled that the district court correctly found the evidence supported the conviction. That claim of error having merit, we now, without passing upon the various other issues treated by the Court of Appeals, modify its judgment by requiring that it remand the cause to the district court for dismissal, and as so modified, we affirm the judgment of the Court of Appeals.

We begin our review by recalling that a verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

The record establishes that in exchange for a reduced charge for his having delivered marijuana, Daniel Hubbard agreed to cooperate in police investigations. Hubbard identified Jimenez as a person from whom he could buy drugs and described where he thought Jimenez lived. As a consequence, on January 21, 1993, Officer Robert Greer of the Gering Police Department and Det. Mark Overman of the Scottsbluff Police Department arranged to follow Hubbard to Jimenez' reported residence where Hubbard was to attempt to buy marijuana from Jimenez while Overman and Greer recorded the transaction through a radio transmitter attached to Hubbard's body. Before proceeding, Greer searched the automobile Hubbard was to use, and Overman, after searching Hubbard, installed the body transmitter on Hubbard. Overman also noted how much money Hubbard had with him, provided him with $100 with which to purchase the drug, and recorded the serial numbers of the bills.

Hubbard then departed in his automobile; Greer and Overman followed in a police vehicle. Hubbard drove to a four-plex apartment building which Overman had previously determined to match the description Hubbard gave the police as containing Jimenez' residence and parked across the street. Greer saw Hubbard walk from his vehicle toward the apartment

building, and Greer then parked the police vehicle a block away. At that time, Overman activated the recorder.

Although Overman saw Hubbard walk toward the apartment building, Overman did not see Hubbard go into any of the apartments; he only saw Hubbard walking in the street toward the building. When Overman had first checked the address of the residence, he found that the utilities were listed in the name of a woman he thought to be Jimenez' mother. However, his notes did not identify the person to whom the utilities were listed, and he neither knew the name of the person he believed to be Jimenez' mother nor recalled why he had believed that this person was Jimenez' mother. He simply could not explain why he believed as he did. While Overman had seen Jimenez in the apartment area at various times, Overman did not see Jimenez on January 21, 1993. Neither could Greer verify that Jimenez was present in the apartment Hubbard entered on January 21.

According to Hubbard's testimony, he entered the four-plex and knocked on the door of an apartment, after which someone let him in. Several people were in the apartment, but he recognized Jimenez and Jimenez' brother and mother. Because Jimenez was talking on the telephone, Hubbard sat in the living room with the brother until Jimenez finished his telephone conversation. He and Jimenez then went to Jimenez' bedroom where Hubbard asked Jimenez if he "had any smoke." Jimenez responded "yes" and "pulled out two quarters." Hubbard described a "quarter" as being 7 grams of marijuana. He paid Jimenez $90 for the marijuana and left a couple of minutes later, driving to the police parking lot, with Greer and Overman following.

Upon arrival at the parking lot, Hubbard gave Overman two bags of marijuana. Overman again searched Hubbard and recovered $10 of the $100 that Overman had originally provided; however, none of the money provided Hubbard was found in Jimenez' possession.

The State played the tape recording of the purchase while Hubbard explained what transpired at certain points. Hubbard identified the various voices on the tape as his own and those of Jimenez and Jimenez' brother and mother. At the beginning of the tape, following some knocking sounds, Hubbard is heard to

ask whether "Fernando" was around and was admitted, and at another point, Hubbard states that he is waiting for Fernando. However, the conversation during the actual purchase transpired between "Bud" and "Dude."

Neb. Rev. Stat. § 28-1439.01 (Cum. Supp. 1994) provides: "No conviction for an offense punishable under any provision of the Uniform Controlled Substances Act shall be based solely upon the uncorroborated testimony of a cooperating individual." The requirement of corroboration in this section does not operate to exclude testimony which is not corroborated by other evidence; rather, it only requires that the conviction be based on something more than only such testimony. *State v. Beckner*, 211 Neb. 442, 318 N.W.2d 889 (1982).

> "A corroboration requirement does not mean that a commissioned law enforcement agent would have to be physically present at the time a drug purchase is made. Corroboration could be supplied, by instance, through the use of electronic surveillance, observations which indicate simply that the meeting between the subject and the cooperating individual actually took place, searches of the cooperating individuals both before and within a reasonable time after the drug purchase is alleged to have taken place, the use of marked buy money, the use of cooperating individuals in teams, the use of fingerprint analysis and numerous other investigative techniques."

211 Neb. at 446-47, 318 N.W.2d at 892-93.

Corroboration is sufficient, for purposes of § 28-1439.01, if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986); *State v. Taylor*, 221 Neb. 114, 375 N.W.2d 610 (1985).

We have held that corroboration may be supplied by observation that a meeting between the subject and a cooperating individual actually took place and by searches of the cooperating individual both before and within a reasonable time after the drug purchase took place. *State v. Knoefler*, 227 Neb. 410, 418 N.W.2d 217 (1988).

The principal fact at issue here obviously is the identity of

the person who sold the marijuana to Hubbard. Thus, the relevant inquiry is whether there was corroboration for Hubbard's identification of Jimenez as the person who sold Hubbard the marijuana on January 21, 1993.

When the law requires corroboration of a witness, the witness' testimony must be accompanied by evidence other than that from the witness. *State v. Witmer*, 174 Neb. 449, 118 N.W.2d 510 (1962); *Peery v. State*, 163 Neb. 628, 80 N.W.2d 699 (1957).

Jimenez argues that there is insufficient corroboration because there is no evidence, other than Hubbard's testimony, which identifies Jimenez as the person who sold Hubbard the marijuana on January 21, 1993. Jimenez contends that the tape recording does not corroborate Hubbard's testimony because it does not independently identify Jimenez; there is only Hubbard's testimony that one of the voices belongs to Jimenez.

It is true that in *State v. Loveless*, 209 Neb. 583, 308 N.W.2d 842 (1981), this court, with one member dissenting and two others concurring without comment, approved the admission into evidence, for the purpose of impeaching a defendant, of an only partially audible audiotape recording, together with a transcription of its contents. However, unlike the situation presented here, neither was the identity of the defendant at issue nor was the evidential value of the recording dependent upon the word of a cooperating individual.

Here, everything which ties Jimenez to the events recorded on the tape depends on Hubbard's testimony: Hubbard identified Jimenez as the person from whom drugs could be purchased, Hubbard identified the building Overman saw Hubbard approach as containing Jimenez' residence, and only Hubbard identified Jimenez' voice on the recording. Indeed, although Overman testified that he talked with Jimenez sometime in October, there is no testimony that the voice Overman heard on that occasion matched the taped voice identified by Hubbard as belonging to Jimenez. Neither was any attempt made to otherwise identify the seller's voice or to obtain fingerprints from the bag containing the drugs Hubbard surrendered to the police.

The fact that an officer had seen Jimenez in the area of the

apartment at other times does not establish that Jimenez was in the apartment with Hubbard at the time the drug purchase took place. And while the references in the tape to "Fernando" may suggest that someone named Fernando was at least being sought, they neither alone nor combined with the fact that Jimenez had been seen in the area at other times establish that the Fernando referred to is the Fernando Jimenez in question.

It is the prosecution's burden in a criminal case to produce proof beyond a reasonable doubt of every element of a charged offense. See *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995). Having failed to corroborate Hubbard's identification of Jimenez as the seller of the drug, the State has failed to satisfy its burden. Since the evidence is legally insufficient to sustain the conviction, the charge against Jimenez may not be retried, and the cause must be dismissed. See *id.*

Accordingly, we modify the judgment of the Court of Appeals as set forth in the first paragraph of this opinion and, as so modified, affirm it.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. FLOYD L. DERRY, APPELLANT.

534 N.W.2d 302

Filed June 23, 1995. No. S-94-1178.

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. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence.
3. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to

show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

5. **Jury Instructions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
6. **Jury Instructions: Lesser-Included Offenses: Presumptions: Appeal and Error.** When the trial court in a criminal case provides the jury with a "step" instruction and instructs the jury that, if they convict the defendant of a primary crime, they should not consider the lesser-included offenses charged, an appellate court presumes the jury followed the trial court's instruction and did not consider any of the purported lesser-included offenses after the defendant was found guilty of a primary crime.
7. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence.
8. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
9. ____. In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Deuel County: JOHN D. KNAPP, Judge. Affirmed.

David T. Schroeder, of Kelly & Schroeder, and R. Bradley Dawson, of Clough, Dawson & Piccolo, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and HICKMAN, D.J., Retired.

CONNOLLY, J.

Floyd Derry was convicted of murder in the second degree by a jury in the district court for Deuel County for the November 4, 1993, killing of his wife, Veronica Derry (the victim). Derry appeals his conviction, alleging that certain jury instructions given by the trial court were erroneous, that there was insufficient evidence to support the conviction, and that his

sentence was excessive. For the reasons stated herein, we affirm.

I. FACTUAL BACKGROUND

1. Events Prior to November 4, 1993

Derry and the victim were married March 30, 1959. The record reflects that the marriage was troubled from the beginning. Derry testified that in 1981, he was diagnosed with multiple sclerosis. In 1984, Derry began walking with the aid of crutches. Sometime during the mid-1980's, Derry and the victim started arguing a lot, and the couple's marriage began to deteriorate. In January 1991, the fighting got so bad that Derry began sleeping in a separate bedroom.

On September 21, 1993, the victim told Derry that she wanted a divorce. Two days later, on September 23, Derry received a "Protection Order" issued by the district court for Deuel County, ordering him not to disturb the victim. Derry contacted an attorney and, pursuant to the attorney's instructions, removed his clothing and personal belongings from the family home. Thereafter, Derry showered at a farmstead that he owned 10 miles east of Chappell, Nebraska, near Interstate 80, and slept at his father's home in Chappell.

2. Events on November 4, 1993

After he moved out of the family home, Derry regularly spoke with the victim on the telephone to read her mail to her and to determine if the victim wanted any of the mail brought to her. Sometime during the first few days of November 1993, the victim called Derry and told him that she had been dating another man for approximately 5 years and that she was leaving to be with the other man on Thursday, November 4. Derry testified that during the time preceding that phone call, he had wanted to remain married to the victim.

Derry finished work at approximately 6 p.m. on Thursday, November 4; showered and changed his clothes at his farmstead; and then went into Chappell to eat dinner with his father and to sort the mail. At approximately 8 p.m., Derry left Chappell and drove out to the family home where the victim still resided. Derry testified that he went to see the victim

because he wanted to talk her into staying with him. Derry waited near the house in his pickup until the victim returned and then drove his pickup to just east of the house and parked. Derry got out of the pickup and shut the door. The victim approached him and knocked him down by hitting him in the chest with a large purse.

Derry testified that he got back to his feet and began trying to talk to the victim about getting back together. The victim continued to hit Derry with the purse, eventually knocking him off his feet a second time. Derry testified that as he began crawling back to the pickup the victim stopped hitting him, so he got up and walked to the pickup. Upon reaching the pickup, Derry opened a toolbox and grabbed a crescent wrench. He told the victim, "Now damn it, you hit me again and I am going to hit you back." Derry testified that the victim swung the purse at him again and that he hit her in the ear with the wrench. Derry claimed that he meant to tap the victim on the shoulder with the wrench, but that when he accidentally hit her ear she started bleeding. The wrench flew out of Derry's hand and landed behind the victim.

After being struck with the wrench, the victim dropped her purse and headed for the garage beside the house. Derry picked up the wrench and began to follow her. The victim stopped at the garage and started talking very fast, accusing Derry of following her and spying on her. Derry testified that he denied spying on the victim and that he told her to shut up so they could talk. The victim began to walk toward the back of the house, and Derry followed. Derry testified that he attempted to tap the victim on the shoulder with the wrench, but the wrench flew out of his hand and landed on the ground in front of the victim. The victim dove to the ground and grabbed the wrench. The victim then wrapped her legs around Derry's legs and brought him to the ground beside her. Derry estimated that they were struggling on the ground for approximately 30 minutes.

While they were lying on the ground, Derry testified that the victim kept trying to hit him with the wrench. Derry blocked the victim's attempts to strike him with the wrench by putting his hand on the top end of the wrench. Derry testified that the victim told Derry that he was going to run out of energy and

become weak. Derry, fearing that the victim was right, took his left hand off the wrench and slugged the victim three or four times. Derry felt the victim relax her legs enough for him to twist free, so he pulled loose and grabbed the wrench. In a tape-recorded interview conducted with Sgt. Gary Renner of the Nebraska State Patrol soon after Derry's arrest, Derry gave the following account of events after he gained control of the wrench:

> FD [Derry]: . . . I grabbed that crescent and I twisted and I got it away from her. And she's trying to get it back on, so I hit her, and hit her, and hit her.
>
> GR [Sergeant Renner]: Hmm. Have any idea how many times you hit her?
>
> FD: I don't think I counted.
>
> GR: No but a-a lot though huh?
>
> FD: She kept talking to me. I couldn't believe she's alive, I hit her and I knew she's dead. I mean I hit her really hard and, when on the ground I used both hands on the wrench. And, and I hit her and she was talking to me.
>
> GR: Hmm.
>
> FD: So I had to hit her again. And, you know what she did, she still's talking. And that's, I couldn't believe that I was going to hit her again. Anyway the last time I hit her, I hit her in, in the face and then, and then her face broke.
>
> GR: Where was you hittin' her the other times?
>
> FD: I don—, well I remember, I remember the last time, I was, she just kept talking, I mean, you couldn't get her to shut up. I, some where in the head, I don't know where.

Later in the interview, Sergeant Renner asked Derry why he chased the victim into the backyard. Derry responded:

> FD: Well what, what's gonna happen to me if I, I've hit her with the wrench.
>
> GR: Um hmm.
>
> FD: . . . If I would hit her with a wrench, and she went to town and told I hit her with the wrench, or I could have killed her, I wouldn't have got punished any different. It'd been the same punishment, I was trying to kill her.

. . . .

FD: And then, (unintelligible) I was running, an-and I hit her and then she tangled up her legs around mine. And we were on the ground there for, twenty thirty minutes. She just, had her mouth going all the time and I knew there was no talk. I had to ah, kill her.

Dr. Alvin Armstrong, called by the State as an expert in forensic pathology, conducted an autopsy on the victim and determined that the victim received approximately 39 blows to the head, resulting in her death.

After he killed the victim, Derry attempted to carry or pull her body to his pickup. Finding that he did not have enough strength to move her that far, Derry rolled the victim's body into the bucket of a loader and used the loader to dump her into the bed of his pickup. Derry transported the victim's body to his farmstead near Interstate 80 and dug a shallow hole with another loader. He backed up his pickup to the hole and rolled the victim's body into it. Derry also threw his bloody coveralls and the victim's coat and purse into the hole. Derry covered the hole, went into his house, washed his clothes, and left. Derry estimated that he returned to his father's home in Chappell at 3 or 4 a.m. on November 5, 1993. He eventually got rid of the murder weapon by throwing it into a ditch.

3. Events Leading to Derry's Arrest

On Monday, November 8, 1993, police discovered and excavated the victim's body. Apparently, Derry drove by the farmstead while the police were digging. Figuring that police had found the victim's body, Derry drove away in his white Ford Fiesta and headed west.

Officer Steven Townsend of the Wyoming Highway Patrol received a dispatch concerning Derry's Ford Fiesta. At approximately 10 p.m. on November 8, Officer Townsend spotted Derry's vehicle and attempted to initiate a stop. Derry stopped briefly, then led police on a high-speed chase which ended when Derry crashed his car at Warren Air Force Base. Officer Townsend arrested Derry at that point.

4. Trial

Derry was charged with first degree murder and use of a

deadly weapon to commit a felony. At his jury trial, Derry submitted into evidence the following stipulation:

> On November 4, 1993, at approximately 9:30 p.m., Floyd L. Derry killed Veronica C. Derry upon a sudden quarrel at their residence approximately one-half mile east of Chappell in Deuel County, Nebraska. Veronica C. Derry died as a result of blows to her head from a 15 to 18 inch crescent wrench. After Veronica C. Derry's death, Floyd L. Derry moved her body from the location of her death to a farmstead approximately 10 miles east of Chappell and buried her body.

After hearing all the evidence, the jury convicted Derry of murder in the second degree. The district court overruled Derry's motion for judgment notwithstanding the verdict or, in the alternative, for new trial. This appeal followed.

II. ASSIGNMENTS OF ERROR

Derry contends that the district court erred in (1) erroneously instructing the jury and not giving Derry's proposed jury instruction regarding the definition of "sudden quarrel," (2) erroneously instructing the jury and not giving Derry's proposed jury instruction regarding the definition of "reasonable doubt," (3) erroneously instructing the jury and not giving Derry's proposed jury instruction regarding the material elements for the crime of manslaughter, (4) failing to find that the evidence was insufficient to support a conviction of second degree murder, and (5) imposing an excessive and indeterminate sentence.

III. 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 to or otherwise adversely affected a substantial right of the appellant. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995); *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994); *State v. Gatson*, 244 Neb. 231, 505 N.W.2d 696 (1993).

On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *State v. One*

1985 Mercedes 190D Automobile, 247 Neb. 335, 526 N.W.2d 657 (1995); *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995); *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994).

IV. ANALYSIS

1. Jury Instructions

Derry argues that the district court erroneously defined "sudden quarrel," "reasonable doubt," and the material elements for the crime of manslaughter and contends that the district court erred in refusing to give Derry's proposed instructions defining those terms.

(a) Definition of "Sudden Quarrel"

The district court administered the following jury instruction defining "sudden quarrel": " 'SUDDEN QUARREL' the phrase 'sudden quarrel' does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the parties."

Derry contends that the jury instruction administered by the district court erroneously defined "sudden quarrel." In his proposed jury instruction, Derry asked the district court to define "sudden quarrel" as follows:

> A sudden quarrel is a legally recognized and sufficient provocation which causes a person to lose normal self control.
>
> The phrase "sudden quarrel" does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the parties.
>
> In considering manslaughter, you should consider: whether Mr. Derry acted under the impulse of a sudden quarrel which clouded his reason and prevented rational

> action; whether a sudden quarrel excited Mr. Derry and obscured or disturbed his power of reason to the extent that he acted rashly, without due deliberation and reflection, rather than from judgment; whether, under all the facts and circumstances as disclosed by the evidence, a reasonable time had elapsed from the time of the sudden quarrel to the time of the act for passion to subside and reason to resume control of his mind; and whether the suspension of reason, if shown to exist, arising from the sudden quarrel, continued from the time of the quarrel until the very instant of the act.
>
> If Mr. Derry killed Veronica C. Derry upon a sudden quarrel, you should find him guilty of manslaughter.

Assuming, without deciding, that Derry is correct in arguing that the district court's definition of "sudden quarrel" was erroneous, we nevertheless hold that the allegedly erroneous jury instruction did not constitute prejudicial error. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994).

The district court in the case at bar properly administered a "step" instruction, wherein it instructed the jury to consider the crime of manslaughter only if they found that the State did not prove that Derry was guilty of second degree murder. In *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986), we held that this court will presume that " 'the jury followed the court's instruction and did not consider any of the purported lesser-included offenses after the defendant was found guilty of the primary charge against him.' " *Id.* at 33, 395 N.W.2d at 547-48 (quoting *State v. Murphrey*, 220 Neb. 699, 371 N.W.2d 702 (1985)).

The jury found Derry guilty of second degree murder. Under the step instruction administered by the district court, the jury never reached the question of whether Derry committed the crime of manslaughter. Pursuant to *Pribil*, we assume that the jury obeyed the district court's instructions. Thus, we find that the jury never had the opportunity to apply the district court's definition of "sudden quarrel." Since the jury never reached the question of whether Derry was guilty of manslaughter, he could not have been prejudiced by the erroneous instruction administered by the district court. See *State v. Jones, supra*.

(b) Definition of "Reasonable Doubt"

The district court administered the same jury instruction defining "reasonable doubt" that has been upheld by both this court and the U.S. Supreme Court. *Victor v. Nebraska*, ____ U.S. ____, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994); *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), *cert. denied* 114 S. Ct. 113, 126 L. Ed. 2d 78. Derry proposed an alternative definition of "reasonable doubt" at trial, which he urges this court to adopt, at least prospectively, as the proper definition. Derry's arguments are not compelling, and we find that this assignment of error is without merit.

(c) Elements of Manslaughter

Derry contends that the district court erroneously instructed the jury regarding the elements of the crime of manslaughter and argues that the court erred in refusing to use Derry's proposed instruction regarding the same. This assignment of error is without merit because even if the district court erroneously instructed the jury regarding the elements of manslaughter, Derry could not have been prejudiced by the error. Under the step instruction administered by the district court, the jury never reached the question of whether Derry committed the crime of manslaughter after it determined that he committed second degree murder. See *State v. Jones, supra*. Accord, *State v. Pribil, supra*; *State v. Murphrey, supra*.

2. Sufficiency of Evidence

Derry contends that none of the evidence adduced at trial supported a conviction of second degree murder. A verdict in a

criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Cook*, 244 Neb. 751, 509 N.W.2d 200 (1993); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

Derry argues that, in effect, he testified that he committed manslaughter and that the State offered no substantial evidence to the contrary. We disagree. The State offered into evidence Derry's tape-recorded confession, wherein Derry stated that he felt that he might as well kill the victim rather than let her go to report his violation of her protection order. Derry stated his belief that he would be subjected to the same punishment in either circumstance. Additionally, Derry told Sergeant Renner that he had to kill the victim because she talked constantly and because he knew that he and the victim would not be able to have a discussion. From this evidence, the jury had sufficient grounds to convict Derry of second degree murder.

3. Sentences

In his final assignment of error, Derry challenged the sentence imposed by the district court, contending that the sentence was excessive and that the district court did not have the authority to impose an indeterminate sentence. The district court sentenced Derry to 40 years to life in prison for his second degree murder conviction and to 8 to 18 years in prison for his use of a weapon to commit a felony conviction, sentences to run consecutively. Both sentences are within the statutory limits established by the Legislature. Neb. Rev. Stat. §§ 28-105, 28-1205, and 28-304(2) (Reissue 1989).

(a) Excessive Sentence

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995); *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994). An abuse of discretion takes place when the sentencing court's reasons or

rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993). Derry contends that we should be shocked that he received a sentence whereby he has no expectation of living long enough to be released on parole. Derry claims that the district court abused its discretion in failing to consider his life expectancy in passing sentence.

In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Lowe, supra*; *State v. Ellen*, 243 Neb. 522, 500 N.W.2d 818 (1993). In the case at bar, Derry had no past criminal record, and judging from psychological reports regarding his age, mentality, and experience, he might not pose a threat to society. However, those potentially mitigating factors were counterbalanced by the brutality of the offense, the thought process whereby Derry decided to kill the victim, and his attempts to conceal the commission of the crime, all of which evidenced a blatant disregard for human life. The sentence imposed by the district court was not excessive.

(b) Indeterminate Sentence

As support for his argument that the district court improperly imposed an indeterminate sentence for the second degree murder conviction, Derry cites *State v. Ward*, 226 Neb. 809, 415 N.W.2d 151 (1987), wherein this court held that under §§ 28-105 and 28-304(2) (Reissue 1985), trial courts were not authorized to sentence one convicted of second degree murder to an indeterminate sentence. However, subsequent to our decision in *Ward*, the Legislature enacted 1993 Neb. Laws, L.B. 529, which went into effect September 9, 1993. L.B. 529, as reflected by Neb. Rev. Stat. § 29-2204 (Supp. 1993), provided:

> (1) Except as provided in subsection (4) of this section and except when a term of life is required by law, in imposing an indeterminate sentence upon an offender, the court shall:

(a) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum.

V. CONCLUSION

L.B. 529 went into effect prior to the commission of the crime of which Derry was convicted and is therefore applicable to this case. See *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994). Section 28-304(2) (Reissue 1989) defines murder in the second degree as a Class IB felony. The penalty authorized by § 28-105 (Reissue 1989) for such a felony is a minimum of 10 years' imprisonment and a maximum of life imprisonment. We hold that the sentence imposed by the district court for the second degree murder conviction—40 years to life in prison—was authorized under § 29-2204.

AFFIRMED

SPORTS COURTS OF OMAHA, LTD., A NEBRASKA LIMITED PARTNERSHIP, APPELLANT, V. SAM R. BROWER AND ANDERSEN BERKSHIRE LAURITSEN & BROWER, APPELLEES.

534 N.W.2d 317

Filed June 30, 1995. No. S-93-798.

1. **Expert Witnesses: Rules of Evidence.** Expert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue, and expert testimony concerning the status of the law does not tend to accomplish either of these goals; as a consequence, expert testimony concerning a question of law is generally not admissible in evidence.
2. **Uniform Commercial Code: Security Interests.** The retention of collateral does not in and of itself constitute a disposition under Neb. U.C.C. § 9-504 (Reissue 1980).
3. **Uniform Commercial Code: Security Interests: Words and Phrases.** The phrase "otherwise dispose of," as used in Neb. U.C.C. § 9-504(1) (Reissue

1980), does not include permanent retention of the collateral for the secured party's own use.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Reversed and remanded for further proceedings.

Daniel E. Klaus and Donald L. Dunn, of Rembolt Ludtke Parker & Berger, for appellant.

Dean F. Suing and David A. Castello, of Katskee, Henatsch & Suing, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, and CONNOLLY, JJ.

PER CURIAM.

The plaintiff-appellant, Sports Courts of Omaha, Ltd., alleges that it sustained damage as the result of the negligence of its attorneys, the defendants-appellees, Sam R. Brower and the partnership of which he is a member, Andersen Berkshire Lauritsen & Brower, in permitting the dismissal of Sports Courts of Omaha, Ltd. v. Thomas M. Schuessler and Harry W. Meginnis, Jr., Douglas County District Court, docket 843, page 474, hereinafter referred to as the underlying case. In a bifurcated proceeding, the district court determined that Sports Courts could not have been successful in the underlying case and thus dismissed the within action.

SETTING OF CONTROVERSY

Sports Courts alleges that as a result of the dismissal of the underlying case, it is time barred from successfully pursuing its right to recover on a certain promissory note. So far as is relevant, the defendant attorneys answered that inasmuch as Sports Courts had improperly disposed of certain collateral, Sports Courts would have been precluded from recovering a deficiency judgment on the note and thus had no basis for maintaining this action.

There are three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to

the client. *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991).

The district court elected to nibble at the resolution of this action by trying only whether the method of disposition of the subject collateral was such as to prevent Sports Courts from obtaining a deficiency judgment on the promissory note. As a consequence, the posture of the action is such that no question exists concerning Sports Courts' employment of the defendant attorneys in the underlying case, the defendant attorneys' negligence in permitting the dismissal of the underlying case, or the extent of Sports Courts' damages, if any. The only question is whether the negligence of the defendant attorneys resulted in and was the proximate cause of loss to Sports Courts.

TRANSACTIONAL FACTS

Approximately 5 years after Sports Courts was organized and began operations as a limited partnership, it sold certain of its assets to Tom-Har, Inc., a corporation whose stockholders consisted of Schuessler and Meginnis, the two individuals named as defendants in the underlying case. As part of that transaction, Tom-Har executed a promissory note in favor of the limited partners of Sports Courts.

Later, as Tom-Har was then considered to be in default, Sports Courts hired Brower to review the "purchase agreement or promissory note" relating to that transaction. As a result, the arrangement between Sports Courts and Tom-Har was restructured under documents which Brower prepared and which were executed on May 15, 1984. A cash payment was made toward the note, Tom-Har reaffirmed the debt, and Schuessler and Meginnis became comakers of the note. In addition, a trust deed was executed to secure the obligation, and Schuessler and Meginnis pledged all the capital stock of Tom-Har as security, actual physical possession of which had already been obtained by Brower. At some point, Brower also acquired possession of the stock record book. The pledge agreement named Brower the monitor and agent of Sports Courts. According to the Tom-Har bylaws, in order to vote the shares, Schuessler and Meginnis had to be registered in Brower's name as pledgee, and to issue new shares, the stock

certificate had to be signed by the president and secretary.

Tom-Har also executed a security agreement in favor of Sports Courts which undertook to encumber all of the tangible and intangible assets of Tom-Har located in Omaha. The security agreement was perfected by the filing of a financing statement.

Sports Courts' secretary-treasurer, Marlo Burg, later informed Brower that two monthly payments due on the note were in default. Brower advised Burg of the options available, and at Burg's request, Brower sent a notice of default stating that Sports Courts had directed him as monitor to take all action necessary under the pledge agreement. In another notice of default, Burg advised Tom-Har, Schuessler, and Meginnis that the note would be accelerated if the default was not cured by a specified date.

During discussions over the next few days, Burg and Brower concluded that Brower, acting under the pledge agreement as monitor, would vote the stock. Pursuant to the pledge agreement, Brower sent notice to Tom-Har advising that he had exercised voting rights to the pledged shares of Tom-Har capital stock and had elected Burg as the new sole director of Tom-Har and asking that such be reflected in Tom-Har's corporate minutes. In lieu of a special shareholder meeting, Brower prepared a document in which Tom-Har consented and agreed to the action electing Burg, revoked any action of the former directors in seeking bankruptcy protection, and prevented the taking of any such future action. (The filing for bankruptcy protection was of concern to Sports Courts because Tom-Har's assets secured its note to the limited partners of Sports Courts.)

Subsequently, Tom-Har's bylaws were amended, after which five directors, Burg and four other limited partners of Sports Courts, were elected to the Tom-Har board. Together, these directors also owned 85 percent of Sports Courts.

The day-to-day operations were still left in the hands of Tom-Har. But as the directors wished to sell the business, continuing efforts to do so were made. Brower, again acting as monitor under the pledge agreement, sent a letter to attorney Mike Morrow, who he believed was representing both Schuessler and Meginnis, soliciting written offers to purchase

the Tom-Har capital stock held under the pledge agreement.

Morrow, representing Meginnis, contacted Brower with a proposal by Meginnis and others to purchase the capital stock of Tom-Har, which Sports Courts found acceptable. However, after Brower sent notice to Schuessler and Tom-Har of the intent to sell the Tom-Har capital stock to Meginnis and others, negotiations broke down, and the buyers refused to proceed.

Thereafter, a special meeting of the board of directors of Tom-Har was held, at which the directors were also made officers. Because of concerns about the condition of the club, its level of membership, and its value as collateral, Schuessler was relieved of further responsibility for the operations of the business. Brower was asked to investigate the status of the operating facility and subsequently did so. Although not reflected in the minutes, Brower testified that he was also instructed to take a series of actions to acquire actual physical control of the facility and its assets and to deny Schuessler access or control of the operations or assets.

At a meeting held a few days later, Brower reported the condition of the club to the board, confirming the board's concerns, including those about unpaid bills and taxes and the hygiene of the club. On the following day, that is, on April 9, 1985, without giving Schuessler and Meginnis any further notice, Brower wrote "cancelled" on their Tom-Har stock and reissued the stock to "Sam R. Brower, 'Monitor' under a Certain Pledge Agreement dated May 15, 1984."

TRIAL FACTS

At the partial trial described earlier, the district court received, over Sports Courts' objection, the testimony of a law professor who opined that the cumulative effect of the postdefault acts Brower took as monitor on behalf of his client with regard to the capital stock of Tom-Har was such as to have constituted a disposition of collateral under the provisions of Neb. U.C.C. § 9-504 (Reissue 1980), and that Brower's failure to have given appropriate notice to Tom-Har, Schuessler, and Meginnis precluded the obtaining of a deficiency judgment on the note.

ANALYSIS

Our analysis is confined to the two dispositive assignments of error asserted by Sports Courts, to wit, that the district court (1) improvidently received testimony concerning the status of the applicable law and (2) incorrectly judged that law.

Receipt of Testimony.

At all times during and prior to the date Brower wrote "cancelled" on the Tom-Har stock of Schuessler and Meginnis, § 9-504 read in pertinent part:

> (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. . . .
>
> . . . .
>
> (3) . . . [R]easonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor . . . .

Under that version of § 9-504, compliance with the notice requirement was a condition precedent to the secured creditor's right to recover a deficiency which the creditor had the burden of pleading and of proving. *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990); *Bank of Gering v. Glover*, 192 Neb. 575, 223 N.W.2d 56 (1974).

Thus, if the actions Brower took on behalf of Sports Courts constituted a disposition of the Tom-Har stock, Sports Courts would not have been able to recover a deficiency judgment in the underlying case on the note executed in its favor by Tom-Har, Schuessler, and Meginnis. In that connection, we should note that Sports Courts contends that even if Brower's actions constituted a disposition of the stock without proper notice, neither he nor his firm may use that prior negligence on their part to insulate them from liability on their subsequent negligence in permitting the underlying case to be dismissed. Because, as becomes clear later, we need not concern ourselves with that contention, we do not do so.

There being no dispute as to the actions Brower took in

connection with the capital stock of Tom-Har, whether those actions constitute a disposition of the stock as contemplated by § 9-504 resolves itself into a matter of statutory interpretation, which is a question of law. See *Sylvis v. Walling, ante* p. 168, 532 N.W.2d 312 (1995).

We have previously pointed out that expert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue and that expert testimony concerning the status of the law does not tend to accomplish either of these goals; as a consequence, expert testimony concerning a question of law is generally not admissible in evidence. *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994); *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991); *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984); Neb. Evid. R. 401, 402, and 702, Neb. Rev. Stat. §§ 27-401, 27-402, and 27-702 (Reissue 1989). See, also, *State v. Thomas*, 236 Neb. 553, 462 N.W.2d 862 (1990) (expert testimony generally not admissible as proof counsel was ineffective).

Thus, the district court erred in receiving the opinion of a law professor concerning the status of the law.

Judging the Law.

The above having been resolved, it becomes necessary to determine whether the district court correctly judged the law to be such that Brower's conduct constituted a § 9-504(1) disposition of the Tom-Har capital stock.

Neb. U.C.C. § 9-207(4) (Reissue 1980) provided:

> A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement.

Moreover, the pledge agreement in this case reads in pertinent part as follows:

> Immediately and without further notice, upon the failure of [Tom-Har, Schuessler, and Meginnis] to make any payment due to [Sports Courts] in accordance with the terms and provisions of the Note, whether or not the

> Pledged Stock shall have been registered in the name of [Sports Courts] or [its] nominee, [Brower], or his nominee, as agent for [Sports Courts], shall have with respect to the Pledged Stock, the right to exercise all voting rights as to all shares and, as to all of the Pledged Stock, all other corporate rights . . . as if [Brower] were the absolute owner thereof . . . .

Sports Courts argues that, as its agent, Brower merely acted pursuant to the foregoing statute and contractual authority to preserve the collateral of the going business and that his acts thus did not amount to a § 9-504(1) disposition of the Tom-Har capital stock.

Any suggestion that we have already resolved this issue adversely to Sports Courts is misplaced. It is true that in *Allis-Chalmers Corp. v. Haumont*, 220 Neb. 509, 371 N.W.2d 97 (1985), we ruled that a secured creditor's repossession and subsequent treatment of the collateral constituted a § 9-504(1) disposition such as to require notice to the debtors. The collateral therein consisted of new and used equipment. After taking the new equipment, the secured creditor gave the debtor credit at the invoice price, including freight; the used equipment was sold at private sales. The treatment by the Allis-Chalmers creditor of the used equipment bears no relevant similarity to the treatment of the Tom-Har stock in this case. The Allis-Chalmers used equipment was transferred to a third party for value. Here, there was no third party and no exchange of value. While it is true that just as here there was no transfer to a third party of the Allis-Chalmers new equipment, in *Allis-Chalmers Corp.* there was value given, in that the debtor was credited with the full invoice price of the equipment. The Allis-Chalmers creditor in effect sold the new equipment to itself for whatever later transfers to third parties the creditor might wish to make. Here, Brower merely exercised the rights in the stock given him by the pledge agreement in order to protect the going business the stock represented.

A number of courts have held that retention of collateral does not in and of itself constitute a disposition under § 9-504(1). See, *Lamp Fair, Inc. v. Perez-Ortiz*, 888 F.2d 173 (1st Cir. 1989); *Appeal of Copeland*, 531 F.2d 1195 (3d Cir. 1976);

General Elec. Capital Corp. v. Vashi, 480 N.W.2d 880 (Iowa 1992); *IFG Leasing Co. v. Gordon*, 776 P.2d 607 (Utah 1989). It has also been suggested that disposition under § 9-504(1) and (2) connotes an actual transfer of an interest in the collateral by sale, lease, or contract. See, *General Elec. Capital Corp., supra*; *IFG Leasing Co., supra*.

Although holding that for other reasons the creditor could not obtain a deficiency judgment, the court in *Lamp Fair, Inc.*, 888 F.2d at 177, in applying the laws of Connecticut, observed that whatever might be the meaning of the "words 'otherwise dispose of,' they do not include permanent retention of the collateral for the secured party's own use."

Illuminating reasoning is also found in *Fletcher v. Cobuzzi*, 499 F. Supp. 694 (W.D. Pa. 1980). Therein, the debtor corporation defaulted, and the arrangement was restructured such that the corporation's president made himself personally liable on the debt and put up his stock in the corporation as collateral. After more defaults and unfulfilled new agreements, the secured creditor transferred the stock into its own name and later sold some of the stock without the president's knowledge. The value of the stock subsequently increased, and the president requested that some of the stock be sold, since the debt was now overcollateralized. Upon learning that some of the stock had already been sold, the president demanded the difference between the sale price and the higher value of the stock at the time he requested that it be sold.

The secured creditor claimed that the earlier transfer of the stock into its name had been a foreclosure. In rejecting that claim, the *Fletcher* court held that the mere transfer of the name on the stock did not constitute an "other disposition" within the meaning of § 9-504(1) because such a disposition required some assignment for value of the secured creditor's rights in the collateral. The transfer to the secured creditor was not such an assignment. Instead, the court characterized what had taken place as a repossession or perfection of the secured creditor's rights in the collateral by means of eliminating the president's title and vesting it in the secured creditor. Thus, the secured creditor was liable to the president for the value of the stock in excess of the sums due the secured creditor.

We are persuaded that under the circumstances, Brower's acts in voting the capital stock, in taking corporate action in accordance with that vote, and in canceling the registration of the stock in the names of Schuessler and Meginnis and reissuing it in his name do not constitute a § 9-504(1) disposition of the stock. We must therefore conclude that the district court erred in ruling that Sports Courts could not have been successful in the underlying case.

CONCLUSION

Accordingly, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LANPHIER, J., not participating.

CHRYSLER CORPORATION, APPELLEE, V. LEE JANSSEN MOTOR COMPANY, A NEBRASKA CORPORATION, APPELLANT.

534 N.W.2d 568

Filed June 30, 1995. No. S-93-875.

1. **Judgments: Jurisdiction: Appeal and Error.** When determination of a jurisdictional question involves factual findings, a trial court's decision on the question of jurisdiction will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. ____: ____: ____. When a jurisdictional question does not involve a factual dispute, determination of the jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue.
3. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation.** Pursuant to Neb. Rev. Stat. §§ 60-1411.02 (Cum. Supp. 1992) and 60-1415 (Reissue 1988), the Nebraska Motor Vehicle Industry Licensing Board has the power to deny any application for a license, to revoke or suspend a license, or to place the licensee on probation.
4. **Administrative Law.** Administrative bodies have only that authority specifically

conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act.

5. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.

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

Michael K. High, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellant.

Robert D. Kinsey, Jr., and Richard L. Rice, of Kinsey Ridenour Becker & Kistler, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and LIKES, D.J.

WRIGHT, J.

This appeal comes before us pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 through 84-920 (Reissue 1994). The district court for Lancaster County reversed the Nebraska Motor Vehicle Industry Licensing Board's (Board) determination that Chrysler Corporation (Chrysler) had wrongfully charged back certain warranty claims submitted by Lee Janssen Motor Company (Janssen). The district court held that although Janssen had a right to make a demand for the warranty claims, the Board had no right to make a determination as to the amount of the claims. Janssen appealed to the Court of Appeals, and we removed the appeal to this court in order to regulate the caseloads of the appellate courts.

SCOPE OF REVIEW

When determination of a jurisdictional question involves factual findings, a trial court's decision on the question of jurisdiction will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. When a jurisdictional question does not involve a factual dispute, determination of the jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue. *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989). See

Crystal Clear Optical v. Silver, 247 Neb. 981, 531 N.W.2d 535 (1995).

FACTS

By a letter to the Board dated October 23, 1990, Janssen claimed that Chrysler was violating Neb. Rev. Stat. § 60-1438 (Reissue 1988) by charging back warranty claims which had been, in Janssen's opinion, substantiated. The letter described an audit conducted by Chrysler and outlined several of the disputed warranty claims that the audit had produced. Janssen ended the letter with the following:

> I request that a formal hearing be convened and that Chrysler be required to refrain from further violation of the Statutes that this Board is to enforce equally for the benefit and protection of the customer, dealer and manufacturer. Further I request Chrysler be ordered to withdraw the false charge backs, that my dealership not be threatened, and that my parts not be "C.O.D." as a result of this dispute and for such further remedy as the Board feels is proper.

The Board sent a "Notice of Hearing to Show Cause" to Chrysler concerning "the matter of the revocation or the suspension of the motor vehicle manufacturer license, license #MF-00050 issued by the Board to Chrysler Corporation." Chrysler was notified to appear and show cause why Chrysler's license issued by the Board should not be revoked or suspended by the Board because it was alleged that Chrysler had

> failed, neglected and refused to compensate [Janssen] for warranty service which [Chrysler] requires the Dealer to provide in the amount of [$17,250]. That [Janssen] submitted claims for said warranty work to [Chrysler] and [Chrysler] failed and neglected to disapprove said claims within [30] days . . . . Moreover, [Chrysler] has not demonstrated to [Janssen] that said claims . . . were false, fraudulent or unsubstantiated. That [Chrysler's] conduct . . . is contrary to the provisions of §60-1438 . . . and §60-14.11.02(11) [sic] . . . . That [Chrysler's] failure to comply with the provisions of §60-1438 . . . is willful or through undue negligence.

The notice and hearing were given pursuant to the provisions of Neb. Rev. Stat. §§ 60-1411.02 (Cum. Supp. 1992), and 60-1413, 60-1414, and 60-1415 (Reissue 1988). The notice stated that failure to appear "may cause an order or orders to be entered . . . revoking or suspending your license" or "a demand by the Board . . . for restitution to a harmed consumer."

On August 5, 1991, Janssen revised and narrowed its claims through a complaint before the Board stating that Chrysler was required to compensate Janssen for warranty service. Janssen pled that Chrysler had wrongfully charged back specific warranty claims and presented a list of those specific claims. The complaint ended with the following statement: "WHEREFORE, the complainant requests that defendant be required to pay the sum of $11,760.58 together with the costs of this action." Chrysler's answer denied the allegations of the complaint and stated the Board lacked subject matter jurisdiction to hear the complaint.

At a hearing before the Board on October 25, 1991, the president of Janssen testified: "They charged me back and I felt strongly that they [the claims] should not have been charged back, so I filed a complaint before the board." Chrysler maintained the Board had no jurisdiction, but its auditor testified it disallowed certain warranty claims which Chrysler believed to be unsubstantiated.

The Board found that Chrysler should be entitled to charge back $2,337.39 on warranty claims, but that Janssen was entitled to compensation of $11,760.58 for warranty claims that had been wrongfully charged back. The Board did not make a finding as to whether Chrysler's license should be revoked or suspended.

Chrysler appealed to the district court for Lancaster County. On appeal, the record from the Board was received, and the district court subsequently issued an order on August 31, 1993, finding that the Board did not have the power to determine monetary damages. The court reversed the order of the Board and directed the Board to dismiss Janssen's 1991 complaint. Janssen appeals.

ASSIGNMENT OF ERROR

Janssen claims the district court erred as a matter of law in determining that the Board lacked jurisdiction without first conducting a de novo review of the entire record and the Board's factual findings.

ANALYSIS

The issue of whether the Board lacked jurisdiction is more precisely whether the Board had authority to issue its findings and order awarding damages to Janssen in response to the 1991 complaint filed by Janssen. The Board was established pursuant to Neb. Rev. Stat. § 60-1402(1) (Reissue 1993). The Board's powers are found throughout chapter 60, article 14. Section 60-1411.02 provided:

> The board may, upon its own motion, and shall, upon a sworn complaint in writing of any person, investigate the actions of any person licensed [under chapter 60, article 14. The board] shall have the power to deny any application for a license or to revoke or suspend any license issued under Chapter 60, article 14, when the applicant or licensee including any officer, stockholder, partner, or any person having any financial interest in the applicant or licensee:
>
> . . . .
>
> (11) Has failed to comply with Chapter 60, article 14, and any orders, rules, or regulations of the board adopted and promulgated under Chapter 60, article 14 . . . .

Furthermore,

> [i]f the board shall determine that the license holder has willfully or through undue negligence been guilty of any violation of Chapter 60, article 14 . . . his or her license may be suspended or revoked, or he or she may be placed on probation. The board may make a demand on a [violator of chapter 60, article 14] for restitution to a harmed consumer.

§ 60-1415. After the Board's determination is final, the party may appeal in accordance with the Administrative Procedure Act. *Id.*

Pursuant to § 60-1438(1), Chrysler was required to put in

writing the service and warranty requirements it expected of its dealers, as well as the levels of compensation for the work. Subsection (2) required Chrysler to provide reasonable compensation for the warranty work. Finally, subsection (4) required that all reimbursements for warranty work must be paid within 30 days after Chrysler's approval, subject to a right of audit within 2 years. The motor vehicle industry licensing statutes (chapter 60, article 14) provide that any person who is or may be injured by a violation of the act may bring an action in the appropriate court for damages and equitable relief. See Neb. Rev. Stat. § 60-1440 (Reissue 1993). Thus, an aggrieved party is required to seek such relief by judicial proceeding.

In the case at bar, the district court limited its review to determining the authority of the Board with regard to the 1991 complaint filed by Janssen. When determination of a jurisdictional question involves factual findings, a trial court's decision on the question of jurisdiction will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. When a jurisdictional question does not involve a factual dispute, determination of the jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue. *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989). See, also, *Crystal Clear Optical v. Silver*, 247 Neb. 981, 531 N.W.2d 535 (1995).

It is an elementary principle of administrative law that administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990); *NAPE v. Game & Parks Comm.*, 220 Neb. 883, 374 N.W.2d 46 (1985). We recognize that the jurisdiction of the Board to hear the case at bar is decided by the scope of chapter 60, article 14.

The district court held that

> [n]otwithstanding its notice to show cause . . . the Board did not determine whether Chrysler's license . . . should be revoked or suspended. What the Board did was to determine what monies were due between the parties. It found that $11,760.5[8] was not owed from Janssen to

> Chrysler, but that $2,337.39 was owed from Janssen to Chrysler. The Board also determined that no attorney fees would be awarded. The court finds that the Board did not have authority to determine the equitable relief contained in its Order.
>
> In determining that it had jurisdiction to adjudicate Janssen's Complaint, the Board cited to Neb. Rev. Stat. § 60-1411.02(13) (Cum. Supp. 1992); § 60-1415 (Reissue 1988); and § 60-1438 (Cum. Supp. 1992.) Section 60-1411.02(13) confers upon the Board the right to revoke or suspend a license issued pursuant to Chapter 60, article 14 [the Act] for failure to comply with the provisions of the Act. It does not refer to the Board being permitted to grant equitable relief. Section 60-1415 allows the Board to ". . . make demand on a dealer or licensee for restitution to a harmed consumer." First, Janssen is not a "harmed *consumer.*" Secondly, although a right to make demand exists, a right to determine the amount does not. . . .
>
> . . . .
>
> The decision of the Board is reversed and the case is remanded with directions to dismiss Janssen's Complaint. The court makes no ruling on the show cause issued by the Board, since the Board made no ruling thereon.

In § 60-1411.02, the Board is authorized to impose particular sanctions on licensees who have committed the acts enumerated within the section. In the case of Chrysler, which is a licensee, chapter 60, article 14, authorized the Board to suspend or revoke Chrysler's license or place Chrysler on probation. Within § 60-1411.02 there is no provision whereby the Board may order Chrysler to pay money to Janssen.

The Board claimed as authority § 60-1415: "The board may make a demand on a [violator] for restitution to a harmed consumer." At the time of the Board's decision, the term "harmed consumer" was not defined in chapter 60, article 14. "Consumer care" was defined as "the performance, for the public, of necessary maintenance and repairs to motor vehicles." Neb. Rev. Stat. § 60-1401.02(24) (Cum. Supp. 1992). "Motor vehicle dealer" was defined as "any person engaged in the business of selling or exchanging new or used

motor vehicles and trailers who buys, sells, exchanges, causes the sale of, or offers or attempts to sell five or more new or used motor vehicles in any one calendar year." § 60-1401.02(3).

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. *State ex rel. Perkins Cty. v. County Superintendent*, 247 Neb. 573, 528 N.W.2d 340 (1995); *In re Application of City of Grand Island*, 247 Neb. 446, 527 N.W.2d 864 (1995); *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995). Black's Law Dictionary 316 (6th ed. 1990) defines a consumer as "[o]ne who consumes. Individuals who purchase, use, maintain, and dispose of products and services. Users of the final product. . . . Consumers are to be distinguished from manufacturers (who produce goods), and wholesalers or retailers (who sell goods)." Furthermore, a court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994). See, also, *In re Application of City of Grand Island, supra*; *State ex rel. Scherer v. Madison Cty. Comrs., supra*; *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994). The Legislature equated "consumer" with "public." We conclude that "consumer," as contemplated by the Legislature, meant a member of the general public and not a dealer. Janssen, as a dealer, was not a member of the general public and therefore not a "harmed consumer."

Therefore, the Board's power in this case was limited to a determination of whether Chrysler had violated § 60-1438 and the imposition of a sanction authorized by § 60-1411.02. As previously noted, administrative bodies have only that authority specifically conferred upon them by statute. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). Janssen did not ask for an authorized sanction. The Board imposed no authorized sanction. The Board had no authority to hear Janssen's demand that Chrysler be required to pay Janssen $11,760.58. The judgment of the district court is affirmed.

AFFIRMED.

ANGELA PROCTOR, APPELLANT, V. MINNESOTA MUTUAL FIRE & CASUALTY, APPELLEE.

534 N.W.2d 326

Filed June 30, 1995. No. S-93-986.

1. **Demurrer: Pleadings: Appeal and Error.** In appellate review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. ____: ____: ____. In reviewing a ruling on a general demurrer, an appellate court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.
4. **Constitutional Law: Statutes: 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.
5. **Constitutional Law: Statutes: Service of Process.** In any proceeding, if a statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.
6. **Constitutional Law: Statutes: Service of Process: Appeal and Error.** On appeal to the Supreme Court, a party presenting a case involving the federal or state constitutionality of a statute must serve a copy of the brief assigning unconstitutionality on the Attorney General and file proof of service with the Clerk of the Supreme Court. If the party fails to observe these requirements, the Supreme Court will not consider the constitutionality of the statute under attack.
7. **Statutes: Time.** Statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes.
8. **Statutes: Legislature: Intent.** A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
9. **Statutes: Appeal and Error.** The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; the Supreme Court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
10. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Avis R. Andrews for appellant.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., for appellee.

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

WRIGHT, J.

The plaintiff, Angela Proctor, was injured in a motor vehicle accident. After the driver's insurance company paid Proctor $40,000, she brought suit to collect $25,000 from Minnesota Mutual Fire & Casualty (Minnesota Mutual), which insured Proctor's father. She also sought to have the Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. §§ 60-571 to 60-582 (Reissue 1988), declared unconstitutional. Minnesota Mutual demurred to Proctor's second amended complaint, and the district court granted the demurrer, dismissing the case. Proctor appeals, challenging the constitutionality of the act and the court's granting of a demurrer and dismissal. We removed the appeal to this court under our authority to regulate the caseloads of the appellate courts in this state.

SCOPE OF REVIEW

In appellate review of a ruling on a general demurrer, this court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995); *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994); *Erichsen v. No-Frills Supermarkets*, 246 Neb. 238, 518 N.W.2d 116 (1994). A court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994); *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994); *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994). In ruling on a demurrer, the petition is to be construed liberally; if as so construed the petition states a cause of action, the demurrer is to be overruled. *S.I. v. Cutler, supra*; *Horton v. Ford Life Ins. Co.*, 246 Neb. 171, 518 N.W.2d 88

(1994); *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (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. *Boll v. Department of Revenue*, 247 Neb. 473, 528 N.W.2d 300 (1995); *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995); *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995).

"In any proceeding . . . if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard." Neb. Rev. Stat. § 25-21,159 (Reissue 1989). If this condition is not met, the issue of constitutionality is not properly before the trial court.

On appeal to the Supreme Court, a party presenting a case involving the federal or state constitutionality of a statute must serve a copy of the brief assigning unconstitutionality on the Attorney General and file proof of service with the Clerk of the Supreme Court. If the party fails to observe these requirements, the Supreme Court will not consider the constitutionality of the statute under attack. *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990). See, also, *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994).

FACTS

We rely on Proctor's second amended complaint, accepting as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom.

Minnesota Mutual provided underinsured motorist coverage to Proctor through her father's policy, No. 449523. On July 18, 1989, Proctor was riding in a Jeep operated by Kevin Novotny. Novotny negligently operated the Jeep, causing an accident in which Proctor was seriously injured. Novotny had an insurance policy which provided a limit of $25,000 of coverage to Proctor; however, Novotny's insurance company paid Proctor $40,000. The record does not disclose why $40,000 was paid to Proctor. Proctor's damages exceeded that amount.

Proctor's family insurance policy provided $25,000 in coverage for underinsured motorist insurance. The policy defined an underinsured motor vehicle as "a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but the amount paid under that bond or policy to the 'insured' is less than the limit of liability for this coverage." The policy also provided that the coverage only applied to the owner or operator of such an underinsured motor vehicle. Minnesota Mutual denied coverage to Proctor.

Proctor brought suit in the district court for Dodge County on April 15, 1993. Minnesota Mutual filed a motion to make more definite, after which Proctor filed an amended petition. Minnesota Mutual successfully demurred to the amended petition.

On September 17, 1993, Proctor filed a second amended petition and a motion to determine necessary parties. In the second amended petition, she challenged the constitutionality of the underinsured motorist act:

> To the extent that the [act] may be interpreted to deny Plaintiff relief in the circumstances herein, the same is unconstitutional and that it unfairly legislates against the citizens of the State of Nebraska, in contravention of the equal protection rights and due process rights guaranteed to said citizens, including Defendant, by the United States Constitution and the Constitution of the State of Nebraska.

At the hearing on the motion, Proctor requested that the court decide whether the State of Nebraska was a necessary party to the dispute. The district court ruled that the state was not a necessary party, but added, "You may want to give the attorney general notice of your pleading." Nevertheless, there is no record within the bill of exceptions or transcript that Proctor served the Attorney General with a copy of the proceeding in the district court. There is no record that Proctor served a copy of the brief assigning unconstitutionality on the Attorney General and filed proof of service with the Clerk of the Supreme Court.

On October 8, 1993, the district court issued an order granting Minnesota Mutual's demurrer and dismissing the case

with prejudice. Proctor timely filed her notice of appeal on November 3.

ASSIGNMENTS OF ERROR

Proctor asserts that the district court erred (1) in finding that the second amended petition failed to state a cause of action, (2) in sustaining Minnesota Mutual's demurrer, (3) in failing to consider evidence on the issues raised in the second amended petition and in failing to make a factual interpretation thereof, (4) in failing to allow evidence on the constitutional issues raised and in failing to make a ruling thereon, (5) in entering a decision which is contrary to law, and (6) in dismissing the second amended petition with prejudice.

ANALYSIS

Proctor's argument, concisely stated, is that the district court's decision is unfair because Proctor was not compensated fully for her injury and further that the act is unconstitutional to the extent that it does not allow her to be compensated for her injuries. We first dispose of the constitutional arguments.

CONSTITUTIONALITY

Pursuant to § 25-21,159, whenever litigants challenge the constitutionality of a statute, ordinance, or franchise, they must serve the Attorney General of the state with a copy of the proceeding, and the Attorney General shall be entitled to be heard in the district court. There is no evidence of such a service on the Attorney General by Proctor at the district court level. Although the district court suggested that Proctor send a copy of the proceeding to the Attorney General, there is no evidence in the record that Proctor carried through. The issue of the act's constitutionality was not properly raised in the district court and will not be considered on appeal.

Furthermore, there is no evidence that Proctor informed the Attorney General of this appeal. If the Attorney General is not already a party to an action where the constitutionality of the statute is in issue, a copy of the brief assigning unconstitutionality must be served on the Attorney General within 5 days of the filing of the brief with the Supreme Court

Clerk; proof of such service shall be filed with the Supreme Court Clerk. Neb. Ct. R. of Prac. 9E (rev. 1992). If the party fails to observe these requirements, the Supreme Court will not consider the constitutionality of the statute under attack. *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990). See, also, *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994). We therefore do not consider the constitutional arguments made by Proctor.

STATUTORY INTERPRETATION

We have not decided a case involving underinsured motorist insurance since the act became effective. Prior to the effective date of the act, the clear and unambiguous policy provisions were enforced according to their plain and ordinary meaning. See *Polenz v. Farm Bureau Ins. Co.*, 227 Neb. 703, 419 N.W.2d 677 (1988). The policy which covered Proctor was issued for the period of March 30 to September 30, 1989, and the injury occurred on July 18, 1989. The act set forth a minimum requirement for underinsured motorist coverage. It provided:

> (1) The maximum liability of the insurer under the underinsured motorist coverage shall be the lesser of:
>
> (a) The difference between the limit of underinsured motorist coverage and the amount paid to the insured by or for any person or organization which may be held legally liable for the bodily injury, sickness, disease, or death; or
>
> (b) The amount of damages sustained but not recovered.
>
> (2) In no event shall the liability of the insurer under such coverage be more than the limits of the underinsured motorist coverage provided.

§ 60-578.

An amendment to § 60-578 became operative July 1, 1991. See 1990 Neb. Laws, L.B. 1136. Proctor filed her petition in the district court for Dodge County on April 15, 1993. However, statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes. *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994). Furthermore, a legislative act operates only prospectively and not retrospectively unless the

legislative intent and purpose that it should operate retrospectively is clearly disclosed. *Id.*; *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992). In this case, there is no evidence that the legislation was meant to operate retrospectively, and the present action is governed by the 1988 reissue of the act.

The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Vervaecke v. State*, 247 Neb. 707, 529 N.W.2d 779 (1995); *In re Application of City of Grand Island*, 247 Neb. 446, 527 N.W.2d 864 (1995); *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994). The statute clearly states that the insurer's liability can be "[t]he difference between the limit of underinsured motorist coverage and the amount paid to the insured by [an] organization which may be held legally liable for the bodily injury." § 60-578(1)(a). For example, a victim is covered by $25,000 of underinsured motorist insurance and is paid $20,000 by the tort-feasor. The difference between what was paid and the limit of the coverage is $5,000, the amount of which is paid through the underinsured motorist coverage. On the other hand, if the victim received $30,000, there would be no money owing because the amount received was more than the victim's underinsured motorist coverage.

In the case at bar, Proctor had already been paid $40,000 by the tort-feasor's insurance company. The limit of the underinsured motorist provision on Proctor's policy was $25,000. Proctor has received $15,000 more than the limit of her underinsured motorist insurance coverage. There is no obligation under the statute whereby Minnesota Mutual would owe money to Proctor.

CONTRACTUAL OBLIGATION

We next examine Minnesota Mutual's policy to determine whether there was a contractual obligation to pay Proctor. Proctor's underinsured motorist coverage was couched in the following terms:

> We will pay damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of "bodily injury:"
>
> 1. Sustained by an "insured"; and
> 2. Caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "underinsured motor vehicle."
>
> We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements.

The definition of "underinsured motor vehicle" in the policy is the basis of the limitation of the liability for underinsured motorist coverage. In the present case, Proctor's insurance contract defines an underinsured motor vehicle to exclude situations in which the payments received from a tort-feasor are equal to or greater than the limits of the coverage. Since Proctor had already been paid $40,000, the contract, as well as the statute, did not invoke any coverage based on the underinsured motorist coverage provisions of Proctor's policy.

The policy on its face does not violate the provisions of the act relating to underinsured motorist coverage; therefore, ordinary principles of interpretation apply. An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning. *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994); *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994); *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993).

Minnesota Mutual had no obligation to pay any amount to Proctor. The lack of obligation was apparent on the face of the statute and on the face of the pleadings. When a demurrer to a petition is sustained, a court must grant a plaintiff leave to amend the petition *unless it is clear that no reasonable possibility exists that repleading will correct the defective petition*. *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648

(1995); *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994); *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994). Since the contract did not create a liability on the part of Minnesota Mutual, there was no cause of action, and the demurrer was properly sustained without leave to amend. Furthermore, the lack of notification to the Attorney General forecloses any considerations of constitutionality. Minnesota Mutual was entitled to the granting of the demurrer and the dismissal of the case. The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH and LANPHIER, JJ., concur.

DAVIS ERECTION CO., INC., A NEBRASKA CORPORATION, APPELLANT, V. DANA JORGENSEN, DOING BUSINESS AS JORGENSEN GRADING, APPELLEE, AND ERIKSEN CONSTRUCTION CO., INC., GARNISHEE-APPELLEE.

534 N.W.2d 746

Filed June 30, 1995. No. S-93-1073.

1. **Garnishment: Appeal and Error.** Garnishment is a legal action; to the extent factual issues are involved, the findings of the fact finder will not be set aside on appeal unless clearly wrong; however, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
2. **Judgments: Debtors and Creditors: Garnishment.** The claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee.
3. **Garnishment: Liability: Service of Process: Time.** A garnishee's liability is to be determined as of the time of the service of the summons in garnishment.
4. ____: ____: ____: ____. In determining the liability of a garnishee to a garnishor, the test is whether, as of the time the summons in garnishment was served, the facts would support a recovery by the garnishor's judgment debtor against the garnishee.

5. **Pleadings: Proof.** The party who pleads a setoff bears the burden of proving it.
6. **Pleadings: Claims.** A counterclaim, setoff, or cross-petition, to be available as a matter of affirmative defense or affirmative relief, must be a claim upon which the defendant could, at the date of the commencement of the plaintiff's suit, have maintained an action on the defendant's part against the plaintiff.
7. **Debtors and Creditors: Words and Phrases.** A setoff is a debt for which an action might be maintained by the defendant against the plaintiff, that is, a debt for a certain specific pecuniary amount, recoverable in an action "ex contractu"; the claim must be such that at the date of the commencement of the plaintiff's suit, the defendant could have maintained an action against the plaintiff.
8. **Debtors and Creditors: Intent.** In order to exercise a right of setoff, there must first be an intent and decision to exercise the right to set off, a subsequent action which completes the setoff, and finally a record which verifies that the action has been taken.

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

Gregory C. Scaglione, of Koley, Jessen, Daubman & Rupiper, P.C., for appellant.

No appearance for appellee.

Gregory P. Drew for garnishee-appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

This garnishment proceeding arises out of the interplay of three construction contracts, one entered into by and between the judgment creditor and garnishor, plaintiff-appellant Davis Erection Co., Inc., and its judgment debtor, defendant-appellee Dana Jorgensen, doing business as Jorgensen Grading; another entered into by and between Jorgensen and the garnishee-appellee Eriksen Construction Co., Inc.; and still another entered into by and between Eriksen Construction and the County of Douglas. Determining that Eriksen Construction was not then indebted to Jorgensen, the district court in effect dismissed the within proceeding. Davis Erection thereupon appealed to the Nebraska Court of Appeals, urging, in summary, that in so ruling, the district court erroneously

permitted Eriksen Construction to set off against its certain, liquidated, and mature indebtedness to Jorgensen the contingent, unliquidated, and immature claims Eriksen Construction asserts against Jorgensen. We, on our own motion, removed the matter to this court in order to regulate our caseload and that of the Court of Appeals. We now reverse the judgment of the district court and remand the cause for further proceedings.

II. SCOPES OF REVIEW

Garnishment is a legal action; thus, to the extent factual issues are involved, the findings of the fact finder will not be set aside on appeal unless clearly wrong. See *Action Heating & Air Cond. v. Petersen*, 229 Neb. 796, 429 N.W.2d 1 (1988). However, to the extent issues of law are presented, we as an appellate court have an obligation to reach independent conclusions irrespective of the determinations made by the court below. See *Sylvis v. Walling, ante* p. 168, 532 N.W.2d 312 (1995).

III. FACTS

The county's contract with Eriksen Construction obligated the latter to remove a bridge and build a box culvert under a road. Eriksen Construction contracted part of its obligation to Jorgensen under a document which required Jorgensen to dig the ditch in which Eriksen Construction was to build the culvert, after which Jorgensen was to backfill the ditch with earth, regrade the slopes, build the road, and do other related work. In exchange, Eriksen Construction agreed to pay Jorgensen the "approximate amount of contract $65,064.35 . . . [w]hen and as contract is paid by [the county] with 10% retained until project is accepted by" the county.

In September 1992, one of the slopes caved in during the course of Jorgensen's work and slid into the excavated area because of the presence of a live spring. Jorgensen advised Eriksen Construction by letter that the unforeseen excavation problem resulted because of the effect the abnormal amounts of precipitation had on the ground water and recommended that additional time and cost be expended to remedy the situation, which it characterized as serious because the walls continued to slide.

After Jorgensen found he could not excavate the cave-in, he contracted with Davis Erection to do so. Eriksen Construction then obtained the county's oral approval for extra compensation and later wrote the county that Jorgensen had secured a contractor to excavate the area and that in accordance with the county's verbal agreement, a claim for the costs incurred and time lost would be submitted.

Eriksen Construction thereafter billed the county $33,121.63 for the cave-in work, including charges made by Jorgensen in the sum of $1,400 and by Davis Erection in the amount of $13,637.

Following a series of negotiations, the county issued a change order on June 18, 1993, approving payment to Eriksen Construction of $25,967 for the cave-in work. In its view, the remaining portion of Eriksen Construction's claim represented charges for work contemplated by its original contract with the county. On July 6, 1993, the county drew a warrant directing its bank to issue a $25,967 check to Eriksen Construction. However, Eriksen Construction paid neither Jorgensen nor Davis Erection for the work they did in connection with the change order.

In the meantime, Jorgensen had written Eriksen Construction on June 17, 1993, that the latter's failure to pay and its failure to require the county to issue a change order constituted a breach of the contract between Jorgensen and Eriksen Construction and that Jorgensen would withdraw his equipment from the jobsite until the change order was executed and payment made.

That same day, Eriksen Construction wrote Jorgensen that all requests had been promptly presented to the county, that no one from Eriksen Construction had given verbal directives to perform extra work, and that Jorgensen had been paid all sums due to him to date. The letter further called Jorgensen's attention to the provision in their contract providing that " 'no extra work shall be allowed or changes made . . . or paid for by [Eriksen Construction] unless and until authorized by [Eriksen Construction] in writing before the work and/or changes are begun.' " The letter also advised Jorgensen that their contract required him "to be on the jobsite with sufficient

equipment and manpower to perform the balance of [the] contract . . . ."

Negotiations between Eriksen Construction and Jorgensen apparently continued, for by letter dated June 18, 1993, Jorgensen advised Eriksen Construction that payment under the change order of $12,437 was acceptable, $11,987 for Davis Erection and $450 for Jorgensen.

Jorgensen testified that he decided not to leave the job, returned to the site, and proceeded to work when the weather permitted. However, on or about June 21, 1993, the owner of the backhoe which Jorgensen had leased terminated the arrangement. Jorgensen needed a backhoe but could not rent one. As a result, Eriksen Construction rented a backhoe for him. Eriksen Construction's witness testified that normally, an amount for the rental of the backhoe would be withheld from any payment due Jorgensen, but no written agreement regarding the matter was executed. However, Eriksen Construction estimated the total rental cost for the 5-week period Jorgensen kept it to be $9,000. In addition, there was a $3,467 charge for damages to the backhoe.

In the interim, on July 15, 1993, Davis Erection obtained a $15,137.79 default judgment against Jorgensen. Davis Erection thereafter caused issuance of its summons in garnishment, which Eriksen Construction received, along with the order of garnishment and garnishment interrogatories, on July 28, 1993.

During the evening of July 28, Eriksen Construction's president placed a telephone call to Jorgensen and asked why Eriksen Construction had been served with a garnishment summons. Jorgensen told the president that he could not continue on the job because of the weather, nonpayment under the change order, and "a multitude of things," including the garnishment. The president requested that Jorgensen put his intentions in a letter.

In a letter dated July 29, 1993, Jorgensen stated that he was not able to complete the remaining work because of the weather, untimely payment under the change order, financial problems, and the legal action instituted against him, and requested that he be released from the project. Eriksen Construction responded by letter that it would finish the work contemplated

in their contract and charge Jorgensen for any costs incurred.

In its answers to the garnishment interrogatories, Eriksen Construction admitted that Jorgensen and Eriksen Construction had executed a contract; that periodic progress payments had been made to Jorgensen pursuant to the billings Eriksen Construction had received; and that pursuant to their contract, Eriksen Construction had retained 10 percent of the periodic progress payments in the amount of $4,380.87, which was not payable until the project was accepted by the county. Eriksen Construction took the position that because of Jorgensen's breach, no monies were payable to him at the time. Davis Erection then filed an application to determine Eriksen Construction's liability; in its operative answer to the application, Eriksen Construction again denied owing any money to Jorgensen.

The record establishes that as of July 28, 1992, Eriksen Construction had received from the county payments totaling $157,857.16, including the sum paid under the change order. Eriksen Construction had paid Jorgensen $39,427.84, none of that sum being attributable to the change order and all of it being made by November 24, 1992. Jorgensen testified that he had not been paid for the approximate $8,000 to $10,000 worth of work he had performed from May through July 27, 1993.

Eriksen Construction's president testified that he was aware of several deficiencies in Jorgensen's performance which took place prior to July 28, 1993, for which Eriksen Construction was entitled to backcharge Jorgensen because he had already received full payment for that work. The concrete sewer pipe Jorgensen laid was cracked, so Eriksen Construction replaced it after Jorgensen abandoned the job at an approximate cost of $500. The president also testified that Jorgensen failed to complete the tree removal for which he was responsible, and estimated that it had cost Eriksen Construction approximately $500 to $1,000 to do so. An adjoining drainage system had to be regraded, which the president assumed cost approximately "[a] couple hundred." In addition, Jorgensen caused a retaining wall to crack when he was backfilling; however, as of the time of trial, the president did not know what the county would require in that regard.

Jorgensen testified that the county had notified him about the cracked sewer pipe and trees, but that Eriksen Construction had not notified him as to any backcharges for the cracked sewer pipe, tree removal, regrading of the drainage system, or cracked retaining wall. The only notice of setoff or retainage Eriksen Construction sent Jorgensen related to the 10-percent retainage provided for in their contract.

While the project had been completed by the time of the garnishment trial, the threatened liquidated damages for delay in completion had not been assessed by the county. Eriksen Construction's president anticipated a meeting with the county to discuss such, but it was the position of Eriksen Construction that the weather and possibly some engineering defects caused some of the delay.

Eriksen Construction's project manager testified that in his opinion, Jorgensen did not diligently pursue the project during the summer of 1993; according to him, Jorgensen failed to work on some days when the weather permitted and arrived at the jobsite without equipment or fuel for the equipment. In his view, the cost to repair the cracked pipe was "closer to a thousand [dollars]," tree removal was "maybe" $500 to $750, and repairing the adjoining drainage system was approximately $200. He was unsure as to what the county would require regarding the cracked retaining wall and did not have a cost estimate for any repair.

IV. ANALYSIS

Neb. Rev. Stat. § 25-1030.02 (Reissue 1989) provides in pertinent part:

> If it shall appear upon the trial of the liability of the garnishee that the garnishee was (1) indebted to the defendant, or (2) had any property or credits of the defendant, in his possession or under his control *at the time of being served with the notice of garnishment*, he shall be liable to the plaintiff, in case judgment is finally recovered by plaintiff against the defendant, to the full amount thereof, or to the amount of such indebtedness or property held by the garnishee.

(Emphasis supplied.)

We have held that the claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee. See *Action Heating & Air Cond. v. Petersen*, 229 Neb. 796, 429 N.W.2d 1 (1988). We have also held that a garnishee's liability is to be determined as of the time of the service of the summons in garnishment. *Chicago, B. & Q. R. Co. v. Van Cleave*, 52 Neb. 67, 71 N.W. 971 (1897). Accordingly, in determining the liability of a garnishee to a garnishor, the test is whether, as of the time the summons in garnishment was served, the facts would support a recovery by the garnishor's judgment debtor against the garnishee. See, *Action Heating & Air Cond. v. Petersen, supra*; *Darr v. Long*, 210 Neb. 57, 313 N.W.2d 215 (1981); *Chicago, B. & Q. R. Co. v. Van Cleave, supra*.

As reflected in part III, by the time the garnishment summons and interrogatories were served on Eriksen Construction, the work under the change order was completed and payment therefor made to Eriksen Construction. Thus, absent any defense, counterclaim, or setoff, the facts support a recovery by Jorgensen against Eriksen Construction.

Eriksen Construction urges that it owed Jorgensen nothing when it received the garnishment summons because of backcharges attributable to unsatisfactory work done by Jorgensen for which it had paid Jorgensen in full, to backhoe rental and damage thereto, and to liquidated damages to be assessed by the county in the future. Therefore, it becomes necessary to examine whether Eriksen Construction proved that as of July 28, 1993, it was entitled to a setoff and properly exercised that right against any amount otherwise due and owing to Jorgensen.

1. Requirements for Setoff

Neb. Rev. Stat. § 25-812 (Reissue 1989) provides that a "defendant may set forth in his answer as many grounds of defense, counterclaim, and setoff as he may have." Neb. Rev. Stat. § 25-816 (Reissue 1989) also provides that a "setoff can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract . . . ." These statutes illustrate the statement in Stephen L. Sepinuck, *The Problems*

With Setoff: A Proposed Legislative Solution, 30 Wm. & Mary L. Rev. 51 (1988), that state statutes do not specify the acts a creditor must take to exercise setoff rights. However, a review of the case law reveals some general rules concerning the right of setoff and how one must exercise the right in order to maintain it against a garnishor.

Usually, courts have prohibited setoff when the debt owed is immature, contingent, or unliquidated. Sepinuck, *supra*. Generally, in order to be available as a setoff, a claim or demand of a garnishee against a judgment debtor must be due and owing the garnishee at the commencement of the action. See, *Crocker-Citizens Nat. Bank v. Control Metals Corp.*, 566 F.2d 631 (9th Cir. 1977); *American Surety Co. v. City of Akron*, 95 F.2d 966 (6th Cir. 1938); *Termini v. Arthur Exhibitions*, 9 Misc. 2d 557, 169 N.Y.S.2d 584 (1957), *aff'd* 5 App. Div. 2d 973, 173 N.Y.S.2d 243 (1958); *Mattek v. Hoffmann*, 272 Wis. 503, 76 N.W.2d 300 (1956); *Petition of Keyser*, 98 N.H. 198, 96 A.2d 551 (1953); *Bagdasarian v. Gragnon*, 31 Cal. 2d 744, 192 P.2d 935 (1948); *Bridgeport-City Trust Co. v. Niles-Bement-Pond Co.*, 128 Conn. 4, 20 A.2d 91 (1941); *Com. Tr. Co. of Pittsburgh's Appeal*, 324 Pa. 161, 188 A. 200 (1936); *Old First Natl. Bank & Trust Co. v. Snouffer*, 99 Ind. App. 325, 192 N.E. 369 (1934); *Hayes, Admr. v. Hayes*, 2 Del. Ch. 191 (1859).

As a general matter, courts prohibit setoff when the debt owed the one effecting setoff is contingent. See, *Termini v. Arthur Exhibitions, supra*; *Johnson v. Dutch Mill Dairy, Inc.*, 237 Minn. 117, 54 N.W.2d 1 (1952); *Walker v. Carolina Mills Lumber Co., Inc.*, 429 So. 2d 1065 (Ala. Civ. App. 1983); *Countiss v. Whiting*, 306 Ill. App. 548, 29 N.E.2d 277 (1940); *Mitchell v. Sears Roebuck & Co.*, 76 Ohio L. Abs. 178, 145 N.E.2d 570 (1957).

Most jurisdictions follow the rule that an unliquidated claim cannot be set off against a liquidated claim. See, *McGuire v. Gerstley*, 204 U.S. 489, 27 S. Ct. 332, 51 L. Ed. 581 (1907); *Webber v. Johnson*, 342 Mass. 455, 174 N.E.2d 40 (1961); *Johns-Manville v. Connelly*, 144 W. Va. 498, 108 S.E.2d 836 (1959); *Lehigh &c Co. v. Company*, 89 N.H. 274, 197 A. 410 (1938); *Kortz v. Union Cent. Life Ins. Co.*, 264 Ky. 750, 95

S.W.2d 611 (1936); *Kress v. Central Trust Company*, 153 Misc. 397, 275 N.Y.S. 14 (1934), *aff'd* 246 App. Div. 76, 283 N.Y.S. 467 (1935); *In re Estate of Nairn*, 215 Iowa 920, 247 N.W. 220 (1933); *Mack v. Hugger Bros. Const. Co.*, 153 Tenn. 260, 283 S.W. 448 (1925); *Suhs v. Homewood Rice Land Syndicate*, 128 Ark. 19, 193 S.W. 271 (1917); *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 52 S.E. 835 (1906).

It is worth noting, however, that the bankruptcy code creates exceptions to the foregoing rules, as it provides for the estimation of immature, contingent, and unliquidated debts. 11 U.S.C. §§ 101(5)(A) and 502(c) (1988 & Supp. V 1993). Nonetheless, our case law is consistent with the general rules recited above. The party who pleads a setoff bears the burden of proving it. *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993); *Heusser v. McAtee*, 151 Neb. 828, 39 N.W.2d 802 (1949); *Citizens Nat. Bank v. Rawley*, 131 Neb. 10, 267 N.W. 151 (1936). See, also, *Carlson v. Nelson*, 204 Neb. 765, 285 N.W.2d 505 (1979), *modified* 205 Neb. 483, 288 N.W.2d 489 (1980). A counterclaim, setoff, or cross-petition, to be available as a matter of affirmative defense or affirmative relief, must be a claim upon which the defendant could, at the date of the commencement of the plaintiff's suit, have maintained an action on the defendant's part against the plaintiff. *Weller v. Putnam*, 184 Neb. 692, 171 N.W.2d 767 (1969); *American Gas Construction Co. v. Lisco*, 122 Neb. 607, 241 N.W. 89 (1932); *Bank of Crab Orchard v. Myers*, 120 Neb. 84, 231 N.W. 513 (1930); *Gurske v. Kelpin*, 61 Neb. 517, 85 N.W. 557 (1901); *Simpson v. Jennings*, 15 Neb. 671, 19 N.W. 473 (1884).

A setoff is a debt for which an action might be maintained by the defendant against the plaintiff, that is, a debt for a certain specific pecuniary amount, recoverable in an action "ex contractu." *Simpson v. Jennings, supra.* The claim must be such that at the date of the commencement of the plaintiff's suit, the defendant could have maintained an action against the plaintiff. See *id.*

How one exercises the right of setoff is less defined. However, most jurisdictions require some overt or positive act to effect a setoff; the courts have not specified what conduct

will suffice. Sepinuck, *supra*. The U.S. Court of Appeals for the Sixth Circuit is the one exception. That court held in *Baker v. National City Bank of Cleveland*, 511 F.2d 1016, 1018 (6th Cir. 1975), that in the banking context, "setoff is not complete until three steps have been taken: (1) the decision to exercise the right, (2) some action which accomplishes the setoff and (3) some record which evidences that the right of setoff has been exercised." We adopted the Sixth Circuit's rule, writing in *United Seeds v. Eagle Green Corp.*, 223 Neb. 360, 363, 389 N.W.2d 571, 574 (1986): "There must first be an intent and decision to exercise the right to set off, a subsequent action which completes the setoff, and finally a record which verifies that the action has been taken."

In *United Seeds*, the garnishor had obtained a judgment against the debtor and served a garnishment summons upon the debtor's bank in an attempt to garnish the debtor's account. Following the bank's claim that it was not indebted to the debtor, the garnishor filed an application to determine the bank's liability. Judgment was rendered against the bank, and the bank appealed.

The debtor maintained a checking account with a bank that held three promissory notes issued by the debtor. Two of the notes were due and owing, and the debtor had authorized the bank to apply funds from the debtor's checking account in payment for the mature promissory notes; however, the debtor explained that the payment would cause cash-flow problems. The bank agreed to honor outstanding and unpresented checks issued by the debtor, and the debtor continued to make deposits to and draw on the account.

On appeal, the bank claimed that its debit against the debtor's checking account constituted a valid setoff against a general deposit of the debtor of the matured debt owed it by the debtor.

In affirming the judgment in favor of the garnishor in *United Seeds*, we observed that the mere retrospective declaration of an intent to exercise a setoff does not establish a setoff. See *In re Archer*, 34 B.R. 28 (N.D. Tex. 1983). We concluded that the bank's bookkeeping entries regarding the debtor's checking account were consistent with an intent to set off, but that the bank's willingness to honor the debtor's overdrafts indicated

that the bank was secure about its depositor's ability to repay its outstanding notes. We further reasoned that the trial court must have found that the claimed setoff was precipitated by the imminent garnishment, that the agreement to honor the debtor's overdrafts was an agreement to allow the debtor full use of its deposits while circumventing the garnishment statutes, and that such an agreement was inconsistent with an intent to exercise the right of setoff.

Like *United Seeds*, *Baker v. National City Bank of Cleveland, supra*, concerned an attempted garnishment of a depositor's checking account to which the bank claimed a setoff for loan indebtedness. In *Baker*, the trial court ordered the bank to rescind the setoff and credit the depositor's account, and the bank appealed. The Sixth Circuit held that the bank's nonjudicial setoff was ineffective because the bank had taken no affirmative step to assert such a setoff as of the effective time of a court order enjoining such setoffs in a reorganization proceeding.

The *Baker* opinion restricted its analysis to setoffs by banks, framing the issue as: "What requirements must a bank meet in order to effect a non-judicial setoff against the account of a customer?" 511 F.2d at 1017. It concluded:

> It would be unrealistic to hold that mere intra-mural declarations between employees of a bank, accompanied by no affirmative acts and no steps to record the transaction, are sufficient to effectuate a setoff. The business of banks is carried on, in the main, by making entries in records rather than by the transfer of money. It is a business of debits and credits. To permit a bank to effect a setoff against a customer's account by means of mere conversations among bank personnel would seriously undermine confidence in the banking system. Further, to permit the consequences of a critical order of a court of competent jurisdiction in reorganization proceedings to be evaded on the basis of the proof in this record would be detrimental to orderly legal processes.

511 F.2d at 1019.

But whether in the banking context or otherwise, setoff encourages equitable and economically efficient business

transactions and avoids multiplicity of actions. Stephen W. Schwab et al., *Onset of An Offset Revolution: The Application of Set-Offs in Insurance Insolvencies*, 95 Dick. L. Rev. 449 (1991). It has been recognized as a substantive right designed to avoid the injustice of requiring a debtor to pay the full measure of his obligation while receiving only a portion of the amount owed to him. *Id.* In the contemporary business world, setoff promotes economy of time and efficiency of method in resolving debt between parties. *Id.*

As a matter of common sense, in no context should one be compelled to pay today what one will be entitled to recover tomorrow. In sum, setoff can be said to further the two public policies that are commonly known as fairness and commercial necessity. *Id.*

> Nevertheless, one must recognize that setoff is an extremely powerful tool—a tool, which even if exercised properly, may injure the other party. The best example of this tendency is in a bank's use of setoff against a depositor.
>
> When a bank sets off funds in a depositor's checking account against a debt owed it by that depositor, the bank is likely to dishonor any outstanding checks drawn on that account. If the debtor is a merchant, such dishonor may cause suppliers to cease delivering goods necessary to the depositor's business or may cause utility companies to discontinue essential services. Requiring prior notice of setoff might eliminate these effects . . . .
>
> Requiring the bank to give contemporaneous notice of its action to the depositor cannot eliminate injury. Yet, such notice might reduce the amount of injury while costing the bank (or other party effecting setoff) little or nothing in money, time, and effort. Presumably for this reason, at least one state has statutorily required banks and savings and loan associations to notify depositors of setoff within one day following its exercise. Moreover, article 9 of the Uniform Commercial Code requires notice in an analogous situation.

Stephen L. Sepinuck, *The Problems With Setoff: A Proposed Legislative Solution*, 30 Wm. & Mary L. Rev. 51, 64-65 (1988).

Yet, in dealing with when a depositor's account is subject to setoff, neither Neb. U.C.C. § 4-303 (Reissue 1992) nor its counterpart, Uniform Commercial Code § 4-303, 2B U.L.A. 269 (1991), as proposed by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, specifies how a bank "exercises" a setoff. Thus, the method by which a bank is to exercise its rights of setoff is no more to be found in the Uniform Commercial Code than is it to be found in §§ 25-812 and 25-816.

It is instructive to note, as did the court in *Baker v. National City Bank of Cleveland*, 511 F.2d 1016, 1017 (6th Cir. 1975), that the U.S. Supreme Court has characterized a setoff as, broadly speaking, representing " 'the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised by business men *in making book entries* whereby one mutual debt *is applied* against another. . . .' " (Emphasis in original.) See *Studley v. Boylston Bank*, 229 U.S. 523, 33 S. Ct. 806, 57 L. Ed. 1313 (1913).

The reasoning in both *Baker* and *United Seeds v. Eagle Green Corp.*, 223 Neb. 360, 389 N.W.2d 571 (1986), regarding the need for affirmative attestation to the exercise of a setoff is equally compelling within the general business community as it is to banks. In essence, a bank and depositor share the same debtor-creditor relationship as any other party indebted to another in other contexts. Moreover, we have neither been cited to, nor do we find, any authority which distinguishes a bank setoff from setoffs in general. Therefore, it is consistent to extend the requirements for maintaining a setoff as announced in *Baker* and *United Seeds* to other setoffs, and we hereby so do.

2. Eriksen Construction's Failures

Eriksen Construction failed to prove that as of the time it was served with the summons in garnishment, it had exercised any right of setoff it might have had against Jorgensen. If for no other reason, this is so because there is no record which evidences that Eriksen Construction had by that time made any book entry which applied monies then due Eriksen Construction

from Jorgensen to monies Eriksen Construction then owed Jorgensen.

V. JUDGMENT

Accordingly, as first noted in part I, the judgment in favor of Eriksen Construction must be, and hereby is, reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LANPHIER, J., dissenting.

Davis Erection sought to garnish county funds held by Eriksen Construction allegedly due to Jorgensen for work performed by Jorgensen and its subcontractor Davis Erection. Davis Erection had obtained a default judgment against Jorgensen after Jorgensen failed to pay it under its contract with Davis. Eriksen Construction resisted the garnishment on the basis that it did not owe Jorgensen anything due to Jorgensen's failure to perform.

Garnishment is a legal, not an equitable, remedy. The factual findings of a trial court in a law action tried without a jury have the effect of a finding by a jury and, on appeal, will not be set aside unless clearly wrong. *Otoe Cty. Nat. Bank v. Froelich*, 234 Neb. 1, 448 N.W.2d 917 (1989). The district court's finding that the garnishee, Eriksen Construction, was not presently indebted to the judgment debtor, Jorgensen, should be upheld.

"Garnishment in aid of execution of a judgment is proper in Nebraska only when the garnishee has property of and is indebted to the judgment debtor." *Darr v. Long*, 210 Neb. 57, 61, 313 N.W.2d 215, 217-18 (1981). See Neb. Rev. Stat. § 25-1056 (Reissue 1989). A judgment creditor's claim in garnishment can rise no higher than that of his debtor. *Action Heating & Air Cond. v. Petersen*, 229 Neb. 796, 429 N.W.2d 1 (1988); *Darr v. Long, supra*; *Certain-teed Products Corp. v. Carlisle*, 156 Neb. 185, 55 N.W.2d 489 (1952). If the debtor has a right of action in garnishment against the garnishee, so does the creditor, but not otherwise. *Action Heating & Air Cond. v. Petersen, supra*; *Darr v. Long, supra*. A proceeding in

garnishment is effectively an action by a debtor in the plaintiff-creditor's name against the garnishee. *Darr v. Long, supra.* The test in determining liability of the garnishee to the garnishor-plaintiff is whether or not the facts would support a recovery by the principal defendant against the garnishee. *Action Heating & Air Cond. v. Petersen, supra.*

In this case, the garnishee had no present indebtedness to the judgment creditor which was subject to garnishment. Since Jorgensen was in default of its contract, the amount that Eriksen Construction owed, if any, to Jorgensen was indeterminable. The trial court could not conclude that Eriksen Construction was indebted to Jorgensen, and therefore the county funds held by Eriksen were not subject to garnishment.

In *Certain-teed Products Corp. v. Carlisle, supra,* we addressed the ability of a creditor to garnish the amounts allegedly due a debtor-subcontractor from a general contractor. The general contractor had paid the subcontractor some $20,000 pursuant to the contract calling for a total payment of approximately $24,000. The unpaid $4,000 was recorded as a credit balance on the general contractor's books. The general contractor had not paid the remaining $4,000 pursuant to a contract term stating that it was not liable to the subcontractor for payment in excess of the amount which the contractor received from the owner. The general contractor had received only $20,000 from the owner. We held that the $4,000 credit balance did not represent a present indebtedness which the general contractor owed the subcontractor despite the fact that it was recorded on the books. The liability of the garnishee-general contractor to the subcontractor was contingent on the collection of money from the owner. Therefore, the debt was not subject to garnishment.

In *Action Heating & Air Cond. v. Petersen, supra,* a subcontractor attempted to garnish the unpaid balance that the project owner owed the general contractor. In their answers to the garnishment interrogatories, the project owners admitted $9,600 was due under the terms of the contract. However, the owners denied that there was any debt owing to the general contractor because the contractor had failed to perform. The contract required the general contractor to pay for labor and

material costs, which he had failed to do. In fact, it was one of the unpaid subcontractors who attempted to garnish the unpaid balance. We held that since the general contractor had failed to comply with the contract, the garnishee-owners were not indebted to the general contractor. Therefore, the subcontractor was not entitled to garnish the funds held by the project owners.

As of July 28, 1992, the date Eriksen Construction was served with the garnishment summons, any amount it owed Jorgensen was uncertain and contingent. The county had yet to accept the project, liquidated damages were possible, backhoe rental was due, back charges were possible, etc. With these facts, the district court correctly held that there was no present debt owing Jorgensen that was subject to garnishment.

In its application to determine liability of the garnishee, appellant Davis Erection argued that Eriksen Construction had no right of setoff. The majority opinion accepts Davis Erection's characterization of Eriksen Construction's defense to the garnishment as the assertion of a right of setoff. The majority then analyzes the matter in terms of whether Eriksen Construction was entitled to a setoff against Jorgensen and whether it properly exercised that right.

As the cases cited by the majority correctly indicate, a setoff is a claim filed by a defendant against the plaintiff when sued and in which he seeks to cancel the amount due from him with a debt that the plaintiff owes the defendant. See, *Weller v. Putnam*, 184 Neb. 692, 171 N.W.2d 767 (1969); *American Gas Construction Co. v. Lisco*, 122 Neb. 607, 241 N.W. 89 (1932); *Bank of Crab Orchard v. Myers*, 120 Neb. 84, 231 N.W. 513 (1930); *Gurske v. Kelpin*, 61 Neb. 517, 85 N.W. 557 (1901); *Simpson v. Jennings*, 15 Neb. 671, 19 N.W. 473 (1884).

Eriksen Construction did not attempt to setoff a claim or debt that Jorgensen owed to it in order to cancel out any amount it owed Jorgensen. Eriksen Construction's answer to the garnishment interrogatories did not assert any right to setoff. Its answer, and all of its subsequent pleadings and arguments, simply assert that there was no debt owed due to Jorgensen's failure to perform. There is no setoff. Setoff should not be in issue.

The majority concludes that Eriksen Construction failed to

prove that as of the time it was served with the summons in garnishment that it had exercised any right of setoff it might have had against Jorgensen. In light of the holdings of *Action Heating & Air Cond.* and *Certain-teed Products Corp.*, the findings of the district court should be affirmed on the basis that no debt was owed, rather than be reversed using setoff principles which are inapplicable.

STATE OF NEBRASKA, APPELLEE, V. ROBERT SCHMAILZL, APPELLANT.

534 N.W.2d 743

Filed June 30, 1995. No. S-94-522.

1. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
2. ____: ____. An appellate court obtains jurisdiction over an appeal when the notice of appeal and the docket fee have been deposited in the office of the clerk of the district court.
3. **Affidavits: Fees: Appeal and Error.** A poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal by Neb. Rev. Stat. §§ 33-103 (Reissue 1993) and 25-1912 (Cum. Supp. 1994).
4. **Criminal Law: Jurisdiction: Appeal and Error.** Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994) sets forth the only method by which a party may invoke the jurisdiction of an appellate court to review a criminal case.
5. **Affidavits: Fees: Appeal and Error.** An inadequate poverty affidavit does not waive the mandatory docket fee or vest jurisdiction in an appellate court.
6. **Criminal Law: Jurisdiction: Affidavits: Costs: Appeal and Error.** To vest jurisdiction in an appellate court, a poverty affidavit in a criminal appeal must follow the language of Neb. Rev. Stat. § 29-2306 (Cum. Supp. 1994), which provides that the affidavit shall state that the defendant is unable by reason of poverty to pay the costs.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Appeal dismissed.

Dorothy Walker and Shawn Elliott, of Mowbray & Walker, P.C., for appellant.

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

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

WRIGHT, J.

Robert Schmailzl appeals from his conviction of making terroristic threats, a violation of Neb. Rev. Stat. § 28-311.01(1)(a) and (c) (Reissue 1989). We find, however, that we do not have jurisdiction over the matter because the poverty affidavit is deficient, and the appeal must be dismissed.

SCOPE OF REVIEW

Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter. *State v. Miller*, 240 Neb. 297, 481 N.W.2d 580 (1992). See, also, *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995); *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, 247 Neb. 162, 525 N.W.2d 221 (1995).

FACTS

This is Schmailzl's second appearance before this court on the charge of making terroristic threats. After the district court for Seward County found that the statute under which Schmailzl was charged was unconstitutional, it dismissed the amended information. The State brought error proceedings, and in *State v. Schmailzl*, 243 Neb. 734, 502 N.W.2d 463 (1993), this court held that the statute was constitutional. The cause was remanded for further proceedings.

After a jury trial, Schmailzl was found guilty on March 30, 1994, and on May 23, he was sentenced to probation. On that same date, Schmailzl filed a notice of appeal and a motion for leave to proceed in forma pauperis, which incorporated his financial affidavit. In the affidavit, Schmailzl stated only that "he is not able to procure counsel to represent him in an appeal of this matter due to his financial situation." In an order dated June 13, the district court overruled the motion to proceed in forma pauperis.

JURISDICTION

We first consider whether this court has been vested with jurisdiction by the filing of the affidavit, which addresses only Schmailzl's inability to pay for counsel. Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter. *State v. Miller, supra.*

Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 1994) provides that an appellate court obtains jurisdiction over an appeal when the notice of appeal and the docket fee have been deposited in the office of the clerk of the district court. A poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal by Neb. Rev. Stat. §§ 33-103 (Reissue 1993) and 25-1912. *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995). Section 25-1912 sets forth the only method by which a party may invoke the jurisdiction of an appellate court to review a criminal case. *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994). If no docket fee was paid and the affidavit is not sufficient to meet the statutory requirements, this court lacks jurisdiction over the matter.

Schmailzl sought to vest jurisdiction in this court by filing a notice of appeal and a poverty affidavit in lieu of paying the docket fee. The affidavit states: "[T]he defendant in the above-captioned matter . . . is not able to procure counsel to represent him in an appeal of this matter due to his financial situation."

We hold that a poverty affidavit must assert that the defendant is unable by reason of poverty to pay the costs of the appeal in order to vest jurisdiction with an appellate court. An inadequate affidavit does not waive the mandatory docket fee or vest jurisdiction, and this case must be dismissed because the appeal was not properly perfected. The affidavit filed by Schmailzl was insufficient.

The record before us includes two affidavits. The above affidavit, which we have found to be insufficient, was filed in the Seward County District Court on May 23, 1994, along with the notice of appeal. It is this affidavit which determines whether jurisdiction has vested with the appellate court. The

second affidavit was offered at the hearing on the motion to proceed in forma pauperis. In it, Schmailzl stated that "he does not have funds sufficient to afford the costs of preparing the necessary trial record" and that "he does not have funds sufficient to retain counsel to represent him upon appeal." The second affidavit was notarized on June 13, 1994. The second affidavit was not filed in the office of the clerk of the district court along with the notice of appeal, as required by statute.

We also point out that the district court's denial of Schmailzl's motion to proceed in forma pauperis does not determine the question of jurisdiction. We have held that no statute requires that the trial court approve a request to proceed in forma pauperis. *In re Interest of N.L.B.*, 234 Neb. 280, 450 N.W.2d 676 (1990). An in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty. *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995). It is not necessary for the trial court to take action on a motion to proceed in forma pauperis in order for the appellate court to be vested with jurisdiction.

The second affidavit, offered at the hearing on the motion to proceed in forma pauperis, is considered only to determine whether the district court abused its discretion in denying the motion. 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. *Id.*

This court obtains jurisdiction upon the filing of the notice of appeal and a proper poverty affidavit. The poverty affidavit in a criminal appeal must follow the language of Neb. Rev. Stat. § 29-2306 (Cum. Supp. 1994), which provides that the affidavit shall state that the defendant "is unable by reason of poverty to pay the costs." Schmailzl's affidavit, which addressed only the costs of retaining counsel, does not meet the requirement, and jurisdiction has not vested in this court. Because we lack jurisdiction over the matter, we cannot reach the merits of the action.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL EONA, APPELLANT.
534 N.W.2d 323

Filed June 30, 1995. No. S-94-871.

1. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
2. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Rev. Stat. §§ 27-404(2) (Cum. Supp. 1994) and 27-403 (Reissue 1989), and the trial court's decision will not be reversed absent an abuse of that discretion.
3. **Trial: Words and Phrases.** Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition.
4. **Evidence.** The probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues of the case.

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

Anthony S. Troia for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and HICKMAN, D.J., Retired.

WHITE, C.J.

Daniel Eona was charged by information with first degree murder and use of a firearm in the commission of a felony. Eona and Gary Brunzo were tried together for the December 6, 1993, murder of Henry Thompson. See *State v. Brunzo, ante* p. 176, 532 N.W.2d 296 (1995). A jury convicted Eona on the murder charge, and the district court sentenced him to life imprisonment.

Before trial, Eona filed a motion to suppress some of the testimony of two of Eona's coconspirators, Angel Huerta and Juan Carrera. Huerta and Carrera were to, and in fact did, testify that after they, along with Eona and several other individuals, attended a memorial service for a mutual friend, Michael Campbell, who had been killed during a drive-by

shooting, they wanted to retaliate for Campbell's death. Huerta and Carrera testified that they intended to retaliate by killing someone during a drive-by shooting. They also testified that normally, to conduct a drive-by shooting, they would steal a vehicle so that it would not be recognized.

Huerta and Carrera also testified that after the memorial service, they went to a 7-Eleven store across the street from where the memorial service had been held to make some phone calls. While across the street, Huerta and Carrera saw Eona in the driver's seat of a minivan which they knew Eona did not own. Huerta and Carrera got into the van with both Eona and the victim, Thompson. Huerta and Carrera testified that shortly thereafter, Thompson was shot and Thompson's body was dumped onto the street.

Huerta also testified that after they dumped Thompson's body they proceeded in the van to a house where they thought Nacho Palma resided. Huerta testified that he and Carrera fired shots at the house. Carrera testified that he then accompanied Eona, who had been driving the van all night, to the Missouri River, where Eona disposed of the van.

In his motion in limine, Eona sought to suppress on relevance grounds all Huerta's and Carrera's testimony about the evening's events that had occurred after Thompson's murder. The district court denied Eona's motion. The jury convicted Eona of first degree murder, and the district court sentenced him to life imprisonment. Eona appealed.

Eona assigns three errors in his appeal. Eona contends that the district court abused its discretion in denying his motion in limine and admitting the testimony of his two coconspirators regarding the subsequent drive-by shooting, in admitting evidence of the subsequent drive-by shooting because the danger of unfair prejudice outweighed its probative value, and in denying his motion for a mistrial. Eona therefore contends that his conviction and sentence should be reversed.

The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994). We have held that because exercise of judicial discretion is implicit

in Neb. Rev. Stat. § 27-401 (Reissue 1989), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Rev. Stat. §§ 27-404(2) (Cum. Supp. 1994) and 27-403 (Reissue 1989), and the trial court's decision will not be reversed absent an abuse of that discretion. See *Carter, supra*. Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *Id.*

Section 27-404(2) is an inclusionary rule which permits the use of relevant other bad acts for purposes except to prove the character of a person in order to show that such a person acted in conformity with that character. *Carter, supra*. The rule sets forth the circumstances under which evidence of other bad acts is admissible: as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* However, evidence which is otherwise admissible under § 27-404(2) may be excluded under § 27-403 if its probative value is substantially outweighed by other considerations. *Carter, supra*.

Accordingly, we review the admission of evidence of other acts by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted. *Id.*

The Nebraska Evidence Rules define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." § 27-401. In the case at bar, Huerta's and Carrera's testimony was clearly relevant because it established a motive for killing Thompson: the coconspirators killed Thompson to eliminate him as a witness to the theft of the van and to prevent him from witnessing the drive-by shooting. Furthermore, admitting evidence to establish motive necessarily implies that the evidence was admitted for a proper purpose. Therefore, the

evidence was relevant to establish a motive for the crime charged, and that admission was proper.

Additionally, § 27-403 provides in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." For the purposes of this rule, probative value is a relative concept. The probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues of the case. *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. *Id.* In the case at bar, the evidence admitted clearly had probative value: it helped establish the coconspirators' motive for killing Thompson. As a result, we are unable to conclude that the district court abused its discretion in admitting this evidence.

Finally, the district court gave a limiting instruction to the jury, both at the time of the testimony and at the close of the trial, instructing the jury to consider the evidence only for the purpose for which it was admitted. The district court instructed the jury as follows:

> The evidence that defendant Daniel Eona may have aided and abetted in a driveby shooting has been received only for the limited purpose of helping you to decide whether the defendant Daniel Eona had the proof of [sic] motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident to commit the crimes charged. You must consider the evidence for that limited purpose and for no other.

Since the evidence admitted was relevant, had a proper purpose, had probative value outweighing its unfair prejudice, and was accompanied by a limiting instruction, we are compelled to conclude that the district court did not abuse its discretion in admitting the evidence.

The decision of the district court is affirmed.

AFFIRMED.

CHRYSLER MOTORS CORPORATION, A DELAWARE CORPORATION, APPELLANT, V. LEE JANSSEN MOTOR COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.

534 N.W.2d 309

Filed June 30, 1995. No. S-94-895.

1. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.
2. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
3. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
4. **Administrative Law: Presumptions.** Members of a commission are presumed to be fair and impartial.
5. **Administrative Law: Motor Vehicles: Franchises: Legislature.** The authority to regulate the franchise rights of automobile manufacturers and dealers in Nebraska is clearly within the power of the Legislature. It is within the authority of the Legislature to require that termination proceedings involving franchises be heard and determined by the Nebraska Motor Vehicle Industry Licensing Board.
6. **Motor Vehicles: Franchises.** Matters involving the distribution and sale of motor vehicles vitally affect the general economy of the state, the public interest, the public welfare, and public safety, and distribution and sales under the franchise system require the exercise of the state's police power to insure the public welfare, to regulate commerce, to establish guidelines for enforcement of a fair and equitable balance between parties to such franchises, and to provide judicial relief from unfair and inequitable practices affecting the public interest.

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

Robert D. Kinsey, Jr., and Richard L. Rice, of Kinsey Ridenour Becker & Kistler, for appellant.

Michael K. High, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellee Lee Janssen Motor Co.

Don Stenberg, Attorney General, and Paul N. Potadle for appellees Nebraska Motor Vehicle Industry Licensing Board et al.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and LIKES, D.J.

WRIGHT, J.

Chrysler Motors Corporation (Chrysler) appeals from the Lancaster County District Court's dismissal of its declaratory judgment action, which challenged the constitutionality of certain provisions of the motor vehicle industry licensing statutes. The court found that the hearing provisions of Neb. Rev. Stat. §§ 60-1420 to 60-1435 (Reissue 1993) were not contrary to the due process guarantees of the Nebraska or U.S. Constitution, and dismissed the action.

SCOPE OF REVIEW

The constitutionality of a statute is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995).

FACTS

Chrysler is a Delaware corporation licensed and doing business in the State of Nebraska as a new motor vehicle manufacturer. Lee Janssen Motor Company (Janssen) is a Nebraska corporation doing business in McCook, Nebraska, as an authorized new car and truck dealer of Chrysler products. The Nebraska Motor Vehicle Industry Licensing Board (Board) is a Nebraska administrative agency created pursuant to Neb. Rev. Stat. §§ 60-1401.01 to 60-1440 (Reissue 1993). At the times relevant to this opinion, the Board was chaired by Alvin Abramson, director of the Department of Motor Vehicles, and included nine other individuals (the members of the Board).

In the early 1970's, Chrysler and Janssen executed and entered into direct dealer agreements for the Chrysler, Plymouth, and Dodge lines. In 1990, restated sales and service agreements for Chrysler vehicles were executed by Chrysler and Janssen to replace the previous direct dealer agreements. The 1990 agreements are the basis for Chrysler's action to terminate the Janssen franchise.

Chrysler named as defendants Janssen, the members of the Board in their official capacities, and the Board as a corporate entity. Chrysler's amended petition for declaratory judgment pursuant to Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue

1989) alleged, inter alia, that the chairman of the Board, the executive director of the Board, and the members of the Board, "acting in concert with other Board members or individually, pursuant to Neb. Rev. Stat. §§ 60-1420 and 1425, [are] required to perform an act not legally authorized or which exceeds or abuses the authority conferred upon [the Board]." The amended petition refers to a portion of the provisions of § 60-1420, which states: "(1) Except as provided in subsection (2) of this section, no franchisor shall terminate or refuse to continue any franchise unless the franchisor has first established, in a hearing held pursuant to section 60-1425, that: (a) The franchisor has good cause for termination or noncontinuance . . . ."

Chrysler alleged that the right to terminate Janssen's franchise required the exercise of judicial powers in excess of the Board's authority and, as such, the Board was without jurisdiction and authority to resolve the dispute. Chrysler further alleged that § 60-1420, which requires Chrysler to appear before the Board "to obtain the Board's approval prior to termination of a franchise . . . violates the due process rights guaranteed to Chrysler by the Nebraska Constitution, Article I, Section 3." Chrysler asserts that the Board is not a neutral, impartial, and detached decisionmaker and that the compositional bias of the Board violates the due process rights guaranteed to Chrysler by the 14th Amendment to the Constitution of the United States.

Chrysler requested two declarations: first, that the Board is without jurisdiction to determine the parties' rights under the agreements, and second, that the requirements of § 60-1401.01 et seq., specifically § 60-1420 requiring proceedings before the Board prior to termination of a franchise, violate the due process guarantees provided in Neb. Const. art. I, § 3, and the 14th Amendment to the Constitution of the United States. Finally, having attacked the right of the Board to hear termination cases, Chrysler petitioned the district court to declare that Chrysler was entitled to terminate Janssen's dealership franchise.

The members of the Board denied that they had been exercising power "not legally authorized or which exceeds or

abuses the authority conferred" upon the Board. The Board asserted that the court had no jurisdiction because the state had not waived its sovereign immunity with respect to a declaratory judgment. Janssen generally denied Chrysler's allegations and subsequently filed a motion for summary judgment on the constitutional issue. The Board filed a motion for summary judgment on the issue of the Board's sovereign immunity.

On July 13, 1994, the district court, inter alia, made the following findings:

> 2. On or about January 12, 1993, Chrysler notified Janssen that it was terminating its dealership agreements. Neb. Rev. Stat. § 60-1420 (Cum. Supp. 1992) prohibits the termination of a car dealership franchise unless the manufacturer establishes good cause for the termination at a hearing before the Board. Chrysler claims that the hearing requirement violates the due process guarantees under Article I. Sec. 3 of the Constitution of the State of Nebraska and the Fourteenth Amendment of the United States Constitution.
>
> 3. The Motion for Summary Judgment filed by the Board is based on the claim that an action against the Board is, in effect, an action against the state and the state has not waived its sovereign immunity with respect to proceedings under the Declaratory Judgment Act. Since this action challenges the validity of a statute, there is no waiver of sovereign immunity with respect to the Board itself. . . . The Motion for Summary Judgment should be sustained as to the Board itself.
>
> 4. Janssen's Motion for Summary Judgment concerns the constitutional issues raised by Chrysler. As noted above, any termination of a franchise requires the manufacturer to first appear before the Board to obtain the Board's approval of such termination. Neb. Rev. Stat. § 60-1420 (Cum. Supp. 1992). Pursuant to Neb. Rev. Stat. § 60-1402 (Reissue 1988), the Board consists of (i) the Director of Motor Vehicles; (ii) one factory representative; (iii) one member of the general public; (iv) one motorcycle dealer; (v) three new motor vehicle dealers; and (vi) two used motor vehicle dealers and one

trailer dealer or a combination motor vehicle or trailer dealer.

5. Chrysler claims that the composition of the Board is constitutionally infirm in that it deprives it of a neutral and detached decision-maker. In support of this argument Chrysler relies upon several decisions from the State of California. . . . Understandably, the composition of the Nebraska board raises a "perception" of nonneutrality. . . .

. . . .

7. Chrysler's concern with the neutrality of the Board is understandable. Nevertheless, in light of the de novo review provided by Section 84-917, the challenged statutory scheme does not violate the due process guarantees of the Nebraska and United States Constitutions. The California decisions are inapplicable.

IT IS ORDERED that the Motion for Summary [Judgment] of the Nebraska Motor Vehicle Licensing Board be sustained as to the Board and that the amended petition be dismissed as to the Board for lack of jurisdiction.

IT IS FURTHER ORDERED that the Motion for Summary Judgment of Lee Janssen Motor Company be sustained as to the constitutionality of the hearing requirements of Neb. Rev. Stat. § 60-1420 et seq.; the court finds that such provisions are not contrary to the due process guarantees of the Nebraska or United States Constitutions.

Chrysler's motion for new trial, filed on July 21, 1994, was overruled on August 19. On August 26, Chrysler filed a motion for summary judgment. On September 8, based on the court's decision of July 13, all defendants filed motions to dismiss Chrysler's petition for lack of jurisdiction.

The district court found that the motor vehicle industry licensing statutes provide that dealer terminations shall be conducted before the Board and that the court lacked jurisdiction to hear Chrysler's request to terminate the Janssen franchise. The court sustained the motions to dismiss and overruled Chrysler's motion for summary judgment. Chrysler

timely perfected its appeal to this court.

ASSIGNMENTS OF ERROR

Chrysler asserts that the district court erred (1) in finding that the dealer termination provisions of chapter 60, article 14, do not violate the due process guarantees of the Nebraska or U.S. Constitution and, thus, finding that the provisions of chapter 60, article 14, are constitutional; (2) in holding that the subsequent de novo review by an appellate court remedies and eliminates due process violations present in Board proceedings wherein the Board sits as fact finder and decisionmaker in manufacturer-dealer disputes; (3) in dismissing the Board as a party to this action for lack of jurisdiction; and (4) in dismissing Chrysler's amended petition for lack of jurisdiction, thereby requiring Chrysler to proceed before the Board to terminate Janssen's franchise.

ANALYSIS

We address Chrysler's first assignment of error, since it is dispositive of the case. Chrysler did not directly attack the constitutionality of § 60-1402, which establishes the composition of the membership of the Board. By a declaratory judgment action, Chrysler attempted to bypass the requirement of § 60-1420 that "no franchisor shall terminate or refuse to continue any franchise unless the franchisor has first established, in a hearing held pursuant to section 60-1425, that: (a) The franchisor has good cause for termination . . . ." Chrysler sought to avoid the requirement of § 60-1420 by asking the district court to declare that Chrysler was entitled to terminate Chrysler's franchise with Janssen.

Chrysler argues that because of the composition of the Board, the Board is not capable of acting as a neutral and detached decisionmaker in dealer termination proceedings under § 60-1420. Chrysler claims that its due process rights are violated because the Board as composed pursuant to § 60-1402 has an inherent bias favoring automobile dealers versus automobile manufacturers. Chrysler contends that such bias, when coupled with the statutory requirement that a manufacturer must appear before the Board to show "good cause" for termination of a dealership, denies Chrysler its

constitutionally protected right to an impartial decisionmaker.

The composition of the Board is established by § 60–1402, which provides:

> (1) There is hereby established the Nebraska Motor Vehicle Industry Licensing Board which shall consist of the Director of Motor Vehicles, who shall be chairman of the board, and nine members appointed by the Governor as follows: One factory representative, one member of the general public, and one motorcycle dealer . . . one new motor vehicle dealer from each of the three congressional districts of the state . . . and two used motor vehicle dealers and one trailer dealer or combination motor vehicle or trailer dealer . . . *Provided,* that no member of the board shall participate in any manner in a proceeding before the board involving his licensed business.

It is this composition of the Board that Chrysler claims establishes the inherent bias of the Board.

Certain propositions of law govern our determination of the issue before us. The constitutionality of a statute or ordinance is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *Boll v. Department of Revenue*, 247 Neb. 473, 528 N.W.2d 300 (1995); *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995); *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995). The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995); *Hlava v. Nelson*, 247 Neb. 482, 528 N.W.2d 306 (1995).

A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *City of Ralston v. Balka, supra*; *Hlava v. Nelson, supra*; *Boll v. Department of Revenue, supra*. Unconstitutionality must be clearly established before a statute will be declared void. *Hlava v. Nelson, supra*; *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995).

In the case at bar, Chrysler has the burden of clearly establishing that § 60–1420 is unconstitutional. Chrysler relies

upon the following cases: *American Motors Sales Corp. v. New Motor Vehicle Bd.*, 69 Cal. App. 3d 983, 138 Cal. Rptr. 594 (1977); *Chevrolet Motor Div. v. New Motor Veh. Bd.*, 146 Cal. App. 3d 533, 194 Cal. Rptr. 270 (1983); *Nissan Motor Corp. v. New Motor Vehicle Bd.*, 153 Cal. App. 3d 109, 202 Cal. Rptr. 1 (1984); and *University Ford etc. v. New Motor Vehicle Bd.*, 179 Cal. App. 3d 796, 224 Cal. Rptr. 908 (1986). In each case, the court held that the membership of several car dealers on the motor vehicle board deprived a manufacturer litigant of due process because the board was not impartial.

In *American Motors Sales Corp.*, the manufacturer attempted to terminate a dealership for failure to develop a sufficient sales volume. Following a hearing, the hearing officer found "good cause" for termination. The New Motor Vehicle Board disagreed. On appeal, the superior court held that sections of the California Vehicle Code violated due process under the state and federal Constitutions. The vehicle code mandated that the board must include four dealers but need not include any manufacturers.

The California Court of Appeal affirmed and held that dealer members of the board had an economic stake in every franchise termination before the board and that it was to every dealer's advantage not to permit termination for low sales performance. The Court of Appeal stated that a new-car dealer was not per se biased to a degree that he could not or should not under any circumstances serve on the board, but the combination of the mandated dealer board members, the lack of any counterbalance in mandated manufacturer members, the nature of the adversaries, and the nature of the controversy did not furnish an impartial tribunal. The court concluded that the objectionable feature of dealer membership on the board was the distinct possibility that a dealer-manufacturer controversy would be decided not on its merits but on the potential interest of the dealer members. "Because the challenged Board members have a 'substantial pecuniary interest' in franchise termination cases . . . their *mandated* presence on the Board potentially prevented a fair and unbiased examination of the issues before it in this case, in violation of due process." *American Motors Sales Corp.*, 69 Cal. App. 3d at 992, 138 Cal. Rptr. at 599.

The court in *Chevrolet Motor Div. v. New Motor Veh. Bd., supra*, similarly concluded that dealer members were biased and that their presence on the board resulted in a substantial probability that decisions in dealer-manufacturer disputes would be made on the basis of inappropriate considerations. *Nissan Motor Corp. v. New Motor Vehicle Bd., supra*, reaffirmed the decisions discussed above. *University Ford etc. v. New Motor Vehicle Bd., supra*, held that the board, composed of the dealers and members of the public, was not an impartial forum for resolving dealer-manufacturer disputes and that the constitutional defect could not be remedied by voluntary recusal of the board's dealer members. Following these decisions, the California Legislature amended the vehicle code to expressly prohibit all dealer members from participating in or discussing any disputes before the board between a dealer and a manufacturer. *British Motor Car D. v. New Motor Veh. Bd.*, 194 Cal. App. 3d 81, 239 Cal. Rptr. 280 (1987).

The California cases were premised upon the assumption that dealer members of the board always have an economic stake in every franchise termination before the board. This assumption prefaced the conclusion that the mandated presence of dealer members potentially prevented a fair and impartial tribunal.

Chrysler argues that the California courts' rationale as to the impermissibility of dealer board members determining dealer-manufacturer disputes is equally applicable to Nebraska. We decline to adopt the premise that a dealer member always has a pecuniary interest in every franchise termination case. The dissent in *American Motors Sales Corp.* points out that "[i]t is sheer speculation to conclude, absent a finding of actual bias, that a dealer-member has a pecuniary interest antagonistic to the manufacturer . . . ." 69 Cal. App. 3d at 994, 138 Cal. Rptr. at 600.

In *Gen. GMC Trucks v. Gen. Motors Corp.*, 239 Ga. 373, 237 S.E.2d 194 (1977), *cert. denied* 434 U.S. 996, 98 S. Ct. 634, 54 L. Ed. 2d 491, the Supreme Court of Georgia rejected the trial court's holding that a commission consisting of nine members, of whom five are franchised dealers, must necessarily be prejudiced. The court recognized that it was common and acceptable practice to appoint members of a profession or

business to oversee the practices of that group. "Members of a commission are presumed to be fair and impartial." *Gen. GMC Trucks*, 239 Ga. at 375, 237 S.E.2d at 195.

A similar result was reached in *General Motors Corp. v. Capitol Chevrolet*, 645 S.W.2d 230 (Tenn. 1983). Commencing with an administrative proceeding before the Tennessee Motor Vehicle Commission, General Motors applied for permission to open a new dealership in a part of the metropolitan Nashville trade area. The commission unanimously denied the application. General Motors appealed via the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-117 (1979). On appeal, the chancellor of the equity court held the statute unconstitutional because the commission as constituted did not provide a fair and impartial tribunal. The chancellor concluded that each dealer member would inevitably have a substantial pecuniary interest in a matter involving a dispute with a manufacturer. At the time of the hearing involved, the commission was composed of nine dealer members and two consumer members.

The Supreme Court of Tennessee stated that it was unable to accept the premise that no automobile dealer could serve fairly on the commission. Only by innuendo and suggestion had there been any hint of bias or partiality. The court stated that the record did not justify striking down the commission as being unconstitutionally composed or biased as a matter of law. The court specifically noted: "The 'realities' of the situation are that the manufacturer is dominant in every respect over the dealers. It was partly because of this obvious disparity in economic power with its potential—and, historically, actual—abuses that statutes such as those in question were enacted." *General Motors Corp.*, 645 S.W.2d at 237.

In reversing the lower court's decision, the court recognized that only those members of the commission with substantial pecuniary interests in the proceedings should be disqualified, citing *Gibson v. Berryhill*, 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973). The court stated that similar statutes regulating the automobile business have been enacted in all but a few states and have boards generally composed of motor vehicle dealer members and members of the public who

represent consumer interests. The court noted that the only contrary decision was *American Motors Sales Corp. v. New Motor Vehicle Bd.*, 69 Cal. App. 3d 983, 138 Cal. Rptr. 594 (1977), which the court found was not binding. We adopt the reasoning of the courts in *Gen. GMC Trucks v. Gen. Motors Corp.*, *supra*, and *General Motors Corp. v. Capitol Chevrolet*, *supra*, and find that the membership of the Board is not inherently biased because some of the members are dealers.

The legislative history of 1971 Neb. Laws, L.B. 768, clearly delineates the purposes for creating the Board. Senator Herbert J. Duis, the introducer of L.B. 768, stated the following:

> The intent of LB. 768 is to re-codify the existing Motor Vehicle Dealers' Licensing Act and to up-grade the sales and service of motor vehicles, motorcycles, and trailers by those licensed under the Act. To a large extent, a franchise system is established between the manufacturers of these vehicles and their dealers and the sales and servicing of the vehicles after sales includes more than the mere transfer of title and is a continuing obligation of all the persons involved in the sale, including the manufacturer, the selling dealer and the buying public. The termination or non-continuation of this franchise relationship without good cause results in the general buying public being denied the availability of continuing mechanical and operational services after the sale and precludes the continued availability of these services which are necessary to serve the public of this state and also to assure the safer operating condition of the vehicle.

Statement of Purpose, L.B. 768, Committee on Public Works, 82d Leg., 1st Sess. (Feb. 18, 1971).

The reason for the enactment of such laws was discussed in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978). The Court recognized the disparity in bargaining power between automobile manufacturers and their dealers, which prompted Congress and 25 states to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers. In *Orrin W. Fox Co.*, California's Automobile Franchise Act, via the California Vehicle Code, explicitly

conditioned a motor vehicle manufacturer's right to terminate a dealership upon compliance with the procedural requirements enacted in the Automobile Franchise Act and, if necessary, upon approval of the New Motor Vehicle Board. The Court noted that California's legislature was constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right to franchise. Citing *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963), the Court pointed out that " '[l]egislative bodies have broad scope to experiment with economic problems . . . .' " *Orrin W. Fox Co.*, 439 U.S. at 107.

From our reading of *Orrin W. Fox Co.* and the legislative history in Nebraska, we find that the authority to regulate the franchise rights of automobile manufacturers and dealers in Nebraska is clearly within the power of the Legislature. It is within the authority of the Legislature to require that termination proceedings involving franchises be heard and determined by the Board. See §§ 60-1420 and 60-1425. "States may . . . require businesses to secure regulatory approval before engaging in specified practices." (Emphasis omitted.) *Orrin W. Fox Co.*, 439 U.S. at 108.

In this case, Chrysler has indirectly attacked the requirements of §§ 60-1420 and 60-1425 by alleging a violation of due process because "the Board is not capable of acting as a 'neutral and detached decision-maker' in the statutorily mandated dealership termination proceedings [Neb. Rev. Stat. § 60-1420 (Supp. 1992) et seq.] . . . ." Brief for appellant at 10. It is Chrysler's burden to establish the unconstitutionality of the statutes in question. See *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995). It has not met that burden.

Having concluded that the composition of the Board is not inherently biased, we examine the evidence presented by Chrysler in support of its constitutional challenge. Chrysler offered affidavits of two Chrysler employees and the legislative histories of 1957 Neb. Laws, ch. 280, §§ 1 to 18, pp. 1011-24, and 1971 Neb. Laws, L.B. 768.

The affidavit of William S. Hurst, an employee of Chrysler for more than 18 years, stated that as Chrysler's National Dealer Placement Manager, he is familiar with numerous

disputes and legal proceedings by dealers against Chrysler. The disputes involve disagreements over various aspects of dealer-manufacturer relationships, including dealer termination matters. Hurst stated that many of the disputes are the result of conflicting economic interests of the motor vehicle dealer and Chrysler. He stated that state-created dealer franchise boards frequently take positions which conflict with or are adverse to the positions taken by a manufacturer.

The affidavit of Robert M. Williams, the director of National Dealer Relations for Chrysler, stated that his responsibilities include resolving disagreements between dealers and Chrysler, including disputes in the areas of marketing, warranty reimbursement, warranty and sales incentive audits, product offerings, and dealer contractual obligations. Williams stated that such disputes are not always resolved, and as a result, dealers may choose to litigate the dispute.

This evidence and our review of the legislative histories do not establish that the makeup of the Board is biased. Chrysler has offered no evidence of a direct, personal, substantial, or pecuniary interest of any member of the Board, nor do the affidavits imply that the members of the Board are themselves biased. In *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973), the Court held that only those "with substantial pecuniary interest in legal proceedings" should be disqualified. No substantial pecuniary interest of the members of the Board has been demonstrated in the present case.

Of the 50 states, 48 states now have legislation dealing with motor vehicle franchises. The need for this legislation is based upon public policy, public interest, and public welfare. Nebraska has determined that matters involving the distribution and sale of motor vehicles vitally affect the general economy of the state, the public interest, the public welfare, and public safety, and that distribution and sales under the franchise system require the exercise of the state's police power "to insure the public welfare, to regulate commerce, to establish guidelines for enforcement of a fair and equitable balance between parties to such franchises, and to provide judicial relief from unfair and inequitable practices affecting the public interest." § 60-1401.01.

Based on our review of Chrysler's arguments in relation to the legislative intent, the existing statutes as applied to Chrysler, and the evidence, we conclude that Chrysler has failed to sustain its burden of establishing that the composition of the Board pursuant to § 60-1402 is biased or that § 60-1420 as applied to Chrysler violates the Constitution of the State of Nebraska or the 14th Amendment to the Constitution of the United States.

Since we have concluded that §§ 60-1402 and 60-1420 are constitutional, we do not address Chrysler's other assignments of error. As previously noted, the means by which a dealership can be terminated are found solely in § 60-1420. Chrysler did not utilize the statutory procedures. Consequently, the district court was correct in dismissing Chrysler's petition. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BRYAN E. BARFOOT, APPELLANT.

534 N.W.2d 572

Filed June 30, 1995. No. S-94-1096.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous.
2. ____: ____: ____. The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
3. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
4. **Homicide: Intent: Postconviction: Appeal and Error.** The failure to include malice as an element in an adjudgment of guilt of second degree murder may be raised as plain error on direct appeal or on a motion for postconviction relief.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Reversed and remanded with directions.

Bryan E. Barfoot, pro se.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

PER CURIAM.

Bryan E. Barfoot appeals from the Dawson County District Court's judgment overruling his motion for postconviction relief from an accepted plea of nolo contendere to a charge of second degree murder. We reverse the district court's order and remand the cause with directions to grant Barfoot a new trial because the information charging Barfoot with second degree murder did not include malice as an element of the crime.

BACKGROUND

In August 1986, Barfoot entered a nolo contendere plea to the charge of second degree murder in connection with the death of his wife. He was sentenced to imprisonment for a term of 10 years to life. Barfoot filed a direct appeal, in which the judgment was summarily affirmed.

On October 31, 1994, Barfoot filed a motion for postconviction relief, claiming that the information on which he was charged omitted malice as an element of the crime and that he received ineffective assistance of counsel because his attorney failed to inform him of the elements of the crime for which he was charged and because his attorney failed to object to both the information and the constitutionality of Neb. Rev. Stat. § 28-304 (Reissue 1989).

In its order, the district court reasoned that the lack of the word "malice" in the information was not considered to be plain error upon the direct appeal and that it should not be considered plain error for the purposes of a motion for postconviction relief. The court further reasoned that Barfoot's attorney performed in accord with the standard of an attorney with ordinary training in criminal law, citing the inequity of requiring an attorney to "anticipate decisions of the Nebraska Supreme Court." Based on these findings, the court overruled the motion. Barfoot appeals from that ruling.

ASSIGNMENTS OF ERROR

Barfoot argues that the district court erred (1) in finding that the statute under which he was charged was constitutional, (2) in finding that the failure of the information to include malice as an element was not plain error, and (3) in finding that Barfoot had received effective assistance of counsel.

STANDARD OF REVIEW

A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995); *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994). The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *State v. Williams, supra*; *State v. Jones*, 246 Neb. 673, 522 N.W.2d 414 (1994).

An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. See, *State v. Eggers*, 247 Neb. 989, 531 N.W.2d 231 (1995); *State v. Wilson*, 247 Neb. 948, 530 N.W.2d 925 (1995); *State v. Williams, supra*.

ANALYSIS

Malice is an element of second degree murder. The issues raised in this matter have been addressed by this court in a number of recent decisions. See, e.g., *State v. Plant, ante* p. 52, 532 N.W.2d 619 (1995); *State v. Eggers, supra*; *State v. Wilson, supra*; *State v. Williams, supra*; *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *State v. Ladig*, 246 Neb. 542, 519 N.W.2d 561 (1994); *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

The cases cited above, when read together, delineate the following precepts regarding an appeal from an adjudgment of

guilt of second degree murder, whether based on a jury verdict or a plea agreement. The omission of malice as an element of second degree murder in a jury instruction is plain error. *State v. Williams, supra*; *State v. Myers, supra*. Similarly, the omission of malice as an element of second degree murder in an information is plain error. *State v. Ladig, supra*; *State v. Manzer, supra*. The failure to include malice as an element in an adjudgment of guilt of second degree murder may be raised as plain error on direct appeal or on a motion for postconviction relief. See, *State v. Plant, supra*; *State v. Williams, supra*; *State v. Manzer, supra*.

Barfoot pled nolo contendere to second degree murder based on an information which failed to include malice as an essential element of the crime. The defective information constituted plain error which requires the granting of the motion for postconviction relief. See, *State v. Manzer, supra*; *State v. Ladig, supra*.

Accordingly, the judgment of the trial court is reversed, and the matter is remanded with directions to grant Barfoot a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., dissenting.

I respectfully dissent from the result reached by the majority, based on my agreement with Justice Wright's dissenting opinion in *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994). See, also, *State v. Lowe, ante* p. 215, 533 N.W.2d 99 (1995) (Connolly, J., dissenting).

WRIGHT, J., joins in this dissent.

RADEC CONSTRUCTION, INC., A NEBRASKA CORPORATION, APPELLEE, V. SCHOOL DISTRICT NO. 17 OF DOUGLAS COUNTY, NEBRASKA, APPELLANT.

535 N.W.2d 408

Filed July 7, 1995. No. S-93-796.

1. **Appeal and Error.** In a law action tried to the court, the findings of the court will not be disturbed on appeal unless clearly wrong.

2. **Contracts: Contractors and Subcontractors.** Generally, the courts have held that parties to a contract may agree that classification, quantity, and quality of work done or things furnished shall be left to the judgment of a third person, and his estimate or decision shall be final.
3. ____: ____. When parties to a contract leave determination of certain disputes to the judgment of a third party, the decision of one so authorized is binding upon the parties thereto except when it is based upon fraud, gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment. However, in cases where it appears that there was no reasonable basis for the third party's action, or if it is patently erroneous, the third party's decision is equivalent of bad faith and the contractor is not bound by the third party's decision.
4. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Malcolm D. Young and Jeff C. Miller, of Young & White, for appellant.

William T. Ginsburg for appellee.

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

CONNOLLY, J.

RaDec Construction, Inc. (RaDec), filed an action against School District No. 17 of Douglas County, Nebraska (Millard), for the balance due under a contract to build a new school. RaDec claimed that Millard failed to pay the proper amount for the earthwork performed by RaDec and its subcontractors. The district court ruled in favor of RaDec and issued a judgment against Millard in the amount of $80,269. Millard appealed. For the reasons stated herein, we affirm the judgment of the district court.

BACKGROUND

RaDec was named the general contractor for the construction of the school on a bid of $5,275,800, of which $404,269 was allocated for earthwork. The project initially required grading and excavation of the site, including hauling in an additional 100,000 cubic yards of fill dirt.

The parties entered into a contract which included a "General

Conditions of the Contract for Construction" form contract drafted by the American Institute of Architects. The form contract contained the following provision, which governed changes in the project after the formation of the contract, if mutual acceptance was not possible:

> **12.1.4** . . . [T]he Contractor, provided he receives a written order signed by the Owner, shall promptly proceed with the Work involved. The cost of such Work shall then be determined by the Architect on the basis of the reasonable expenditures and savings of those performing the Work attributable to the change, including, in the case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case . . . the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data for inclusion in a Change Order. Unless otherwise provided in the Contract Documents, cost shall be limited to the following: cost of materials, including sales tax and cost of delivery; cost of labor, including social security, old age and unemployment insurance, and fringe benefits required by agreement or custom; workers' or workmen's compensation insurance; bond premiums; rental value of equipment and machinery; and the additional costs of supervision and field office personnel directly attributable to the change. Pending final determination of cost to the Owner, payments on account shall be made on the Architect's Certificate for Payment. The amount of credit to be allowed by the Contractor to the Owner for any deletion or change which results in a net decrease in the Contract Sum will be the amount of the actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in any one change, the allowance for overhead and profit shall be figured on the basis of the net increase, if any, with respect to that change.

After formation of the contract, Wilscam, Mullins, Birge, Inc. (Wilscam), the architecture firm which designed the school, revised the earthworking plan so that no fill dirt would be needed at the site. Wilscam asked RaDec to submit an

itemized quotation of costs without the fill dirt. RaDec made a similar request of its subcontractor, Wiekhorst Brothers Excavation (Wiekhorst). Wiekhorst submitted proposed reductions in the amount of its subcontract first by $30,100, then by $80,000. Wilscam rejected both offers as being unfair to Millard.

Since the parties could not reach a mutual acceptance regarding costs, Millard informed RaDec that it would invoke § 12.1.4, giving Wilscam the power to reasonably determine how much credit Millard should receive after the contract was altered to eliminate fill dirt. At a meeting attended by representatives of Millard, RaDec, Wiekhorst, Wilscam, and Negus-Sweenie, Inc. (the grading subcontractor), a representative from Negus-Sweenie proposed that the cost of the earthwork without the fill dirt would be $203,500.

Two months after that meeting, a second meeting was held to determine the amount of credit due Millard and was attended only by representatives of Millard and Wilscam. Wilscam issued a change order deducting $189,018 from the contract due to the simplified earthworking plan. Notes from the second meeting showed that Wilscam arrived at the $189,018 deduction by subtracting $407,888 (the amount due RaDec for earthwork according to payment schedules) from the contract total and adding in its place the amount proposed by Negus-Sweenie for the earthwork ($203,500) plus profit of 7 1/2 percent. Although the figures employed by Wilscam exactly corresponded with the figures supplied by Negus-Sweenie, a representative of Wilscam testified that other figures were considered.

RaDec objected to Wilscam's determination, claiming that Wilscam had no authority to determine the costs of the earthwork "from the bottom up," but should have determined the probable costs to RaDec from the time of the change order so as to reflect those costs already incurred. RaDec refused to sign the change order, but finished the project. During the course of the construction, RaDec fired Wiekhorst as the earthwork subcontractor and hired Negus-Sweenie to finish the job. Wiekhorst filed suit against RaDec's bonding company and accepted a $75,000 payment in settlement of that suit. The evidence reflected that the settlement amount constituted

payment in consideration for work completed by Wiekhorst.

In February 1991, RaDec filed suit against Millard seeking additional payment for the earthwork. RaDec alleged that Millard paid $248,138 for the earthwork but that RaDec incurred $332,492.45 in expenses for the same work.

After a bench trial, based on the testimony of a former officer of RaDec, the district court found in favor of RaDec and awarded RaDec $80,269. In a letter to counsel, the district court stated, "I conclude that the only logical . . . way to determine any adjustment in the contract price would be to determine the cost of trucking in the dirt, determining the cost of using on-site dirt, and the difference would constitute the reduction . . . in the total contract price." The district court found Wilscam's revision of the entire earthwork portion of the contract to be arbitrary and a gross mistake. Millard appealed.

ASSIGNMENTS OF ERROR

Millard argues that the district court erred in (1) applying the incorrect standard for reviewing Wilscam's decision, (2) finding that the evidence satisfied the standard applied by the district court, and (3) finding that the evidence supported the award.

STANDARD OF REVIEW

In a law action tried to the court, the findings of the court will not be disturbed on appeal unless clearly wrong. *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995).

ANALYSIS

In a letter to counsel for both parties accompanying its order in the case at bar, the district court stated that Wilscam's method of determining the amount of credit due Millard was arbitrary and a gross mistake. Millard contends that the district court applied an incorrect standard and should have applied a stricter standard. Specifically, Millard argues that before the district court could invalidate Wilscam's determination, it had to find that the determination was based on fraud, gross mistake as necessarily implies bad faith, or failure to exercise an honest judgment. We agree.

In *In re Appeal Roadmix Construction Corporation*, 143 Neb. 425, 435, 9 N.W.2d 741, 746 (1943), this court stated the following rule:

> Generally, the courts have held that parties to a contract may agree that classification, quantity, and quality of work done or things furnished shall be left to the judgment of a third person and his estimate or decision shall be final . . . : "It may be observed generally that, under the federal and state authorities, it is competent for parties, in this class of general construction work, to designate in the contract some person or official to pass upon and decide all disputed questions that may arise in the course of construction, and that his decision shall be final." . . . [T]he decision of one so authorized is binding upon the parties thereto except when it is based upon fraud, gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment.

Pursuant to *In re Appeal Roadmix Construction Corporation*, Millard is correct in arguing that the district court could not invalidate Wilscam's decision in the absence of fraud, gross mistake as would necessarily imply bad faith, or failure to exercise an honest judgment. However, we also note that in cases where it appears that there was no reasonable basis for the third party's action, or if it is patently erroneous, the courts have found the equivalent of bad faith, and the contractor is not bound by the third party's decision. See *Savin Bros., Inc. v. State*, 62 A.D.2d 511, 405 N.Y.S.2d 516 (1978), *aff'd* 47 N.Y.2d 934, 393 N.E.2d 1041, 419 N.Y.S.2d 969 (1979). Therefore, if the district court could have determined that Wilscam's determination had no reasonable basis or that it was patently erroneous, then the district court could correctly have found Wilscam's decision to constitute a gross mistake as would necessarily imply bad faith.

Having established the proper standard of review for the district court, we now turn to the district court's decision. The district court found that Wilscam erroneously determined the new contract price reflecting the lack of need for fill dirt "from the bottom up." Evidence presented to the district court indicated that Wilscam figured the cost of the earthwork without fill dirt by using figures supplied by Negus-Sweenie, without attempting to verify whether those figures bore a reasonable relationship to actual costs. The district court found that RaDec

had presented Wilscam with an accounting which accurately reflected the change in costs resulting from the elimination of fill dirt from the contract, but that Wilscam never utilized those figures.

In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *First Westside Bank v. For-Med, Inc.*, 247 Neb. 641, 529 N.W.2d 66 (1995); *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995); *Production Credit Assn. v. Eldin Haussermann Farms*, 247 Neb. 538, 529 N.W.2d 26 (1995). In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995); *Label Concepts v. Westendorf Plastics, supra*; *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994).

We determine that the district court was not clearly wrong in concluding that Wilscam's determination of the reduction in contract price constituted a gross mistake. Furthermore, we hold that Wilscam's determination was patently erroneous and therefore legally equivalent to bad faith for the purposes of deciding the instant case.

AFFIRMED.

ROSE EQUIPMENT, INC., A NEBRASKA CORPORATION, APPELLANT, V. FORD MOTOR COMPANY, A CORPORATION, APPELLEE.

535 N.W.2d 404

Filed July 7, 1995. No. S-93-825.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** The judgment rendered or final order made by the district court in an Administrative

Procedure Act appeal may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record.

2. **Administrative Law: Final Orders: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act 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.

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

Terrance A. Poppe, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellant.

Stephen H. Nelsen, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

CAPORALE, LANPHIER, and CONNOLLY, JJ., and WITTHOFF, D.J., and BOSLAUGH, J., Retired, and RONIN, D.J., Retired.

PER CURIAM.

Rose Equipment, Inc. (Rose), appeals from an order by the district court for Lancaster County which affirmed the decision of the Nebraska Motor Vehicle Industry Licensing Board to terminate a franchise agreement between Rose and Ford Motor Company (Ford). This is an appeal in accordance with the Administrative Procedure Act. See Neb. Rev. Stat. § 60-1435 (Reissue 1993).

Rose and Ford entered into a franchise agreement for the sale and service of Ford's heavy-duty-truck line. Rose asserts that since 1988, Ford sought to cripple Rose's dealership by refusing to extend credit to Rose, refusing to pay for warranty work, suggesting transferring the franchise in Lincoln to Sapp Brothers Ford, refusing to respond in a timely manner to Rose's concerns regarding parts returns, and terminating Rose's floor plan without explanation. Ford contends that it had good cause to seek termination, since (1) Rose's truck sales were excessively low as compared to other dealers in Lincoln and similar markets, (2) Rose's parts purchases from Ford were continually low, (3) Rose refused to make any substantial or permanent investment in the franchise, (4) Rose had inadequate equipment and parts to properly serve Ford customers, (5) Rose

refused to perform warranty work on Ford trucks, (6) Rose failed to actively promote the sale of Ford vehicle products and failed to hire a sales person to sell the Ford trucks, (7) Rose failed to maintain an inventory of trucks, and (8) Rose failed to submit adequate financial statements to Ford.

In March 1991, Ford filed an application with the board to terminate the franchise agreement pursuant to Neb. Rev. Stat. § 60-1420 (Reissue 1993). An evidentiary hearing was held before the board on July 26. On March 12, 1992, the board granted Ford's application to terminate the franchise. Rose appealed to the district court, and the district court reversed and remanded the decision upon finding that Rose did not receive a fair hearing. The board reheard the matter on October 29 and again granted Ford's application to terminate the franchise. Rose again appealed to the district court, which affirmed the board's decision.

Rose contends that the district court erred in sustaining the board's decision to terminate the franchise agreement because Ford failed to meet its burden of proof on the issue of good cause.

The judgment rendered or final order made by the district court in an Administrative Procedure Act appeal may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record. *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994). When reviewing an order of a district court under the Administrative Procedure Act 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. *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995). See, *Sunrise Country Manor, supra*; *Abbott v. Department of Motor Vehicles*, 246 Neb. 685, 522 N.W.2d 421 (1994).

Rose first argues that it was denied a fair hearing as required by Neb. Rev. Stat. § 60-1427 (Reissue 1993), since not all members of the board were present at the hearing, but admittedly reviewed the testimony before reaching a decision. We note that the requirement of due process is satisfied in the

de novo review in the district court. See Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1994). Further, there is no requirement in § 60-1427 that members of the board be present physically at hearings pursuant to the act. The assignment is without merit.

Section 60-1420 establishes the conditions upon which a franchisor may terminate a franchise agreement with the franchisee. Pursuant to § 60-1420, Ford must establish (1) that it has good cause for termination, (2) that upon termination Ford will establish another franchise in the same line-make in the community or that the community cannot support the franchise, and (3) that Ford will comply with the repurchase provisions found in Neb. Rev. Stat. § 60-1430.02 (Reissue 1993).

Neb. Rev. Stat. § 60-1433 (Reissue 1993) lists nonexclusive circumstances the board considers to determine whether good cause exists for termination. Those nonexclusive circumstances include:

> (1) Amount of business transacted by the franchisee;
>
> (2) Investment necessarily made and obligations incurred by the franchisee in the performance of his part of the franchise;
>
> (3) Permanency of the investment;
>
> (4) Whether it is injurious to the public welfare for the business of the franchisee to be disrupted;
>
> (5) Whether the franchisee has adequate . . . equipment, parts and qualified service personnel to reasonably provide consumer care . . . ;
>
> (6) Whether the franchisee refuses to honor warranties of the franchisor to be performed by the franchisee if the franchisor reimburses the franchisee for such warranty work performed by the franchisee;
>
> (7) . . . [F]ailure by the franchisee to substantially comply with those requirements of the franchise which are determined by the board to be reasonable and material; and
>
> (8) . . . [B]ad faith by the franchisee in complying with those terms of the franchise which are determined by the board to be reasonable and material.

Id. Good cause for termination cannot be established by "[t]he

sole fact that the franchisor desires further penetration of the market" or "[t]he fact that the franchisee refused to purchase or accept delivery" of vehicles or parts not ordered by the franchisee. Neb. Rev. Stat. § 60-1429 (Reissue 1993). Each of the above listed conditions will be discussed below as they apply to the facts.

The evidence supports a finding that from 1983 through 1990, except 1985, Rose's percentage of the heavy-truck registrations sold in the Lincoln market was below district, regional, and national averages. Rose's heavy-truck sales were substantially less than those of dealers located in Omaha and Grand Island. The Omaha dealer sold over 13 times as many trucks as Rose, and the Grand Island dealer sold nearly 3½ times as many trucks as Rose from 1985 through 1990.

Ford allowed Rose to set its own sales objectives, which Rose never met. The evidence also shows that Rose's truck-parts purchases were lower on average than those of the Omaha and Grand Island dealers. Although Rose was capable of substantial parts purchases as evidenced by the amounts purchased in 1987 and 1988, Rose's parts purchases fell dramatically in 1990.

Rose argues that Ford sought termination based solely on the fact that Ford desired further market penetration which, according to § 60-1429, cannot be considered good cause for termination. However, § 60-1433 does allow the board to consider the amount of business transacted. Furthermore, market penetration certainly is not Ford's sole reason for seeking termination as shall be discussed below.

As to the amount of investment necessarily made by Rose, we consider only those investments required by Ford under the franchise agreement. See *In re Application of General Motors Corp.*, 232 Neb. 11, 439 N.W.2d 453 (1989). The investment required by Ford in this case is nominal. The Rose facility was already in existence at the time the franchise agreement was entered into with Rose, and no investment in the facility was required by Ford. The only investment Rose had to make under the agreement was the purchase of parts inventory. The record reflects that the average amount of Rose's parts inventory was nominal. Indeed, the only evidence of a permanent investment Rose made was reflected in its parts inventory.

The proximity of Grand Island and Omaha to Lincoln will allow Rose's customers to obtain service, so termination of Rose's franchise agreement would not be injurious to public welfare.

The record reflects that although Rose's service facilities are adequate and its personnel qualified, its parts inventory is not adequate, nor does it maintain all of the special tools necessary to properly service Ford's heavy trucks. The record also reflects that Rose refused to do warranty work on Ford trucks. This is evidenced by statements made by an owner of Rose to a Ford engineer, by the drop in warranty claims, and by customer complaints made to Ford about Rose's refusal to do warranty work.

Finally, there is evidence that Rose neglected to comply with the reasonable and material requirements of the franchise agreement by Rose's failure to aggressively promote Ford products, failure to maintain any truck inventory, failure to hire a sales person to sell the trucks, failure to keep an adequate parts supply, failure to provide warranty work, and failure to provide adequate financial statements to Ford.

Ford testified that it had a replacement dealer to take Rose's place in Lincoln and that Ford would comply with the repurchase requirements of § 60-1430.02. Ford has met the requirements set forth in § 60-1420 for the termination of Rose's franchise. We affirm the district court's judgment upon finding no error on the record and finding that the district court's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

AFFIRMED.

WHITE, C.J., participating on briefs.

FAHRNBRUCH and WRIGHT, JJ., not participating.

DANIEL COVERT, SR., AND JERRY C. HIGGINS AND MYRNA F. HIGGINS, HUSBAND AND WIFE, APPELLEES, V. MARY L. RICHARDS, APPELLANT.

535 N.W.2d 701

Filed July 7, 1995. No. S-93-889.

1. **Property: Easements.** The owners of a party wall are not tenants in common, but each owns in severalty the part thereof situated on that owner's land and has an easement of support from the other part of the wall.
2. **Property.** A party wall is for the common benefit of contiguous proprietors; neither may subject it to a use whereby it ceases to be continuously available for enjoyment by the other.
3. ____. Contiguous proprietors may subject a party wall to whatever uses are proper to a wall, if the like freedom of the other is not curtailed thereby.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Richard W. Harter, of Harter Law Office, P.C., for appellant.

William R. Reinsch and Linda Frederick Thompson, of Reinsch & Slattery, P.C., for appellees.

CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BOSLAUGH, J., Retired.

PER CURIAM.

The district court enjoined the defendant-appellant, Mary L. Richards, from eliminating the leaks in the flat roof on her building by constructing a pitched roof and gutter system resting on half of the party walls separating her building from the flat-roofed buildings adjoining on either side of it, one owned by the plaintiff-appellee Daniel Covert, Sr., and the other by the plaintiffs-appellees Jerry C. Higgins and his wife, Myrna F. Higgins. Richards appealed to the Nebraska Court of Appeals, claiming that the district court erred in so ruling. We then, on our own motion, removed the matter to this court in order to regulate our caseload and that of the lower appellate court.

We begin by noting that at the commencement of this litigation, Ludovina T. Brady, who owned the middle building as a joint tenant with Richards, was also named a defendant; however, Brady has since died, and the parties stipulated that the action survives in Richards alone.

We have written that the owners of a party wall are not tenants in common, but that each owns in severalty the part thereof situated on that owner's land and has an easement of support from the other part of the wall. See *First Investment Co. v. State Fire Marshal*, 175 Neb. 66, 120 N.W.2d 549 (1963).

In *First Investment Co.*, an interior second-floor wall entirely on the Lowes' side of First Investment's property line separated a building into two parts. One part of the building was owned by First Investment, and the other part was owned by the Lowes. We held that in the event that the part owned by First Investment was to be demolished because of decay as ordered by the fire marshal, First Investment had no obligation to share in the cost of resurfacing what had been an interior party wall so as to make it suitable as an exterior wall. In so holding, we reasoned that as the reciprocal easements arose by implication, the owners had the right of support from the wall, but not from each other's building. Thus, First Investment was not obligated to preserve its building for the sake of the party wall, and once First Investment demolished its portion of the building, the party wall would serve solely the interests of the Lowes.

In *Calmelet v. Sichl*, 48 Neb. 505, 67 N.W. 467 (1896), the commissioner ruled that the contiguous proprietor who had a "mere" easement of support in a party wall located on a neighbor's property did not have a right to extend the wall upward. In so ruling, the commissioner reasoned that the fact that the parties had agreed to the contiguous proprietorship of the three-story wall "did not justify one of these parties in putting up the fourth story in his own right, for his own benefit, and in open hostility to the wishes of the other joint [partner]." *Id.* at 512, 67 N.W. at 469.

The situation here differs from those presented in *First Investment Co.* and *Calmelet* in that the record does not tell us on whose land or lands the subject walls rest. The situation at hand further differs from that presented in *Calmelet* in that here there is no allegation of a contract concerning the ownership of the walls, and also differs from that in *First Investment Co.* because there is no proof of prior common ownership. Nonetheless, since the parties herein stipulated to the party wall relationship, we are persuaded that in the absence of proof of a

contract which provides otherwise, and irrespective of whether a party wall straddles boundary lines or rests entirely upon the land of one of the contiguous proprietors,

> [a] party wall is for the common benefit of contiguous proprietors. Neither may subject it to a use whereby it ceases to be continuously available for enjoyment by the other . . . . Each may subject it to whatever uses are proper to a wall, if the like freedom of the other is not curtailed thereby.

Varriale v. Brooklyn Edison Co., 252 N.Y. 222, 224, 169 N.E. 284 (1929).

In that case, the defendant had built a large electric sign weighing 2½ tons with iron beams resting on the top of the party wall and spanning its entire width. In affirming an injunction, the *Varriale* court wrote in 252 N.Y. at 225–26, 169 N.E. at 284–85:

> We think the sign complained of subjects the wall to a use for the benefit of one owner whereby it ceases to be continuously available for enjoyment by the other. There has been an exclusive appropriation, which, so long as it is suffered, will make equal use impossible. The beams laid across the capstone, and covering the whole wall, even the plaintiff's half, have no relation to any use that can be common to the two proprietors. On the contrary, the beams will have to be removed and the structure torn down if the plaintiff has occasion at any time to build the wall higher, as she is privileged to do. . . .
>
> . . . A privilege so valuable is not to be appropriated by a strong hand, but should be acquired, if at all, through treaty and consent. The defendant has no more right to place its beams upon a wall located on the plaintiff's land than it would have to project them without consent across the open space beyond.

See, also, *Fidelity Lodge, etc., of New Castle, Ind., v. Bond*, 147 Ind. 437, 45 N.E. 338 (1896).

Although Richards' plan calls for resting the roof and gutter system only on the half of the party walls facing her building, the plan would nonetheless subject the walls to a use which benefits only her and which would have no relation to any party

wall use that could be common to the other contiguous proprietors.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, C.J., participating on briefs.

SAMUEL K. POPPLETON AND WILLIAM S. POPPLETON III, APPELLANTS, V. VILLAGE REALTY CO., INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

535 N.W.2d 400

Filed July 7, 1995. No. S-93-892.

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 or parties against whom the judgment is granted and gives such party or parties the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper 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. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the moving party is entitled to judgment as a matter of law.
4. **Equity: Quiet Title.** A quiet title action sounds in equity.
5. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.
6. **Deeds.** Ordinarily, in the event of repugnancy and inconsistency between grant, habendum, and description clauses of a deed, the granting clause will prevail.
7. **Estates.** A condition subsequent attached to a fee simple estate which restrains alienation of the property conveyed is void whether such restraint is direct or indirect.

8. ____. Neb. Rev. Stat. § 76-2,104(5) (Reissue 1990) does not apply when conditions subsequent attached to a fee simple estate restrain alienability because such conditions subsequent are void ab initio.

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

David L. Buelt, of Ellick, Jones, Buelt, Blazek & Longo, for appellants.

Richard E. Croker and Martin P. Pelster, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for appellee Union Pacific Railroad Company.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, and CONNOLLY, JJ.

FAHRNBRUCH, J.

Samuel K. Poppleton and William S. Poppleton III appeal a summary judgment in which a district court refused to quiet title in them of real estate formerly used as a railroad right-of-way.

The district court found that the Poppletons and all persons claiming under them, or either of them, have no estate, right, title, lien, or interest in or to the real estate involved.

The court quieted title to the real estate involved herein in the defendant Lyman-Richey Corporation subject to the terms, provisions, and mineral reservation contained in a deed from Union Pacific Railroad Company to Village Realty Co., Inc., dated February 24, 1992, as corrected by an instrument dated May 12, both of which were filed with the Douglas County register of deeds.

We affirm the holdings of the district court for Douglas County.

ASSIGNMENTS OF ERROR

In substance, the Poppletons contend that the trial court erred in (1) failing to recognize that a specific statute protects the Poppletons' reversionary interest; (2) failing to recognize that the reversionary interest claimed by the Poppletons is protected by due process and contract clause requirements under the federal and state Constitutions; (3) finding that the appellees

were entitled to a summary judgment; (4) failing to receive certain evidence at the hearing on the appellees' motion for summary judgment; (5) failing to properly consider the contractual nature of the deed which reserved a reversionary interest to the Poppletons; (6) relying upon inapplicable and noncontrolling case law in reaching its decision in this case; and (7) not finding the appellees were estopped by their prior course of conduct from asserting their present legal positions.

STANDARD OF REVIEW

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party or parties against whom the judgment is granted and gives such party or parties the benefit of all reasonable inferences deducible from the evidence. See, *Molt v. Lindsay Mfg. Co.*, *ante* p. 81, 532 N.W.2d 11 (1995); *Keefe v. Glasford's Enter.*, *ante* p. 64, 532 N.W.2d 626 (1995).

Summary judgment is proper 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. *Molt, supra*; *Keefe, supra*.

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the moving party is entitled to judgment as a matter of law. *Keefe, supra*; *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995).

Since this is a quiet title action, it sounds in equity. See, *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992), *opinion modified* 242 Neb. 97, 490 N.W.2d 461 (*Union Pacific I and II*); *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992). On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995).

FACTS

Viewing the evidence in a light most favorable to the Poppletons and giving them the benefit of all reasonable inferences deducible from the evidence, the facts of this case are as follows:

The Poppletons are the great-grandsons and only heirs of Andrew J. Poppleton. In November 1885, Andrew Poppleton conveyed to the Omaha Belt Railway Company by warranty deed a strip of real estate located in Douglas County. In the deed, Poppleton's wife, Caroline, relinquished her right to dower in the property conveyed to Omaha Belt Railway. Following the habendum clause, the 1885 deed contains a clause that "[i]n case the land conveyed in this deed shall be abandoned for railway purposes by the grantee or its successors, the same shall revert to the grantor, his heirs or assigns . . . ."

The legal description of the land involved in this case as described by the trial court is:

> "Part of the abandoned Missouri Pacific Railroad right-of-way lying within the Southwest 1/4 of the Southwest 1/4 of Section 17, Township 15 North, Range 13 East of the 6th P.M., Douglas County, Nebraska and within the Northwest 1/4 of the Northwest 1/4 of Section 20, Township 15 North, Range 13 East of the 6th P.M., Douglas County, Nebraska all more particularly described as follows: Beginning at the point of intersection of the South line of California Street and the West line of said abandoned railroad; Thence South (assumed bearing) 1258.70 feet on the West line of said abandoned railroad; Thence South (assumed bearing) 1258.70 feet on the West line of said abandoned railroad [sic]; Thence S89°30'00"E 100.00 feet on a line 1298.70 feet South of and parallel with the South line of West Cuming Addition, as surveyed, platted and recorded in said Douglas County to the East line of said abandoned railroad; Thence North 1258.70 feet on the East line of said abandoned railroad to the South line of California Street; thence N89°30'00"W 100.00 feet on the South line of California Street to the point of beginning."

On January 19, 1910, Omaha Belt Railway, by quitclaim

deed, conveyed its interest in the land to the Missouri Pacific Railway Company. On April 1, 1984, Missouri Pacific quitclaimed its interest in the land to Union Pacific, one of the defendants in this lawsuit.

On February 24, 1992, Union Pacific, by quitclaim deed, conveyed the property to Village Realty, subject to certain terms, provisions, and mineral reservation contained in the conveyance. On July 22, Village Realty conveyed by warranty deed its interest in the property to Lyman-Richey.

All parties to this lawsuit agree that the property here in question has not been used for railroad purposes since the conveyance from Union Pacific to Village Realty in 1992. The Poppletons contend that such lack of use constitutes abandonment of Union Pacific's interest and that fee simple absolute title vested in the Poppletons as heirs of Andrew Poppleton pursuant to their "reverter" clause in the 1885 deed.

Union Pacific filed a motion for summary judgment contending that the issues were governed by *Union Pacific I and II*. In those two opinions, this court found that the deeds in question, which contained similar language to the deed in the present case, created a fee simple estate subject to a condition subsequent. This court held that the reversionary interests set forth in the deeds were void as an unlawful restraint on the alienation of the properties involved because they adversely affected the marketability of the properties.

In the case at bar, the trial court granted Union Pacific's motion for summary judgment. The court found that the facts in this case had been previously ruled upon in *Union Pacific I and II* and that as a matter of law, the Poppletons' claim to the property was void.

The Poppletons moved for a new trial which was overruled.

Originally, the Poppletons appealed the district court judgment to the Nebraska Court of Appeals. Pursuant to our authority to regulate the caseloads of the appellate courts, this case was removed from the Court of Appeals' docket to this court's docket.

ANALYSIS

We will address only the Poppletons' sixth and first

assignments of error which are dispositive of this appeal. The Poppletons argue that the trial court erred in relying upon *Union Pacific I and II* because they are distinguishable and do not control the present case. We disagree.

The critical parts of the 1885 deed in the present case are substantially the same as the deeds interpreted by this court in *Union Pacific I and II*. In *Union Pacific I and II*, the deeds provided in pertinent part:

> "Know all Men by these Presents, That [the Grantors] For the consideration of . . . Dollars in hand paid by the Omaha and Republican Valley Railway Company of Nebraska a corporation organized under the laws of the State of Nebraska, the receipt of which is hereby acknowledged, do hereby GRANT and CONVEY unto the said Railroad Company and to their [sic] successors and assigns forever, the following piece or parcel of land, situate in the County of . . . and State of Nebraska, to-wit: A strip of land through . . . two hundred (200) feet in width, being One Hundred feet on either side of the centre line of the Road of said Company as located or to be located by the Engineer of said Railroad Company.
>
> TO HAVE AND TO HOLD the same unto the said Railroad Company and to their [sic] successors and assigns forever. *PROVIDED, That in case said Railroad Company do [sic] not construct their [sic] road through said tract, or shall after construction permanently abandon the route through said tract of land, then the same shall revert to and become reinvested in the said grantors, their heirs or assigns.*"

(Emphasis supplied.) *Union Pacific I*, 241 Neb. at 680, 490 N.W.2d at 465.

We note that the granting clause as well as the habendum clause in the case at bar are similar to those in the deeds given to the railroad in *Union Pacific I and II*. Just as in those cases, the granting clause in the deed given by Andrew Poppleton to Omaha Belt Railway conveys the entire estate, with no exceptions, reservations, or specifications for the use of the land. As in *Union Pacific I and II*, the habendum clause in the 1885 deed conveys the entire estate. *Union Pacific I and II* stand

for the proposition that ordinarily, in the event of repugnancy and inconsistency between grant, habendum, and description clauses of a deed, the granting clause will prevail.

We held in *Union Pacific I and II* that because of the reverter clause, each of the deeds there created a fee simple estate subject to a condition subsequent. The parties agree in this case that the 1885 deed also created a fee simple subject to a condition subsequent. The Poppletons contend that *Union Pacific I and II* do not apply in this case because no reversion holder was a party to that case. In *Union Pacific I and II*, the State acquired the property which abuts the railroad line by conveyance. In the present case, the Poppletons are heirs of the original owner of the invalid reversionary interest. We do not find this difference significant since the reverter clause was void from its inception as an unlawful restraint against alienation of the property. See *Union Pacific I and II*.

We next turn to the Poppletons' first assignment of error that the trial court failed to recognize a specific statute that protects their claimed reversionary interest. Neb. Rev. Stat. § 76-107(2) (Reissue 1990) provides that possibilities of reverter and rights of reentry for breach of conditions subsequent are limited to a 30-year duration. Neb. Rev. Stat. § 76-2,104(5) (Reissue 1990) provides an exception to the 30-year limitation set forth in § 76-107(2) in any grant or easement to any railroad.

In *Union Pacific II*, we found this exception not to be applicable. In that opinion, we found that the "possibility of reverter set out in the deeds to the Railroad obviously affects the marketability of the title the Railroad received and completely limits alienability. Therefore, the possibility of reverter in the deeds is void, and the Railroad owns the property in fee simple absolute." *Id.* at 99, 490 N.W.2d at 469. We relied on *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 183 N.W.2d 485 (1971), in which we held that a restraint on alienation in the form of a condition subsequent, forfeiting or terminating the fee simple estate, or providing for a limitation over upon the breach of the condition, is void. We further held that a condition subsequent attached to a fee simple estate which restrains alienation of the property conveyed is void whether such restraint is direct or indirect.

Accordingly, § 76-2,104(5) does not apply when conditions subsequent attached to a fee simple estate restrain alienability because such conditions subsequent are void ab initio.

Viewing the evidence in a light most favorable to the Poppletons, we find that no genuine issue of material fact exists. The facts of this case have been previously ruled upon in *Union Pacific I and II*, and the appellees are entitled to a judgment as a matter of law. Therefore, the trial court was correct in granting summary judgment in favor of the appellees and quieting title to the property in Lyman-Richey and Union Pacific as their interests may appear.

Because our discussion of the Poppletons' sixth and first assignments of error are dispositive of the appeal, we need not address the Poppletons' remaining assignments of error. The judgment of the district court is affirmed.

AFFIRMED.

LANPHIER, J., not participating.

DENNIS C. SMITH, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

535 N.W.2d 694

Filed July 7, 1995. No. S-93-938.

1. **Drunk Driving: Police Officers and Sheriffs: Blood, Breath, and Urine Tests.** Any peace officer who has reasonable grounds to believe that an arrestee was operating a motor vehicle while under the influence of alcohol can require the arrestee to submit to a chemical test of his breath, blood, or urine.
2. **Motor Vehicles: Blood, Breath, and Urine Tests.** Any person who is requested to submit to a chemical test must be advised of the consequences of refusing to submit to the test and the consequences of submitting to the test and failing it.
3. **Administrative Law: Appeal and Error.** The judgment rendered or final order made by the district court in an Administrative Procedure Act appeal may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record.
4. **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 decision made by the court below.

5. **Implied Consent: Blood, Breath, and Urine Tests.** Any person who operates a motor vehicle in Nebraska is deemed to have given his or her consent to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol in his or her body.
6. **Motor Vehicles: Police Officers and Sheriffs: Blood, Breath, and Urine Tests.** The purpose of requiring arresting officers to advise drivers of the consequences of a refusal to take a breath test is to ensure that the driver knows and is in a position to make a rational and voluntary decision as to whether he or she will comply with law.
7. **Statutes: Legislature: Intent: Appeal and Error.** In ascertaining the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as determined from the language of the statute considered in its plain, ordinary, and popular sense.
8. **Statutes: Presumptions: Words and Phrases.** When the word "shall" appears in a statute, mandatory or ministerial action is presumed.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellant.

David Kimble for appellee.

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

LANPHIER, J.

On May 16, 1993, the appellee, Dennis C. Smith, was arrested by an officer of the Seward Police Department for driving while under the influence of alcohol. Prior to administering the chemical test which confirmed the concentration of alcohol in Smith's breath, the arresting officer read Smith an administrative license revocation advisement (the advisory form), which is required by state statute. The advisory form attempted to detail the consequences of refusing to submit to the breath test and the consequences of submitting to the test and failing it. Smith consented to the breath test, and the test confirmed an alcohol concentration in excess of the legal limit. Following an administrative hearing, Smith's motor vehicle operator's license was revoked for a period of 90 days by the director of the Department of Motor Vehicles. The sole issue in

this case is whether the arresting officer, by reading the advisory form, gave Smith adequate notice of the consequences of failing a breath test as required by Neb. Rev. Stat. § 60-6,197(10) (Reissue 1993). The advisory form failed to give Smith adequate notice of the consequences of failing a chemical test. We therefore affirm the order of the district court for Seward County which vacated the order of the director of the Department of Motor Vehicles revoking Smith's operator's license.

BACKGROUND

As of January 1, 1994, the Nebraska Rules of the Road, chapter 39 of the Nebraska Revised Statutes, were renumbered. They are now codified at Neb. Rev. Stat. § 60-601 et seq. (Reissue 1993 & Cum. Supp. 1994). For convenience, we use the new numbering scheme.

Pursuant to § 60-6,197, any peace officer who has reasonable grounds to believe that an arrestee was operating a motor vehicle while under the influence of alcohol can require the arrestee to submit to a chemical test of his breath, blood, or urine. Section 60-6,197(10) mandates that any person who is requested to submit to a chemical test be advised of the consequences of refusing to submit to the test and the consequences of submitting to the test and failing it.

Since Smith failed the breath test, his motor vehicle operator's license was impounded and he was issued a temporary license. He was informed that unless he filed a petition with the Department of Motor Vehicles (Department) for review, his license would be automatically revoked 30 days from the date of his arrest.

On May 25, 1993, Smith requested an administrative hearing before the Department to contest the revocation. On May 26, the Department notified Smith that his administrative hearing would be conducted on June 3. At the hearing, the primary issue was whether the advisory form adequately informed Smith of the consequences of taking and failing a chemical test. By an order dated June 9, the director of the Department revoked Smith's operating license and privilege to operate a motor vehicle for 90 days.

On June 14, 1993, in accordance with § 60-6,208 and the Administrative Procedure Act, Smith filed a petition in the district court for Seward County seeking review of the director's order. On August 23, the appeal was heard by the district court. By its order of September 23, the district court determined that Smith was given inadequate notice of all the consequences of submitting to a test of one's breath if the chemical test discloses the presence of alcohol in a concentration in excess of the legal limit. The district court vacated and set aside the Department's order revoking Smith's license. The Department appealed the district court's order to the Nebraska Court of Appeals. By order of this court, the appeal was removed to our docket.

ASSIGNMENTS OF ERROR

The Department asserts that the district court erred in finding that the arresting officer failed to give Smith adequate notice of the consequences of failing or refusing a chemical test of his blood, breath, or urine and erred by reversing the Department's order of revocation and ordering the reinstatement of Smith's license.

STANDARD OF REVIEW

The judgment rendered or final order made by the district court in an Administrative Procedure Act appeal may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record. *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995); *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994); *Abbott v. Department of Motor Vehicles*, 246 Neb. 685, 522 N.W.2d 421 (1994).

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 decision made by the court below. *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

ANALYSIS

Any person who operates a motor vehicle in Nebraska is deemed to have given his or her consent to submit to a chemical

test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol in his or her body. § 60-6,197(1). A person who refuses to submit to the test is subject to an automatic administrative license revocation. § 60-6,197.

Prior to 1993, Nebraska law provided for administrative license revocation only when a person refused to submit to a chemical test and when such refusal was not shown to be reasonable. Neb. Rev. Stat. § 39-669.16 (Reissue 1988). After January 1, 1993, a person who agreed to submit to the chemical test and failed it also became subject to automatic administrative license revocation. § 60-6,205(3). Today, in both circumstances, the arresting officer immediately impounds and revokes the operator's license and issues the driver a temporary license. § 60-6,205(2), (3), and (4). The temporary license expires and the revocation is automatically effective 30 days after the arrest unless successfully appealed. § 60-6,205(2) and (3).

Advisory Required by Statute

Prior to requiring an arrestee to submit to a chemical test or refuse to submit, the arresting officer shall advise the arrestee of the consequences of both choices. § 60-6,197(10). Formerly, the statute only required that the arresting officer advise the arrestee of the consequences of refusing to submit to a chemical test. Neb. Rev. Stat. § 39-669.08(5) (Reissue 1988). That statute was amended, and effective January 1, 1993, the arrestee "shall be advised of . . . the consequences if he or she submits to such test and the test discloses the presence of a concentration of alcohol in violation of subsection (1) of section [60-6,196]." 1992 Neb. Laws, L.B. 291, § 5.

In interpreting the former statute, we stated that the purpose of requiring arresting officers to advise drivers of the consequences of a refusal to take a breath test is to ensure that the driver knows and is in a position to make a rational and voluntary decision as to whether he or she will comply with law. *State v. Deets*, 234 Neb. 307, 450 N.W.2d 696 (1990). If it can be shown that the licensee was properly advised, the only understanding required by the licensee is an understanding that

he or she has been asked to take a test. See, *id.*; *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988); *Pollard v. Jensen*, 222 Neb. 521, 384 N.W.2d 640 (1986); *Martinez v. Peterson*, 212 Neb. 168, 322 N.W.2d 386 (1982).

As amended, the statute now requires a warning about the consequences of submission to the test. The Legislature also amended another section of the administrative license revocation provisions. Section 60-6,205(6)(c) allows a driver to successfully contest the revocation of his or her license by establishing that the arresting officer failed to advise of the consequences of failing the chemical test.

In ascertaining the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as determined from the language of the statute considered in its plain, ordinary, and popular sense. *Anderson v. Nashua Corp., supra*; *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993). It is our duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Id.*

When the word "shall" appears in a statute, mandatory or ministerial action is presumed. Neb. Rev. Stat. § 49-802 (Reissue 1993). Section 60-6,197(10) states that a driver *shall* be advised of the consequences of submitting to the test and failing it. The word "consequence" is not defined by § 60-6,197(10). A consequence is the result following in natural sequence from an event. *Board of Trustees, etc., v. Miller*, 186 Okla. 586, 99 P.2d 146 (1940). "Cause" and "consequence" are correlative terms, and one implies the other. *Monroe v. Hartford Street Ry. Co.*, 76 Conn. 201, 56 A. 498 (1903).

The sensible reading of § 60-6,197(10) indicates that the Legislature intended drivers to be advised of the natural and direct legal consequences flowing from submitting to a chemical test and failing it.

Adequacy of Advisory Form

The portion of the one-page advisory form which informed Smith of the consequences of failing a chemical test reads as follows:

> I must further advise you that if you refuse to take the

> test or tests as I direct, or if you submit to the test or tests, and the results disclose the presence of drugs or of alcohol in an illegal concentration, I am required to immediately impound your license, and your license will be automatically revoked in 30 days unless you file a petition within 10 days of your arrest and request a hearing.
>
> The penalty for refusal is the revocation of your license or driving privilege for one year.
>
> If you submit to the test or tests, and the results disclose the presence of drugs or alcohol in an illegal concentration, and your license has not been revoked within the last eight years, the penalty is the revocation of your license or driving privilege for 90 days. If your license has been revoked within the last eight years, the penalty is revocation of your license or driving privilege for one year.

The advisory form partially complied with § 60-6,197's mandate requiring that drivers be advised of the consequences of failing a chemical test. Smith was informed of some, but not all, of the administrative consequences of taking and failing the test. For example, Smith was not informed that in order to reinstate his license after the expiration of the revocation period, he would have to pay a reinstatement fee. See § 60-6,206(3).

Smith was not informed that the results of a valid chemical test could be competent evidence in any prosecution involving a driving under the influence offense. See § 60-6,201. A valid breath test given within a reasonable time after the accused was stopped is probative of a driving under the influence offense. *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990).

A separate part of the advisory form did inform Smith of the criminal penalties for first, second, third, and fourth or subsequent convictions of driving while intoxicated and refusal to submit to the test. However, as the Department concedes in its reply brief, the advisory form is not perfectly worded. The wording of the form is confusing as to whether those criminal penalties attach to the crime of driving while intoxicated or the crime of refusal to submit to the test or both.

In addition, there are more serious penalties including felonies which could result from a test which disclosed an

illegal concentration of drug or alcohol. By limiting the listed penalties in the advisory form to convictions of driving while intoxicated, the form could be considered not only inadequate but misleading.

As we stated in *State v. Deets*, 234 Neb. 307, 450 N.W.2d 696 (1990), the purpose of requiring arresting officers to advise drivers of the consequences of a refusal to take a breath test is to ensure that the driver is in a position to make a rational and voluntary decision. If it can be shown that the licensee was properly advised, the only understanding required by the licensee is an understanding that he or she has been asked to take a test in order to revoke the driver's license due to his or her refusal to submit to the test. See, *id.*; *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988); *Pollard v. Jensen*, 222 Neb. 521, 384 N.W.2d 640 (1986); *Martinez v. Peterson*, 212 Neb. 168, 322 N.W.2d 386 (1982).

When *Deets* and the other foregoing cited cases were decided, an operator's license could only be administratively revoked upon refusal to submit to the chemical test. An arresting officer's observations or the defendant's poor performance on field sobriety tests is sufficient evidence to sustain a conviction of driving under the influence. Thus, refusal to submit to the chemical test resulted in the consequence of administrative license revocation *in addition to* any other penalty. See *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). Informing drivers of this additional consequence met the previous statute's directive.

Today, whether a driver refuses to submit to the test or takes the test and fails to pass it, the driver faces administrative license revocation. The Legislature has mandated that drivers shall be advised of the consequences in both situations. For example, this now includes the evidentiary consequences and the possibility of felony convictions.

The State argues that the disclosure statute be read in a manner which Justice Holmes referred to in a different setting as affording it "a little play in its joints." *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501, 51 S. Ct. 228, 75 L. Ed. 482 (1931).

Although the Department concedes that the advisory form is

not perfectly worded, the Department argues that the information conveyed is not in any way incorrect and is not false. In essence, the Department asserts that the disclosure is "close enough for government work." We disagree. The advisory form is not "close enough" and does not comply with the legislative requirement that drivers shall be advised of the legal consequences of failing a chemical test.

The dissent, relying on *State v. McGuire*, 493 So. 2d 559 (La. 1986), argues that § 60-6,197(10) does not require a law enforcement officer to embark upon a discussion of the legal consequences of submitting to and failing a chemical test. In *State v. McGuire*, the Supreme Court of Louisiana interpreted Louisiana's equivalent of Nebraska's informed consent statute. However, Louisiana's legislative mandate and the advisory form before the court in *State v. McGuire* are far different from § 60-6,197(10) and the advisory form before us today.

The dissent asserts that the advisory form administered by the officer in *State v. McGuire* was adequate. However, the Louisiana form was much more comprehensive than Nebraska's form. The Louisiana form advised the driver that the test results would be used against her in court and advised her of her constitutional rights. The Supreme Court of Louisiana noted that the advisory form conformed to a legislative directive which specifically delineated the legal consequences of which a driver must be informed. The statute before us provides no such delineation.

Smith was not properly advised of material and critical consequences of failing a breath test as required by § 60-6,197(10). Smith is not claiming that he failed to understand the advisory form. Smith is arguing that he never had the opportunity to understand all of the statutory consequences of failing the breath test because he was never informed of the consequences. It is impossible to understand information that is never conveyed. We agree that the advisory form in this case fails to comply with the statutory directive that a driver must be informed of the consequences of failing a chemical test before being required to submit to the test.

The Department argues that even if Smith was not properly advised of the consequences of failing the chemical test, the

revocation of his driver's license was proper because he was not prejudiced. The Legislature made the advisement of consequences mandatory by the use of the word "shall" in § 60-6,197(10). Section 60-6,205(6)(c) does not require a showing of prejudice. Smith is not required to show prejudice in order to prove that the arresting officer failed to comply with § 60-6,197(10)'s mandate.

CONCLUSION

Smith was not fully advised of the consequences of submitting to the breath test and failing it as required by § 60-6,197(10). Therefore, the Department acted improperly in ordering that Smith's license be revoked. For the foregoing reasons, we affirm the order of the district court which reinstated Smith's operator's license.

AFFIRMED.

CONNOLLY, J., dissenting.

In my opinion, the advisory form which the law enforcement officer read to Smith was adequate under Neb. Rev. Stat. § 60-6,197(10) (Reissue 1993) to advise Smith of the consequences of taking and failing a chemical test.

The majority opinion holds that the advisory form only partially complied with the requirements of § 60-6,197(10). As examples of what was missing from the form, the majority opinion notes that Smith was not informed that (1) in order to reinstate his license after the expiration of the revocation period, Smith would have to pay a reinstatement fee; (2) the results of the chemical test *could* be competent evidence in any prosecution for driving under the influence; (3) failing the breath test would be probative of a driving under the influence offense; and (4) there were more serious penalties, including felonies, which could result from a test which disclosed an illegal concentration of drugs or alcohol.

The majority opinion ignores the Legislature's intent behind § 60-6,197(10). In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail

over that of a particular part considered separately. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). An appellate court must look at the statutory objective to be accomplished, problem to be remedied, or purpose to be served, and then place on the statute a reasonable construction which best achieves its purpose, rather than a construction which will defeat the purpose. *Id.*

The Legislature enacted 1992 Neb. Laws, L.B. 291, to provide

> a swift and sure method for administratively revoking a person's driver's license if he or she either refuses to submit to a test of his or her alcohol concentration under the state implied consent law or if such test of alcohol concentration indicates that he or she is under the influence of alcohol or drugs in violation of [§ 60-6,196].

Statement of Purpose, L.B. 291, Committee on Transportation, 92d Leg., 1st Sess. (Feb. 11, 1991). In passing L.B. 291, the Legislature intended to "provide a deterrent to persons who might be tempted to drink and drive." Statement of Purpose, *supra*.

The Louisiana Supreme Court decision in *State v. McGuire*, 493 So. 2d 559 (La. 1986) is directly on point. The statute in effect at the time of the *McGuire* decision required a law enforcement officer who requested a driver to submit to a chemical test to " 'first inform the person of the consequences of a refusal and the consequences if the test is conducted and the results indicate a blood alcohol concentration of .10 percent or above . . . .' " *Id.* at 561. The warning administered by the officer in *McGuire* contained only the following language with regard to the consequences of submitting to and failing the chemical test: " '[T]est results of .10 percent or above will be used against you in court.' . . . 'If you submit to the test, and the test results show a blood alcohol level of .10 percent or above, your driver's license shall be suspended for a minimum period of three (3) months.' " *Id.* at 562.

The court in *McGuire* held that the warning administered by the officer constituted satisfactory compliance with the statute requiring the officer to inform the driver of the consequences of failing the test. The *McGuire* court specifically held that the

statute did not require a law enforcement officer to embark upon a discussion of the legal consequences of submitting to and failing the chemical test.

I would reach the same decision in the case at bar that the Louisiana Supreme Court reached in *McGuire*. Of the four deficiencies cited by the majority opinion in the advisory form, three dealt with the use of the chemical test results in subsequent criminal prosecutions. Those legal consequences existed prior to the passage of L.B. 291, and the Legislature never saw fit to require a law enforcement officer to inform the driver of those consequences. See *State v. Deets*, 234 Neb. 307, 450 N.W.2d 696 (1990). The passage of L.B. 291 enabled law enforcement officers to immediately revoke and impound a driver's license for submitting to and failing a chemical test. The purpose of L.B. 291 was to combat the drunk driving problem with a swift and efficient administrative procedure, not to require police officers to provide drivers with a litany of their rights and the consequences of their actions. The only information the Legislature intended for law enforcement officers to have to impart to drivers pursuant to § 60-6,197(10) was with regard to the new administrative consequence—if the driver submitted to and failed a chemical test, his or her license would be revoked.

The majority also cited the lack of information regarding a reinstatement fee as one of the consequences about which Smith should have been informed. Pursuant to *State v. Deets, supra*, the purpose of the statute requiring the advising of consequences is to provide the driver with relevant information ensuring that "the driver knows and is in a position to make a rational and voluntary decision as to whether he will comply with the law." 234 Neb. at 308, 450 N.W.2d at 697. If a law enforcement officer is required to inform the driver of the potential monetary consequences of failing a chemical test, such as the payment of a reinstatement fee, why not require the arresting officer to inform drivers that they could lose their jobs, that their insurance premiums might be increased, and that they might incur attorney fees if charges are filed?

Clearly, the only relevant consequence of failing a chemical test contemplated by § 60-6,197(10) is the administrative

revocation of the license. Smith was sufficiently informed of that consequence.

WRIGHT, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY A. CISNEROS, APPELLANT.

535 N.W.2d 703

Filed July 14, 1995. No. S-94-255.

1. **Appeal and Error.** 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.
2. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence.
3. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
4. **Juror Misconduct: New Trial.** If a juror's misconduct prejudices the defendant, the defendant is entitled to a new trial, but is not necessarily entitled to a dismissal of the charges.
5. **Criminal Law: Witnesses: Testimony.** A person commits the offense of witness tampering if, believing that an official proceeding or investigation of a criminal matter is pending or about to be instituted, he attempts to induce or otherwise cause a witness, informant, or juror to testify or inform falsely, or withhold any testimony, information, document, or thing.
6. ____: ____: ____. A person who has knowledge of a relevant fact or occurrence sufficient to testify in respect to it is a witness for purposes of the witness tampering statute, Neb. Rev. Stat. § 28-919 (Reissue 1989).
7. **Jurors: Trial.** Trial to the jury normally follows immediately upon the impaneling and swearing of the jury. Potential jurors are randomly selected from a jury wheel, qualified, and assigned to a jury panel, and jurors for specific trials are selected from the jury panel as required.
8. **Records: Juvenile Courts.** The medical, psychological, psychiatric, and social welfare reports and the records of juvenile probation officers as they relate to

individual proceedings in the juvenile court are not open to inspection, without order of the court.

9. **Pretrial Procedure: Evidence: Impeachment: Witnesses.** A trial court has discretion in the matter of discovery where material is sought for impeachment purposes. However, a witness may assert that the information sought is privileged or protected and resist discovery.

Petition for further review from the Nebraska Court of Appeals, IRWIN and MILLER-LERMAN, Judges, and NORTON, District Judge, Retired, on appeal thereto from the District Court for Dawes County, PAUL D. EMPSON, Judge. Judgment of Court of Appeals affirmed.

Jerry Matthews for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

LANPHIER, J.

After a jury trial in the district court for Dawes County, Anthony A. Cisneros was convicted of tampering with a witness. The jury found Cisneros not guilty of pandering, but did not reach a verdict on charges of sexual assault. Cisneros appealed to the Court of Appeals and claimed that the trial court should have dismissed the case after it had declared a mistrial, that there was insufficient evidence to convict, and that his sentence was excessive. The Court of Appeals affirmed his conviction and sentence in all respects. We granted Cisneros' petition for further review. Finding no merit in any of his assignments of error, we affirm the holdings of the lower courts. However, in addition, we address two concerns which arise from a review of the record. First, the juror misconduct which resulted in a mistrial is partially attributable to the district court's practice of impaneling multiple juries at the beginning of its term for all trials scheduled that term. Any cost savings allegedly realized by this practice (which practice has been criticized by this court in the past) were surely offset by the potential for mistrial when the extended time period between jury selection and trial created an opportunity for a juror to discuss the case with potential witnesses. Second, Cisneros was

permitted to use confidential information contained in juvenile court records to disparage a witness in a manner not contemplated by evidentiary rules.

BACKGROUND

On March 1, 1993, the alleged victim went to the Second Hand Rose, a pawnshop, in order to pawn a ring. She alleged that the proprietor, Cisneros, fondled her breasts, buttocks, and inner thighs against her will. She further alleged that Cisneros offered her money in exchange for sexual relations and told her that she could get money if she would have sexual relations with his friend. The alleged victim said she escaped from the pawnshop and ran out to her mother who was waiting in the car.

The alleged victim's mother testified that her daughter, the alleged victim, was upset and crying when she left the pawnshop. The mother testified that her daughter told her that Cisneros had touched her and offered to pay her for sex. The mother testified that she dropped her daughter off at the daughter's apartment and then went to the police station to report the incident.

After the alleged victim's mother dropped the alleged victim off at her apartment, the alleged victim recounted the alleged incident to her boyfriend, Russell Cavaness. Cavaness and the alleged victim then went to the pawnshop to confront Cisneros. The alleged victim waited outside. According to Cavaness, Cisneros admitted touching the alleged victim and offered Cavaness $20 to not report the incident to the police. Cavaness went outside and talked it over with the alleged victim, and they decided to take the money.

Meanwhile, the alleged victim's mother reported the incident to the police. Statements were taken from the alleged victim, her mother, and Cavaness regarding the alleged sexual assault and the $20 payment. In an amended information, Cisneros was charged with three counts of third degree sexual assault, Neb. Rev. Stat. § 28-320(1) (Reissue 1989); two counts of attempted pandering, Neb. Rev. Stat. § 28-802 (Reissue 1989); and two counts of tampering with a witness, Neb. Rev. Stat. § 28-919 (Reissue 1989).

Cisneros' case was set for trial on August 23, 1993. On

August 2, the district court impaneled juries for all of the trials scheduled during its August term, including Cisneros' trial.

Between jury selection and the trial, one of the jurors had a conversation with a potential witness in the case. The witness expressed his opinion to the juror that everything had been blown out of proportion and that the matter should never have gone to court.

That same juror was acquainted with the alleged victim's mother. On August 5 or 6, the alleged victim's mother and the juror discussed the case over the telephone. On August 7, the alleged victim's mother and the juror encountered each other at a church meeting and further discussed the case and the juror's possible biases. The alleged victim's mother thought the juror was prejudiced against unmarried, pregnant girls. Since the alleged victim was unmarried and pregnant, her mother thought the juror should be removed.

On August 9, the alleged victim's mother called the Dawes County Attorney's office and left a message regarding her objections to the juror. The prosecutor was in trial, so the alleged victim's mother stopped by his office the next day and left a written statement. Receiving no response, she contacted Officer John A. Herron of the Chadron Police Department on August 12. Herron contacted the juror and confirmed that the juror had conversed with the alleged victim's mother and the witness.

Cisneros' attorney learned of the juror misconduct on August 13, and on August 17 submitted a motion for a mistrial. The court granted the mistrial on the ground of juror misconduct and specifically stated that the mistrial was not granted due to any misconduct on the part of Herron or anyone else. That same day, the court rescheduled the trial for December 8.

On December 6, the district court conducted jury selection for the trials scheduled during its December term. Following several continuances, Cisneros' trial began on January 3, 1994. At the close of the State's case, the district court dismissed one count of sexual assault, one count of attempted pandering, and one count of tampering with a witness. The jury was unable to reach a verdict on the two counts of third degree sexual assault. The jury returned a verdict of not guilty on the remaining

attempted pandering charge and guilty of tampering with a witness. The district court sentenced Cisneros to 70 days in the county jail, with work release, for his conviction of tampering with a witness, a Class IV felony.

Cisneros appealed to the Court of Appeals. Cisneros asserted that the district court erred by (1) not granting his motion for mistrial with prejudice, (2) finding him guilty as a matter of law on the charge of witness tampering, and (3) imposing an excessive sentence. The Court of Appeals affirmed Cisneros' conviction and sentence. *State v. Cisneros*, 95 NCA No. 6, case No. A-94-255 (not designated for permanent publication). We granted Cisneros' petition for further review.

ASSIGNMENTS OF ERROR

Cisneros asserts that the Court of Appeals improperly (1) refused to determine whether the mistrial caused by prosecutorial misconduct barred further trial in this matter, (2) determined that there was sufficient evidence to convict him of tampering with a witness, (3) determined that the sentence was not an abuse of discretion by the district court.

STANDARD OF REVIEW

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. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995).

A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *State v. Brunzo, ante* p. 176, 532 N.W.2d 296 (1995); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Cook*, 244 Neb. 751, 509 N.W.2d 200 (1993).

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995); *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994).

ANALYSIS

MISTRIAL

In Cisneros' petition for further review, he argues that the Court of Appeals erred in refusing to determine the issue of whether the mistrial caused by prosecutorial misconduct barred his subsequent trial. The Court of Appeals did not address Cisneros' assignment of error regarding prosecutorial misconduct because he failed to raise the issue in the trial court. We agree.

First, Cisneros did not complain of prosecutorial misconduct when the juror's misconduct came to light. When an issue is raised for the first time on appeal, it is generally disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *Jirkovsky, supra.*

Second, Cisneros did not request a mistrial "with prejudice" either in his written motion or at the hearing regarding the juror's misconduct. The trial judge immediately scheduled a new trial when he granted the mistrial. The case proceeded to trial some 5 months later without any argument from Cisneros that the mistrial due to juror misconduct barred a subsequent retrial. If a juror's misconduct prejudices the defendant, the defendant is entitled to a new trial, but is not necessarily entitled to a dismissal of the charges. *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992) (finding prejudice arising from juror misconduct, reversing conviction, and remanding for a new trial).

During oral arguments before this court, some discussion was entertained regarding double jeopardy. Certainly, if the constitutional provision against double jeopardy was being violated, we could consider Cisneros' argument regarding the prosecutorial misconduct under the doctrine of plain error. However, assuming arguendo that some prosecutorial misconduct did occur, the misconduct alleged in this case would not bar a new trial. See, *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986); *State v. Munn*, 212 Neb. 265, 322 N.W.2d 429 (1982).

In *Bostwick*, we stated that prosecutorial misconduct, even if viewed as harassment or overreaching, does not bar retrial after

a defendant's motion for a mistrial is granted. A defendant's motion for a mistrial is a deliberate election on his part to forego his right to have his guilt or innocence determined before the first trier of fact. Absent intentional conduct on the part of the prosecutor to goad the defendant into moving for a mistrial, a defendant cannot raise the bar of double jeopardy to a second trial after succeeding in bringing the first trial to a close on his own motion. *State v. Bostwick, supra.*

Cisneros failed to complain of any alleged prosecutorial misconduct at trial and failed to ask for a mistrial with prejudice. We affirm the Court of Appeals' refusal to address his assignment of error.

WITNESS TAMPERING

Cisneros was convicted of witness tampering, in violation of § 28-919, for offering Cavaness $20 in exchange for his promise not to report the incident to the police. A person commits the offense of witness tampering if, "believing that an official proceeding or investigation of a criminal matter is pending or about to be instituted, he attempts to induce or otherwise cause a witness, informant, or juror to: (a) Testify or inform falsely; or (b) Withhold any testimony, information, document, or thing[.]" § 28-919(1).

Cisneros argued to the Court of Appeals, and to this court in his petition for further review, that Cavaness was not a witness for the purpose of § 28-919 and that as a matter of law, the conviction cannot stand. Cisneros asserts that Cavaness had no firsthand knowledge of the alleged sexual assault and pandering charges and therefore would not have been able to testify to anything.

Witness tampering statutes cover the broad spectrum of all persons who pose a threat to an accused or a person who is about to be accused. *State v. McCoy*, 227 Neb 494, 418 N.W.2d 250 (1988). In *McCoy*, we held that a person who has knowledge of a relevant fact or occurrence sufficient to testify in respect to it is a witness for the purpose of § 28-919.

Cavaness' testimony was relevant evidence regarding the allegations. Cavaness testified that the alleged victim was shaking and crying when she returned from the pawnshop, and

such evidence would be corroborative and relevant to her state of mind. Cavaness testified Cisneros offered him money for not going to the police. That testimony is directly relevant because it indicates that Cisneros had identified Cavaness as a potential witness and sought to influence his behavior. See *State v. McCoy, supra*. Clearly, Cavaness was a witness for the purpose of § 28-919.

Cisneros asserts that there was insufficient evidence of witness tampering to sustain a conviction of witness tampering. The jury heard the testimony of Cavaness and the alleged victim regarding the $20 offer. Cisneros testified that he gave Cavaness the $20 "out of the goodness of his heart" after Cavaness complained that the amount Cisneros paid the alleged victim for the pawned ring was insufficient. In finding Cisneros guilty of witness tampering, the jury clearly determined that his testimony was not credible. Construing the evidence most favorably to the State, we find it is sufficient to support his conviction. See, *State v. Brunzo, ante* p. 176, 532 N.W.2d 296 (1995); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Cook*, 244 Neb. 751, 509 N.W.2d 200 (1993).

EXCESSIVE SENTENCE

Cisneros was convicted of a Class IV felony that carries a sentence of 0 to 5 years' incarceration. Cisneros was sentenced to 70 days in county jail, with work release. Cisneros asserts that the Court of Appeals improperly determined that the sentence was not an abuse of discretion by the district court.

A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995); *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994). We find no abuse of discretion and affirm the sentence.

JURY SELECTION

The district court for Dawes County conducts jury selection on one day for all of the trials scheduled during a monthly term. Neb. Rev. Stat. § 25-1632 (Reissue 1989). We have previously commented on Dawes County's practice of impaneling multiple juries in order to economize on jury expenses. *State v. Myers*,

190 Neb. 466, 209 N.W.2d 345 (1973). In *Myers*, we were forced to vacate two convictions because of problems with the Dawes County experimental method of impaneling multiple juries. We must again question the district court's wisdom of impaneling multiple juries in such manner.

Normally, trial to the jury follows immediately upon the impaneling and swearing of the jury. *State v. Myers, supra.* Potential jurors are randomly selected from a jury wheel, qualified, and assigned to a jury panel. Neb. Rev. Stat. § 25-1601 et seq. (Reissue 1989); Neb. Rev. Stat. § 29-2004 (Reissue 1989). Jurors for specific trials are selected from the jury panel as required. § 25-1629.04.

In *Myers*, we noted that Dawes County's practice of impaneling all of the juries required for trial during the month on one day at the beginning of the month creates a time interval between jury impanelment and trial. We commented that the recessed time interval created an opportunity for juror misconduct.

That is exactly what happened in this case. Between the time the jury was selected on August 2 and when the mistrial was declared on August 17, a juror had multiple conversations with witnesses. The misconduct we feared in *Myers* was realized in this case. It was only brought to the attention of the judicial system due to the persistence of the alleged victim's mother. It raises the question of whether a similar situation has gone undetected in the past. This method of selecting juries well in advance of trial is unacceptable. It maximizes the opportunity for jury misconduct. We now, therefore, by virtue of our constitutional power and duty, pursuant to Neb. Const. art. V, § 1, to exercise "general administrative authority over all courts in this state," direct all trial courts of this State to henceforth discontinue such system of advance jury selection.

Use of Confidential Juvenile Records

Although uncomplained of at trial or on appeal, we take plain notice of the use of confidential juvenile records to impeach the testimony of the alleged victim. Medical records gathered during juvenile court proceedings intended to protect the alleged victim as a juvenile in need were extensively used in the trial to

attack her character. Confidential juvenile records are generally inaccessible.

In 1990, while the alleged victim was still a minor, she was held to be a juvenile in need of assistance as described in Neb. Rev. Stat. § 43-247(3) (Reissue 1993). Under the direction of the Department of Social Services, she received medical care and counseling. In the course of her treatment, she and her mother shared confidential information with medical professionals. Records of her medical treatment were necessarily filed in the county court sitting as a juvenile court.

Neb. Rev. Stat. § 43-2,108(2) (Reissue 1993) states that the "medical, psychological, psychiatric, and social welfare reports and the records of juvenile probation officers as they relate to individual proceedings in the juvenile court shall not be open to inspection, without order of the court." Further, in all cases arising under § 43-247(3)(a), as was the alleged victim's proceeding before the juvenile court, the court shall grant access to the confidential record information only in three limited situations. § 43-2,108(3). None of those situations apply here.

In a motion for discovery dated June 30, 1993, Cisneros requested "[t]he results and reports of physical or mental examinations, specifically including any psychological tests, examinations, or reports of [the alleged victim] which were made within the last three years including any which may be in the County Court records . . . ." Cisneros asserted that the requested discovery was essential to his defense and was not requested primarily for the purpose of harassment. Cisneros did not state why the discovery was essential to his defense.

According to its journal entry of July 6, the district court ordered that defense counsel have access to the alleged victim's juvenile court records if the county attorney had access to the files. The county attorney does have access to juvenile court records in some circumstances not present here. See, e.g., § 43-2,108(3).

A trial court has discretion in the matter of discovery where material is sought for impeachment purposes. *State v. Trammell*, 231 Neb. 137, 435 N.W.2d 197 (1989). However, a witness may assert that the information sought is privileged or protected and resist discovery. *Trammell, supra*; *State v. Beach*, 215 Neb. 213,

337 N.W.2d 772 (1983).

Section 43-2,108(2) and (3) provided ample support for the county attorney to resist Cisneros' motion for discovery of the alleged victim's juvenile records. Cisneros' motion lacked specific facts to create any reasonable grounds to believe that the failure to produce the information would impair his right to confront the alleged victim.

In *Beach*, the defendant sought the juvenile records of the alleged victim in order to introduce her prior juvenile adjudications for impeachment purposes. The trial court precluded the use of any prior juvenile adjudications. The defendant claimed he was denied his right to effectively confront and cross-examine witnesses. We noted that *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), provides that a criminal defendant must be allowed to introduce evidence that a witness for the state who implicated and identified the defendant had a prior juvenile record in order to show that the witness' testimony was somehow coerced and motivated by the state's threat to revoke his probation. However, in *Beach*, we held that *Davis* did not permit the defense to use the victim's juvenile records in order to cast her as a dishonest juvenile offender in front of the jury.

On July 23, 1993, the pretrial conference was had. At that time, the county attorney had not produced the requested records. Counsel and the court discussed whether the alleged victim's medical and juvenile court records were subject to discovery pursuant to *State v. Trammell, supra*. No mention was made of the statutory confidentiality of juvenile court records.

Trammell sets out a procedure to be followed when a defendant seeks privileged information about the victim for impeachment purposes. If the victim refuses to waive the privilege, the trial court can order a hearing. At the hearing, the defendant must establish that his right of confrontation is likely to be impaired if he does not have access to the information. If the defendant meets this burden, and with the victim's consent, the court can conduct an in-camera inspection of the confidential information. If necessary, the court can then turn over to the defendant any relevant material for the purpose of cross-examination. If the victim refuses to consent to the

in-camera inspection and/or subsequent release of relevant information, then the court may be obliged to strike the victim's direct testimony.

The county attorney did not assert that the alleged victim's juvenile records were not open to inspection pursuant to § 43-2,108(2) and (3) and *State v. Beach, supra*. The county attorney did not invoke the protections afforded by *Trammell*. At the suggestion of the trial judge, the county attorney without objection contacted the alleged victim and obtained her permission to turn the sealed records over to the defense.

The fact the records were made available does not necessarily mean they are admissible. However, using information from the alleged victim's juvenile court records, the defense cross-examined her and her mother using information obtained from the juvenile records. The resulting record leads one to question who was on trial, the alleged victim or Cisneros.

Few if any objections were made to this line of questioning. For example, during the alleged victim's testimony, the county attorney objected when the defense attempted to question her regarding a hospitalization some 2 years prior to the alleged assault. The court sustained the county attorney's relevance objection. However, when the defense called the therapist who treated the alleged victim during that hospitalization, no objection was made.

The use of such records in this trial tarnished the proceedings. The trial record reveals the judge's frustration. We likewise do not wish to allow the abuses apparent in the record to pass without comment.

CONCLUSION

The issues of whether or not Cisneros' mistrial should have been granted "with prejudice" and whether there was any alleged prosecutorial misconduct were not presented to the trial court; therefore, they have no merit on appeal. Sufficient evidence exists to sustain Cisneros' conviction of witness tampering. The accompanying sentence was not excessive. We therefore affirm Cisneros' conviction and sentence.

AFFIRMED.

CONNOLLY, J., concurring in the result.

I concur in the result reached by the majority. However, I write separately to express my disagreement with what I consider to be an advisory opinion regarding the discovery of the alleged victim's confidential medical records. The issue of the confidentiality of the alleged victim's records was not raised in the trial court and was not briefed or argued in front of the Court of Appeals or this court. The majority took "plain notice" of the juvenile records issue. I disagree with the majority's consideration of a "plain notice" doctrine. I am not familiar with the "plain notice" doctrine, but I do know that the confidentiality issue is neither related to any assignment of error nor germane to this decision. Since I am uncertain of the full import of this issue, I limit my concurrence.

CAPORALE and WRIGHT, JJ., join in this concurrence.

STATE OF NEBRASKA EX REL. FIRSTIER BANK, N.A., OMAHA, RELATOR, V. HONORABLE J. PATRICK MULLEN, JUDGE OF THE DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA, RESPONDENT.

534 N.W.2d 575

Filed July 14, 1995. No. S-95-130.

1. **Mandamus.** To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear.
2. ____. Mandamus lies only to enforce performance of a mandatory ministerial act or duty and is not available to control judicial discretion.
3. ____. A seemingly discretionary decision to act may, in fact, be purely ministerial.
4. ____. The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
5. **Mandamus: Proof.** In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.

6. **Attorney and Client: Conflict of Interest.** An attorney must avoid the present representation of a cause against a client of a law firm with which he or she was formerly associated, and which cause involves a subject matter which is the same as or substantially related to that handled by the former firm while the present attorney was associated with that firm.
7. **Attorney and Client: Conflict of Interest: Presumptions.** Confidences and secrets possessed by an attorney are presumptively possessed by other members of the attorney's firm.
8. **Attorney and Client: Conflict of Interest.** An attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client's interest in the same subject matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof.
9. **Attorney Fees.** An attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility and inconsistent with the character of the profession.
10. **Attorneys at Law: Conflict of Interest.** For purposes of ensuring a fundamentally fair trial, the question of whether a disqualified law firm is participating with successor counsel is highly relevant to a pending action.
11. **Attorney Fees.** Absent special circumstances, fee arrangements are not confidential professional communications protected by the attorney-client privilege.
12. **Attorney Fees: Courts.** Courts have authority to monitor and determine the reasonableness of contingent fee contracts under the court's inherent power to regulate the bar.
13. ____: ____. Courts have traditional authority to supervise the charging of fees for professional services under the court's inherent power to regulate the practice of law.
14. **Attorneys at Law.** The mere possibility of transgression of ethical canons, without discovery, is not sufficient for the extreme remedy of disqualification. It does, however, provide sufficient concern to justify discovery into terms of written agreements between successor counsel and the disqualified firm.
15. ____. A lawyer should promote public confidence in the legal system and in the legal profession.
16. **Mandamus: Final Orders: Appeal and Error.** Generally, a discovery order can be reviewed on appeal from a final judgment. However, when the remedy, though available, is inadequate, mandamus will lie.

Original action. Peremptory writ issued.

Richard L. Anderson and Robert S. Lannin, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., and Louis A. Huber III and Daniel R. Young, of Smith, Gill, Fisher & Butts, P.C., for relator.

Patrick H. Barth, of Law Offices of Patrick H. Barth, and J. Michael Coffey for amici curiae Samuel C. Carroll et al.

David S. Houghton and T. Geoffrey Lieben, of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., for amicus curiae Lieben Dahlk.

CAPORALE, FAHRNBRUCH, WRIGHT, and CONNOLLY, JJ., and WITTHOFF, D.J., and BOSLAUGH, J., Retired, and RONIN, D.J., Retired.

PER CURIAM.

In its petition for a peremptory writ of mandamus, the relator, FirsTier Bank, N.A. (FirsTier), asks this court to require a district court judge to compel disclosure of a fee agreement between the law firm of Lieben, Dahlk, Whitted, Houghton and Jahn, P.C. (Lieben Dahlk), and its successor counsel, Patrick H. Barth and J. Michael Coffey.

FirsTier claims the district judge's refusal to require disclosure of the fee agreement is inconsistent with this court's previous writ of mandamus which ordered the disqualification of Lieben Dahlk from further representation of plaintiffs in their lawsuits against FirsTier.

For the reasons hereinafter stated, we hold that District Judge J. Patrick Mullen should be and hereby is ordered to require full discovery of the fee agreement involved.

ASSIGNMENT OF ERROR

FirsTier claims that Judge Mullen erred in denying its motion to compel discovery of the fee agreement between Lieben Dahlk and its successor counsel because the existence of a fee agreement continues and aggravates the appearance of impropriety found to exist in *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993).

STANDARD OF REVIEW

To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. Mandamus lies only to enforce performance of a mandatory ministerial act or duty and is not available to control judicial discretion. *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994); *State ex rel. FirsTier Bank v. Buckley, supra*. A seemingly discretionary decision to act may,

in fact, be purely ministerial. *State ex rel. Creighton Univ. v. Hickman, supra*. The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994).

In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. See *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995).

FACTS

This action impacts three cases pending in the district court for Douglas County. FirsTier is one of the defendants in each of the cases. Those cases are designated in the district court as Carroll and Nellson v. FirsTier Financial, Inc., and FirsTier Bank, N.A., Omaha; Trachtenbarg et al. v. FirsTier Financial, Inc., and FirsTier Bank, N.A., Omaha; and Howard et al. v. FirsTier Financial, Inc., and FirsTier Bank, N.A., Omaha (the underlying cases). All of the underlying cases were filed in the district court for Douglas County in April 1992. Lieben Dahlk represented the plaintiffs in each of the underlying cases.

The plaintiffs in the underlying cases allege that Omaha National Bank, the predecessor of FirsTier, was executor or testamentary trustee of estates in which the plaintiffs claim an interest. Those plaintiffs assert that in regard to the estates in which they claim an interest, FirsTier's predecessor breached its fiduciary duty and fraudulently engaged in self-dealing in January 1971. At that time, Omaha National Bank was represented by the law firm of Fitzgerald, Brown, Leahy, McGill & Strom (Fitzgerald Brown). In 1971, Fitzgerald Brown hired attorney T. Geoffrey Lieben. Lieben and several other attorneys left Fitzgerald Brown on August 31, 1988, to form the Lieben Dahlk firm.

In a previous original action, FirsTier sought writs of mandamus compelling the judges in the underlying cases to enter orders disqualifying Lieben Dahlk from representing the plaintiffs. We issued a peremptory writ of mandamus, directing the district court to disqualify the firm of Lieben Dahlk from

further representation of the plaintiffs in the underlying cases. *State ex rel. FirsTier Bank v. Buckley, supra* (which opinion was published August 13, 1993). In so doing, we held that an attorney must avoid the present representation of a cause against a client of a law firm with which he or she was formerly associated, and which cause involves a subject matter which is the same as or substantially related to that handled by the former firm while the present attorney was associated with that firm.

Upon the withdrawal of Lieben Dahlk as counsel for the plaintiffs in the underlying cases, Coffey of the Nebraska bar and Barth of the New York bar entered appearances as successor counsel. Neither Coffey nor Barth met with the plaintiffs prior to accepting their cases.

Although our opinion disqualifying Lieben Dahlk was published on August 13, 1993, and advised the world of the disqualification, Coffey claims he was first personally advised of Lieben Dahlk's disqualification on approximately December 15. He consulted with Lieben Dahlk on or about December 18, regarding the underlying cases.

Earlier, in late October 1993, Lieben advised Barth of Lieben Dahlk's disqualification in the underlying cases. On October 31 or November 7, Barth consulted with Lieben Dahlk attorneys about the underlying cases. On December 2 and 3, Barth reviewed Lieben Dahlk's work product regarding those cases. By June 22, 1994, Barth had corresponded with Lieben Dahlk on 14 occasions regarding the underlying cases.

FirsTier filed a motion to prohibit dissemination of Lieben Dahlk's files in the underlying cases to successor counsel. As part of the proceedings on that motion, FirsTier served depositions upon written questions to Lieben Dahlk and successor counsel in which FirsTier asked whether a fee arrangement existed between Lieben Dahlk and successor counsel. Lieben Dahlk refused to answer the question regarding a fee arrangement. In Barth's separate answer, he acknowledged that a written fee arrangement existed with Lieben Dahlk, but refused to disclose the content. FirsTier then filed a motion to compel discovery and to disclose the existence of any fee arrangement between Lieben Dahlk and successor counsel. In

proceedings before an appointed special master, Coffey acknowledged that the fee arrangement in question includes Lieben Dahlk on a quantum meruit theory.

On December 28, 1994, the trial court granted, in part, the motion to prohibit dissemination of Lieben Dahlk's files, but overruled the motion to compel discovery of a fee agreement. The trial court found that a fee agreement between Lieben Dahlk and successor counsel would not in and of itself violate the writ of mandamus issued and ordered by this court. On February 6, 1995, FirsTier applied for leave to file this original action in this court.

ANALYSIS

Approximately 2 years prior to the filing of the underlying cases in the district court, this court announced that confidences and secrets possessed by an attorney are presumptively possessed by other members of the attorney's firm. *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990). We further held that an attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client's interest in the same subject matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof. *Id.*

Clearly, Lieben Dahlk had notice nearly 2 years prior to representing the plaintiffs that confidences and secrets of FirsTier possessed by Fitzgerald Brown were imputed to attorney Lieben. Lieben Dahlk knew or should have known that it could not represent those whose interests were adverse to FirsTier in the same subject matter to which FirsTier's confidences and secrets related.

The rules set forth in *State ex rel. Freezer Servs., Inc. v. Mullen, supra*, were the foundation of our holding in *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993), to disqualify Lieben Dahlk from the litigation then before us. Although we expanded these rules in *State ex rel. FirsTier Bank v. Buckley*, we also stated that the judge's duty to disqualify Lieben Dahlk existed in November 1992, when FirsTier applied for a writ of mandamus seeking the disqualification.

As a result, the argument made by successor counsel, Coffey and Barth, that Lieben Dahlk did not have notice, prior to disqualification, of the ethical transgressions inherent in representing the plaintiffs in the underlying cases lacks merit. At all times relevant, Lieben Dahlk had notice and knew or should have known that it could not represent the plaintiffs in the specific action against FirsTier. Because Coffey was also a member of the Nebraska bar, he is charged with knowledge of our opinion, *State ex rel. FirsTier Bank v. Buckley, supra*, issued August 13, 1993, in which we disqualified Lieben Dahlk.

That being stated, successor counsel's argument that Lieben Dahlk is entitled to quantum meruit fees in representing the plaintiffs also lacks merit. We do not accept the contention that an attorney can receive fees for representation which from the outset gives the appearance of impropriety and is violative of established rules of professional conduct. An attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility and inconsistent with the character of the profession. See, *Eriks v. Denver*, 118 Wash. 2d 451, 824 P.2d 1207 (1992); *In re Estate of McCool*, 131 N.H. 340, 553 A.2d 761 (1988); *Moses v. McGarvey*, 614 P.2d 1363 (Alaska 1980).

It is undisputed that a fee arrangement in written form exists between Lieben Dahlk and successor counsel. Thus, we address whether the district court erred in overruling FirsTier's motion to compel discovery of that fee arrangement.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. *Shahan v. Hilker*, 241 Neb. 482, 488 N.W.2d 577 (1992). See, also, Neb. Ct. R. of Discovery 26(b)(1) (rev. 1992). For purposes of ensuring a fundamentally fair trial, the question of whether a disqualified law firm is participating with successor counsel is highly relevant to a pending action.

As to issues of privilege, the fee arrangement in question does not concern attorney and client communication, but, rather, attorney and disqualified counsel communication.

In any event, absent special circumstances, fee arrangements

are not confidential professional communications protected by the attorney-client privilege. *Murray v. Stuckey's Inc.*, 153 F.R.D. 151 (N.D. Iowa 1993). We have previously held that courts have authority to monitor and determine the reasonableness of contingent fee contracts under the court's inherent power to regulate the bar. *Kirby v. Liska*, 214 Neb. 356, 334 N.W.2d 179 (1983). Furthermore, courts have traditional authority to supervise the charging of fees for professional services under the court's inherent power to regulate the practice of law.

FirsTier seeks to discover relevant and nonprivileged information. FirsTier has a right to inquire into and determine the extent of Lieben Dahlk's retained interest in the lawsuit. FirsTier's right to discovery is particularly strong here, where discovery is being resisted by the disqualified firm that by its inappropriate conduct created the issue the discovery is designed to resolve. *Gregori v. Bank of America*, 207 Cal. App. 3d 291, 254 Cal. Rptr. 853 (1989), is persuasive on the point.

FirsTier's motion to compel discovery is also relevant to inquire into the conduct of successor counsel. We have previously held that a law firm should be disqualified from representing its client when it hires as temporary clerical help a disbarred attorney who previously worked as an attorney on the same case for another firm which represents the opposing party, because such action has the appearance of impropriety. *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994). The record reflects that after successor counsel learned of Lieben Dahlk's disqualification, successor counsel consulted with Lieben Dahlk and entered into a written fee arrangement with Lieben Dahlk. The record further reflects that successor counsel reviewed Lieben Dahlk's files containing the work product of the disqualified firm which may or may not have contained confidential material obtained while Lieben's former firm represented FirsTier. The mere possibility of transgression of ethical canons, without discovery, is not sufficient for the extreme remedy of disqualification. See *Silver v. Downs*, 493 Pa. 50, 425 A.2d 359 (1981). It does, however, provide sufficient concern to justify discovery into terms of written agreements between successor counsel and the

disqualified firm.

A lawyer should promote public confidence in the legal system and in the legal profession. Canon 9, EC 9-1, of the Code of Professional Responsibility. Lieben Dahlk gave the appearance of impropriety when it filed the underlying actions against FirsTier in 1992. The record seems to suggest that even after Lieben Dahlk was disqualified from representing the plaintiffs in the underlying litigation it continued to be involved by supplying its work product to successor counsel. As previously stated, Lieben Dahlk filed the underlying actions within 2 years of our opinion in *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990).

In light of the facts surrounding FirsTier's discovery request, the respondent had a clear and absolute duty to allow the discovery requested by FirsTier. The respondent's duty existed at the time the writ was applied for and was imposed by our rules regarding discovery as well as our writ ordering the disqualification of Lieben Dahlk.

Generally, a discovery order can be reviewed on appeal from a final judgment. *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989). However, when the remedy, though available, is inadequate, mandamus will lie. *State ex rel. Freezer Servs., Inc. v. Mullen, supra*. To wait for an appeal on this issue would mean that any divulgence of relevant confidences and secrets will have already occurred and that the trial would be tainted with the appearance of impropriety. Under these facts, an appellate court could not return the parties to the status quo ante, and as a result, the available remedy is inadequate. See *id.*

CONCLUSION

Accordingly, we order that a peremptory writ of mandamus issue directing the respondent to vacate his order denying FirsTier's motion to compel discovery and to sustain FirsTier's motion to compel discovery of the written fee arrangement together with the terms and conditions contained therein between Lieben Dahlk and successor counsel, Coffey and Barth, in the underlying cases.

PEREMPTORY WRIT ISSUED.

WHITE, C.J., and LANPHIER, J., not participating.

GRACE L. OLSEN, APPELLANT AND CROSS-APPELLEE, V. HAROLD C. OLSEN, APPELLEE AND CROSS-APPELLANT.

534 N.W.2d 762

Filed July 21, 1995. No. S-93-908.

1. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.
2. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another. A theory of recovery is not itself a cause of action.
3. **Actions.** Whether more than one cause of action is stated depends mainly upon whether more than one primary right or subject of controversy is presented and also upon whether recovery on one ground would bar recovery on the other, whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief.
4. **Judgments: Conveyances.** When a judgment or decree is rendered for a conveyance and the party against whom the judgment or decree is rendered does not comply therewith, the judgment or decree shall have the same operation and effect and be as available as if the conveyance had been executed conformable to the judgment or decree.
5. **Final Orders: Words and Phrases.** An order affecting a substantial right in an action, when such order determines the action and prevents a judgment, is a final order which may be vacated, modified, or reversed.
6. ____: ____. To be final, an order must dispose of the whole merits of the case. When no further action of the court is required to dispose of a pending cause, the order is final. If the cause is retained for further action, the order is interlocutory.
7. **Liability: Damages: Appeal and Error.** Generally, an interlocutory summary adjudication of liability alone, which does not decide the question of damages, is not appealable.

Appeal from the District Court for Banner County: JOHN D. KNAPP, Judge. Appeal dismissed.

Paul E. Hofmeister, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellant.

Robert M. Harris, of Harris & Lippstreu, P.C., for appellee.

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

LANPHIER, J.

Appellant, Grace L. Olsen, and appellee and cross-appellant, Harold C. Olsen, were divorced in 1979. The decree dissolving the parties' marriage was issued by the district court for Kimball County. In 1990, Grace Olsen sued Harold Olsen in the district court for Banner County, claiming that a mineral deed she received pursuant to their marriage dissolution action failed to convey all of the mineral rights granted to her by the divorce decree. In her petition, Grace Olsen requested declaratory relief regarding her interest in the mineral rights under the divorce decree and mineral deed, that title to the mineral rights be quieted in her, that the mineral deed be reformed to provide for what she was entitled to by the divorce decree, and an accounting. By agreement of the parties, the accounting was bifurcated for trial from the other issues. The district court quieted title to certain mineral rights in Grace Olsen. However, the district court found Grace Olsen guilty of laches and quieted title in her as of February 6, 1990, the date of her original petition in this action, rather than the date of the divorce decree. The district court held in favor of Harold Olsen in the declaratory judgment and reformation claims. Both parties have appealed, and this matter is now before us while the accounting issue is still pending before the district court. Therefore, these appeals are from an interlocutory order and we must dismiss them.

BACKGROUND

The parties' property settlement agreement, entered into in contemplation of the dissolution of their marriage, provided that Grace Olsen would receive an undivided one-half interest in all of the oil, gas, and minerals then owned by Harold Olsen. The decree of dissolution, dated February 6, 1979, approved the parties' property agreement. Neither the decree nor the property agreement contained any legal description of Harold Olsen's mineral interests. The decree directed the parties to execute and deliver the necessary documents to consummate the property agreement.

On August 15, 1979, Grace Olsen's attorney prepared a mineral deed which purported to put into effect the property

agreement's division of the mineral interests. The mineral deed was prepared using legal descriptions that Grace Olsen had obtained from Harold Olsen's sister.

Sometime in 1984, Grace Olsen became aware that the mineral deed inaccurately described some mineral interests and omitted other interests owned by Harold Olsen at the time of the decree. For several years, Harold Olsen promised to sign a corrected mineral deed but repeatedly delayed actual execution. Ultimately, this action ensued.

In her fourth amended petition, filed January 21, 1991, Grace Olsen alleged four counts which can generally be described as an action for declaratory judgment, quiet title, reformation of the mineral deed, and an accounting. In his answer, Harold Olsen defended on various grounds, including that the action was barred by the statute of limitations and laches and that the original mineral deed was intended to modify the terms of the dissolution decree.

The district court stayed trial on the accounting issue pending its decision on the first three issues. After a bench trial, both parties' motions for a new trial were denied. Grace Olsen appealed and Harold Olsen cross-appealed to the Nebraska Court of Appeals. By order of this court, the case was removed to our docket.

ASSIGNMENTS OF ERROR

Appellant, Grace Olsen, asserts that the district court erred in finding that the effective date for quieting title was February 6, 1990, in finding that she was guilty of laches, and in finding for Harold Olsen on the declaratory judgment and reformation counts.

In his cross-appeal, Harold Olsen asserts that the district court erred in failing to find that Grace Olsen's action was barred by the statute of limitations and laches.

STANDARD OF REVIEW

For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995); *Fritsch v.*

Hilton Land & Cattle Co., 245 Neb. 469, 513 N.W.2d 534 (1994). In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *Barks v. Cosgriff Co., supra*; *Fritsch v. Hilton Land & Cattle Co., supra.*

ANALYSIS

In her fourth amended petition, filed in Banner County, Grace Olsen separated her averments into what she alleged were four causes of action. A cause of action consists of the fact or facts which give one a right to judicial relief against another. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). A theory of recovery is not itself a cause of action. *St. Paul Fire & Marine Ins. Co., supra.*

Whether more than one cause of action is stated depends mainly upon whether more than one primary right or subject of controversy is presented and also upon whether recovery on one ground would bar recovery on the other, whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief. *Hoiengs v. County of Adams, supra.*

The subject of controversy here is title to mineral rights. Grace Olsen's interest in the mineral rights is based on the divorce decree of the district court for Kimball County, which approved the parties' agreement in contemplation of divorce. In the four different counts that Grace Olsen pled, including the quiet title action, she essentially sought to have the divorce decree construed and enforced and to receive an accounting of the proceeds due her under the decree. In so doing, Grace Olsen stated one cause of action supported by four theories of recovery.

Although the decree did not specifically identify the mineral interests, it did convey an undivided one-half interest in all of the mineral interests owned by Harold Olsen at the time of the divorce from Grace Olsen. When a judgment or decree is rendered for a conveyance and the party against whom the judgment or decree is rendered does not comply therewith, the

judgment or decree shall have the same operation and effect and be as available as if the conveyance had been executed conformable to the judgment or decree. Neb. Rev. Stat. § 25-1304 (Reissue 1989). "Construction" of the divorce decree was unnecessary. The fact that the mineral deed purportedly conveyed less than a one-half interest in the mineral interests granted her by the divorce decree does not deprive her of those interests. An accounting action on the decree is the only issue. The accounting action, still pending before the district court, is all that is necessary to effectuate the decree.

In his brief, Harold Olsen asserts that this court must dismiss the appeals because they are not appeals from a final order. We agree.

An order affecting a substantial right in an action, when such order determines the action and prevents a judgment, is a final order which may be vacated, modified, or reversed. Neb. Rev. Stat. § 25-1902 (Reissue 1989). To be final, an order must dispose of the whole merits of the case. When no further action of the court is required to dispose of a pending cause, the order is final. If the cause is retained for further action, the order is interlocutory. *Wicker v. Waldemath*, 238 Neb. 515, 471 N.W.2d 731 (1991); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989). "Generally, an interlocutory summary adjudication of liability alone, which does not decide the question of damages, is not appealable." *Jaramillo v. Mercury Ins. Co.*, 242 Neb. 223, 237, 494 N.W.2d 335, 345 (1993), citing *Hart v. Ronspies*, 181 Neb. 38, 146 N.W.2d 795 (1966).

In *Bass v. Dalton*, 213 Neb. 360, 329 N.W.2d 115 (1983) (*Bass v. Dalton I*), we reviewed assignments of error arising from the dissolution of a medical partnership. When we decided *Bass v. Dalton I*, the trial court had construed the partnership agreement and had ordered an accounting. However, the accounting had not been conducted prior to the appeal. After remand, the trial court adjudicated the accounting as mandated by this court. A second appeal, assigning errors arising from the accounting, ensued. *Bass v. Dalton*, 218 Neb. 379, 355 N.W.2d 225 (1984) (*Bass v. Dalton II*). In *Bass v. Dalton II*, we noted that our review of the first appeal had been premature and

therefore improvident. Since the trial court had ordered an accounting which had not yet been conducted, no final order had been entered at the time of *Bass v. Dalton I*. Substantial rights of the parties remained undetermined, and the order was interlocutory. Our oversight in addressing the first appeal caused us to review the issues presented in the matters of *Bass v. Dalton* in a piecemeal fashion, a result we noted that we wished to avoid in the future.

In *Wicker v. Waldemath, supra*, the defendant appealed from a judgment finding that the plaintiff had the right of possession to disputed land. The trial court had ordered a bifurcated trial on the issue of ejectment and the issue of an accounting or damages for rents and profits. The appeal was prosecuted before the resolution of the issue of damages or an accounting. We held there was no final order which could be appealed and dismissed the appeal as premature.

In this case, the district court stayed trial on the accounting or damages issue pending its decision on the first three theories of recovery. The parties have prosecuted their appeals before the resolution of their cause of action. Thus, according to *Bass v. Dalton II, supra*, and *Wicker v. Waldemath, supra*, the order of the district court before us is not final. The appeals are therefore dismissed.

CONCLUSION

Consideration of the issues presented by these appeals would be premature and improvident, and they must be dismissed.

APPEAL DISMISSED.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. TOWNHOUSER, INC., DAKOTA PLACE, INC., AND WILLIAM KREIN, APPELLANTS.

534 N.W.2d 756

Filed July 21, 1995. No. S-93-1036.

1. **Quiet Title: Equity.** A suit to quiet title is equitable in nature.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Conveyances: Estates.** Any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that upon the occurrence of a stated event the conveyor or his successor in interest shall have the power to terminate the estate creates a fee simple subject to a condition subsequent.
4. **Estates: Property.** An estate in fee simple subject to a condition subsequent which restrains alienation of the property, either directly or indirectly, is void.
5. **Estates.** Conditions subsequent to a fee simple estate title which do not limit alienation and are otherwise valid, are enforceable if they are reasonable and do not affect adversely the marketability of the fee.
6. ____. Estates upon a condition subsequent, which, after having become fully vested may be defeated by a breach of condition, are not favored in law.
7. **Deeds.** Conditions subsequent contained in a deed will be construed most strongly against the holder of a right of entry and a forfeiture will not be enforced unless clearly established.
8. **Deeds: Conveyances: Intent.** To constitute a breach of a condition subsequent in a deed relating to maintenance or use of the land conveyed, there must be such neglect to comply as to indicate an intention to disregard the condition. In such a case, it is not enough to show that the letter of the condition is violated; it must appear that its true spirit and purpose have been intentionally disregarded by the grantee.

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

Mark A. Hunzeker, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellants.

William F. Austin, Lincoln City Attorney, and Steven Huggenberger for appellee.

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

LANPHIER, J.

The property at issue is a 19.1-acre tract which appellants, Townhouser, Inc.; Dakota Place, Inc.; and William Krein, conveyed to the City of Lincoln (City) for use as a park. If development of the park was not commenced within 7 years of the date of acceptance, the conveyance provided appellants the right to reenter. Claiming that development had not been commenced within the required time, appellants gave notice to the City of their reentry on March 9, 1992. The City initiated this action to be declared the owner of the subject property located in Lancaster County. Appellants counterclaimed asking the district court for Lancaster County to quiet title in them. Prior to trial, the City dismissed its petition. The case was tried on appellants' counterclaim. The district court dismissed the counterclaim and adjudged the City to be the owner of the property. Appellants timely filed an appeal to the Court of Appeals, and the case was administratively removed to this court. On our de novo review of the record, we find that the condition was not violated. We, therefore, affirm the judgment of the district court.

BACKGROUND

The property in question is a 19.1-acre tract located on the north side of Pine Lake Road between 56th and 70th Streets in Lincoln. In April 1983, appellants offered to convey this property to the City for use as a park. On July 11, 1983, the City accepted the offer. The deed conveying the property contained the following condition: "[I]f such public park development is not commenced within seven years from the date of acceptance by the Grantee of this conveyance, then the Grantors shall have the right to re-enter and repossess the premises as of their former estate and this conveyance shall be void."

The parties agree that 7 years from the date of acceptance is July 11, 1990. The issue addressed at trial was whether public park development had been timely commenced.

The City adduced evidence showing that prior to July 11, 1990, the property had been mowed, trees had been trimmed, a fence with a gate had been erected, a sign had been erected,

a property line survey had been conducted, a topographic survey had been conducted, and a conceptual master plan had been drawn, but not implemented.

Appellants adduced evidence that most of the property was farmed by a tenant through 1990. One of the appellants, William Krein, testified that the property was being farmed in the fall of 1991. Gene Meyer, the tenant who farmed the property, testified that 1990 was the last year he farmed the property. However, Mark Krumm, who mowed this property for the City, testified that there were no crops on the property in 1988, 1989, or 1990. Lawrence Findley, a district park supervisor for the City's parks and recreation department, testified that the property was not farmed after 1988.

Admitted into evidence were advertising supplements prepared by the City's parks and recreation department. Those supplements list the various parks and show the facilities available at each. Supplements submitted were those published from September 9, 1984, to January 1, 1993. The property at issue here is referred to as "Pine Lake and 60th Park," and first appears in the supplements on May 21, 1989. In that supplement, no facilities are designated as available at the property. The category "Undeveloped — Not for Public Use" was also not designated as applicable to the property. The same is true for the supplement dated January 1, 1990. However, in the March 25, 1990, supplement the property is designated "Undeveloped — Not for Public Use." The designation is the same in the May 20, 1990, supplement. None of the remaining supplements address the 7-year time period with which we are concerned.

Documents authored by the parks and recreation department called project summaries were also admitted. These summaries showed what amounts the City budgeted for the various parks. In a 1988-89 summary, the listing for the Pine Lake Road and 60th Street Park contained the following: "As part of the acquisition negotiations for this park, development must begin in the 1988-89 year. Preliminary development will be primarily landscaping and site grading." The summary showed that $5,000 was budgeted for the 1988-89 year. The 1989-90 summary stated: "This will begin development of this park per

the master plan prepared in 1988. Development will include: road, parking, grading, seeding, landscaping, playground, soccer goals, paths." The 1990-91 summary contained the exact same statement found in the 1989-90 summary and showed that $60,000 was budgeted for the year.

ASSIGNMENTS OF ERROR

On appeal, appellants assert the trial court erred in (1) finding that the City's generalized acts of ownership and preliminary planning efforts constituted commencement of the development of a park, (2) finding that a violation of a condition in a deed which requires commencement of a course of action within a specified period of time will not create a forfeiture unless accompanied by such neglect as to show intentional disregard of that condition, (3) finding that actions taken approximately 2 years after the date of reversion and after Townhouser's declaration of reverter are relevant to the question of whether the necessary actions were undertaken within the allotted time, (4) not finding that the City had repeatedly admitted that it had not commenced development of the property as a park by July 11, 1990, and (5) adjudging the City to be the owner of the property.

STANDARD OF REVIEW

A suit to quiet title is equitable in nature. *ADC-I, Ltd. v. Pan American Fuels*, 247 Neb. 71, 525 N.W.2d 190 (1994); *Saunders v. Rebuck*, 242 Neb. 610, 496 N.W.2d 472 (1993). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Walker v. Walker Enter.*, *ante* p. 120, 532 N.W.2d 324 (1995); *Winberg v. Cimfel*, *ante* p. 71, 532 N.W.2d 35 (1995); *University Place-Lincoln Assocs. v. Nelsen*, 247 Neb. 761, 530 N.W.2d 241 (1995).

ANALYSIS

The deed with which we are concerned provides that

appellants may reenter the property conveyed if the development of a public park is not timely commenced. Any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that upon the occurrence of a stated event the conveyor or his successor in interest shall have the power to terminate the estate creates a fee simple subject to a condition subsequent. *McArdle v. School Dist. of Omaha*, 179 Neb. 122, 136 N.W.2d 422 (1965). Thus, we are concerned with a fee simple subject to a condition subsequent.

An estate in fee simple subject to a condition subsequent which restrains alienation of the property, either directly or indirectly, is void. *Poppleton v. Village Realty Co., ante* p. 353, 535 N.W.2d 400 (1995); *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992), *opinion modified* 242 Neb. 97, 490 N.W.2d 461. However, conditions subsequent to a fee simple estate title which do not limit alienation and are otherwise valid, are enforceable if they are reasonable and do not affect adversely the marketability of the fee. *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 183 N.W.2d 485 (1971). The parties have not raised restraint of alienation as an issue; we assume consequently, as have the parties, that the condition does not limit alienation and therefore is valid and enforceable because it is reasonable and does not adversely affect marketability of the fee. Thus, we proceed to determine whether the condition has been met.

Estates upon a condition subsequent, which, after having become fully vested may be defeated by a breach of condition, are not favored in law. *McArdle, supra*; *Erskine v. Board of Regents*, 170 Neb. 660, 104 N.W.2d 285 (1960). Conditions subsequent contained in a deed will be construed most strongly against the holder of a right of entry and a forfeiture will not be enforced unless clearly established. *Id.* To constitute a breach of a condition subsequent in a deed relating to maintenance or use of the land conveyed, there must be such neglect to comply as to indicate an intention to disregard the condition. *Id.* In such a case, it is not enough to show that the letter of the condition is violated; it must appear that its true spirit and purpose have been intentionally disregarded by the grantee. *Id.*

In light of the evidence adduced, we cannot conclude that the condition was violated. The condition required commencement of development, not development. Moreover, the condition did not state what type of park must be developed or what facilities must be available. A park may be little more than an area maintained in its natural state. *Abboud v. Lakeview, Inc.*, 237 Neb. 326, 466 N.W.2d 442 (1991). Given the rules cited above against favoring a right of entry, very little is required to meet the condition contained in the deed.

Though little had been done to the property, we find that the condition has been met. Appellants argue that the City merely maintained the property. We disagree. Though mowing and trimming trees could be characterized as maintenance, the erection of a fence and gate clearly constitutes development. Though the evidence is conflicting on when the property was last used for agriculture, we defer to the trial judge who heard and observed the witnesses and apparently accepted the City's version of the facts. *Walker v. Walker Enter., ante* p. 120, 532 N.W.2d 324 (1995). Moreover, the surveying of the property and the drawing of plans show that the City had no intention of disregarding the spirit of the condition. That funds were allocated for development of the property is also indicative of the City's intention of developing the property as a park.

In light of this evidence, we conclude that the district court correctly determined that the condition had been satisfied and that appellants are not entitled to reenter the property, but that it should remain the City's. The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., concurs.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL W. RYAN, APPELLANT.

534 N.W.2d 766

Filed July 21, 1995. No. S-94-207.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous.
2. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing at a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1994) for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.
3. **Postconviction: Effectiveness of Counsel: Proof.** When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
4. **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 defendant's conviction, the 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.
5. **Rules of the Supreme Court: Appeal and Error.** Nebraska Supreme Court rules provide that the brief of an appellant shall contain, among other things, a separate, concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error. Each assignment of error shall be separately numbered and paragraphed, bearing in mind that consideration of the case will be limited to errors assigned and discussed.
6. **Expert Witnesses: Effectiveness of Counsel: Proof.** Expert evidence is generally not admissible as proof that the assistance of counsel in a criminal case was ineffective.
7. **Appeal and Error.** An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration upon appeal.
8. **Constitutional Law: Death Penalty.** The death penalty by electrocution as punishment for crime is not a cruel and unusual punishment within the meaning of the state and federal Constitutions.
9. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
10. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of

ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.

11. **Postconviction: Appeal and Error.** From a procedural standpoint, a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.
12. **Aiding and Abetting.** The common-law distinction between a principal and an aider and abettor has been abolished in Nebraska.
13. ____. A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.
14. **Criminal Law: Aiding and Abetting: Convictions.** An aider and abettor can be convicted of any crime, even a greater offense than the principal, provided the conviction is supported by the evidence of the facts and the defendant's state of mind.
15. **Criminal Law: Jury Instructions: Intent.** A special diminished capacity instruction need not be given where the jury had otherwise been properly instructed that intent was an element of the crime charged.
16. **Pleas: Effectiveness of Counsel: Proof.** In order to satisfy the prejudice requirement in the context of a plea, a defendant must show that there is a reasonable probability that but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial.
17. **Sentences: Evidence.** In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence.
18. ____: ____. The sentencing phase is separate and apart from the trial phase and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
19. ____: ____. A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed.
20. **Constitutional Law: Death Penalty.** A death sentence is a unique penalty which implicates the 8th and 14th Amendments to the U.S. Constitution.
21. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** Whenever a State seeks to impose the death penalty, the discretion of the sentencing body must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. The sentencing authority's discretion must be guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
22. **Homicide: Aggravating and Mitigating Circumstances.** Torture may be found where the victim is subjected to serious physical, sexual, or psychological abuse before death.
23. **Statutes: Sentences: Courts.** A state supreme court may salvage a facially vague statute by construing it to provide the sentencing body with objective criteria for applying the statute.
24. **Constitutional Law: Aggravating and Mitigating Circumstances.** The first prong of aggravating circumstance (1)(d) of Neb. Rev. Stat. § 29-2523 (Reissue

1989), narrowed by this court's decisions defining the phrase "especially heinous, atrocious, cruel" to mean unnecessarily torturous to the victim, satisfies constitutional requirements.

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

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

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

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

PER CURIAM.

Michael W. Ryan, who was convicted of first degree murder and sentenced to death for the torture slaying of James Thimm, appeals an order of the trial court denying him postconviction relief.

We affirm the order of the district court denying postconviction relief to Ryan.

I. STANDARD OF REVIEW

A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995); *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994).

In an evidentiary hearing at a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1994) for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993); *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992).

When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the

propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions. *State v. Williams, supra*; *State v. Nielsen, supra*.

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 defendant's conviction, the 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. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995).

II. FACTS

The sordid facts of this case are fully set forth in this court's opinion rendered as a result of Ryan's direct appeal. See *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), *cert. denied* 498 U.S. 881, 111 S. Ct. 216, 112 L. Ed. 2d 176 (1990) (*Ryan I*). We have included only those facts necessary to an understanding of the issues in this appeal.

The facts, as reflected by the record, are as follows:

During the summer and fall of 1984, Ryan and several other men and women, along with 10 of their children, moved to a farm owned by Ora Richard (Rick) Stice located near Rulo, Nebraska. The group was united by their common interest in the teachings of a certain Rev. James Wickstrom. Group members studied the Bible and referred to God as "Yahweh."

The group also believed that Ryan and other members of the group possessed the spirits of archangels and that the infant of a female group member who became pregnant while at the farm was divinely conceived. Members of the group considered Ryan to be the leader and obeyed his orders without question. Ryan sometimes referred to himself as "king." Ryan claimed to hear "Yahweh" speak directly to him and allegedly saw visions in the sky. He further claimed to know what other group members

were thinking and to be able to predict things which later came true.

Although Ryan was legally married to Ruth Ryan, he also "married" four female group members, three of whom were themselves married to other men, claiming that this was done at the direction of "Yahweh."

Every detail of every activity at the farm was determined by consulting "Yahweh" through a method called the "arm test." To perform the arm test, one group member would hold his or her right arm out, and a second group member would place one hand on the shoulder and one hand on the wrist of the first group member, exerting downward pressure on the arm. The second group member would then question "Yahweh." If "Yahweh's" answer was yes, the arm stayed up; if the answer was no, the arm would yield to the pressure and fall. Group members were permitted to use the arm test only with Ryan's permission.

The group also had strong survivalist and paramilitary characteristics. Large amounts of food, ammunition, and weapons, including fully automatic weapons, were stockpiled on the farm. Each of the men in the group was assigned a military rank and was able to work up to the rank of general. Those men included Ryan's son, Dennis Ryan, who was 15 years old at the time these incidents occurred, but who was treated as a man. The other men on the farm, in addition to Michael and Dennis Ryan, included Rick Stice, James Thimm, Timothy Haverkamp, David Andreas, and James Haverkamp.

Early in 1985, Thimm, Stice, and Stice's 5-year-old son, Luke, fell out of favor with "Yahweh" for various reasons and were demoted by Michael Ryan to slave status. After their demotion, the three were moved to a separate house on the farm where they were subjected to physical, psychological, and sexual abuse.

In March, while Ryan was temporarily absent, Rick Stice escaped from the farm and returned 7 or 8 days later. After that time, the treatment of Stice and Thimm worsened. At night, the two men were sometimes chained and were forced to sleep on a porch. If Stice and Thimm went outside during the daytime,

they were guarded by the other men to prevent them from running away.

Late in March, after Rick Stice had returned, Ryan shoved 5-year-old Luke Stice, causing him to strike his head and lose consciousness. No medical help was sought for the child, and he died later that evening. Luke Stice was buried on the farm property. Early in April, Rick Stice again escaped from the farm, and he did not return.

Ryan's abuse of Thimm culminated in one final, torturous episode near the end of April. On April 28, Ryan accused Thimm of blaspheming "Yahweh" and of trying to poison the group by putting household cleaner on a wild turkey that was being stored in the refrigerator. Ryan launched into a brutal "discipline" of Thimm dictated by "Yahweh" through the arm test. Michael and Dennis Ryan, Andreas, and Timothy and James Haverkamp all participated in these events.

Thimm was taken to a hog confinement building, where, over a period of 2 days, the men took turns sexually assaulting Thimm by penetrating his anus with a shovel handle until his bowel ruptured, whipping Thimm on his back and abdomen, and shooting off the fingertips of Thimm's left hand. (The trial court stated that Thimm was "sodomized" in reference to the men penetrating Thimm's anus with the shovel handle. See Neb. Rev. Stat. § 28-318(6) (Reissue 1989), defining sexual penetration as including "any intrusion . . . of . . . any object manipulated by the actor into the . . . anal open[ing] of the victim's body." See, also, *People v Merriweather*, 447 Mich. 799, 527 N.W.2d 460 (1994), in which the Michigan Supreme Court referred to the insertion of an object into a victim's anus as sodomy.) Thimm was forced to disrobe for this abuse and was chained or tied with baling wire during much of this time. Michael Ryan also broke Thimm's arm, permitted Dennis Ryan to break Thimm's left leg, and directed Timothy Haverkamp in breaking Thimm's right leg. Michael Ryan then demonstrated to Timothy Haverkamp and Dennis Ryan how to skin a human being by using a razor blade and a pair of pliers to skin part of Thimm's leg.

Ultimately, Michael Ryan stomped on Thimm's chest, breaking several of his ribs, and Thimm died on April 29, 1985.

Thimm's body was placed inside a sleeping bag and buried in an unmarked grave on the farm.

On June 25, 1985, Andreas and James Haverkamp were arrested for stealing a sprayer rig. While in jail, those two men decided to notify the authorities of events which had taken place on the Rulo farm. On August 17 and 18, the farm was searched by a team of law enforcement officers, and the bodies of 5-year-old Luke Stice and Thimm were exhumed.

Michael Ryan was subsequently charged with two counts of first degree murder for the killings of Luke Stice and Thimm. Dennis Ryan was charged with first degree murder for the killing of Thimm. Timothy Haverkamp pled guilty to second degree murder before Michael Ryan's trial and testified for the State in that trial. Andreas and James Haverkamp pled guilty to lesser charges before Ryan's trial and also testified for the State.

Ryan was convicted of Thimm's first degree murder at a jury trial and was subsequently sentenced to death. His conviction and sentence were affirmed by this court. See *Ryan I*. After Ryan was found guilty, but before he was sentenced, he pled no contest to a reduced charge of second degree murder for the killing of Luke Stice and was sentenced to life imprisonment on that charge.

We note that Ryan was represented at trial by Richard Goos, an experienced criminal defense attorney from the Lancaster County Public Defender's office, and Louis Ligouri, an attorney in private practice, both of whom were appointed by the trial court. Goos was first employed by the Lancaster County Public Defender's office in 1971. He testified at Ryan's postconviction hearing that he had represented approximately nine first degree murder defendants, including two on whom the State sought to impose the death penalty, before he was appointed to represent Ryan.

Two of the nine first degree murder defendants were convicted as charged and sentenced to death. Of the remaining seven first degree murder defendants, Goos testified, three were convicted of second degree murder, three were convicted of manslaughter, and one was acquitted. Goos also testified that prior to the time he represented Ryan, he had handled three or four cases in which an insanity defense was asserted.

After trial and before sentencing, the court terminated Ligouri's services and soon thereafter appointed Bruce Dalluge to assist Goos in preparation for Ryan's sentencing hearing. Dalluge represented Ryan on his direct appeal.

On December 17, 1991, Ryan filed a second amended motion for postconviction relief, requesting that his conviction and sentence be set aside as being obtained in violation of his federal and state constitutional rights. Throughout the postconviction proceedings, Ryan was represented by court-appointed counsel, Robert Creager. In the postconviction proceedings, Ryan alleged, in 16 claims containing numerous subparts, that his conviction and sentence were infirm for the following reasons: (1) constitutional errors appearing on the trial record, (2) constitutional errors on the record on direct appeal, (3) ineffective assistance of trial counsel, and (4) prosecutorial misconduct. Ryan also filed a pretrial statement of issues, listing 36 "issues," in the district court. At some point, the issue of cumulative error was also raised as issue 37.

The district court granted an evidentiary hearing on 25 of the 36 issues listed; retained 7 issues for the purpose of argument, limiting evidence to the record made at trial and sentencing; and struck 4 of the issues. An evidentiary hearing was held, following which the district court entered an order denying Ryan postconviction relief.

Ryan timely appealed to this court, making 14 assignments of error on appeal. He also raises in this court the 37 issues which were before the district court.

III. ASSIGNMENTS OF ERROR

Ryan contends that the postconviction trial court erred in (1) prohibiting the use of expert testimony to establish claims of ineffective assistance of counsel; (2) striking several of Ryan's claims; (3) failing to find that Ryan had been denied effective assistance of counsel at his trial with respect to advisement of all available defenses, the assertion of the insanity defense, the assertion of the insanity defense over Ryan's objection, the failure to object to a joint trial with Dennis Ryan, and Michael Ryan's decision to testify at trial; (4) failing to find that Ryan had been denied effective assistance of counsel at sentencing

because counsel failed to respond to false testimony and permitted Ryan to testify at trial; (5) failing to find that Ryan had been denied effective assistance of counsel in connection with the preparation and presentation of issues at sentencing, including development of all statutory and nonstatutory mitigating circumstances, meeting statutory aggravating circumstances, making all available constitutional challenges to the death penalty, and formulating a reasonable trial strategy with respect to sentencing issues; (6) failing to find that aggravating circumstance (1)(d) of Neb. Rev. Stat. § 29-2523 (Reissue 1989) was unconstitutional on its face and as applied to Ryan; (7) failing to find that aggravating circumstance (1)(a) of § 29-2523 was unconstitutional on its face and as applied to Ryan; (8) failing to find that Ryan's constitutional rights were violated at sentencing by the lack of standards for the impaneling of a three-judge panel, the trial judge's refusal to recuse himself, and the trial judge's refusal to convene a three-judge panel; (9) failing to find that the evidence was insufficient to support the application of statutory aggravating circumstances (1)(d) and (1)(a); (10) failing to find that Ryan was denied his right to a statutory proportionality review on appeal; (11) failing to find that deposition misconduct by the prosecution deprived Ryan of his rights to due process of law; (12) failing to find that Ryan had been deprived of his right to counsel by the firing of one of his trial attorneys; (13) failing to find that the cumulative effect of all the errors in this case deprived Ryan of a fair trial; and (14) failing to grant Ryan postconviction relief.

The 37 issues raised by Ryan in his brief, many of which he concedes are not supported by the record or have been adequately dealt with on direct appeal and are only being raised for the purpose of federal appellate review, are as follows: (1) unconstitutionality of aggravating circumstance (1)(d) as applied to Ryan, (2) unconstitutionality of aggravating circumstance (1)(a) as applied to Ryan, (3) unconstitutional reliance of aggravating circumstance (1)(a) on "vicarious" findings, (4) proportionality review, (5) lack of standards for impaneling a three-judge panel, (6) unconstitutionality of death by electrocution, (7) trial judge's refusal to recuse himself from

sentencing, (8) insufficient evidence to support aggravating circumstance (1)(d), (9) insufficient evidence to support aggravating circumstance (1)(a), (10) failure to advise on all possible defenses, (11) failure to advise on insanity defense, (12) unreasonable assertion of the insanity defense, (13) failure to object to joint trial, (14) failure to advise on testifying at trial and sentencing, (15) deposition misconduct, (16) failure to call witnesses, (17) failure to cross-examine one of the female cult members, (18) failure to reply to false trial testimony of defense psychiatric expert regarding an army induction incident, (19) discharge of Ligouri, (20) failure to conduct a voir dire examination of judge regarding a three-judge sentencing panel, (21) failure to consult with Ryan in preparation for sentencing, (22) failure to develop all statutory and nonstatutory mitigating circumstances, (23) failure to meet the burden of proof on mitigating circumstances, (24) entry of a no contest plea in the Luke Stice case, (25) failure to object to sentencing evidence, (26) prosecutorial misconduct, (27) reasonable doubt instruction, (28) failure to object to the reasonable doubt instruction, (29) state of the appellate record, (30) judicial misconduct during trial, (31) judicial misconduct at sentencing, (32) judicial interference with right to counsel, (33) failure to object to a jury instruction, (34) violation of sequestration order by experts, (35) jury misconduct (juror falling asleep), (36) jury misconduct (juror reading newspaper), and (37) cumulative effect of errors.

IV. ANALYSIS

Before proceeding further, we observe that analysis of this case is made needlessly confusing for both the court and opposing counsel by Ryan's nonconformist approach to the organization of the errors of the district court on appeal to this court. Supreme Court rules provide that the brief of an appellant shall contain, among other things,

> [a] separate, concise *statement of each error* a party contends was made by the trial court, together with the issues pertaining to the assignments of error. Each *assignment of error* shall be separately numbered and paragraphed, bearing in mind that *consideration of the*

case will be limited to errors assigned and discussed. (Emphasis supplied.) Neb. Ct. R. of Prac. 9D(1)d (rev. 1992).

Nonetheless, Ryan has presented the court with a voluminous brief which lists not only 14 assignments of error but also an additional 37 issues on appeal. We note that Ryan has brought all 37 issues which were before the district court before this court for further consideration. Some of these issues are subsumed in Ryan's 14 assignments of error, some appear to stand alone, and yet others have been abandoned for various reasons.

Because of the seriousness of the offense of which Ryan has been convicted, we have given Ryan the benefit of the doubt in order to fully address all issues except those which have been clearly abandoned. In addition, we exercise our option to review the record for plain error. See Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1994). However, Ryan and his counsel should not mistake the court's tolerance as approval of their creative approach to brief writing in clear violation of the court's rules.

We now address the assignments of error raised by Ryan.

1. Expert Testimony

In his first assignment of error, Ryan claims that the postconviction court erred in prohibiting the use of expert testimony to establish his claim of ineffective assistance of trial counsel. He concedes that this court has held that expert evidence is generally not admissible as proof that the assistance of counsel in a criminal case was ineffective. See, e.g, *State v. Thomas*, 236 Neb. 553, 462 N.W.2d 862 (1990); *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990), *cert. denied* 499 U.S. 931, 111 S. Ct. 1338, 113 L. Ed. 2d 269 (1991); *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989); *State v. Ohler*, 219 Neb. 840, 366 N.W.2d 771 (1985).

However, we need not reach this issue, because the record fails to show that Ryan attempted at any time to offer expert testimony to establish his claim of ineffective assistance of trial counsel. An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration upon appeal. *State v. Tanner*, 233 Neb. 893, 448 N.W.2d 586 (1989); *State v. Brockman*, 231 Neb. 982, 439 N.W.2d 84 (1989); *State v.*

Narcisse, 231 Neb. 805, 438 N.W.2d 743 (1989). This assignment of error is without merit.

2. Striking Claims

Ryan next assigns as error the postconviction court's striking of several of Ryan's claims prior to his hearing. The record reflects that the postconviction court struck issue 6, which claimed that death by electrocution is cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution and Neb. Const. art. I, § 9; issues 27 and 28, challenging the reasonable doubt jury instruction; and issue 29, relating to the state of the appellate record in Ryan's direct appeal.

Ryan has since conceded both in his reply brief and at oral argument that issues 27 and 28 cannot form the basis for relief because the U.S. Supreme Court has recently upheld Nebraska's reasonable doubt instruction. See *Victor v. Nebraska*, ____ U.S. ____, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). Ryan likewise has conceded that issue 29, relating to the complex and confusing nature of the appellate record, lacks legal merit. However, Ryan continues to maintain that the postconviction court erred in striking issue 6 on the constitutionality of electrocution as punishment for crime.

We have held that "[t]he death penalty by electrocution as punishment for crime is not a cruel and unusual punishment within the meaning of the state and federal Constitutions." *State v. Alvarez*, 182 Neb. 358, 366, 154 N.W.2d 746, 751 (1967), *cert. denied* 393 U.S. 823, 89 S. Ct. 81, 21 L. Ed. 2d 94 (1968). More recently, the U.S. District Court for the District of Nebraska has held that death by electrocution does not amount to impermissible cruel and unusual punishment. *Harper v. Grammer*, 654 F. Supp. 515 (1987). There is no legal merit to issue 6.

There being no legal merit to any of the four claims stricken by the postconviction court, Ryan has suffered no prejudice by the court's actions. This assignment of error affords no basis for postconviction relief.

3. Ineffectiveness of Counsel

In assignment of error 3, Ryan asserts that the postconviction

court erred in failing to find that Ryan had ineffective assistance of counsel. Specifically, counsel's alleged ineffectiveness, raised in issues 10 to 14, includes the assertions that counsel (1) failed to advise Ryan on all possible defenses, (2) failed to advise him on the insanity defense, (3) unreasonably asserted the insanity defense, (4) failed to object to a joint trial with Ryan's son, Dennis, and (5) failed to advise Ryan on testifying at trial and at the sentencing hearing. We address each of these five issues seriatim.

(a) Failure to Advise on All Possible Defenses

In issue 10, Ryan asserts that his defense counsel failed to adequately advise him of all possible defenses to the crimes with which he was charged and failed to provide him with a professional assessment of the consequences of the various defense options.

At the postconviction hearing, Ryan testified that in meetings with his trial attorneys, Goos and Ligouri, the only options ever discussed with him were the possibility of a plea bargain and an insanity defense. Ryan argues that the defense of factual innocence, or guilt of the lesser-included offenses of second degree murder or manslaughter were available to him, as well as the option of putting on no defense.

Goos testified at the postconviction hearing that he and Ligouri considered resting at the end of the State's case, but that he rejected that possibility because he considered insanity to be not only a valid defense, but the only viable defense available to Ryan. In his opinion, other defenses were not available to Ryan. For example, Goos stated, there was no evidence to support self-defense as a potential defense. The record reflects that Goos did, however, argue to the jury in his closing statement that the element of malice was lacking in Ryan's actions and that Ryan should not be found guilty of first degree murder.

Ligouri testified at the postconviction hearing that he and Goos had specifically discussed with Ryan, on more than one occasion, the possibility of a second degree murder or manslaughter conviction, but that the predominant defense discussed was the insanity defense. Ligouri further testified that

the possibility of resting after the State's case was discussed between himself and Goos, as well as with Ryan. Ligouri believed that he and Goos had given Ryan a thorough explanation of the possible defenses that could have been asserted in his case.

Our review of the evidence shows that a defense of factual innocence would not have been successful in this case. Even without Ryan's own testimony about the acts leading to Thimm's death, there were four eyewitnesses to most of these acts, and at least two eyewitnesses to the rest. These eyewitnesses each testified to Ryan's sodomizing, whipping, and shooting of Thimm. The pathologists for both Ryan and the State testified that either of these first two acts could have been fatal to Thimm. There was also testimony from Ryan and other witnesses that "Yahweh" desired that Thimm die before 6 p.m. on the day of his death.

The conflict in testimony as to whether Goos and Ligouri discussed possible defenses with Ryan was resolved adversely to Ryan by the postconviction trial judge, who, as trier of fact, resolves such conflicts in the evidence. That judge's finding is not clearly erroneous. Moreover, implicit in the jury's verdict finding Ryan guilty of first degree murder is its rejection of factual innocence, as well as the lesser-included offenses of second degree murder and manslaughter, upon which the jury was instructed. Therefore, even assuming that his trial counsel failed to adequately discuss possible defenses with him, Ryan suffered no prejudice thereby. In passing, we note that the postconviction judge was a judge other than the one who presided over Ryan's jury trial and sentencing.

(b) Failure to Advise on Insanity Defense

Ryan also claims, in issue 11, that trial counsel failed to advise him on the implications of the insanity defense. According to Ryan, the only thing he was told about the insanity defense was that it was the only way to "keep [him] out of the electric chair."

Both Goos and Ligouri testified at the postconviction hearing that they discussed the insanity defense repeatedly and at length with Ryan. Ligouri testified that Ryan was fully apprised of the

consequences of asserting an insanity defense, including that Ryan would be required to submit to examination by a State psychiatrist, that information would be available to the State through the psychiatrist that would be otherwise unavailable to the State, that to some extent Ryan would be waiving his privilege against self-incrimination, and that evidence of some uncharged misconduct would become admissible at trial.

Again, the postconviction trial judge, as the fact finder, resolved this conflict in evidence against Ryan, and it was not clearly erroneous for him to do so.

(c) Assertion of Insanity Defense

Ryan contends in issue 12 that his trial counsel unreasonably asserted an insanity defense over his objection, in violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution.

Although Ryan testified at his postconviction hearing that he was adamantly opposed to the insanity defense and objected repeatedly to its assertion, he admitted that he cooperated with a psychiatrist who examined him on his own behalf, as well as one who examined him for the State. Ryan further conceded that at a "pretrial thing" at Falls City, he told his attorneys to "do whatever you think you've got to do, but . . . I'm not going to go any further with your insanity crap."

During direct examination of Ryan at trial, the following exchange took place between Ryan and Goos:

Q: Do you think that you are crazy?

A: Me?

Q: Yes.

A: No, I don't.

Q: Do you think you were crazy back when James Thimm was killed?

A: No. I was doing what I felt we was told to do whether it was what I wanted or not.

Q: You know that Mr. Ligouri and I filed a notice of insanity defense in this case?

A: Yeah, and you know I argued with you about it.

Q: Well, were we successful finally in getting you to agree that we put the question to the jury even though you

objected to our doing so?

A: I finally told you, "*If that's what you wanted to do, do it,*" but it was at my objection, and that's what you done.

(Emphasis supplied.)

Goos testified that he had no memory of Ryan repeatedly stating to trial counsel that he did not wish to raise the insanity defense. Rather, Goos testified that Ryan was "very cooperative" with the insanity defense and made no objection to it even after the trial was over.

Ligouri testified that while Ryan was not in favor of the insanity defense, he did consent to its use in his behalf. Ligouri stated that he found Ryan to be a cooperative client who entrusted the decision on the use of the insanity defense to his defense attorneys.

Both attorneys testified that Ryan cooperated with the psychiatrists utilized in connection with the case. The postconviction trial judge, in refusing Ryan relief on this issue, stated that Ryan "objected to being called crazy, but authorized his counsel to use the [insanity] defense."

A case directly on point with the present case is *Gacy v. Welborn*, 994 F.2d 305 (7th Cir. 1993). In that case, the defendant was convicted of the serial killing of 33 young men whom he lured to his home for homosexual liaisons. Gacy restrained his victims, strangled them to death, and then disposed of most of the bodies in the crawl space of his home.

Gacy relied on an insanity defense, but was convicted of 33 counts of murder and was sentenced to death for 12 of the killings. During the course of the trial, Gacy announced to the court that he was " 'against the insanity defense from the beginning.' " 994 F.2d at 317.

In his petition for a writ of habeas corpus, Gacy claimed that his defense counsel had raised the insanity defense over his objections, thus depriving him of the ability to control decisions vital to his defense. The U.S. Court of Appeals for the Seventh Circuit rejected this argument, stating:

> As for the contention that counsel barged ahead with an unwanted insanity defense . . . the evidence gets in the way. Gacy cooperated with extended interviews and tests

> by six experts for the defense and another six for the state, not the behavior you would expect of a person who wanted to stand on a plain denial of guilt.

994 F.2d at 317.

We note that two psychiatrists and a clinical psychologist testified on Ryan's behalf at trial. Dr. William S. Logan, a psychiatrist, had conducted two interviews with Ryan, the first lasting approximately 8 hours and the second lasting approximately 1½ hours. Dr. Logan testified that there were only one or two times when Ryan refused to answer his questions. He stated that he personally did not do any psychological testing of Ryan.

The other psychiatrist who testified on Ryan's behalf, Dr. Maurice K. Temerlin, had interviewed Ryan for approximately 3½ hours. Although Dr. Temerlin testified that Ryan was initially tense and angry, Dr. Temerlin never indicated that Ryan had failed to cooperate with the interview. In fact, both Dr. Logan and Dr. Temerlin were able to obtain enough information from Ryan to evaluate him and to form a medical opinion as to his psychiatric condition.

Dr. Robert Schulman, a clinical psychologist who testified in Ryan's behalf, testified that he had conducted a 4-hour interview with Ryan in order to perform a battery of intellectual and personality tests. According to Dr. Schulman, he used at least eight separate evaluation techniques, including a Rorschach test, on Ryan. He was also able to arrive at a diagnostic conclusion on the basis of his testing.

Dr. Emmett M. Kenney, a psychiatrist, evaluated Ryan for the State. Dr. Kenney examined Ryan for 1 hour 20 minutes and also relied on the report of a Dr. Strider, a psychologist who had evaluated Ryan upon Dr. Kenney's recommendation. Dr. Kenney testified that Ryan refused to talk to him about some things, including the events surrounding Thimm's death. Dr. Kenney also testified that according to Dr. Strider's report, one psychological test of Ryan was aborted because Ryan refused to follow the instructions, and another, the Rorschach or inkblot test, was invalid because Ryan did not provide a sufficient number of responses for the test to be interpreted.

Ryan testified at his postconviction hearing that he did, in

fact, agree to talk to Dr. Logan, although he claimed that he was uncooperative in Dr. Logan's testing of him. According to Ryan, he "took part of them and got up and walked out. . . . They was looking at ink blots and things like this, and they had one that had . . . hundreds of questions, and I done part of them and that was the end of it. I just left."

Attorney Ligouri testified that in his opinion, Ryan was cooperative with both Dr. Logan and Dr. Kenney. He did not recall either Dr. Logan or Dr. Kenney asking Ryan to perform any tests. Attorney Goos also testified that Ryan cooperated with the many doctors who examined him.

Ryan's testimony that he did not fully cooperate with Dr. Logan is inconsistent with the trial testimony of Dr. Logan, as well as with the postconviction hearing testimony of his trial attorneys. The testimony of Ligouri and Goos, as well as the trial testimony of the psychiatrists and the psychologist who examined Ryan, leads to the inescapable conclusion that Ryan did cooperate with the experts who were assisting him in his insanity defense and that it was only the *State's* experts that Ryan refused to cooperate with to some degree. We agree with the *Gacy* court that this is not the behavior one would expect from a defendant who is completely opposed to the assertion of an insanity defense.

Moreover, Ryan's jury trial testimony reflects that although he did not think he was crazy and he objected to the insanity defense, he had agreed to let his trial attorneys proceed with the insanity defense if they wanted to. As the court noted in *Gacy v. Welborn*, 994 F.2d 305, 317 (7th Cir. 1993), "A statement such as 'I was against the insanity defense from the beginning' is some distance from 'I directed [trial counsel] to drop that defense, and he refused.' Being 'against' a defense at the outset is consistent with yielding to the judgment of those who know better." We find that Ryan acquiesced in the assertion of the insanity defense.

We hold that the insanity defense for Ryan was an objectively reasonable trial strategy. Goos and Ligouri were faced with the almost impossible task of defending a man who had repeatedly committed various acts of most horrible torture upon another human being; who did these acts in the name of an angry deity;

who heard his deity speak audibly to him; who believed that every aspect of his life, as well as the lives of others in the group, was directed by that deity through an arm test; who believed he possessed the spirit of an archangel; who believed he could predict the future and read the minds of others in the group; who saw visions in the sky; who believed that a female group member's infant had been divinely conceived; and who stated that he was directed by his deity to marry four women, even though he was already legally married to another woman.

It is an understatement to say that trial counsel was presented with an almost insurmountable set of facts. Goos testified that he could perceive no disadvantages to using the insanity defense that would outweigh its use, because "the man was obviously either insane or he was unbelievably cruel and subhuman." Additionally, it is apparent from the record that the defense of factual innocence would have been unsuccessful, as were counsel's arguments in favor of a lesser-included offense.

In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See, also, *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993); *State v. Nielsen, supra*; *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992).

Given the facts of this case, we decline to second-guess the decision of Ryan's trial counsel to assert an insanity defense. Based upon the evidence in this case, we agree with the postconviction trial judge that the assertion of the insanity defense on Ryan's behalf was a reasonable strategic choice by counsel. Therefore, Ryan is not entitled to postconviction relief on this issue.

(d) Failure to Object to Joint Trial

Ryan contends in issue 13 that his trial counsel failed to adequately advise him of the consequences of a joint trial with

his son, who had also been charged with first degree murder in the death of Thimm. Ryan claims that the consolidation was prejudicial to his defense, because his son's trial counsel blamed everything on Ryan.

In Ryan's direct appeal, he claimed that he was prejudiced by the trial court's failure to sustain his motion to sever his case from his son's case. See *Ryan I*. At that time, we held that Ryan had failed to show that he was prejudiced by the joinder of his trial with the trial of his son. *Id.*

Although Ryan now frames this issue as one of ineffective assistance of counsel, we nevertheless continue to adhere to our holding in *Ryan I*. Because we have already determined that Ryan was not prejudiced by having a joint trial, he cannot have suffered any prejudice from trial counsel's allegedly deficient advice on this issue, and we need not address whether such performance was in fact deficient. See *Strickland v. Washington, supra*. Moreover, in this state, from a procedural standpoint, a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Nielsen, supra*; *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 97, 126 L. Ed. 2d 64. Ryan is not entitled to postconviction relief on issue 13.

(e) Failure to Advise on Testifying

In the last issue raised in assignment of error 3, which Ryan discusses as issue 14, Ryan complains that his trial counsel failed to advise him about testifying at trial and at sentencing. In a similar vein, Ryan alleges as part of assignment of error 4 that he was denied effective assistance of trial counsel because counsel permitted him to testify at trial. We elect to consolidate all issues related to Ryan's testifying at trial and sentencing for the purpose of discussion.

Ryan testified at his postconviction hearing that his trial counsel did not discuss with him the advisability of testifying in his own behalf at either his trial or his sentencing hearing, nor did they inform him of his Fifth Amendment right to remain silent and not take the witness stand. However, Ryan admitted

on cross-examination that he never told either of his trial attorneys that he did not wish to testify at trial.

Ligouri testified at the postconviction hearing that he had discussed the issue of testifying at trial with Ryan. He recalled informing Ryan "very early on" that he had the right not to testify. Ligouri described Ryan as a "pretty cooperative client" who was willing to go along with what his attorneys deemed to be in his best interests. Ligouri testified that Ryan expressed no reservations about testifying and that Ryan wanted to testify. Similarly; Goos testified at the postconviction hearing that he and Ligouri talked to Ryan at length about his proposed testimony and that Ryan never indicated that he did not wish to testify.

Ligouri stated that he and Goos discussed Ryan's testimony with him on more than one occasion and that he went over an outline of the questions that would be asked. Ligouri also testified that Ryan was informed that if he did testify, he would be subject to cross-examination, and Ligouri discussed with Ryan what questions might be covered on cross-examination.

Ligouri testified that the purpose of having Ryan testify at trial was to support the insanity defense and to support Ryan's claim that he had not struck the fatal blow to Thimm. Goos testified that Ryan also wished to take the witness stand in order to refute the testimony of certain witnesses he claimed were lying. Goos further testified that Ryan's testimony supported the defense's argument that Ryan had not acted maliciously, but, rather, had acted in response to the dictates of his god, "Yahweh."

Ryan now complains about only two topics on which his defense counsel elicited trial testimony. At his postconviction hearing, Ryan testified that he objected to trial counsel's questioning him about his belief that the telephone conversations of private parties could be selectively monitored by the government through satellite communications, and he especially objected to counsel's implication following such testimony that Ryan was "nuts, like that couldn't happen." Ryan also objected to questioning about his relationship with his mother while he was growing up. Ryan testified that he felt

counsel had not adequately prepared him to testify on these two topics.

However, Ryan was apparently very willing to testify to the events surrounding the killing of Thimm, as indicated by the following exchange between Ryan and his counsel during his postconviction hearing:

> Q. . . . [T]hose are examples of things that you testified to that you weren't prepared for?
>
> A. Yeah. *I thought that they was going to ask me what happened out there at the farm with the incident and that's what we would be talking about*, and, like I say, he got off on this phone thing, and then wanting to talk about whether my mom and I got along or not, and I didn't have anything to say.

(Emphasis supplied.)

From this testimony and the rest of the record before us, we can only conclude that Ryan had no objection to testifying in his own behalf at the time of trial and that he has no present objection to having done so. Whether Ryan got along with his mother during his childhood is so collateral to the charge against him as to be insignificant, and his testimony that his telephone calls were being monitored by satellite clearly demonstrated his paranoia and was relevant to his insanity defense.

Ryan has not been prejudiced by the above complained-of testimony, nor was he prejudiced by any of his other testimony. As we have previously stated, the evidence against Ryan, testified to by eyewitnesses to the torture and killing of Thimm, was overwhelming. In his postconviction relief trial, Ryan failed to present any evidence from which either the postconviction court or this court could infer that had he exercised his Fifth Amendment right to remain silent either at trial or at his sentencing hearing, there was a reasonable probability that the result of Ryan's trial or sentencing would have been different.

Because Ryan has suffered no prejudice by his decision to testify at trial or at his sentencing hearing, we cannot say that trial counsel were ineffective in advising him and in permitting him to testify at either proceeding. Ryan is not entitled to postconviction relief on this issue.

4. False Testimony

In assignment of error 4, discussed by Ryan as issue 18, Ryan complains that he was denied effective assistance of counsel at sentencing because counsel failed to respond to allegedly false testimony. He further alleges in this assignment of error that his counsel was ineffective in permitting him to testify at trial. We have addressed this second issue under assignment of error 3, above.

Issue 18 concerns the testimony of Dr. Logan, the psychiatrist who testified for Ryan in support of his insanity defense. At trial, Dr. Logan testified that Ryan had told him of an "altercation" which occurred when Ryan was being inducted into military service. At Ryan's sentencing hearing, Dr. Logan again testified that Ryan apparently fought with military police and was discharged from the military 3 days later.

Following Dr. Logan's testimony at the sentencing hearing, Ryan testified that Dr. Logan had not been telling the truth about the induction incident. Ryan claimed that he was sent home for a medical reason on the third day of induction physicals. At his postconviction hearing, Ryan testified that he had not gotten into an altercation with military police at the induction center and that he had not told Dr. Logan that he was involved in such an incident.

Ryan asserts that his trial counsel was ineffective for failing to impeach Dr. Logan's testimony. He concedes that counsel's failure to respond to this issue would not have affected the outcome of the trial. However, Ryan claims that it may have affected the outcome of his sentencing, because the court used the incident to support aggravating circumstance (1)(a) in sentencing him to death.

We need not reach the issue of whether trial counsel was ineffective for failing to impeach Dr. Logan's allegedly false testimony. As we discuss in part IV(9) of this opinion in connection with assignment of error 9, Ryan has conceded that the issue of whether the evidence was sufficient to support aggravating circumstance (1)(a) was fairly presented to this court on direct appeal and that he is merely preserving the issue for federal review.

A motion for postconviction relief cannot be used to secure

review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993); *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 97, 126 L. Ed. 2d 64. Because Dr. Logan's testimony about the induction center incident was part of the evidence used in support of aggravating circumstance (1)(a), which evidence this court found to be sufficient in Ryan's direct appeal, Ryan cannot procedurally claim at this time that he was prejudiced by his trial counsel's failure to impeach that testimony. This assignment of error is without merit.

5. SENTENCING ISSUES

In assignment of error 5, Ryan complains that the postconviction court erred in failing to find that he had been denied effective assistance of counsel in connection with the preparation and presentation of issues at sentencing, including the development of all statutory and nonstatutory mitigating circumstances, meeting statutory aggravating circumstances, making all available constitutional challenges to the death penalty, and formulating a reasonable trial strategy with respect to sentencing.

In addition to the four issues identified in the assignment of error itself, Ryan identifies several additional issues which he attempts to discuss simultaneously.

(a) Preparation and Presentation of Issues at Sentencing

Ryan alleges as issue 21 that trial counsel was ineffective for failing to properly prepare for sentencing, failing to obtain from the prosecution evidence which the prosecution intended to use at sentencing, and failing to discuss strategy with Ryan. This allegation is completely unsupported by the evidence, beyond Ryan's bald assertion that he had no contact with counsel in preparation for sentencing.

Goos, who was Ryan's principal attorney at the sentencing stage, testified to the contrary. Goos stated that he had kept Ryan fully apprised of what was happening in the case from the very beginning, including during preparation for the sentencing hearing. Goos specifically recalled discussing sentencing issues

with Ryan, including mitigating and aggravating circumstances.

According to Goos, his preparation for sentencing included obtaining records pertaining to attacks on the death penalty; performing a great deal of research; meeting with Ryan at the penitentiary; preparing motions and pleadings; meeting with and telephoning other attorneys, as well as possible witnesses for the sentencing hearing; and many conferences with his law clerk.

Goos' testimony is supported by documents submitted into evidence at the postconviction hearing, including letters from Goos to Ryan and Goos' time log on the case, which indicates that Goos spent over 138 hours preparing for Ryan's sentencing hearing.

Based upon this evidence, the postconviction court's finding that Ryan "[did] not point to a specific failure of counsel that would have changed the evidence considered by the court at sentencing or would make the imposition of the death penalty less likely" is not clearly erroneous.

Ryan has failed to demonstrate a reasonable probability that but for counsel's deficient performance, the outcome of his sentencing would have been different. As discussed elsewhere in this opinion, the evidence in this case is more than sufficient to support, beyond a reasonable doubt, Ryan's conviction and sentence. Therefore, we need not reach the question of whether counsel's performance was deficient. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Ryan is not entitled to postconviction relief on this issue.

(b) Failure to Develop all Mitigating Circumstances

In issue 22, Ryan asserts that counsel unreasonably failed to argue the applicability of mitigating circumstances (2)(b) and (2)(f) of § 29-2523.

Mitigating circumstance (2)(b) applies when "[t]he offender acted under unusual pressures or influences or under the domination of another person." In connection with this, Ryan argues that he was strongly under the religious influence of the Reverend James Wickstrom at the time he killed Thimm. Wickstrom was a religious leader connected with the Posse

Comitatus and a group known as the Identity Movement. Prior to the time Ryan and his followers retreated to the Rulo farm, Ryan had spent a period of time attending Wickstrom's lectures, as well as listening to audiotapes and watching videotapes prepared by Wickstrom.

However, the evidence shows that Ryan's beliefs and acts went far beyond those espoused by Wickstrom. For example, Dr. Logan testified at trial that the arm test was generally accepted among Identity Movement groups to test for impurities in food based on Old Testament dietary laws, but that its use to ask routine questions of "Yahweh" about every aspect of daily existence was a deviation from Identity Movement beliefs. Dr. Logan further testified that other Identity Movement members did not believe, as did Ryan, that they possessed the spirits of archangels and had other supernatural powers.

Members of the Rulo group who testified at trial, including Ryan, consistently denied listening to the Wickstrom tapes with any frequency, even though such tapes were available. Most importantly, all members of the group perceived Ryan to be their leader, with the group members acting at his direction.

The evidence would not have supported mitigating circumstance (2)(b), and therefore, counsel's performance could not be found deficient for failing to argue its applicability.

Mitigating circumstance (2)(f) of § 29-2523 applies when "[t]he victim was a participant in the defendant's conduct or consented to the act." Ryan argues that Thimm consented to his abuse in its early phases and that Thimm had opportunities to escape but did not do so.

At the postconviction hearing, when questioned about Ryan's contention that Thimm could have left the farm but chose to stay even after his first day of torture, Goos responded, "I never saw that as a very strong argument . . . . The man was tied down." We agree with Goos.

Our review of the trial record reflects that Thimm was kept chained in the hog confinement building when he was not being tortured and that during most of the times when Thimm was being tortured, his hands or feet, or both, were bound with baling wire. In fact, the wire was still present around Thimm's hands and feet at the time his body was exhumed.

Moreover, there is evidence in the record to suggest that Thimm was in a weakened condition at the time his torture commenced. Thimm had been shot through the face by Dennis Ryan several weeks prior to his death, and there was testimony that Thimm's diet following his demotion to slave status was less than desirable, consisting of small birds that had been shot by the other men.

Based on the record in this case, it is inconceivable how Thimm could have escaped under the circumstances or how Thimm's behavior could in any rational way be interpreted as acquiescence to the torture he was forced to endure. It is abundantly clear that there was no chance that Ryan could have convinced any conscientious sentencing court of the existence of mitigating circumstance (2)(f), and counsel was not deficient for failing to argue its applicability.

Although Ryan assigns as error counsel's failure to develop nonstatutory mitigating circumstances, he does not discuss this in his brief, except to suggest that even if Wickstrom's influence of Ryan did not support mitigating circumstance (2)(b), this could have been considered as a nonstatutory mitigating circumstance. Ryan does not explain how this issue would have been any more successful as a nonstatutory mitigating circumstance than it would have been as a statutory mitigating circumstance. He merely asserts that the issue is "ripe for further development." Brief for appellant at 100. The burden is upon Ryan, as a criminal defendant seeking postconviction relief, to establish a basis for such relief. See, *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995); *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994). This he has failed to do.

Ryan is not entitled to postconviction relief on issue 22.

(c) Failure to Make All Constitutional Challenges to Death Penalty

Ryan claims that the record supports the following direct constitutional challenges to the death penalty: (1) The jury verdict was based, at least in part, on an aiding and abetting theory; (2) the court refused to permit the jury to consider a diminished capacity defense; and (3) trial counsel failed to understand the burden of proof as to mitigating circumstances.

We turn first to Ryan's claim that his death sentence should have been challenged on constitutional grounds because the jury verdict was based in part upon an aiding and abetting theory. We have found no evidence in the record to support such a claim. The jury was instructed in the alternative, that is, that the State was required to prove that Ryan killed Thimm, "either alone or while aiding and abetting another."

The record reflects that five verdict forms were given to the jury: guilty of first degree murder, guilty of second degree murder, guilty of manslaughter, not responsible by reason of insanity, and not guilty. The jury returned the verdict form finding Ryan "guilty of first degree murder." There is no indication whether the jury based its verdict upon a finding that Ryan acted alone or upon a finding that Ryan was aiding and abetting another in the killing of Thimm.

Assuming that the jury in fact rejected an aiding and abetting theory, Ryan could not have been prejudiced by any failure of trial counsel to make a constitutional challenge to the death penalty on that basis.

Ryan also argues that he could not have aided and abetted another in the killing of Thimm because only he, of the five participants in the killing, was convicted of first degree murder. This argument is apparently premised on the erroneous notion that an aider and abettor cannot be convicted of a greater offense than a principal. Such is not the law in this state. In *State v. Secret*, 246 Neb. 1002, 1009–10, 524 N.W.2d 551, 557 (1994), we held:

> The common-law distinction between a principal and an aider and abettor has been abolished in Nebraska. *State v. Thomas*, 210 Neb. 298, 314 N.W.2d 15 (1981); *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972). "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." Neb. Rev. Stat. § 28-206 (Reissue 1989). . . .
>
> . . . *An aider and abettor can be convicted of any crime, even a greater offense than the principal, provided the conviction is supported by the evidence of the facts and the defendant's state of mind.*

(Emphasis supplied.)

Therefore, the jury properly could have convicted Ryan of first degree murder on an aiding and abetting theory, if it did in fact choose to do so, even though none of the other participants in the killing were found guilty of first degree murder. Trial counsel could not have successfully challenged Ryan's death sentence on this basis.

Ryan also argues that under the Eighth Amendment, an aider and abettor to a killing cannot be sentenced to death unless there is a finding that the defendant killed or intended that death would result. He cites *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), in support of this proposition. Ryan's reliance upon *Enmund* and *Tison* is misplaced. The *Enmund* case may not be read that broadly, and such is not the holding of *Tison*.

In *Enmund*, the defendant was the driver of a getaway car who sat some 200 yards away on the roadside while two other individuals robbed and killed an elderly couple in their farmhouse. There was evidence that the couple was killed after the husband called out for help and the wife appeared with a gun and shot one of the robbers. Enmund was convicted of first degree murder and robbery and sentenced to death. His sentence was affirmed by the Florida Supreme Court, even though that court concluded that "the only evidence of the degree of [Enmund's] participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes." *Enmund v. State*, 399 So. 2d 1362, 1370 (Fla. 1981).

The U.S. Supreme Court concluded that the imposition of the death penalty, in those circumstances, was inconsistent with the 8th and 14th Amendments and reversed the judgment of the Florida Supreme Court upholding Enmund's death sentence. The Court based its holding on the fact that Enmund neither killed nor intended to kill and that for the purposes of the death penalty, his culpability was limited to his participation in the robbery.

Five years later, in *Tison*, the Supreme Court again addressed the issue of whether the death penalty may be imposed upon a

defendant who has aided and abetted a killing. The facts of that case are significantly different from the facts in *Enmund*. In *Tison*, two defendant brothers and other family members planned and executed the escape of their father and another inmate from prison. After experiencing a breakdown of their vehicle, the group decided to flag down a passing motorist and steal a vehicle.

When John and Donnelda Lyons, accompanied by their 2-year-old child and 15-year-old niece, stopped to render aid, the Tison group took the Lyons vehicle at gunpoint, drove the Lyons family into the desert, and brutally shot all four family members to death with shotguns. Two of the Tison brothers were apprehended after a shootout at a police roadblock. The two brothers were convicted of capital murder, armed robbery, kidnapping, and car theft in connection with the Lyons killings, and the Arizona Supreme Court affirmed those convictions, even though the two brothers had not actually fired the shots killing the Lyons family members.

The Supreme Court, in analyzing *Tison*, revisited its analysis of *Enmund*:

> *Enmund* explicitly dealt with two distinct subsets of all felony murders in assessing whether Enmund's sentence was disproportional under the Eighth Amendment. At one pole was Enmund himself: *the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state*. Only a small minority of States even authorized the death penalty in such circumstances and even within those jurisdictions the death penalty was almost never exacted for such a crime. The Court held that capital punishment was disproportional in these cases. *Enmund* also clearly dealt with the other polar case: the felony murderer who actually killed, attempted to kill, or intended to kill. The Court clearly held that the equally small minority of jurisdictions that limited the death penalty to these circumstances could continue to exact it in accordance with local law when the circumstances warranted.

(Emphasis supplied.) 481 U.S. at 149–50.

The Court recognized that the Tison brothers' cases did not

fall into either of these neat categories. However, the Court further noted that neither do most state laws fall at the poles of the spectrum, but, rather, into two intermediate categories:

> Four States authorize the death penalty in felony-murder cases upon a showing of *culpable mental state such as recklessness or extreme indifference to human life*. Two jurisdictions require that the defendant's *participation be substantial* and the statutes of at least six more, including Arizona, *take minor participation in the felony expressly into account* in mitigation of the murder. [Nebraska is one of these six states. See § 29-2523(2)(e).] These requirements significantly overlap both in this case and in general, for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life.

(Emphasis supplied.) 481 U.S. at 152-53.

The Court focused upon the importance of mental state in its analysis, holding that

> the *reckless disregard for human life* implicit in knowingly engaging in criminal activities known to carry a grave risk of death *represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment* when that conduct causes its natural, though also not inevitable, lethal result.

(Emphasis supplied.) 481 U.S. at 157-58.

Ultimately, the Court held that "*major participation* in the felony committed, *combined with reckless indifference to human life*, is sufficient to satisfy the *Enmund* culpability requirement." (Emphasis supplied.) 481 U.S. at 158.

Thus, while *Enmund* held the death penalty to be unconstitutional in the case of a minor actor who had no culpable mental state with regard to killing, *Tison* allows the death penalty to be imposed on a major participant in a killing who acts with reckless indifference to the life of the victim.

Ryan was not a "minor actor" in the killing of Thimm. As noted above, it is a mitigating circumstance under Nebraska law that "[t]he offender was an accomplice in the crime committed by another person and his participation was relatively minor." § 29-2523(2)(e). In sentencing Ryan to death, the sentencing

court explicitly rejected this mitigating circumstance, stating:

> The trial record clearly identifies and shows that the defendant was the leader on the "Rulo farm" and more specifically, was the leader and instigator of the atrocities committed on James Thimm. Michael W. Ryan was the first person to probe, whip, shoot a finger, break a limb, and skin James Thimm.

Ryan's death sentence does not offend *Enmund*.

There is also ample support for Ryan's death sentence under the *Tison* standard. Regardless of whether Ryan struck the final, fatal blows to Thimm, the evidence of his involvement in the killing is overwhelming. Ryan participated fully in the abuse of Thimm. It was Ryan who consulted "Yahweh" as to the various tortures to be inflicted upon Thimm. It was Ryan who communicated "Yahweh's" desires as to Thimm's fate to the four other participants and directed them to carry out "Yahweh's" wishes. By any definition, Ryan was a major participant in the killing of Thimm.

Moreover, Ryan's actions in connection with the torture and killing of Thimm exhibited a reckless indifference to human life. By his own admission, he was aware that the torture being inflicted upon Thimm carried a grave risk of death. In fact, Ryan testified that "Yahweh" had indicated to him that Thimm should die. Ryan felt at some point that it was inevitable that Thimm would die. Even though he knew that Thimm was severely injured after his bowel had been ruptured, Ryan did not seek any type of medical attention for Thimm in order to save his life. Greater indifference to human life cannot be imagined.

As Justice Sandra Day O'Connor explained in *Tison*,

> some nonintentional murderers may be among the most dangerous and inhumane of all[, for example,] *the person who tortures another not caring whether the victim lives or dies* . . . . This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill."

(Emphasis supplied.) 481 U.S. at 157.

Ryan's death sentence meets the constitutional requirements of *Tison*. Ryan could not have prevailed on any constitutional challenge to his death sentence based upon his claim that his

verdict was based in part upon an aiding and abetting theory. Therefore, Ryan suffered no prejudice from his counsel's failure to make such a challenge.

As to Ryan's contention that counsel should have made a constitutional challenge to the death penalty based on the court's refusal to permit the jury to consider a diminished capacity defense, we held in *Ryan I* that such an instruction is not required under our law and that the trial court had not erred in refusing to give the jury Ryan's requested instruction on diminished capacity. Specifically, we stated that " 'a special diminished capacity instruction need not be given where the jury had otherwise been properly instructed that intent was an element of the crime charged.' " 233 Neb. at 105, 444 N.W.2d at 632. Therefore, Ryan has suffered no prejudice because any challenge to the death penalty on this basis would have been unavailing. This issue will not be revisited further, even though it is now framed in the language of ineffective assistance of counsel.

Ryan also claims that trial counsel was ineffective for failing to understand the burden of proof as to mitigating circumstances. Ryan states in his brief that "Goos testified [at the postconviction hearing] that . . . he may have believed at the time, that the burden of proof was on the State to disprove the existence of the mitigating factors he presented." Brief for appellant at 99. Ryan also maintains that there is "no discussion in the sentencing brief concerning which party had the ultimate burden of persuasion with respect to statutory mitigating circumstance[s]." *Id.*

The record is to the contrary. On October 16, 1986, prior to sentencing, Goos submitted a document to the sentencing court entitled "Argument and Brief in Support of Life Imprisonment." In a subsection entitled "Statutory and Nonstatutory Mitigating Circumstances," Goos wrote the following:

> There is another marked difference between the aggravating and mitigating factors, and that arises from the fact that the aggravating must be proven beyond a reasonable doubt whereas *the mitigating need only be proven by a preponderance of the evidence. And using that standard of proof, defendant believes that he is entitled to*

> *(1) (b), (c) and (g) of the statutory mitigating circumstances . . . .*

(Emphasis supplied.)

Clearly, Goos was aware that it was the defendant's burden to prove the existence of the statutory mitigating circumstances, and to prove their existence by a preponderance of the evidence. To suggest otherwise borders on frivolity.

(d) Formulating Trial Strategy With Respect to Sentencing Issues

After careful consideration, we are unable to determine any issues raised by Ryan in this subsection of assignment of error 5 which have not been addressed in detail elsewhere in this opinion.

(e) Luke Stice Plea Bargain

As part of assignment of error 5, Ryan also discusses issue 24, in which he contends that his "trial counsel unreasonably pled the Defendant no contest to second degree murder in connection with the Luke Stice case, prior to his being sentencing [sic] in the present case, so as to establish the existence of an aggravating circumstance . . . ." Brief for appellant at 87.

The record reflects that, on July 28, 1986, while awaiting sentencing for the killing of Thimm, Ryan pled no contest to an amended information charging him with murder in the second degree in the killing of 5-year-old Luke Stice. Ryan had been scheduled for trial on a charge of first degree murder in the death of Stice, commencing on August 4.

On August 28, 1986, Ryan was given a life sentence for the killing of Stice. Ryan's sentencing hearing for the first degree murder of Thimm was held on September 15 and 16, having been continued at Ryan's request until after his trial for the killing of 5-year-old Luke Stice.

On October 16, 1986, Ryan was sentenced to death for the killing of Thimm. The sentencing court found the existence of aggravating circumstance (1)(a) of § 29-2523, that "[t]he offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal

activity," supported the death penalty.

The sentencing court cited Ryan's numerous abuses of Luke Stice, as well as other incidents of assaultive behavior by Ryan, as facts supporting beyond a reasonable doubt the existence of aggravating circumstance (1)(a). However, the court specifically stated in its sentencing order that Ryan "did not have, prior to the death of James Thimm, a prior conviction of another murder or a crime involving the use or threat of violence to the person."

Ryan has wrongly concluded that it was his plea of no contest that established the existence of aggravating circumstance (1)(a). It was Ryan's acts toward 5-year-old Stice prior to the boy's death, and not Ryan's conviction of second degree murder for his killing of Stice, which the court considered in aggravation of Ryan's sentence. Those acts were part of the trial record and could have been used in support of aggravating circumstance (1)(a) even if Ryan had not pled no contest at the time he did.

Moreover, in order to satisfy the prejudice requirement in the context of a plea, a defendant must show that there is a reasonable probability that but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial. *State v. Escamilla*, 245 Neb. 13, 511 N.W.2d 58 (1994). When a defendant pleads guilty on advice of counsel, the defendant's attorney has the duty to advise the defendant of the available options and possible consequences. *Id.*

Ryan testified at this postconviction hearing that attorney Goos came to the penitentiary after Ryan's trial for Thimm's murder. Ryan stated that Goos

> started wanting to talk about the Luke Stice case, and he didn't want to try it. He wanted to come up with a plea bargain of some sort. He had too much to do. We couldn't win it, and I would have a harder time fighting two death penalty cases because he said . . . we know you're going to get the death sentence, and he said on one, he said, "If we don't have to fight the other," he said, "it will be a lot easier."

When asked what his reaction to this was, Ryan replied:

> I didn't like it. I told him, I said, "I didn't do it." [Goos] didn't want to fight it. He said, "Well, that's right,

> he said, "Okay, I believe you." He said, "There's been too much testimony for me not to understand what happened," but, he says, "We can't win. You already seen that."

Ryan further testified that Goos did not discuss with him the effect that a plea in the Stice case might have on his sentencing in the Thimm case or that a no contest plea to second degree murder might be used to establish the existence of a statutory aggravating circumstance in the Thimm case.

Goos testified at the postconviction hearing that Ryan wanted to plead no contest to a reduced charge of second degree murder for the Stice killing. Goos stated that Ryan did not want to go to trial on that charge, even though he told Ryan that he "thought we could win that case or at least get a manslaughter," and that he in no way encouraged Ryan to plead no contest. Goos further testified that he always lets his clients decide whether they want to have a trial or to enter a plea and that Ryan wanted to enter the plea or it would not have been done. Goos testified that Ryan was told that the plea could be used as an aggravator, that he understood this, and that he wanted to enter the plea anyway.

Goos' testimony at the postconviction hearing is consistent with his notes made at the time he was representing Ryan, which were entered into evidence at the postconviction hearing. In a note dated June 24, 1986, Goos wrote the following: "CF w/Mike at Pen. Says he wants to P.N.C. - thinks he can challenge it later - I said NO!! - denies again any guilt. I said I didn't want to be a party to it; that we had a chance to win, or at least get manslaughter." On cross-examination, Goos translated the abbreviations in the memo. He testified that the first sentence meant "conference with Mike at Pen." "P.N.C." meant "plead no contest." Goos also explained that he "didn't want [Ryan] to plead no contest thinking later he could get [the conviction] removed."

Goos' notes from July 28, 1986, the day Ryan entered his plea of no contest, were also entered into evidence. In those notes, Goos wrote that " 'facts underlying this plea' may be used in aggravation." Goos testified that the judge discussed this at the time Ryan made the plea and that he thought the quoted

language was probably from what the judge had said. We note that in accepting Ryan's plea and finding him guilty of murder in the second degree, the court found such plea to be entered "voluntarily, knowingly, and intelligently, *with full understanding of the possible consequences.*" (Emphasis supplied.)

The postconviction court found that Ryan "questions the timing of the plea of no contest to the Luke Stice second degree murder, though the record shows Ryan, at the time, made that choice." The postconviction court resolved this conflict in the evidence against Ryan, and the record supports such a finding. Therefore, the postconviction court was not clearly wrong in so finding. The record also reflects that Ryan was advised that the facts underlying his plea could be used in aggravation of his sentence for the killing of Thimm.

Ryan has not shown any reasonable probability that but for the advice of Goos, he would have insisted upon going to trial. In fact, the opposite is true. Ryan appears to have insisted upon pleading no contest *in spite of* the advice of counsel. Ryan is not entitled to postconviction relief on this issue.

(f) Failure to Object to Evidence of Aggravating Circumstances

In issue 25, Ryan alleges that his trial counsel unreasonably failed to object to evidence offered by the State to support aggravating circumstances (1)(a) and (1)(d), and failed to prepare to confront or rebut such evidence. The gist of Ryan's argument in his brief appears to be that his attorney was ineffective for failing to raise the issue of whether evidence of other crimes, admitted for a limited purpose at trial, could properly be considered by the sentencing court.

According to Neb. Rev. Stat. § 29-2522 (Reissue 1989), when a court imposes the death penalty, it is required to make its determination in writing, and such determination "shall be supported by written findings of fact *based upon the records of the trial* and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination." (Emphasis supplied.)

Neb. Rev. Stat. § 29-2521 (Reissue 1989) states that "[i]n the

proceeding for determination of sentence, evidence may be presented *as to any matter that the court deems relevant to sentence* . . . . Any such evidence which the court deems to have probative value may be received." (Emphasis supplied.)

Thus, the sentencing court, in imposing the death penalty, has not only the statutory *authority* to consider the trial record, but is statutorily *required* to make written findings of fact based upon that record.

Moreover, we have held that "the sentencing phase . . . is separate and apart from the trial phase and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence." *State v. Anderson and Hochstein*, 207 Neb. 51, 72, 296 N.W.2d 440, 453 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981).

A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed. See, e.g., *State v. Hoffman*, 246 Neb. 265, 517 N.W.2d 618 (1994); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990).

Even though the evidence of prior crimes and bad acts on the part of Ryan had been admitted for a limited purpose at the time of trial, the sentencing court was entitled, in its discretion, to consider and use such evidence in determining Ryan's sentence. That being the case, Ryan has suffered no prejudice from any failure of counsel to object to the use of such evidence in sentencing. Ryan is not entitled to postconviction relief on this issue.

6. Constitutionality of Aggravating Circumstances

Next, Ryan complains that the aggravating circumstances used to support his death penalty are unconstitutional both facially and as applied to him. These issues were raised as assignments of error 6 and 7, and encompass issues 1, 2, and 3.

Section 29-2523(1) enumerates eight aggravating circumstances which may be considered by the sentencing court

in determining whether to impose a death sentence upon a defendant:

> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;
>
> (b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;
>
> (c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;
>
> (d) The murder was especially heinous, atrocious, cruel, *or* manifested exceptional depravity by ordinary standards of morality and intelligence;
>
> (e) At the time the murder was committed, the offender also committed another murder;
>
> (f) The offender knowingly created a great risk of death to at least several persons;
>
> (g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or
>
> (h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(Emphasis supplied.)

The trial court, in sentencing Ryan to death, found beyond a reasonable doubt that aggravating circumstances (1)(a) and (1)(d) existed in Ryan's killing of Thimm. Ryan challenges the constitutionality of both of these aggravating circumstances.

(a) Aggravating Circumstance (1)(a)

We first examine the constitutionality of aggravating circumstance (1)(a). In assignment of error 7, Ryan claims that (1)(a) is unconstitutional both facially and as applied to him. In issue 2, Ryan claims that (1)(a) is unconstitutionally vague and overbroad as applied to him because this court, on direct appeal, imputed to Ryan the serious assaultive or terrorizing acts committed by others. Ryan also claims, in issue 3, that his appellate counsel was ineffective for failing to raise on direct

appeal the issue of whether such "vicarious" acts may constitutionally be used to support (1)(a).

Ryan concedes that the constitutionality of aggravating circumstance (1)(a) was properly presented on direct appeal and that the ineffective assistance of counsel claim in issue 3 is therefore moot. However, he argues that this court's analysis of the issue was constitutionally deficient because the terms "substantial history" and "criminal activity" were not adequately narrowed or defined. We disagree.

In *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *cert. denied* 434 U.S. 912, 98 S. Ct. 313, 54 L. Ed. 2d 198, the defendant argued that the terms "serious assaultive or terrorizing criminal activity" were vague and indefinite. We rejected that argument, stating:

> The words "serious," "assaultive," and "terrorizing" are words in common usage with meanings well-fixed and generally clearly understood. *The term "substantial history" is likewise reasonably clear.* "History" refers to the individual's past acts preceding the incident for which he is on trial and "substantial," as here used, refers to an actual, material, and important history of acts of terror of a criminal nature.

(Emphasis supplied.) 197 Neb. at 546, 250 N.W.2d at 879.

Ryan's assertions to the contrary notwithstanding, this court long ago defined the term "substantial history." The term "criminal activity" is one in common usage, with a well-fixed and generally clearly understood meaning.

The U.S. Court of Appeals for the Eighth Circuit, in holding that aggravating circumstance (1)(a) is not unconstitutionally vague, stated that "[t]he Nebraska Supreme Court has provided sufficient guidance to sentencing bodies, concerning this particular aggravating circumstance, to prevent the arbitrary and capricious infliction of the death penalty . . . ." *Moore v. Clarke*, 904 F.2d 1226, 1234 (8th Cir. 1990), *reh'g denied* 951 F.2d 895 (8th Cir. 1991), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992).

Ryan's argument that the terms in aggravating circumstance (1)(a) have not been adequately narrowed and defined is lacking in legal merit, and Ryan has failed in his burden to establish a

basis for postconviction relief on this issue. We decline to further address the issue, Ryan having conceded that his ineffective assistance of counsel claim was properly presented to this court on direct appeal.

(b) Aggravating Circumstance (1)(d)

We now turn to the constitutionality of aggravating circumstance (1)(d), challenged by Ryan as assignment of error 6 and issue 1. The State, in its brief, correctly notes that the question of the constitutionality of this aggravating circumstance was raised and disposed of in Ryan's direct appeal and argues that Ryan may not raise the issue again in a postconviction proceeding.

A death sentence is a "unique penalty" which implicates the 8th and 14th Amendments to the U.S. Constitution. *Furman v. Georgia*, 408 U.S. 238, 310, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring). Whenever a State seeks to impose the death penalty, the discretion of the sentencing body "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

The sentencing authority's discretion must be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Profitt v. Florida*, 428 U.S. 242, 258, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). See, also, *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) (holding that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty" and must "channel" the sentencer's discretion by " 'clear and objective standards' " that provide " 'specific and detailed guidance' " and " 'make rationally reviewable the process for imposing a sentence of death' ").

The imposition of a death sentence is clearly a grave act, and the burden on this State to show that such a sentence has been constitutionally applied to a particular defendant is a heavy one.

Ryan may not be sentenced to death in reliance upon an aggravating circumstance that has not been suitably directed, limited, and defined in a constitutional fashion by this court. We therefore elect to review aggravating circumstance (1)(d) for its constitutionality both facially and as applied to Ryan.

(i) State Law Definition of (1)(d)

Aggravating circumstance (1)(d) of § 29-2523 exists when "[t]he murder was especially heinous, atrocious, cruel, *or* manifested exceptional depravity by ordinary standards of morality and intelligence." (Emphasis supplied.) We have repeatedly stated that this aggravating circumstance

> describes two separate disjunctive circumstances which may operate together or independently of one another. [Citations omitted.] The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said this circumstance includes a " 'pitiless crime which is unnecessarily torturous to the victim' and . . . cases where torture, sadism, or the imposition of extreme suffering exists."

State v. Reeves, 239 Neb. 419, 431, 476 N.W.2d 829, 838 (1991), *cert. denied* 506 U.S. 837, 113 S. Ct. 114, 121 L. Ed. 2d 71 (1992). See, also, *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), *cert. denied* 484 U.S. 905, 108 S. Ct. 247, 98 L. Ed. 2d 205 (1987); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), *cert. denied* 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987); *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864; *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied* 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158; *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). This first circumstance is typically referred to as the "first prong" of (1)(d).

This court has narrowed the class of especially heinous, atrocious, or cruel murders to include those involving torture, sadism, or sexual abuse. See, *State v. Palmer, supra*; *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied* 469 U.S. 1028, 105 S. Ct. 447, 83 L. Ed. 2d 372; *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977), *cert. denied* 439

U.S. 882, 99 S. Ct. 220, 58 L. Ed. 2d 194 (1978); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), *cert. denied* 434 U.S. 912, 98 S. Ct. 313, 54 L. Ed. 2d 198. Torture may be found where the victim is subjected to serious physical, sexual, or psychological abuse before death. *State v. Palmer, supra.*

We have also held the first prong of (1)(d) to be applicable when the murder was preceded by acts performed for the satisfaction of inflicting either mental or physical pain or when such pain exists for any prolonged period of time. See, *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), *cert. denied* 498 U.S. 1127, 111 S. Ct. 1091, 112 L. Ed. 2d 1195 (1991); *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985). In other words, this prong must be looked upon through the eyes of the victim. *State v. Joubert, supra.*

The second circumstance, or prong, is that the murder manifested exceptional depravity.

> "[E]xceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. . . . [W]here one or more of those five factors are present, there may be a finding of "exceptional depravity" concerning a first degree murder.

State v. Palmer, 224 Neb. at 320, 399 N.W.2d at 731–32.

The second prong of (1)(d), that the murder manifested exceptional depravity by ordinary standards of morality and intelligence, pertains to the state of mind of the actor. *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991), *cert. denied* 501 U.S. 1201, 111 S. Ct. 2279, 115 L. Ed. 2d 965; *State v. Moore, supra.* We have held that this prong refers to a murder so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life. *State v. Moore, supra*; *State v. Peery, supra*; *State v. Rust, supra.*

(ii) Federal Law Analysis of (1)(d)

The U.S. Supreme Court has held the words "heinous,"

"atrocious," and "cruel" to be unconstitutionally vague in an Oklahoma sentencing statute which is very comparable to Nebraska's § 29-2523(1)(d). See *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). See, also, *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) (holding Georgia's " 'outrageously or wantonly vile, horrible or inhuman' " aggravating circumstance to be unconstitutional because the Georgia court failed to limit the statute in such a way as to provide a principled distinction between death penalty and non-death-penalty cases).

In both *Maynard* and *Godfrey*, the defendant was sentenced to death by a jury which had been instructed in only the bare language of the sentencing statute or in language which was similarly vague.

Likewise, the U.S. Court of Appeals for the Eighth Circuit has found the text of Nebraska's aggravating circumstance (1)(d), standing alone, to be constitutionally insufficient. *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *reh'g denied* 951 F.2d 895 (8th Cir. 1991), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992). However, "a state supreme court may salvage a facially-vague statute by construing it to provide the sentencing body with objective criteria for applying the statute." *Moore v. Clark*, 904 F.2d at 1229. The Eighth Circuit, in several recent cases, has looked beyond the text of § 29-2523(1)(d) to determine whether (1)(d) has been limited and defined by this court in such a way as to provide sentencing bodies in Nebraska with objective criteria for the application of that aggravating circumstance.

The Eighth Circuit has held that the first prong of aggravating circumstance (1)(d) of § 29-2523, narrowed by this court's decisions defining the phrase "especially heinous, atrocious, cruel" to mean unnecessarily torturous to the victim, satisfies the constitutional requirements of *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Godfrey v. Georgia, supra*; and *Maynard v. Cartwright, supra*. See *Harper v. Grammer*, 895 F.2d 473 (8th Cir. 1990).

However, even as limited and defined by this court, the "exceptional depravity" language of the second prong of aggravating circumstance (1)(d), has failed to pass constitutional

muster in the federal courts. In *Moore v. Clarke, supra*, the Eighth Circuit found that a sentencing body could "glean only subjective and unilluminating fragments from existing [Nebraska] case law." 904 F.2d at 1232. That court held that the language of the second prong, even as defined and limited by case law, remained unconstitutionally vague and provided "insufficient guidance to a sentencing body called upon to determine whether a particular murder 'manifested exceptional depravity.' " 904 F.2d at 1233. See, also, *Holtan v. Black*, No. CV 84-L-393, 1986 WL 12479 (D. Neb. Nov. 5, 1986), *vacated on other grounds* 838 F.2d 984 (8th Cir. 1988).

Importantly, though, the Eighth Circuit held in *Harper* that *the invalidity of the second prong of (1)(d) does not vitiate the efficacy of the first prong*. Harper's sentencing court had relied upon facts supporting both the first and second prongs of aggravating circumstance (1)(d). Because aggravating circumstance (1)(d) was constitutional at least in part and had been validly established by the first prong, the court held that it was unnecessary to resentence Harper.

In *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994), the Eighth Circuit again upheld a defendant's death sentence even though the sentencing panel had relied partially upon the unconstitutional second prong of (1)(d). The court found that the defendant's sexual assault of his murder victim was sufficient to support the constitutional first prong. Quoting *Harper*, the court noted that " ' "[*t*]*he two prongs are not separate factors*; each of the prongs simply purports to be justification for the application of the aggravating factor." ' " (Emphasis supplied.) 40 F.3d at 1535.

We therefore hold that aggravating circumstance (1)(d) is facially constitutional to the extent that the first prong has been narrowed and defined by this court. We now determine whether aggravating circumstance (1)(d) has been constitutionally applied to Ryan.

(iii) Application of (1)(d) to Ryan

Ryan does not dispute the constitutionality of the first prong of aggravating circumstance (1)(d), nor does he assert that the sentencing judge relied solely upon the unconstitutional second

prong of (1)(d). Rather, he complains that the sentencing judge made only a single series of findings of fact supporting the application of (1)(d), instead of stating which findings of fact supported which prong. He asserts that the record "makes it clear that the trial court and the appellate court relied heavily on the 'exceptional depravity' component of (1)(d)" in sentencing him to death. Brief for appellant at 22.

Ryan contends that it is "pure speculation to conclude that the original sentencing judge would have reached the same conclusion about the weight given to circumstance (1)(d), if only the first prong applied." Brief for appellant at 25.

In finding that aggravating circumstance (1)(d) applied to Ryan's killing of Thimm, the sentencing court stated in part:

> Some of the facts supported by the evidence which would allow this Court to find beyond a reasonable doubt that the murder of James Thimm was especially heinous, atrocious, cruel, *or* manifested exceptional depravity by ordinary standards of morality and intelligence are as follows:
>
> a) The death of James Thimm occurred over several days while James Thimm was tied and chained in a hog confinement shed;
>
> b) Michael W. Ryan on numerous occasions sodomized James Thimm with a shovel handle and directed others to do the same;
>
> c) Michael W. Ryan upon several occasions whipped and beat James Thimm and directed others to do the same;
>
> d) Michael W. Ryan shot the fingertips of James Thimm with a .22 caliber pistol and directed others to do the same;
>
> e) Michael W. Ryan skinned James Thimm while he was alive;
>
> f) Michael W. Ryan broke James Thimm's arm and directed others to assist in that effort;
>
> g) Michael W. Ryan broke James Thimm's legs and directed others to assist with this;
>
> h) Michael W. Ryan, by force, crushed James Thimm's ribcage[,] which was the final act that caused his death;
>
> i) There is also some evidence that Michael W. Ryan

either removed or amputated James Thimm's penis and testicles or directed that this be done by others;

j) Michael W. Ryan wired or chained James Thimm to a farrowing crate while all of these cruel acts were taking place or directed that others do this to James Thimm;

k) Michael W. Ryan caused James Thimm to suffer further humiliation by directing him to perform homosexual acts with another member of the group.

THE COURT CONCLUDES AND FINDS BEYOND A REASONABLE DOUBT THIS AGGRAVATING CIRCUMSTANCE EXISTS IN THIS CASE.

(Emphasis supplied.)

While it is true that the sentencing judge, in his order, did not apply the facts to each prong of (1)(d) separately, the language of the order indicates that the sentencing judge found facts to support the application of *either* the first or second prong of (1)(d) beyond a reasonable doubt. This is not fatal to the use of (1)(d) as an aggravating circumstance.

It is evident that to the extent that the sentencing court may have based its factual findings upon the unconstitutional second prong of (1)(d), Ryan's death sentence may be tainted by constitutional error, although not necessarily reversible error. See *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988) (holding that "not all constitutional violations amount to reversible error"). Accord *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994). "[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Moreover, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24.

In *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), the U.S. Supreme Court held that upon a determination that an invalid aggravating circumstance had been considered by a sentencing body, it was constitutionally permissible for a state supreme court to either

reweigh the aggravating and mitigating circumstances or to perform a harmless error analysis.

However, the U.S. Court of Appeals for the Eighth Circuit has held that appellate reweighing violates a defendant's right to due process under Nebraska's death penalty sentencing statutes. See *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993), *cert. denied* 508 U.S. 967, 113 S. Ct. 2950, 124 L. Ed. 2d 697. See, also, *Reeves v. Hopkins*, No. CV90-L-311, 1994 WL 704553 (D. Neb. Dec. 16, 1994). That leaves this court with the options of performing a harmless error analysis or remanding the cause to the district court for a new sentencing hearing. See *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), *cert. denied* 506 U.S. 837, 113 S. Ct. 114, 121 L. Ed. 2d 71 (1992). We elect to perform a harmless error analysis.

(iv) Harmless Error Analysis

Harmless error analysis of constitutional error is governed by *Chapman v. California, supra*. The Eighth Circuit, applying the *Chapman* analysis in *Williams v. Clarke, supra*, stated:

> [T]he issue under *Chapman* is whether the sentencer actually rested its decision to impose the death penalty on the valid evidence and the constitutional aggravating factors, independently of the vague factor considered; in other words, whether what was actually and properly considered in the decision-making process was "so overwhelming" that the decision would have been the same even absent the invalid factor.

40 F.3d at 1541.

While it may be said that many of the sentencing court's findings might implicate the second prong of aggravating circumstance (1)(d), those same facts help to overwhelmingly support the constitutional first prong of (1)(d). Upon a review of the facts of this case, it is clear beyond a reasonable doubt that the sentencing court's decision would have been the same absent any reliance upon the "exceptional depravity" language of the second prong of (1)(d).

The facts listed by the sentencing court in support of aggravating circumstance (1)(d) are most horrid examples of both torture and sexual abuse. It is not necessary to consider

each of these facts; we need look no further than those admitted by Ryan himself and confirmed by the testimony of his partners in this ghastly crime.

Ryan admitted that he sodomized Thimm with a shovel handle. He further admitted directing Dennis Ryan, Andreas, and the two Haverkamps to sodomize Thimm also, in a sequence dictated by "Yahweh." All four of these men testified at trial and confirmed Ryan's account of how Thimm was sodomized. All five participants testified that at some point, Thimm's rectum was ruptured. Pathologists for both the State and for Ryan testified that there was also a traumatic injury to Thimm's liver, indicating that a blunt foreign object had been thrust some 1½ to 2 feet into Thimm's body cavity.

This incomprehensibly gruesome activity overwhelmingly supports a finding beyond a reasonable doubt that Thimm's murder involved sexual abuse. This fact further overwhelmingly supports a finding beyond a reasonable doubt that Ryan tortured Thimm, torture being defined by this court as " 'serious physical, sexual, or psychological abuse before death.' " *State v. Palmer*, 224 Neb. 282, 315, 399 N.W.2d 706, 729 (1986), *cert. denied* 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987).

Ryan also admitted that he whipped Thimm on at least three occasions and directed the other four men to whip Thimm on these same three occasions, because "Yahweh" indicated to Ryan that Thimm had not been punished enough for his supposed transgressions. Dennis Ryan, Andreas, and the two Haverkamps also testified that Thimm was repeatedly whipped by Michael Ryan and by themselves upon Ryan's instructions. The pathologist for the State testified at trial that during his autopsy of Thimm's body he discovered linear bruises all over Thimm's back, as well as hemorrhaging into the soft tissues under the skin on Thimm's back. The fact that Ryan, by his own admission, repeatedly whipped Thimm also overwhelmingly supports, beyond a reasonable doubt, the conclusion that Thimm was brutally tortured prior to his death.

Ryan admitted that he shot off one of the fingertips of Thimm's left hand with a .22-caliber pistol and directed the four other men that "Yahweh" would permit each of them to

shoot off one of Thimm's fingertips. Moreover, Ryan admits that Thimm was held captive in a hog confinement shed for a period of at least 2 days while these acts were taking place and that Thimm was chained or bound with baling wire much of the time, either by Ryan or at his direction. Again, these facts are sufficient to support beyond a reasonable doubt that Ryan tortured Thimm prior to his death. It is uncontroverted in the record that Thimm was alive and conscious during all of the above episodes of sexual abuse and torture.

Ryan admitted that he broke Thimm's arm, but testified that he was not positive whether Thimm was alive or dead at that time. Timothy Haverkamp, who was present at the time Ryan broke Thimm's arm, testified that Thimm was alive at the time. Although he was not present at the time Ryan actually broke Thimm's arm, James Haverkamp testified that he observed Thimm breathing after his arm was broken.

Ryan admitted that he skinned part of Thimm's lower right leg with a razor blade and a pair of pliers, but contends that Thimm was dead at that time. However, Timothy Haverkamp testified that Thimm was alive at the time Ryan skinned Thimm's leg, that Ryan told Thimm that he was going to skin him and then held up a piece of the skin to show to Thimm, and that Thimm was moving his eyes and could still talk "partway." James Haverkamp testified that he observed Thimm after his leg was skinned and that he was breathing at that time.

The evidence, beyond a reasonable doubt, shows that Thimm was still alive and conscious when his leg was skinned. Moreover, all the evidence indicates that Ryan skinned Thimm's leg after breaking Thimm's arm. It thus can be inferred that Thimm was still alive when his arm was broken. Breaking the bones of, and skinning, a living human being are facts that overwhelmingly constitute torture beyond a reasonable doubt.

The above evidence provides overwhelming factual support for the sentencing court's finding that Ryan's murder of Thimm was "especially heinous, atrocious, [and] cruel." There can be no more horrible way to die than to be chained in an animal shed for several days; to be repeatedly sodomized, whipped, shot, and skinned; to have one's bones broken; and to have all of this done in the name of one's god. If these acts are not

especially heinous, atrocious, and cruel, no acts are. If these facts do not support the existence of aggravating circumstance (1)(d), no facts ever will.

Any one of these acts is an objective factor sufficient to satisfy beyond a reasonable doubt the existence of aggravating circumstance (1)(d) as the first prong had been defined and limited by this court at the time Ryan was sentenced to death. See, e.g., *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied* 469 U.S. 1028, 105 S. Ct. 447, 83 L. Ed. 2d 372; *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864; *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977), *cert. denied* 439 U.S. 882, 99 S. Ct. 220, 58 L. Ed. 2d 194 (1978); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied* 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158; *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), *cert. denied* 434 U.S. 912, 98 S. Ct. 313, 54 L. Ed. 2d 198; *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). See, also, *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994) (holding a finding of sexual abuse to be an objective factor which constitutionally and appropriately narrows the definition of the first prong of (1)(d)); *Harper v. Grammer*, 895 F.2d 473 (8th Cir. 1990) (holding that the first prong of (1)(d) was constitutionally applied to defendant in case where facts indicated that the murder was unnecessarily torturous to the victims).

Ryan's argument that the sentencing court's order is heavily based on a finding of "exceptional depravity" is wholly without merit. The facts of this case clearly establish that Ryan's murder of Thimm was aggravated by repeated acts of torture and sexual abuse. Therefore, even absent any consideration of the second prong, aggravating circumstance (1)(d) is nonetheless amply established beyond a reasonable doubt by facts in support of the constitutional first prong which are so overwhelming that any consideration of the second prong could only constitute harmless error.

We find, beyond a reasonable doubt, that Ryan would have been sentenced to death whether or not the sentencing court considered the second prong of aggravating circumstance (1)(d). This assignment of error is without merit.

7. SENTENCING PANEL AND RECUSAL OF JUDGE

In his eighth assignment of error, Ryan contends that appellate counsel unreasonably failed to raise on direct appeal that his constitutional rights in regard to sentencing were violated by (1) a lack of standards for when a three-judge panel is used for sentencing, (2) the trial judge's refusal to recuse himself, and (3) the trial judge's refusal to convene a three-judge panel.

We turn first to the two issues raised regarding the use of a three-judge panel for sentencing, discussed by Ryan as issues 5 and 20. These two issues were fully addressed by this court in Ryan's direct appeal. See *Ryan I*. In that case, we rejected Ryan's argument that a three-judge panel should be mandatory when requested by a defendant, because Neb. Rev. Stat. § 29-2520 (Reissue 1989) specifically grants to the trial judge the discretion to request a panel for purposes of sentencing a defendant convicted of first degree murder. We further held that § 29-2520 violates neither the Nebraska Constitution nor the U.S. Constitution. Moreover, we found that there was no evidence in the record indicating that Ryan had suffered any prejudice by the trial judge's refusal to request a three-judge panel for sentencing.

A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Jones*, 246 Neb. 673, 522 N.W.2d 414 (1994); *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993).

Because issues 5 and 20 have already been litigated on direct appeal, Ryan is not entitled to further review of these issues.

Ryan has conceded in his brief that his claim that his constitutional rights were violated at sentencing because the trial judge refused to recuse himself, discussed as issue 7, was fairly presented by counsel on direct appeal. Because all three issues raised by Ryan in assignment of error 8 have been litigated and decided adversely to Ryan on direct appeal, this assignment of error affords Ryan no basis for postconviction relief.

8. SUFFICIENCY OF EVIDENCE FOR AGGRAVATING CIRCUMSTANCES

In his ninth assignment of error, Ryan claims that his counsel

was ineffective in failing to raise on direct appeal whether there was sufficient evidence of aggravating circumstances (1)(a) and (1)(d) in support of his death sentence. This was brought before the postconviction court as issues 8 and 9.

Ryan now concedes that these issues were fairly presented to this court on direct appeal and that each claim "lacks factual merit." Brief for appellant at 36. Ryan indicates that he is merely preserving the issues for federal review. Because Ryan concedes that assignment of error 9 has no merit, and because we generally do not review issues which have been previously litigated on direct appeal, we decline to further consider this assignment of error.

9. Proportionality Review

Ryan complains, in assignment of error 10 and issue 4, that the district court erred in failing to find that he was denied his right to a statutory proportionality review on direct appeal. This is not the precise issue that was before the postconviction court. Rather, the record shows that the issue presented was "[w]hether trial [sic] counsel unreasonably failed to argue on direct appeal that the Nebraska Supreme Court's declaration that the statutorily mandated 'proportionality' review of sentences imposed in 'criminal homicide' cases is unconstitutional," thus rendering the remaining provisions of the death penalty unenforceable.

Following Ryan's postconviction hearing, counsel for Ryan stated to the court that appellate counsel had, indeed, raised the issue of proportionality review in constitutional terms. Ryan concedes in his brief that the issue had been raised and fairly presented on direct appeal and that the only purpose for raising the issue at this time was to preserve it for federal review.

Because Ryan concedes that this issue was raised on direct appeal, at which time it was fully litigated, Ryan cannot secure further review of the issue by way of a motion for postconviction relief. See, *State v. Jones, supra*; *State v. Lindsay, supra*; *State v. Bowen, supra*. This assignment of error is without merit.

10. Deposition Misconduct

Once more, Ryan's assignment of error differs from the issue

which he raised in his postconviction hearing. In assignment of error 11, Ryan states that the trial court erred in failing to find that deposition misconduct by the prosecution deprived him of his right to due process of law. However, at the postconviction hearing and in his brief before this court, this issue was addressed as issue 15, and defined as

> [w]hether trial counsel unreasonably failed to make an adequate record of the fact that during defense discovery depositions of Ora Richard Stice and John David Andreas, the Sheriff played a tape recording of Stice's testimony for the benefit of Andreas before Andreas gave his deposition, in order to "align" their testimony; and/or unreasonably failed to object to such conduct and bring the issue to the attention of the trial court, either to disqualify the witnesses, or to seek dismissal of the charges for reasons of prosecutorial misconduct, or for the purposes of producing evidence to "impeach" the testimony of such witnesses at trial, in violation of the Defendant's rights under the Sixth Amendment of the United States Constitution, and Art. I sec. 11 of the Nebraska Constitution.

Specifically, Ryan complains that the State tape-recorded the deposition of Stice and played the tape for Andreas before Andreas gave his deposition so that Andreas could give testimony consistent with what had been testified to by Stice. Ryan further claims that Andreas' deposition was taped and played for James Haverkamp prior to Haverkamp's deposition.

The record shows that Ryan's counsel filed a motion to preclude the testimony of Haverkamp and Andreas based on the alleged deposition misconduct. Dennis Ryan's counsel joined in the motion and requested an evidentiary hearing on the issue. Michael Ryan's counsel stated that he was *not* requesting an evidentiary hearing on that motion, although he was seeking an evidentiary hearing on a related motion regarding the sentencing of Andreas and Haverkamp. The trial court denied the request for an evidentiary hearing on the motion to preclude the testimony of Haverkamp and Andreas and deferred ruling until Dennis Ryan's counsel filed appropriate affidavits in support of the motion.

There is no evidence in the record before us that any supporting affidavits were ever filed by either counsel or that the court ever made a final ruling on the motion. Both Haverkamp and Andreas testified at trial. Neither Michael Ryan's nor Dennis Ryan's defense attorneys objected or filed a motion to preclude the testimony of either Haverkamp or Andreas during trial.

We note that Michael Ryan was represented by different counsel on direct appeal than he was at the guilt phase of his trial. Therefore, there was no reason Ryan could not have raised, on direct appeal, the issue of whether trial counsel were ineffective in their actions related to the alleged deposition misconduct. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal. *State v. Keithley*, 247 Neb. 638, 529 N.W.2d 541 (1995); *State v. Jones*, 246 Neb. 673, 522 N.W.2d 414 (1994); *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993). This assignment of error is without merit.

11. Firing Trial Attorney

In assignment of error 12, discussed as issue 19, Ryan contends that the postconviction court erred in failing to find that Ryan was deprived of his right to counsel when the trial court fired one of his defense attorneys. The trial court terminated the services of court-appointed defense attorney Ligouri after Ryan's trial, but before his sentencing hearing.

Ryan raised an identical ineffective assistance of counsel claim on his direct appeal. See *Ryan I*. We held then that Ryan had received effective representation and that he had failed to show any prejudice by the firing of Ligouri.

This issue, having been fully litigated and decided adversely to Ryan on direct appeal, affords Ryan no basis for postconviction relief. See, *State v. Jones, supra*; *State v. Lindsay, supra*; *State v. Bowen, supra*.

12. Judicial Misconduct

In issue 30, Ryan claims that trial counsel unreasonably failed to object to judicial misconduct at trial. In issue 31, Ryan

claims that trial counsel unreasonably failed to raise judicial misconduct as grounds for recusal of the trial judge from the sentencing process and as grounds for impaneling a three-judge panel for sentencing. Ryan has discussed these two issues together in his brief, and we will likewise consider them together for purposes of our analysis.

Ryan asserts, in issue 30, that the trial judge "exhibited contempt for Ryan by turning his back on Ryan during Ryan's testimony before the jury." Brief for appellant at 107. Ryan argues that the performance of both trial counsel and appellate counsel was deficient as to this issue.

Issue 31 relates to an ex parte communication which the sentencing judge had with the Stice family after Ryan had pled no contest to second degree murder in the killing of 5-year-old Luke Stice. The communication took place after Ryan's conviction for the murder of Thimm, but before his sentencing hearing on that conviction, and before his sentencing for the killing of Stice. Again, Ryan asserts that both trial counsel and appellate counsel were ineffective.

As Ryan concedes in his brief, these issues relating to judicial misconduct were raised and disposed of on direct appeal. This court considered whether the trial judge's conduct had prejudiced Ryan's right to a fair trial and concluded that it had not. As to the judge's actions in turning his back during Ryan's trial testimony, we stated:

> The fact that the trial judge turned away from the defendant in an attempt to hide his expressions from the jury while the defendant described, in detail, the atrocities of his crime was inappropriate, *but does not constitute prejudicial error in this case*. There are cases when such conduct by a judge might constitute prejudicial error in a criminal trial, but *in this case, where the evidence of defendant's guilt is so overwhelming, we hold that the trial judge's actions did not constitute reversible error*. It would have been better had the judge observed all witnesses while they testified about the sickening events, as the jury was required to do, but *the judge's conduct does not constitute prejudicial error in this case*.

(Emphasis supplied.) *Ryan I*, 233 Neb. at 122, 444 N.W.2d at 641.

Likewise, we held that any ex parte communication by the judge with the Stice family could not have been prejudicial to Ryan. "[A]ny communications with the Stice family occurred *after the case had been submitted to the jury and the jury had determined defendant guilty* of first degree murder. The activities in this regard could not have affected the jury verdict in any way." (Emphasis supplied.) *Id.*

Moreover, as noted in *Ryan I*, and as we now again note, Ryan's conviction for the second degree murder of 5-year-old Luke Stice *was not used by the sentencing court* as an aggravating factor. Therefore, the judge's ex parte communication with the Stice family could not have prejudiced Ryan at either the trial phase or the sentencing phase of the proceedings.

Although we do not condone the cited actions of the trial judge, our holding in *Ryan I* that Ryan was not prejudiced by the judge's actions is dispositive of Ryan's claim that trial counsel and appellate counsel were ineffective in failing to raise the issue of judicial misconduct. In the absence of a showing of prejudice, Ryan is not entitled to postconviction relief on either issue 30 or issue 31. These issues were decided on direct appeal, and Ryan is not entitled to have them relitigated in a postconviction proceeding.

13. Cumulative Error

In assignment of error 13, also discussed as issue 37, Ryan contends that cumulative error at trial and sentencing deprived him of his due process right to a fair trial. Ryan raised this issue on direct appeal, at which time we held that

> the combined effect of the errors defendant alleged occurred at trial was *harmless beyond a reasonable doubt and that the defendant was not prejudiced* by these alleged errors. This conclusion is supported by the overwhelming evidence against the defendant, including the defendant's own testimony as to his part in the murder of James Thimm. The cumulative effect of these alleged errors did not have a material effect on the jury in reaching its verdict. A defendant is not constitutionally entitled to receive a perfect trial, only a fair and constitutional trial.

(Emphasis supplied.) *Ryan I*, 233 Neb. at 150, 444 N.W.2d at 656.

Because we generally do not review issues which have been previously litigated on direct appeal, we decline to further consider this assignment of error.

14. Other Issues Conceded by Ryan

Ryan also has raised other issues which he now concedes are not factually supported by the evidence or were disposed of on direct appeal and which he declines to discuss in his brief. These issues include the failure of counsel to call certain witnesses (issue 16), failure of counsel to cross-examine one of the female group members (issue 17), misconduct by the prosecutor and a State Patrol investigator (issue 26), judicial interference with the right to counsel (issue 32), failure of counsel to object to a jury instruction (issue 33), violation of a sequestration order by the State's expert witnesses (issue 34), and juror misconduct by falling asleep at trial and by reading a newspaper (issues 35 and 36).

We have examined the above issues for plain error, and finding none, we will not address them further.

15. Failure to Grant Postconviction Relief

In assignment of error 14, Ryan alleges that the postconviction court erred in failing to grant him postconviction relief. After carefully considering all of Ryan's previous assignments of error and issues presented for consideration by the court and finding all of these to be without merit, we hold that the district court correctly denied Ryan's petition for postconviction relief.

V. CONCLUSION

There being no merit to any of Ryan's assignments of error or to any of the issues raised by him, the judgment of the district court denying postconviction relief to Ryan is affirmed.

Affirmed.

HAROLD DECOSTE AND IN BEHALF OF ALL WHO HAVE BEEN CHARGED PURSUANT TO WAHOO CITY ORDINANCE 1413, OTHER THAN THOSE NAMED AS DEFENDANTS HEREIN, APPELLEE AND CROSS-APPELLANT, V. THE CITY OF WAHOO, A MUNICIPAL CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES.
534 N.W.2d 760

Filed July 21, 1995. No. S-94-526.

Constitutional Law: Ordinances: Service of Process: Jurisdiction. The requirement that the Attorney General be served with a copy of the proceeding when the constitutionality of an ordinance is raised, pursuant to Neb. Rev. Stat. § 25-21,159 (Reissue 1989), is a statutory prerequisite to the exercise of the district court's jurisdiction. Absent compliance with the statute, a district court may not exercise its jurisdiction.

Appeal from the District Court for Saunders County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions to dismiss.

Charles H. Wagner and Maureen Freeman-Caddy, of Edstrom, Bromm, Lindahl, Wagner & Miller, for appellants.

Neil W. Schilke, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and LIKES, D.J.

LANPHIER, J.

Appellee, Harold DeCoste, brought suit in the district court for Saunders County against appellants, the City of Wahoo, the mayor of Wahoo, and members of the Wahoo City Council. Appellee sought to enjoin the enforcement of two city ordinances, Nos. 1413 and 1416. Appellee also sought to have the ordinances declared void, have the money collected pursuant to those ordinances returned, and have appellee's attorney fees and expenses taxed to appellants pursuant to 42 U.S.C. §§ 1983 and 1988 (1988 & Supp. IV).

The ordinances were apparently enacted after Wahoo's solid waste disposal area was found to be contaminating ground water and federal regulations required that the landfill be closed. In order to fund the closing of the landfill, the city adopted ordinances Nos. 1413 and 1416. Ordinance No. 1413 provided

that a management fee be levied against the residences and commercial and industrial businesses authorized to utilize the solid waste area. Residences were charged a management fee of $10 per month, and businesses were charged $20 per month. Ordinance No. 1416 provided that residents delinquent in paying the management fee would be denied the use of the waste disposal area.

On April 22, 1993, appellee, on behalf of all who were charged pursuant to ordinance No. 1413, filed an amended petition in the district court for Saunders County. Appellee alleged that there was no statutory authority for the imposition of the management fee and that the management fee violated the equal protection provisions of the Nebraska and U.S. Constitutions. Appellee asked the district court to issue an injunction prohibiting appellants from making any further demand for payment of the management fees, to declare ordinances Nos. 1413 and 1416 void and unenforceable, and to order that all funds received pursuant to those ordinances be returned. Appellee further alleged that he had been subjected to a deprivation of his rights and privileges secured by the U.S. Constitution and that he was entitled to damages under 42 U.S.C. § 1983.

After a bench trial, the district court enjoined the enforcement of the ordinances, declared the ordinances void, ordered that all funds collected pursuant to the ordinances be returned, and ordered that appellants pay appellee's attorney fees and expenses.

In reviewing the record, we note a procedural omission on the part of appellee which obviates the need to address the assigned errors.

Although the record shows that the Attorney General was notified that an appeal concerning the constitutionality of two statutes was pending, the record before us fails to show that the Attorney General was served with a copy of the district court proceeding pursuant to Neb. Rev. Stat. § 25-21,159 (Reissue 1989). That section provides in pertinent part the following:

> In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if

> the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.

Having alleged that the ordinances in question are unconstitutional, appellee was obligated to serve the Attorney General with a copy of the proceeding. Because appellee failed to observe this statutory prerequisite to the exercise of the district court's subject matter jurisdiction, this action must be dismissed. We, therefore, reverse the judgment of the district court and remand the cause with directions that it be dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BEN SIMON'S, INC., A NEBRASKA CORPORATION, APPELLANT, V. LINCOLN JOINT-VENTURE, AN OHIO GENERAL PARTNERSHIP, AND GENERAL MILLS RESTAURANTS, INC., A FLORIDA CORPORATION, APPELLEES.

535 N.W.2d 712

Filed August 11, 1995. No. S-93-1014.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In equity actions, an appellate court reviews the factual findings de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.

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

Richard L. Spangler, Jr., Robert B. Evnen, and David A. Hecker, of Woods & Aitken Law Firm, for appellant.

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellee Lincoln Joint-Venture.

Robert T. Grimit, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee General Mills.

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

WHITE, C.J.

Ben Simon's, Inc. (Simon's), filed an action seeking an injunction against Lincoln Joint-Venture (LJV) and General Mills Restaurants, Inc. (GMRI), prohibiting them from constructing a restaurant in a parking area that Simon's contended was restricted under its lease agreement with LJV. The Lancaster County District Court denied Simon's request. Simon's appealed to this court seeking a mandatory injunction to raze the subsequently constructed restaurant. We dismiss.

The record contains the following facts: In 1959, Simon's and the Lincoln Gateway Shopping Center (Gateway) entered into a lease agreement. Approximately 15 years later, the parties amended the lease.

A portion of the amended lease, the second supplemental agreement, states that the "[l]andlord further agrees that it will not, without the written approval of [Simon's], construct any new buildings or additions to existing buildings in that area . . . labeled as [the] 'permanent parking area'." The parties attached a drawing of the parking area. The second supplemental agreement also required the landlord to maintain a parking ratio of 5.5 parking spaces for each 1,000 square feet of gross leasable area at Gateway. Simon's did not record the second supplemental agreement.

In 1974, at the same time the parties entered into the second supplemental agreement, Reuben's restaurant existed within the area subject to the approval clause. Thereafter, during the 1980's, new occupants twice remodeled the Reuben's building without Simon's approval.

In 1985, LJV purchased Gateway. In February 1993, LJV entered into a lease with GMRI granting the latter permission to construct a new restaurant on the same "pad site" as the

Reuben's building. Under the lease, GMRI agreed to demolish the Reuben's building and construct a new restaurant, the Olive Garden, that would not eliminate any existing parking areas.

In April 1993, Simon's informed LJV that Simon's did not feel the expansion plans for the Reuben's building complied with its lease. LJV responded by stating that the new restaurant fit within the pad site of the old Reuben's building and that LJV intended to increase the number of available parking spaces in the area. However, LJV did not ask for Simon's approval of the new construction until June 1993. On July 12, 1993, Simon's filed this suit to enjoin the construction of the Olive Garden, alleging that the construction violated the second supplemental lease agreement.

At trial, Simon's contended that the Olive Garden, although constructed on the same pad site as the Reuben's building, could hold more people and therefore would use the parking spaces intended for Simon's customers. LJV argued that there would be more parking spaces available to Simon's customers as a result of a concurrent parking expansion project. GMRI argued that it had no knowledge of the second supplemental agreement because Simon's did not record the agreement; furthermore, GMRI had incurred substantial costs in preparing to build the Olive Garden.

The district court refused to enjoin LJV and GMRI from constructing a new restaurant on the old pad site. Subsequently, GMRI built the Olive Garden. Simon's now asks this court to grant a mandatory injunction to raze the Olive Garden because Simon's contends there is a parking deficit of 68 spaces at Gateway.

Simon's assigned six errors, which may be consolidated into five. Simon's contends that the district court erred (1) in concluding that Simon's did not sustain its burden of proof that construction of the Olive Garden constituted a breach of Simon's lease with LJV, (2) in concluding that Simon's had to establish irreparable harm, (3) in concluding that Simon's lease with LJV did not entitle Simon's to exercise sole discretion concerning GMRI's building request, (4) in concluding that Simon's withheld approval of GMRI's building request unreasonably and without good faith, and (5) in excluding

certain testimony relating to the good faith and commercial reasonableness of Simon's decision to withhold its approval of GMRI's building request.

An action for injunction sounds in equity. *University Place-Lincoln Assocs. v. Nelsen*, 247 Neb. 761, 530 N.W.2d 241 (1995); *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994); *CAE Vanguard, Inc. v. Newman*, 246 Neb. 334, 518 N.W.2d 652 (1994). In equity actions, an appellate court reviews the factual findings de novo on the record and reaches a conclusion independent of the findings of the trial court. *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 529 N.W.2d 16 (1995); *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995); *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994). An appellate court has an obligation to reach its own independent conclusions as to questions of law. *State v. Skalberg*, 247 Neb. 150, 526 N.W.2d 67 (1995); *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994); *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994).

Simon's seeks a restoration of the status quo before construction. We decline to order LJV and GMRI to raze the Olive Garden. This is because of the nature of the remedy sought by Simon's. An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Nebraska Irrigation, Inc., supra*. We agree with the trial court that irreparable damage entitling Simon's to the mandatory razing has not been shown. Indeed, we accept the view that rather than making less parking available, the plan increased available parking. Nor should we be inclined in equity to enforce a construction restriction against a third party having no knowledge of the restriction.

At oral argument, Simon's counsel specifically asked this court only for a mandatory injunction to raze the Olive Garden and did not request monetary damages. Simon's neither requested monetary relief nor proved damages in any amount arising from the construction of the Olive Garden or the alleged

parking deficiency at Gateway. Under Nebraska law, while damages need not be proved with mathematical certainty, they cannot be established by speculation or conjecture. *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994). Without proof, any damages associated with the construction of the Olive Garden or the alleged parking deficiency at Gateway are speculative and uncertain as to amount. Furthermore, the complete failure to prove any monetary damages provides no reasonably certain factual basis for computation of the loss, and consequently there is uncertainty as to the fact of whether damages were sustained at all; the absence of such a record is fatal to recovery. See *id.*

Absent a request for monetary damages, Simon's contention that it will not be made whole without an order granting a mandatory injunction is an argument for specific performance of its lease agreement with LJV. Even assuming that Simon's suffers from a 68-space parking deficit at Gateway, equity disallows the requested remedy when it is too extreme. Specific performance of a contract will not be granted where enforcement of the contract would be unjust. *Wallroff v. Dougherty*, 212 Neb. 178, 322 N.W.2d 392 (1982).

AFFIRMED.

CLAIR CALLAN, APPELLANT, V. M. BERRI BALKA, STATE TAX COMMISSIONER, APPELLEE.

536 N.W.2d 47

Filed August 11, 1995. No. S-94-354.

1. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, and the Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Constitutional Law: Statutes: Proof.** The party claiming a statute is unconstitutional has the burden to show and clearly demonstrate that the questioned statute is unconstitutional.

3. ____: ____: ____. To establish the unconstitutionality of a legislative act under Neb. Const. art. XIII, § 3, a party must prove that the credit of the state was given or loaned in aid of any individual, association, or corporation.
4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts regarding constitutionality should be resolved in favor of its validity.
5. **Constitutional Law: Statutes: Presumptions: Proof.** The party asserting the unconstitutionality of a statute has the burden of overcoming the presumption of constitutionality by clearly demonstrating that the statute is unconstitutional.
6. **Constitutional Law: Statutes.** When a challenged statute is susceptible of more than one reasonable construction, a court uses the construction that will achieve the purposes of the statute and preserve the statute's validity.
7. **Summary Judgment.** Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

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

Joseph M. Casson for appellant.

Don Stenberg, Attorney General, and L. Steven Grasz for appellee.

Robert T. Grimit and David D. Zwart, of Baylor, Evnen, Curtiss, Grimit & Witt, for amici curiae American Corn Growers Assoc. et al.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BUCKLEY, D.J.

WRIGHT, J.

Clair Callan filed a petition for declaratory and injunctive relief, seeking a determination that the ethanol tax credit provisions of Neb. Rev. Stat. §§ 66-1326 and 66-1329 (Cum. Supp. 1992) are in violation of article XIII, § 3, of the Nebraska Constitution. The district court granted summary judgment, and Callan appeals.

SCOPE OF REVIEW

The constitutionality of a statute is a question of law, and the Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995). The party claiming a statute is unconstitutional has the burden to show and clearly

demonstrate that the questioned statute is unconstitutional. *Id.*

FACTS

On April 15, 1992, 1992 Neb. Laws, L.B. 754, known as the Ethanol Authority and Development Act, was signed into law. It was codified at Neb. Rev. Stat. §§ 66-1301 through 66-1329 (Cum. Supp. 1992) and later recodified at Neb. Rev. Stat. §§ 66-1330 through 66-1348 (Supp. 1993). Effective September 1, 1993, §§ 66-1326 and 66-1329 were recodified as §§ 66-1344 and 66-1347 (Supp. 1993) pursuant to 1993 Neb. Laws, L.B. 364. Hereinafter, we shall refer to the statutory citations by their current designations.

M. Berri Balka is the duly appointed and acting state Tax Commissioner of the State of Nebraska and is charged with the duty of administering the revenue laws of the state, including provisions of the Ethanol Development Act. The act requires the Nebraska Department of Revenue to adopt and promulgate rules and regulations to provide for the issuance of transferable motor fuel tax credit certificates to ethanol producers in Nebraska and to enter into agreements with ethanol producers on behalf of the State of Nebraska to furnish tax credits to producers as mandated by § 66-1344.

On June 8, 1993, Callan filed a petition in the district court for declaratory judgment and injunctive relief, seeking to permanently enjoin Balka from implementing and administering or enforcing the provisions of §§ 66-1344 and 66-1347. In his answer, Balka denied that the statutes violate Neb. Const. art. XIII, § 3. Balka subsequently filed a motion for summary judgment, and following a hearing, the district court found there was no genuine issue of material fact that §§ 66-1344 and 66-1347 serve a valid public purpose and do not violate Neb. Const. art. XIII, § 3. The court dismissed Callan's petition.

The section of the Nebraska Constitution, article XIII, § 3, under which this action is brought provides:

> The credit of the state shall never be given or loaned in aid of any individual, association, or corporation, except that the state may guarantee or make long-term, low-interest loans to Nebraska residents seeking adult or post high school education at any public or private

institution in this state. Qualifications for and the repayment of such loans shall be as prescribed by the Legislature.

The statutes alleged to be unconstitutional provided as follows:

(1) Each producer of ethanol shall receive a credit pursuant to this section of twenty cents per gallon of ethanol produced in Nebraska, which credit shall be in the form of a transferable motor fuel tax credit certificate. After July 1, 1994, no such credit shall be given for ethanol produced at an ethanol facility which was in production on or before January 1, 1992, unless on or before July 1, 1994, the name plate design capacity for the production of ethanol, before denaturing, at the facility has been expanded to equal at least two times the name plate design capacity for production of ethanol, before denaturing, existing at the facility as of January 1, 1992.

(2) Any ethanol facility which is in production at the rate of at least twenty-five percent of its name plate design capacity for the production of ethanol, before denaturing, on or before December 31, 1992, shall receive a credit of twenty cents per gallon of ethanol produced beginning with the first month for which it is eligible to receive such credit and ending not later than December 31, 1997.

(3) Any ethanol facility which is not in production on or before December 31, 1992, but which is in production at the rate of at least twenty-five percent of its name plate design capacity for the production of ethanol, before denaturing, on or before December 31, 1995, shall receive a credit of twenty cents per gallon of ethanol produced for sixty months beginning with the first month for which it is eligible to receive such credit and ending not later than December 31, 2000.

(4) Any ethanol facility eligible for a credit under subsection (1), (2), or (3) of this section shall also receive a credit of twenty cents per gallon of ethanol produced in excess of the original name plate design capacity which results from expansion of the facility completed on or before December 31, 1995. Such credit shall be for sixty

months beginning with the first month for which production from the expanded facility is eligible to receive such credit and ending not later than December 31, 2000.

(5) The credit shall be given only for ethanol produced at a plant in Nebraska at which all fermentation, distillation, and dehydration takes place. Not less than two million gallons and not more than twenty-five million gallons of ethanol produced annually at an ethanol facility shall be eligible for the credit, and the credit may only be claimed by a producer for the period specified in subsection (2), (3), or (4) of this section.

(6) The Department of Revenue shall prescribe an application form and procedures for claiming the credit and shall adopt and promulgate rules and regulations to carry out this section.

§ 66-1344.

(1) There is hereby created the Ethanol Production Incentive Cash Fund which shall be used by the board to pay the credits created in section 66-1344 to the extent provided in this section. Any money in the fund available for investment shall be invested by the state investment officer pursuant to sections 72-1237 to 72-1276. On or before September 1, 1993, the State Treasurer shall transfer to the Ethanol Production Incentive Cash Fund the entire balance of the Ethanol Authority and Development Cash Fund and thereafter shall transfer such additional money as shall be (a) appropriated to the Ethanol Production Incentive Cash Fund by the Legislature, (b) given as gifts, bequests, grants, or other contributions to the Ethanol Production Incentive Cash Fund from public or private sources, (c) made available due to failure to fulfill conditional requirements pursuant to investment agreements entered into prior to April 30, 1992, (d) received as return on investment of the Ethanol Authority and Development Cash Fund, and (e) otherwise credited to the Ethanol Production Incentive Cash Fund from sources deemed appropriate by the Legislature.

(2) Commencing January 1, 1993, the Department of Revenue shall, at the end of each calendar quarter, notify

the State Treasurer of the amount of motor fuel tax that was not collected in the preceding calendar quarter due to the credits provided in section 66-1344. The State Treasurer shall transfer from the Ethanol Production Incentive Cash Fund to the Highway Trust Fund an amount equal to such credits less the following amounts:

(a) For 1993, 1994, and 1995, the amount generated during the calendar quarter by a one-cent tax on motor fuel pursuant to sections 66-489 and 66-605.07;

(b) For 1996, the amount generated during the calendar quarter by a three-quarters-cent tax on motor fuel pursuant to such sections;

(c) For 1997, the amount generated during the calendar quarter by a one-half-cent tax on motor fuel pursuant to such sections; and

(d) For 1998, 1999, and 2000, no reduction.

The amounts shall be transferred through December 31, 2000. For 1993 through 1997, if the amount generated pursuant to subdivisions (a), (b), and (c) of this subsection and the amount transferred pursuant to subsection (1) of this section are not sufficient to fund the credits provided in section 66-1344, then the credits shall be funded through the Ethanol Production Incentive Cash Fund but shall not be funded through either the Highway Cash Fund or the Highway Trust Fund. For 1998, 1999, and 2000, the credits provided in such section shall be funded through the Ethanol Production Incentive Cash Fund but shall not be funded through either the Highway Cash Fund or the Highway Trust Fund.

(3) On February 15, 2001, the State Treasurer shall transfer any unexpended and unobligated funds from the Ethanol Production Incentive Cash Fund to the Highway Trust Fund.

§ 66-1345.

The Tax Commissioner and the producer eligible to receive credit under section 66-1344 shall enter into a written agreement. The producer shall agree to produce ethanol at the designated facility and any expansion thereof. The Tax Commissioner, on behalf of the State of

Nebraska, shall agree to furnish the producer the tax credits as provided by and limited in such section in effect on the date of the agreement. The agreement to produce ethanol in return for the credit shall be sufficient consideration, and the agreement shall be binding upon the state. No credit shall be given to any producer of ethanol which fails to produce ethanol in Nebraska in compliance with the agreement. The agreement shall include:

(1) The name of the producer;

(2) The address of the ethanol facility;

(3) The date of the initial eligibility of the ethanol facility to receive such credits;

(4) The name plate design capacity of the ethanol facility as of the date of its initial eligibility to receive such credits; and

(5) The name plate design capacity which the facility is intended to have after the completion of any proposed expansion. If no expansion is contemplated at the time of the initial agreement, the agreement may be amended to include any proposed expansion.

§ 66–1347.

It is undisputed that Balka, as the Tax Commissioner, has entered into an agreement with one or more ethanol producers located in the State of Nebraska pursuant to §§ 66–1344 and 66–1347 and has issued and continues to issue transferable motor fuel tax credit certificates to ethanol producers.

ASSIGNMENT OF ERROR

Callan assigns as error the district court's finding that §§ 66–1344 and 66–1347 do not violate Neb. Const. art. XIII, § 3.

ANALYSIS

CONSTITUTIONALITY

To establish the unconstitutionality of a legislative act under Neb. Const. art. XIII, § 3, the party must prove that the credit of the state was given or loaned in aid of any individual, association, or corporation. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). The constitutionality of a statute is a

question of law, and the Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995).

In *Haman*, the Legislature, as a response to the losses to depositors because of the failure of the Nebraska Depository Institution Guaranty Corporation, a private corporation, enacted 1990 Neb. Laws, L.B. 272A. This law authorized the Department of Banking and Finance to fulfill the $30,000 guaranty of every depositor of the failed Commonwealth Savings Company. Haman, a nondepositor Nebraska resident taxpayer, sought to have L.B. 272A declared unconstitutional, because, inter alia, it pledged the credit of the state.

We stated that the plaintiff must prove three elements: (1) The credit of the state (2) was given or loaned (3) in aid of any individual, association, or corporation. We also stated that the purpose of article XIII, § 3, is to prevent the state or any of its governmental subdivisions from extending the state's credit to private enterprise, citing *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956). "It is designed to prohibit the state from acting as a surety or guarantor of the debt of another." *Haman*, 237 Neb. at 718, 467 N.W.2d at 850. We noted that the first question involving the statute was whether it involved the "credit of the state." "The state's credit is inherently the power to levy taxes and involves the obligation of its general fund." *Id.* at 719, 467 N.W.2d at 850. In noting the distinction between the loaning of state funds and the loaning of the state's credit, we stated that a loan of state funds places the state in the position of a creditor, and the loan of credit places the state in the position of a debtor. Since L.B. 272A made the state forever liable for the losses of industrial company depositors and obligated present and future taxes from the state's general fund contrary to article XIII, § 3, we found the statute unconstitutional. See *Haman, supra.*

In contrast to *Haman*, *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979), upheld the constitutionality of a fund which assisted private mortgage lenders in providing mortgage financing for single-family residences at reduced rates. The mortgage fund

acquired the money through bond sales and was responsible for the payment of those bonds. We held the fund was constitutional because the credit of the state was not being given or loaned in aid of any individual and only the fund was involved. The fund acquired moneys through the sale of bonds, and it repaid the bonds through revenue it acquired. In the event there was insufficient revenue with which to repay the bonds, the state in no manner became obligated or liable. The act provided the bonds would not be a debt, liability, or general obligation of the state.

Here, we examine § 66-1344 to determine whether it involves a credit of the state which is given or loaned to ethanol producers. The affidavit of Janet A. Stege, administrator of the motor fuels division of the Nebraska Department of Revenue, provides a background and procedure for the ethanol tax credit program.

STEGE'S AFFIDAVIT

Stege's affidavit recites that the Ethanol Production Incentive Cash Fund (EPICF), created by § 66-1345, was initially funded by a transfer of $11 million from the Ethanol Authority and Development Cash Fund. The Ethanol Authority and Development Cash Fund was funded by a checkoff program on grain sold in Nebraska. Additional moneys are transferred into the EPICF pursuant to statute from money which may be appropriated by the Legislature; money received as gifts, bequests, grants, or other contributions from public or private sources; money made available due to failure to fulfill conditional requirements pursuant to investment agreements entered into prior to April 30, 1992; money received as return on investment of the fund; and money otherwise credited to the fund from sources deemed appropriate by the Legislature. § 66-1345(1).

Stege stated that in January 1993, it became the duty of the Department of Revenue at the end of each calendar quarter to notify the State Treasurer of the amount of the motor fuel tax that was not collected in the preceding calendar quarter due to the ethanol tax credits provided by § 66-1344. The State Treasurer is then directed to transfer from the EPICF to the

Highway Trust Fund an amount equal to the credits less the amounts mandated in § 66-1345(2).

As of September 1, 1993, the EPICF's balance was $16,746,500. No general fund moneys have been appropriated to the EPICF since its inception. The ethanol tax credits cannot be funded from either the Highway Cash Fund or the Highway Trust Fund. Under §§ 66-1344 and 66-1347, upon meeting certain conditions, the ethanol producer is eligible to receive a credit of 20 cents per gallon of ethanol produced in Nebraska. The credit is given only for ethanol produced at a plant in Nebraska at which all fermentation, distillation, and dehydration take place. A producer receives credit for all qualified gallons for 60 months beginning with the first month for which the producer is eligible. Credits will not be granted after December 31, 2000. The credit is in the form of a transferable motor fuel tax credit certificate, which an ethanol producer can then transfer to any individual or entity which is responsible for paying motor fuel taxes under Nebraska law, Stege stated.

Stege's affidavit provided an example of the ethanol tax credit program. If an ethanol producer produces 1 million gallons per month, the producer submits to the department a form indicating the amount of qualified production in the previous month. Based on production of 1 million gallons and a credit of 20 cents per gallon, a credit of $200,000 is applied to the producer. The ethanol producer designates a company or individual to which the $200,000 in motor fuel tax credits shall be assigned. Typically, the credits are assigned to an "oil jobber" to reduce the oil jobber's motor fuel tax liability. If the oil jobber's monthly fuel tax is less than $200,000, the credit can be carried over until it is depleted. The jobber, in a private and separate transaction, remits to the ethanol producer a check for $200,000 less any negotiated fee. The State of Nebraska does not enter into any surety or guarantee agreement with respect to the issuance of the credits. Stege estimated that sales of gasoline containing the oxygenate ethanol composed 47 percent of all gasoline sold in Nebraska in 1992.

CALLAN'S ARGUMENT

Callan argues that the transferable motor fuel tax credits

create an obligation assumed by the state to forgo the collection of motor fuel taxes which have already been levied. He claims that by issuing the tax credits, the state is in the position of a debtor and that the payment of the subsidy is the making of a loan to private enterprise. He argues the credit is dispensed to offset the collection of levied motor fuel taxes, and the credits reduce the taxes otherwise dedicated to the Highway Cash Fund and Highway Trust Fund.

According to Callan, the definition of the term "credit of the state" includes a " 'loan of money' " as well as " 'the creation of a debt of the state, either direct or contingent.' " Reply brief for appellant at 9. He claims that the subsidy authorized by §§ 66-1344 and 66-1347, as well as the fund transfer mandated by § 66-1345, constitutes a direct debt of the state given to private enterprise without valuable consideration. The debt is paid by forgoing the collection of levied motor fuel taxes which are otherwise due to the state.

Debtor or Creditor

The key question in our determination of the constitutionality of §§ 66-1344 and 66-1347 is whether the state acts as a debtor by extending the state's credit to private corporations, associations, or individuals. In prior cases where the state became a debtor in the interest of private parties, we held the statutes unconstitutional. See, *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991); *Chase v. County of Douglas*, 195 Neb. 838, 241 N.W.2d 334 (1976); *State ex rel. Beck v. City of York*, 164 Neb. 223, 82 N.W.2d 269 (1957).

The ethanol tax credits may be used to pay Nebraska motor fuel taxes. Black's Law Dictionary 403 (6th ed. 1990) defines a debt as "[a] fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future." The motor fuel taxes are fixed and certain obligations to pay money in the present or in the future to the state. Black's further defines a debtor as "[o]ne who owes a debt to another who is called the creditor." *Id.* at 404. It is clear that a taxpayer responsible for paying motor fuel taxes is a debtor to the State of Nebraska and, conversely, that the state is a creditor of the taxpayer. The redemption of the motor fuel tax credit requires

the state to forgo the collection of that portion of the motor fuel tax which is a debt owed to the state. The state is in the position of a creditor excusing the payment of the motor fuel tax by the debtor. The tax credit merely offsets a debt owed to the state. Although the motor fuel taxes collected are reduced because of the ethanol credits, the ethanol tax credit program does not place the state in the position of a debtor or guarantor. Until the state is owed the motor fuel tax, the tax credit cannot be used by the party who has the tax credit. The credit is only redeemable against a debt that is owed by a party to the state. The state forgives an indebtedness, but is never obligated to pay any money or extend a credit of the state. Contrary to Callan's argument, the state does not create or incur an indebtedness. The state always remains a creditor in relation to the motor fuel tax. We therefore conclude that the state is not a debtor, surety, or guarantor of the debt of another with respect to the tax credits authorized by § 66-1344.

Many provisions in the Nebraska Revenue Act of 1967, Neb. Rev. Stat. §§ 77-2701 through 77-27,135.01 (Reissue 1990 & Cum. Supp. 1994), allow taxpayers to decrease their tax liability by the use of various types of credit. See, e.g., §§ 77-2704.12(3), 77-2715.07, and 77-2734.03. See, also, Neb. Rev. Stat. §§ 77-1736.08 and 77-27,188 (Cum. Supp. 1994) and 77-4105 (Reissue 1990). In all these cases, the revenues of the state are reduced from the level at which they would be if the tax credits were not allowed. However, in none of these instances involving tax credits does the state guarantee payment or lend its credit to the transaction. If the issuance of the credits exhausts the EPICF, the state cannot fund the credits from the Highway Trust Fund, the Highway Cash Fund, or otherwise. There is no obligation on the general fund of the state.

It is true that § 66-1345 directs the State Treasurer to transfer money periodically from the EPICF to the Highway Trust Fund in an amount equal to the number of tax credits redeemed, less certain amounts as specified by the statute. Money from a state fund administered by the Nebraska Ethanol Board is transferred to a state fund administered by the Department of Revenue. The Legislature has chosen to

internally reimburse the Department of Revenue for income that was not received through the usual motor fuel tax. The transfer of money from one state agency to another cannot be considered the loaning of the state's credit to private industry. The EPICF does not implicate the credit of the state.

Nor does the fact that the Highway Trust Fund might not be reimbursed if the EPICF is depleted implicate article XIII, § 3. There is no obligation to replace revenue uncollected because of a tax credit. In the case of other tax credits, the Legislature has chosen to allow the income to remain uncollected. In this case, if the ethanol fund is insufficient to replace the lost revenue, the Highway Trust Fund remains unreimbursed. In either case, the state has chosen to forgo the collection of revenue. In neither case is the state a debtor to any party.

A statute is presumed to be constitutional, and all reasonable doubts regarding constitutionality should be resolved in favor of its validity. See *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995). The party asserting the unconstitutionality of a statute has the burden of overcoming this presumption by clearly demonstrating that the statute is unconstitutional. See, *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995); *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). When a challenged statute is susceptible of more than one reasonable construction, a court uses the construction that will achieve the purposes of the statute and preserve the statute's validity. *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993).

Although the amount of motor fuel taxes collected by the state is reduced by the ethanol tax credit program, the state is not placed in the position of a debtor. The tax credit is used to offset a debt owing to the state. The credit of the state is not involved. We find that Callan's arguments are not persuasive. Since Callan has failed to meet the first prong of the *Haman* test, further analysis is unnecessary.

Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Tompkins v. Raines*, 247 Neb. 764, 530 N.W.2d 244 (1995). We find that there is no genuine issue as to any material fact as to the constitutionality of the ethanol

tax credit program and that Balka is entitled to a judgment as a matter of law. We therefore affirm the judgment of the district court.

AFFIRMED.

LANPHIER, J., dissenting.

"The credit of the state shall never be given or loaned in aid of any individual, association, or corporation . . . ." Neb. Const. art. XIII, § 3. Relying upon *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991), the main opinion states that to prove a violation of article XIII, § 3, a plaintiff must show that (1) the credit of the state (2) was given or loaned (3) in aid of any individual, association, or corporation. Those joining in the main opinion conclude that the credit of the state was not involved because the state did not become a debtor, surety, or guarantor by issuing motor fuel tax credit certificates. I respectfully dissent. In this case, the credit of the state is being given.

The primary issue is whether by the issuance of motor fuel tax credit certificates the state's credit (i.e., the general fund) becomes obligated. "The state's credit is inherently the power to levy taxes and involves the obligation of its general fund." *Haman v. Marsh*, 237 Neb. at 719, 467 N.W.2d at 850. Article XIII, § 3, seeks to prohibit the obligation of present and future taxes from the state's general fund in aid of private entities. *Haman, supra*.

In holding that the state is not a debtor, surety, or guarantor of the debt of another in this case, those joining in the main opinion assert that the state always remains a creditor in relation to taxpayers holding motor fuel tax credit certificates. The opinion accurately states that the relationship between the state and taxpayers responsible for paying motor fuel taxes is that of a creditor and a debtor. The opinion then states that since the taxpayer does not use the tax credit until the motor fuel taxes are due, the state remains a creditor and never assumes the taxpayer's debt because the tax credit wipes out that debt. The main opinion states the conclusion that the motor fuel tax credits reduce the amount owed the state rather than create a debt that the state owes or guarantees.

However, when the state forgoes the collection of levied

motor fuel taxes, the credit of the state is implicated. Dealers in motor fuel (oil jobbers) must pay taxes on fuel sold. Motor fuel tax liability is a debt owed by the oil jobbers to the state. Qualified ethanol producers receive motor fuel tax credits which they can assign to oil jobbers for a negotiated fee. Collected motor fuel taxes are placed in the Highway Trust Fund. The Highway Trust Fund is then reimbursed from the Ethanol Production Incentive Cash Fund (EPICF) for the amount of lost revenue due to the tax credits. See Neb. Rev. Stat. § 66-1345(2) (Supp. 1993). The fact that the Highway Trust Fund must be reimbursed for the amount of lost revenue undermines the conclusion in the main opinion that the motor fuel tax credits reduce the amount owed the state rather than create a debt that the state owes or guarantees.

The transferable motor fuel tax credit certificates create an obligation assumed by the state to credit the bearer's motor fuel tax liability in an amount equal to the amount of the certificate. The issuance of the tax credit certificates results in a legally enforceable obligation on the part of the state to forgo the collection of motor fuel taxes which have already been levied. The state's guarantee of the tax credit certificates makes them marketable items that ethanol producers are able to transfer for value. The very fact that the state must honor the tax credit certificates when properly presented by a bearer proves that there is a debt. Forgiving an enforceable debt creates income to the benefit of the obligor of that debt. There follows consequently a loss of that same amount to the obligee, here, the state. The definition of income includes the "discharge of indebtedness." Glenn G. Munn, Encyclopedia of Bankers and Finance 459 (8th ed. 1983). In the statutory scheme before us, that income is generated following the state's having committed to suffer that loss. As discussed, that commitment guarantees the negotiability of the certificate. Thus, the credit of the state was given or loaned.

Although the moneys from the general fund have never been used to directly fund the motor fuel tax credits, the general fund can become obligated via the EPICF. The EPICF is funded through appropriations, gifts, return on investment, and money transferred from the Ethanol Authority and Development Cash

Fund. The Ethanol Authority and Development Cash Fund was funded by a checkoff program on grain sold in Nebraska and was the primary source of money in the EPICF. The main opinion states that no general fund moneys have been appropriated to the fund since its inception.

However, the motor fuel tax credits must be funded through the EPICF. § 66-1345(2). One source of funds for the EPICF is appropriations from the general fund. § 66-1345(1)(a). If general fund moneys are appropriated, article XIII, § 3, would be violated.

In *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979), we held a bond fund which assisted private mortgage lenders in providing mortgage financing was constitutional. The general fund was not implicated, and in the event that there was insufficient revenue with which to repay the bonds, the state in no manner became obligated or liable.

In this case, the general fund may become obligated in the event that the EPICF is insufficient to reimburse the Highway Trust Fund for the lost motor fuel taxes.

In order to prove a violation of article XIII, § 3, the plaintiff must show the state's credit was given or loaned in aid of any individual, association, or corporation. The appellee and amici curiae argue that since the ethanol producer credit has for its objective the promotion of public prosperity, health, security, and the general welfare of all the inhabitants of the State of Nebraska, it therefore serves a public purpose. It is true that we have previously held that the expenditure of public funds for building ethanol plants had a public purpose, given the then-current energy crisis and the need to promote the use of agricultural products by converting them to alcohol. See *State ex rel. Douglas v. Thone*, 204 Neb. 836, 286 N.W.2d 249 (1979).

However, in *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991), we rejected an argument that public purpose necessarily saved a statute which violated the prohibition against the giving or lending of the state's credit where the pledge benefits a private individual, association, or corporation. We stated that

> [t]he prohibition against the pledge of the state's credit does not hinge on whether the legislation achieves a "public purpose" when the pledge benefits a private individual, association, or corporation. *McGuffey v. Hall*, 557 S.W.2d 401 (Ky. 1977). The key is whether the state stands as a creditor through the expenditure of public funds or as a debtor by the extension of the state's credit to private corporations, associations, or individuals.

Haman, 237 Neb. at 722, 467 N.W.2d at 852.

Therefore, having concluded that the state stands as a debtor by issuing transferable motor fuel tax credit certificates which benefit a private individual, association, or corporation, I would find that the statute is unconstitutional regardless of its public purpose.

The issue is not the benefits of ethanol, but, with apologies to Marshall McLuhan: the method is the message. The issue is whether this court will sanction what is by any other name a raid on the public treasury in violation of the constitutional prohibition against giving or loaning the state's credit for private purposes. If it can be done here, it can be done for any other purpose. The door has been opened.

A method to promiscuously purloin the public purse for private gain has now been judicially sanctioned. The prohibition in article XIII, § 3, of our Constitution has been eviscerated.

CAPORALE and FAHRNBRUCH, JJ., and BUCKLEY, D.J., join in this dissent.