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# REPORTS OF CASES

DECIDED BETWEEN

APRIL 8, 1980 and JULY 29, 1980

IN THE

# Supreme Court of Nebraska

JANUARY TERM 1980

## VOLUME CCVI

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JILL NAGY

OFFICIAL REPORTER

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1981

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For the benefit of the State of Nebraska

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# TABLE OF CASES REPORTED


Action Enterprises, Inc.; Carroll v. ..... 204
Adkins & Webster v. North Platte Civil Service Comm. ..... 500
Agnew, Bassinger v. ..... 1
Ahrens v. Dye ..... 423
Alcoholic Resocialization Conditioning Help, Inc. v. State ..... 788
Allen Products Co., Inc.; Sellens v. ..... 506
Anderson; Clemens Mobile Homes, Inc. v. ..... 58
Anderson v. Anderson ..... 655
Anderson, D. R., Constructors, Inc.; Shreves v. ..... 433
Aschenbrenner v. Nebraska P. P. Dist ..... 157
Avco Financial Services of Nebraska, Inc.; Kuntzelman v. ..... 130
Auger; State v. ..... 666

Bailey v. Luckey ..... 53
Banner County v. State Board of Equalization & Assessment ..... 715
Bassinger v. Agnew ..... 1
Beam; State v. ..... 248
Benedict v. Benedict ..... 284
Bevco, Inc.; D. K. Meyer Corp. v. ..... 318
Blair, City of; Staley v. ..... 292
Board of Education; Richardson v. ..... 18
Board of Equalization; Otradovsky v. ..... 559
Borland v. Gillespie ..... 191
Bouma, In re Estate of, ..... 209
Box Butte County v. State Board of Equalization & Assessment ... 696
Brannen v. Nebraska Liquor Control Commission ..... 662
Briar West, Inc. v. City of Lincoln ..... 172
Buckley: Lambertus v. ..... 440

Cargile; Kuhlman v. ..... 302
Carroll v. Action Enterprises, Inc. ..... 204
Cather & Sons Constr., Inc.; City of Lincoln v. ..... 10
Central Constr. Co. v. Republican City School Dist. No. 1 ..... 615
Chalen v. Cialino ..... 106
Chamberlin v. Chamberlin ..... 808
Cialino; Chalen v. ..... 106
City of Blair; Staley v. ..... 292
City of Gering; Lindgren v. ..... 360
City of Lincoln; Briar West, Inc. v. ..... 172
City of Lincoln v. Cather & Sons Constr., Inc. ..... 10
City of North Platte; Simpson v. ..... 240

City of Omaha; Morford v. ..... 271
Clemens Mobile Homes, Inc. v. Anderson ..... 58
Continental Casualty Co.; Troy & Stalder Co. v. ..... 28
Cosgrove v. Mademoiselle Fashions ..... 275
County, Banner v. State Board of Equalization & Assessment ..... 715
County, Box Butte v. State Board of Equalization & Assessment ... 696
County of York v. Johnson ..... 200

D. K. Meyer Corp. v. Bevco, Inc. ..... 318
D. R. Anderson Constructors, Inc.; Shreves v. ..... 433
Daiss, Inc.; Jackman v. ..... 295
Danielsen v. Richards Mfg. Co., Inc. ..... 676
Daringer; State Securities Co. v. ..... 427
Dawson v. Papio Nat. Resources Dist. ..... 225
Denbeck; Fink v. ..... 462
Denny Wiekhorst Excavating, Inc.; Morris Mills v. ..... 443
Department of Public Welfare; Gosney v. ..... 137
Dept. of Banking and Finance; Southwestern Bank & Trust Co. ... 599
Diplomat Inn, Inc. v. Weindorf ..... 565
Dixon v. Reconciliation, Inc. ..... 45
Dockendorf v. Orner ..... 456
Douglas, State ex rel., v. Herrington ..... 516
Dugan v. Village of Greeley ..... 804
Durand, In re Interest of, ..... 415
Durand; State v. ..... 415
Dye; Ahrens v. ..... 423

Eliker v. Eliker ..... 764
Elsasser v. Elsasser ..... 128
Empkey; Luscher v. ..... 572
Engel v. Rhen Marshall, Inc. ..... 265
England; Olson v. ..... 256
Estate of Bouma, In re, ..... 209
Estate of Kentopp, In re, ..... 776
Estate of Luckey, In re, ..... 53
Estate of Olson, In re, ..... 256
Estate of Saathoff, In re, ..... 793
Estate of Wentling, In re, ..... 335

Farm Bureau Ins. Co. of Nebraska v. Wozny ..... 639
Farmers Mut. Home Ins. Co. v. Roberts & Dybdahl, Inc. ..... 651
Fink v. Denbeck ..... 462
First United Methodist Church; Meyer v. ..... 607
French; State v. ..... 92
Fricke v. Hart ..... 590

Gerber; State v. ..... 75
Gering, City of; Lindgren v. ..... 360

Giles; Nehls v. ..... 209
Gillespie; Borland v. ..... 191
Gosney v. Department of Public Welfare ..... 137
Gray v. Maxwell ..... 385
Great Western v. State Board of Equalization & Assessment ..... 721
Grosvenor v. Grosvenor ..... 395

Halbert v. Nebraska Liquor Control Commission ..... 687
Hansen v. U.S.A.A. Casualty Ins. Co. ..... 147
Hanson v. Rockwell ..... 299
Harders; Mazankowski v. ..... 583
Hart; Fricke v. ..... 590
Hehn v. State ..... 34
Herrington; State ex rel. Douglas v. ..... 516
Holdrege Coop. Equity Exchange; Johnson v. ..... 569
Homan; The Nebraskans, Inc. v. ..... 749
Hutson v. The Rush Creek Land and Livestock Co. ..... 658

In re Estate of Bouma ..... 209
In re Estate of Kentopp ..... 776
In re Estate of Luckey ..... 53
In re Estate of Olson ..... 256
In re Estate of Saathoff ..... 793
In re Estate of Wentling ..... 335
In re Interest of Durand ..... 415
In re Interest of Wolkow ..... 512
Interest of Durand, In re, ..... 415
Interest of Wolkow, In re, ..... 512

Jackman v. Daiss, Inc. ..... 295
James J. Parks Co. v. Lakin ..... 184
Jenny; Wentling v. ..... 335
Johnson v. Holdrege Coop. Equity Exchange ..... 569
Johnson; County of York v. ..... 200

Karlen; Weiseth v. ..... 724
Kennedy; State v. ..... 404
Kentopp v. Kentopp ..... 776
Kentopp, In re Estate of, ..... 776
Kolar; State v. ..... 619
Kosnopfl v. Kosnopfl ..... 516
Kreifels v. Wurtele ..... 491
Kuhlman v. Cargile ..... 302
Kuntzelman v. Avco Financial Services of Nebraska, Inc. ..... 130

LaFrance, Walker, Jackley & Saville; Rullman v. ..... 180
Lakin; James J. Parks Co. v. ..... 184
Lambertus v. Buckley ..... 440

Larimore, State ex rel., v. Snyder ..... 64
Lincoln, City of; Briar West, Inc. v. ..... 172
Lincoln, City of, v. Cather & Sons Constr., Inc. ..... 10
Lindgren v. City of Gering ..... 360
Liss v. Liss ..... 587
Little Blue N.R.D. v. Lower Platte North N.R.D. ..... 535
Livingston; Peterson & Vogt v. ..... 753
Long; State v. ..... 446
Lower Elkhorn Nat. Resources Dist.; Winter v. ..... 70
Lower Platte North N.R.D.; Little Blue N.R.D. v. ..... 535
Luckey; Bailey v. ..... 53
Luckey, In re Estate of, ..... 53
Luscher v. Empkey ..... 572

Mademoiselle Fashions; Cosgrove v. ..... 275
Marijo, Inc.; Woodsmall v. ..... 405
Marts v. Marts ..... 38
Maxwell; Gray v. ..... 385
Mazankowski v. Harders ..... 583
McClintick; Novotny v. ..... 99
Meyer v. First United Methodist Church ..... 607
Morford v. City of Omaha ..... 271
Morgan; State v. ..... 818
Morris Mills v. Denny Wiekhorst Excavating, Inc. ..... 443
Murdoch v. Murdoch ..... 327

Nebraska Liquor Control Commission; Brannen v. ..... 662
Nebraska Liquor Control Commission; Halbert v. ..... 687
Nebraska P. P. Dist.; Aschenbrenner v. ..... 157
Nebraska State Bar Association, State ex rel., v. Walsh ..... 737
Nebraskans, Inc., The, v. Homan ..... 749
Nehls v. Giles ..... 209
Newman; Ross v. ..... 42
North Platte, City of; Simpson v. ..... 240
North Platte Civil Service Comm.; Adkins & Webster v. ..... 500
Novotny v. McClintick ..... 99

Ocander v. B-K Corporation ..... 287
Occidental Sav. & Loan Assn. v. Venco Partnership ..... 469
Olson v. England ..... 256
Olson, In re Estate of, ..... 256
Omaha, City of; Morford v. ..... 271
Orner; Dockendorf v. ..... 456
Otradovsky v. Board of Equalization ..... 559

Packett; State v. ..... 548
Papio Nat. Resources Dist.; Dawson v. ..... 225
Papio Nat. Resources Dist.; Prucka v. ..... 234

Paynter; Sortino v. ..... 348
Peterson & Vogt v. Livingston ..... 753
Prucka v. Papio Nat. Resources Dist. ..... 234
Ramirez; Schanaman v. ..... 212
Reconciliation, Inc.; Dixon v. ..... 45
Republican City School Dist. No. 1; Central Constr. Co. v. ..... 615
Rhen Marshall, Inc.; Engel v. ..... 265
Richards Mfg. Co., Inc.; Danielsen v. ..... 676
Richardson v. Board of Education ..... 18
Roberts & Dybdahl, Inc.; Farmers Mut. Home Ins. Co. v. ..... 651
Rockwell; Hanson v. ..... 299
Ross v. Newman ..... 42
Rouse; State v. ..... 371
Rullman v. LaFrance, Walker, Jackley & Saville ..... 180
Rush Creek Land and Livestock Co., The; Hutson v. ..... 658

Saathoff v. Saathoff ..... 793
Saathoff, In re Estate of, ..... 793
Salestrom; Waite v. ..... 578
Schanaman v. Ramirez ..... 212
Schaneman v. Schaneman ..... 113
Schlothauer; State v. ..... 670
Scott; State v. ..... 451
Sellens v. Allen Products Co., Inc. ..... 506
Shreves v. D. R. Anderson Constructors, Inc. ..... 433
Simpson v. City of North Platte ..... 240
Snyder; State ex rel. Larimore v. ..... 64
Sortino v. Paynter ..... 348
Southwestern Bank & Trust Co. v. Dept. of Banking and Finance .. 599
Staley v. City of Blair ..... 292
State; Alcoholic Resocialization Conditioning Help, Inc. v. ..... 788
State v. Auger ..... 666
State v. Beam ..... 248
State v. Durand ..... 415
State v. French ..... 92
State v. Gerber ..... 75
State; Hehn v. ..... 34
State v. Kennedy ..... 404
State v. Kolar ..... 619
State v. Long ..... 446
State v. Morgan ..... 818
State v. Packett ..... 548
State v. Rouse ..... 371
State v. Schlothauer ..... 670
State v. Scott ..... 451
State v. Tatum ..... 625
State v. Tipton ..... 731
State v. Van Egmond ..... 331

State v. Van Egmond ..... 356
State v. Voight ..... 829
State v. Weik ..... 217
State Board of Equalization & Assessment; Banner County v. ..... 715
State Board of Equalization & Assessment; Box Butte County v. .. 696
State Board of Equalization & Assessment; Great Western v. ..... 721
State ex rel. Douglas v. Herrington ..... 516
State ex rel. Larimore v. Snyder ..... 64
State ex rel. Nebraska State Bar Association v. Walsh ..... 737
State Securities Co. v. Daringer ..... 427

Tatum; State v. ..... 625
The Nebraskans, Inc. v. Homan ..... 749
The Rush Creek Land and Livestock Co.; Hutson v. ..... 658
Tipton; State v. ..... 731
Torrey v. Torrey ..... 485
Troy & Stalder Co. v. Continental Casualty Co. ..... 28

U.S.A.A. Casualty Ins. Co.; Hansen v. ..... 147

Van Egmond; State v. ..... 331
Van Egmond; State v. ..... 356
Van Pelt v. Van Pelt ..... 350
Venco Partnership; Occidental Sav. & Loan Assn. v. ..... 469
Village of Greeley; Dugan v. ..... 804
Vogt, Peterson &, v. Livingston ..... 753
Voight; State v. ..... 829

Waite v. Salestrom ..... 578
Walsh; State ex rel. Nebraska State Bar Association v. ..... 737
Wassenmiller; Ybarra v. ..... 164
Webster, Adkins & v. North Platte Civil Service Comm. ..... 500
Weik; State v. ..... 217
Weindorf; Diplomat Inn, Inc. v. ..... 565
Weiseth v. Karlen ..... 724
Wentling v. Jenny ..... 335
Wentling, In re Estate of, ..... 335
Whitlatch v. Whitlatch ..... 527
Weikhorst, Denny, Excavating, Inc.; Morris Mills v. ..... 443
Williams v. Williams ..... 630
Winter v. Lower Elkhorn Nat. Resources Dist. ..... 70
Witcig v. Witcig ..... 307
Wolkow, In re Interest of, ..... 512
Woodsmall v. Marijo, Inc. ..... 405
Wozny; Farm Bureau Ins. Co. of Nebraska v. ..... 639
Wurtele; Kreifels v. ..... 491

Ybarra v. Wassenmiller ..... 164

York, County of, v. Johnson ..... 200

CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

JANUARY TERM, 1980

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LOIS BASSINGER, APPELLEE, V. LIBBIAN A. AGNEW, APPELLANT.

290 N. W. 2d 793

Filed April 8, 1980. No. 42574.

1. **Directed Verdict.** A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence favorable to the party against whom the motion is made and who is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom.
2. **Directed Verdict: Juries.** At the conclusion of either party's case, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find on a particular issue in favor of the party upon whom the burden of proof on that issue is imposed.
3. **Pedestrians: Motor Vehicles: Right-of-Way.** A pedestrian has equal rights with the operator of a vehicle in the use of a private way used by members of the public and each must use reasonable care for his own safety and the safety of others.
4. **Pedestrians: Right-of-Way: Negligence.** A pedestrian has a legal right to walk longitudinally along a highway or driveway, but in doing so is required to use reasonable care for his own safety.
5. **Damages: Juries.** Where there is competent evidence of future pain and suffering that is reasonably certain to continue into the future, the amount of damages is for the jury.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Reversed and remanded for a new trial.

Wellensiek & Rehmeier, for appellant.

Hoch & Steinheider, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Appellant, Libbian A. Agnew (defendant), appeals from a jury verdict of $6,250 entered in favor of appellee, Lois Bassinger (plaintiff), as a result of an automobile-pedestrian accident. The trial court had directed a verdict as to liability. Defendant assigns as errors the following: (1) The court refused to direct a verdict in defendant's favor at the conclusion of plaintiff's evidence; (2) The court ruled that defendant was guilty of negligence as a matter of law; (3) The court failed to instruct the jury on the question of plaintiff's contributory negligence; and (4) The verdict of the jury was not supported by the evidence and was excessive. We reverse and remand for a new trial.

The accident in question occurred on August 11, 1977, along the south side of St. Mary's Hospital in Nebraska City. The hospital is located on the north side of Third Avenue, just east of 14th Street, and the accident happened near an entrance which faces to the south. The entrance doorway itself opens out from what appears to be a waiting room addition, which addition extends out to the south a distance of approximately 20 feet from the main building and is about 55 feet long from east to west. To the immediate east of the hospital, taking up most of the remainder of the block, is a parking lot for automobiles. A driveway approximately 10 feet in width runs from the parking lot in a straight westerly direction along the hospital entrance a distance of about 5 or 6 feet to the south of it. Immediately west of the entrance is a flower bed taking up the space between the driveway and the wall of the waiting room and extending approximately 10 feet west to the outside wall of the waiting room structure. From that point on, an open expanse of lawn across which pedestrians

can walk extends and fans out to the northwest, west, and southwest. Just at the east edge of the flower bed, the driveway begins to curve to the south and terminates, running straight south onto Third Avenue.

Proceeding due south from the entrance is a pedestrian sidewalk which, after crossing the driveway, continues on south to the public sidewalk running along the north side of Third Avenue. Other than on that sidewalk and the driveway, there was no other way for a pedestrian to proceed from the hospital to the public streets or sidewalks.

At approximately 3:15 p.m. on the day of the accident, plaintiff, the housekeeping supervisor at the hospital, and two of her coworkers, Mildred Lyerla and Judy Jensen, concluded their duties for that day and were leaving the hospital. All three women, with plaintiff in the lead, followed by Mrs. Lyerla and then Mrs. Jensen, came out of the entrance, stepped off the curb onto the driveway, and proceeded in a single file in a westerly direction. According to Mrs. Lyerla's testimony, all three women looked both to the east and to the west before stepping onto the driveway and there were no moving automobiles in sight. Also, they were all walking right next to the curb on the north side and it was not possible to walk off the driveway at that point because of the flower bed. She went on to say that "out of the blue sky, well, here comes this car. Goes by this Judy and me and she hits Lois. She just didn't make the turn." The point where the plaintiff was struck was just about where the driveway begins to curve to the south. According to the testimony of the witness, the car did not stop, but the witness observed the license plate number. The other two women then helped plaintiff up and into the hospital.

The plaintiff testified in her own behalf and said she was a 47-year-old married woman who had three

children, one of whom was a minor, aged 16, and still at home. Her version of the accident was very similar to Mrs. Lyerla's. She said they walked out the entrance, looked both ways, saw no cars, and then proceeded to walk in a westerly direction in single file right up next to the curb. She said this was her usual route in leaving work and ordinarily, when she got to the end of the flower bed, she would step up onto the grass and walk across the lawn. According to her testimony, three-fourths of the people leaving the hospital do so in the same manner. While still alongside the flower bed, she said, there was "[j]ust this awful loud thud that hit me and knocked me down." She said she was struck on the left hip and thigh and was knocked to the ground. When asked if she saw the car after it hit her, she said she knew it was there and that she was between it and the curb and she was in fear she would be run over.

The defendant's version of what happened is that there was no accident at all. She testified that she proceeded on down the driveway in a westerly direction past the door and saw the three women walking in single file in the same direction alongside the flower bed. She claimed to have stayed as far to the south side of the driveway as she could and, as she was passing the pedestrians, "the first one leaned over toward the driveway a little bit farther and I thought at the time she must have dropped something . . . and she seemed to lean over to pick it up." Defendant claimed to be going not more than 5 miles per hour and insisted she felt nothing that would give her any reason to believe she had struck anyone. She knew nothing about the accident until contacted by the police a short time later when she had returned to her home.

The first three assignments of error may be treated together. Basic to a consideration of them is an awareness of the rule that a motion for a directed

verdict must be treated as an admission of the truth of all material and relevant evidence favorable to the party against whom the motion is made and who is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom. *Empfield v. Ainsworth Irr. Dist.*, 204 Neb. 827, 286 N.W.2d 94 (1979). Also important in our determination is the corollary to that rule that, at the conclusion of either party's case, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find on a particular issue in favor of the party upon whom the burden of proof on that issue is imposed. *Id.*

With these basic rules in mind, it is necessary to explore the rules of substantive law that are applicable to this particular case. In *Nygaard v. Stull,* 146 Neb. 736, 21 N.W.2d 595 (1946), we held that the rules of the road fixed by the statute then in effect, Neb. Rev. Stat. § 39-741 (1943), extended not only to all public highways, but also to all roads not public highways if used for travel by the public. That particular statute defined the term "highway" as "every way . . . open to the use of the public, as a matter of right, for the purposes of vehicular travel . . . ." Since that time, that particular statute has been repealed and in its place is Neb. Rev. Stat. § 39-602 (Supp. 1979), which defines a highway as "any . . . way which is publicly-maintained when any part thereof is open to the use of the public for purposes of vehicular travel." Additionally, a private road is defined by that statute to mean "every way . . . in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons." The driveway in question where the accident occurred was not "publicly-maintained," but rather privately owned subject to usage by patients, visitors,

and others having legitimate business at the hospital, and would not seem to qualify as a highway. Neb. Rev. Stat. § 39-603 (Reissue 1978) mandates that the rules of the road as provided by Neb. Rev. Stat. §§ 39-601 to 6,122 (Reissue 1978) "refer exclusively to operation of vehicles upon highways." We hold that the driveway in this case was a private way and that the rules of the road as set forth in §§ 39-601 to 6,122 did not apply to its use.

However, that is not to say that the general rules as to the degree of care and prudence established by the common law to be employed by users of public ways should not be applicable in the instant situation. In *Caldwell v. Heckathorn,* 176 Neb. 704, 707, 127 N.W.2d 182, 185 (1964), we held that "A pedestrian has equal rights with the operator of a vehicle in the use of public highways and each must use reasonable care for his own safety and the safety of others."

This rule applies with equal force to a private way used by members of the public. See 60A C.J.S. *Motor Vehicles* § 349 (1) at 464 (1969):

> [U]nder the common law or general tort law, there is a duty of exercising due care and avoiding injury to others, resting on one who operates a motor vehicle in places other than public streets or highways, as, for example, in operating on a private driveway or a private road . . . .

Without deciding this precise point, we have held in cases in which the accident did occur on private property that the question of negligence of the operator and the contributory negligence of the pedestrian was a question of fact for the jury. *Thomas v. Fundum*, 135 Neb. 728, 283 N.W. 839 (1939); *Johns v. Glidden*, 173 Neb. 732, 114 N.W.2d 767 (1962). See, also, *Anderson v. Wilcox*, 189 N.W.2d 541 (Iowa 1971).

Defendant bases her contention that the court

should have directed a verdict in her favor following the close of plaintiff's case on the theory that plaintiff stepped from an area of safety into an area of danger. She cites *Zawada v. Anderson,* 181 Neb. 467, 149 N.W.2d 329 (1967). However, in that case we denied defendant's motion for a directed verdict and stated: "In a literal sense, we suppose any pedestrian involved in a collision with a vehicle at an intersection crosswalk has moved from a place of safety into the path of danger at some point during the crossing." *Id.* at 469, 149 N.W.2d at 332. The more important inquiry in this case is whether or not plaintiff was negligent in failing to see the oncoming vehicle of the defendant if, in fact, it was within her sphere of vision at the time she stepped onto the driveway. There is nothing in the record before us justifying the drawing of a conclusion that the plaintiff was guilty of contributory negligence as a matter of law.

The answer to the second and third assignments of error is found in the conflicting evidence submitted by the two parties. There was no indication of what part of the automobile struck the plaintiff. Therefore, on that point alone, it is just as consistent to conclude that after defendant had successfully and safely passed the first two women and was part of the way past the plaintiff, the plaintiff did move farther out into the driveway and into the side of the car. This would be consistent with defendant's version of the accident, to which we have previously referred. She testified: "As I got up even with these ladies, the first one leaned over toward the driveway a little bit farther and I thought at the time she must have dropped something, maybe her purse or something; and she seemed to lean over to pick it up. And then they — I moved on a little bit. I was going quite slow." When asked whether she felt a "thump or anything," she replied "No, I didn't feel a thing. That's why when the three of them turned around

and started back east I had no reason to think anything happened or that I had done anything." Although the testimony of the other two witnesses, the plaintiff and Mrs. Lyerla, does not corroborate defendant's testimony, neither does it dispute it. Neither of the latter two witnesses was asked nor testified as to the manner in which the actual impact took place and neither specifically disputed the defendant's claim that plaintiff leaned out into the driveway just as defendant was going past her. Although, logically, defendant's testimony may not appear to be as believable as that of the other two witnesses, we cannot say as a matter of law that the accident did not happen in the manner related by defendant. As stated in *Caldwell v. Heckathorn, supra* at 710, 127 N.W.2d at 186:

> The plaintiff had a legal right to walk longitudinally along the highway or to stand alongside his car, but in doing so he is required to use reasonable care for his own safety. [Citations omitted.] The question is whether the plaintiff was in the exercise of ordinary care under the circumstances then existing. As we view it, this is a question to be determined by the jury.

This then disposes of the second and third assignments of error. The question of defendant's negligence and plaintiff's contributory negligence were questions of fact which should have been submitted to the jury under proper instructions and the trial court erred in failing to do so.

Although it is not necessary to a determination of this appeal that we consider the defendant's last assignment of error, we feel that, because a new trial will be necessary, some comment should be made in regard to the court's instructions on the measure of damages. The instructions permitted the assessment of damages for future disability and pain and suffering for the remainder of the plaintiff's ex-

pected lifetime. The defendant's assignment of error did not specifically point out or argue the instructions, but merely claimed that the damages were excessive. She did, however, specifically object to such instructions at the conference on instructions.

The only testimony as to the possibility of future damages came from Dr. R. C. Fenstermacher. He was asked whether the pain and discomfort in the leg would be permanent. His answer was that "It's very difficult to say whether they'll be permanent, on and on." In the court's syllabus to *LeMieux v. Sanderson*, 180 Neb. 311, 142 N.W.2d 557, 559 (1966), we said: "Where there is competent evidence of future pain and suffering that is reasonably certain to continue into the future, the amount of damages is for the jury." Reaching a contrary result, but based on the same rule of law, this court stated in *Hermilla v. Peterson*, 171 Neb. 365, 379, 106 N.W.2d 507, 514 (1960):

> The record yields no evidence of the quality required to show with reasonable certainty that appellee suffered a permanent injury as a proximate result of the collision . . . or that damage is reasonably certain to occur as a result of the injuries pleaded by appellee. Likewise, evidence is wholly lacking to establish with reasonable certainty that future pain and suffering will be experienced by appellee as the result of any injury inflicted on her by the accident.

We believe that the court erred in instructing on these particular elements of damages on the basis of the record before us.

The judgment is reversed and the case remanded to the District Court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., not voting.

# CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. CATHER AND SONS CONSTRUCTION, INC., A NEBRASKA CORPORATION, APPELLANT.

290 N. W. 2d 798

Filed April 8, 1980. No. 42590.

1. **Injunction.** Before one may be granted injunctive relief, one must plead and prove that, unless the injunction is granted, the moving party will suffer irreparable harm and damage and has no other adequate remedy at law.
2. _____. Injunction is an extraordinary remedy and ordinarily will not be granted except in a clear case where there is an actual and substantial injury. The right must be clear and the damage, irreparable.
3. **Injunction: Inverse Condemnation.** Generally, injunction is not a proper action to prevent a landowner from seeking damages to property through inverse condemnation by reason of earlier governmental action.
4. **Statutes: Abutting Landowner: Inverse Condemnation.** In order for a landowner to be considered to have property abutting a vacated street under the provisions of Neb. Rev. Stat. § 15-702.03 (Reissue 1977), some portion of the boundary of the landowner's property previously available for ingress or egress to or from the proposed vacated street must be in common with the property line of that street.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded with directions to dismiss.

Edward F. Carter, Jr., of Barney & Carter, P. C., for appellant.

William F. Austin, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

This is an appeal by Cather and Sons Construction, Inc., a Nebraska corporation (Cather), from a judgment entered by the District Court for Lancaster County, Nebraska (trial court), on January 10, 1979. By its judgment, the trial court enjoined Cather from proceeding with an inverse condemnation ac-

tion it had filed against the City of Lincoln, Nebraska (City), in the county court of Lancaster County, Nebraska.

Cather assigns two specific errors committed by the trial court: (1) That the trial court erred in finding that Cather was not an abutting property owner within the meaning of Neb. Rev. Stat. § 15-702.03 (Reissue 1977); and (2) That the trial court erred in finding that Cather's action for inverse condemnation was improper and should be enjoined. We have reviewed the record and find that the trial court was correct in its finding that Cather's property did not abut the subsequently vacated street as contemplated by § 15-702.03 but that it was in error in granting the injunction requested by the City. For that reason, we are required to reverse the action of the trial court and remand the case with directions to dismiss.

This is the second appearance of this case before this court and the detailed facts are fully set out in our earlier opinion, *Cather and Sons Constr., Inc. v. City of Lincoln*, 200 Neb. 510, 264 N.W.2d 413 (1978), (*Cather I*), and need not be again set out herein. For purposes of this opinion, it is sufficient for us to briefly describe the facts.

The City, by ordinance, vacated portions of North 56th Street, Morrill Avenue, and Ballard Avenue, all located in the City of Lincoln, Nebraska. Cather owns real estate which fronts on a portion of Ballard Avenue though not directly in front of that portion of Ballard Avenue vacated by the City. The vacated portion of Ballard Avenue ends exactly at the point where the Cather property begins. Cather's property, as it approaches the vacated portion of Ballard Avenue, is triangular in shape as is the vacated portion of Ballard Avenue. The vertex of the Cather triangle and the vertex of the vacated Ballard Avenue triangle come together at a point. It is by reason of this common vertex that Cather maintains

that its property "abuts" the vacated portion of Ballard Avenue.

In *Cather I,* Cather sought to enjoin the City from vacating Ballard Avenue. We affirmed the trial court's denial of Cather's requested injunction, though we noted that the question of Cather's damages by reason of the street vacation was close. Our basis for denying the injunctive relief, however, was premised on our finding in *Cather I* that Cather had failed to prove either that it would suffer irreparable damage by reason of the vacation of the street or that it did not have an otherwise adequate remedy at law. Specifically, we suggested in *Cather I* that the property owner might bring an inverse condemnation action pursuant to Neb. Rev. Stat. § 76-705 (Reissue 1976) if, indeed, Cather had suffered compensable damages.

Following our decision in *Cather I,* Cather did file an inverse condemnation action in the county court of Lancaster County, Nebraska, alleging that it had been "damaged" by reason of the City's vacating the streets in question. The petition in the county court alleged several grounds upon which a right of recovery could be based. One ground was that Cather was "an abutting property owner" whose permission had not first been obtained by the City as required by § 15-702.03. In addition, however, Cather alleged that its property had been damaged by reason of the vacation in violation of Neb. Const. art. I, § 21, which prohibits a governmental subdivision from taking *or damaging* private property without just compensation.

The City then filed this action seeking to enjoin Cather from proceeding with the inverse condemnation. As grounds for the injunction, the City alleged that it had no way to present its defenses in the inverse condemnation proceeding and, therefore, it had no adequate remedy at law. Further, the City alleged that the cost of the inverse condemnation

would be substantial and would be charged against the City because of the City's inability to present its proper defenses. It should be noted that the City's petition in no manner directly or indirectly alleged that, unless the action were enjoined, the City would suffer irreparable harm or damage. Likewise, no evidence was offered by the City during the trial as to what defenses City had which could not be raised in the inverse condemnation action or what costs would be involved in the action which justified the granting of an injunction. The conclusory allegations of the City's petition were totally unsupported by evidence. Likewise, the record is totally devoid of any evidence to prove that, unless the condemnation action were enjoined, the City would suffer irreparable harm or damage.

We have frequently pointed out that before one may be granted injunctive relief, one must *plead and prove* that, unless the injunction is granted, the moving party will suffer irreparable harm and damage and has no other adequate remedy at law. See, *Steffen v. County of Cuming*, 195 Neb. 442, 238 N.W. 2d 890 (1976); *Halligan v. Elander*, 147 Neb. 709, 25 N.W.2d 13 (1946). Likewise, we have noted that injunction is an extraordinary remedy and ordinarily will not be granted except in a clear case where there is an actual and substantial injury. The right must be clear and the damage, irreparable. See *Larson v. Board of Regents*, 189 Neb. 688, 204 N.W. 2d 568 (1973).

The fact that a party, including a governmental subdivision, must expend substantial sums of money to defend a lawsuit, while perhaps unfortunate, is generally not evidence of either irreparable harm or damage, or the fact that no adequate remedy at law exists. Would we enjoin a governmental subdivision from proceeding with condemnation merely because a landowner claimed that it would cost a substantial sum of money to prove its case, absent other evi-

dence of irreparable harm or damage, or absent other evidence of inadequacy of the remedy at law? We think not. See *Cather I.*

Why, then, should the City be granted an injunction in this case, absent its pleading and proof of either irreparable harm and damage, or the inadequacy of its remedy at law?

Both the City, in requesting the injunction, and the trial court, in granting the injunction, placed reliance upon our decision in *State v. Nickel Grain Co., Inc.*, 182 Neb. 191, 153 N.W.2d 727 (1967). We did indeed say in the *Nickel Grain* case that injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain. In deciding the *Nickel Grain* case, which involved inverse condemnation, we relied upon our decision in the case of *Consumers Public Power District v. Eldred*, 146 Neb. 926, 22 N.W.2d 188 (1946). We now believe that a more careful analysis of both the *Nickel Grain* case and the *Consumers Public Power* case raises a serious question as to whether injunction generally should lie to prevent an action in inverse condemnation. The *Nickel Grain* case authorized the granting of an injunction by a court to enjoin a property owner from proceeding with an inverse condemnation action against a governmental subdivision. As noted, however, a reading of the *Nickel Grain* case discloses that it relied upon our earlier decision in *Consumers Public Power* as authority for the proposition that a governmental subdivision may enjoin a property owner from filing an inverse condemnation action. But, an examination of the *Consumers* case does not support the decision in *Nickel Grain.* Unlike the *Nickel Grain* case, *Consumers* involved a suit by a *landowner* to enjoin a *governmental subdivision* from condemning the landowner's property and not the reverse. While in the *Consumers* case the landowner happened also to be a governmental subdivi-

sion, the basis of the suit was that the condemnation had not yet occurred and the landowner was seeking to prevent the taking. Obviously, in such a case, injunction may be proper if the governmental subdivision seeking to acquire the property is without authority. Little purpose would be served in permitting the governmental subdivision to file a condemnation action, pay the award into court, take possession of the property, and construct the project only to be later told by the court that it was without authority. One cannot "unring the bell."

An entirely different situation exists, however, in an inverse condemnation action. The taking *or damaging* contrary to Neb. Const. art. I, § 21, if proven, has already occurred. Injunction would serve little or no purpose at that point. In this case, the trial court did not enjoin the "wrong," i.e., the damage to the property, if any, but rather enjoined the right to attempt to prove that a wrong had occurred. While there may be an extreme case where such relief, if properly pleaded and proved, might be granted, generally, we should not try matters piecemeal or enjoin a party from having access to a statutory right such as that prescribed by the inverse condemnation statutes even if, ultimately, the landowner is unable to prove any damages. Generally, injunction is not a proper action to prevent a landowner from seeking damages to its property through inverse condemnation by reason of earlier governmental action. To the extent that our decision in *State v. Nickel Grain Co., Inc., supra,* is in conflict with this holding, it is overruled.

In this particular matter, the City has every right to allege and prove in the inverse condemnation action that no damages have occurred to the landowner by reason of its actions and, therefore, no recovery should be allowed. That the City may question how the appraisers will view this defense does not justify denying the landowner the right to try to

prove such claim, first to a board of appraisers and thereafter to a jury on appeal, if need be. If the landowner's claim is without merit as a matter of law, the City can always move for summary judgment once in the District Court. This may be inconvenient but it is no greater a burden than that regularly imposed on landowners. Trial courts should be hesitant to enjoin a citizen's right to claim a benefit under a statute, particularly where, as in this case, there is neither a sufficient allegation nor sufficient proof of either irreparable harm or damage or of an inadequate remedy at law.

Having concluded that the trial court erred in granting the injunction, we could terminate our opinion and say no more. Nevertheless, we recognize that by reason of our action here the landowner may elect to proceed with the inverse condemnation action. In an effort to avoid further unnecessary appeals we have elected to review the question of whether the landowner's property did indeed abut the vacated portion of Ballard Avenue. We avoided that question in *Cather I,* to no avail.

Cather's argument essentially is that the word "abut" means "to touch." Therefore, according to Cather, if its property "touches" the vacated street at any point, Cather is entitled to the rights of an abutting property owner under the provisions of § 15-702.03.

The difficulty with Cather's argument is best pointed out by the authorities and cases cited by Cather in support of its position. In 10 McQuillin, Municipal Corporations, § 30.55, at 763 (3d. ed. 1966), the noted authority on municipal law, it is stated: "If the property does abut, the lot line and street line are common." In other words, there is a recognition that before properties may abut each other there must be some common boundary line and not merely a minute pin-point touching occasioned by the existence of a common vertex.

Similarly, in *Messinger v. City of Cincinnati,* 36 Ohio App. 337, 173 N.E. 260 (1930), cited by Cather, the evidence disclosed that the properties involved had common property lines in part. Again, we see more than just a mere touching.

We believe that a reading of § 15-702.03 likewise indicates that more than a mere pin-point touching is contemplated before a property owner is considered to have "abutting" property. The statute reads, in part, as follows:

> The right of reasonably convenient egress to and ingress from . . . may not be denied except with the consent of the owners of such lands or lots, or with the condemnation of such right of access to and from such abutting lands or lots.

It would appear from a reading of this statute that "abutting" means "fronting." It is almost impossible to conceive how one could otherwise have "access" either to or from such abutting property through the mere touching of the two triangles involved in this case. It seems to us that "abutting," in the statute in question, contemplates the ability to move from the street to be vacated onto the property owner's land and return and, therefore, means "fronting." The clear purpose of the statute would seem to be to prevent governmental entities from landlocking private property without either first obtaining permission from the property owner affected or paying compensation therefor. We therefore now hold that in order for a landowner to be considered to have a property abutting on a vacated street under the provisions of § 15-702.03, some portion of the boundary of the landowner's property previously available for ingress or egress to or from the proposed vacated street must be in common with the property line of that street. Other jurisdictions have taken a similar view. See, *Boonville Merc. Co. v. Hogan,* 205 Mo. App. 594, 226 S.W. 620 (1920); Ables

*v. Southern Ry. Co.*, 164 Ala. 356, 51 So. 327 (1909). On that basis, the trial court was correct in finding that Cather was not an abutting property owner. Consistent with what we said in *Cather I* about a property owner's right to recover for special damages, if Cather's property has otherwise been damaged by reason of the street being vacated, that matter can be determined in the inverse condemnation action if Cather desires.

The judgment of the trial court is therefore reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CLINTON, J., not voting.

BOSLAUGH, J., concurring.

I concur only in that part of the opinion which holds that the appellant was not an abutting owner.

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ELMER RICHARDSON, APPELLEE, V. BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 100, KEYA PAHA COUNTY HIGH SCHOOL DISTRICT, APPELLANT.

290 N. W. 2d 803

Filed April 8, 1980. No. 42690.

1. **Administrative Hearings: Appeal and Error.** An administrative agency which decides disputes of adjudicative fact is required to act in a judicial manner and orders made in the exercise of such judicial function are reviewable by error proceedings.
2. **Administrative Hearings: Legislative Delegation.** Even though an agency is performing a legislative function, the Legislature may confer upon it judicial power to determine facts and equities under which legislation authorizes some changes to be made.
3. **Appeal and Error: Courts.** One cannot be denied his right of review in the appellate courts, and proceedings in error are always resorted to where no other method is pointed out or provided for.
4. **Administrative Hearings: Appeal and Error: Schools and School Districts.** The State Board of Education hearing appeals as provided for in Neb. Rev. Stat. § 79-1103.05 (2) (Reissue 1976) acts in a quasi-judicial capacity and, therefore, either party has the right to appeal to the District Court any such order made, either by writ of

error or under authority of Neb. Rev. Stat. § 84-917 (Reissue 1976).

5. **Judgments: Collateral Attack.** A collateral attack upon a judgment will not lie unless the judgment is absolutely void.
6. **Jurisdiction: Judgments: Collateral Attack.** Where the court or quasi-judicial agency has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack if the judgment is only voidable and not void.
7. **Administrative Hearings: Judgments: Collateral Attack.** The rule against collateral impeachment of judicial decisions applies to the determination of officers and agencies who are called upon to act judicially in matters of administration.
8. **Constitutional Law: Statutes: Rules of Supreme Court.** In order to question the constitutionality of a statute, Rule 18 of the Revised Rules of the Supreme Court (1977) requires the appealing party to serve a copy of its brief on the Attorney General.
9. **Administrative Orders: Appeal and Error.** An order of an administrative agency which has become final cannot be relitigated in an action in court to enforce such order.

Appeal from the District Court for Keya Paha County: HENRY F. REIMER, Judge. Affirmed.

John A. Wagoner, for appellant.

Edward E. Hannon of Cronin, Hannon & Symonds, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

The defendant, the Board of Education of School District No. 100, Keya Paha County High School District (School District), is a Class VI school district organized under the provisions of Neb. Rev. Stat. §§ 79-1101 et seq. (Reissue 1976). It appeals a judgment of $2,010 entered against it by the District Court for Keya Paha County, Nebraska, in favor of the plaintiff, Elmer Richardson (Richardson). This judgment represents a portion of the amount paid by Richardson to the Burke, South Dakota, High School as tuition for his two children for the school year 1976-77. This amount, as a percentage figure previously, had been ordered paid by the Nebraska State Board of Education (State Board) under the

authority of Neb. Rev. Stat. § 79-1103.05 (Reissue 1976). The School District asserts as error: (1) That the trial court failed to hold that particular statute to be special legislation in violation of Neb. Const. art. III, § 18; (2) That it failed to find the legislation "unconstitutional as being violative of the equal protection clause of the Constitution of the United States;" (3) That it held that the decision of the State Board was a final order and not appealable; (4) That there was no evidence from which it could find that the Burke High School was approved or accredited as required by Nebraska statutes; and (5) That the State Board had no authority to order payment of 75 percent of the tuition charged by the Burke, South Dakota, High School. We affirm the judgment of the District Court.

Richardson lives in the extreme northeast corner of Keya Paha County. The boundaries of the School District embrace his property. The physical plant of the school maintained by the School District is in the town of Springview which is 35 miles from Richardson's home and accessible by way of 17.6 miles of oiled road and 17.4 miles of gravel and dirt road. During extremely bad weather, the alternative route to Springview is through Burke, South Dakota, making a total traveling distance of 75 miles one way. Burke is 15 miles from Richardson's home by way of 14 miles of oiled and 1 mile of graveled road. Maintained and operated in Burke is a first level accredited educational institution under the laws of the State of South Dakota.

Section 79-1103.05 provides, in part, as follows:

> (1) When application is made in writing by the parent . . . of a pupil . . . the board of education of any school district of the sixth class maintaining an accredited high school may pay the regular . . . tuition for any pupil residing in such . . . district and attending an accredited . . . high school in this state out-

> side such school district when such high school shall be located at least ten miles closer to the place of residence of such pupil than the school maintained by such . . . district and when, in the opinion of the board of education, the best interest of such pupil or such school district may so require. When the school attended is outside this state, the board of education may pay the regular high school tuition or such portion thereof as may be agreed upon by the respective governing bodies.

Pursuant to this statute, Richardson made application to the School District to have it pay the 1976-77 tuition to Burke High School for Richardson's children. At a regular meeting of the board of education of the School District, the application was unanimously rejected. The reasons given were the additional cost to the local taxpayers and that the accepting of such application "could lead to more applications which would cause a decline in the enrollment at Keya Paha County High School which would be detrimental to the operations of the school."

Subsection (2) of § 79-1103.05 declares that: "Any parent . . . of such student who is aggrieved by a decision of the board . . . may appeal such decision to the State Board of Education whose decision shall be binding when the school attended is outside the State of Nebraska." Accordingly, Richardson appealed the School District's rejection of his application to the State Board, before which a hearing was held on August 13, 1976. At that hearing, witnesses appeared in behalf of both Richardson and the School District. They testified to such matters as the location of and convenience of access to the two schools in relation to Richardson's home, the relative educational opportunities offered by each school, and the costs or expenses incurred or to be incurred by both the School District and Richardson.

A verbatim transcript of that testimony, together with all documentary evidence presented at that hearing, appear as exhibits in the bill of exceptions of the District Court trial. On September 24, 1976, an order was entered by the State Board finding generally the existence of the statutory prerequisites previously mentioned, that it would be in the best interests of the children if they were permitted to attend the public high school in Burke, and that the School District shall pay 75 percent of the tuition charged said children for the 1976-77 school year. Actually, the original order referred to the school year 1975-76, but by order nunc pro tunc dated October 1, 1976, it was changed to read "1976-77." No appeal was taken from this order and the next filing by either party was on September 8, 1977, when the petition was filed in the District Court resulting in the proceeding from which this appeal was taken.

The petition filed by Richardson, other than alleging the statutorily-required basic facts previously presented before the State Board, simply pled the order entered by that board and attached the same as an exhibit. It further alleged that the School District had failed and refused to pay to Richardson the sum of $2,010 which represented 75 percent of the total tuition paid by him, and prayed for judgment in that amount. The School District's answer asserted that the order of the State Board was vague and indefinite in its findings as to the adequacy of the education offered by the Burke High School and that § 79-1103.05 is void and unenforceable because it violates Neb. Const. art. I, § 1, and art. VIII, § 1, and U.S. Const. amend. XIV.

Although all the evidence previously heard by the State Board was offered and received in the District Court as well as additional testimony, duplicative in nature, as to the convenience and best interests of the pupils and the quality of the education offered by Burke High School, we view the proceeding as simply

a suit to recover money claimed to be due and owing by virtue of an order of the State Board. In other words, it amounted, in effect, to an action to enforce an order of a state agency. This required proof of the issuance of that order and of the amount of tuition paid by Richardson. Under that theory of the case, the judgment of the trial court is fully supported by the undisputed evidence. However, the School District has mounted a collateral attack on the order of the State Board, challenging both the constitutionality of § 79-1103.05 and the findings made by the State Board under the provisions of that statute. The challenge, in part, involves the questions of whether the State Board has the authority to set the portion of tuition that the School District must pay and whether the decision of the State Board is appealable to the District Court or whether it is final.

The question as to the authority of the State Board to set the amount of tuition to be paid is simply a matter of statutory construction. We must presume that the Legislature intended every provision of the statute to have a meaning. *Rohrer v. Hastings Brewing Co.*, 83 Neb. 111, 119 N.W. 27 (1908). Referring then to the words of the statute as to attendance at schools outside the State of Nebraska, a school district "may pay the regular high school tuition or such portion thereof as may be agreed upon by the respective governing bodies." § 79-1103.05 (1). It would then appear that a school district is permitted, first, to make a decision as to whether to pay at all and, second, how much to pay. Although it must be conceded that apparently the School District is limited to paying all or such portion of the tuition as may be agreed upon, rather than an arbitrary percentage of the total, nevertheless it should be noted that the lesser figure of 75 percent was suggested by Richardson himself and he makes no complaint in this regard.

The statute permits the parent of a student who is aggrieved by the decision of the school district to appeal to the state board, "whose decision shall be binding." § 79-1103.05 (2). In order for this provision to have meaning, the State Board would necessarily have the authority to review the decisions of the School District as to whether to pay and how much to pay. In reviewing these two decisions, the State Board was required to conduct a hearing, receive evidence, and decide adjudicative facts. An agency which decides a dispute of adjudicative fact is required to act in a judicial manner and orders made in the exercise of such judicial function are reviewable by error proceedings. *School Dist. No. 23 v. School Dist. No. 11*, 181 Neb. 305, 148 N.W.2d 301 (1967). Additionally, even though an agency is performing a legislative function, the Legislature may confer upon it judicial power to determine facts and equities under which legislation authorizes some changes to be made. *Ruwe v. School District,* 120 Neb. 668, 234 N. W. 789 (1931). "One cannot be denied his right of review in the appellate courts, and proceedings in error are always resorted to where no other method is pointed out or provided for." *Languis v. DeBoer*, 181 Neb. 32, 37, 146 N.W. 2d 750, 753 (1966). Neb. Rev. Stat. § 25-1901 (Reissue 1975).

However, there is another method specifically provided for in order to review the actions of a state agency. Neb. Rev. Stat. § 84-917 (1) (Reissue 1976) provides that: "Any person aggrieved by a final decision in a contested case . . . is entitled to judicial review under sections 84-917 to 84-919." Neb. Rev. Stat. § 84-901 (3) (Reissue 1976) defines a contested case as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Subsection (1) of that same section defines an agency as "each

board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules . . . ." In another chapter, it is provided that: "The State Board of Education . . . shall be the policy-forming . . . body for the state school program." Neb. Rev. Stat. § 79-321 (3) (Reissue 1976). "The State Board of Education shall have the power and it shall be its duty: . . . To . . . establish rules and regulations . . . To interpret its own policies, standards, rules, and regulations and, upon reasonable request, hear complaints and disputes arising therefrom." Neb. Rev. Stat. § 79-328 (Reissue 1976).

We therefore hold that the State Board of Education hearing appeals as provided for in § 79-1103.05 (2) acts in a quasi-judicial capacity and, therefore, either party has the right to appeal to the District Court any such order made, either by a petition in error or by direct appeal as provided by law.

In so holding, we are not unaware of our rulings in *Gretna Public School v. State Board of Education,* 201 Neb. 769, 272 N.W.2d 268 (1978), and *School Dist., The City of York v. State Board of Education,* 201 Neb. 773, 272 N.W.2d 363 (1978). In those cases, we concluded that no appeal was available under the provisions of § 84-917 from a declaratory ruling of the State Board of Education pursuant to Neb. Rev. Stat. § 84-912 (Reissue 1976) as it then read. However, we pointed out that § 84-912 specifically provided that: "Such a ruling is subject to review in the manner provided in the code of civil procedure." We went on to say that § 84-917 conferred the right of appeal in a contested case only and a proceeding to obtain a declaratory ruling is not such a contested case. That is the distinction that exists between those cases and the instant case.

It is clear that the School District took no steps to prosecute an appeal of any nature within 30 days of entry of the State Board's order, as required by Neb.

Rev. Stat. §§ 25-1931 (Reissue 1975) and 84-917 (2) (Reissue 1976). Rather, it attempted to collaterally attack an order of the State Board which had long before become final. "A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack because the judgment is only voidable and not void." *State ex rel. Casselman v. Macken*, 194 Neb. 806, 809, 235 N.W.2d 867, 869 (1975). "The rule against collateral impeachment of judicial decisions applies to the determinations of state and county officers or boards of officers, who, although not constituting a court, are called on to act judicially in matters of administration . . . ." 49 C. J. S. *Judgments* § 407d at 804 (1947). See, also, *City of Phoenix v. Wright,* 61 Ariz. 458, 150 P.2d 93 (1944).

It is apparent from the record that the State Board had jurisdiction of the parties and the subject matter. Even assuming, which we do not here decide, that § 79-1103.05 (2) is unconstitutional because of one or more of the reasons advanced by the School District, the order made by the State Board would, at most, be voidable, determinable in a proper appeal procedure. "A statute is presumed to be constitutional and a judgment entered on an unconstitutional statute is not absolutely void but is voidable only." *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 107, 181 N.W.2d 119, 123 (1970). The order entered by the State Board not being void, the School District may not at this stage collaterally attack that order by challenging the constitutionality of the statute.

Additionally, there was no compliance with Rule 18 of the Revised Rules of the Supreme Court (1977), which requires that a party presenting a case involving the constitutionality of a statute must file a written notice thereof with the clerk of this court and serve a copy of the brief on the Attorney General.

Therefore, we come to the conclusion that the issue of the constitutionality of § 79-1103.05 is not properly before us on the record in this case.

The order of the State Board requiring the School District to pay 75 percent of Richardson's tuition costs not having been appealed, it became a final order and those issues could not be relitigated in Richardson's suit to collect under that order. Therefore, it is not necessary to consider the remaining assignments of error.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C. J., concurs in result.

CLINTON, J., not voting.

WHITE, J., concurring.

In *Gretna Public School v. State Board of Education*, 201 Neb. 769, 272 N.W.2d 268 (1978), we held that no right of appeal exists from a declaratory ruling of an administrative agency pursuant to Neb. Rev. Stat. § 84-912 (Reissue 1976), the statute then in effect, as the same was not a "contested case." Neb. Rev. Stat. § 84-917 (Reissue 1976). (Section 84-912 has been amended since *Gretna* was decided. See Neb. Rev. Stat. § 84-912 (Supp. 1979).)

The *Gretna* holding should be limited to its facts. In that case, the State Board of Education was powerless to do anything about *Gretna's* complaints, as was the District Court, and as was this court. The state aid money was distributed. The State Board had no authority to recall it or to deduct any alleged overpayment from the some 1,200 school districts in this state from future years' allocation. What we might more appropriately have said is that, while the State Board may render advisory opinions, the District Court and the Supreme Court will not.

TROY & STALDER CO., A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. CONTINENTAL CASUALTY COMPANY, AN ILLINOIS CORPORATION, APPELLEE.

290 N. W. 2d 809

Filed April 8, 1980. No. 42701.

1. **Evidence: Notice: Presumptions.** Evidence that a letter was properly addressed, stamped, and mailed raises a presumption that the letter reached the addressee in the usual course of the mails.
2. _____: _____: _____. The presumption of receipt of mail by the addressee does not arise unless it is shown that the letter was properly addressed, stamped, and mailed.
3. _____: _____: _____. The presumption of receipt of mail by the addressee may be rebutted by any relevant evidence. Positive testimony that a letter was not received simply raises a question of fact to be decided by the trier of fact.
4. **Judgments: Trial: Appeal and Error.** The judgment of a trial court in an action at law tried to the court without a jury has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

William B. Woodruff, P. C., for appellants.

Eugene P. Welch and Thomas A. Grennan of Gross, Welch, Vinardi, Kauffman, Day & Langdon, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This action began as a declaratory judgment proceeding to require the defendant insurance company to assume the defense of certain malpractice actions against the plaintiff architects under a professional liability insurance policy. The malpractice actions were concluded before the declaratory judgment action was determined and the action proceeded on an amended petition seeking damages and attorney's fees for breach of contract. The District Court found that no coverage was afforded under the policy of in-

surance and dismissed the action.

On March 27, 1968, the defendant insurance company issued an architects' and/or engineers' professional liability insurance policy to plaintiffs insuring them against legal liability caused by error, omission, or negligent act. The insurance policy was renewed annually through March 27, 1976. The policy was canceled on July 16, 1976, for nonpayment of premium. The defendant provided continuous malpractice coverage for plaintiffs from March 27, 1968, through July 16, 1976. The insurance policy covered

> errors, omissions or negligent acts which occur on or after the date stated in item 6 of the declarations (the effective date of the first policy issued and continuously renewed by the Company) provided that claim therefor is first made against the insured during this policy period and reported in writing to the Company during this policy period or within 60 days after the expiration of this policy period.

The policy required:

> The insured shall, as soon as practicable after receiving notification of an actual or alleged error, omission or negligent act that might reasonably be expected to create a claim against him, give written notice thereof to the Company along with full and complete particulars of the actual or alleged error, omission or negligent act.
>
> The insured shall, as soon as practicable after a claim has been made against him but in any event within 60 days after the expiration of this policy period, give written notice thereof to the Company along with full and complete particulars of the claim.
>
> If suit is brought against the insured, the insured shall immediately forward to the Company every demand, complaint, notice,

summons, pleading or other process received by him or his representative.
All notices and other papers shall be sent to the Company at 310 South Michigan Avenue, Chicago, Illinois 60604.

On April 23, 1971, plaintiffs entered into an agreement with Wilson Certified Foods, Inc., for the construction of a new pork processing plant near Marshall, Missouri. Plaintiffs' work under that contract was completed in the fall of 1973. After completion of that project, plaintiffs claimed they were entitled to more architectural fees from Wilson than they had received, and continued to negotiate with Wilson in an attempt to obtain the balance due.

On March 3, 1976, plaintiffs mailed a letter addressed to "Mr. H. Norman Hunt Claims Manager Victor O. Schinnerer & Co., Inc. 5028 Wisconsin, Ave. Washington, D. C. 20016." The letter advised Mr. Hunt that plaintiffs intended to sue Wilson for approximately $90,000, and that Wilson would undoubtedly file a counterclaim. It also stated that, in plaintiffs' opinion, any legitimate counterclaims would be nebulous.

H. Norman Hunt was an agent of the defendant insurance company who was in charge of the Omaha, Nebraska, claims office of the defendant. Hunt had never lived or worked in Washington, D.C., and had never been an employee of Victor O. Schinnerer & Co., Inc. Victor O. Schinnerer & Co., Inc., was the producing agent for architects' and engineers' malpractice insurance policies written by the defendant and had no responsibility for handling claims or defense under such policies.

The evidence was that neither H. Norman Hunt nor anyone in his office, Continental Casualty Company, nor anyone in the Schinnerer office in Washington, D.C., ever received the March 3, 1976, letter.

On April 30, 1976, Wilson advised plaintiffs by letter of claims against the plaintiffs for errors and

omissions in the architectural work for the Missouri plant. Plaintiffs did not forward that letter to the defendant or any of its agents, or notify them of its receipt. The insurance policy was canceled by defendant, after notice, effective July 16, 1976, for nonpayment of premium.

In the spring of 1977, plaintiffs were sued by Wilson for professional malpractice in the construction of the Missouri hog plant and copies of the summons and complaint were sent to Victor O. Schinnerer & Co., Inc., in Washington, D. C.

On April 6, 1977, plaintiffs sued Wilson in the United States District Court for Nebraska to recover architectural fees, and on June 6, 1977, Wilson filed a counterclaim against plaintiffs alleging malpractice. A copy of the counterclaim was sent to Victor O. Schinnerer & Co., Inc. Schinnerer advised the defendant of the claims and H. Norman Hunt, the claims manager of the defendant in Omaha, denied coverage on the basis that the claim was not reported to the company during the policy period or within 60 days after expiration.

On August 28, 1978, pursuant to a stipulation of the parties, judgment was entered in the United States District Court for Nebraska in favor of plaintiffs in the sum of $94,910.48, and Wilson was found to be entitled to a setoff against that judgment in the sum of $69,910.48 for damages caused by plaintiffs' professional errors and omissions.

Meanwhile, on June 10, 1977, plaintiffs filed this action for a declaratory judgment in the District Court for Douglas County, Nebraska, seeking to require the defendant to undertake the defense of the malpractice lawsuits.

In December 1978, following the entry of the stipulated judgments in the federal court, plaintiffs filed an amended petition in this action in the District Court for Douglas County, praying for judgment against the defendant for breach of contract in the

sum of $69,910.48, together with attorney's fees incurred in the defense of the malpractice actions.

The case was tried to the court without a jury. On February 15, 1979, the District Court entered judgment for the defendant. The District Court found that plaintiffs failed to report in writing to the defendant during the policy period the fact that a claim was made against the insured; that the letter of March 3, 1976, was incorrectly addressed and not entitled to the presumption of delivery; and also that the letter was not delivered to the defendant. The District Court therefore found that plaintiffs had no coverage under the policy of insurance and dismissed plaintiffs' action. The plaintiffs have appealed.

The plaintiffs contend that the letter of March 3, 1976, was properly addressed, stamped, and mailed and is therefore entitled to the presumption that it was received by the addressee in the usual course of the mails. Essentially, plaintiffs' position is that the presumption is irrebuttable and that testimony or evidence that the letter was not received is insufficient to overcome the presumption and is also insufficient to support a finding by the fact finder that the letter was not received.

The addressee of the letter of March 3, 1976, was H. Norman Hunt. Hunt was the claims manager of the defendant in Omaha, Nebraska. The evidence was undisputed that Hunt's correct address was Omaha, Nebraska, and that he was not and never had been a resident of Washington, D.C.

We have recently held that the presumption of receipt of mail by the addressee does not arise unless it is shown that the letter was properly addressed, stamped, and mailed. *Waite Lumber Co., Inc. v. Carpenter*, 205 Neb. 860, 290 N.W.2d 655 (1980). That case also points out that even if the presumption of receipt of mail arises, it may be rebutted by any relevant evidence and positive testimony that a

letter was not received simply raises a question of fact to be decided by the trier of fact. Even where the evidence of proper addressing and mailing is sufficient to raise the presumption of receipt and shift the burden of proof on the issue to the opposing party, the presumption is still rebuttable and the factual issue of whether mail was received is for determination by a jury under proper instructions where the evidence is in conflict.

In the case now before us, the trier of fact not only determined that the letter of March 3, 1976, was not properly addressed to the defendant nor any of its authorized agents and was not entitled to the presumption of delivery, but the court also found on the evidence that the letter of March 3, 1976, was not delivered to the defendant. The court also found that the letter did not constitute sufficient notice of a claim. There was evidence to support those factual findings.

In a law action tried to the court without a jury, it is not within the province of this court to weigh or resolve conflicts in the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the trier of fact. The judgment of a trial court in an action at law tried to the court without a jury has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong. *Insurance Co. of North America v. Hawkins*, 197 Neb. 126, 246 N.W.2d 878 (1976).

The judgment of the trial court is affirmed.

AFFIRMED.

CLINTON, J., not voting.

ARTHUR HEHN, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, AND DOROTHY C. RYAN, OFFICE SUPERVISOR, APPELLEES.

290 N. W. 2d 813

Filed April 8, 1980. No. 42702.

1. **Administrative Hearings: Appeal and Error: Record: Revocation.** Upon a petition for review of an order of suspension of an operator's license by the director of the Department of Motor Vehicles, the District Court is required to consider the record made before the director.
2. **Administrative Orders: Appeal and Error: Burden of Proof: Revocation.** On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish the invalidity of the order.

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

L. William Kelly III and Kelly, Kelly & Kelly, for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an appeal from the District Court for Hall County, Nebraska, which, on review of the defendant Department of Motor Vehicles' order suspending the plaintiff's, Arthur Hehn's, operating privileges in the State of Nebraska for failure to comply with the terms of the Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. § 60-501 (Supp. 1979) and §§ 60-502 to 569 (Reissue 1978), affirmed the order of the department. Plaintiff appeals.

This action, although not specifically designated as such by the parties in their pleadings, is conceded by the briefs to be pursuant to the provisions of § 60-503, which provide that:

Any person aggrieved by an order or act of

> the department under the provisions of sections 60-501 to 60-569, may, within twenty days after notice thereof, file a petition in the district court of the county . . . for a review thereof, . . . . The court shall summarily hear the petition as a case in equity without a jury and may make any appropriate order or decree.

This court has previously held that:

> Under the Motor Vehicle Safety Responsibility Act the issue before the Director is not whether the operator was at fault in the accident but whether the evidence supports the finding that there is a reasonable possibility of a judgment being rendered against the operator involved in the accident.

*Berg v. Pearson*, 199 Neb. 390, 259 N.W.2d 275 (1977) (court's syllabus).

Plaintiff assigns three errors: (1) That the trial court erred in determining that the burden of proof was on the license holder; (2) That the trial court erred in determining that there was a reasonable possibility of a judgment being rendered against plaintiff; and (3) That the trial court erred in admitting into evidence over objection exhibit 4 consisting of the letters, accident report, and interdepartmental communication of an analyst's report. Finding no error in the proceeding, we affirm. We shall discuss the last assignment first.

Section 60-507 (3) provides: "(3) In determining whether there is a reasonable possibility of judgment being rendered against such operator, the department shall consider all reports and information filed in connection with the accident."

Upon a petition for review of an order of suspension of an operator's license, the issue is the same as that which was before the director, but the District Court must consider any additional facts developed in the hearing in the District Court. *Berg v. Pear-*

*son, supra.* It is elementary that, if the District Court is to determine whether the director's action was correct and if the director is required by statute to consider all such reports and information filed in connection with the accident, then the record made before the director must be available to the District Court. To hold otherwise would render farcical the remedy of § 60-503. We would, in effect, be requiring the court to review a record without permitting that record to be admitted into evidence. It would be fruitless to discuss the ramifications of the suggestion that the report before the Department of Motor Vehicles constituted hearsay or for what purpose it was offered in evidence. The fact is that the record made before the director is admissible as evidence in the District Court because the statute plainly suggests that it is admissible.

The next assignment of error we shall consider is the plaintiff's contention that the court erred in placing the burden on the plaintiff to attack the validity of the order. Plaintiff argues that, unless the director has the burden of showing that there is a reason to believe recovery can be had against a licensee, due process will be violated. Plaintiff does not specifically cite any cases which hold directly on that point. We merely note that the U.S. Supreme Court in *Jennings v. Mahoney*, 404 U.S. 25, 26 (1971), said:

> We held that, although a determination that there was a reasonable possibility that the motorist was at fault in the accident sufficed, "before the State may deprive [him] of his driver's license and vehicle registration," the State must provide "a forum for the determination of the question" and a "meaningful . . . 'hearing appropriate to the nature of the case.' "

The court did not indicate that the State must bear the burden of proof; indeed, the body of law seems to indicate that the burden is on the licensee. In

*Mackey v. Director of Department of Motor Vehicles*, 194 Neb. 707, 235 N.W.2d 394 (1975), this court noted that the appealing licensee had the burden of pleading and proving the specific grounds on which he relied to establish a claim of invalidity of a license revocation under the former "points" statute, Neb. Rev. Stat. § 39-7,129 (Reissue 1968). See, also, *Lutjemeyer v. Dennis*, 186 Neb. 46, 180 N.W.2d 679 (1970); 73 C.J.S. *Public Administrative Bodies and Procedure* § 206 (1951). We hold that the procedure specified by the District Court placing on the plaintiff the burden of proving the invalidity of the order of the director of the Department of Motor Vehicles was correct and does not violate the due process rights of plaintiff.

The last issue we shall consider is whether the director of the Department of Motor Vehicles can be sustained in his finding that there was a reasonable possibility that a judgment would be rendered against the plaintiff.

On the date of the accident, July 19, 1977, the plaintiff had a valid Nebraska driver's license and had no liability insurance. There is no contention that the plaintiff had valid liability insurance in effect at the date of the accident or that he had furnished a bond or a valid release to the department pursuant to § 60-507.

The plaintiff indicated that he was driving on Highway 2 within the boundaries of Cairo, Hall County, Nebraska, in a westerly direction at a speed of 20 to 25 miles an hour; that he was turning left between intersections, apparently into an alley, where left turns were not prohibited. The plaintiff's evidence indicates that, as he was slowing down to turn left, he saw no vehicles either following or approaching him and that, as he was turning, he heard a screech of tires from the rear and felt an impact to his truck coming from the rear. The accident report of the investigating officer, Howard N. Jen-

sen, which was considered by the director, stated that the plaintiff's vehicle was attempting to make a left turn into an alley between Suez and Berber Streets, on Highway 2 in Cairo; the other vehicle was also westbound and had started to pass plaintiff's vehicle and struck it in the left rear as the plaintiff was turning into the alley. The police officer indicated on the report that the plaintiff's left-turn signal was not operating. While the plaintiff testified that his signal was operating before the accident, he conceded that the signal was not operating after the accident. There was no evidence presented to show that the signal lamp was in any way damaged or rendered inoperable by the accident. On the basis of those reports, the director found that a reasonable possibility existed that the plaintiff could be held liable for making a turn into an alley without a proper signal. It is not the function of the director to weigh the alleged negligence or contributory negligence of the parties involved but to make, on the basis of a report, a determination of whether a reasonable possibility of liability exists.

Based on the facts outlined above, it is obvious that such determination by the director and by the District Court is supported by sufficient fact so as not to constitute an abuse of discretion.

AFFIRMED.

KRIVOSHA, C. J., concurs in result.

CLINTON, J., not voting.

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SHELLEY S. MARTS, APPELLANT, V. ROBERT E. MARTS, APPELLEE.

290 N. W. 2d 816

Filed April 8, 1980. No. 42756.

1. **Child Custody.** The best interests of the minor children is the paramount consideration in determining custodial issues.

2. **Divorce: Decrees: Child Custody.** Where a decree has been entered following trial on the merits which awards custody of minor children, it is ordinarily not subject to modification in the absence of a material change of circumstances occurring subsequent to the entry of the decree.
3. **Child Custody: Appeal and Error.** The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Russell S. Daub, for appellant.

John Thomas, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

This is an appeal by the petitioner, Shelley S. Marts (Shelley), from an order of the District Court for Douglas County, Nebraska, modifying a divorce decree to change custody of the parties' 9-year-old daughter, Heather. The modification changed custody from the petitioner to the court, with physical possession being placed with the respondent, Robert E. Marts (Robert). Shelley claims the trial court erred and alleges that there are no facts in the record to support a finding that the best interests of the child required a change of custody. We affirm.

The principles which control this type of case may be stated as follows: The best interests of the minor children is the paramount consideration in determining custodial issues. *Fleharty v. Fleharty,* 202 Neb. 245, 274 N.W.2d 871 (1979); *Broadstone v. Broadstone*, 190 Neb. 299, 207 N.W.2d 682 (1973). Where a decree has been entered following trial on the merits which awards custody of minor children, it is ordinarily not subject to modification in the absence

of a material change of circumstances occurring subsequent to the entry of the decree. *Buchele v. Tuel*, 204 Neb. 641, 284 N.W.2d 564 (1979); *Gray v. Gray*, 192 Neb. 392, 220 N.W.2d 542 (1974). The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. *Turner v. Turner*, 205 Neb. 6, 286 N.W.2d 100 (1979).

There is little evidence of the circumstances that existed at the time of the original divorce decree. The record indicates that Shelley was bringing up Heather in a fairly normal one-parent family situation, while Robert regularly paid his child support. At times, neither parent provided the child with an exemplary lifestyle. Shelley has lived with her boyfriends on at least two different occasions, while Robert has since married the woman with whom he had been living. Perhaps the main difference between the two is that Shelley engaged in her affairs while she had custody of the child, a fact which may encourage the child to view that type of lifestyle as common and proper, when in reality it is not.

Testimony from a psychologist, Dr. Kenneth Berry, indicated that Heather was adult-oriented and somewhat independent. This appears to be due to her relationships with her mother's various male friends and the fact that frequent residential moves have left her with very few, if any, child playmates. Dr. Berry stated there was no evidence of Heather being emotionally disturbed and that she had adequate educational development.

Shelley is now a student at the University of Nebraska-Omaha. She is working part time at two different jobs for a total of approximately 30 hours each month. There is a conflict of evidence as to how many times Shelley has moved to different

rental units in Omaha, but by her own admission she has moved at least five times. During the course of one of these moves, Shelley did not notify Robert of her or the child's new address for nearly 1 year. Heather was once found alone and unattended by a juvenile officer. Robert had to leave work to wait with the child in juvenile court until Shelley could be located. Shelley has been living in an apartment with a man for approximately 18 months. The couple stated they planned to be married in 1978, but no marriage has yet occurred.

Robert has since remarried and owns a house in a stable family neighborhood in Omaha. He has demonstrated a renewed interest and concern for Heather. He has a steady full-time job with the Douglas County Data Processing Center. There is testimony his new wife and Heather have a good relationship and have participated in various educational and social activities together.

The issue of child custody was not contested in the original divorce decree. While neither party has been found to be an unfit parent, the District Court did make sufficient findings of fact to indicate there has been a material change of circumstances over the past 5 years. Shelley has expressed a desire to further her career in the theater, possibly as a drama instructor. Her current boyfriend is a professional actor. She admits that further travels may be required in order to enhance career opportunities. While her desire for success and stardom may be meritorious, the somewhat transient lifestyle is apt to be detrimental to a child of Heather's age. Dr. Berry stated that while both parents were fit to have custody, it would not be detrimental to Heather to have her live with her father. We conclude on independent examination of the record that there has been a change in circumstances in the deteriorating lifestyle of Shelley, detrimental to the environment of a child of Heather's age, whereas

Robert's attitude as a father has matured and improved to the point where it is fairly obvious that he is in a position to provide a more stable and natural home life for Heather at this time.

We affirm the decision of the District Court.

AFFIRMED.

CLINTON, J., participating on briefs.

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K. W. ROSS AND KAREN POWELL ROSS, HUSBAND AND WIFE; GEORGE D. YOUNG AND WILLIE PODESTA YOUNG, HUSBAND AND WIFE, APPELLEES AND CROSS-APPELLANTS, V. MURRAY NEWMAN, APPELLANT AND CROSS-APPELLEE.

291 N. W. 2d 228

Filed April 15, 1980. No. 42598.

1. **Restrictive Covenants: Deeds.** A restrictive covenant requiring approval of an owner's use of property is unenforceable if it fails to provide a clear standard by which such approval will be judged and when such approval will be required.
2. _____: _____. Restrictions on the erection or use of buildings will be construed, if possible, so as to effectuate the intention of the parties.
3. _____: _____. Covenants restricting the use of property are not favored in the law and, if ambiguous, will be construed in a manner permitting the maximum unrestricted use of the property.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded with directions to dismiss.

John H. Cotton of Gaines, Otis, Mullen & Carta, for appellant.

Elizabeth Stuht Borchers and Gunderson, Abrahamson & Borchers, for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and MARTIN, District Judge.

MARTIN, District Judge.

Appellant Murray Newman, the owner of a town-

house in Country Club Acres, a condominium regime in Omaha, Nebraska, installed a skylight in his townhouse. Other owners in the condominium sought injunctive relief against him for violation of the restrictive covenants of the condominium. The District Court for Douglas County, Nebraska, enjoined Newman from further violations of the covenants and ordered removal of the skylight. He appeals the decision and asserts that the covenants are vague and ambiguous; that the covenants were applied in an arbitrary and capricious manner; and that the violation, if any, was minor and did not warrant the remedy ordered.

The covenants in question here are section 5c:

> No clustered residence will be altered, built, constructed, or otherwise maintained on any townhome lot without an express written approval executed by a majority of the owners of such townhome lots as to general appearance, exterior color or colors, harmony of external design and location in relation to surroundings and topography and other relevant architectural factors, location within townhome lot boundary lines, quality of construction, size, and suitability for clustered residential purposes . . . .

and paragraph 8:

> *Modification, Revocation.* The covenants contained herein may be modified or revoked upon a majority vote of all townhome lot owners. Any Easement contained herein may be revoked in whole or in part by the grantee thereof, its successor or assign.

The evidence indicates that other owners objected verbally to Newman or his contractor to the installation of the skylight. Newman, through his attorney, attempted to seek the informal approval of the other coowners to installation of the skylight, but when this endeavor failed, went ahead with the installa-

tion. Previously, Newman had installed an exterior front door and bevelled glass window, and others in the condominium had expressed their individual tastes by installing a door knocker, different colored front doors, and a patio, all without a vote under the provisions of paragraph 8, above. At one time, TV antennas had been placed on two of the townhouses, but they had been removed.

Appellees, however, contend that the changes made by Newman to his townhouse were such "alterations" as would require a majority vote of the other owners and so constituted a breach of the covenants.

The question here is, is "altered" or "alteration" defined anywhere in the covenants so as to put Newman on notice that the skylight, bevelled window, etc., would be "alterations" requiring a majority vote of the owners?

We think not. The evidence indicates that the other coowners had different definitions of "alteration" in mind. The main assertion in their argument is that *any change* must be voted on. Black's Law Dictionary (5th ed. 1979) defines "alteration," in part, as "A change of a thing from one form or state to another . . . ." 3A C.J.S. *Alteration* at 263 (1973) states that an alteration of a building is "a change or substitution in a substantial particular of one part of a building for a building different in that particular . . . ."

No clear standard is set forth in these covenants as to what is meant by "alteration" and we feel that, in the absence of such a standard, the trial court should have found the covenants unenforceable. This court stated in *Hogue v. Dreeszen,* 161 Neb. 268, 73 N.W.2d 159 (1955), that a restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the

purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property. Restrictions as to the erection or use of buildings will be construed, if possible, so as to effectuate the intention of the parties.

While the *Hogue* case involved the interpretation of covenants relating to erection of buildings, the same rule applies to the use of buildings.

In this instance, reference to the covenants as a whole shows that the intention of the framers of the covenants was to preserve the public appearance of the units. From the evidence, it is clear that the changes made by Newman do not change the form of the structure so as to contravene this intent.

The statutes and uniform course of procedure do not authorize payment of attorney's fees for appellees and same are denied.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, J., concurs in result.

CLINTON, J., not voting.

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JOHNNY DIXON, DOING BUSINESS AS J. D. PRODUCTIONS, APPELLANT, V. RECONCILIATION, INC., DOING BUSINESS AS KOWH AM-FM RADIO STATION, KEITH DONALD, AND CARL ALLISON, INDIVIDUALLY AND SEVERALLY, APPELLEES.

291 N. W. 2d 230

Filed April 15, 1980. No. 42688.

1. **Conspiracy.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
2. _____. An action of conspiracy sounds essentially in tort. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury

upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter, persons cannot conspire.

3. **Pleadings: Petition.** The petition must contain a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition.
4. **Pleadings: Demurrer.** A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from the facts which are well pleaded. A petition is sufficient if, from the statement of facts set forth therein, the law entitles the plaintiff to recover.
5. _____: _____. Pleadings are to be liberally construed, and if with such construction a petition states a cause of action against a defendant and in favor of the plaintiff, a demurrer thereto should be overruled.
6. **Conspiracy.** To state a cause of action for conspiracy, it is necessary for the pleader to allege not only the conspiracy and the doing of the wrongful acts, but also facts showing that damage resulted therefrom.
7. **Conspiracy: Corporations.** To set forth a claim of conspiracy between a corporation and its corporate employees, the petition must allege that the latter are acting outside the scope of their authority or other than in the normal course of their corporate duties.

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

Jarve L. Garrett, for appellant.

H. Daniel Smith, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Plaintiff below, Johnny Dixon, doing business as J. D. Productions, hereinafter referred to as "Dixon," appeals to this court from the action of the District Court for Douglas County, Nebraska, sustaining the demurrer of the defendants to Dixon's third amended petition which sought damages for an alleged civil conspiracy between the defendants, Reconciliation, Inc., doing business as KOWH AM-FM Radio Station, hereinafter referred to as "KOWH"; Keith Donald,

general manager of said radio station, hereinafter referred to as "Donald"; and Carl Allison, sales manager of said radio station, hereinafter referred to as "Allison." The petition alleges that the defendants did jointly and severally conspire among themselves and with others for the purpose of intentionally injuring, either directly or indirectly, the plaintiff's promotional business in general and, specifically, his promotion of a B. T. Express concert. As previously mentioned, the trial court sustained the demurrer and dismissed Dixon's third amended petition. The sole issue in this appeal is the correctness of the ruling by the trial court.

We have in this state recognized a cause of action for damages resulting from civil conspiracy. The general nature of the action is set out in *Peters v. Woodman Accident & Life Co.*, 170 Neb. 861, 104 N.W.2d 490 (1960), wherein we stated: "A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means." *Id.* at 869, 104 N.W.2d at 496. In *Frank H. Gibson, Inc. v. Omaha Coffee Co.*, 179 Neb. 169, 137 N.W.2d 701 (1965), we cited with approval language from the earlier case of *Reid v. Brechet*, 117 Neb. 411, 220 N.W. 590 (1928), as follows:

> An action of conspiracy sounds essentially in tort. . . . The principle [sic] element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter persons cannot conspire.

*Id.* at 179, 137 N.W.2d at 708. See, also, *Davidson v. Simmons*, 203 Neb. 804, 280 N.W.2d 645 (1979); *Workman v. Workman*, 174 Neb. 471, 118 N.W.2d 764 (1962); *Trebelhorn v. Bartlett*, 154 Neb. 113, 47 N.W.

2d 374 (1951); *Rettinger v. Pierpont,* 145 Neb. 161, 15 N.W.2d 393 (1944). The general rule in this state appears to be in accord with W. Prosser, Law of Torts 293 (4th ed. 1971), where that eminent authority states:

> There has been a good deal of discussion as to whether conspiracy is to be regarded as a separate tort in itself. On the one hand, it is clear that the mere agreement to do a wrongful act can never alone amount to a tort, whether or not it may be a crime; and that some act must be committed by one of the parties in pursuance of the agreement, which is itself a tort. "The gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff." It is only where means are employed, or purposes are accomplished, which are themselves tortious, that the conspirators who have not acted but have promoted the act will be held liable.

Having stated the general nature of the action involved in this appeal, we believe it would be helpful at this time to set forth applicable principles of pleading with reference thereto. It is a statutory requirement that petitions must contain a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. Neb. Rev. Stat. § 25-804(2) (Reissue 1975). The statutes also provide that a defendant may demur to a petition when it appears on its face that the petition does not state facts sufficient to constitute a cause of action. Neb. Rev. Stat. § 25-806(6) (Reissue 1975). "It is unimportant how meritorious a cause of action a litigant may have. It cannot avail him anything if he fails to properly state in his petition concerning it sufficient actionable facts. A petition which fails to plead actionable facts is vulnerable to a general demurrer." *Johnson v. Ruhl,* 162 Neb. 330, 335, 75 N.W.2d 717, 720 (1956). See, also, *State Auto. & Cas.*

*Underwriters v. Farmers Ins. Exchange,* 204 Neb. 414, 282 N.W.2d 601 (1979).

> A . . . general . . . demurrer "tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded. A petition is sufficient if from the statement of facts set forth therein the law entitles the plaintiff to recover."

*Clyde v. Buchfinck,* 198 Neb. 586, 592, 254 N.W.2d 393, 397 (1977). See, also, *Cizek v. Cizek,* 201 Neb. 4, 266 N.W.2d 68 (1978); *Dangberg v. Sears, Roebuck & Co.,* 198 Neb. 234, 252 N.W.2d 168 (1977); *Pfeifer v. Ableidinger,* 166 Neb. 464, 89 N.W.2d 568 (1958). We have also held that pleadings are to be liberally construed, and if with such construction a petition states a cause of action against a defendant and in favor of the plaintiff, a demurrer thereto should be overruled. *Pefley v. Johnson,* 30 Neb. 529, 46 N.W. 710 (1890).

With the foregoing rules in mind, we must, therefore, determine what facts must be alleged in order to state a cause of action for conspiring to injure a business relation. To state a cause of action for conspiracy, it is necessary for the pleader to allege not only the conspiracy and the doing of the wrongful acts, but also facts showing that damage resulted therefrom. *Commercial Union Assurance Co. v. Shoemaker,* 63 Neb. 173, 88 N.W. 156 (1901); *Reed v. Occidental Bldg. & Loan Ass'n,* 122 Neb. 817, 241 N. W. 769 (1932); *Rankin v. Bigger,* 128 Neb. 800, 260 N. W. 202 (1935). Of interest in this connection is *Stewart Land Co. v. Perkins,* 290 Mo. 194, 234 S.W. 653 (1921), wherein the court held that a petition alleging that plaintiff was engaged in a lawful business and that defendant without cause or excuse, and actuated alone by malice, conspired with others to interfere with and destroy plaintiff's business, and

in pursuance of such conspiracy has actually interfered with and damaged the business, sufficiently stated a cause of action on the case for unlawful conspiracy.

We now examine the allegations contained in Dixon's third amended petition. Concededly, this petition is not a model of good pleading. However, in addition to the general allegation that the defendants did jointly and severally conspire among themselves and with others for the purposes of intentionally injuring, either directly or indirectly, the plaintiff's promotional business in general and, specifically, his promotion of the B. T. Express concert, the petition contains numerous allegations and descriptions of various acts allegedly committed by the parties in furtherance of the conspiracy, and also allegations with reference to their status as agents of KOWH at the time of performing such acts. Giving Dixon the benefit of every inference which may be reasonably drawn from his pleadings, as we are required to do, we believe that a fair summary of the allegations contained in his petition would include the following facts: that Dixon was in the business of promoting concerts through various forms of media, including, but not limited to, promotion by radio station advertisements; that an employee and sales agent of KOWH, acting within the scope of his authority and on behalf of KOWH, induced Dixon to purchase broadcast time for promotional announcements in furtherance of his business and that Dixon paid such agent the sum of $300 for such radio announcements, part of which was for promoting a concert by a group known as B. T. Express; that defendants Donald, the general manager of the station, and Allison, the sales manager, did intentionally conspire to injure plaintiff's promotional business and his promotion of the B. T. Express concert and instructed the salesman to whom the $300 was paid to convert that money to his personal use; that defendant KOWH, in

furtherance of the conspiracy, refused to air the radio announcements which Dixon had purchased, knowing that their agent had the money for same in his possession; that Allison, while acting outside the scope of his authority as sales manager of KOWH, intimidated the general manager of the Omaha Civic Auditorium and caused him to pay additional money for the same advertisements that Dixon had originally purchased from KOWH's sales agent; that KOWH broadcast the radio announcements at a later date than requested, thereby violating the agreement between KOWH and the general manager of the civic auditorium; that Allison, acting outside the scope of his authority as sales manager of KOWH, intimidated the father of one of the other musicians scheduled to appear at the concert, who was attempting to place radio advertisements in Dixon's name, and caused the father to place the announcements in the name of his son; that KOWH, with the purpose of injuring Dixon's promotional business, ran certain other radio announcements back-to-back with the radio announcements purchased by Dixon; and that KOWH stopped promoting the records of the B. T. Express, the group scheduled to appear at the concert. Finally, Dixon prayed for damages to his promotional business caused by the actions of the alleged conspirators. We believe the foregoing allegations, although not artfully pleaded, are sufficient to *state* a cause of action on the theory of civil conspiracy to injure Dixon's business.

Defendants contend, however, that the petition was defective because a corporation cannot conspire with itself and because the tort upon which the conspiracy claim was founded does not exist in this state. As to the first contention, it is true as a general proposition that a corporation cannot conspire with itself any more than a private individual can do so. As stated in *Soft Water Utilities, Inc. v. LeFevre,*

159 Ind. App. 529, 539, 308 N.E.2d 395, 399 (1974): "A corporation cannot conspire with an agent when that agent is *acting within the scope of his authority.* A corporation acts through its agent and the acts of the agent are the acts of the corporation." (Emphasis supplied.) See, also, *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911 (5th Cir. 1952), *cert. denied,* 345 U. S. 925 (1953); *Cole v. University of Hartford,* 391 F. Supp. 888 (D. Conn. 1975). It is, however, possible for a corporate official, acting in his individual capacity, to enter into a conspiracy with the corporation. *Cape Cod Food Products v. National Cranberry Ass'n,* 119 F. Supp. 900 (D. Mass. 1954). To set forth a claim of conspiracy between a corporation and its corporate employees, the petition must allege that the latter are acting outside the scope of their authority or other than in the normal course of their corporate duties. *Webb v. Culberson, Heller & Norton, Inc.*, 357 F. Supp. 923 (N.D. Miss. 1973); *Cole v. University of Hartford, supra; Soft Water Utilities v. LeFevre, supra.* It is clear from a reading of the petition that Dixon has alleged in several different places that Donald and Allison were acting outside the scope of their corporate duties when they engaged in acts which furthered the aims of the purported conspiracy. We think their allegations in this regard were sufficient and we reject defendants' claim to the contrary.

We likewise reject defendants' second argument that there is no action in this state for injury to one's business. We have previously discussed this issue and it is clear that such a cause of action does exist. However, defendants specifically direct our attention to *Buhrman v. International Harvester Co.,* 181 Neb. 633, 150 N.W.2d 220 (1967), which holds that a concerted refusal to continue a business relationship, *terminable at will,* does not constitute conspiracy as such a refusal would not be an unlawful act. We note from the record, however, that in his earlier

petitions, which were dismissed by the court on demurrers, Dixon had previously alleged as a separate cause of action a breach of contract by refusal to do business with Dixon. However, the third amended petition does not rely upon a breach of contract to establish its claim of conspiracy but on intentional acts done for the purpose of injuring the plaintiff's business. We do not have an allegation of a mere refusal to do business; rather, the petition alleges, in addition, various acts, including conversion of money paid to an agent of KOWH. We reject defendants' contentions in this regard.

We wish to emphasize that we do not pass upon the merits of Dixon's claim, nor the possibility of his recovery. We only state that his petition contains sufficient allegations of fact to state a cause of action for civil conspiracy to injure Dixon's business, keeping in mind that he is to be given the benefit of every inference which may reasonably be drawn from the allegations contained in the petition.

We conclude, therefore, that the District Court was in error in sustaining the demurrer and dismissing Dixon's third petition and we reverse and remand this matter to the District Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

BOSLAUGH, J., concurs in result.

CLINTON, J., not voting.

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IN RE ESTATE OF CHARLES H. LUCKEY, DECEASED. LA VERNE BAILEY, APPELLANT, V. JEROME LUCKEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES H. LUCKEY, DECEASED, APPELLEE.

291 N. W. 2d 235

Filed April 15, 1980. No. 42699.

1. **Adoption: Parental Rights.** After a decree of adoption is entered, the usual relation of parent and child and all of the rights, duties,

and other legal consequences of the natural relation of parent and child shall thereafter exist between such adoptive child and the person or persons adopting such child and his, her, or their kindred.

2. _____: _____. The purpose of Neb. Rev. Stat. § 43-110 (Reissue 1978) is to terminate any relationship which existed between the natural parent and the child and to create a new relationship between the adoptive parent and the child.
3. **Intestate Succession.** The right of inheritance is purely a creature of statute and must be determined not as a matter of sentiment but as a matter of law.
4. **Adoption: Parental Rights: Intestate Succession.** Under the provisions of Neb. Rev. Stat. § 30-2309 (Reissue 1975), a twice-adopted child may not inherit under the laws of intestacy from its first adoptive parent who has thereafter consented to the second adoption and relinquished all rights of a parent as to the child.

Appeal from the District Court for Platte County: JAMES A. BUCKLEY, Judge. Affirmed.

Patrick Brock, for appellant.

Luckey, Sipple & Hansen, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

This appeal is a case of first impression and involves the issue of whether a twice-adopted person may inherit under the laws of intestacy from his first adoptive parent. The trial court decreed that the second adoption terminated the relationship between the child and his first adoptive father and, therefore, under the provisions of Neb. Rev. Stat. § 30-2309 (Reissue 1975), eliminated the child's right to inherit under the Nebraska laws of intestacy from his first adoptive father. We agree with the decision of the trial court and affirm the judgment.

The decedent, Charles H. Luckey, and one Ruth Louis were married in 1921. On January 14, 1928, decedent and his then wife adopted the appellant, La Verne Bailey. On January 25, 1935, Charles H. Luckey and Ruth Louis were divorced and, in August of 1935, Ruth Louis married Richard Bailey. In July

of 1943, Ruth and Richard Bailey adopted appellant. At the time of the adoption, appellant was over the age of 14 and voluntarily entered his appearance in the adoption proceedings and consented to said adoption by Richard Bailey. The decree of adoption entered on July 31, 1943, by the county court of Platte County, Nebraska, recites that, at the time of the hearing on the adoption, the first adoptive father, Charles H. Luckey, appeared in person and voluntarily relinquished all right to the custody of and the control over appellant. The decree of adoption entered on July 31, 1943, declared that the appellant was now the child of Richard and Ruth Bailey. Decedent died intestate on January 4, 1978.

Following his death, a brother of the decedent, Emil Luckey, as a surviving brother claiming to be a legal heir, filed a petition to appoint a nephew of Charles H. Luckey as the personal representative of the estate. Appellant entered his appearance, objected to the petition, and claimed that he was the sole and only heir and had priority to be the personal representative of the estate of the deceased. Hearing was held in the county court, which found adversely to appellant. Subsequently, appeal was taken to the District Court for Platte County, Nebraska, which likewise found adversely to the appellant.

Appellant's claim must fail on two grounds. To begin with, it appears to us that a reading of the statute involved precludes appellant from being considered a child of his first adoptive father following the second adoption and he, therefore, is not entitled to inherit under the Nebraska laws of intestacy. Prior to January 1, 1977, this jurisdiction was committed to the view that a child, though adopted, could nevertheless inherit from its natural father. See *Wulf v. Ibsen*, 184 Neb. 314, 167 N.W.2d 181 (1969). On January 1, 1977, however, a new Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 to 2902 (Reissue

1975), took effect. Section 30-2309 provides, in part, as follows: "If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person . . . an adopted person is the child of an adopting parent and not of the natural parents . . . ." The Nebraska Comment following § 30-2309 provides, in part, as follows: "This section legislatively overrules *Wulf v. Ibsen*, 184 Neb. 314, 167 N.W.2d 181 (1969), noted in 49 Neb. L. Rev. 538-41 (1970), allowing an adoptive child to inherit from his natural parents as well as his adoptive parents." Appellant argues that the Legislature cannot overrule a decision of this court. While it is true that the Legislature cannot overrule a decision of this court by simple mandate, nevertheless it is clear that the Legislature may adopt a statute which has the effect of overruling a previous decision. The Nebraska Comment makes it clear that such was the legislative intent in enacting § 30-2309. We believe that a simple reading of the statute, together with the laws concerning adoption, in particular, Neb. Rev. Stat. § 43-110 (Reissue 1978), makes it clear that the Legislature did indeed overrule the effect of our earlier decision in the *Wulf* case and provided that an adoptive child could only inherit by intestacy from his last adoptive parent.

Specifically, § 43-110 provides that, after a decree of adoption is entered, the usual relation of parent and child and all of the rights, duties, and other legal consequences of the natural relation of parent and child shall thereafter exist between such adoptive child and the person or persons adopting such child and his, her, or their kindred. The purpose of § 43-110 is to terminate any relationship which existed between the natural parent and the child and to create a new relationship between the adoptive parent and the child. The adoptive parent then becomes, in law, the equivalent of the natural parent. If a sub-

sequent adoption occurs and, as in this case, the first adoptive parent, now occupying the position of a natural parent, consents to the adoption and relinquishes all rights, the relationship which existed between the first adoptive parent and the child is likewise terminated and ceases to exist and is replaced by a new relationship between the child and the second adoptive parent who, in law, then becomes the equivalent of a natural parent. See *In re Estate of Taylor*, 136 Neb. 227, 285 N.W. 538 (1939). It makes little or no sense to suggest that the law intended that if one were a natural parent and an adoption occurred, all relationship, including the right to inherit by intestacy, would terminate, but if one were an adoptive parent who later consented to a subsequent adoption, the relationship would not terminate and the right to inherit would continue. Once the second adoption occurs, there is no longer any legal relationship between the relinquishing parent and the child. Any other reading of § 30-2309 would be absurd.

A second reason exists why the appellant may not recover. There is no common law right of inheritance. The right of inheritance is purely a creature of statute and must be determined not as a matter of sentiment but as a matter of law. See, *In re Estate of Grinnell*, 117 Neb. 332, 220 N.W. 583 (1928); *Neil v. Masterson*, 187 Neb. 364, 191 N.W.2d 448 (1971).

As we clearly said in *In re Estate of Enyart*, 116 Neb. 450, 454, 218 N.W. 89, 91 (1928):

> The right of inheritance is created by statute. It is within the power of the legislature to determine what persons or whether any person shall inherit from one who dies intestate, and to determine what proportion of the decedent's estate shall descend to any particular person or class of persons. The legislature creates and may take away the right to inherit. It is within the power of the

> legislature to confer the right of inheritance upon adopted children or adoptive parents, as well as upon natural children and parents.

Section 30-2309 makes no reference to a "former adoptive parent." The statute being silent as to the right to inherit from a first adoptive parent by a child twice adopted must be interpreted to mean that no right exists. It does not follow that where all rights of inheritance are statutory, the absence of a reference to a "former adoptive parent," compels us to include the former adoptive parent within the meaning of provisions referring to the current adoptive parent. Had the Legislature intended to exclude the natural parent but include subsequent parents, including a former adoptive parent, it could have easily done so. All the evidence as to their intent is to the contrary as is the language of § 30-2309. We therefore hold that, under the provisions of § 30-2309, a twice-adopted child may not inherit under the laws of intestacy from its first adoptive parent who has thereafter consented to the second adoption and relinquished all rights of a parent as to the child.

AFFIRMED.

CLINTON, J., not voting.

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CLEMENS MOBILE HOMES, INC., A CORPORATION, AND JERALD E. CLEMENS, INDIVIDUALLY, APPELLANTS, V. FRANCIS ANDERSON, APPELLEE.

291 N. W. 2d 238

Filed April 15, 1980. No. 42722.

1. **Contracts.** A written contract expressed in unambiguous language is not subject to interpretation or construction and the intention of the parties must be determined from its contents.
2. _____. Where the contract is unambiguous, it is not subject to interpretation or construction.

Appeal from the District Court for Scotts Bluff

County: ROBERT O. HIPPE, Judge. Affirmed.

James R. Hancock and Richard S. Kleager of Hancock Law Offices, for appellants.

Donn C. Raymond and Rick L. Ediger of Raymond, Olsen & Coll, P.C., for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

This is a suit which was commenced by appellants, Clemens Mobile Homes, Inc., a closely-held corporation, and Jerald E. Clemens, its majority stockholder, against appellee, Francis Anderson, a minority stockholder and former employee. The suit was in the nature of an action for specific performance to compel Anderson to sell his minority interest in the corporation to Clemens Mobile Homes, Inc., pursuant to a buy-sell agreement previously executed by the corporation and both the stockholders. After taking evidence, the District Court for Scotts Bluff County, Nebraska, determined that the buy-sell agreement did not require a minority stockholder to sell his stock in the corporation upon termination of his employment with the corporation and denied the request for specific performance. For reasons more particularly set out in the opinion, we agree with the action of the trial court and affirm the judgment.

Clemens Mobile Homes, Inc., was incorporated on April 5, 1971, by Jerald E. Clemens, its president and then only stockholder. In the fall of 1971, the appellee, Francis Anderson, Clemens' brother-in-law, moved from California to Scottsbluff, Nebraska, for the purpose of accepting employment with Clemens Mobile Homes, Inc. Within several months of the time Anderson came to work for Clemens, he invested $15,000 in the corporation for which he was to receive a one-sixth interest, the remaining five-sixths

being owned by Clemens. The parties had had some difficulties in the past and, in an effort to avoid any future difficulty, Clemens had the corporation's attorney prepare a buy-sell agreement which was thereafter executed by the corporation and each of the stockholders. There is some dispute in the testimony as to how much discussion was actually had prior to the time the document was executed. Clemens maintained that it was his intention that the contract require Anderson to sell his stock in the event Anderson terminated his employment with the corporation. Anderson denied that fact and maintained that the purpose of the agreement was to insure that Anderson could get back his investment if he so desired.

The language of the agreement is quite clear and unambiguous. It begins by providing, in part, as follows:

> WHEREAS, it is the desire of the Corporation and the Stockholders that, in the event of the death of any one of the Stockholders, or in the event that a Stockholder *desires to sell his stock during his lifetime,* the Corporation shall purchase the shares of stock of the Stockholder in the Corporation . . . .

(Emphasis supplied.) Article II of the agreement, entitled "Purpose of Agreement," further provides as follows:

> The purpose of this agreement is to provide for the purchase by the Corporation of the capital stock owned by any Stockholder on his death, or when the Stockholder desires to leave the Corporation during his lifetime.

Article IV, entitled "Contract for Purchase and Sale," provides:

> Upon the death, prior to the termination of this Agreement, of a Stockholder, or when a Stockholder desires to leave the Corporation during his lifetime the Corporation shall have

> the right and is obligated and agrees to purchase the capital stock in the Corporation owned by the Stockholder, and each of the Stockholders agree that his capital stock in the Corporation shall be sold, transferred, and assigned to the Corporation upon the terms hereinafter set forth.

And, finally, Article XIII, entitled "Sale of Stock During Lifetime of Stockholder," reads as follows:

> Any Stockholder may during his lifetime elect to sell stock in this Corporation. The Stockholder shall be obligated to sell to the Corporation, and the Corporation shall be obligated to buy from the Stockholder his capital stock at its then market value as determined in ARTICLE V. above. The Stockholder shall give written notice to the Corporation of his desire to sell at least 30 days prior to the date he intends to leave the Corporation.

On May 29, 1973, Anderson voluntarily terminated his employment with the corporation. It is by reason of that termination that this specific action arises. Clemens maintains that the term "leave the Corporation" in the buy-sell agreement requires Anderson to sell his stock to the corporation upon terminating his employment with the corporation. Anderson, on the other hand, maintains that no such obligation exists. Rather, he argues, the agreement simply provides that, in the event that Anderson should ever desire to sell his stock, he must sell it to the corporation and the corporation must purchase the stock. It is the latter interpretation with which the trial court apparently agreed and with which we agree.

There are certain basic rules of construction that must be kept in mind when attempting to review a contract such as this. A written contract expressed in unambiguous language is not subject to interpre-

tation or construction and the intention of the parties must be determined from its contents. *Mid States Engineering v. Rohde*, 182 Neb. 590, 156 N.W.2d 149 (1968); *Reorganized Church of Jesus Christ v. Universal Surety Co.*, 177 Neb. 60, 128 N.W.2d 361 (1964). Where the contract is unambiguous, it is not subject to interpretation or construction. *Timmerman Bros., Inc. v. Quigley*, 198 Neb. 129, 251 N.W.2d 877 (1977); *Inland Drilling Co. v. Davis Oil Co.*, 183 Neb. 116, 158 N.W.2d 536 (1968); *C. G. Smith Constr. Co. v. Cobleigh Electric Co.*, 196 Neb. 711, 246 N.W.2d 55 (1976); *Ely Constr. Co. v. S & S Corp.*, 184 Neb. 59, 165 N.W.2d 562 (1969).

In construing a written instrument for the purpose of ascertaining the intentions of the parties, resort must be had to the instrument as a whole and, if possible, effect must be given to every part thereof. *Mills v. Aetna Ins. Co.*, 168 Neb. 612, 96 N.W.2d 721 (1959). Furthermore, it is important that the contract made by the parties be enforced and a new contract not be created by construction. *Preferred Risk Mut. Ins. Co. v. Continental Ins. Co.*, 172 Neb. 179, 109 N.W.2d 126 (1961).

Appellants' argument is premised upon the proposition that the words "to leave the corporation" mean to terminate employment with the corporation. While, of course, the parties could have contracted for such a provision, no such agreement can be found in this particular contract. It is clear that one may be an employee of a corporation without being a stockholder and, likewise, one may be a stockholder of a corporation without being an employee. Nowhere in this agreement is there any reference made to the employment relationship between the parties and the corporation other than a brief mention in one of the recitals that the death of the parties would affect the corporation. While it may very well have been contemplated by the parties that their relationship as both employees and as

stockholders of the corporation should be and would be coexistent, they failed to so provide in the clear language of the agreement and, therefore, this court should not supply that missing language.

Further, it seems equally reasonable to argue that what the parties intended was to insure that there was a certain market for their interests in the corporation and that such interests were not sold to outsiders. Therefore, if either stockholder desired to sell his interest in the corporation, he was obligated to sell it to the corporation and the corporation was obligated to purchase it. The agreement is more than a first right of refusal. The obligations of the parties are clear and unequivocal. The stockholder desiring to sell must sell *to* the corporation and the corporation must purchase *from* the stockholder. The precipitating factor in the agreement, however, is not the termination of employment with the corporation but, rather, a desire by a stockholder to terminate his relationship with the corporation *as a stockholder* by "leaving the corporation."

Article XIII makes this quite clear when it uses the language "Any Stockholder may during his lifetime elect to sell stock in this Corporation." It is only when the stockholder exercises such election that the provisions of the buy-sell agreement come into effect. The election to sell, however, is in no manner tied to an obligation to be employed. We believe that the language of the agreement is clear and unambiguous and leaves no room for construction. Anderson has apparently not elected to sell his stock and is, therefore, not obligated to do so. There being no such obligation, neither the corporation nor Clemens is entitled to specific performance. The judgment of the trial court in denying such specific performance must, therefore, be affirmed. Having disposed of the case on this point, we need not consider any other

assignments of error raised by the parties.

AFFIRMED.

CLINTON, J., not voting.

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STATE OF NEBRASKA EX REL. SUSAN LARIMORE, APPELLANT, V. ROBERT SNYDER, WHOSE CORRECT NAME IS ROBERT SCHNEIDER, APPELLEE.

291 N. W. 2d 241

Filed April 15, 1980. No. 42727.

1. **Paternity: Jurisdiction: Statutes.** The failure of a putative father to support his alleged child is only an ancillary issue in a paternity case and is not an act "causing tortious injury" within the meaning of the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536(1)(c) (Reissue 1975).
2. _____: _____: _____. An act of sexual intercourse between consenting adults does not constitute an act "causing tortious injury" in this state for purposes of the Nebraska long-arm statute. Neb. Rev. Stat. § 25-536(1)(c) (Reissue 1975).
3. _____: _____: _____. In a paternity action, Nebraska courts do not acquire personal jurisdiction over a nonresident putative father by virtue of personal service in the state of his residence under the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536(1)(c) (Reissue 1975).

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Brian J. Waid and Marion Yoder, for appellant.

No appearance for appellee Snyder.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is a paternity action in which the plaintiff sought a determination of paternity against the nonresident defendant and an award of child support and medical costs. The defendant was personally served with summons in Missouri, but did not appear. At a hearing on a motion for default judg-

ment, the District Court for Gage County, Nebraska, determined that the court did not have personal jurisdiction over the defendant and dismissed plaintiff's petition.

The only evidence before the trial court was presented by the plaintiff at a hearing on her motion for default judgment. In 1977, plaintiff was an unmarried woman living in Beatrice, Nebraska, and the defendant was employed in Lincoln, Nebraska, and had been a resident of Nebraska since September 1, 1976. Plaintiff first met the defendant in October 1977, at the home of a friend in Beatrice, Nebraska. Later on the same evening, the plaintiff accompanied the defendant to a motel in Lincoln, Nebraska, where they had sexual intercourse. They returned to Beatrice some time after midnight.

Some time in December 1977, plaintiff discovered that she was pregnant. She advised the defendant of that fact but did not see him thereafter. Plaintiff testified that she had never had sexual relations prior to having intercourse with the defendant in October 1977; that she had not had sexual relations with anyone else; and that defendant was the only person who could be the father of the child. The child was born on August 1, 1978.

After obtaining leave to proceed in forma pauperis, plaintiff filed her petition in this action on October 13, 1978, seeking a judgment that the defendant is the natural father of the child and fixing and directing the payment of child support. The petition alleged that the defendant was a resident of Nebraska. The initial summons for service in Nebraska was returned "Not Found." Thereafter, an alias summons was personally served on the defendant in Missouri on November 2, 1978. The defendant was employed in Missouri and began work on October 23, 1978. Subsequent notices of hearing and appeal were returned unclaimed or undeliverable.

The defendant did not appear in this proceeding

and the plaintiff filed a motion for default judgment. At the hearing on the motion, the court determined that the paternity proceeding here was not a cause of action described in Neb. Rev. Stat. § 25-536 (Reissue 1975), the Nebraska long-arm statute, which authorizes personal jurisdiction under the minimum contacts rule, and dismissed plaintiff's petition.

The sole issue on appeal is whether in personam jurisdiction of a nonresident defendant is acquired in a paternity action by personal service of summons on the putative father in the state of his residence. The plaintiff contends that a proceeding seeking a declaration of paternity and an award of child support is a cause of action arising from an act in this state "causing tortious injury" within the meaning of § 25-536(1)(c), or is a cause of action for failure to provide support within the ambit of the holding in *Stucky v. Stucky*, 186 Neb. 636, 185 N.W.2d 656 (1971). We disagree.

For out-of-state personal service of summons to be valid in obtaining in personam jurisdiction, there must be appropriate statutory authority in the forum state for such service and the constitutional basis of minimum contacts with the forum state must be met. See *Internat. Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Section 25-536 provides:

> (1) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:
> (a) Transacting any business in this state;
> (b) Contracting to supply services or things in this state;
> (c) Causing tortious injury by an act or omission in this state;
> (d) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in

any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;

(e) Having an interest in, using, or possessing real property in this state; or

(f) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

*Stucky v. Stucky, supra,* involved jurisdiction for purposes of divorce, child custody, and the determination and fixing of amounts of child support and alimony. This court held that domicile alone was sufficient to establish in personam jurisdiction over an absent defendant where personal service of summons was had. In that case some of the same evidence which established the domicile in the forum state also established the contractual and legal duty of marital support and the continuous contacts with the forum state involved in the subsequent performance and breach of that duty. Although *Stucky* applied the minimum contacts concept to marital support cases without reference to any specific subsection of § 25-536, the holding is supported under a reasonable interpretation of more than one subsection of that statute.

Some states have held that, in a paternity case, the alleged failure to fulfill a duty of support by a putative father is alone sufficient to constitute a tort or a tortious injury within the meaning of statutes essentially similar to § 25-536. See, *In re Miller,* 86 Wash. 2d 712, 548 P.2d 542 (1976); *Poindexter v. Willis*, 87 Ill. App. 2d 213, 231 N.E.2d 1 (1967); *State ex rel. Nelson v. Nelson*, 298 Minn. 438, 216 N. W.2d 140 (1974). It is on the basis of the holdings

under this line of authority that the plaintiff seeks to bring the present case within the ambit of *Stucky*.

The other line of judicial authority holds that the primary issue for determination in a paternity case is whether the alleged father is, in fact, the father and that failure to support his alleged child is only an ancillary issue. Those cases hold that the cause of action is not for a tortious act or injury within the meaning of the long-arm statute.

The two lines of authority differ in their treatment of the duty of support. Aside from the factual differences, there is also a distinction between the *Stucky* case and the present case with respect to the support issue. The *Stucky* case involved an action to enforce a duty of support already legally established. The present case is brought to establish paternity and the resulting duty of support which would flow from the legal establishment of paternity. That specific distinction between *Stucky* and the present case is the distinction which separates the two lines of judicial authority with respect to asserting long-arm jurisdiction over nonresident defendants in paternity cases under statutes similar to ours. See, Annot., *Long-Arm Statutes: Obtaining Jurisdiction Over Nonresident Parent in Filiation or Support Proceeding*, 76 A.L.R.3d 708 (1977); Levy, *Asserting Jurisdiction Over Nonresident Putative Fathers in Paternity Actions,* 45 U. Cin. L. Rev. 207 (1976).

The reasoning is persuasive in the cases which hold that an action for a decree of paternity and support is not a cause of action for a tortious act or injury within the meaning of the long-arm statute, and that personal jurisdiction is therefore not acquired. *State, ex rel., v. Schutts*, 217 Kan. 175, 535 P.2d 982 (1975), represents that line of authority. It holds that in a paternity action an act of sexual intercourse between consenting adults does not constitute a "tortious act" so as to authorize personal service of summons on the nonresident putative father under

the Kansas long-arm statute and that failure to support is only an ancillary issue in a paternity case and cannot be considered a "tortious act" under the long-arm statute.

The same result was reached on the same basis in Colorado. In *A.R.B. v. G.L.P.,* 180 Colo. 439, 507 P. 2d 468 (1973), the Colorado court held that, in a paternity action, Colorado courts do not acquire jurisdiction over a nonresident respondent by virtue of personal service in the state of his residence pursuant to the long-arm statute and that an act of sexual intercourse between consenting adults does not constitute a "tortious act" for purposes of the Colorado long-arm statute.

We hold that the failure of a putative father to support his alleged child is only an ancillary issue in a paternity case and is not an act "causing tortious injury" within the meaning of the Nebraska long-arm statute. An act of sexual intercourse between consenting adults does not constitute an act "causing tortious injury" in this state for purposes of the Nebraska long-arm statute. In a paternity action, Nebraska courts do not acquire personal jurisdiction over a nonresident putative father by virtue of personal service in the state of his residence under the Nebraska long-arm statute.

Although Nebraska has constitutional authority to extend its long-arm statutes to include paternity cases such as this, it has not yet done so. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

CLINTON, J., not voting.

KENNETH WINTER, NORMAN HERIAN, REUBEN BRETSCHNEIDER, JOHN SILHACEK, CAROL SILHACEK, MAYNARD ABLER, WILLIAM KROUPA, MARY VOECKS, KENNETH CHRISTENSEN, AND ALVIN VYHLIDAL, APPELLANTS, V. LOWER ELKHORN NATURAL RESOURCES DISTRICT, RICHARD ALEXANDER, RICHARD HAHN, HOWARD HANSEN, ROBERT JORDAN, LOWELL JOHNSON, DALE LINGENFELTER, WILLIAM MEYER, PAUL MILLARD, DENNIS NEWLAND, GLEN OLSON, BURT PETERSON, VAL PETERSON, JOHN THOR, RAY VOGEL, CLINTON VON SEGGERN, MELVIN VON SEGGERN, HAROLD WAGNER, AND HOSKINS-WESTERN-SONDEREGGER, INC., APPELLEES.

291 N. W. 2d 245

Filed April 15, 1980. No. 42728.

1. **Waters-Beneficial Use: Appeal and Error.** Determination of the feasibility of a recreational facility is a legislative function and is not within the scope of judicial review.
2. **Waters-Beneficial Use: Statutes: Permits.** An application for a water permit under Neb. Rev. Stat. § 46-233 (Reissue 1978) is not required until actual construction work at the site is commenced.

Appeal from the District Court for Pierce County: MERRITT C. WARREN, Judge. Affirmed.

John E. North and Mark E. Belmont of McGrath, North, O'Malley & Kratz, P.C., for appellants.

Jewell, Otte, Gatz, Collins & Domina, for all appellees except Hoskins-Western-Sonderegger, Inc.

Cline, Williams, Wright, Johnson & Oldfather, for appellee Hoskins-Western-Sonderegger, Inc.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an appeal from an injunction action brought by the appellants, who are residents and taxpayers of the Lower Elkhorn Natural Resources District (hereafter LENRD), against the LENRD and the individual members of the board of directors

of that district (hereafter Board), as well as Hoskins-Western-Sonderegger, Inc., an engineering firm which contracted with the LENRD. The action arose from the activities of the LENRD in planning for and adopting a recreational project, referred to as the Willow Creek Project.

The case was submitted to the District Court for Pierce County, Nebraska, on stipulated facts and exhibits. It is not necessary to give a complete summary of the historical development of the Willow Creek Project. The salient facts are these. The Willow Creek Project, which will comprise a total of 1,730 acres for a dam, lake, and recreational facilities, was first considered by the LENRD on November 29, 1973. The Board then authorized the staff to proceed with the planning. From that time until December 16, 1977, when the written approval of the Nebraska Game and Parks Commission was obtained, the Board hired two engineering firms to complete various engineering, technical, economic, and environmental studies. Approximately $44,000 was expended for those services. The estimated cost of the Willow Creek Project is $5.2 million. The Willow Creek Project was adopted by the Board on June 22, 1978, as recorded in the minutes of that meeting. At the time of trial, it was stipulated that the LENRD had not made application to the Nebraska Department of Water Resources for a permit to appropriate water.

Residents and taxpayers of the LENRD contended that certain expenditures made by the LENRD were improper on the following grounds: (1) That the LENRD failed to obtain the written approval of the Nebraska Game and Parks Commission prior to the development and adoption of plans for the Willow Creek Project; (2) That the directors of the LENRD exceeded their statutory authority in authorizing the expenditure of public funds for the development of the plans for the Willow Creek Project; and (3) That

the LENRD failed to obtain a water permit prior to developing plans for the Willow Creek Project.

The District Court sustained the demurrer of Hoskins-Western-Sonderegger, Inc., to the second cause of action in appellants' amended petition and, subsequently, the demurrer of all the appellees to the second cause of action in appellants' second amended petition. In both cases, the cause of action successfully demurred to corresponded to Issue (2), above. Consequently, only the first and third issues were tried before the court. The District Court found generally in favor of the LENRD and specifically found that the LENRD had secured the written approval of the Nebraska Game and Parks Commission prior to the adoption or development of plans for the Willow Creek Project.

In their appeal, the appellants contend that plans for the Willow Creek Project were "adopted" and "developed" by the LENRD, within the meaning of Neb. Rev. Stat. § 2-3229 (Reissue 1977), before they were submitted to or approved by the Nebraska Game and Parks Commission. The pertinent portion of the statute was as follows: "Plans for development and management of fish and wildlife habitat and recreational and park facilities shall be approved in writing by the Game and Parks Commission prior to their adoption or development."

It is asserted by the appellants that the engineering studies and other preparations conducted by the LENRD violated the express language of § 2-3229. We are not persuaded by this contention. The District Court found:

> [T]he question of the Game and Parks Commission approval boils down to what actions amount to . . . adoption of the plans or development of the plans . . . . I certainly wouldn't argue that $44,000 is a lot of money, but this is a 5.2 million dollar project and I think the amount spent on the preliminary

> studies and feasibility studies or the type undertaken here, have to be judged in light of the size and complexity; size and cost of the project . . . .
>
> [I]t is certainly reasonable that a district get some engineering studies and develop the plans so that they are in somewhat of a final form before they go to the commission for approval.

As noted earlier, on December 16, 1977, the Nebraska Game and Parks Commission gave its written approval for the Willow Creek Project pursuant to § 2-3229. The trial court found, and the record supports the finding, that the LENRD adopted the plan on June 22, 1978, subsequent to the approval of the Game and Parks Commission. The assignment is without merit.

Appellants' second contention alleges the court erred in sustaining appellees' demurrer. The appellants' second amended petition contained a second cause of action which alleged that the Willow Creek Project was not economically feasible, technically feasible, environmentally sound, or in conformance with the Nebraska state water plan. In each of these areas, an essentially legislative judgment is to be exercised. No breach of a specific statutory requirement is pointed out to us. The determination is not within the scope of judicial review. As we said in *Twin Loups Reclamation & Irr. District v. Blessing*, 202 Neb. 513, 515, 276 N.W.2d 185, 187 (1979):

> Appellants first assert that the trial court erred in refusing to pass on the feasibility of the project. We agree with the trial court. The Legislature clearly authorized the courts to pass on the validity of contracts of the district. *It did not, and possibly could not, delegate to the courts the authority to pass on the wisdom of the project themselves* . . . . There can be little doubt that in determining to

> enter into a contract, the district was acting in a legislative capacity. It is not the function of the court to act as a super-legislature, and that power cannot be delegated to us.

(Emphasis supplied.)

Finally, we consider appellants' third contention: That the LENRD violated Neb. Rev. Stat. § 46-233 (Reissue 1978) by failing to obtain a water permit for the Willow Creek Project. Section 46-233 provides, in part, as follows:

> (1) The United States of America and every person hereafter intending to appropriate any of the public waters of the State of Nebraska shall before (a) commencing the construction, enlargement, or extension of any works for such purpose, [or] (b) performing any work in connection with the same . . . make an application to the Department of Water Resources for a permit to make such appropriation . . . .

The District Court found that an application for a water permit under § 46-233 is not required until actual construction work at the site is commenced.

No actual construction has been undertaken and the preliminary engineering and feasibility studies are not included within § 46-233(1)(b). Whether condemnation proceedings, acquisition of land, or letting contracts for construction are within that subsection is not before us and is not decided.

Finding no error, we affirm the decision of the District Court.

AFFIRMED.

CLINTON, J., not voting.

# STATE OF NEBRASKA, APPELLEE, V. JOHN B. GERBER, APPELLANT.

291 N. W. 2d 403

Filed April 15, 1980. No. 42816.

1. **Jury Trial: Rules of Courts.** One charged with a criminal violation in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, may make an oral request for a jury trial at the time of arraignment or may make a written request prior to trial in accordance with rules established by the particular county or municipal court.
2. **Blood, Breath, and Urine Tests: Evidence: Foundation.** Before the results of a preliminary breath test may be received in evidence, it must be shown that the requirements of Neb. Rev. Stat. § 39-669.11 (Reissue 1978) have been met, including evidence that the method of performing the preliminary test has been approved by the Nebraska Department of Health and that the person administering and interpreting the test possesses a valid permit issued by the Nebraska Department of Health for that purpose.
3. **Arrests: Drunk Driving.** The offering of a preliminary test of the breath under Neb. Rev. Stat. § 39-669.08(3) (Reissue 1978) is not a condition precedent to an arrest for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor.
4. **Blood, Breath, and Urine Tests: Evidence: Foundation.** Before the results of a Breathalyzer test may be received in evidence, it must be shown that the requirements of Neb. Rev. Stat. § 39-669.11 (Reissue 1978) have been met, including evidence that the method of performing the Breathalyzer test has been approved by the Nebraska Department of Health and that the person administering and interpreting the test possessed a valid permit issued by the Nebraska Department of Health for that purpose.
5. _____: _____: _____. Before the results of a Breathalyzer test for blood alcohol are admissible into evidence, a proper foundation must be laid for the admission of such evidence.
6. **Blood, Breath, and Urine Tests: Evidence: Foundation: Drunk Driving.** Before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the

test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with directions to dismiss.

Friedman Law Offices, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

The appellant, John B. Gerber (Gerber), was convicted in the municipal court of the city of Lincoln, Nebraska, of the offense of operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine, contrary to Neb. Rev. Stat. § 39-669.07 (Reissue 1978). Gerber appealed the conviction to the District Court for Lancaster County, Nebraska, which affirmed the judgment of the municipal court. Thereafter, he perfected his appeal to this court. For reasons more particularly set out in this opinion, we reverse and dismiss the complaint.

The evidence reflects that shortly after midnight on October 21, 1978, a vehicle driven by Gerber was observed by a member of the Lancaster County sheriff's department, Gary Rikli (Rikli), as it passed through a mobile radar clock in excess of the lawful speed. Rikli proceeded to follow Gerber's vehicle and observed it to cross the centerline, go back into the right lane, and then partially leave the roadway and pull back into the lane again. Rikli turned on his red light and started pursuing Gerber's vehicle. When the vehicle did not stop, Rikli activated his

siren, at which time the vehicle slowed and pulled over to the side of the road. When Rikli approached the vehicle, he observed that Gerber was behind the wheel and that there were three other persons in the vehicle. Upon arriving at the vehicle, Rikli detected the odor of alcohol. He asked Gerber to accompany him back to his police cruiser where he again detected a strong odor of alcohol.

After Rikli read to Gerber a statement concerning an alcohol pretest, Gerber agreed to take the pretest. The evidence discloses that the pretest, known as an "Alco-sensor," is a preliminary test made on the breath of an individual to determine the level of alcohol content. The device takes into itself 1 cubic centimeter of the subject's breath and analyzes it for alcohol content. The result of the analysis is displayed on a readout which is a part of the device. There are three possible readouts: "pass," "fail," or "1." The test performed on Gerber indicated "fail." At that point, Rikli placed Gerber under arrest and transported him to the Lincoln police department.

Upon arrival at the Lincoln police department, Rikli turned Gerber over to an officer of the Lincoln police department, Officer Edward Sexton (Sexton), who was in charge of administering breath tests by the use of a gas chromatograph intoximeter (a "Breathalyzer"). Gerber was asked whether he would submit to such a test and, upon his agreeing to do so, the test was administered. On the basis of the test results, Gerber was charged with a violation of § 39-669.07 and he was brought before the municipal court of the city of Lincoln (trial court) the following morning for arraignment. At the time of the arraignment, he appeared with his lawyer, entered a plea of not guilty to the charge, and orally requested, through his attorney, that he be granted a jury trial. The evidence reflects that the request was denied because it was not in compliance with the rules of

practice previously promulgated by the trial court, in particular Rule XII(c), which reads: "Parties desiring jury trials in criminal cases must request the same *in writing* at the time of arraignment or no later than 14 days prior to the time the case has initially been set for trial by the Court." (Emphasis supplied.) Thereafter, on November 16, 1978, Gerber's counsel filed a written request for jury trial. However, the case had already been set for November 29, 1978, and therefore the trial court denied the request because it was not within time as prescribed by Rule XII(c). On November 28, 1978, the matter was continued until December 20, 1978, whereupon trial was had to the trial court.

Rikli appeared and testified concerning his observance of Gerber on the night in question and the administration of the preliminary test. Counsel for Gerber objected to any testimony concerning the pretest on the grounds that there was not sufficient foundation offered. The objection was overruled.

Rikli then testified that he placed Gerber under arrest and brought him to the Lincoln police station.

Sexton was then called by the State and testified concerning how he administered the Breathalyzer test to Gerber. Gerber's counsel again objected on the basis that, as with the pretest, the results of the Breathalyzer were not admissible in evidence because of insufficient foundation. It is clear from the record that Gerber's objection was based upon the fact that Sexton was unable to testify whether the Breathalyzer was working properly when the test was administered.

Sexton then described how the test was administered. Specifically, he testified that the standard test procedure, which he had followed, requires one to wait for at least 15 minutes after the subject's last drink or smoke. The machine is then activated by switching it into the "operate" position. A steady green light comes on. At that time, the digital read-

ing is .000. The operator then opens a valve and purges the machine for 10 seconds. He then attaches to that valve an ampul containing a measured concentration of ethyl alcohol, referred to as a "NALCO standard." The concentration of ethyl alcohol is printed on the outside of the ampul. If the machine is operating correctly, it will produce a digital reading equal to the number placed on the outside of the ampul. In this way, the operator verifies that the machine is properly operating and is properly reporting alcohol content. After checking the machine with the NALCO standard, the operator clears the machine, attaches a clean mouthpiece, and requests the subject to blow into the mouthpiece as long as possible. The subject's breath is then analyzed by the machine and the digital readout is recorded.

Sexton testified that he had demonstrated this technique to the Nebraska Department of Health and had obtained a permit from them to perform the test. The State, over objection, offered the permit in evidence. The permit was a piece of paper issued by the Nebraska Department of Health authorizing Edward E. Sexton to perform determinations for body fluid alcohol content by use of an "Intoximeter G. C. (direct breath) 'Alert' and Alco-Sensor preliminary breath test." The permit was issued on October 24, 1977, and would expire on March 1, 1979. The permit bore the signatures of Henry D. Smith, Director of Health, and H. E. McConnell, Director of Laboratories. The trial court overruled the objection and received the permit in evidence. Sexton testified on direct examination that the result of the test on Gerber he had described was a reading of nineteen-hundredths of one percent alcohol by weight per unit volume of body fluid.

On cross-examination, Sexton conceded that determining whether the machine works depends upon whether the alcohol content of the NALCO standard

is, in fact, as reflected on the ampul. Sexton admitted, however, that he did not know who had prepared the NALCO standard, where it came from, nor its actual alcohol content. Moreover, he admitted that he did not know whether the machine was really functioning properly at the time he tested Gerber.

The State further offered in evidence, as an exhibit, Rule 3 promulgated by the Nebraska Department of Health on August 27, 1975. Rule 3 is entitled "Rules and Regulations Relating to Analysis for the Determination of Alcoholic Content of Body Fluids and of the Breath under the State Implied Consent Law." Although the heading of the rule implies that it pertains to rules and regulations relating to the analysis of alcohol content, in fact Rule 3 generally prescribes rules and regulations under which a permit is issued to an individual. Rule 3-(3) reads, in part, as follows: "(b) Permittee for the operation of devices for the analysis of breath for alcoholic content: i. Shall adhere strictly to the operation procedures set forth by the operating supervisor of the device for which he holds a permit." There was no evidence as to who was Sexton's operating supervisor nor the operation procedures set forth by such operating supervisor.

On the basis of Sexton's testimony as to the Breathalyzer reading, Gerber was adjudged guilty as charged.

Gerber has assigned several specific errors. They are: (1) The trial court erred in failing to grant Gerber a jury trial; (2) The trial court erred in receiving into evidence without sufficient foundation the results of the pretest device; (3) The trial court erred in receiving hearsay evidence regarding the alleged contents of the NALCO standard; and (4) The trial court erred in receiving into evidence without sufficient foundation the results of the Breathalyzer test.

We turn first to Gerber's contention that the trial court erred in refusing to grant him a jury trial. Our determination of that issue requires us to examine and balance Neb. Rev. Stat. § 24-536 (Reissue 1975), the statute then in effect, on the one hand and § 26-1,202 (Reissue 1975) on the other. Section 24-536 reads, in part, as follows:

> Either party to *any* case in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, and except any matter arising under the provisions of the Nebraska Probate Code, may demand a trial by jury. In *civil* cases, the demand must be in writing and must be filed on or before answer day.

(Emphasis supplied.) (The 1979 amendment to § 24-536 is not relevant to this issue.) Section 26-1,202 provides: "The judges of the municipal court may promulgate rules of procedure and practice in said court, not in conflict with the laws governing such matters." It was pursuant to § 26-1,202 that the municipal court promulgated Rule XII, requiring that requests for a jury trial in a criminal case be in writing. We believe, however, that a reasonable reading of the two statutes compels us to find that a defendant in a criminal case should not be denied a jury trial because of a failure to file a written request at the time of arraignment when the defendant is present in person before the court and makes an oral request.

We have previously held that a violation of § 39-669.07 is either a misdemeanor or a felony and that a defendant charged under said section is entitled to a jury trial under the provisions of § 24-536. *State v. Karel*, 204 Neb. 573, 284 N.W.2d 12 (1979). We believe it significant that § 24-536 makes a distinction between criminal cases and civil cases. Section 24-536 specifically provides that "In *civil* cases, the demand must be in writing and must be filed on or be-

fore answer day." (Emphasis supplied.) It appears to us that, had the Legislature wished to require that a request for jury trial in a criminal case likewise be in writing, it would not have made any distinction. Having made such a distinction, a reasonable reading of the questioned statute must be to the effect that, in criminal cases, the demand need not be in writing. We believe that there exists a very valid reason for such a distinction. In civil cases, the defendant rarely, if ever, appears before the court prior to the actual trial. Virtually all of the defendant's contact with the court prior to trial is in writing. There would be virtually no time for the court to summon a jury in advance of trial if it did not become aware of the defendant's desire for a jury trial until the moment of trial. On the other hand, in a criminal case, it is rare, if ever, that the defendant does not personally appear for arraignment in advance of trial. Further, Rule XII of the Lincoln municipal court permits the defendant to request a jury at *the time of arraignment if in writing.* It seems strange indeed to permit the defendant to answer to the criminal charge by orally pleading not guilty and yet require that, at the same moment, he file a written request for a jury. As the court accepts the oral plea of not guilty, it can just as easily accept an oral request for a jury trial. To impose a requirement that the oral request be ignored and a document in writing be filed with the clerk of the court rather than with the judge imposes an unnecessary and improper requirement upon a defendant and is contrary to § 24-536.

We have previously held that a municipal court may establish reasonable rules for its own administration and we continue to adhere to that view. *Summit Fidelity and Surety Co. v. Nimtz,* 158 Neb. 762, 64 N.W.2d 803 (1954). Under the circumstances, however, we believe that a rule requiring a defendant who personally appears before the court

and enters an oral plea of not guilty to file a written request for a jury trial is unreasonable. The defendant should be permitted to either make the request orally when before the court *or* to file a written request a reasonable time in advance of trial.

We are not unmindful that our decision in *State v. Nielsen*, 199 Neb. 597, 260 N.W.2d 321 (1977), may appear to the contrary. To the extent that it is in conflict with our decision herein, it is specifically overruled. The trial court was in error in refusing Gerber's request for a jury trial.

We turn now to Gerber's additional assignments of error, the first of which was that the trial court erred in receiving in evidence the results of the Alco-sensor preliminary breath test that Rikli administered to Gerber. Gerber's objection is based upon the provisions of Neb. Rev. Stat. § 39-669.11 (Reissue 1978), which provides as follows:

> Any test made under the provisions of section 39-669.08, if made in conformity with the requirements of this section, shall be competent evidence in any prosecution under a state statute or city or village ordinance involving operating a motor vehicle while under the influence of alcoholic liquor, or involving driving or being in actual physical control of a motor vehicle with an amount of alcohol in the blood in violation of a statute or a city or village ordinance. Tests to be considered valid shall have been performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose. The department is authorized to approve satisfactory techniques or methods and to ascertain the qualifications and competence of individuals to perform such tests and to issue permits which shall be subject to termination or revocation

at the discretion of the department.

The preliminary test is indeed a test made under the provisions of § 39-669.08. Section 39-669.08(3) reads as follows:

> Any law enforcement officer who has been duly authorized to make arrests for violation of traffic laws of this state or ordinances of any city or village may require any person who operates or has in his actual physical control a motor vehicle upon a public highway in this state to submit to a *preliminary test* of his breath for alcohol content if the officer has reasonable grounds to believe that such person has alcohol in his body, or has committed a moving traffic violation, or has been involved in a traffic accident. Any person who refuses to submit to such preliminary breath test or whose preliminary breath test results indicate an alcohol content of ten-hundredths of one per cent or more shall be placed under arrest. Any person who refuses to submit to such preliminary breath test shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars.

(Emphasis supplied.) Therefore, before the results of the preliminary test could have been received in evidence, foundation evidence should have established that the requirements of § 39-669.11 had been met, including the requirement that the method of performing the preliminary test had been approved by the Nebraska Department of Health and that Rikli possessed a valid permit issued by the Department of Health for such purpose. Neither of these requirements was established by the evidence. The error, however, was not prejudicial to Gerber. It should be kept in mind that the testimony with regard to the preliminary test was offered not for the

purpose of establishing the charge against Gerber but rather to establish Rikli's justification for placing Gerber under arrest. There was ample evidence in addition to the preliminary test to justify the arrest, including speeding, erratic driving, and the strong odor of alcohol.

Specifically, in *State v. Orosco,* 199 Neb. 532, 260 N. W.2d 303 (1977), we held that the offering of a preliminary test of the breath under § 39-669.08(3) is not a condition precedent to an arrest for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor. In so holding, we said: "The authority of the officer to make such arrest depends not upon the implied consent statute, but exists by virtue of the common law as codified in our statutes, to wit, sections 29-401 and 29-404.02, R. R. S. 1943." 199 Neb. at 540, 260 N.W.2d at 308.

Evidence regarding the preliminary test was offered solely to show the circumstances leading to the arrest which, in turn, required Gerber to submit to the Breathalyzer test or face the resulting consequences. In view of the fact that there was ample other evidence to justify the arrest, the receipt of the preliminary test in evidence was not prejudicial error and not grounds for reversal. *State v. Heiser,* 183 Neb. 665, 163 N.W.2d 582 (1968).

The remaining assignments of error with regard to the admission in evidence of the results of the Breathalyzer test present a more serious question and one which requires us to reverse and dismiss the complaint.

As we have indicated already, § 39-669.11 establishes two requirements that must be met in order for the results of a Breathalyzer test to be admissible in evidence. It must appear (1) That the test has been performed according to methods approved by the Department of Health and (2) That the test

was administered by an individual possessing a valid permit issued by the department for such purpose. The evidence in this case fails to establish that the test was administered according to methods approved by the Department of Health as that term must be understood.

Rule 3, in our view, does not constitute a list of "methods approved by the Department of Health" for the administration of a Breathalyzer test. Rule 3 generally describes how one may become eligible to obtain a permit and, at best, approves such methods as may be brought to the department from time to time, without indicating what those methods are. Nowhere in Rule 3 can one find either techniques or methods for administering a breath test. The only reference is found in Rule 3-(4), which reads as follows:

> An applicant for a permit shall, at the time of making application, state the identity of the method or methods he plans to use and, upon request, furnish details of technique or state where such details are readily available in scientific literature. Results obtained by the applicant in examination of check specimens shall be considered as partial evidence of the suitability of the method or methods for purposes of approval. The granting of a permit for performance of any specific test or technique shall be construed as Departmental approval of said test or method of analysis.

There is no evidence to indicate that any of these requirements were met by Sexton when obtaining his permit. Likewise, this rule appears somewhat in conflict with Rule 3-(3) concerning procedures established by an operating supervisor. Furthermore, neither a reading of Rule 3 nor an examination of the certificate issued to Sexton discloses what method is to be employed in making that test, though one can

determine the type of machinery which may be used. Simply typing on a paper that the operator is authorized to administer a test method known as the "Intoximeter G. C. (direct breath)" does not permit the trial court to know whether the test in fact has been administered by a method or technique approved by the Department of Health. Statutes such as the one in question, being criminal in nature and in derogation of the common law, must be strictly construed.

In *Otte v. State*, 172 Neb. 110, 108 N.W.2d 737 (1961), we held that a registered nurse who administered a blood test without being "under the direction of a physician" as required by statute was not in compliance with statutory requirements and the results of the test could not be admitted into evidence. In so holding we said:

> A statute providing that a presumption of intoxication arises under a determination that the amount of alcohol in the subject's body fluid at the time in question is 0.15 percent or more, by weight, as shown by chemical analysis, is in derogation of the common law and subject to strict construction.

*Id.* at 117, 108 N.W.2d at 741. We believe likewise that where the statute requires that the methods be approved by the Department of Health before the results of the test may be admitted in evidence, the techniques and methods must be set out and approved in sufficient detail that a trial court may determine if, in fact, the method has been followed. In *State v. Graham,* 360 So. 2d 853 (La. 1978), the Supreme Court of Louisiana was called upon to review a case similar to the case at bar under a statute almost identical with ours.

The Louisiana court said:

> The legislature and this Court have recognized the importance of establishing safeguards to guarantee accuracy in chemical

> testing. . . . In considering previous attacks upon the validity of the statutory design, this Court has expressed the opinion that, in order for the State to avail itself of the statutory presumption of a defendant's intoxication without violation of his constitutional due process guarantee of a fair trial, detailed methods, procedures and techniques must be officially promulgated to insure the integrity and reliability of the chemical tests including provisions for "repair, maintenance, inspection, cleaning, *chemical accuracy, certification* [as well as] *proof of adherence to*" those methods, procedures and techniques.

*Id.* at 855 (emphasis in original).

In *State v. Jones,* 316 So. 2d 100, 103 (La. 1975), the case partially quoted in *Graham,* the Louisiana Supreme Court further said:

> We therefore interpret [Louisiana's law relating to breath tests] to mean that before the test results can trigger the presumption of intoxication and thus relieve the State of its burden of proof, much more than the mere designation of the name of a testing device and vague reference to some procedure or technique, without setting forth the specifics of such procedure or technique . . . is necessary.

Such a requirement does not seem unreasonable where the State is permitted to make a prima facie case by merely introducing in evidence the results of a mechanical test. The State's failure to prove the specific steps approved by the Department of Health should have prevented the State from introducing the results of the test in evidence.

Further, we believe that the results of the test offered by Sexton were inadmissible because of a lack of adequate foundation. Sexton admitted that he had no way of knowing whether the Breathalyzer

was operating properly at the time the test was given. Courts which have been called upon to establish rules with regard to such Breathalyzer tests have held that, before the results of a Breathalyzer test for blood alcohol are admissible into evidence, a proper foundation must be laid for the admission of such evidence.

While we are not now called upon to decide the reliability of the Breathalyzer as a means of establishing the State's burden of proof in cases such as this, decisions from other jurisdictions as well as treatises on the subject lead us to believe that we should, at a minimum, require that whatever safeguards can reasonably be provided, should be provided.

In *State v. Jones, supra* at 103, it is noted:

> Even a casual examination of the voluminous literature dealing with chemical tests for intoxication, their reliability, their validity and their drawbacks, compels the conclusion that this entire aspect of the law relating to the significance of the objective effects of alcohol ingestion in criminal prosecutions related to vehicle operation is fraught with difficulty.

In Erwin, Defense of Drunk Driving Cases, Ch. 18 (3rd ed. 1979), a host of possible errors which can affect the results are noted, including differences in altitude; variations in blood-air ratios; variations in individual lung capacity and pulmonary functions; differences in the ratio between blood alcohol and breath alcohol; variations in the amount of carbon dioxide in the subject's alveolar air (air from the lungs) caused by acidosis or alkalosis, hyperventilation, apprehension, or stress; contamination of the breath; regurgitation or vomiting; other contaminants present in or about the mouth or lips; air pollution; or natural body gases. Any one or more of these factors can affect the Breathalyzer results and give an inaccurate reading.

It is not, therefore, unreasonable to require the testifying officer to establish where the NALCO standard came from, how it was received, under what conditions it was kept and preserved, and what spot checks were made to determine the validity of the NALCO standard.

In *State v. Baker,* 56 Wash. 2d 846, 854, 355 P.2d 806, 811 (1960), the Washington court reviewed how the calibration samples were maintained, saying:

> The fact that the *sealed* ampoules are delivered by the manufacturer of the breathalyzer machine for exclusive use in such machine plus the additional fact of regular spot checking of the ampoules is, in our opinion, sufficient *prima facie* proof that the chemicals in any one ampoule are of the proper kind and mixed to the proper proportion.

(Emphasis in original.) We, likewise, would agree that if testimony such as that suggested by the Washington Supreme Court had been given in this case, it would have supplied sufficient foundation concerning the NALCO standard. Our reading of cases which have considered similar problems with regard to adequate foundation discloses that certain basic facts should be established before an objection as to the foundation for the test may be overruled.

Assuming but not deciding that accurate results can be obtained with a Breathalyzer test, we now adopt those rules for our own jurisdiction and determine that before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the

Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with any statutory requirements. Essentially the same requirements are prescribed in *Jones v. City of Forrest City,* 239 Ark. 211, 388 S.W.2d 386 (1965); *State v. Quinn*, 289 Minn. 184, 182 N.W.2d 843 (1971); *Otte v. State, supra; State v. Miller*, 64 N.J. Super. 262, 165 A.2d 829 (1960); *People v. Donaldson*, 36 App. Div. 2d 37, 319 N.Y.S.2d 172 (1971); *State v. Sickles*, 25 Ohio App. 2d 1, 265 N.E.2d 787 (1970); *Pruitt v. State*, 216 Tenn. 686, 393 S.W.2d 747 (1965); *State v. Magoon,* 128 Vt. 363, 264 A.2d 779 (1970); *State v. Baker, supra;* Slough & Wilson, *Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing,* 44 Minn. L. Rev. 673 (1960).

To the extent that our decision in this case is contrary to our holding in *State v. Jablonski,* 199 Neb. 341, 258 N.W.2d 918 (1977), that case is overruled.

While perhaps not necessary to our decision, we nevertheless observe that the reliability of Breathalyzer test results is dependent on two basic assumptions: (1) That there is a direct correlation between alcohol content of air in the lungs and alcohol in the blood; and (2) That this relationship is equally true for all people. The first assumption may be true, but the measurement is subject to immense error due to such factors as the absence of recent vomiting or even burping and the cleanliness of the mouth, to name only a few. It is the second assumption, however, that is most fallacious. The scientific literature establishes that the correlative factor used is simply a mean or average. Significant percentages of persons would have alcohol content in the blood above or below the amount indicated by the Breathalyzer result. In a significant number of cases, where the measurement is at the

minimum to establish illegality, persons can be convicted wrongly.

While not raised in this appeal and therefore not now decided, many commentators have suggested that Breathalyzers should be limited to a corroborative role in the prosecution of the offense of driving while intoxicated. The use of a test which can, standing alone, result in conviction of a crime, when the test results can and do differ from individual to individual, offends our sense of justice and fair play.

In this case, the State failed to meet its burden and failed to produce prima facie evidence that the necessary requirements had been met. Therefore, the test was not admissible in evidence. Absent the test, there was no evidence that Gerber had violated the law as charged. The court should have dismissed the complaint and, accordingly, we now order the complaint dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BOSLAUGH, J., dissenting in part.

Testimony by the examining officer that he possessed a valid permit, accompanied by production of a permit regular on its face, should be sufficient to establish, prima facie, the authority of the officer to perform the test under the statute.

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STATE OF NEBRASKA, APPELLEE, V. GLENN FRENCH, APPELLANT.

291 N. W. 2d 248

Filed April 15, 1980. No. 42945.

1. **Evidence: Trial.** Evidence of other similar acts may be admissible to show the absence of mistake or accident.
2. **False Pretenses: Fraud.** The essential elements of the crime of obtaining goods by false pretenses are: (1) There must be a false pretense or, in other words, a false representation of a claimed fact; (2) The false pretense must be made with the intent to

cheat and defraud the victim; (3) Property of the victim must be obtained because of the false pretense; (4) There must be reliance by the victim upon the false pretense; and (5) The false pretense must be an effective cause in inducing the owner to part with his property.

3. **False Pretenses: Fraud: Intent.** Whether there is an intent on the part of one person to cheat or defraud another usually must be inferred from the nature of the acts themselves and the circumstances surrounding them.
4. **Convictions: Appeal and Error.** This court will not interfere on appeal with a conviction based upon evidence unless the evidence is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt.
5. **Sentences: Probation and Parole: Appeal and Error.** This court will not overturn a sentence of the trial court which does not grant probation unless there has been an abuse of discretion.
6. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Deuel County: JOHN D. KNAPP, Judge. Affirmed.

Smith & Wertz and Dwight E. Smith, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Defendant was charged in the District Court for Deuel County, Nebraska, with obtaining property by false pretenses from Calvin McClung on August 8, 9, 10, 11, 12, 15, and 16, 1977. This was a felony offense under the provisions of Neb. Rev. Stat. § 28-1207 (Reissue 1975), the statute then in effect, and, upon conviction, if the value of the property involved was $35 or more, the statute provided for a term of imprisonment in the Nebraska Penal and Correctional Complex of not more than 5 years nor less than 1

year. A jury was waived and a trial to the court alone resulted in a conviction and a sentence of 3½ years. The defendant's motion for a new trial was overruled and he has appealed to this court. Assigned as errors are the following: (1) The trial court erred in admitting evidence of other alleged similar acts; (2) The trial court erred in overruling defendant's motion for a directed verdict; (3) The evidence was not sufficient to sustain the conviction; and (4) The sentence was excessive and should have provided for probation. We affirm.

A person is deemed guilty of this crime if such person "by false pretense or pretenses . . . shall obtain from any other person . . . goods . . . with intent to cheat or defraud such person . . . ." § 28-1207.

Calvin McClung testified he had a conversation with the defendant on July 27, 1977, wherein defendant offered to buy corn for $1.90 per bushel. He told Mr. McClung that he had a contract to sell corn to a feedlot for $1.90 per bushel and that the parties who had promised to sell to him in order that he might be able to fulfill that contract had "backed out" on the deal. At the time, Mr. McClung knew corn was going down in price and was then currently selling on the market for approximately $1.74. Mr. McClung further testified he did, in fact, sell four loads of corn to defendant at the $1.90 price on July 27 and 29 and August 1 and 4, 1977, for which he was paid in full on the following Saturday. He went on to say that he sold to defendant an additional load on August 8, two loads on August 9, and one load on August 10, at the $1.90 price. Thereafter, according to his testimony, Mr. McClung sold four more loads to the defendant on August 11 for an agreed price of $1.75, and five more loads at $1.59, one load on August 12, three on August 15, and one on August 16. The witness thought the market at that time was probably about 5 cents under the last two contract prices. Mr. McClung was only paid a total of $2,000

for the last 13 loads, consisting of approximately 12,696 bushels, whereas the total value or sales price of the same amounted to $22,947.65.

Additionally, Mr. McClung testified that defendant had told him he was bonded and showed him a paper which appeared to be a bond. The witness stated the reason he dealt with defendant was because the price of corn was going down and was lower than the $1.90 offered and he believed defendant's story that he had this contract to fulfill.

We will pass by the testimony of the State's other witnesses for the time being and set forth that of the defendant, offered in his own behalf, in order to more easily compare it with the testimony of Mr. McClung. Defendant admitted all the transactions set forth above and the payments made as well as the failure to make the remaining payments. He said at the time he offered $1.90 per bushel, the feedlot was bidding $1.74. He explained the reason why he would take such a loss deliberately was that "I committed myself on the corn before I had a commitment on the other end and thought for sure the price would raise and could make a comeback." Defendant explained this more clearly on cross-examination by stating he had commitments to deliver corn to one feedlot at a price of $1.74 per bushel and to another for $1.67 before he purchased any corn from Mr. McClung. He also admitted he had told Mr. McClung, during their conversation about buying the latter's corn, that he had these contracts, but did not believe he told him the contract price. It was also conceded by defendant that he had no grain dealer's bond, but he didn't know if he had told Mr. McClung he was bonded. Defendant acknowledged similar dealings with a Mr. Pickard and Mr. Armstrong, whose testimony will be referred to later on in this opinion, and that altogether he owed these two men, plus Mr. McClung, the sum of $56,409.84. He used the money received from the sale of Mr.

McClung's corn partially for his personal expenses and partially to pay for corn purchased from others, but intended to pay Mr. McClung in full.

Burdette Pickard and Ernest Armstrong both testified in behalf of the State, and it was their testimony that was received over the objections of defendant and which constitutes the basis of defendant's first assignment of error. They are farmers and had dealings with defendant similar to those of Mr. McClung at or near the same time. Mr. Pickard stated that in July of 1977, he sold defendant 5,329 bushels of corn for a contract price of $1.91, received a check for $10,179, then in August sold another 3,955 bushels for $1.71, following which the first check received was returned unpaid. He too was paid but a total of $2,000 for all the corn he sold to defendant. The witness also stated that defendant had told him he was a bonded dealer. Mr. Armstrong testified he was a farmer in the area of Brule, Keith County, Nebraska, and in July of 1977, he sold defendant 12 loads of corn at an average price of $2.20 per bushel which were loaded and hauled by defendant on August 18, 1977. At the same time, according to his testimony, he received a check from defendant in the amount of $22,520.75. Although presented twice for payment, the check was never honored. He said he had received a payment of only $2,000 on the total indebtedness.

As has been mentioned previously, defendant's objections to the testimony of the last two witnesses were overruled, which rulings of the trial court form the basis for defendant's first assignment of error. Neb. Rev. Stat. § 27-404(2) (Reissue 1975) provides, in part, that evidence of other "crimes, wrongs, or acts . . . may . . . be admissible for . . . purposes, such as proof of motive, opportunity, intent, . . . plan, knowledge . . . or absence of mistake or accident." The incidents testified to by these two witnesses certainly were not remote in point of time.

The testimony tended to corroborate the claim by Mr. McClung that defendant had represented to him that he, the defendant, was bonded; it revealed a plan or scheme to obtain property of others without paying for it; and it disclosed the absence of any mistake on the part of defendant as to whether he had or would have the money to cover the checks. In *State v. Rush*, 202 Neb. 425, 275 N.W.2d 834 (1979), although the trial court, in a prosecution for receiving stolen property, excluded evidence that defendant previously had had experience with stolen property, we stated that the court might properly have received it. We went on to point out that under § 27-404(2), such evidence of other acts may be admissible to show the " 'absence of mistake or accident.' " There was no merit to defendant's objections.

The second and third assignments of error may be considered together because if the evidence was sufficient to sustain the trial court's verdict, certainly there was no error in refusing to direct a verdict for the defendant. The essential elements of the crime of obtaining goods by false pretenses are: (1) There must be a false pretense or, in other words, a false representation of a claimed fact; (2) The false pretense must be made with the intent to cheat and defraud the victim; (3) Property of the victim must be obtained because of the false pretense; (4) There must be reliance by the victim upon the false pretense; and (5) The false pretense must be an effective cause in inducing the owner to part with his property. *State v. Bohannon*, 187 Neb. 594, 193 N.W. 2d 153 (1971).

There was evidence offered by the State and not unequivocally denied by the defendant from which the trial court could find, beyond a reasonable doubt, first, that defendant represented to Mr. McClung that he had a contract to sell corn at $1.90 per bushel and that he possessed a valid grain deal-

er's bond. The fact that those representations were false is not disputed. Secondly, the circumstances surrounding all the transactions involving the three sellers support a finding that defendant made those representations with the intent to cheat and defraud the victim. Whether there is an intent on the part of one person to cheat or defraud another usually must be inferred from the nature of the acts themselves and the circumstances surrounding them. *State v. Mills*, 199 Neb. 295, 258 N.W.2d 628 (1977). Finally, the victim, Mr. McClung, testified that the price of corn was well below $1.90 and going down and he believed defendant's story about the contract he had to fulfill at $1.90, and that is the reason he dealt with him and sold him the corn. This would cover the last three elements of the crime as set forth above.

"This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt." *State v. Sommers,* 201 Neb. 809, 818, 272 N.W.2d 367, 372 (1978). Certainly, on the basis of the record, we cannot reach that conclusion here.

Finally, defendant insists that the trial judge abused his discretion in failing to place defendant on probation. It is true that defendant does not have any substantial criminal record. A felony charge of insufficient funds check was filed against him in Thayer County in March of 1978 but was dismissed upon his payment of restitution and costs. He has a pending felony charge in Garden County for obtaining goods by false pretenses from Burdette Pickard. The trial judge, during the sentencing proceedings, rejected the plea for probation because, in his opinion, it would "bring the law into disrepute and would depreciate the seriousness of the offense . . . ." Neb. Rev. Stat. § 29-2260 (Reissue 1975) allows the trial court to withhold sentence of imprisonment un-

less it finds that imprisonment is necessary for the protection of the public because "(c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law." The trial judge viewed this as a serious matter involving a deliberate scheme to cheat and defraud three area farmers out of more than $50,000. We cannot say that he abused his discretion and this court will not overturn a sentence of the trial court which does not grant probation unless there has been an abuse of discretion. *State v. Swails*, 195 Neb. 406, 238 N.W. 2d 246 (1976). The sentence was actually one for not less than 1 year nor more than 3½ years because of the statutory minimum. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. This sentence was within the statutory limits and evidenced no abuse of discretion on the part of the trial judge.

The judgment is affirmed.

AFFIRMED.

CLINTON, J., not voting.

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RONALD J. NOVOTNY AND NANCY A. NOVOTNY, APPELLEES, V. ELLIS MCCLINTICK, INDIVIDUALLY, TRADE-IN HOMES, A COPARTNERSHIP, AND ACTION ENTERPRISES, INC., DOING BUSINESS AS ACTION REAL ESTATE CO., APPELLANTS.

291 N. W. 2d 252

Filed April 23, 1980. No. 42546.

1. **Fraud.** The elements which must be alleged and proved to sustain an action for fraudulent misrepresentation are: (1) That a factual representation was made which was known to be untrue by the party making it or which was recklessly made; (2) That the representation was made with the intent to deceive and to induce action on the part of the other party; and (3) That the other party did, in fact, rely on the representation and acted thereon, thereby sustaining injury.

2. **Directed Verdict.** It is the general rule that in every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it and upon whom the burden is imposed.
3. _____. A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed; such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed and remanded with directions.

William E. Pfeiffer of Spielhagen, Pfeiffer, Miller & Weingarten, Associates, for appellants.

Frank Meares, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

This is an action brought by Ronald J. and Nancy A. Novotny (Novotnys), husband and wife, appellees herein, against Ellis McClintick (McClintick), Trade-In Homes (Trade-In), and Action Enterprises, Inc. (Action), appellants herein, for damages caused by the appellees' reliance on certain purportedly fraudulent misrepresentations made during the sale of property purchased by the appellees from Trade-In Homes. Appellants denied the Novotnys' claims and cross-petitioned for money allegedly due them under the terms of the purchase agreement. Evidence was adduced from which the jury returned a verdict for appellees on their claim in the amount of $3,500, and also for appellants in the amount of $315.39. We reverse and remand.

The facts involved herein are not in substantial conflict. The residence which is the subject of this

action is located in Bellevue, Nebraska. It appears from the record that James O. May and his wife, Peggy S. May, the previous owners of the property, on May 12, 1977, entered into a listing agreement with Action for the sale of the property. On that same date, the Mays entered into an agreement with Trade-In, a partnership comprised of the president and the managers of Action, whereby Trade-In agreed to purchase the home at a price which would guarantee the Mays a net profit of $14,123 should Action fail to sell the property prior to August 12, 1977, to a suitable purchaser for a price of $57,950, or more. The Mays subsequently left this state and moved to Alaska, arriving there on August 9, 1977.

The Novotnys became interested in the property in the latter part of July 1977. They were looking for a residence to purchase in the Bellevue area and examined the property involved herein at that time. When they inspected the residence, the Novotnys were informed by *their* realtor that the owners of the house had moved to Alaska. Subsequently, on August 8, 1977, the Novotnys made an offer to purchase the home for $50,000, which offer was to remain in effect until August 11, 1977. On August 9, their offer was rejected and a counteroffer was made to the Novotnys in the amount of $55,000, purportedly pursuant to a "telecon" which McClintick, the listing agent, had with the Mays on that date. The counteroffer was to remain in effect until August 11, 1977, the final date on which the residence could be sold before the "guarantee to purchase" agreement became operative.

The Novotnys did not act on the counteroffer by August 11, 1977. However, because they "liked the property very much," they made a second offer to purchase on August 15, 1977, for the amount of $53,500. This offer was accepted by Trade-In the following day, August 16, 1977. Trade-In was the owner of the property on that date under the terms

of the "guarantee to purchase" agreement it entered into with the Mays, the effective date of the listing contract having passed without an appropriate buyer being obtained and the Mays having executed a deed to the property to Trade-In on August 10, 1977. Trade-In entered into a listing agreement with Action for the sale of the residence on August 15, 1977. Trade-In's acceptance of the Novotnys' second offer was conditioned on their understanding that the seller, Trade-In, was a licensed Nebraska real estate broker. The purchase contract contains the Novotnys' written acknowledgment of this fact, dated August 17, 1977.

On the date of closing in October, a dispute arose as to the amount of taxes that the Novotnys were obligated to pay under their agreement with Trade-In. Following this dispute, the Novotnys, for the first time, learned of the August 10, 1977, transfer from the Mays to Trade-In. It appears that this transfer was for a lesser total amount than that originally offered by the Novotnys, although the amount netted by the Mays was greater under the "guarantee to purchase" agreement than it would have been under the Novotnys' first offer.

The Novotnys thereafter commenced this action alleging that they suffered damages in the amount of $3,500, which was the difference between their original offer and the accepted offer, due to their reliance on purported misrepresentations made by the appellants. As previously stated, appellants answered denying the Novotnys' claims and cross-petitioned for the amount withheld by the Novotnys from the agreed purchase price for the amount of taxes disputed, and for the cost of a termite inspection. Following a trial to a jury, a verdict was returned for the Novotnys in the amount of $3,500 and for the appellants in the amount of $315.39, the amount of the disputed taxes and the termite inspection. This appeal is from that verdict, wherein four

errors are assigned to the proceedings below. However, we need concern ourselves with only one of such assigned errors.

Appellants contend that the trial court committed error in overruling their motions for a directed verdict. They claim that the Novotnys failed to present sufficient evidence to establish a cause of action for fraudulent misrepresentation. We agree.

It is the general rule that in every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it and upon whom the burden is imposed. *Moats v. Lienemann*, 188 Neb. 452, 197 N.W.2d 377 (1972); *Renna v. Bishop's Cafeteria Co.*, 192 Neb. 33, 218 N.W.2d 246 (1974); *Humphrey Feed & Grain, Inc. v. Union P. R. R. Co.*, 199 Neb. 189, 257 N.W.2d 391 (1977); *Bassinger v. Agnew, ante* p. 1, 290 N.W.2d 793 (1980). A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed; such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence. *Egenberger v. National Alfalfa Dehydrating & Milling Co.*, 164 Neb. 704, 83 N.W.2d 523 (1957); *Humphrey Feed & Grain, Inc. v. Union P. R. R. Co., supra.*

We conclude, from our review of the record, that the Novotnys failed to present sufficient evidence to submit the issue of the alleged falsity of the representations to the jury. The elements which must be alleged and proved to sustain an action for fraudulent misrepresentation are: (1) That a factual representation was made which was known to be untrue by the party making it or which was recklessly

made; (2) That the representation was made with the intent to deceive and to induce action on the part of the other party; and (3) That the other party did, in fact, rely on the representation and acted thereon, thereby sustaining injury. *Page v. Andreasen,* 200 Neb. 641, 264 N.W.2d 682 (1978); *Moser v. Jeffrey,* 194 Neb. 132, 231 N.W.2d 106 (1975).

The Novotnys, in their petition, alleged that appellants represented that the owners of the residence on August 8, 1977, were the Mays; that such representation was false, and that Trade-In was the owner on that date. The record reveals, however, that the allegations are supported, if at all, by only one item of evidence, utility records showing that the named consumer was changed from the Mays to McClintick on August 8, 1977. However, the record reflects that McClintick actually had the utilities changed the following week, but the change was backdated to August 8, 1977, the date of the routine meter reading. Moreover, as of August 8, 1977, the Mays were still the owners of the residence. They did not execute a deed to the property until August 10, 1977. There is nothing in the record to demonstrate that any misrepresentations were made as to ownership of the property. The Novotnys were informed that Trade-In was the seller as was evidenced by their acknowledgment of such fact on the purchase agreement. The allegation of misrepresentation as to the ownership of the property at any time in this proceeding was never proved.

The Novotnys also alleged that the Mays never made a counteroffer and that McClintick's claim to the contrary was a "patently false" misrepresentation. Again, there is no evidence in the record to support this claim. In fact, the evidence with reference to the counteroffer indicates that it was made by the Mays. Mr. May testified by way of deposition on written interrogatories that he had a telephone conversation with McClintick on the 9th or

10th of August wherein he rejected the Novotnys' offer and made a counteroffer of $55,000. His testimony was corroborated by Mrs. May in her deposition on written interrogatories. Furthermore, the Mays refused to sign an affidavit to the contrary which was prepared and delivered to them by the Novotnys' counsel. This affidavit was returned to the Novotnys' counsel with a letter indicating that claims of a lack of knowledge of the Novotnys' original offer were false. The record completely fails to substantiate that the Mays ever agreed or would have agreed to sell the property to the Novotnys for $50,000.

We conclude from a review of the record that the Novotnys failed to sustain their burden of proof in this case. The Novotnys failed to prove sufficient facts to show that a misrepresentation occurred at any time, let alone reliance thereon or damages. What they did show was that they purchased a residence with an appraised value of $60,000 for $53,500, at which price the owner, Trade-In, sustained a $384 loss on the transaction. It is also undisputed that the Novotnys signed an acknowledgment of the fact that the seller of the house was Trade-In. While it is regrettable that they were not more careful in determining the meaning of the writing on which they placed their signatures, such action will not support a claim of misrepresentation, as the statements made to the Novotnys were factually correct. We believe the District Court was in error in failing to direct a verdict for appellants.

We therefore reverse the judgment entered herein and remand this matter to the District Court with directions to enter an order to dismiss the Novotnys' petition, and to enter a judgment for appellants on their cross-petition for the $3,500 held by appellees' loan company, plus $315.39 for taxes and termite inspection.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., not voting.

JOSEPH CHALEN, APPELLANT, V. ANGELA CIALINO, APPELLEE.

291 N. W. 2d 256

Filed April 23, 1980. No. 42581.

1. **Equity: Appeal and Error.** Equity cases are heard de novo by the court. However, in determining the weight to be given to the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
2. **Prescriptive Easements.** The use and enjoyment which will give title by prescription to an easement or other incorporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate.
3. _____. The use and enjoyment which will create an easement by prescription must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement, and it must continue for the full prescriptive period.
4. _____. A permissive use of the land of another, that is, a use or license exercised in subordination to the other's claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued.
5. _____. To establish a prescriptive right to an easement, use and enjoyment must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription.
6. **Easements: Reservations.** As a general rule, there is no implied reservation of an easement when one sells a part of his land over which he has previously exercised a privilege in favor of the land he retains, unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained.
7. **Reservations.** A grantor cannot derogate from his own grant, and, as a general rule, he can only retain a right over a portion of his land conveyed absolutely if there is an express reservation.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Milo Alexander, for appellant.

Joseph P. Inserra and John P. Inserra, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, and WHITE, JJ., and RONIN and GARDEN, District Judges.

GARDEN, District Judge.

This is an action in equity wherein the plaintiff-appellant, Joseph Chalen, seeks to establish an easement for right-of-way across certain real estate owned by the defendant-appellee, Angela Cialino, under either or both of two legal theories: (1) easement by implication, and (2) easement by prescription. The defendant answered by denying plaintiff's right to an easement and by pleading permissive use as an affirmative defense. After trial, the District Court for Douglas County, Nebraska, found for the defendant and dismissed plaintiff's amended petipetition at plaintiff's cost. We affirm the judgment of the trial court.

Equity actions are heard de novo by this court and we are required to reach an independent conclusion as to fact questions without reference to the conclusions of the District Court.

The essential facts in this case are these: Plaintiff and defendant are brother and sister. They live next door to one another at 5027 and 5033 South 23rd Street, respectively, in Omaha, Nebraska. Plaintiff's property is immediately to the north of defendant's. Both properties face South 23rd Street.

Plaintiff has lived at 5027 South 23rd Street since his family moved into the house in 1920. Defendant lived there with plaintiff and their parents until 1932 when she married and moved into the house at 5033 South 23rd Street.

Both properties were originally acquired in a single purchase by the parties' father, Vito Cialino, on April 19, 1919. The house at 5027 South 23rd Street was in its present location in the northwest corner of Lot 9 at that time. The house occupied by the defendant at 5033 South 23rd Street was moved into its present location some time in 1923.

The original purchase by Vito Cialino consisted of the south 2 feet of Lot 10 and all of Lots 9 and 8, Block 20, First Addition to South Omaha, Douglas

County, Nebraska. The subsequent chain of title is as follows: (1) Vito Cialino died on July 8, 1930, and the entire property passed to his widow, Vincenza Cialino. (2) On September 7, 1949, Mrs. Cialino executed two warranty deeds, each subject to a life estate in herself, which divided the property between plaintiff and defendant. Plaintiff was given the south 2 feet of Lot 10, all of Lot 9, and the north 8 feet of Lot 8, Block 20, First Addition to South Omaha, Douglas County, Nebraska. Defendant received the south 42 feet of Lot 8 in the same block and addition under her married name of Angela Pirruccello. (3) By warranty deed dated December 26, 1950, defendant conveyed her remainder interest back to Mrs. Cialino. (4) Slightly over a year later, on September 1, 1952, Mrs. Cialino conveyed the south 42 feet of Lot 8 back to defendant under the name of Angela Cialino, subject to a life estate in herself. (5) On September 9, 1957, Vincenza Cialino died.

Some time in 1920, shortly after plaintiff and his parents moved into the house at 5027 South 23rd Street, plaintiff and his father installed the driveway which is the subject of this dispute. The driveway runs east from South 23rd Street along the southern border of Lot 8 for a distance of approximately 60.5 feet. The driveway then curves to the northeast across the rear of Lot 8 for approximately 58.8 feet to the property line which now divides 5027 and 5033 South 23rd Street. The driveway continues across the rear of Lot 9 to three frame garages located at the rear of 5027 South 23rd Street. Those garages were constructed by plaintiff and his father some time in 1925. The driveway was already in place when defendant's house was moved to its present location in 1923.

Except for a brief time in 1941, the driveway across defendant's property was in constant use from the time of its construction until October 24,

1977, when defendant put up a chain link fence along her northern boundary line. The driveway was used two or three times a week until some time in 1928, and daily thereafter. The driveway was used by plaintiff, members of his family, and tenants occupying space at 5027 South 23rd Street. The driveway was in use at the time of the various transfers which gave plaintiff and defendant their respective interests, at the time of Mrs. Cialino's death in 1957, and for roughly 20 years thereafter. This use was alleged in plaintiff's petition and admitted by defendant's answer and is not disputed.

Plaintiff improved and maintained the driveway over the years by covering it with gravel, banking it, and clearing away weeds and snow.

At the time Vincenza Cialino divided the property in 1949, there was an understanding between plaintiff and defendant that plaintiff was to use the original driveway until such time as a new driveway was constructed on his property.

Defendant repeatedly reminded plaintiff over the years that he was to put in a driveway over his own land. Defendant finally concluded that she would have to force plaintiff to stop using the driveway. She did so on October 24, 1977, by putting up a fence along the boundary line dividing the two properties.

Plaintiff's testimony on the issue of permission was in direct conflict with defendant's. Plaintiff testified that there was never any understanding that a new driveway was to be constructed on his property; that he never asked defendant's permission to use the driveway; that defendant first objected in January or February of 1977; and that plaintiff believed he would be able to use the driveway as long as he wished.

The court stated in *Ohme v. Thomas*, 134 Neb. 727, 728, 279 N.W. 480, 481 (1938):

"While the law requires this court, in deter-

> mining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." [Citations Omitted.]

We find that the defendant has affirmatively proved by a preponderance of the evidence that plaintiff's use of the driveway in question was permissive until such time as defendant withdrew permission by putting up the fence along the boundary line dividing the two properties.

Since plaintiff's use of the driveway across defendant's property was permissive in nature, an easement by prescription could not arise.

This court, in discussing easements by prescription, stated in *Scoville v. Fisher,* 181 Neb. 496, 499, 149 N.W.2d 339, 342 (1967):

> Plaintiff's use of the area in question was neither under a claim of right adverse to the defendants or their predecessors in title nor was it exclusive. We shall discuss first the requirement that the use be adverse. The law with relation to this element and with regard to the distinction between an adverse and permissive user is well set out in Stubblefield v. Osborn, 149 Neb. 566, 31 N.W.2d 547, wherein it is said: " 'An easement by prescription can be acquired only by an adverse user for ten years. Such use must be open, notorious, exclusive and adverse.' Onstott v. Airdale Ranch and Cattle Co., 129 Neb. 54, 260 N.W. 566. See, also, Omaha & R. V. Ry. Co. v. Rickards, 38 Neb. 847, 57 N.W. 739.
>
> "The use and enjoyment which will give title by prescription to an easement or other

incorporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, *under a claim of right,* continuous and uninterrupted, open and notorious, *exclusive,* with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period. See 28 C.J.S., Easements, § 10, p. 645.

" 'A prescriptive right is not looked on with favor by the law, and it is essential that all of the elements of use and enjoyment, stated above, concur in order to create an easement by prescription.' 28 C. J. S., Easements, § 10, p. 645.

" 'A *permissive* use of the land of another, that is a use or license exercised in subordination to the other's claim and ownership, *is not adverse* and cannot give an easement by prescription no matter how long it may be continued, * * *.' 28 C.J.S., Easements, § 14, p. 655.

"To establish a prescriptive right to an easement, *it must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription.* See Sachs v. Toquet, 121 Conn. 60, 183 A. 22, 103 A. L. R. 677."

(Emphasis supplied in *Scoville.*)

We now turn to plaintiff's contention that an easement exists by implication. The conveyance of September 7, 1949, to defendant from her mother was by warranty deed as was the conveyance back to defendant dated February 1, 1952. No reference was made in either deed to the retention by the grantor of any right to use the driveway. Therefore, if such

an easement exists, it must arise by a reservation by implication.

This court, in *Bennett v. Evans,* 161 Neb. 807, 822, 74 N.W.2d 728, 737 (1956), stated as follows:

> But here we are dealing with an implied reservation. Consistent with the above authorities, we adopt the rule applicable to implied reservations as stated in 1 Thompson, § 396, p. 645, which we again quote: "As a general rule, there is no implied reservation of an easement in case one sells a part of his land over which he had previously exercised a privilege in favor of the land he retains, unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained. A grantor, as we have seen, can not derogate from his own grant and as a general rule he can retain a right over a portion of his land conveyed absolutely only by express reservation."

The question in the instant case is: Has the plaintiff shown an implied reservation and, specifically, does the evidence show strict necessity?

Plaintiff's evidence fails to show that the driveway across defendant's property is necessary. The evidence shows conclusively that plaintiff has ample room along the south edge of his property to build his own driveway. The evidence further reflects that the cost to plaintiff will not be exorbitant nor will the placement of the driveway depreciate the value of his real estate. We, therefore, find that, because there is no showing of strict necessity, no easement arose through a reservation by implication.

The trial court was correct in its findings and in dismissing plaintiff's amended petition, and its action in doing so is affirmed.

AFFIRMED.

# WALTER SCHANEMAN AND JOHN SCHANEMAN, CONSERVATORS OF THE ESTATE OF CONRAD SCHANEMAN, SR., FOR AND ON BEHALF OF CONRAD SCHANEMAN, SR., AND CONRAD SCHANEMAN, SR., APPELLEES, V. LAURENCE SCHANEMAN, APPELLANT.

291 N. W. 2d 412

Filed April 23, 1980. No. 42587.

1. **Fiduciary Relationship.** A confidential relation exists between two persons if one has gained the confidence of the other and purports to act or advise with the interest of the other in mind.
2. **Fiduciary Relationship: Equity.** In a confidential or fiduciary relationship in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence is thereby created on the other, equity will scrutinize the transaction critically, especially where age, infirmity, and instability are involved, to see that no injustice has occurred.
3. **Undue Influence.** A prima facie case of undue influence is made out in the case of a deed where it is shown by clear and satisfactory evidence (1) That the grantor was subject to such influence; (2) That the opportunity to exercise it existed; (3) That there was a disposition to exercise it; and (4) That the result appears to be the effect of such influence.
4. **Fiduciary Relationship: Undue Influence: Burden of Proof.** In an action based on undue influence when a confidential relationship exists between the parties and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence shifts to the defendant.
5. **Undue Influence: Presumptions.** In determining whether a presumption of undue influence has been rebutted, the court may consider whether the grantor has received independent advice.
6. **Appeal and Error.** When credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
7. _____. Even when the case is triable de novo, the superior position of the original trier of facts is to be respected and accorded great weight.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Wright & Simmons and John A. Selzer, for appellant.

John K. Sorensen, for appellees.

Heard before KRIVOSHA, C. J., BRODKEY, and HASTINGS, JJ., and FAHRNBRUCH and CLARK, District Judges.

CLARK, District Judge.

This is an action in equity to set aside and cancel a deed executed by Conrad Schaneman, Sr., hereinafter called Conrad, in favor of his eldest son, the defendant, Laurence Schaneman. The action was initiated by the conservators of Conrad's estate and by Conrad himself. Conrad died shortly before trial and the action was revived in the name of the special administrator of Conrad's estate.

By his answer, the defendant admitted the execution of the deed but alleged that the conveyance was pursuant to an oral understanding and agreement between Conrad and the defendant.

The District Court for Scotts Bluff County, Nebraska, found that the execution of the deed was a result of fraud and undue influence, set aside the deed, and quieted title in Conrad. Defendant appeals.

A fair summary of defendant's assignments of error is that the findings of the trial court are contrary to the evidence.

This matter on appeal is reviewed de novo on the record. We affirm the judgment of the District Court.

The property in question was purchased in January 1945 for a price of $23,500. Defendant helped arrange the purchase and loaned his father $10,500 toward the purchase price. The grantees were Conrad and the defendant as joint tenants. There is some testimony that another son, Conrad, Jr., loaned his father $2,500 toward the purchase price also. In any event, it is agreed that Conrad was the real purchaser. By October 1946, Conrad had repaid the loans to his sons and the defendant quitclaimed his interest in the farm to Conrad.

Conrad, who was born in Russia, could not read or

write the English language. He was the father of eight sons and five daughters, all of whom survived him. All the sons except one are farmers in the Scottsbluff area. Conrad had originally owned four 80-acre farms but had sold one of them prior to 1975. He retired from farming in about 1955. After Conrad's retirement various of his sons farmed his four 80-acre farms on a crop rental basis.

Over the years, the family had been close-knit, especially the father and the sons. It had been customary for Conrad and his sons to help one another financially in the purchase of farms. Conrad helped his sons; the sons helped Conrad; and the brothers helped one another in this fashion.

After Conrad's retirement from farming, all the children had frequent contact with Conrad and helped him with his personal needs, although defendant, as the oldest son, perhaps had more contact and a closer relationship with Conrad.

At some time between approximately 1973 and mid-1974, the defendant and Conrad had a falling out and were not speaking with one another and defendant no longer came by to see his father. In mid-1974, the defendant and Conrad apparently resolved their problems and defendant resumed a normal relationship with his father.

Prior to the fall of 1974, and for some 15 or 20 years, the youngest son, Floyd, had primarily been the one to assist his father in the more technical aspects of his business affairs, such as tax matters. Since 1967, a daughter-in-law, Eylene Schaneman, had made daily visits to Conrad to administer needed shots of insulin, which in 1974 increased to two shots daily.

In the fall of 1974, the defendant, who had by then made up his differences with his father, advised the other children that he would henceforth manage his father's business matters and that they no longer need be concerned in that regard. At about the

same time, the defendant notified Eylene Schaneman that she had been giving the insulin shots to Conrad long enough and that other arrangements would be made. Thereafter, the defendant was the primary person who advised Conrad and handled Conrad's business matters, although the other sons did continue to help Conrad to some extent.

On March 18, 1975, Conrad deeded the farm in question to the defendant for a stated consideration of $23,500, which was the original purchase price of the property in 1945. The value of the farm in March 1975 was between $145,000 and $160,000.

In March of 1975, Conrad was a man 82 years of age whose health had been deteriorating since at least 1971. He had numerous periods of hospitalization and suffered from heart problems, diabetes with extremely high and uncontrollable blood sugar levels at times, and obesity. He weighed between 325 and 350 pounds, had difficulty breathing, could not walk more than 15 feet, and was no longer able to drive an automobile. He was unable to shave himself and a special jackhoist had to be utilized to get him in and out of the bathtub. He was, for all intents and purposes, an invalid, completely dependent on others for most of his personal needs and for transportation, banking, and other business matters.

Conrad's children, other than the defendant, testified that during early 1975 Conrad had some days when he was sharper and more alert mentally than on other days, that at times he was confused, had difficulty communicating and, on occasion, seemed to lapse into times long past. On at least one occasion in 1974, he had difficulty placing Eylene when she was there to administer Conrad's insulin medication.

In about the spring of 1977, one of Conrad's sons discovered by accident that defendant's name was on Conrad's bank account as a joint tenant with right of survivorship. At about the same time, it

was discovered that defendant had bought, with Conrad's money, a $20,000 certificate of deposit and that this also listed defendant as joint owner with right of survivorship. It was also later discovered that Conrad had executed a power of attorney in favor of defendant on August 20, 1975.

Proceedings were instituted in the county court of Scotts Bluff County and, in August 1977, Conrad's sons Walter and John were appointed as conservators of Conrad's estate. This action followed.

In September 1978, at hearings regarding the petition for appointment of a conservator, the defendant testified that he visited Conrad at least once a day, sometimes more often. He stated that he had been taking care of Conrad's business for over 2 years. Defendant further testified that in late 1974 and early 1975 Conrad had offered to give a farm to defendant several times, but that he had refused to accept it. Finally, according to the defendant, Conrad told the defendant to take his pick of the three farms. Defendant acceded to his father's wishes and picked the farm in question. Defendant testified that his father then told him he had made a mistake, that he should have picked the "Home Place" instead, but that defendant persisted in his choice. Defendant stated that he offered to give his father money but that Conrad refused. Defendant gave his father a check for $23,500 but Conrad didn't cash it immediately. It is noted that, at these hearings, the defendant never claimed any prior oral agreement between the defendant and Conrad for purchase of any farm and, in particular, none for the purchase of the farm in question.

At the conservatorship proceedings, the defendant stated that a life estate had been reserved for Conrad and that the reservation was set out in the deed. When shown that the deed contained no such provision, he said that it must have been an oral agreement between him and Conrad.

Regarding the purchase of the $20,000 certificate of deposit, defendant admitted that he had been confronted with the fact that his name was listed as a coowner; that he had denied same; and that, when he found that the brothers were correct, he had immediately taken steps to have his name removed. First he stated that his name had been placed on the CD at the direction of the bank, but then decided that it was just an error.

Defendant further denied that he had ever tried to buy the farm from Conrad before March 1975 and that the only conversations with Conrad regarding that property were regarding Conrad's desire to make a gift to the defendant.

By deposition in December 1977, a transcript of which was received in evidence, the defendant stated that he and Conrad had a very close relationship and that his father trusted and relied on the defendant in March of 1975. He again denied that he had tried to buy the farm from Conrad for $23,500 roughly 4 months prior to March 1975 or at any other time. He stated that Conrad wanted defendant to have the farm as a gift due to the fact that defendant had helped Conrad buy the farm in 1945. He further stated that his father had told him, shortly before 1975, that he was going to give the farm to him.

Regarding a conversation that defendant claimed he had with Conrad at the time of the farm purchase in 1945, defendant testified, "[W]e kind of talked about sometime if he'd get to where he couldn't use it, maybe I could take it from there."

He stated that the father made him a gift of the farm but that they exchanged checks in the amount of $23,500 each "to show some consideration [for] the farm."

In April 1978, the defendant testified in a proceeding in county court that he actually bought the farm for $23,500; that his father didn't want the money; and that, at his father's suggestion, the exchange of

checks was made in 1976 because Conrad wanted the matter cleared up.

At trial, defendant testified that in March 1975 his father trusted and relied on the defendant; that defendant held a "special place" with his father; and that Conrad had complete trust and confidence in defendant. He did not recall any period that he and Conrad were not speaking and said that he and his father had never had a falling out. He further stated that, in March 1975, he was handling Conrad's business affairs generally.

At trial, defendant further testified that in 1945, when he had loaned his father money toward the purchase price of the farm, he had asked his father if he, the defendant, could buy the farm back from Conrad for the original purchase price when Conrad was through using the farm. According to defendant, Conrad agreed to do this. Defendant stated that no one but he and Conrad knew of this oral agreement.

Defendant admitted that some time after the property had been conveyed to him, his brother Leroy, who was the tenant farmer on the property in question, approached defendant regarding some $1,500 worth of improvements to be made on the farm. The improvements were made and were paid for out of Conrad's money. Defendant did not tell Leroy that he was then title owner of the farm. Defendant admitted that these improvements would have benefited him as owner of the farm.

Defendant admitted that he had not mentioned the alleged 1945 oral agreement with Conrad when he testified at the conservatorship hearings and in his deposition of December 1977, but stated that that was because the agreement did not come to mind at that time.

Defendant testified that although his father was physically very ill in 1975, he was mentally alert and had full knowledge of his actions. In response to a

question as to why, in April 1975, he had felt it necessary to ask one of Conrad's doctors to express an opinion as to Conrad's mental condition, defendant stated that he was not necessarily concerned about the deed of March of 1975.

Although Conrad died before trial, his testimony from the conservatorship proceedings and from three depositions was admitted into evidence.

Conrad testified that Floyd used to take care of his business, and that when defendant took it over, Conrad wanted to have Floyd continue to help, but defendant said no. Conrad stated that 2 or 2½ years earlier (1974-75), the defendant had approached him and attempted to purchase the farm for the original purchase price; that Conrad had refused; that it made him mad, because defendant "didn't want to give nothing." Conrad had no recollection of a check being tendered by the defendant for $23,500 at the time of the execution of the deed but he knew he wouldn't sell the farm for that because he had paid that for it and it was worth much more now.

Conrad specifically denied any oral agreement ever having been made between him and the defendant regarding sale of the farm at the original purchase price. He further denied ever telling the defendant he would either sell or give the farm to the defendant because the defendant helped to buy the farm.

Conrad testified that within a few months after he had refused to sell defendant the farm, he decided to make a gift of the farm because defendant was his best boy and looked after him. He stated defendant only asked to buy the farm on one occasion, but asked for it as a gift several times; that no one else was around when defendant asked Conrad to give him the farm: "He was pretty careful about that." Conrad could not refuse defendant anything because defendant was his best boy. Defendant, according to Conrad, told him not to tell the other children

about the gift; to "keep it quiet."

Conrad testified that although he was originally happy with the fact that he had made a gift of the farm, he had changed his mind when he thought about it, because it was not right that defendant had his own farms but wanted to take this farm away from the other kids. He also stated he had changed his mind because the other kids were unhappy and had "raised hell" about it. Conrad further stated that it was his desire that his children share equally in his property when he could no longer use it.

In response to questions as to whether defendant ever talked Conrad into doing anything he didn't want to do, Conrad stated that defendant was smart about that; "he kept the other boys apart." When asked if he had ever done anything because the defendant wanted him to, Conrad responded that the defendant dictated everything and told him what to do. When asked if property was important to him at the time he gave the farm to the defendant, Conrad replied that it wasn't; that nothing was important; that he didn't care anymore.

Conrad's sons, other than defendant, testified at trial regarding the physical disabilities of their father and the fact that they saw Conrad frequently and that his mental acuity seemed to decrease from time to time. They all testified that the defendant had never mentioned any oral agreement to buy the farm nor the fact that the farm had been deeded to him. They testified that Conrad had always trusted the defendant the most of any of the children, although all the children maintained a close and friendly relationship with their father. Son Leroy also testified that in 1974 he had offered his father $150,000 for the purchase of the farm and had been refused. The children further testified that Conrad's mental acuity seemed to be much the same in his later years as it was in 1975.

Conrad's second wife, Mollie, age 80, who had

signed an antenuptial agreement and had no interest in the property, except a one-half interest in the house located on the farm, testified by deposition.

She testified that Conrad, in 1975, was physically unable to do anything by himself. She also testified that Conrad and all of his boys were "awful close" but that defendant was the favorite son and that defendant helped Conrad in his business and Conrad trusted defendant with all his affairs.

Mollie further testified that there was a time when defendant and Conrad had some trouble and were not speaking to each other but that it didn't last too long. She stated that Conrad was upset because defendant would not talk to him and that during this period defendant didn't do anything for Conrad. Later she saw the defendant and Conrad after they had been "bawling" or crying together and that then things were all right and "they was hand in hand."

She testified that Conrad told her he had promised the farm to defendant and she went with Conrad to the lawyer's office to sign the deed. Defendant hired the lawyer; the defendant's daughter worked for the lawyer; and the defendant and Mollie were the only ones to go to the lawyer's office with Conrad.

She further stated that the only time Conrad talked of making a gift of the farm to the defendant, the defendant was present. She testified that the lawyer read the deed to her and to Conrad at the same time. She further testified that, in her opinion, Conrad's mind was absolutely sound at the time the deed was signed.

At trial, the lawyer who prepared the deed and witnessed the execution of same testified that he had first met Conrad when the defendant brought Conrad to his office on March 17, 1975. Conrad and the defendant told the attorney that Conrad wanted to convey or make a gift to the defendant of the farm and that a life estate for Conrad was discussed. The at-

torney prepared a deed reserving a life estate to Conrad.

On March 18, 1975, Conrad and the defendant returned and stated they had been discussing the matter and had decided to do what had originally been agreed upon in prior years; that is, that the defendant was to buy the farm for the original purchase price. The attorney then drafted a deed without reservation of a life estate. Conrad told the attorney that the defendant had helped him buy the farm and that he (Conrad) had told the defendant that when Conrad was done with it defendant could have it for what had been the original purchase price. Conrad, at the same time, told the attorney that the others would cause trouble for the defendant and asked him to draft a will which would cut off any of the children who contested the conveyance. This was done. Conrad executed the deed and will in the presence of the attorney after having both of the instruments read to him. The attorney expressed the opinion that Conrad was completely competent on March 17 and 18, 1975. The attorney had been hired by the defendant and was later hired by the defendant to represent him and Conrad in the conservatorship matter.

Another lawyer, in the same firm, testified that on March 18, 1975, he had visited with Conrad for 15 or 20 minutes. Conrad told him he wanted defendant to have the farm. This witness felt Conrad had testamentary capacity and was mentally competent on that date.

H. B. Kennison, a medical doctor, testified by deposition that he had been Conrad's treating physician during Conrad's hospitalization in Denver, Colorado, on six occasions between January 1971 and May 1975. The last time the witness had contact with Conrad was during his hospitalization of April 25 through May 4, 1975. The witness testified that Conrad, during the years 1971-75, was a very sick old

man, suffering from diabetes, shortness of breath, heart problems, and obesity. He was virtually an invalid in December 1974 and had a blood-sugar level of 440 on admission to the hospital at that time. Normal blood-sugar level was stated to be 70 to 110.

Dr. Kennison stated that if the mental sharpness of Conrad changed from time to time, this could be explained by the fact that the diabetes was out of control and that a high blood-sugar level can affect a person's mental sharpness. Hospital records reflected that in April 1975, Conrad was generally considered to be well-oriented "in all three spheres," in that he seemed to know who he was, where he was, and when it was. The records did reflect at least one occasion of mental aberration when Conrad complained that he didn't know who the nurses were, where he was, or how he got there. The doctor felt, however, that on the occasions that he observed Conrad, Conrad was competent and able to know what was going on in regard to his business affairs.

Regarding this last period of hospitalization in Denver, Conrad testified in one of his depositions that while he was in the hospital, defendant was in his room wanting him to sign things, that he did not recognize defendant, and he had to ask the nurse who defendant was.

Dr. Clark D. Wieland, a psychiatrist, testified that he had examined Conrad in July 1977. He had the opinion that, at that time, Conrad's testamentary capacity was intact but that he would not be capable of intricate management of his business affairs. He found Conrad to be hazy in orientation in terms of time; that his recent memory was impaired; that he was more prone to mood swings than most people would be; and that his comprehension was "down."

Dr. Wieland felt that Conrad had moderate organic brain syndrome at the time of the examination which, together with Conrad's age, diabetes, and

other medical problems, would tend to make him emotionally unstable and to impair his judgment. He further felt that a high blood-sugar level could cause Conrad's judgment, emotional stability, and general mental alertness to vary from one period to another, that he could have what the doctor termed "rainy, cloudy, or clear" days. He felt that the difference between a "cloudy" or "clear" mental condition would not be apparent to most people. The doctor stated that Conrad's condition would have been a lot worse in July 1977 than it was in March 1975.

Dr. Wieland stated in a deposition that Conrad advised him that he, Conrad, had willed one-third of his property to the defendant because the defendant had helped him a great deal in acquiring his estate and Conrad felt he owed a special obligation to that son. Conrad expressed no regret over deeding the property to defendant. Dr. Wieland stated that it was probable that Conrad had some mental impairment in 1975 but that it was probably worse in 1977.

The claim made in defendant's answer that the deed was executed pursuant to an oral contract entered into between him and his father in 1945, does not hold up under scrutiny. Defendant's testimony, given at various times, regarding the alleged oral contract, is vague, evasive, and contradictory. We conclude that there was no such contract and proceed to review the evidence as it relates to whether or not the gift was a result of undue influence on the part of the defendant.

An examination of the evidence reflects, in our opinion, that from the fall of 1974 until the conservatorship proceedings were commenced, there existed between the defendant and Conrad a confidential relationship and that, during that period, Conrad relied on the defendant for advice in his business affairs.

"[A confidential] relation exists between two per-

sons if one has gained the confidence of the other and purports to act or advise with the other's interest in mind." *Boettcher v. Goethe,* 165 Neb. 363, 378, 85 N.W.2d 884, 892 (1957).

"In a confidential or fiduciary relationship in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence is thereby created on the other, equity will scrutinize the transaction critically, especially where age, infirmity, and instability are involved, to see that no injustice has occurred." *Cunningham v. Quinlan,* 178 Neb. 687, 134 N.W.2d 822 (1965) (court's syllabus).

Here the evidence reflects that, due to age and physical infirmities, Conrad was, for all intents and purposes, an invalid at the time of the conveyance. It further supports a finding that Conrad's mental acuity was impaired at times and that he sometimes suffered from disorientation and lapse of memory. Considering all the evidence, we find that, in March 1975, Conrad was subject to the influence of the defendant, who was acting in a confidential relationship; that the opportunity to exercise undue influence existed; that there was a disposition on the part of the defendant to exercise such undue influence; and that the conveyance appears to be the effect of such influence. These findings establish a prima facie case of undue influence and cast upon the defendant the burden of going forward with the evidence.

> A prima facie case of undue influence is made out in case of a deed where it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. . . . In an action based on undue influence, when a confiden-

> tial relationship exists between the parties, and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence shifts to the defendants.

*Anderson v. Claussen*, 200 Neb. 74, 79, 262 N.W.2d 438, 441 (1978). See, also, *Guill v. Wolpert*, 191 Neb. 805, 218 N.W.2d 224 (1974).

The two attorneys who were present at the execution of the deed testified regarding the testamentary capacity of Conrad at the time in question. However, their exposure to Conrad was limited and the issue is not merely one of testamentary capacity and mental competence on a given day, but that of undue influence and the mental acuity of Conrad as it pertains to Conrad's susceptibility to that undue influence. Medical testimony was received to the effect that Conrad's lack of sharpness might well not be noticed by one who had only limited exposure to him.

Further, it is apparent that Conrad was not afforded the opportunity to seek independent advice from any source other than defendant. "One of the most important elements considered by the courts in determining whether a presumption of undue influence has been rebutted is whether the grantor has received independent advice . . . ." *Gaeth v. Newman*, 188 Neb. 756, 763, 199 N.W.2d 396, 402 (1972). See, also, *Rule v. Roth*, 199 Neb. 746, 261 N.W.2d 370 (1978).

We find that the defendant has not rebutted the presumption of undue influence which was raised by the plaintiff's prima facie case.

Further, inasmuch as there was irreconcilable conflict in some of the testimony, we consider that the trial court observed the witnesses and obviously accepted one version of the facts over the other. See *Von Seggern v. Von Seggern,* 196 Neb. 545, 244 N.W.2d 166 (1976). Even from the cold record, it is

obvious that the defendant was not a very credible witness. As defense counsel stated in his appellate brief, "He was not a good witness for himself."

The judgment of the trial court was correct and is affirmed.

AFFIRMED.

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JEANNIE L. ELSASSER, APPELLEE, V. ARLIE C. ELSASSER, APPELLANT.

291 N. W. 2d 260

Filed April 23, 1980. No. 42637.

1. **Child Custody: Appeal and Error.** An award of custody is subject to review de novo; however, the determination of the trial court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
2. **Child Custody.** Custody of minor children is determined on the basis of their best interests.

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

Alan L. Plessman, for appellant.

Jerry David Slominski, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and MARTIN, District Judge.

MARTIN, District Judge.

This case involves the award of custody of two minor boys in a proceeding for dissolution of marriage. In the original decree of January 13, 1978, legal custody of the two minor children was placed with the probation office of the Separate Juvenile Court of Lancaster County, Nebraska, with physical custody in the mother and with reasonable rights of visitation awarded the father under supervision of the probation office. Prior to the original divorce

trial, respondent father had had custody of the minor children.

Subsequently, the appellant and the attorney appointed to represent the children filed separate motions to modify the decree insofar as custody of the children was concerned and, after trial, both applications were overruled, as was the motion for a new trial.

Appellant contends that the lower court abused its discretion and that its decision was contrary to law.

This is a familiar story wherein each party, at great length, lists the character and personality defects of the other, as well as each party's behavioral lapses. Each produced witnesses supporting his or her contentions.

This is an appeal de novo, but as this court has said in *Fleharty v. Fleharty*, 202 Neb. 245, 274 N.W. 2d 871 (1979), and other cases, weight will be given to the fact that the trial court observed the witnesses and their manner of testifying and that the trial court accepted one version rather than the other.

An examination of the record indicates that the trial court carefully weighed the factors set down in *Christensen v. Christensen*, 191 Neb. 355, 215 N.W. 2d 111 (1974), and determined in this situation that the best interests of the children would indicate that their physical custody should remain with their mother.

There was no abuse of discretion here as the evidence supports the decision of the trial court.

AFFIRMED.

CLINTON, J., not voting.

MOFFATT J. KUNTZELMAN, ALSO KNOWN AS JAMES M. KUNTZELMAN, APPELLANT, V. AVCO FINANCIAL SERVICES OF NEBRASKA, INC., A NEBRASKA CORPORATION, APPELLEE.

291 N. W. 2d 705

Filed April 29, 1980. No. 42558.

**Installment Loans: Consumer Protection: Statutes.** An installment loan made by a licensee under the installment loan act, Neb. Rev. Stat. §§ 45-114 to 158 (Reissue 1978), and pursuant to the terms of that act, is an action or transaction otherwise permitted, prohibited, or regulated by a regulatory body acting under the statutory authority of this state and is, therefore, exempt from the provisions of the Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 to 1623 (Reissue 1978).

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Charles I. Scudder and Howard Kaiman, for appellant.

John J. Reefe, Jr., for appellee.

Paul L. Douglas, Attorney General, Robert F. Bartle, Dale A. Comer, Paul E. Hofmeister, and Jerold V. Fennell, for amicus curiae.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

This is a class action based upon an alleged violation of the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 to 1623 (Reissue 1978), by the appellee finance company. In response to Moffatt J. Kuntzelman's petition, Avco Financial Services of Nebraska, Inc. demurred on grounds: (1) That the cause of action was barred by the applicable statute of limitations; and (2) That Avco was exempted from the provisions of the Nebraska Consumer Protection Act (Act). Avco thereafter was permitted to file a supplemental demurrer on the ground that Kuntzelman's petition failed to state facts sufficient

to constitute a cause of action. At the hearing on the various demurrers, the parties herein stipulated that, at all times pertinent to the action, Avco was licensed under the provisions of the Nebraska installment loan act, Neb. Rev. Stat. §§ 45-114 to 158 (Reissue 1978). The District Court for Douglas County, Nebraska, sustained the demurrers on each and every ground and ordered that Kuntzelman's petition be dismissed. Kuntzelman thereafter appealed to this court. We affirm.

The petition alleges that Kuntzelman was a member of a class of persons who were debtors of Avco who were forced, coerced, and required to reaffirm a prior indebtedness earlier discharged through bankruptcy proceedings. It appears that Kuntzelman had borrowed money from Avco on May 3, 1973. He made payments on this loan until January 1974. On March 11, 1974, Kuntzelman filed a petition in bankruptcy which listed the Avco debt as one of his obligations to be discharged thereunder. Subsequent to the filing of the bankruptcy petition, Kuntzelman entered into a loan agreement with Avco, dated April 24, 1974, wherein he reaffirmed a portion of the debt listed in the bankruptcy proceedings. The petition alleged that Avco, as a condition precedent to making the loan to Kuntzelman, coerced him into reaffirming a portion of the prior debt to Avco which had been discharged by the intervening bankruptcy. A second loan agreement was entered into by Kuntzelman with Avco on October 17, 1975, wherein, as a condition of receiving the loan, he reaffirmed a further portion of the debt listed in the bankruptcy petition.

Finally, the petition alleged that the solicitation of the conditional loans by Avco was an unfair or deceptive practice in the commerce of loaning money and that such practice was a restraint of trade prohibited by the Act. As was earlier indicated, the District Court upheld Avco's demurrers to Kuntzel-

man's petition. Kuntzelman has appealed to this court, contending that the District Court erred: (1) In determining Avco to be within the groups exempted under § 59-1617 from the provisions of the Act; (2) In determining that Kuntzelman failed to allege facts sufficient to set forth a cause of action against Avco; (3) In determining that Kuntzelman's actions were barred by the applicable statute of limitations; and (4) In failing to determine when Kuntzelman made payments on the loan agreements entered into after March 11, 1974, the date of the filing of the bankruptcy petition.

We note, initially, that the 1979 Legislature statutorily declared that the practice in which Avco allegedly engaged violates the provisions of the installment loan act. Neb. Rev. Stat. § 45-187 (Supp. 1979) provides: "No licensee shall, directly or indirectly, require a borrower as a condition of granting a loan to such borrower to reaffirm or otherwise obligate himself or herself to pay a former debt to the licensee which has been discharged in bankruptcy proceedings." This opinion, therefore, will be of limited effect, and concern only those parties who entered into a loan agreement prior to August 24, 1979, the effective date of the aforementioned section, and whose actions are not barred by the applicable statute of limitations. We now turn our attention to the errors assigned by Kuntzelman to the lower court's proceedings.

Kuntzelman contends, first, that the District Court committed error in determining that Avco was exempt from the provisions of the Nebraska Consumer Protection Act, pursuant to § 59-1617 of the Act. Said section provides, in part: "Nothing in [the Act] shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the Director of Insurance, the Public Service Commission, the federal power commission *or any other regulatory body or officer act-*

*ing under statutory authority of this state or the United States . . . .*" (Emphasis supplied.) We have not yet had occasion to interpret either the entire Act or this specific section. The Attorney General has intervened in this case and has filed an Amicus Curiae Brief on this point only, wherein he contends that the aforementioned section should be interpreted narrowly and that Avco should not be exempt from the coverage of the Act.

Avco, however, contends that it is exempt from the provisions of the Act by virtue of the general phrase "or any other regulatory body or officer acting under statutory authority of this state or the United States," because it is regulated by the Department of Banking and Finance pursuant to the provisions of the installment loan act. Kuntzelman and the Attorney General assert that the construction urged by Avco would render nugatory the Act, as virtually every phase of a person's life is regulated by one or more state bodies. They further contend that the Legislature clearly did not intend to pass an act which would exempt all bodies from its coverage. We must, therefore, review the legislative history of the Act for determination of the legislative intent.

The Act was adopted by our Legislature in 1974 as L.B. 1028. A review of the legislative proceedings reveal that the Act, in actuality, incorporates a previous bill, L.B. 326, 83rd Leg., 2d Sess. (1974). A review of the legislative proceedings with reference to L.B. 326 reveals that the exemption provision in question was never discussed. However, certain other provisions of the Act were apparently patterned after a consumer protection act adopted by the State of Washington. See R.C.W.A. §§ 19.86.010 to 19.86.920 (Reissue 1978). In fact, our Act and the Washington Act are practically identical in scope and wording, particularly with reference to the exemption provision. Therefore, the decisions of the

Washington courts interpreting that state's exemption provisions are helpful and instructive herein.

The exemption provision of the Washington Consumer Protection Act, § 19.86.170, provides, in part:

> Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States . . . .

In *State v. Reader's Digest Ass'n,* 81 Wash. 2d 259, 501 P.2d 290 (1972), it was stated:

> The term "other regulatory body" must be construed in light of the preceding terms and the intent of the entire act. The *ejusdem generis* rule is that specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence. [Citations omitted.] The specific agencies or bodies mentioned in the statute all regulate areas where permission or registration is necessary to engage in an activity. Once the requisite permission is obtained, the activity is subject to monitoring and regulation.

*Id.* at 279, 501 P.2d 303.

This rule was expanded upon in *Dick v. Attorney General,* 83 Wash. 2d 684, 521 P.2d 702 (1974), wherein that court stated:

> We have stated that the Consumer Protection Act should be liberally construed to effect its purpose, in accordance with the direction contained in RCW 19.86.920. [Citations omitted.] If a particular practice found to be unfair or deceptive is not regulated, even

> though the business is regulated generally, it would appear to be the legislative intent that the provisions of the act should apply. The use of the word "actions or transactions" rather than "business or trade" makes it clear, we think, that this was the legislative intent.

*Id.* at 688, 521 P.2d 705.

We believe that this construction is also consistent with decisions rendered by the majority of courts which have examined the area. The courts have consistently refused to find that regulation, in and of itself, gives rise to immunity from the provisions of such acts. Conduct is not immunized merely because the person so acting falls within the jurisdiction of a regulatory body. In that regard, see, *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976); *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975); *Northeastern Tel. Co. v. American Tel. & Tel. Co.,* 477 F. Supp. 251 (D. Conn. 1978); *Interconnect Planning v. American Tel. & Tel.,* 465 F. Supp. 811 (S.D.N.Y. 1978); *Cain v. Air Cargo, Inc.*, 599 F.2d 316 (9th Cir. 1979); *Mt. Hood Stages, Inc. v. Greyhound Corp.,* 555 F.2d 687 (9th Cir. 1977). In this connection, see, also, Annot., 89 A.L.R.3d 399 (1979).

In this case, however, we believe that the actions involved are regulated by "a body or officer acting under statutory authority of this state or the United States." This case involved a loan made by a licensed installment loan company. Such companies are strictly regulated by the Department of Banking and Finance under the terms of the installment loan act. Not only does the Department of Banking and Finance have the power and duty to inspect the business, records, and accounts of persons or entities lending money under the provision of the installment loan act, but the department also has the power to order any person or entity subject to the provisions of that act to desist from any practice which the de-

partment finds does not conform to the requirements set forth therein. See §§ 45-130 to 132. Moreover, § 45-133 restricts advertising with reference to the rates, terms or conditions, for the lending of money, credit, or goods by persons subject to the provisions of the act, and empowers the department to order any such person to cease and desist from any conduct found to be in violation of such restrictions. It appears to us that the very action complained of by Kuntzelman in this matter was subject to regulation by the Department of Banking and Finance.

The District Court was, therefore, correct in sustaining Avco's demurrer on the grounds that the action complained of was exempt from the provisions of the Act, pursuant to § 59-1617. In view of our decision, we need not examine the other errors assigned by Kuntzelman in this appeal. We emphasize that we do not here hold that every entity within the jurisdiction of a regulatory agency is exempt from the Act. We only hold, as we must from a reading of the statute, that Avco is exempt from the Act by virtue of the regulation by the Department of Banking and Finance of the specific transaction involved herein. The decision reached by the District Court was correct and we affirm the action of the District Court in sustaining the demurrer to Kuntzelman's petition.

AFFIRMED.

CLINTON, J., not voting.

WHITE, J., dissenting.

I agree with the majority that Neb. Rev. Stat. § 59-1617 (Reissue 1978) does not exempt an "action or transaction" from the Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 to 1623 (Reissue 1978), merely because the business or trade involved is regulated generally by the State of Nebraska through one of its agencies. In my view, however, the actions involved herein were not specifically regulated

by the terms of the installment loan act, Neb. Rev. Stat. §§ 45-114 to 158 (Reissue 1978), prior to the passage of Neb. Rev. Stat. § 45-187 (Supp. 1979).

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GRETCHEN GOSNEY, APPELLANT, V. DEPARTMENT OF PUBLIC WELFARE, STATE OF NEBRASKA, APPELLEE.

291 N. W. 2d 708

Filed April 29, 1980. No. 42576.

1. **Administrative Hearings: Appeal and Error.** The review of appeals from orders of the Department of Public Welfare by this court under Neb. Rev. Stat. § 84-917 (6) (Reissue 1976) is governed by the criteria of that statute, as is review by the District Court. The ultimate question is whether or not such orders were in violation of constitutional provisions; whether they were supported by competent, material, and substantial evidence; and whether they were arbitrary or capricious.
2. **Public Welfare: Medical Assistance.** In order to qualify for medical assistance under Neb. Rev. Stat. § 68-1020 (Reissue 1976), a person must be a bona fide resident of the State of Nebraska.
3. **Public Welfare: Medical Assistance: Legal Residence.** A requirement of a state statute that an applicant for medical assistance must be a bona fide resident of that state to receive such assistance and a finding that one is not a bona fide resident but has come into the state for the sole purpose of receiving such benefits, does not create any irrebuttable presumption or permanent classification that would prevent appropriate proof of legitimate residency.
4. **Legal Residence: Domicile: Words and Phrases.** The terms "residence" and "domicile," as used in statutes, are generally convertible terms.
5. **Domicile.** Domicile is that place where a person has his true, fixed, and permanent home.
6. _____. In order to effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. The mere residing at a different place, although evidence of a change, is, however long continued, per se insufficient.
7. _____. In order to acquire a domicile by choice there must be a concurrence of: (1) Residence (bodily presence) in the new locality, and (2) An intention there to remain. Act and intent must, therefore, concur, and the absence of either of these thwarts the change.

8. **Legal Residence: Domicile: Minors.** The residence of a minor is, by operation of law, determined and fixed by that of the parent legally entitled to custody and control.
9. **Legal Residence: Domicile: Burden of Proof.** The burden of proof is on the party who asserts that a change of domicile has taken place.
10. **Legal Residence: Domicile.** The mere transfer of a person to an institution for treatment of mental illness or deficiency does not, in and of itself, alter the legal domicile.
11. **Legal Residence: Domicile: Disabled Persons.** Persons under legal disability generally are incapable of losing or gaining a residence or domicile by acts controlled by others.
12. _____: _____: _____. A mentally ill or deficient minor, who is incapable of acquiring a domicile of choice and who continues to live with his parents upon attaining the age of majority, retains the domicile of such parents.
13. _____: _____: _____. A court having jurisdiction over an incompetent, and particularly a court which has appointed a guardian for him, may, whenever it appears to be in the incompetent's best interest, direct or authorize the guardian or those having control of the incompetent's person to change the incompetent's domicile for him.

Appeal from the District Court for Kearney County: FRED R. IRONS, Judge. Affirmed.

William A. Tringe, Jr. and Riedmann & Kruger, for appellant.

Paul L. Douglas, Attorney General, Royce N. Harper, and Gary L. Baker, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

This is an appeal from an order of the District Court for Kearney County, Nebraska, which affirmed a decision of the State Department of Public Welfare (DPW) denying medical assistance to the plaintiff, Gretchen Gosney (Gretchen). This appeal involves the basic question of how to establish the residency of an incompetent adult.

On September 20, 1976, an application for medical assistance was filed on behalf of Gretchen with the

Kearney County Division of Public Welfare (Division). The application was denied on January 1, 1977, because it was determined that Gretchen was not a bona fide resident of Nebraska. This decision was appealed to the DPW under the provisions of Neb. Rev. Stat. §§ 68-1016 and 68-1024, (Reissue 1976), and a hearing was held on March 9, 1977. On March 25, 1977, DPW issued a finding and order, affirming the action of the Division. An appeal to the District Court, as provided by the provisions of Neb. Rev. Stat. § 84-917 (Reissue 1976), resulted in an order affirming the earlier order of the DPW. On appeal here, Gretchen assigns as error: (1) The finding by the District Court that the order of DPW was not in violation of constitutional provisions; (2) The finding by the District Court that the order of DPW was supported by competent, material, and substantial evidence in view of the entire record; and (3) The finding by the District Court that the order of the DPW was not arbitrary or capricious. We affirm.

The case was submitted to the District Court by stipulation of the parties on the record made before the DPW, and although we have been provided with no bill of exceptions, it is apparent that the record referred to is contained in the transcript and we will consider the case on that basis. At the outset, it must be said that because of the rather incomplete record made before the DPW, we are presented with a very sketchy factual background.

Gretchen is an adult female classified as having Down's Syndrome who has attained a mental age of between 4 and 5 years and possesses an I.Q. of 32 to 34. She was born March 7, 1957, and spent approximately 13 years in a special school in New York State. It is not clear whether her parents were also living in New York at that time, but in any event, they located in Denver, Colorado, in about 1966. Some time thereafter, Gretchen was removed from

New York State and brought to Denver where she resided with her parents. On June 23, 1975, she was brought to Bethphage Mission in Axtell, Kearney County, Nebraska, by her parents for in-patient care. Gretchen's parents paid the cost of maintaining her at Bethphage until some time shortly after she attained the age of majority under Nebraska law, which was on March 7, 1976. The parents continued to maintain their residence in Denver.

Neither of the parents testified at the hearing before the DPW. Gretchen also did not appear and, according to a representative of Bethphage Mission, her absence was due to the fact that "she wouldn't understand the importance of what is going on." The only other evidence presented established the residency of Gretchen's parents at Denver, Colorado, and disclosed that they had brought Gretchen to Bethphage Mission and that she remained a "guest" there at the time of trial. It is from this paucity of facts that we must conduct our review. Although Neb. Rev. Stat. § 84-918 (Reissue 1976) provides that any appeal from a judgment of the District Court under §§ 84-917 to 919 "shall be heard de novo on the record," we have interpreted that language to mean that we are limited to and "governed by the criteria of section 84-917 (6), R. R. S. 1943, as is the review by the District Court." *The 20's, Inc. v. Nebraska Liquor Control Commission,* 190 Neb. 761, 764, 212 N.W.2d 344, 346 (1973). Therefore, our review must be limited to whether or not the order of the DPW was in "violation of constitutional provisions," whether it was supported by "competent, material, and substantial evidence," and whether it was "[a]rbitrary or capricious." Neb. Rev. Stat. § 84-917 (6) (Reissue 1976).

In order to qualify for medical assistance under Nebraska law, a person "[m]ust be a bona fide resident of the State of Nebraska; . . . ." Neb. Rev. Stat § 68-1002 (Reissue 1976). See, also, § 68-1020 (Reissue

1976). The DPW found that Gretchen was "not a bona fide Nebraska resident because she came to the State of Nebraska for the sole and only purpose of receiving medical assistance; . . . ." Gretchen's constitutional attack, to which the greater portion of the argument portion of her brief is devoted, criticizes this finding as having created an irrebuttable presumption which excludes her from ever proving her eligibility for benefits. She contends that our decision in *Bauer v. Board of Regents of University of Nebraska,* 192 Neb. 87, 219 N.W.2d 236 (1974), prohibits such result. It is true that in that case we struck down that portion of a statute relating to resident and nonresident tuition which prohibited a person from ever establishing residence in Nebraska while attending any institution of learning within the state. We said, in *Bauer*: " '. . . (T)he Supreme Court clearly distinguished between statutory schemes that impose irrebutable [sic] presumptions of non-residence and those . . . that use residency requirements as one element in determining bona fide residence.' " *Id.* at 88, 219 N.W.2d 237 (quoting *Sturgis v. State of Washington* (D. Wash. Unrep. 1973), aff'd 414 U.S. 1057 (1973).) Also cited to us are the cases of *Carrington v. Rash,* 380 U.S. 89 (1965); *Shapiro v. Thompson,* 394 U.S. 618 (1969); and *Vlandis v. Kline,* 412 U.S. 441 (1973).

*Carrington v. Rash, supra,* involved a provision of the Texas Constitution which prohibited any member of the armed forces who moved his home to Texas from ever voting in any election in that state so long as such person remained a member of the armed forces. This was found to violate the equal protection clause, U.S. Const. amend. XIV. In *Shapiro v. Thompson, supra,* the court declared unconstitutional certain state and District of Columbia statutory provisions which denied welfare assistance to residents of the state or the District of Columbia who had not resided within the jurisdictions for at

least 1 year immediately preceding their applications. The precise holding of that case was that, absent a compelling state or governmental interest, such statutory provisions violated the equal protection clause by imposing a classification upon welfare applicants which impinged upon their constitutional right to travel freely from state to state. A requirement of a state statute that an applicant for medical assistance must be a bona fide resident of that state in order to receive such assistance and a finding that one is not a bona fide resident but one who comes into the state for the sole purpose of receiving such benefits, does not create any irrebuttable presumption or permanent classification that would prevent appropriate proof of legitimate residency. There is no constitutional denial of equal protection demonstrated by the facts of this case.

Illustrative of that position is the third case cited by Gretchen, *Vlandis v. Kline, supra.* There, a Connecticut statute which declared that students from outside of the state who came into the state to attend school were permanently and irrebuttably classified as nonresidents for tuition purposes, was held to be unconstitutional. Of particular interest to the question at hand is the following language from that case:

> We hold only that a permanent irrebuttable presumption of nonresidence . . . is violative of the Due Process Clause . . . . The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, *but who have come there solely for educational purposes,* cannot take advantage of the in-state rates. Indeed . . . Connecticut, through an official opinion of its Attorney General, has adopted one such reasonable standard . . .:
>
> "In reviewing a claim of in-state status,

> the issue becomes essentially one of domicile. In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning. . . . Each individual case must be decided on its own particular facts. In reviewing a claim, relevant criteria include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc."

*Id.* at 453 (emphasis supplied).

In order to review Gretchen's second and third assignments of error, it is necessary to examine some general rules. "The terms 'residence' and 'domicile,' as used in statutes, are generally convertible terms . . . ." *Wood v. Roeder,* 45 Neb. 311, 315, 63 N.W. 853, 855 (1895). Domicile is that place where a person has his true, fixed, and permanent home. *Clymer v. LaVelle,* 194 Neb. 91, 230 N.W.2d 213 (1975). In order " 'to effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. The mere residing at a different place, although evidence of a change, is, however long continued, *per se* insufficient.' " *State v. School District,* 55 Neb. 317, 320, 75 N.W. 855, 856 (1898) (quoting *Wood v. Roeder*). In order to acquire a domicile by choice there must be a concurrence of: "(1) Residence (bodily presence) in the new locality, and (2) an intention there to remain. . . . Act and intent must, therefore, concur, and the absence of either of these thwarts the change." *State v. Jones,* 202 Neb. 488, 492, 275 N.W.2d 851, 853 (1979).

It is therefore apparent that it is critical in the first instance at least that there be an intention manifested on Gretchen's behalf that she intended to make Nebraska her legal residence. She argues

that the decisions of the DPW and the District Court were arbitrary and capricious because the record upon which those decisions were made "contains no evidence whatsoever that Gretchen Gosney was unable to form at least a minimal desire or intention to remain in one location rather than another." The evidence disclosed that the reason Gretchen did not attend the administrative hearing was because "she wouldn't understand the importance of what is going on." Additionally, it was undisputed that she had an I.Q. of 32 to 34 and a mental age of between 4 and 5 years. It was not unreasonable for the DPW and the District Court to conclude on the basis of that record that Gretchen was totally incapable of manifesting an intelligent intent as to the establishment of a residence.

Perhaps of even greater significance is the fact that neither Gretchen nor anyone on her behalf came forward with any evidence from which any intent could be inferred. She had come to Nebraska from Colorado where she had made her home with her parents and her residence remained in Colorado at least through the period of her minority. The residence of a minor is, by operation of law, determined and fixed by that of the parent legally entitled to custody and control. *Clymer v. LaVelle, supra.* Upon reaching her majority, the presumption would be that her residence remained in Colorado.

> A person, who becomes mentally incapable of acquiring a domicil of choice before he comes of age and who continues to live with his parent, does not become emancipated upon arriving at majority. If no legal guardian of his person is appointed and if he continues to live with the parent, he has the domicil of the parent. If he does not continue to live with the parent, his domicil remains in the place in which he was domiciled at the time of his separation from the parent.

Restatement (Second) of Conflict of Laws § 23 at 95 (1969). If, because of her continued dependence upon her parents, Gretchen was considered to have continued to live with her parents, her residence was Colorado. If it could be said that she did not continue to live with them, her residence remained where it was at the time of separation, also Colorado. In order to qualify for assistance to the disabled, one must be a bona fide resident of Nebraska. Neb. Rev. Stat. § 68-1002 (Reissue 1976). Gretchen's residence having been established in Colorado, the burden was upon her to prove a change to Nebraska. " 'The burden of proof is on the party who asserts that a change of domicil has taken place.' " *Stucky v. Stucky,* 186 Neb. 636, 185 N.W.2d 656 (1971) (quoting Restatement (Second) of Conflict of Laws § 19, Comment c (Proposed Draft).)

In *Commonwealth v. Kernochan,* 129 Va. 405, 106 S.E. 367 (1921), a Miss Marshall had moved to New York State with her parents when she was between 8 and 10 years of age. Before reaching her majority, her mind became impaired while visiting an aunt who lived in Virginia. She was admitted to a mental hospital where she continued to reside up until the date of trial. The court said, at 411, 106 S.E. 369:

> Miss Marshall's domicile was clearly in New York at the time of her commitment to the hospital. There is no room for controversy upon this point. It has remained in New York to this day, notwithstanding her continued presence in Virginia, unless it has been changed by some competent and authorized person or tribunal, and the burden of proving the change is on the party alleging it.

Finally, Gretchen insists that the findings and orders of the DPW and of the District Court are not supported by competent, material, and relevant evidence, particularly in view of the apparent weight which was placed on the fact that she was moved to

Nebraska for the purpose of enjoying care at the Bethphage Mission. She argues that the motivation of a party in changing her legal residence is immaterial so long as she has the requisite intent to establish a new residence. *State ex rel. Rittenhouse v. Newman,* 189 Neb. 657, 204 N.W.2d 372 (1973). We have already touched on the issue of the absence of her expressed intent. Additionally, the mere transfer of a person to an institution on account of mental illness does not in and of itself alter the legal domicile. *Matter of First Trust Co. v. Goodrich,* 3 N.Y.2d 410, 144 N.E.2d 396, 165 N.Y.S.2d 510 (1957). Persons under legal disability generally are incapable of losing or gaining a residence or domicile by acts controlled by others. *County of Kearney v. County of Buffalo,* 167 Neb. 117, 91 N.W.2d 304 (1958). One exception to this rule is, of course, the situation earlier referred to where such person continues to reside with the parents. Additionally,

> [I]t appears that a court having jurisdiction over an incompetent, and particularly a court which has appointed a guardian for him, may, whenever it appears to be in the incompetent's best interest, direct or authorize the guardian or those having control of the incompetent's person to change the incompetent's domicil for him.

25 Am. Jur. 2d. *Domicile,* § 82 (1966). See, also, Annot. 96 A.L.R.2d 1236 (1964). Nevertheless, there is no evidence in this record that Gretchen had the requisite intent to change her domicile. There is nothing to indicate that her parents moved their residence to Nebraska so as to effect a change of domicile for her nor does the record reveal that any court authorized such change. As previously stated, bodily presence and intent, or authorized action, must concur for there to be a change in domicile and the absence of the same here thwarts any change. The order of the DPW was supported by competent,

material, and relevant evidence, as found by the District Court, and its judgment is affirmed.

AFFIRMED.

CLINTON, J., not voting.

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CYNTHIA S. HANSEN, APPELLANT, V. U.S.A.A. CASUALTY INSURANCE COMPANY, APPELLEE.

291 N. W. 2d 715

Filed April 29, 1980. No. 42583.

1. **Insurance Contracts: Public Policy.** Any contract of insurance which is contrary to any settled rule of public policy is invalid and unenforceable.
2. **Insurance Contracts: Cancellation of Insurance: Notice.** Where an insurer has information that there are multiple owners of an insured motor vehicle, though only one may be shown as the named insured, the company may not cancel the policy either at the request of the named insured or at the company's initiative, until notice is given to all persons known to have an ownership interest in the motor vehicle, at their last known address, affording such owners a reasonable opportunity to obtain other insurance.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded with directions.

John Thomas, for appellant.

James W. Knowles of Knowles & Edmunds and Edward A. Mullery, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY and WHITE, JJ., and RONIN and GARDEN, District Judges.

KRIVOSHA, C. J.

This appeal presents to the court a question of first impression: Whether an insurer, before canceling the insurance covering a motor vehicle owned by several individuals, must give notice of such cancellation to all the owners even though not all the owners are shown on the face of the policy as the named insured. The trial court concluded that the insurer

was only required to give notice of cancellation to any owner listed as a named insured and sustained the appellee's motion for summary judgment. For reasons more particularly set out in this opinion, we believe that the rule should be otherwise and, accordingly, we reverse and remand with directions the decision of the District Court for Douglas County, Nebraska.

The record discloses that the appellant, Cynthia Hansen (Hansen), and one Robert L. Roos (Roos) were married on August 14, 1976. At the time of their marriage, Hansen was the owner of a 1974 Toyota Corona (vehicle). Title to the vehicle was placed in the name of "Robert L. Roos and/or Cynthia S. Roos (Hansen) WROS."

At the time of the parties' marriage, Roos was an officer in the U. S. Army and, as such, was eligible to insure his vehicles with United States Automobile Association (U.S.A.A.), a reciprocal insurance exchange located in Texas. Insurance with U.S.A.A. could be obtained only by officers of the armed forces and only such officers could be shown as the named insured. The policy did provide, however, that the coverage would extend to the spouse of a named insured if a member of the named insured's household. Roos had already insured with U.S.A.A. a 1975 Toyota Land Cruiser owned by the parties and, on August 25, 1976, he submitted an application to U.S.A.A. for the purpose of having the 1974 Toyota Corona added to the policy. The application required the applicants to advise U.S.A.A. of the "[n]ame in which the vehicle is legally registered." In response to that question, the parties advised U.S.A.A. that title to the vehicle was in the names of "Robert L. Roos and Cynthia S. Roos." Likewise, the application advised U.S.A.A. that Hansen was to be the principal operator of the vehicle and that she was Roos' wife. Thereafter, the policy of insurance was reissued covering both the 1975 Toyota Land

Cruiser and the 1974 Toyota Corona. Because, however, only military officers could purchase a policy from U.S.A.A., only Roos' name was shown on the policy as the named insured. Hansen's name appeared on the policy simply as an operator and not as a named insured.

Some time early in December 1977, the parties separated and on December 15, 1977, Hansen filed suit to dissolve the marriage. On or about February 6, 1978, Hansen received a telephone call from Roos in which Roos advised her that he had removed the insurance on the 1974 Toyota Corona effective February 28, 1978. Hansen maintains that, when she was advised of this fact, she told Roos that if the company wanted to cancel the policy they would give her notice and took no further steps to obtain any other coverage. The evidence further discloses that, on or about February 6, 1978, Roos telephoned U.S.A.A. and asked them to delete the 1974 Toyota Corona from the policy, leaving insurance coverage under the policy only on the 1975 Toyota Land Cruiser. Roos advised the company that he and his wife had separated and requested that it notify her of the fact that the automobile she owned and operated would be removed from the policy effective February 28, 1978.

The record reflects further that, on or about March 2, 1978, Roos again called U.S.A.A. to inquire whether notice had been sent to his wife. U.S.A.A. replied that there was no record of any notice being sent but that it would advise Hansen that the policy had been canceled as to her vehicle and that she should obtain other insurance. The records of U.S.A.A. specifically show the following notation as of, apparently, March 9, 1978: "Call . . . I'll send notification to Cynthia that car has been ex, . . . ." The record further reflects that the company was aware that the parties had separated and were in the process of obtaining a divorce. On March 11,

1978, Hansen was involved in a two-car accident and immediately notified U.S.A.A. of the fact, believing that she still had coverage for her vehicle with U.S.A.A.

On March 14, 1978, U.S.A.A. wrote Hansen a letter stating: "We regret to tell you that we are unable to continue USAA insurance for you. The coverage for the 1974 Toyota has been canceled effective February 28, 1978. You should obtain insurance in your own name immediately for proper coverage."

Hansen was subsequently sued by the owner of the other vehicle involved in the March 11 accident. U.S.A.A. refused to defend the suit or to pay plaintiff's claim on the collision, as the result of which the instant action was commenced by Hansen to have the court declare her rights under the policy and to provide other equitable relief.

U.S.A.A. moved for summary judgment. The trial court granted the motion on the basis that, Hansen not being a named insured, U.S.A.A. was under no obligation to notify her of the cancellation of the policy as to the vehicle and no coverage existed on the date of the accident.

Hansen argues to the court that she was entitled to notification as a matter of law by reason of the fact that she was a joint owner of the property and a joint insured. She relies upon our decision in *Kent v. Dairyland Mut. Ins. Co.*, 177 Neb. 709, 131 N.W.2d 146 (1964). It is true that, in *Kent,* we said, where property is jointly owned and *so insured,* one owner cannot cancel the policy of insurance without the consent of the coinsured. The *Kent* decision, however, is limited to those instances in which the property is not only jointly owned but jointly insured. The instant property, while jointly owned, was not jointly insured, as claimed by Hansen, and the *Kent* decision is of little help in deciding this matter.

U.S.A.A., on the other hand, maintains it had no alternative but to accept directions from the sole

named insured. The company points to both the language of the policy itself and to Neb. Rev. Stat. § 44-379 (Reissue 1978). See, also, Neb. Rev. Stat. § 44-379.01 (Reissue 1978).

U.S.A.A. misses the true issue. The issue in this case is not whether the named insured had the right to cancel the policy or any part thereof, but whether a co-owner of the property, not a named insured, is at least entitled to notice of such cancellation before it becomes effective. To be sure, the company should not be placed in the position where a named insured may order the cancellation of a policy while another party countermands the request. To that extent, the law is clear that the named insured was entitled to cancel the insurance on his own behalf. See, 17 Couch on Insurance 2d, § 67:100 (1967); *Johnson v. St. Paul Fire & Marine Ins. Co.*, 104 Neb. 831, 178 N.W. 926 (1920). The question here, however, is whether Hansen was entitled to be notified of the cancellation prior to the time it became effective so that she might obtain other insurance in advance of cancellation.

The considerations involved in this case affect more than just the insured and the insurer and, in fact, involve the general public. The action of the insurer caused Hansen to become an uninsured motorist without opportunity to obtain other insurance before the provided coverage was withdrawn. We are, in reality, called upon to decide whether the public policy of this state should be such that an insurer may create uninsured motorists without their knowledge or whether the public policy should rather be that, having once obtained coverage, one may not become an uninsured motorist without, at least, being made aware of that fact. If we opt for the second choice, then we must determine that an insurer may not cancel a policy covering a mutually owned motor vehicle without first advising each of the known mutual owners at his or her last known

address. This would have to be true notwithstanding any provision in the policy to the contrary. Such a rule, however, would be appropriate. It has frequently been held that any contract of insurance which is contrary to any settled rule of public policy is invalid and unenforceable. *Ritter v. Mutual Life Insurance Co.,* 169 U.S. 139 (1898); 43 Am. Jur. 2d, Insurance, § 241 (1969).

Is there sufficient compelling public policy to require such a rule as suggested herein? In *Farm Bureau Ins. Co. v. Adams,* 145 Ind. App. 516, 519, 251 N.E.2d 696, 698 (1969), the Indiana court made this interesting observation:

> Notice of motor vehicle liability insurance cancellation touches an area of public interest far beyond the scope of the relationship of the parties before us. The dangers of driving uninsured vehicles are obvious. Not only may one be subjected to the risk of a large financial liability at the hands of a negligently injured person, but the opportunity for that other injured party to gain a reasonable amount of damages for his injury is considerably lessened. It is for the benefit of every driver and passenger on our roads today, as well as ourselves, that we carry liability insurance.

We share this view. An examination of certain Nebraska statutes likewise makes it clear that our Legislature also shares it.

Nebraska has adopted what is referred to as the Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. § 60-501 (Supp. 1979) and 60-502 to 569 (Reissue 1978). Under the provisions of Part (c) of that act, entitled "Security Following Accident" and comprising §§ 60-507 to 515, anyone having an automobile accident involving bodily injury or death, or property damage in excess of $250 must, within 90 days following such event, file with the Department of

Motor Vehicles evidence of financial responsibility. Upon a driver's failure to do so, the Department of Motor Vehicles revokes the individual's license to operate a motor vehicle and the ability to register a motor vehicle. To permit an insurer to cancel without notice a policy covering a mutual owner, not a named insured, is not only to subject the individual to subsequent potential liability for damages which the individual may not be able to meet, but also to subject the individual to the loss of driving privileges and ownership of a vehicle. All of this will be avoided if we declare that an insurer is required to notify all known owners of property that they and their property are about to become uninsured.

Under the same Motor Vehicle Safety Responsibility Act, one who has lost one's license by reason of failure to have insurance may not have that license reinstated without filing proof of financial responsibility, such as a certificate by an insurance carrier. § 60-529. Section 60-544 provides that, once a carrier has certified a motor vehicle liability policy for purposes of permitting an operator to have a license reinstated, such certificate may not be canceled or terminated until at least 10 days after notice of cancellation or termination of the insurance is filed *in the office of the Department of Motor Vehicles.* It makes little sense to us to hold that, once an individual who has lost a license for failure to be insured obtains proof of financial responsibility, the company may not cancel the certificate unless notice is given, even though the operator may not be the named insured, but may cancel the policy without notice in the first instance, thereby possibly causing a loss of license that will bring into play the provisions of §§ 60-526 to 529.

Two other jurisdictions which have had occasion to view this matter have reached similar conclusions. In the case of *Safeco Insurance Co. v. Green,* 260 Md. 411, 272 A.2d 383 (1971), the facts disclosed

that, prior to March 6, 1967, one Donald G. Orem (Orem) procured an automobile insurance policy from Safeco. The policy was issued in his name only. On March 6, 1967, Orem had added to the policy a Cadillac titled in the name of his wife. No mention of ownership was made in the policy. On Saturday, April 15, 1967, Orem became angry with his wife. He telephoned his insurance agent and directed that the Cadillac be removed from the policy. The accident which gave rise to the litigation occurred the following day, when Mrs. Orem was operating the Cadillac. In holding the cancellation ineffective, the Maryland court said:

> Safeco and its agent had knowledge of the existence of the wife since her occupation was listed as "Housewife". Smith [the agent] had that knowledge at the time of the elimination of the coverage of the vehicle since the reason given for elimination pertained to the wife. The elimination of that coverage without notice to her placed her in a precarious position. If she failed to obtain other insurance she became liable for the increased payment for the benefit of the Unsatisfied Claim and Judgment Fund. Under the rules of the Unsatisfied Claim and Judgment Fund Board if she failed "to show evidence of continuous insurance, or to prove [s]he ha[d] surrendered [her] license plates prior to insurance termination, or to pay the statutory fee", her motor vehicle registration became subject to suspension by the Department of Motor Vehicles. Without notice, she would have had no reason to procure other insurance. . . .
>
> In the light of the established public policy of this State relative to insurance of motor vehicles, we hold that Safeco was without authority under the circumstances of this

> case to eliminate or delete the vehicle known to be operated by Mrs. Orem without first giving notice to her of that deletion and a reasonable time thereafter to obtain insurance protection elsewhere. She was a known beneficiary of this liability policy.

*Safeco, supra* at 416, 272 A.2d 386.

A similar result was reached in the case of *Government Employees Ins. Co. v. Employers Commercial Union Ins. Co.*, 88 Misc. 2d 132, 387 N.Y.S.2d 52 (1976) (*GEICO I*), *aff'd sub nom. Govt. Ins. v. Employers Ins.*, 62 A.D.2d 123, 404 N.Y.S.2d 652 (1978) (*GEICO II*). In the *GEICO* case, a father held a GEICO policy in his name alone on both his own car and his son's. At some point, he declined to renew the coverage on his son's car, but the son was never notified of the nonrenewal and, a few months later, he had an accident while driving his own car. The company maintained that, because the father was the named insured, he alone had the right to cancel the policy and no other notice was required. In rejecting that position, the New York court said:

> Since the son, the car owner, had his insurance dropped without his apparent consent, it left the odd and unpalatable situation of an uninsured owner-driver on the road possibly thinking he was still insured. Worse it left accident victims subject to injury at his hands without the insurance protection our laws mandate.

*GEICO I, supra,* at 132, 387 N.Y.S.2d 53.

We find the reasoning of these decisions persuasive. Once a company has knowledge that there are multiple owners of property covered by the policy, though all are not shown as the named insured, in addition to any other statutory or policy requirement regarding notice, all known owners are entitled to notice of the fact that the policy is about to be canceled and should be given reasonable time to obtain

other insurance. To hold less would be to ignore the realities of life. Few owners of motor vehicles concern themselves with whether they are shown upon the policy as a "named insured" as long as they believe they have coverage. To permit one owner to expose another owner to potential liability without notice is not consistent with what the Legislature attempted to do in enacting the Motor Vehicle Financial Responsibility Act. To require notice to all known owners of the motor vehicle does not exact too high a price for the privilege of doing business in this state.

We, therefore, hold that where an insurer has information that there are multiple owners of an insured motor vehicle, though not all are shown as named insured, the company may not cancel the policy, either at the request of a named insured or at the company's initiative, until notice is given to all persons known to have an ownership interest in the motor vehicle, at their last known addresses, in enough time to afford them a reasonable opportunity to obtain other insurance. For that reason, the judgment of the District Court is reversed and the cause remanded with directions to find that the purported notice of cancellation was given to Hansen after the date of the accident and was ineffective, thereby entitling Hansen to all her rights under the policy.

REVERSED AND REMANDED WITH DIRECTIONS.

# PETE ASCHENBRENNER, JR., AND MARY ASCHENBRENNER, HUSBAND AND WIFE, ROBERT J. ASCHENBRENNER AND PETE ASCHENBRENNER III, OWNERS, AND FEDERAL LAND BANK OF OMAHA, APPELLEES, V. NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

291 N. W. 2d 720

Filed April 29, 1980. No. 42640.

1. **Constitutional Law: Statutes.** The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself.
2. _____: _____. If an act is complete and independent in itself, it may incidentally amend, modify, or have impact upon the provisions of existing statutes without controverting the provisions of Neb. Const. art III, § 14, relating to amendments.
3. _____: _____. This court will not strike down an act of the Legislature under the provision of the Neb. Const. art. III, § 14, if it can be said that the title calls attention to the subject matter of the bill.
4. _____: _____. In examining the validity of a legislative act, all reasonable doubts must be resolved in favor of its constitutionality.
5. _____: _____. The mere fact that an act of the Legislature adopts the provisions of prior acts by reference thereto does not render the new act amendatory of the acts to which reference is made if, in other respects, it is a complete act in itself.
6. _____: _____. The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded.

Barlow, Johnson, DeMars & Flodman and Raymond, Olsen & Coll, for appellant.

Wright & Simmons and John A. Selzer, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Nebraska Public Power District (NPPD) appeals from an order entered by the District Court for Scotts Bluff County, Nebraska, dismissing its appeal of an appraisers' award in a condemnation proceeding. The appellee property owners moved to dismiss the appeal on the ground that NPPD failed to file an appeal bond on its appeal to the District Court pursuant to Neb. Rev. Stat. § 76-716 (Reissue 1976). NPPD contended that it was excused from this requirement by virtue of Neb. Rev. Stat. § 70-680 (Reissue 1976), adopted in 1971 as L.B. 310. The District Court found that the aforementioned sections could not be reconciled with each other, that § 70-680 was amendatory legislation, and that said section was unconstitutional under Neb. Const. art. III, § 14. We reverse and remand.

The principal issue presented herein is whether § 70-680 is unconstitutional. Said section provides:

> No bond for costs, appeal, supersedeas, injunction or attachment shall be required of any public power district or public power and irrigation district organized or created pursuant to the provisions of Chapter 70, article 6, or of any officer, board, head of any department, agent or employee of such public power district or public power and irrigation district in any proceeding or court action in which the public power district or public power and irrigation district or any officer, board, head of department, agent or employee is a party litigant in its or his official capacity.

The Legislature, in enacting this section, clearly intended to exempt public power districts from the requirement of posting appeal and supersedeas bonds. In the Hearings on L.B. 310 Before the Public Works Comm., 82d Leg., 1st Sess. (February 4, 1971), a proponent, Del E. Dirrim, stated:

> As you are aware, the State of Nebraska and its various departments are exempt from filing bonds in their legal activities for appeals, supersedeas injunctions, etc. Four years ago the Legislature extended this exemption to municipalities, so at the present time municipal electric systems are not required to post bonds and pay the premiums therefor in their legal activities. Two years ago, the last session of the Legislature, the Legislature extended this exemption to the Metropolitan Utilities District . . . or metropolitan utilities districts — I believe there is only one. The language of this bill is the verbatim language of last year's bill which extended this exemption to the metropolitan utilities districts, with the exception of the fact that it makes reference to districts formed under Chapter 70, Article 6, or public power districts, rather than metropolitan utilities districts.

The District Court found that § 70-680 violated the provisions of Neb. Const. art. III, § 14, which section provides, in part, as follows: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

This court has had occasion to consider the applicability of this provision of our Constitution on numerous occasions. Guidelines in this area were set out in *State ex rel. Douglas v. Gradwohl,* 194 Neb. 745, 235 N.W.2d 854, (1975), wherein we stated:

> In State v. Greenburg, 187 Neb. 149, 187 N. W. 2d 751, we said: "The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself. . . .

> The constitutional provision is applicable to an act which is not complete in itself, but relates to other existing statutes by changing them in part so that the changes and the existing provisions result in a connected piece of legislation covering the same subject matter." In Bodenstedt v. Rickers, 189 Neb. 407, 203 N. W. 2d 110, we held: "If an act is complete and independent in itself, it may incidentally amend, modify, or have impact upon the provisions of existing statutes without controverting the provisions of the Constitution relating to amendments set out in Article III, section 14."

*Id.* at 751, 235 N.W.2d 859.

Even more succinct was our statement in *Blackledge v. Richards,* 194 Neb. 188, 231 N.W.2d 319 (1975):

> The purpose of Article III, section 14, of the Nebraska Constitution, is to prevent surreptitious legislation. This court will not strike down an act of the Legislature under this provision of the Constitution if it can be said that the title calls attention to the subject matter of the bill.

*Id.* at 192, 231 N.W.2d 323.

In examining the validity of a legislative act, this court has often stated that all reasonable doubts must be resolved in favor of its constitutionality. *State ex rel. Douglas v. Nebraska Mortgage Finance Fund,* 204 Neb. 445, 283 N.W.2d 12 (1979); *Prendergast v. Nelson,* 199 Neb. 97, 256 N.W.2d 657 (1977); *Dwyer v. Omaha-Douglas Public Building Commission,* 188 Neb. 30, 195 N.W.2d 236 (1972); *United Community Services v. The Omaha Nat. Bank,* 162 Neb. 786, 77 N.W.2d 576 (1956).

Of special interest in this connection is *Department of Banking v. Foe,* 136 Neb. 422, 286 N.W. 264 (1939). That case involved the validity of a legislative act enacted for the purpose of permitting the

garnishment of salaries of public officers and employees. In holding the act to be constitutionally permissible under Neb. Const. art. III, § 14, this court stated:

> Defendant contends that chapter 58, Laws 1925, is amendatory, in that it amends, by addition and by reference to it in terms, the general garnishment laws. The title to said chapter 58 is as follows: "An act to provide for garnishment of officers and employees of the state of Nebraska or any county, township, municipal corporation, municipally owned corporation, or school district." Section 1 of the act in part provides: "That all provisions, requirements, conditions and exemptions, of the garnishment laws of the state of Nebraska, shall apply to all state, county, municipal, municipally owned corporation, township and school district officers and employees, to the same extent and effect as such laws apply under the existing statutes of the state of Nebraska to officers and employees of private corporations."
>
> This court held in *State v. Ure,* 91 Neb. 31, 135 N.W. 224: "The mere fact than an act of the legislature adopts the provisions of prior acts by reference thereto does not render the new act amendatory of the acts to which reference is made if in other respects it is a complete act in itself." The above holding was quoted in the case of *Sheridan County v. Hand,* 114 Neb. 813, 210 N.W. 273.
>
> The act in question, as shown by the title, discloses conclusively that it purports to be an independent, separate and new act, covering the entire subject to which it relates, and, as it is not amendatory, it does not run counter to section 14, art. III of the Constitution, providing: "No law shall be amended

> unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed." See, also, *State v. Moorhead,* 100 Neb. 298, 159 N.W. 412, and *Richardson v. Kildow,* 116 Neb. 648, 218 N.W. 429. In the latter case it was held: "Where a legislative act, though complete in itself, refers to another act for the procedure to be taken, the latter act, *pro tanto,* becomes a part of the former to the same extent as though actually incorporated therein."

*Id.* at 427, 286 N.W. 267.

With the foregoing authorities in mind, we conclude that § 70-680 is not violative of Neb. Const. art. III, § 14. It cannot be disputed that the title of § 70-680 calls attention to and makes clear the purpose and subject matter of the statute. We believe that the situation presented in this case is directly analogous to *Department of Banking v. Foe, supra,* and cannot be distinguished from that case. Moreover, the reasoning employed therein is convincing. Section 70-680 is complete in and of itself, covering the entire area relating to supersedeas and appeal bonding requirements for public power districts. The District Court was therefore incorrect in finding that the legislation herein was amendatory and violative of Neb. Const. art. III, § 14.

The practical difficulty of adopting a contrary rule was well stated in *De France v. Harmer,* 66 Neb. 14, 92 N.W. 159 (1902), where this court said:

> A very great number of our original enactments, indirectly and by implication, amend pre-existing statutes. Take for example the homestead law. It amends the decedents' act, the law on the subject of real estate, the married woman's act and the Code of Civil Procedure. It is quite probable that other acts have even a wider influence. To hold

> that a re-enactment and publication of every statute thus amended is required by the constitution would bring confusion and disaster. It would, as is said in *People v. Mahaney,* [13 Mich. 481], make it impossible to tell what the law is.

*Id.* at 17, 92 N.W. 160.

It is also contended that the statute violates Neb. Const. art. III, § 18 as it grants special privileges and immunities to public power districts. That section provides: "The Legislature shall not pass local or special laws in any of the following cases, that is to say:

. . .

"Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . ."

This court has often stated that the power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. *State ex rel. Douglas v. Nebraska Mortgage Finance Fund, supra; Dwyer v. Omaha-Douglas Public Building Commission, supra; City of Scottsbluff v. Tiemann,* 185 Neb. 256, 175 N.W.2d 74 (1970).

In *State ex rel. Meyer v. Knutson,* 178 Neb. 375, 379, 133 N.W.2d 577, 581 (1965), we stated:

> Statutes which are reasonably designed to protect the health, morals, and general welfare do not violate the Constitution where the statute operates uniformly on all within a class which is reasonable. This is so even if the statute grants special or exclusive privileges where the primary purpose of the grant is not the private benefit of the grantees but the promotion of the public interest.

Section 70-680 does not impermissibly grant to

public power districts privileges, immunities, or exclusive franchises because of classification. In fact, we believe the statute is in the public interest because it excuses public power districts from the necessity of posting appeal and supersedeas bonds. Such bonds are not necessary since there is little possibility of a public power district being unable to satisfy a judgment rendered against it. The exemption from bonding requirements obviates the necessity of payment of bond premiums and decreases the costs of operation, thus aiding these bodies in minimizing their charges to the consumers. We conclude that the section does indeed promote a public interest which makes the classification reasonable. We find that § 70-680 does not violate Neb. Const. art. III, § 18.

We hold that the District Court was in error in dismissing the action and reverse and remand this matter for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

CLINTON, J., not voting.

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PERFECTO YBARRA, APPELLANT, V. WALTER W. WASSENMILLER AND FIRST NATIONAL BANK & TRUST COMPANY, A CORPORATION, APPELLEE.

291 N. W. 2d 725

Filed April 29, 1980. No. 42697.

1. **Negligence: Juries.** In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence. If reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.
2. **Pedestrians: Motor Vehicles: Right-of-Way.** A pedestrian has

equal rights with the operator of a vehicle in the use of a private way used by members of the public and each must use reasonable care for his own safety and the safety of others.

3. **Pedestrians: Right-of-Way: Negligence.** A pedestrian has a legal right to walk longitudinally along a driveway, but in doing so is required to use reasonable care for his own safety.
4. **Negligence: Motor Vehicles.** The law does not forbid the backing of an automobile upon the streets or highways, and to do so does not constitute negligence, but the driver of an automobile must exercise ordinary care in backing his machine, so as not to injure others by the operation, and this duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured.
5. _____: _____. In backing a vehicle, the operator's duty to sound a horn is not an absolute one, but depends upon the circumstances at the time.
6. **Negligence.** One who is capable of understanding and discretion, and who fails to exercise ordinary care and prudence to avoid obvious dangers, is negligent or contributorily negligent.
7. **Negligence: Pedestrians: Motor Vehicles.** One who is in a place of safety and is aware of a moving vehicle in close proximity to him, and who moves from such place of safety into the path of the vehicle and is struck, is, by his own conduct, guilty of negligence more than slight sufficient to defeat his recovery.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Friedman Law Offices, Herbert J. Friedman, for appellant.

Con M. Keating and Gary J. Nedved of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Perfecto Ybarra, plaintiff, brought this action against Walter W. Wassenmiller, defendant, for damages alleged to have been suffered when plaintiff, while walking on the driveway of the First National Bank & Trust Company's drive-in banking facilities, was struck by a camper-trailer being backed up by the defendant. The jury was instructed on

both the alleged negligence of the defendant and contributory negligence of the plaintiff, and it returned a verdict in favor of the defendant. Plaintiff appeals, contending that the trial court erred: (1) In refusing to grant plaintiff's motion for a directed verdict against the defendant; and (2) In instructing the jury on contributory negligence of the plaintiff. We affirm.

On July 29, 1976, plaintiff was employed as a uniformed security and traffic guard at the First National Bank & Trust Company's drive-in banking facilities located at 13th and L Streets in Lincoln, Nebraska. The bank was joined in the lawsuit as a party defendant for workmen's compensation subrogation purposes and is not a party to this appeal. At approximately 4:45 p.m. on that date, the defendant, who was driving a 1975 Chevrolet pickup truck with a camper shell on it, drove into the banking facilities for the purpose of cashing a check. The northern portion of the west side parking and driving area was closed off to traffic because of construction operations. The defendant, finding no parking stalls, parked in an area not designated for parking near the northeast corner of the west side facilities. He was headed in a northerly direction and directly in front of him was the blocked-off construction area. Immediately to his right, or to the east, was a line of diagonally-parked automobiles. Directly south of this line of automobiles was the guard shack which constituted the plaintiff's headquarters while on duty. Straight west of the defendant's vehicle was a driveway leading to a drive-through teller station. Farther to the south and west of his vehicle was the bank building itself. The driveway on which defendant was parked extended to the south and provided access to the facility from L Street.

The defendant had just stopped his truck and was in the process of getting out to transact his business when the plaintiff walked up to him from the guard

shack and told him he would have to move his vehicle. The plaintiff then turned and started back for the guard shack, walking in a southerly direction directly behind the defendant's camper vehicle. At the same time, the defendant commenced backing and after moving perhaps 15 to 20 feet, he struck the plaintiff. The defendant said he looked in both of his outside rear view mirrors and through the back window and saw no one behind him. He insisted that he continued to look to his rear as he backed, but admitted that there is a blind spot where nothing can be seen looking back in any manner. He did not see the plaintiff behind him.

The plaintiff testified that after he told the defendant he would have to move he, the plaintiff, turned and walked to the south and toward the guard shack along the driveway behind the defendant's vehicle. He said that he may have glanced once at the truck, but after walking the whole length of it, he never did see it again. He also agreed that the only way the defendant could have moved his truck was to the rear, but he contended that after backing it a shorter distance than the defendant did, it could have been driven in a forward motion to the west and through the teller driveway. At the close of all the evidence, the plaintiff moved the court for an order "directing liability against the defendant for the reason that the defendant is negligent as a matter of law . . . ." This motion was overruled. Additionally, although the plaintiff made no specific objection on the record to the trial court's giving of an instruction on his alleged contributory negligence, he nevertheless raises that as one of his assignments of error.

In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence. If

reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury. *Pearson v. Richard*, 201 Neb. 621, 271 N.W.2d 326 (1978). A pedestrian has equal rights with the operator of a vehicle in the use of a private way used by members of the public and each must use reasonable care for his own safety and the safety of others. *Bassinger v. Agnew, ante* p. 1, 290 N.W.2d 793 (1980). A pedestrian has a legal right to walk longitudinally along a driveway, but in doing so is required to use reasonable care for his own safety. *Bassinger v. Agnew, supra.*

Plaintiff's argument that he was entitled to a directed verdict on the question of liability is based upon his claim that the defendant was guilty of negligence as a matter of law in failing to keep a proper lookout and in failing to sound a warning of his intention to back. Addressing first the claim as to lookout, three of the principal cases cited by the plaintiff are *Bonnes v. Olson*, 197 Neb. 309, 248 N.W.2d 756 (1976); *Johnson v. Enfield,* 192 Neb. 191, 219 N.W.2d 451 (1974); and *Taulborg v. Andresen,* 119 Neb. 273, 228 N.W. 528 (1930).

In *Bonnes v. Olson*, the defendant, who was required by law to stop at the intersection, admitted that she did not stop, although she insisted that she did slow down and look both ways, entered the intersection, and struck the plaintiff who was proceeding along the intersecting arterial street. From a jury verdict in favor of the plaintiff, the defendant appealed the trial court's failure to grant her a new trial. It is true that this court, in affirming the failure to grant a new trial, said that the defendant was guilty of negligence as a matter of law, either in failing to look or in failing to see a vehicle favored over her. However, obviously, that case presented a set of facts different from that which we have here.

*Johnson v. Enfield* involved an accident in which

the defendant's truck was parked parallel to a curb. The plaintiff's minor son, driving a motorcycle, pulled into a parking place some 10 feet ahead of the defendant in order to try to get his machine restarted. Immediately thereafter, the defendant started forward, looking to his left and to the rear, watching oncoming traffic, remained in the parking lane next to the curb, and struck the young man and his motorcycle. The jury returned a verdict in favor of the plaintiff on the cause of action for personal injuries to her son, but in favor of the defendant on the plaintiff's derivative action for medical expenses. The trial court granted a new trial as to both causes of action on the basis that they were inconsistent. This court affirmed and agreed that it was unquestioned that it is the duty of a driver of a motor vehicle to see that which is in plain sight, and went on to say: "There was clearly a *jury issue* on the defendant's duty to keep a proper lookout and reasonable control of his truck under the circumstances." (Emphasis supplied.) *Id.* at 195, 219 N.W.2d 454.

The third case, *Taulborg v. Andresen*, was a "backing" case in which the plaintiff, a passenger in an automobile being driven down the highway, claimed that the defendants backed onto the highway and into the car in which the plaintiff was riding. It is true that the defendants' version of the accident was that their truck was parked alongside the highway and was struck by the automobile in which the plaintiff was riding. Although our opinion does not specifically say so, it is apparent that the jury returned a verdict for the defendant. This court reversed the judgment of the trial court and remanded the case for a new trial because the trial judge had tendered to the jury a supplemental instruction on lookout without either party being notified or present in court and which contained an erroneous statement of law. However, there is language in the

closing portion of the opinion which is of interest in this case:

> If, as the plaintiff contends, the defendant was backing his truck onto said highway, he would necessarily be operating it against the line of approaching traffic from the west. The law does not forbid the backing of an automobile upon the streets or highways, and to do so does not constitute negligence, but the driver of an automobile must exercise ordinary care in backing his machine, so as not to injure others by the operation, and this duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured.

*Id.* at 279, 228 N.W. 531.

In the case at bar, defendant was directed by the plaintiff, a uniformed person in an obvious position of authority, to move his truck. Whether the defendant kept a proper lookout and whether he had a right to believe that the person who told him to move would stay out of the way of danger were questions to be decided by the jury. See, also, *Chew v. Coffin*, 144 Neb. 170, 12 N.W.2d 839 (1944), and *Thomas v. Fundum*, 135 Neb. 728, 283 N.W. 839 (1939), both "backing" cases involving pedestrians, wherein this court approved the action of the trial court in submitting the question of negligence to the jury.

In support of his contention that the defendant's failure to sound his horn constituted negligence as a matter of law, the plaintiff refers to *Christoffersen v. Weir*, 110 Neb. 390, 193 N.W. 922 (1923), and *Kauffman v. Fundaburg*, 123 Neb. 340, 242 N.W. 658 (1932). *Christoffersen v. Weir* involved an injury to a pedestrian whose case was submitted to a jury which returned a verdict in her favor. We simply suggested that the ordinance requiring the installation of warning devices on vehicles contemplated the use of the same when circumstances might warrant it. In syl-

labus No. 3 of *Kauffman v. Fundaburg*, we said:

> Evidence respecting negligence of truck driver in failing to keep proper lookout shortly before striking a boy crossing a street near an intersection and to give timely warning or keep the truck under proper control, considering that there were school children on both sides of the street, held sufficient for submission to the jury.

Holding that the duty to sound a horn is not an absolute one, but depends upon the circumstances at the time, are *Tews v. Bamrick and Carroll*, 148 Neb. 59, 26 N.W.2d 499 (1947), and *Rowedder v. Rose*, 188 Neb. 664, 199 N.W.2d 18 (1972). In the final analysis, there is no merit to plaintiff's first assignment of error.

The plaintiff insists that the question of his contributory negligence as to the failure to keep a proper lookout and in walking behind defendant's truck, when he should have known that it was in the process of backing, should not have been submitted to the jury. In this regard, it must be remembered that plaintiff was not an ordinary pedestrian when walking behind the defendant's vehicle. He was a person in authority who had ordered the defendant to move and should have reasonably believed that the defendant would follow his directions. He admitted he knew that, initially, at least, the only way the defendant could move would be in a backward direction which would place himself in the path of danger by walking behind the truck. We said in *Garcia v. Howard*, 200 Neb. 57, 61, 262 N.W.2d 190, 193 (1978): "One who is capable of understanding and discretion, and who fails to exercise ordinary care and prudence to avoid obvious dangers, is negligent or contributorily negligent."

In *Steel v. Nordin,* 175 Neb. 900, 124 N.W.2d 921 (1963), a case with facts quite similar to those found here, we held that one who is in a place of safety and

is aware of a moving vehicle in close proximity to him, and who moves from such place of safety into the path of the vehicle and is struck, is, by his own conduct, guilty of negligence more than slight sufficient to defeat his recovery. As we have stated earlier in this opinion, although a pedestrian may have a perfect right to be where he is, nevertheless, he is bound to exercise reasonable care for his own safety. The trial court was correct in submitting to the jury the issue of plaintiff's contributory negligence.

The judgment of the trial court is affirmed.

AFFIRMED.

CLINTON, J., not voting.

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BRIAR WEST, INC., A CORPORATION, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

291 N. W. 2d 730

Filed April 29, 1980. No. 42750.

1. **Municipal Corporations: Municipal Powers.** A municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects and purposes of a municipality.
2. _____: _____. Statutes granting powers to municipalities are to be strictly construed and where doubt exists, such doubt must be resolved against the grant.
3. **Municipal Corporations: Municipal Powers: Subdivisions:** Municipalities have no power to impose conditions on subdivisions which are not within the purview of their delegated authority or enabling legislation.
4. **Tax Assessments: Eminent Domain.** The only foundation for a local assessment lies in the special benefits conferred upon the property assessed and an assessment beyond the benefits so conferred is a taking of property for public use without compensation and, therefore, illegal.

Appeal from the District Court for Lancaster

County: SAMUEL VAN PELT, Judge. Reversed and remanded.

Chauncey E. Barney of Barney & Carter, P.C., for appellant.

William F. Austin, City Attorney, and William G. Blake, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is an action for a declaratory judgment in which the plaintiff, Briar West, Inc., prayed for a declaration that in addition to other requirements made by the City of Lincoln as conditions for the approval of a subdivision, a developer of land may not also be required to pay the equivalent of one-half of the local street paving costs for the future widening and paving of arterial streets which abut the proposed subdivision. The District Court for Lancaster County, Nebraska, found that the imposition of such costs was within the scope of the city's authority and had a rational and reasonable nexus with the needs created by and the benefits conferred upon the subdivision and dismissed plaintiff's petition.

Plaintiff is the owner and developer of a proposed subdivision to the city of Lincoln, Nebraska, known as Briarhurst West Fourth Addition. This subdivision is located south of the city in the area northeast of the intersection of South 27th Street, a north-south street, and Old Cheney Road, which runs east and west.

On November 4, 1976, the plaintiff filed a preliminary plat for the subdivision. The planning commission approved the preliminary plat, and on February 7, 1977, the Lincoln city council approved it, both subject to the plaintiff's compliance with certain conditions. Those conditions required the plaintiff to furnish park and recreational equipment;

furnish water and sanitary sewers; furnish right-of-way, paving, and ornamental lighting for all interior streets in the subdivision; install sidewalks; and guarantee construction of a storm sewer system. These conditions involving the area within the subdivision are not in dispute and are not involved here.

Additional conditions were imposed with respect to South 27th Street and Old Cheney Road: (1) The plaintiff was required to dedicate, without compensation, a 17-foot-wide strip of land along both streets in order to provide for future street widening; (2) Plaintiff was required to relinquish the right of direct vehicular access from all lots abutting the two streets and to provide and permanently maintain a landscape screen as a physical barrier to access; and (3) Plaintiff was required to agree to pay "the equivalent cost of local street paving installation" for the future installation of widened paving on both of the streets. The costs of street paving were to be paid either by immediate cash payment of an amount based on current estimates, or by furnishing a bond to guarantee payment of the actual cost of such improvement when the improvement was actually made and completed.

The plaintiff has accepted and agreed to comply with conditions (1) and (2) and no issue is raised with respect to them in this appeal. This proceeding seeks to have condition (3) declared illegal and void.

Old Cheney Road and South 27th Street are presently two-lane section-line roads with a right-of-way 66 feet in width. Although they have both been paved by the county, they do not meet municipal street standards. The 1961 comprehensive regional plan shows both Old Cheney Road and South 27th Street as future major streets with two to four moving lanes. The 1977 comprehensive regional plan designates both streets as arterial streets. South 27th Street is shown as a two-lane arterial street and Old Cheney Road is shown as a four-lane arterial

street, with the improvement to municipal standards projected to take place in the period from 1981 to 1985. When they are improved, both streets are required by the Lincoln municipal code to have a right-of-way width of 100 feet.

A portion of the final plat of Briarhurst West Fourth Addition involving approximately 570 feet along Old Cheney Road received final approval on May 31, 1977. The estimated equivalent cost of local street paving for that portion of the plat was $17,000. The estimated equivalent cost of local street paving for the remaining 1,900 feet of frontage along both Old Cheney Road and South 27th Street was $60,500. By stipulation, plaintiff's obligation to pay the total amount of $77,500 was to await the result of this proceeding.

The District Court found that the requirement that developers pay the equivalent cost of local street paving installations for major streets which abut proposed subdivisions is within the scope of the city's authority and "bears a rational nexus to the needs created by, and the benefits conferred upon, the subdivision," and dismissed plaintiff's petition.

Plaintiff argues that subdivision controls imposed by municipalities must be authorized by statute or municipal code and must be reasonable as concerns the particular subdivision involved. More specifically, the plaintiff contends that there is no express or implied statutory authority granted to the city that authorizes the city, as part of the subdivision approval process, to require developers, in a case such as this, to make a contribution to the construction of the city's major street network beyond that justified by the ordinary concept of special benefit.

The rule has long been established in this state that a municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects

and purposes of a municipality. Statutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant. *Nelson-Johnston & Doudna v. Metropolitan Utilities District*, 137 Neb. 871, 291 N.W. 558 (1940).

The above rules are generally held to be applicable to subdivision controls. See *Hylton Enterprises v. Board of Supervisors,* 220 Va. 435, 258 S.E.2d 577 (1979). Furthermore, municipalities and reviewing authorities have no power to impose conditions on subdivisions which are not within the purview of their delegated authority or enabling legislation. 82 Am. Jur. 2d, *Zoning and Planning*, § 166 (1976).

The city argues that Neb. Rev. Stat. § 15-901 (Reissue 1977) grants to primary class cities broad police power authority to regulate the subdivision of land and to require developers to provide public improvements for land subdivisions. The city further argues that that broad police power is sufficient to permit the city to require a developer to pay the equivalent cost of providing local street paving for one-half the abutting portion of a major street to which direct access from all abutting lots in the proposed subdivision is completely denied.

Contrary to that assertion, even the city's own municipal subdivision ordinance does not authorize the city's action in this case. The requirement that the plaintiff pay the equivalent cost of local street paving installation for the abutting major streets, even though the plaintiff has also been required to relinquish the right to direct vehicular access to those same abutting major streets, has been made by the city pursuant to Lincoln, Neb., Code § 26.11.110 (1978), which provides:

> In addition to all other requirements of this title, the subdivider shall pay the cost of the installation of paving and street lighting on all local streets within the subdivision and

> shall pay the equivalent cost of local street paving installations for major or collector street paving installations within or abutting the subdivision.

The municipal code defines a "local street" at § 26.07.210 as "any public street that is used or intended to be used for the principal purpose of serving as access to abutting property," and a "major street" at § 26.07.190 as "a street, freeway, expressway and arterial, as shown on the current major street plan or highway plan . . . ."

The foundation for the requirement that the subdivider pay the cost of the installation of paving on all local streets is the fact that the street will serve as access to the abutting property. Implicit in the requirement that the subdivider also pay the equivalent cost of local street paving installation for major or collector street paving installations is the assumption that the street will serve as access to the abutting property. In a case such as this, where the city has required that the subdivider relinquish the right of direct vehicular access from all abutting lots to the arterial street, the ordinance does not authorize the additional requirement that the subdivider also pay the equivalent cost of local street paving installation for the abutting major street.

The city's action in this case is not authorized under the provisions of § 15-901. Section 15-901 provides, in part:

> No owner of any real estate located . . . within any city of the primary class or within three miles of the corporate limits . . . shall be permitted to subdivide, plat or lay out said real estate in building lots and streets . . . without first having obtained the approval thereof by the city council of such city . . . . Such a city shall have authority within the area above described to regulate the subdivision of land for the purpose,

> whether immediate or future, of transfer of ownership or building development . . .; to prescribe standards for laying out subdivisions in harmony with the comprehensive plan; to require the installation of improvements by the owner or by the creation of public improvement districts, or by requiring a good and sufficient bond guaranteeing installation of such improvements; and to require the dedication of land for public purposes.

The city argues that § 15-901 authorizes it to indirectly assess property above and beyond the concept of special benefit that limits similar special assessments for public improvements. See Neb. Rev. Stat. §§ 15-701 through 759 (Reissue 1977) and related cases. Section 15-901 does grant broad police power to the cities of the primary class to assure proper meshing of subdivisions with the rest of the community. However, the section does not authorize the use of subdivision control as a device to evade constitutional limitations. Neb. Const. art. I, § 21, prohibits the taking of property for public use without just compensation. That prohibition is the basis of the restriction on special assessments. The only foundation for a local assessment lies in the special benefits conferred by the improvement upon the property assessed, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation and, therefore, illegal. *Loup River Public Power District v. County of Platte*, 144 Neb. 600, 14 N.W.2d 210 (1944). Not only is this limitation inherent in the grant of authority by § 15-901, it is also evident in the very language of the grant itself. The only portion of the section which would arguably allow the city's action in this case is that portion which grants the city authority "to require the installation of improvements by the owner or by the creation of public improvement dis-

tricts, or by requiring a good and sufficient bond guaranteeing installation of such improvements . . . ." If the city had chosen to create public improvement districts to install the streets, any assessments would necessarily be limited by the special benefits conferred upon the property assessed. Such a limitation also applies to the alternative of requiring installation of improvements by the owner.

The city has not attempted in any way to link the required payment to special benefits conferred upon the subdivision by the future improvement of Old Cheney Road and South 27th Street. Nor is there any indication that any special benefits would, in fact, arise from such future improvement.

This court has held that the right of access is a property right and the Legislature cannot provide for its taking or damaging without just compensation. *Morehead v. State*, 195 Neb. 31, 236 N.W.2d 623 (1975). That holding does not prevent a city from reasonably limiting access to existing streets as a condition of approval of a subdivision, but it does point up the cumulative unreasonableness of the several requirements imposed here.

Even if there is legislative authority for the imposition of conditions, reasonableness is the essential requirement in determining what costs may be legally imposed as a condition of subdivision approval, and two general theories or rules of reasonableness have been adopted by courts. The city urges that we adopt the rule which authorizes, as a condition of subdivision approval, the imposition of those costs which have a rational and reasonable nexus with the needs created by and benefits conferred upon the subdivision. See *Land/Vest Props., Inc. v. Town of Plainfield*, 117 N.H. 817, 379 A.2d 200 (1977). The appellants urge adoption of the rule which permits, as a condition of subdivision approval, the imposition of only those costs which are specifically and uniquely attributable to the particu-

lar subdivision. See *McKain v. City Plan. Comm.*, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971).

It is unnecessary to make a choice between those rules here. No case has been cited under either rule in which a court has held it to be reasonable for a city to require a developer to relinquish all right of direct access to an arterial street from all abutting lots in the subdivision and, at the same time, pay the costs of future widening and paving of the street to which access has been restricted. The unreasonableness of such a requirement is accentuated in the present case by the fact that no time limit is specified for the widening and paving of the streets nor, indeed, is there any absolute requirement that it be done at all.

The action of the city in imposing the equivalent cost of local street paving installation in this case is not authorized under § 15-901 nor is it authorized by § 26.11.110. Declaratory judgment should have been entered declaring that the imposition of such future paving costs as a condition of approval of the plat of Briarhurst West Fourth Addition was not authorized by law and is illegal and void.

REVERSED AND REMANDED.

BRODKEY, J., participating on briefs.

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ROBERT R. RULLMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE B. RULLMAN, DECEASED, APPELLANT, V. LAFRANCE, WALKER, JACKLEY & SAVILLE, A PARTNERSHIP, AND MCDERMOTT AND MILLER, A PARTNERSHIP, APPELLEES.

292 N. W. 2d 19

Filed May 6, 1980. No. 42632.

1. **Contracts: Parol Evidence.** Parol evidence is not admissible to add to, contradict, or vary the terms of a written contract.
2. **Contracts: Intention of the Parties.** A written contract expressed

in unambiguous language is not subject to interpretation or construction but the intention of the parties must be determined from its contents.

Appeal from the District Court for Hall County: L. W. KELLY, JR., Judge. Affirmed.

Thomas A. Wagoner, for appellant.

Les Seiler, for appellees.

Heard before KRIVOSHA, C. J., BRODKEY and HASTINGS, JJ., and CLARK and FAHRNBRUCH, District Judges.

FAHRNBRUCH, District Judge.

This is an accounting action originally brought by George B. Rullman for sums claimed due as a result of the sale of his Hastings, Nebraska, accounting business to defendant, LaFrance, Walker, Jackley & Saville, an accounting partnership. The Hastings business was subsequently acquired by McDermott and Miller, another accounting partnership.

After initiating the action in the District Court for Hall County, Nebraska, Mr. Rullman died and the action was revived by the personal representative of his estate, Robert R. Rullman.

On December 28, 1971, George Rullman, a certified public accountant, sold, under written instrument, his Hastings, Nebraska, accounting business to the LaFrance partnership, which had its principal office in Great Bend, Kansas. Approximately a year and a half later, the McDermott partnership acquired LaFrance's Hastings office.

Subsequent to the Rullman sale, the LaFrance partnership and, thereafter, the McDermott partnership, not only served Rullman's former clients, but also acquired a substantial number of new clients at the Hastings office and generally prospered. Rullman, in his petition, claimed that he was entitled not only to 15 percent of the gross billings to the clients he turned over to LaFrance, but also to 15 percent of

the gross billings to new clients procured by LaFrance and McDermott during the term of the contract.

The trial court found the agreement ambiguous, admitted parol evidence, and found that the parties intended that Rullman should be paid 15 percent of the gross billings of Rullman's clients for 84 months, but no part of the gross billings to new clients.

While we affirm the results of the trial court's judgment in finding for the defendants, we do not agree that the written contract involved in this action was unclear, ambiguous, or subject to two interpretations. To the contrary, we find the agreement was clear and unambiguous, and that the trial court was in error in admitting parol evidence.

Parol evidence is not admissible to add to, contradict, or vary the terms of a written contract. *C. G. Smith Constr. Co. v. Cobleigh Electric Co.*, 196 Neb. 711, 246 N.W.2d 55 (1976). There is no theory on which we can find the instrument in this case to be ambiguous, unclear, or subject to more than one interpretation.

A written contract expressed in unambiguous language is not subject to interpretation or construction and the intention of the parties must be determined from its contents. *Clemens Mobile Homes, Inc. v. Anderson, ante* p. 58, 291 N.W.2d 238 (1980); *C. G. Smith Constr. Co. v. Cobleigh Electric Co., supra; Kingery Constr. Co. v. Board of Regents*, 189 Neb. 453, 203 N.W.2d 150 (1973); *Gerdes v. Omaha Home for Boys*, 166 Neb. 574, 89 N.W.2d 849 (1958).

Here, the intent of the parties is clearly expressed in the introductory portion of the Rullman-LaFrance agreement. LaFrance was "desirous of acquiring the clientele of Rullman and to provide the accounting and related expert services to said clientele in the future . . . ." It was "the genuine desire of both parties" that the agreement "serve the purpose to the

end that the clientele of Rullman will be serviced by LaFrance . . . ."

Thereafter, the agreement provided that LaFrance was to pay Rullman a sum "equal to fifteen per cent (15%) of the gross billings for assignments performed by the Hastings office during a period of eighty-four (84) months . . . ." Since the purpose of the contract was to "serve the purpose to the end that the clientele of Rullman will be serviced by LaFrance," it is unmistakably clear that the parties intended the word "assignments" to apply only to the work done for Rullman's former clientele during the term of the contract and not to the work for newly acquired clients.

In July 1973, when McDermott purchased LaFrance's Hastings business and assumed LaFrance's obligations under the Rullman-LaFrance agreement, Rullman attempted to modify the December 28, 1971, agreement. Although the modification instrument was executed by Rullman and McDermott, it never became operative. Rullman failed to release LaFrance from liability on the December 28, 1971, agreement and McDermott failed to perform certain conditions under the Rullman-McDermott modification. These were conditions precedent to the Rullman-McDermott modification agreement becoming operative and it, therefore, never became effective. Therefore, the 1971 agreement remained in effect.

The trial court's judgment insofar as finding for the defendants is affirmed.

AFFIRMED.

JAMES J. PARKS COMPANY, APPELLANT AND CROSS-APPELLEE, V. CHARLES E. LAKIN, APPELLEE AND CROSS-APPELLANT.

292 N. W. 2d 21

Filed May 6, 1980. No. 42730.

1. **Specific Performance.** Specific performance is not generally demandable as a matter of absolute legal right but is addressed to the sound legal discretion of the court. It will not be granted where enforcement of the contract would be unjust.
2. _____. A party seeking specific performance must show his right to the relief sought, including proof that he is ready, able, and willing to perform his obligations under the contract.
3. _____. The right to specific performance may be lost by abandonment of the contract and by conduct inconsistent with the right to relief.
4. **Abandonment of Contract: Contracts.** An abandonment of a contract may be effected by acts of one of the parties thereto, which are inconsistent with the existence of the contract and are acquiesced in by the other party.
5. **Equity: Necessary Parties.** An equitable right may not be properly asserted in an action unless all of the necessary parties have been made parties to the action.
6. **Indispensable Parties.** An indispensable party is one who not only has an interest in the subject matter of the controversy, but has an interest of such a nature that a final determination cannot be made without affecting his rights, or leaving the controversy in such condition that the final determination may be wholly inconsistent with equity and good conscience.
7. _____. The absence of indispensable parties cannot be waived by the parties to the litigation.
8. **Marketable Title: Liens.** Generally, title to land is not unmarketable because of an outstanding lien if the lien may be discharged with the purchase money at the time fixed for performance.
9. **Specific Performance: Liens.** If the encumbrance may not be discharged out of the purchase money, specific performance is not an appropriate remedy.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed in part, and in part reversed and remanded.

Monte Taylor of Taylor, Hornstein & Peters, for appellant.

Robert H. Berkshire, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This was an action for specific performance of a repurchase agreement. On November 1, 1970, the plaintiff, James J. Parks Company, purchased 303 acres of citrus grove land from the defendant, Charles Lakin, for $2.52 million, payable in installments over a 10-year period. The land consisted of four separate tracts located in Yuma County, Arizona, and is described in the record as the "Phase II groves." The transaction was conceived as a tax shelter arrangement for the plaintiff, and a repurchase agreement between the parties, entered into on December 15, 1970, was a part of the transaction.

The repurchase agreement provided that the plaintiff could, at its election, require the defendant to repurchase the property upon 30 days' notice. The agreement also granted the defendant an option to repurchase part of the property from the plaintiff. The agreement contained a formula for computing the price in the event either party exercised its option under the agreement. The contracts gave the defendant extensive control over the management and operation of the groves, including the right to approve all expenditures.

On January 1, 1972, the plaintiff sold an undivided one-half interest in the property to 11 investors. The contract of sale, which was approved by the defendant, was in the form of an absolute sale and contained no reference to the repurchase agreement. On this same date, the defendant repurchased a one-eighth interest in the property from the plaintiff. The repurchase transaction did not conform to the terms of the repurchase agreement which the parties had entered into on December 15, 1970, and appar-

ently was independent of the December 15, 1970, agreement.

The January 1, 1972, agreement between the parties made substantial changes in the original November 1, 1970, agreement. The interest rate on the unpaid principal balance was reduced from 10 percent to 8 percent; the defendant was given the right to approve the parties who would pick, pack, and market the fruit; title to the property was to be transferred to a trustee; and the parties agreed, upon request of either party, to form a partnership and convey their interest in the groves to the partnership. The agreement made no reference to the December 15, 1970, repurchase agreement.

A form of partnership agreement was prepared which was executed by both the plaintiff and the defendant. The agreement was not executed by Donald Graham and Maurice Waring, accountants who had been advising the parties throughout their various transactions and who were to be partners under the agreement. Graham and Waring had acquired an interest in the "Phase I" groves from the defendant in November 1971. The purpose of the partnership was to consolidate the undivided interests which the partners held in the Phase I and Phase II groves and facilitate the management and operation of the groves.

Although Graham and Waring did not execute the partnership agreement, all of the parties proceeded as if the partnership were in effect. In January 1973, Graham and Waring purchased the defendant's interest in the groves. The transaction was accomplished by an assignment of the defendant's partnership interest to Graham and Waring. The agreement recited that the partnership existed; that Graham and Waring were purchasing the defendant's partnership interest; that the plaintiff agreed to the assignment; and that Graham and Waring ratified and confirmed the partnership agreement.

The payments due the defendant under the original November 1, 1970, agreement were made through 1975. In 1976, the defendant accepted promissory notes for the principal and interest due. On March 25, 1977, the plaintiff notified the defendant that it was exercising its right under the December 15, 1970, repurchase agreement and demanded that the defendant repurchase the Phase II groves, less the one-eighth interest which the defendant had repurchased in January 1972.

This action was commenced on September 8, 1977, to compel specific performance of the repurchase agreement. The plaintiff claims there is due it from the defendant the sum of $901,801.66, plus the cost of maintaining and operating the groves after April 1, 1977. The defendant cross-petitioned for $1,905,120, the balance due him under the November 1, 1970, agreement, together with interest from November 1, 1977.

The trial court found there were indispensable parties who had not been joined in the action; that the plaintiff had not shown it was able to perform the repurchase agreement; that the parties by their conduct had demonstrated they did not consider the repurchase agreement to be in effect; and that the plaintiff was not entitled to specific performance. On the cross-petition, the trial court found that, since the property was mortgaged and the defendant could not convey a clear title to the property to the plaintiff, the defendant should not recover judgment against the plaintiff. The petition was dismissed with prejudice. The cross-petition was dismissed without prejudice. The plaintiff has appealed. The defendant has cross-appealed.

Specific performance is not generally demandable as a matter of absolute legal right but is addressed to the sound legal discretion of the court. It will not be granted where enforcement of the contract would be unjust. *Tedco Development Corp. v. Overland*

*Hills, Inc.*, 200 Neb. 748, 266 N.W.2d 56 (1978). A party seeking specific performance must show his right to the relief sought, including proof that he is ready, able, and willing to perform his obligations under the contract. *Tedco Development Corp. v. Overland Hills, Inc., supra.*

The right to specific performance may be lost by abandonment of the contract and by conduct inconsistent with the right to relief. *Sofio v. Glissmann*, 156 Neb. 610, 57 N.W.2d 176 (1953). An abandonment of a contract may be effected by acts of one of the parties thereto, which are inconsistent with the existence of the contract and are acquiesced in by the other party. *Sofio v. Glissmann, supra.*

The record fully supports the finding of the trial court that the plaintiff was not entitled to specific performance of the repurchase agreement. There was no tender of performance, other than by allegation in the petition, and the plaintiff failed to show that he could perform his part of the agreement by reconveying the groves to the defendant.

It is not clear from the record what interest the plaintiff now has in the property. The record indicates that persons not identified in the record have acquired an interest in the property. There is evidence that the plaintiff's interest in the Phase I and Phase II groves now does not exceed 12½ percent. Other than the plaintiff, none of the persons who have an interest in the property are parties to the action.

An equitable right may not be properly asserted in an action unless all of the necessary parties have been made parties to the action. *First Nat. Bank of Wayne v. Gross Real Estate Co.*, 162 Neb. 343, 75 N.W.2d 704 (1956).

An indispensable party is one who not only has an interest in the subject matter of the controversy, but who has an interest of such a nature that a final determination cannot be made without affecting his

rights, or leaving the controversy in such condition that the final determination may be wholly inconsistent with equity and good conscience. *Shepoka v. Knopik*, 197 Neb. 651, 250 N.W.2d 619 (1977).

The absence of indispensable parties cannot be waived by the parties to the litigation. *Coker v. Coker*, 173 Neb. 361, 113 N.W.2d 329 (1962); *Cunningham v. Brewer*, 144 Neb. 211, 13 N.W.2d 113 (1944).

The plaintiff has not acquired the interests of the other owners and the evidence does not show that he can acquire their interests. The rights of the other owners are involved in this action and a final determination could not be made without affecting their rights or leaving the controversy in such condition that the determination would be wholly inconsistent with equity and good conscience.

The record sustains the finding that there are indispensable parties who were not joined in the action. Since they are not identified in the record and the extent of their interest is not shown, the problem could not be solved by ordering joinder. Under these circumstances, dismissal of the petition was proper.

The record further sustains a finding that the parties abandoned the repurchase agreement. The evidence shows that, after the sale by the plaintiff of a half interest in the property to the 11 investors on January 1, 1972, the parties no longer considered the repurchase agreement binding. In addition to the facts that have been summarized previously, the defendant testified positively that the sale to the 11 outside investors was a final sale which terminated the options under the repurchase agreement. The conduct of the parties after that time was inconsistent with the existence of the repurchase agreement, but was consistent with the defendant's understanding of the arrangement between the parties. None of the agreements after January 1, 1971, referred to the repurchase agreement. The provisions of the partner-

ship agreement, which was executed by the plaintiff, conflicted with the terms of the repurchase agreement and that partnership agreement was a strong indication that the parties had abandoned any rights that originated in or existed because of the December 15, 1970, repurchase agreement. After the defendant sold his interest in the property in 1973, he no longer participated in the management of the property. Upon the record in this case, the plaintiff had no right to specific performance of the December 15, 1970, repurchase agreement.

With respect to the defendant's cross-petition, the general rule is that title to land is not unmarketable because of an outstanding lien if the lien may be discharged with the purchase money at the time fixed for performance. See *Olson v. Woodhouse*, 112 Neb. 527, 199 N.W. 815 (1924). However, if the encumbrance may not be discharged out of the purchase money, specific performance is not an appropriate remedy. See, 71 Am. Jur. 2d *Specific Performance* § 136 (1973); *Guild v. Atchison, Topeka & Sante Fe Railroad Co.*, 57 Kan. 70, 45 P. 82 (1896).

Although the record indicates that the indebtedness secured by the mortgages upon the property is less than the amount due the defendant under the November 1, 1970, agreement, the terms of the mortgages are not shown in the record. We conclude that the cause should be remanded to the District Court to permit the defendant to make a showing as to whether the indebtedness secured by the mortgages on the property can be discharged out of the purchase money.

That part of the judgment dismissing the petition with prejudice is affirmed; the dismissal without prejudice of the cross-petition is reversed and the cause remanded for further proceedings.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED.

CLINTON, J., not voting.

# LA DONNA BORLAND, APPELLANT, V. ROBERT S. GILLESPIE, APPELLEE.

292 N. W. 2d 26

Filed May 6, 1980. No. 42759.

1. **Directed Verdict.** A motion for directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict: Juries.** At the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, that is, whether there is any evidence upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed.
3. **Negligence: Proximate Cause.** In an action based upon negligence, the plaintiff, in order to recover, must establish not only the negligence of the defendant, but also that such negligence was the "proximate cause" of the occurrence, accident, or harm; and also the proximate cause of the resulting damages.
4. **Negligence: Proximate Cause: Words and Phrases.** "Proximate cause," as used in the law of negligence, is that cause which in a natural and continuous sequence unbroken by an efficient intervening cause, produced the injury, and without which the injury would not have occurred.
5. **Negligence: Proximate Cause.** A tort-feasor whose negligence has caused injury to another is also liable for any subsequent injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person.
6. **Negligence: Damages.** The evidence of damages is required to be direct and certain. Proof that damage might or could have been caused by the accident is not sufficient to sustain a verdict for a claimant.
7. **Collateral Estoppel.** Collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

Robert V. Roach of Welsh, Sibbernsen & Bowen, for appellant.

Charles O. Forrest of Kneifl, Kneifl & Forrest, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Appellant, La Donna Borland, appeals from an order sustaining a motion to dismiss her action against appellee, Robert Gillespie, made following the completion of her evidence on the issue of liability. This appeal presents the rather unique question as to whether or not the negligence of one causing an accident and damages to a victim is the proximate cause of a later accident involving the victim who was purportedly chasing the original tort-feasor who had allegedly fled the scene of the first collision. The assignments of error can be simply stated as a contention that the trial court erred in failing to submit the issue of proximate cause and liability to the jury. We affirm.

On July 16, 1977, at approximately 12:35 a.m., a collision occurred on U. S. Highway No. 6, about ½ mile west of Ashland, Nebraska, involving the front end of the Borland automobile and the rear end of the Gillespie vehicle, which vehicles were then being operated by the respective named parties to this litigation. There are two diametrically opposed versions of the facts of this case. Mrs. Borland testified that she was driving down the highway when the automobile being driven by Mr. Gillespie passed her, stopped, and then backed into her car. She also said that both drivers got out of their automobiles, that Mr. Gillespie began yelling at her, and when her husband got out of the car to check the damage, Mr. Gillespie jumped back into his vehicle and drove away from the scene of the accident. Mrs. Borland

returned to her car and gave chase in an effort to get his license plate number, since no information had been exchanged. During the course of the chase, Mrs. Borland was involved in a second accident when she lost control of her automobile, went off the highway, and struck a tree with such force as to shear off the treetop and impale the front of the car on the remaining tree trunk. Mrs. Borland suffered serious injuries as a result of that collision.

Mr. Gillespie has a totally different version of how the first collision took place. According to Mr. Gillespie, he, along with his wife and two young children, were on their way from a drive-in movie to a restaurant for breakfast via U. S. Highway No. 6. Mr. Gillespie looked up into his rear view mirror to see a car directly behind him and then the car hit his from behind. He pulled his car off the road and then stopped. Mr. Gillespie got out of the car and began to walk back to the Borland vehicle when he saw another car coming over the top of the hill, which he then flagged down. The car stopped and Mr. Gillespie told the two women in the car that there had been an accident and asked them to go into town to call the police. At this moment, he alleges, Mrs. Borland came out of her car, and "[S]he ran up to me and started hitting me to the back of the head and slapping me and yelling obscene language at me."

Mr. Gillespie then told Mrs. Borland and the two women that he would go to town and get the police himself. Mr. Gillespie then went back to his own vehicle and left the scene to get the police. Mr. Gillespie first stopped at a restaurant to phone the police but it was closed, so he went on into Ashland and notified the chief of police that there had been an accident. He was not involved in the second accident and was unaware of it until some time later.

Two lawsuits arose out of this situation. Mrs. Gillespie, as a passenger in her husband's car, brought

suit against Mrs. Borland and her husband for personal injuries sustained in the first collision. Mrs. Borland filed an action against Mr. Gillespie for personal injuries and property damage sustained in both accidents. She alleged that both collisions were proximately caused by Mr. Gillespie's negligence as to lookout, control, speed, and right-of-way. Mrs. Borland filed a motion to consolidate the cases for trial and subsequently the District Court entered an order of consolidation. Trial of the two cases was commenced before a jury. By agreement of the parties, both of them submitted all their evidence as to liability, and their own testimony as to injuries and damages, reserving only that of the various treating physicians. At the close of that portion of the trial, the court sustained Mr. Gillespie's motion for a dismissal as to liability, assigning as a reason for this action that there was no evidence to establish any causal connection between the two accidents. At this point it should be noted that apparently the court's reasoning was based in part upon an unannounced finding that Mrs. Borland failed to prove any damages which proximately resulted from the first collision. We shall have more to say about that later. In any event, after dismissing Mrs. Borland's action, the court continued to hear the remainder of the lawsuit of Mrs. Gillespie against the Borlands, which was submitted to the jury upon appropriate instructions. The jury returned a verdict for the plaintiff in the amount of $5,852.16. Mrs. Borland perfected an appeal of her case against Mr. Gillespie.

A motion for directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.

*Anderson v. Moore*, 202 Neb. 452, 275 N.W.2d 842 (1979); *Floridia v. Farlee*, 201 Neb. 39, 266 N.W.2d 204 (1978). For the purpose of ruling on this motion, the version of the facts according to Mrs. Borland, the party against whom the motion is directed, must be accepted as true. At the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, that is, whether there is any evidence upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. *Empfield v. Ainsworth Irr. Dist.*, 204 Neb. 827, 286 N.W.2d 94 (1979). The question, therefore, is whether Mrs. Borland had presented any evidence whereby a jury could impose liability upon Mr. Gillespie.

The theory of Mrs. Borland is that Mr. Gillespie was negligent in causing the first collision, and everything which occurred thereafter somehow was the result of, and proximately caused by, Mr. Gillespie's negligent act. Therefore, Mr. Gillespie should be liable for all of Mrs. Borland's subsequent injuries.

> In an action based upon negligence, the plaintiff, in order to recover, must establish not only the negligence of the defendant, but also that such negligence was the "proximate cause" of the occurrence, accident, or harm; and also the proximate cause of the resulting damages. "Proximate cause," as used in the law of negligence, is that cause which in a natural and continuous sequence unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.

*Pendleton Woolen Mills v. Vending Associates, Inc.*, 195 Neb. 46, 50-51, 237 N.W.2d 99, 102 (1975).

We recently adopted the following general rule:

> [A] tortfeasor whose negligence has caused injury to another is also liable for any subse-

> quent injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person.

*Watkins v. Hand*, 198 Neb. 451, 453, 253 N.W.2d 287, 289 (1977). The theory of Mrs. Borland that the injury sustained by her from the collision with the tree was proximately caused by any negligence on Mr. Gillespie's part is simply untenable. The first collision and the second collision were not part of a continuous sequence as there was a break by an intervening cause. The acts of Mrs. Borland herself intervened when she began to pursue Mr. Gillespie and then lost control of the vehicle, running off the road and hitting a tree.

Mrs. Borland argues that she should have been allowed to present the issue of the reasonableness of the pursuit to the jury as bearing upon the issue of causation. However, the reasonableness of such pursuit is not the determining factor when deciding whether it is in the natural chain of events. The question is, was the injury the result of an efficient intervening act which breaks the sequence and, therefore, places the injury outside the proximate chain of events. Here, Mrs. Borland's acts of pursuing the Gillespie vehicle by driving a car she knew to be damaged from the first collision and failing to stop when she realized she was having problems with the steering mechanism, all as indicated by her own testimony, were acts outside the natural sequence of events that arose out of the alleged negligence of Mr. Gillespie. The trial court correctly directed the verdict against Mrs. Borland on the issue of liability for injuries sustained from the collision with the tree.

The focus then turns to the first collision and the injuries sustained therefrom. Mrs. Borland failed to present evidence that she suffered personal injuries as a result of the first collision. In her deposition, when asked what injuries she received as a result of the first accident, she said, "None that I know of." During the trial, she testified that "I'm not sure that some of it didn't stem from the first one, but I have no way of actually knowing."

> The evidence of damages is required to be direct and certain. Proof that damage might or could have been caused or was probably caused by the accident is not sufficient to sustain a verdict for a claimant. Such evidence is not of the quality required to satisfy the burden of a claimant to establish by a preponderance of evidence an injury and the extent thereof.

*Johnsen v. Taylor*, 169 Neb. 280, 292-93, 99 N.W.2d 254, 262 (1959).

If the evidence of a claimant fails to establish the extent of the injury he claims was inflicted upon him, and a jury cannot determine damages except by indulging in speculation and conjecture, then the District Court is required to refrain from submitting the matter of damages and to decide the case as a matter of law. *Johnsen v. Taylor, supra.* Since Mrs. Borland could not prove what, if any, damages were sustained solely from the first collision, the trial court correctly sustained the motion for directed verdict on the issue of Mr. Gillespie's liability to her for personal injuries.

However, the evidence does tend to show that there is a factual issue regarding damages to the Borland automobile which resulted from the first collision. We cannot assume that, had Mrs. Borland been permitted to put on her case as to property damage, she would not have had evidence of the dollar amount of such damage. "Where reasonable

minds might differ as to conclusions to be drawn from the evidence, and where there is conflict in the evidence, such issues are for the jury." *Bedke v. Kucera*, 200 Neb. 380, 382-83, 263 N.W.2d 830, 832 (1978).

If Mr. Gillespie was found to be negligent, a jury could properly proceed to return a verdict for Mrs. Borland in the amount of damages to her automobile. However, the error in failing to submit that issue to the jury, if any there be, was at most harmless for the reasons set out below.

As indicated earlier, after the verdict was directed on the issue of liability of Mr. Gillespie to Mrs. Borland, the trial continued on the issue of liability of Mrs. Borland to Mrs. Gillespie for personal injuries. The jury verdict against Mrs. Borland on her claim was included as a part of the supplemental transcript on appeal. The issue of liability for the first collision, therefore, was tried and submitted to the jury, and Mrs. Borland was determined to be the negligent party. If we were to remand this case on the issue of the liability of Mr. Gillespie for property damages to Mrs. Borland, it would be to no avail, since the issue of negligence would be collaterally estopped at a new trial.

> It is now generally held that collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.

*Peterson v. The Nebraska Nat. Gas Co.*, 204 Neb. 136, 139, 281 N.W.2d 525, 527 (1979).

In all cases in which a person finds himself subject to preclusion, he has either had the opportunity to litigate the matter or his interests have been ade-

quately represented in the litigation of the matter. *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 230 N.W.2d 99 (1975).

Mrs. Borland was a party to the case brought by Mrs. Gillespie and had the opportunity to fully and fairly litigate the issue of negligence. It is true that since Mrs. Gillespie was a passenger in her husband's automobile, any defenses of contributory negligence that might be available to Mrs. Borland against Mr. Gillespie could not be used against his wife as a passenger. "The negligence of a husband while driving an automobile with his wife as a guest may not be imputable to her . . . ." *Bartek v. Glasers Provisions Co., Inc.*, 160 Neb. 794, 801, 71 N.W.2d 466, 472 (1955).

However, this will not affect an application of collateral estoppel in the instant case because of the unique factual situation. The versions of how the first accident occurred were so diametrically opposed that there is no way in which one party could have been contributorily negligent. Either Mr. Gillespie's version would be believed and Mrs. Borland would be found to be negligent by rear-ending the Gillespie vehicle, or Mrs. Borland's story would be believed and Mr. Gillespie would be liable for negligently backing into the Borland vehicle. The jury accepted the Gillespie version as being the true one and found Mrs. Borland to be negligent. No appeal was taken from that judgment, and it is final.

> Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to a prior suit or as a privy; and, where not so, that at least the presently asserted interest was adequately represented in the prior trial.

*Hickman, supra* at 28-29, 230 N.W.2d at 106. Mrs. Borland was a party to both cases and had the opportunity to fully and fairly litigate the question of

negligence as to the first collision. We believe that she has had her day in court and the doctrine of collateral estoppel would bar any further litigation on the issue of negligence.

The decision of the District Court in dismissing Mrs. Borland's case, at least as to her personal injuries, was correct, and there otherwise being no prejudicial error in the record, its judgment is affirmed.

AFFIRMED.

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COUNTY OF YORK, A POLITICAL SUBDIVISION, APPELLANT, V. GAYLE L. JOHNSON AND A. JUNE JOHNSON, APPELLEES.
292 N. W. 2d 31

Filed May 6, 1980. No. 42785.

1. **Attorney's Fees: Minors' Contracts: Necessaries.** Legal services furnished to a minor charged with a crime may be necessaries.
2. **Necessaries: Causes of Action: Petitions: Parent and Child.** A petition in an action against the parents of a minor for reimbursement for necessaries furnished to the minor at his request which does not allege that the parents refused to provide the necessaries for the minor does not state a cause of action.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

Vincent Valentino, York County Attorney, and Michael J. Murphy, for appellant.

Bailey, Polsky, Huff, Cada & Todd, for appellees.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and WARREN and FUHRMAN, District Judges.

PER CURIAM.

This was an action by the County of York, Nebraska, against the parents of Ricky A. Johnson to recover the amount paid by the county for the services of de-

fense counsel appointed by the court in *State v. Johnson*, 200 Neb. 760, 266 N.W.2d 193 (1978).

Ricky A. Johnson, who was then 17 years of age, was charged with first degree murder in the death of a York, Nebraska, police officer. The amended petition alleged that defense counsel had been appointed for him at public expense pursuant to his request. The theory of the action was that the services of a defense counsel was a necessary of life which had been furnished by the county and for which it should be reimbursed by the defendant's parents. In *Cobbey v. Buchanan*, 48 Neb. 391, 67 N.W. 176 (1896), this court held that it was a question of fact whether legal services furnished by a lawyer employed by a minor who had been ordered to return to the reform school for a violation of parole were necessaries.

The trial court sustained the defendants' general demurrer and dismissed the amended petition. The county has appealed.

Neb. Rev. Stat. § 29-1804.06 (Reissue 1975) provides for the appointment of defense counsel for an indigent defendant who is charged with a felony. Neb. Rev. Stat. § 29-1804.10 (Reissue 1975) provides for reimbursement of the county by the defendant in the event the court later finds the defendant is no longer indigent or that the initial determination of indigency was incorrect. There is no statutory provision for reimbursement by the parents of a minor defendant except Neb. Rev. Stat. § 43-205.06 (Reissue 1978), which refers only to proceedings in the juvenile court.

Generally, a cause of action exists for reimbursement from a parent for necessities supplied by a third person to the child. *Groner v. Davis*, 260 Md. 471, 272 A.2d 621 (1971); *Lawrence v. Cox*, 464 S.W.2d 674 (Tex. Civ. App. 1971); *In Re O*, 71 Misc. 2d 774, 337 N.Y.S.2d 138 (1972); 67A C.J.S. *Parent & Child* § 73 (1978).

Only a few states have dealt with the problem involved in this case. In California, the courts have upheld a statutory scheme where parents are required to reimburse the state if their minor child receives representation in juvenile cases by either the public defender or court-appointed counsel and the parents have the ability to pay private counsel. *In Re Ricky H.*, 2 Cal. 3d 513, 468 P.2d 204, 86 Cal. Rptr. 76 (1970). In that case the court pointed out that "[t]here exists substantial authority holding that counsel fees incurred on behalf of a minor child are in the nature of 'necessaries' for which the parents are liable." *Id.* at 521, 468 P.2d at 208, 86 Cal. Rptr. at 80.

A recent New York case held that parents may be responsible for the legal fees of their minor son who was involved in a paternity action. *Russo v. Hafner*, 100 Misc. 2d 841, 420 N.Y.S.2d 64 (Fam. Ct. 1979). In *Griston v. Stousland*, 186 Misc. 201, 60 N.Y.S.2d 118 (1946), an attorney sought recovery from a father for legal services rendered his 17-year-old daughter in connection with criminal charges. The father had obtained legal counsel for his daughter. However, in the course of the criminal proceedings, the daughter dismissed that attorney and retained counsel of her own choosing. In the *Griston* case, the court noted: "Legal services rendered to an infant, at her request, for her protection in connection with her prosecution for a criminal offense, are in the nature of necessaries for which the father, under appropriate conditions, may be held responsible." *Id.* at 60 N.Y.S.2d 119. The court held that it was a question of fact whether the father had provided appropriate legal assistance and had discharged the obligation imposed upon him by law.

Construing a statute requiring the court to prepare a transcript of the record for purposes of appeal at public expense for persons not having sufficient

means to do so, the Indiana Supreme Court tempered the statute's application to minors, stating: "A dependent child, whose parents are able to pay for his necessary expenses, is neither a 'poor person' nor a 'pauper.' " *State ex rel. Butler v. Allen Circuit Court*, 241 Ind. 627, 630, 170 N.E.2d 663, 665 (1960), *rev'd on rehearing on other grounds*, 241 Ind. 632, 174 N.E.2d 411 (1960). The court further pointed out that established law requires parents to provide necessary expenses for their dependent children, if they are able to do so. In that court's opinion, such expenses would seem to include the expense of legal services necessary in defense of a criminal charge.

In *Serabian v. Alpern*, 284 Md. 680, 399 A.2d 267 (1979), the Maryland Court of Appeals reversed the decision of the District Court for Montgomery County, Maryland, Juvenile Division, which had awarded a counsel fee of $2,500 for legal services on behalf of a minor to be paid by the child's mother. Generally upholding such a right of action, the court noted:

> It has been held that legal services provided to a minor may, in some circumstances, be deemed "necessaries" for which a parent may be required to pay, *e.g.*, where they are reasonable and necessary for the protection or enforcement of the property rights of the minor or for his personal protection, liberty or relief.

*Id.* at 686-87, 399 A.2d at 271. However, the court also held that the fees were improperly assessed because the court did not inquire into the mother's eligibility for services of the public defender, nor did it inquire into the mother's willingness to provide legal services for her child. In addition, the lower court did not advise the mother that she could be held responsible for the legal fees.

In the *Serabian* case, the Maryland court noted

that the appropriate means by which to attempt recovery would be an action at law where the final determination would be a question for the fact finder, a question not actually before that court at that time. Although the *Serabian* case was not an action at law, the opinion establishes criteria by which the petition in the instant case may be tested.

Although the county alleged the defendants had consented to the appointment of counsel to defend Ricky, there was no allegation that the defendants had refused to provide legal services for him. Under the particular circumstances in this case, we believe the demurrer was properly sustained.

The judgment of the District Court is affirmed.

AFFIRMED.

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DOROTHY H. CARROLL, APPELLEE, V. ACTION ENTERPRISES, INC., DOING BUSINESS AS ACTION REAL ESTATE, APPELLANT, IMPLEADED WITH RICH JUNGJOHAM AND BILLIE HAWES, APPELLEES.

292 N. W. 2d 34

Filed May 6, 1980. No. 42797.

1. **Real Estate: Brokers: Contracts.** A seller of real estate is under no obligation to sell his property to a purchaser procured by a broker. The broker's obligation is merely to provide a purchaser and he has no authority, unless otherwise specifically agreed, to enter into a binding contract of sale on behalf of the seller.
2. _____: _____: _____. A real estate broker or agent of a seller who receives a purchase offer from a prospective purchaser for submission to the seller has a duty to the prospective purchaser to timely and truthfully submit or communicate such offer to the seller.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with directions.

William E. Pfeiffer of Spielhagen, Pfeiffer, Miller & Weingarten, Associates, for appellant.

Bailey, Polsky, Huff, Cada & Todd and James D. Smith, for appellee Carroll.

Heard before McCOWN and WHITE, JJ., and COLWELL, GRANT, and KORTUM, District Judges.

McCOWN, J.

This is an action by the plaintiff, a prospective purchaser, against the defendant real estate brokerage company, agent of the seller, for alleged negligence in connection with the presentation of plaintiff's written offer to purchase a leasehold interest. The District Court for Sarpy County, Nebraska, found that the defendant was negligent in failing to submit to the owner all the underlying facts and circumstances with respect to plaintiff's purchase offer and an identical offer submitted by another prospective purchaser. The court found that, as a proximate result of such negligence, plaintiff's offer was rejected and plaintiff was damaged. The court entered judgment for the plaintiff in the sum of $7,500.

In 1978, the Omaha National Bank, as executor of the estate of a decedent, decided to sell the decedent's leasehold interest in real estate located on Thomas Lake in Saunders County, Nebraska. A double-wide trailer home and a converted garage are located on the leasehold.

On June 8, 1978, at approximately 11 a.m., an officer of the Omaha National Bank listed the property for sale with the defendant, Action Real Estate. A uniform listing contract on a form approved by the multiple listing service was executed. The list price for the property was $24,500 cash. The bank officer also advised the plaintiff and James W. Warren that the property had been listed for sale with the defendant. Warren was a cooperating real estate broker under the multiple listing service and had previously

appraised the property for the bank.

At approximately 2:30 p.m., June 8, 1978, Warren called the listing agent for the defendant and informed her that he wished to make an offer to purchase the property on behalf of his son. The listing agent told Warren that he need not bring the offer to the defendant's office that day because it could not be presented to the bank until the following day. The written purchase offer was received by the defendant at 8 a.m. on June 9, 1978. It was dated June 8, 1978.

In the late afternoon of June 8, 1978, plaintiff's husband called defendant's office and asked for the listing agent. The listing agent was not in the office and Mr. Carroll talked with a sales agent. Arrangements were made to have the sales agent meet the plaintiff at the property. At approximately 6 p.m. on June 8, 1978, plaintiff signed a purchase offer for the property and gave the agent an earnest money deposit. The evidence is conflicting as to the conversations with the sales agent. Plaintiff's evidence was that the sales agent advised the plaintiff that she had bought the property. The sales agent denied making any such statements and also testified that she had advised plaintiff's husband that there was another offer pending. The plaintiff's offer and the Warren offer were each for the full list price of $24,500 cash and were identical in all material respects except for the amount of the downpayment deposit.

On the afternoon of June 9, 1978, defendant's listing agent met with the bank officer who had listed the property, and submitted the two offers. The listing agent testified that she discussed the chronology of events of both offers, including the sequence of physical receipt. The bank officer testified that she told him that both offers were received on June 8, 1978, and that she was unable to state unequivocally which offer came first. The bank officer also testi-

fied that if he had been told unequivocally by the defendant that the plaintiff's offer came in first, he probably would have accepted it. The bank rejected both offers and directed the agent to request both parties to make another offer if they were interested.

Plaintiff refused to make any further offers and asserted that her offer was submitted first and that she felt she had bought the property. Warren submitted a subsequent offer for $25,010, which was accepted by the bank. This action by the plaintiff against the defendant followed.

The case was tried to the court without a jury. The District Court found that the defendant owed a duty to the plaintiff to submit the purchase offer to its principal in a timely manner, which it performed. The court also found that the defendant owed a duty to the plaintiff to inform the bank of all underlying facts and circumstances concerning the receipt and submission of both offers; that it negligently breached that duty; and that, as a proximate result of the defendant's negligence, the plaintiff was damaged. The District Court entered judgment for the plaintiff in the sum of $7,500 and this appeal followed.

The defendant contends that the District Court erroneously found that the defendant owed a duty to the plaintiff to inform the bank of all underlying facts and circumstances known by the defendant concerning the receipt and submission of both purchase offers. The defendant's position is that a real estate broker, the agent of the seller, has a duty to a prospective purchaser only to timely and truthfully communicate offers from the prospective purchaser to the seller and from the seller to the prospective purchaser, and that such duties were carried out by the defendant here.

The law is well settled in this state that a seller is under no obligation to sell his property to a pur-

chaser procured by a broker. The broker's obligation is merely to provide a purchaser and he has no authority, unless otherwise specifically agreed, to enter into a binding contract of sale on behalf of the seller with a purchaser. *Fleming Realty & Ins., Inc. v. Evans*, 199 Neb. 440, 259 N.W.2d 604 (1977); *Brezina v. Hill*, 195 Neb. 481, 238 N.W.2d 903 (1976).

The tort liability of an agent in a case such as this is based upon the common law obligation that every person must do that which he undertakes so as not to injure another rather than upon any contractual relationship existing between the agent and principal. See, *Simon v. Omaha P.P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972); 3 Am. Jur. 2d *Agency* § 300 (1962).

Courts have applied two different theories in determining what duty is owed to a prospective purchaser by a real estate broker who is the agent of the seller. One theory is that the only duties resting upon him are those which he owes to his principal, the seller, and he has no legal duty whatever to the prospective purchaser. The other theory is that although the real estate agent is primarily the agent of the seller, he nevertheless has the duty to truthfully communicate offers from the seller to the prospective purchaser and offers from the prospective purchaser to the seller, and that such duties are owed to the prospective purchaser as well as to the seller. See Annot., 55 A.L.R.2d 342 (1957), and cases there cited.

Cases holding a broker liable to a prospective purchaser for failure to communicate offers almost invariably involve active fraud, misrepresentation, or concealment on the part of the broker. Such circumstances are not present in this case, nor were they alleged.

We find no authority to support the position that a broker who is an agent for a seller has a duty to a prospective purchaser to inform the seller of all underlying facts and circumstances concerning the of-

fer of either the particular prospective purchaser or of any other prospective purchasers. We believe the appropriate rule to be that a real estate broker or agent of a seller who receives a purchase offer from a prospective purchaser for submission to the seller has a duty to the prospective purchaser to timely and truthfully submit or communicate such offer to the seller. The defendant performed that ordinarily recognized duty to the plaintiff by submitting her offer to the seller in a timely manner and the District Court so found. We find no basis for creating a new or additional standard of duty. The evidence does not support the judgment of the District Court.

The judgment of the District Court is reversed and the cause is remanded to the District Court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

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IN RE ESTATE OF NAMEN BOUMA, DECEASED. BETSY NEHLS, APPELLANT, V. CHARLES GILES, PERSONAL REPRESENTATIVE OF THE ESTATE OF NAMEN BOUMA, DECEASED, RUTH A. EDMUNDS, EDWIN BOUMA, FRANCES OLSON, MYRTLE J. JONES, PAUL DIETZ, DELMER DIETZ, AND DEAN A. BOUMA, APPELLEES.

292 N. W. 2d 37

Filed May 6, 1980. No. 42818.

1. **Burden of Proof: Contracts for Services: Unilateral Contracts.** The burden of proof is upon the claimant seeking compensation for services rendered during the life of the deceased person to prove an agreement, express or implied, to pay for the services.
2. **Parent and Child: Contracts for Services: Unilateral Contracts.** Personal services rendered by a child to a parent are presumed, in the absence of special circumstances, to have been rendered gratuitously. This presumption may be overcome by sufficient evidence tending to establish a contract for remuneration.

Appeal from the District Court for Custer County: L. W. KELLY, JR., Judge. Affirmed.

Carlos E. Schaper, for appellant.

Steven O. Stumpff of Stumpff & Washburn, for appellees.

Heard before KRIVOSHA, C. J., BRODKEY, WHITE, and HASTINGS, JJ., and CAPORALE, District Judge.

CAPORALE, District Judge.

Appellant, a daughter of the decedent, has appealed from the judgment of the District Court for Custer County, Nebraska, denying her claim for the value of the board and room, general care, and clothing furnished by her to her deceased father. We affirm the judgment of the District Court.

The essential facts are that the decedent lived with Betsy Nehls, appellant, and her husband and children for a little over 6 years, the period covered by the claim, immediately prior to his death. There is no question that, during this period of time, the appellant treated her father as a member of her family. She provided him with a home, and with food, clothing, and care. The appellant testified she had a conversation with her father, in the presence of her husband, in 1968 or 1969, to the general effect that her father wanted to live with her, that his other children had no use for him, and that he had some bonds which he wanted appellant to have. Appellant's husband generally corroborated this testimony. Appellant further testified that she and her father had another conversation, in 1971, wherein the decedent again said that appellant could have the bonds. Appellant did not know the exact amount of the bonds, but she understood the value to be around $10,000. She recognized that, if her father were required to be placed in a home, the bonds might be used and she would have nothing. One of appellant's brothers testified that a couple of years prior

to his death, decedent said he was trying to get back some of what he figured Betsy owed him.

The county court of Custer County allowed appellant's claim in the sum of $10,829. Certain of the decedent's other heirs appealed to the District Court pursuant to the provisions of Neb. Rev. Stat. § 30-1601 (Reissue 1975), which allows any person affected by an order in probate matters to do so. *Clutter v. Merrick*, 162 Neb. 825, 77 N.W.2d 572 (1956).

Although the cause was triable in the District Court as an action at law under the provisions of Neb. Rev. Stat. §§ 25-1104 and 30-1606 (Reissue 1975), the parties elected to try the matter to the court on the record made in the county court. The District Court found that appellant failed to sustain the requisite burden of proof and, consequently, reversed the action of the county court.

The judgment of a trial court in an action at law tried to the court without a jury has the effect of a jury verdict and should not be set aside on appeal unless clearly wrong. *Insurance Co. of North America v. Hawkins*, 197 Neb. 126, 246 N.W.2d 878 (1976).

The burden of proof is upon the claimant seeking compensation for services rendered during the life of the deceased person to prove an agreement, express or implied, to pay for the services. Personal services rendered by a child to a parent are presumed, in the absence of special circumstances, to have been rendered gratuitously. This presumption may be overcome by sufficient evidence tending to establish a contract for remuneration.

*In re Estate of Benson*, 128 Neb. 138, 258 N.W. 60 (1934), affirmed the District Court's dismissal of a daughter's claim for nursing services to her deceased father. The court found the testimony of claimant's husband to be insufficient to sustain the claimant's burden of proof, and sustained a motion to dismiss at the close of the claimant's evidence. Likewise, *In re Estate of Wieland*, 104 Neb. 412, 177

N.W. 651 (1920), held that no promise or agreement to pay could be implied from the fact that the daughter had rendered personal services to her mother for a period of years immediately preceding the mother's death.

On the other hand, testimony from one other than the claimant child and spouse may overcome the presumption. Thus, *In re Estate of Skade*, 135 Neb. 712, 283 N.W. 851 (1939), held that it was error for the court not to submit the question to a jury in view of the testimony of an independent witness that the deceased father had said he intended to pay the claimant. In the case of *In re Estate of Chalupa*, 134 Neb. 918, 280 N.W. 164 (1938), the existence of a memorandum entitled "Wage Scale for Amelia" and the testimony of disinterested witnesses as to conversations wherein the deceased mother had said that her daughter would be paid for her services required the trial court to submit the question to the jury. See, also, *Kloke v. Martin*, 55 Neb. 554, 76 N.W. 168 (1898), wherein the testimony of two independent witnesses was sufficient to overcome the presumption and to have the matter submitted to the jury for determination.

Under the circumstances of this case, the record supports the trial court's finding that the appellant failed to sustain her burden of proof.

AFFIRMED.

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DARLENE SCHANAMAN, PERSONAL REPRESENTATIVE OF ROBERT W. SCHANAMAN, JR., DECEASED, APPELLANT, V. KELLY ANN RAMIREZ AND REYNALDO RAMIREZ, APPELLEES.

292 N. W. 2d 39

Filed May 6, 1980. No. 42823.

1. **Rules of the Road: Turning Vehicles.** It is unlawful for the driver

of a vehicle to turn left unless and until such movement can be made with reasonable safety.

2. **Rules of the Road: Turning Vehicles: Right-of-Way.** The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard.
3. **Right-of-Way: Words and Phrases.** By "right-of-way" is meant the right of one vehicle to proceed in a lawful manner in preference to another approaching under such circumstances of direction, speed, and proximity as to give rise to danger of a collision unless one grants precedence to the other.
4. **Rules of the Road: Proper Lookout.** A motorist must see what is in plain sight.
5. **Proper Lookout: Right-of-Way: Negligence.** A driver who fails to see another who is favored over him is guilty of negligence as a matter of law.
6. **Proper Lookout: Right-of-Way.** Although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving.
7. **Right-of-Way: Speeding.** One does not forfeit his right-of-way by driving at an unlawful speed.
8. **Negligence.** Negligence is not presumed and the mere happening of an accident does not prove negligence.
9. **Negligence: Proximate Cause.** It is essential to the defense of contributory negligence that the negligence of the plaintiff be the proximate cause or a proximately contributing cause.
10. **Juries: Directed Verdict.** A trial court has the duty not to submit to the jury issues which are not sustained by the evidence.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded for a new trial.

Raymond, Olsen & Coll, P.C., for appellant.

Holtorf, Hansen, Kovarik & Nuttleman, P.C., for appellees.

Heard before KRIVOSHA, C. J., BRODKEY, WHITE, and HASTINGS, JJ., and CAPORALE, District Judge.

CAPORALE, District Judge.

The plaintiff, as personal representative of her deceased son, Robert W. Schanaman, Jr., appeals the

trial court's judgment on the jury's verdict for the defendant in a wrongful death action arising out of a pickup truck-motorcycle accident. For the reasons set forth below, we reverse and remand for a new trial.

The salient facts, considering the evidence most favorably to the defendants, are these. The accident occurred during dusk at approximately 7:30 p.m. at the intersection of East Overland and Fifth Street, Scottsbluff, Nebraska, on September 22, 1977. Both streets were four lanes, one 42½ and the other 43½ feet wide. Defendant, Kelly Ann Ramirez, was driving a pickup truck and had been traveling west on East Overland intending to turn left (south) onto Fifth Street. Plaintiff's decedent was driving a motorcycle and had been traveling east on East Overland at a speed in excess of the 30-mile-per-hour limit. The intersection was controlled by traffic lights which signalled green for east-west traffic. Each vehicle involved had its lights on. As defendant approached the intersection, there were no cars traveling west directly ahead of her. There were, however, four cars approaching the intersection from the west. Defendant allowed two of them to clear the intersection and she slowed down to approximately 5 miles per hour, but never came to a complete stop. Of the two remaining eastbound automobiles, both of which were in the lane nearest to the center line, the one nearest the intersection was moving slowly. When that vehicle was approximately two car lengths from the defendant, she judged that she had enough time to make it through the intersection and made a left turn. In the meantime, the motorcycle continued traveling east in the lane nearest the center line. When the eastbound automobile ahead of decedent's motorcycle slowed down, the decedent went around it, to the automobile's right, moving to a point approximately midway into the outside lane. The motorcycle con-

tinued forward, to the east, in that outside lane. Defendant collided with the motorcycle without ever having seen it. The impact occurred in the southeast quarter of the intersection.

At the close of defendant's case, plaintiff moved for a directed verdict "in favor of the plaintiff on issues of liability only." The court overruled that motion and submitted the case to the jury on the issues of defendant's negligence, decedent's contributory negligence, comparative negligence, proximate cause, and damages. Plaintiff assigns as error the court's failure to sustain her motion and the submission to the jury of the issues of defendant's and decedent's negligence.

Plaintiff's claims must be tested in accordance with the following rules of substantive law.

It is unlawful for the driver of a vehicle to turn left unless and until such movement can be made with reasonable safety. Neb. Rev. Stat. § 39-652 (Reissue 1978). The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard. Neb. Rev. Stat. § 39-636 (Reissue 1978); *Floridia v. Farlee*, 201 Neb. 39, 266 N.W.2d 204 (1978). By "right-of-way" is meant the right of one vehicle to proceed in a lawful manner in preference to another approaching under such circumstances of direction, speed, and proximity as to give rise to danger of a collision unless one grants precedence to the other. Neb. Rev. Stat. § 39-602(81) (Supp. 1979). A motorist must see what is in plain sight. *Davis v. Spindler*, 156 Neb. 276, 56 N.W.2d 107 (1952); *Caldwell v. Heckathorn*, 176 Neb. 704, 127 N.W.2d 182 (1964). A driver who fails to see another who is favored over him is guilty of negligence as a matter of law. *Bonnes v. Olson*, 197 Neb. 309, 248 N.W.2d 756 (1976); *Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848

(1960). However, although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving. *Nichols v. McArdle, supra; Bonnes v. Olson, supra; Hayes v. Anderson Concrete Co., Inc.*, 186 Neb. 771, 186 N.W.2d 477 (1971). One does not forfeit his right-of-way by driving at an unlawful speed. *Epperson v. Utley*, 191 Neb. 413, 215 N.W.2d 864 (1974). Negligence is not presumed and the mere happening of an accident does not prove negligence. *Farro v. Rubottom*, 202 Neb. 120, 274 N.W.2d 149 (1979); *Wolcott v. Drake*, 162 Neb. 56, 75 N.W.2d 107 (1956). And, finally, it is essential to the defense of contributory negligence that the negligence of the plaintiff's decedent be the proximate cause or a proximately contributing cause of the death. *Kaufman v. Tripple*, 180 Neb. 593, 144 N.W.2d 201 (1966); *Bonnes v. Olson, supra.*

There is no evidence of any factor which would excuse defendant from seeing plaintiff's decedent. The location of the impact establishes that plaintiff's decedent was approaching the intersection and was so close as to constitute an immediate hazard. We conclude defendant was negligent as a matter of law in failing to see plaintiff's decedent who was in a favored position having the right-of-way over defendant.

In submitting to the jury the question of the contributory negligence of plaintiff's decedent, the court submitted the issues of lookout, control, speed, and failure to yield the right-of-way. The jury could have inferred from the failure of plaintiff's decedent to diminish his speed that he, notwithstanding his right-of-way, failed to keep a proper lookout. There is no evidence, however, from which it can be reasonably inferred that decedent failed to have his motorcycle under control. It cannot be inferred from the mere happening of the accident. There is

evidence that decedent was speeding. Witness Paul Stuve testified he had plaintiff's decedent in view over a period of several blocks, that the witness was traveling at 30 miles per hour, and that the motorcycle passed him and continued to increase the distance between it and the witness' vehicle. The right-of-way, as has been seen, belonged to plaintiff's decedent, not to defendant. The jury could infer that decedent's speed and failure to keep a proper lookout were proximately contributing causes of the collision.

Since the question of the contributory negligence of plaintiff's decedent was for the jury, the trial court was correct in overruling plaintiff's motion for a directed verdict on the "issues of liability." Plaintiff did not move the court to instruct the jury that defendant was negligent. Nonetheless, a trial court has the duty not to submit to the jury issues which are not sustained by the evidence. *Nichols v. McArdle, supra; Colton v. Benes*, 176 Neb. 483, 126 N.W.2d 652 (1964); *Rose v. Gisi*, 139 Neb. 593, 298 N.W. 333 (1941).

Accordingly, the cause must be remanded for a new trial on the question of the contributory negligence of plaintiff's decedent and the comparative negligence questions arising under the provisions of Neb. Rev. Stat. § 25-1151 (Reissue 1975).

REVERSED AND REMANDED FOR A NEW TRIAL.

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STATE OF NEBRASKA, APPELLEE, V. DAVID EDWARD WEIK, APPELLANT.

292 N. W. 2d 289

Filed May 6, 1980. No. 42851.

1. **Value of Goods: Larceny.** Where value of goods is an element of the crime charged and there is a market for the goods, the value to

be proved is the market value at the time and place of the crime charged.

2. _____: _____. The value of the property at the time and place of the taking is a fact question for the decision of the jury from the evidence adduced.
3. **Lesser-Included Offense.** The test which must be applied in determining whether or not to submit a lesser-included offense is whether there is evidence which produces a rational basis for a verdict acquitting defendant of the offense charged and convicting him of the lesser offense.
4. **Larceny.** Rules for establishing value in civil cases are ordinarily applicable in distinguishing between grand and petit larceny.
5. **Sentences: Appeal and Error.** A sentence imposed which is within the statutory limits will not be disturbed by this court on appeal, absent an abuse of discretion by the trial court.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

William B. Zastera, for appellant.

Paul L. Douglas, Attorney General, and Linda A. Akers, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Defendant, David Edward Weik, was charged in an information with committing the offense of grand larceny. He was convicted of this offense after trial to a jury and was sentenced to imprisonment in the Nebraska Penal and Correctional Complex for a term of not less than 1 nor more than 3 years. He has appealed the conviction and sentence to this court. We affirm.

The material facts in this case are that during the late evening hours of November 17, 1978, some tools belonging to one Richard Aufenkamp were taken from the box of a pickup truck owned by him and parked on the street in front of his residence in Nebraska City. The tools in question were contained in two separate tool boxes. In the early part of December, the tools were located at a car dealership in

Tecumseh, Nebraska. It appears that one Rodney Huffmann had brought the tools to the automobile dealer as collateral for his indebtedness on an automobile he purchased.

Rodney Huffmann appeared as a witness for the State at the trial. He testified that on the evening of November 17, 1978, he and Weik were driving around the streets of Nebraska City, and that both he and Weik expressed a desire to gain possession of some tools. Huffmann testified that he and Weik removed two boxes of tools from the back of a parked pickup truck, and that he and Weik each took one of the boxes. The tools and the tool boxes were later identified as the ones taken from Aufenkamp's truck. Huffmann further testified that Weik subsequently gave his box of tools to Huffmann and permitted Huffmann to use them as collateral on the vehicle Huffmann purchased.

Weik disputed this testimony. He testified that he did not remove either tool box from the back of the pickup and that he never had possession of either tool box. He also contended he never had a discussion with Huffmann about using the tools as collateral for the purchase of a vehicle.

The principal issue in this appeal involves the sufficiency of the evidence as to the value of the tools taken. The owner of the tools, Aufenkamp, testified at the trial that their value was $500. One Cecil Neil, an expert witness, also testified as to the value of the tools. Mr. Neil was in the business of buying and selling tools, both new and used. He testified that the market value of the tools was $442.75. However, neither of these witnesses testified as to the value of the tools on the specific date of the theft; nor was there any testimony adduced by either party with reference to the variation, if any, in the market value of the tools between the date of the taking and the date of trial.

After hearing the evidence, the jury, which was

given the "aiding and abetting" instruction, returned a verdict of guilty and found the value of the stolen tools to be $301.

Weik was sentenced, as previously stated, and has appealed to this court. He assigns the following errors as justifying reversal: (1) That the trial court erred in allowing Aufenkamp and Neil to testify as to the value of the tools and in failing to grant Weik's motion to dismiss the case following the State's rest; (2) That the trial court erred in failing to give an instruction to the jury on the lesser-included offense of petit larceny; and (3) That the sentence imposed was excessive. We now examine these assignments of error.

Weik contends, first, that it was error to allow the testimony as to value by witnesses Aufenkamp and Neil. Specifically, Weik claims that the witnesses did not testify as to the value of the tools as of the date of the taking, the value being an essential element distinguishing grand larceny from petit larceny. Weik was charged with a violation of Neb. Rev. Stat. § 28-506 (Reissue 1975), which provides, in pertinent part:

> Whoever steals any money or goods and chattels of any kind whatever, whether the same be wholly money, or wholly in other property, or partly in money and partly in other property, the property of another, of the value of *three hundred dollars or upwards*; or steals or maliciously destroys any money, promissory note, bill of exchange, order, draft, receipt, warrant, check, or bond, given for the payment of money, or receipt acknowledging the receipt of money, or other property, of the value of three hundred dollars or upwards shall, upon conviction thereof, be imprisoned in the Nebraska Penal and Correctional Complex not more

than seven years nor less than one year. (Emphasis supplied.)

In construing this section, this court has stated: "[W]here value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place [of the taking]." *State v. Hayes*, 187 Neb. 325, 326, 190 N.W.2d 621, 622 (1971); *State v. Stowell*, 190 Neb. 615, 211 N.W.2d 130 (1973). See, also, *State v. Carroll*, 186 Neb. 148, 181 N.W.2d 436 (1970).

While it is true that, under the above statutory rule, it is necessary for the State to establish the market value of the stolen property as of the date of the commission of the offense, which in this case was the taking of the property on November 17, 1978, yet we do not interpret this rule in such a narrow fashion as to require testimony of a witness or witnesses *in haec verba* that, at the specific time of the taking of the stolen property, it had a market value of a specific amount. These facts may be established circumstantially, as well as by direct evidence, and the ultimate resolution of the value of the property at the time and place of the taking is clearly a fact question for the decision of the jury from the evidence adduced.

In the instant case, while it is true that neither the owner of the property, nor the expert witness, Mr. Neil, testified to the value of the tools as of the date of taking, November 17, 1978, yet the testimony of both witnesses was to the effect that the tools greatly exceeded the $300 specified in the applicable statute. Both witnesses testified at the trial that commenced on April 30, 1979. However, the record is clear that the witness Neil had seen the tools on several prior occasions, and had, in fact, inventoried and placed the valuation upon the tools on December 29, 1978, or approximately 6 weeks after their theft, and long before the trial itself. There is absolutely nothing in the record to indicate that the value of the

used tools had fluctuated or changed in any manner between the date of their taking on November 17, 1978, and the date of their valuation in December of 1978.

The court was faced with a similar situation in *Cummings v. State,* 106 S.W. 363 (Tex. Crim. 1907). In that case the court held that where, in a prosecution for theft, a witness swore that the value of the property alleged to have been stolen was $300 at the time of the trial, and there was no claim that the value of the property had undergone any change from the time of the theft up to such time, the value was sufficiently proven. The court stated:

> The verdict of the jury is supported by the evidence. The market value of the property was established by a jeweler, who was a witness in the case, who swore that the value of the property at the time of the trial was $300. There was no insistence pro or con that the value of the property had undergone any change from the time of the theft up to the time of the trial.
>
> The evidence amply supports the verdict, and the judgment is in all things affirmed.

See, also, *People v. Siderius*, 29 Cal. App. 2d 361, 84 P.2d 545 (1938); *Hoffman v. State*, 24 Okla. Crim. 236, 218 P. 176 (1923), as to value at the *place* of the taking.

In the instant case, there was evidence as to the value of the stolen tools much earlier than the date of the trial and there was no evidence that the value of the property had changed between the date of the taking and the date of the trial, a period of less than 6 months. The jury could have believed, and obviously did, from the evidence offered at the trial that the value of the items stolen was, at or near the date of the taking, in excess of $300. Weik's first assignment of error is without merit and the District Court acted correctly in denying Weik's motion to dismiss.

Weik next contends that it was error to fail to submit an instruction on the lesser-included offense of petit larceny to the jury. In *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978), we said: "The test which must be applied in determining whether or not to submit a lesser-included offense is whether there is evidence which produced a rational basis for a verdict acquitting defendant of the offense charged and convicting him of the lesser offense." *Id.* at 707, 271 N.W.2d at 474.

Weik contends that there was evidence which would provide a rational basis for a finding that he did not commit grand larceny but did commit petit larceny. Specifically, he claims that the lesser-included offense should have been instructed on for two reasons: (1) The testimony with reference to the value of the tools was in dispute; and (2) A dispute existed as to whether the theft of the tools was one act or two acts.

As to his first claim, Weik contends that the value of the tools was not established as being in excess of $300. We disagree. "Rules for establishing value in civil cases are ordinarily applicable in distinguishing between grand and petit larceny." *State v. Carroll, supra* at 150, 181 N.W.2d at 437. A person shown to be familiar with property and its fair and reasonable market value is competent to testify as to such value; moreover, the qualifications of a witness to give testimony as to the value of property is subject to the discretion of the trial court and a ruling thereon will only be disturbed when clearly wrong. *Borden v. General Insurance Co.*, 157 Neb. 98, 59 N.W.2d 141 (1953). In this matter, both Aufenkamp and Neil were shown to be familiar with the property and its value. Likewise, they both placed the value in excess of $300. Weik directs our attention to the testimony of Neil on cross-examination wherein he admitted that his valuation of the tools could have varied by as much as 25 cents per

item. However, even taking that variation into consideration, there is no evidence in the record to indicate that the tools in question were worth less than $300. We point out that the question of the value of stolen property is a fact question for the determination of the jury on the basis of the evidence submitted on that issue. The jury found in its verdict that the value of the property taken was in excess of $300 and the evidence in the record supports its finding.

Weik also claims that the lesser-included offense instruction should have been given as there was a dispute as to whether the tools were taken in one common act or two separate acts. We find no merit to this claim. Section 28-506 provides, in pertinent part: "The total value of money or property so stolen by a series of acts from the same owner shall be considered as stolen in one act . . . ." The record reveals that the tool boxes were taken from the same owner's truck during a time period of not over 5 minutes from each other. Huffmann testified that he and Weik drove around the block prior to taking the tool box. Although Huffmann testified that he and Weik had each taken one, Weik testified that both tool boxes were taken by Huffmann at the same time. We conclude that the two tool boxes were taken as part of one criminal act or transaction. The District Court was correct in refusing to instruct the jury on the lesser-included offense of petit larceny as there was no evidence which would "rationally" support an acquittal on the charge of grand larceny. *State v. Tamburano, supra.*

Finally, Weik claims that the sentence imposed by the trial court was excessive. Again, we find no merit to this claim. Weik was charged and sentenced under § 28-506, since the crime was committed prior to the effective date of our new criminal code. See *State v. Weinacht*, 203 Neb. 124, 277 N.W.2d 567 (1979). Under that section, the punish-

ment which may be imposed for conviction of the crime of grand larceny is imprisonment in the Nebraska Penal and Correctional Complex for a term of 1 to 7 years. Weik was sentenced to a term of 1 to 3 years by the District Court. The rule is well established that a sentence imposed which is within the statutory limits will not be disturbed by this court on appeal, absent an abuse of discretion by the trial court. *State v. Crouch,* 205 Neb. 781, 290 N.W.2d 207 (1980); *State v. Freeman,* 201 Neb. 382, 267 N.W.2d 544 (1978). A review of the record herein reveals a lengthy arrest record and a short employment record. Past probation appears not to have aided Weik. We therefore conclude that the trial court did not abuse its discretion in imposing on Weik the sentence it did, and we find no error in that sentence.

There being no other errors appearing of record by Weik, the judgment and sentence imposed herein by the District Court must be affirmed.

AFFIRMED.

CLINTON, J., not voting.

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DONALD J. DAWSON AND MINA PFEIFLEY DAWSON, HUSBAND AND WIFE, BILL PALMER, AND BRIAN WHEELER, APPELLEES, V. PAPIO NATURAL RESOURCES DISTRICT, APPELLANT.

292 N. W. 2d 42

Filed May 13, 1980. Nos. 42564, 42641.

1. **Eminent Domain: Market Value: Foundation.** Generally, in an eminent domain proceeding, evidence about the sale of the identical property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting market conditions.

2. **Damages: Burden of Proof.** It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural.
3. **Expert Witnesses.** Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury.
4. _____. Where the opinion testimony of an expert witness does not have a sound and reasonable basis, it should be stricken.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with directions.

Paul F. Peters, for appellant.

J. Thomas Rowen of Miller & Rowen, P.C., for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

The appellant, Papio Natural Resources District, appeals from a jury verdict in favor of the landowners Donald J. Dawson and Mina Pfeifley Dawson. While the records indicate that there are two separate appeals, consolidated for hearing, the facts disclose but a single trial with two separate notices of appeal. For our purposes, we shall consider the matters together as though they constituted but one appeal.

Papio filed its petition in the county court of Sarpy County, Nebraska, on May 4, 1978, seeking to condemn certain of the land of the Dawsons located in Sarpy County. Papio alleged that, for purposes of the Missouri River Levee System Unit R-616 and for recreational purposes, it was necessary that Papio acquire certain of the Dawsons' real estate, more particularly consisting of 79.5 acres of land, together with a permanent berm easement over a 9.5-acre

tract and permanent levee easements over 12.1- and 0.3-acre tracts. The appellees Bill Palmer and Brian Wheeler were later added as parties, it appearing that they had rights as tenants. The county court appraisers awarded the Dawsons $305,210 in damages and awarded tenants Palmer and Wheeler crop damages in the amount of $15,210. Papio perfected an appeal to the District Court for Sarpy County, Nebraska.

Immediately following the empaneling of the jury, the District Court viewed the Dawson property by helicopter. Evidence was thereafter presented by both the Dawsons and Papio and, upon consideration of the evidence, the jury returned a verdict in favor of the Dawsons in the amount of $450,000. By stipulation of the parties, it was agreed that a directed verdict should be entered in favor of Papio on the issue of crop damage to the tenants.

Papio filed several motions for new trial which accounts for the two appeals, and a motion to vacate the judgment, all of which were overruled. The District Court, after taking further evidence, entered an award in favor of the Dawsons for attorney's fees and costs in the amount of $59,336.80. Papio appeals from the judgments for damages, fees, and costs. The legal propositions presented to us in the instant case are not dissimilar from those presented to us in the case of *Clearwater Corp. v. City of Lincoln,* 202 Neb. 796, 277 N.W.2d 236 (1979), involving similarly located property though involving a different governmental subdivision. For reasons more particularly set out herein and earlier discussed in the *Clearwater* case, we must, as we did in that case, reverse and remand the instant case for a new trial.

Papio assigns a number of errors. There is but one that we need consider at this time in order for us to dispose of the instant appeal. Papio maintains that the evidence presented by the Dawsons' expert witnesses was insufficient to justify consideration by

the jury. A brief summary of the evidence is necessary in order to consider that assignment of error.

The record discloses that Kenneth Amick, the owner and operator of a sand and gravel operation located near the Dawson property, had previously testified in a case involving Frank H. Prucka and Margaret Prucka and Papio. It further appears that Mr. Amick was unavailable to testify in the instant case due to a health problem and that the parties stipulated and agreed that Amick's testimony given in the Prucka case could be read into evidence in the Dawson case in the absence of Amick, subject to Papio's right to object to the evidence.

Amick's testimony basically established the manner in which a sand deposit may be developed, how the sand is removed, the method of calculating the amount of sand in a deposit, and how it is valued.

Papio objected to several parts of the testimony, maintaining that Amick's evidence should not be considered by the jury because Amick had not seen the Dawson property. While a serious question may be raised as to the weight and sufficiency of the evidence as it was presented, a matter to be considered by the jury, it is clear that the evidence, in itself, was admissible for foundational purposes and could have been considered by the Dawsons' other witnesses had they been sufficiently familiar with the facts of the matter. The introduction into evidence of Amick's testimony was not reversible error. See *Iske v. Omaha Public Power Dist.*, 185 Neb. 724, 178 N.W.2d 633 (1970). The testimony of the other two expert witnesses, however, makes it clear that Amick's testimony, while admissible, was of little importance to them.

After Amick's testimony was read, the Dawsons called as an expert witness one Joseph G. Strawn, who testified that he was the county assessor of Sarpy County from 1967 to 1971. He testified that he had conducted appraisals for various clients and had

appraised the Dawson farm as of May 5, 1978, the date of the taking. According to Strawn, based upon comparable sales, the entire 430-acre farm had a value of $1,569,500 or $3,650 per acre before the taking; the value of the 102.4 acres involved in the fee taking and easement areas was $373,760; and the remaining 327.6 acres had a "before" value of $1,195,740 and an "after" value of $801,700 giving a value for severance damages of $394,040. He estimated total damages at $767,800. An examination of the record discloses, however, that the properties considered "comparable" by Strawn, in fact, were not "comparable" and could not be considered for purposes of determining the "before" and "after" value based upon a market approach.

The witness further testified that, in part, his appraisal was based upon an "income" approach and considered the fact that sand located beneath the Dawson property could be economically removed from the land and commercially sold and the remaining property thereafter developed for recreational purposes. However, on cross-examination, Strawn stated that he had no indication of any large project in the vicinity which would require any substantial quantities of the type of material available from the Dawsons' property and his testimony revealed that he had no idea whatsoever of the demand for the material. He further conceded that, without any demand for the sale of the materials, the sand could not be economically removed and the resultant lake could not be created. All of these matters would be important, however, if Strawn were to base his opinion on the value of the sand beneath the property. He further conceded that he knew that the present zoning of most of the Dawson property was for agricultural use and the land could not be put to what, in his opinion, was its highest and best use without rezoning.

The Dawsons then called a James W. Warren who

owned a real estate and insurance office and was a licensed appraiser. When asked his opinion of the value of the Dawsons' land before the taking, using a comparable sale or market approach, the witness said he derived his values by using "factors." The witness enumerated his "factors" and then stated, "I just look at the different things and derive factors in my mind." The witness gave his opinion that the total damages from the taking were $748,175, consisting of the taking and damages to the remainder. Mr. Warren stated that the sales he used in his "factor system" indicated that, since the Dawson land was adjacent to the city of Bellevue, he had to use development in his thinking. He knew that the zoning of the property was agricultural but the zoning did not affect his opinion of the highest and best use of the property, he testified, because people were always getting property rezoned.

The witness said he considered a number of land sales, perhaps 200 to 250, but picked out a cross-section. Over objection as to foundation, the witness was allowed to testify that he used as a "factor" a 1974 sale in Papillion, Nebraska, of land for lake development at $2,083 an acre. A second sale he considered was land sold to the city of Papillion. Insufficient evidence was introduced to clearly indicate that the sale was voluntary. A third sale considered was the sale of an existing developed lake, not comparable in size. Warren conceded that the difference in size did not make the sale comparable but was used as a "factor."

A fourth sale considered by Warren was a 1977 sale by Campbell Soup Company to Advanced Development. Furthermore, the evidence disclosed that the land was already zoned for industrial use and was to be used by the purchaser for a housing development.

A fifth sale involved a 67-acre tract of land adjacent to Interstate 80.

The evidence disclosed that a number of the sales considered by Warren were not comparable either in time or in the nature of the sale or the size of the tract. It is clear that, to a large extent, Warren's testimony, like Strawn's, was based upon an assumption that the sand beneath the property could be removed and commercially sold at a profit and a resulting lake could be developed for recreational purposes. Warren, however, testified on cross-examination that he had no knowledge or information as to the demand for such material or whether there was, in fact, a market for it. He could not show the existence of any demand that would indicate that it was likely that there would be a person who would pay royalties to the Dawsons to withdraw the material. The evidence at trial disclosed that, absent a commercial market to remove the sand, the land could not be economically developed. On the other hand, the evidence disclosed that Papio produced a witness who testified that he had knowledge of the state of the market for the sand. But, upon the Dawsons' objections, the witness was prohibited from giving his opinion on the question of whether there was a market for the sand.

As we indicated earlier, the principal issue raised by Papio is whether the testimony of the Dawsons' two experts was based upon sufficient foundation to justify its being considered by the jury. We believe from what we have pointed out, that it was not. It appears to us that it fails in two respects. The testimony with regard to "comparable sales" fails to establish that, in fact, the sales were comparable. Generally, in an eminent domain proceeding, evidence as to the sale of the identical property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances

surrounding the sale, and other relevant factors affecting market conditions. *Clearwater Corp. v. City of Lincoln, supra; Roush v. Nebraska P. P. Dist.*, 189 Neb. 785, 205 N.W.2d 519 (1973). The record in this case fails to disclose the existence of those relevant factors and the evidence of comparable sales is, therefore, defective. Papio's objection to the testimony by the two experts based upon comparable sales should have been sustained.

Likewise, both of the Dawsons' principal expert witnesses determined that the highest and best use of the property was for the removal of sand and the development of a recreational area. Again, the underlying factors necessary for them to reach such a conclusion are totally lacking in the record. It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural. *Clearwater Corp. v. City of Lincoln, supra.* While it is true that the current Nebraska Rules of Evidence, Neb. Rev. Stat. §§ 27-101 to 1103 (Reissue 1975), have substantially liberalized the requirements for an expert witness to render an opinion absent objection, the rules have not eliminated the requirement that an expert, in fact, have some basis for his opinion when called upon to disclose that basis. See § 27-705. As we said in *Clearwater* at 803-04, 277 N.W.2d at 241, discussing the change in the Rules of Evidence:

> This does not mean that an expert witness is no longer required to disclose the basis for his opinion if required to do so by the trial court or that the jury is entitled to consider the opinion of an expert witness if cross-examination discloses there is no adequate factual basis for the opinion.
>
> . . .
>
> Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a

> reasonably accurate conclusion as distinguished from a mere guess or conjecture. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury. Gilbert v. Gulf Oil Corporation, 175 F. 2d 705 (4th Cir., 1949). See, also, Horton v. W. T. Grant Co., 537 F. 2d 1215 (4th Cir., 1976); Wilson v. Volkswagen of America, Inc., 561 F. 2d 494 (4th Cir., 1977); Polk v. Ford Motor Co., 529 F. 2d 259 (8th Cir., 1976); Omaha Indian Tribe, Treaty of 1854, Etc. v. Wilson, 575 F. 2d 620 (8th Cir., 1978); Tabatchnick v. G. D. Searle & Company, 67 F. R. D. 49. Where the opinion testimony of an expert witness does not have a sound and reasonable basis it should be stricken. Arkansas-Missouri Power Co. v. Sain, 262 Ark. 326, 556 S. W. 2d 441.

The evidence presented in this case failed to disclose that there was any present demand for the sand to be mined from the property or that it could be economically mined under present conditions of demand and transportation costs. Absent such evidence, it was improper to permit the Dawsons' experts to render an opinion that the highest and best use of the land was the removal of the sand and the development of the land for recreational purposes. For that reason, the testimony should not have been admitted in evidence. Having admitted the evidence over objection, the trial court committed reversible error.

Having so disposed of the case on this assignment of error, it becomes unnecessary for us to consider any of the other assignments of error. The judgment of the trial court is reversed and the cause remanded with directions to grant a new trial in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., not voting.

# FRANK H. PRUCKA AND MARGARET PRUCKA, HUSBAND AND WIFE, APPELLEES, V. PAPIO NATURAL RESOURCES DISTRICT, APPELLANT.

292 N. W. 2d 293

Filed May 13, 1980. No. 42565.

1. **Attorney's Fees.** In the determination of a reasonable attorney's fee, the court should consider the importance of and the result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the experience and professional training of the attorney, the difficulty of the questions of fact and law that are raised, and the time and labor necessarily required in the performance of those duties.
2. _____. The court, in awarding a reasonable attorney's fee, may consider the actual agreement existing between a litigant and his attorney, including an obligation to pay a contingent fee, particularly if such a contract is customary in the locality. While the actual agreement is neither the sole factor nor a factor to be given any greater weight than any of the other factors, it may, nevertheless, be considered.
3. _____. Any work done in connection with a condemnation proceeding which is relevant and material and properly introduced in evidence on appeal in the District Court, whenever prepared, may be considered by the District Court in awarding a reasonable attorney's fee.
4. _____. The allowance of a reasonable attorney's fee for necessary services performed by an attorney in perfecting an appeal to the District Court will not be reversed on appeal to this court in the absence of abuse of discretion.

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

Paul F. Peters, for appellant.

J. Thomas Rowen of Miller & Rowen, P.C., for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

This is an appeal by Papio Natural Resources District from an order of the District Court for Sarpy County, Nebraska, allowing attorney's fees and costs to the appellees, Frank H. Prucka and Mar-

garet Prucka, husband and wife. For reasons more particularly set out in the opinion, we affirm the judgment of the trial court in allowing such attorney's fees and court costs.

Papio commenced an eminent domain proceeding in the county court of Sarpy County, Nebraska, seeking to acquire certain property of the Pruckas located in Sarpy County. The board of appraisers awarded damages in the Sarpy County court in the amount of $116,390.40. On appeal to the District Court for Sarpy County, Nebraska, the jury returned a verdict in the amount of $208,823.60, $92,433.20 more than the award in county court. Pursuant to Neb. Rev. Stat. § 76-720 (Reissue 1976), the Pruckas filed an application for attorney's fees and fees of expert witnesses, requesting an "appropriate amount." Appellant filed objections to the application, requesting that prior to the hearing on the application, the Pruckas be required to provide (1) An itemization of the hours expended by the Pruckas' attorney in the prosecution of the case; (2) A statement of the hourly rate which the Pruckas contended was applicable, and (3) An itemization of the Pruckas' expert witness fees.

On January 3, 1979, a hearing was had on the Pruckas' application, at the conclusion of which the trial court awarded attorney's fees in the amount of $30,000 and expenses in the amount of $3,404.16. The court also ordered Papio to pay costs of the action, including the $400 cost of a helicopter ordered by the court in order for the jury to view the property in question. Papio has appealed from that order. Among its several objections, Papio contends that the trial court erred in considering the fact that the Pruckas had entered into a contingent fee contract with their counsel. Likewise, Papio contends that the trial court erred in including in the award of attorney's fees services rendered by the Pruckas' attorneys prior to the appeal in the District Court.

Papio does not appeal from the award rendered by the jury for the taking.

The appeal in essence presents three questions: (1) Whether a contingent fee contract may be considered in a hearing before the District Court in determining what is a reasonable attorney's fee under the provisions of § 76-720; (2) Whether attorney services performed prior to the time the petition on appeal was filed in the District Court, but nevertheless relating to services performed in the trial to the District Court, are material and may be considered by the District Court in determining what is a reasonable attorney's fee under the provisions of § 76-720; and (3) Whether the District Court's award of $33,404.16 in the instant case for attorney's fees and taxable court costs constituted an abuse of discretion.

Section 76-720 provides, in part, as follows:

> If an appeal is taken from the award of the appraisers by the condemnee and the amount of the final judgment is greater by fifteen per cent than the amount of the award, . . . the court may in its discretion award to the condemnee a reasonable sum for the fees of his attorney and for fees necessarily incurred for not more than two expert witnesses.

While the statute is couched in terms of "may," we have held that, in the absence of unusual and compelling reasons, the court "shall" enter such an award. See, *Pieper v. City of Scottsbluff,* 176 Neb. 561, 126 N.W.2d 865 (1964); *Iske v. Metropolitan Utilities Dist.,* 183 Neb. 34, 157 N.W.2d 887 (1968). No question exists that the increase in the award was in excess of 15 percent and entitled the Pruckas to a reasonable attorney's fee.

We have further had occasion to indicate the factors to be considered by the court in entering such an award. In *Jensen v. State,* 184 Neb. 802, 811, 172

N.W.2d 607, 612 (1969), we said:

> We have said many times that in the determination of a reasonable attorney's fee there should be considered the importance of and the result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the experience and professional training of the attorney, the difficulty of the questions of fact and law that are raised, and the time and labor necessarily required in the performance of those duties.

Likewise, in *Hughes Farms, Inc. v. Tri-State G. & T. Assn., Inc.*, 182 Neb. 791, 798, 157 N.W.2d 384, 388 (1968), we said:

> We believe that all of the elements entering into the determination of the amount of a reasonable fee as set out in Canon 12 of the Canons of Professional Ethics of the American Bar Association should properly be considered.

Canon 12 appears as DR-2-106(B) of the Code of Professional Responsibility adopted by this court on May 2, 1973, and provides, in part, as follows:

> Factors to be considered as guides in determining the reasonableness of a fee include the following: . . .
>
> 3. The fee customarily charged in the locality for similar legal services. . . .
>
> 8. Whether the fee is fixed or contingent.

While it is true, as we said in *Schimonitz v. Midwest Electric Membership Corp.*, 182 Neb. 810, 816, 157 N.W.2d 548, 552 (1968), that "we do not interpret the reference in section 76-720, R.R.S. 1943, to a reasonable fee to mean a contingent fee," we likewise do not mean to say that the court, in awarding a reasonable fee, may not consider the fact that the litigant is obligated to pay a contingent fee, particularly if such a contract is customary in the locality.

While that factor is neither the sole factor nor a factor to be given any greater weight than any other, it may, nevertheless, be considered. Likewise, the court may consider any other fee agreement entered into by the parties. The District Court was entirely correct in considering the fact that the Pruckas had entered into a contingent fee contract with their attorney as one of the factors in determining a reasonable fee in this case.

To some extent, Papio's argument concerning the award of attorney's fees seems to be based on a notion that the Pruckas failed to sustain a burden imposed upon them to introduce evidence sufficient to satisfy all of the factors set out in *Jensen v. State, supra*. We do not believe that the condemnee has any such burden. The trial court is obligated, under the clear meaning of § 76-720, to award a reasonable sum for the fees of the condemnee's attorney. This must be done whether the condemnee introduces any evidence or not. While it is in the condemnee's best interest to introduce evidence pertaining to the various factors, the failure to introduce evidence concerning one or more of the factors does not preclude the condemnee from being awarded a reasonable attorney's fee as determined by the trial court. In the instant case, the condemnee's counsel did introduce certain evidence which he believed relevant in aiding the court in arriving at a reasonable attorney's fee.

With regard to the second contention, that the trial court awarded fees for services for work done prior to the perfection of the appeal in the District Court, the record discloses that, while some of the work may have been initially performed in connection with the hearing in county court, it was nevertheless necessary and relevant to the hearing in the District Court. We see little purpose to be served in requiring that the results of work done for the county court proceeding which remain material and relevant in

the District Court, should be discarded and abandoned and the work duplicated and repeated solely so that it may be shown that the work was done in connection with the appeal in the District Court. We hold that the results of any work done in connection with a condemnation proceeding which are relevant and material and properly introduced in evidence on appeal in the District Court, whenever prepared, may be considered by the latter court in awarding a reasonable fee. The District Court is not required to allow a fee for such services. On the other hand, the court should not be precluded from taking such factors into account in determining a reasonable fee.

Turning, then, to the amount of the award, we observe that cases from this jurisdiction can be found encompassing a full range of fees awarded by district courts in condemnation cases. They serve little purpose except to indicate that the awarding of an attorney's fee involves numerous factors which vary from case to case and which must generally be left to the discretion of the District Court, which is most familiar with the factors to be considered. This court has consistently held that the allowance of a reasonable attorney's fee for necessary services performed by an attorney in perfecting an appeal to the District Court will not be reversed on appeal in the absence of abuse of discretion in making the allowance. See, *Jensen v. State, supra; State, ex rel. Sorensen, v. First State Bank of Bethany,* 123 Neb. 620, 243 N.W. 877 (1932). Our review of the record fails to disclose that the trial court abused its discretion. Accordingly, we affirm the judgment of the trial court.

AFFIRMED.

BOSLAUGH, J., concurs in result.

CLINTON, J., not voting.

THOMAS F. SIMPSON AND RUTH I. SIMPSON, APPELLANTS, V. CITY OF NORTH PLATTE, LINCOLN COUNTY, NEBRASKA; CARL E. BIEBER, MAYOR OF NORTH PLATTE; R. L. GRADY, CITY CLERK OF NORTH PLATTE; GARY W. RICKETT, BUILDING INSPECTOR OF NORTH PLATTE; MARVIN P. HOMAN, ALAN ZOOK, BRUNO A. FONTANE, LAWRENCE TIMMERMANS, DOUGLAS F. JOHNSON, JACK D. ENGDAHL, FONCE BRYNOFF, AND ELMER SANDERS, APPELLEES.

292 N. W. 2d 297

Filed May 13, 1980. No. 42680.

1. **Municipal Corporations: Police Power: Eminent Domain.** A city may not, under the guise of the police power, take private property for public use without just compensation.
2. **Police Power: Constitutional Law: Eminent Domain.** For the nexus test to apply, thus making a compulsory dedication a constitutionally valid exercise of the police power, the nexus must be rational. This means it must be substantial, demonstrably clear, and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements, not for the purpose of "banking" the land for use in a projected but unscheduled possible future use.
3. **Municipal Corporations: Police Power: Eminent Domain.** A city may not, under the guise of the police power, require a property owner to dedicate private property for some future public purpose as a condition of obtaining a building permit without paying the property owner just compensation, when the requested dedicated property is to be placed in a land bank for future use by the city and such future use is not directly occasioned by the construction sought to be permitted.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Reversed and remanded.

Leonard P. Vyhnalek of McCarthy, McCarthy, & Vyhnalek, for appellants.

Kay & Satterfield, for appellees.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

This is an appeal from a judgment of the District Court for Lincoln County, Nebraska, finding the provisions of city ordinance No. 1962 of the City of North Platte, Lincoln County, Nebraska, valid and enforceable. Our examination of the record in this case and the law applicable thereto convinces us that the ordinance is in violation of the Nebraska Constitution and that, therefore, the judgment of the District Court must be reversed.

Presumably pursuant to the provisions of Neb. Rev. Stat. § 18-1721 (Reissue 1977), the City of North Platte adopted city ordinance No. 1962 which provided, in part, as follows:

> Section 1. In order to lessen congestion on the streets and to facilitate adequate provisions for community utilities and facilities such as transportation, no building or structure shall be erected or enlarged upon any lot in any zoning district, including the two mile zone, unless the half of the street adjacent to such lot has been dedicated to its comprehensive plan width.
>
> Section 2. That the maximum area of land required to be so dedicated shall not exceed twenty-five percent of the area of any such lot and the dedication shall not reduce such lot below a width of 50 feet or an area 5,000 square feet.

The ordinance further contains a section 3 which provides that applications for variances to the ordinance may be made and directed to the city clerk, who shall forward the same to the planning commission for recommendation to the city council. The variance, however, is not to be approved unless the North Platte city council, in passing on the application after recommendation from the planning commission, finds:

(a) Strict application of the Subdivision Or-

> dinance would produce undue hardship; (b) Such hardship is not shared generally by other properties in the same zoning district and the same vicinity; (c) The authorization of such variance will not be a substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance; (d) The granting of such variance is based upon reason of demonstrable and exceptional hardship as distinguished from variances for purposes of convenience, profit or caprice; and (e) The condition or situation of the property concerned or the intended use of the property is not of so general or reoccurring nature as to make reasonably practicable the formulation of a general amendment to the ordinance.

The plaintiffs, Thomas F. Simpson and Ruth I. Simpson, are the owners of a tract of land in North Platte, Lincoln County, Nebraska, more particularly located at the northeast quadrant of the intersection of South Jeffers Street where Leota Street "dead ends" into South Jeffers Street. The lot contains 36,900 square feet with a 205-foot front facing west on Jeffers Street and is 180 feet deep. The property in question is undeveloped.

In 1976, the Simpsons negotiated a lease with Colony Foods, Inc., for the purpose of constructing a fast-food restaurant known as "Hobo Joe's" on the real estate in question. Under the provisions of the lease, the Simpsons were to construct a building and provide suitable parking. The Simpsons made application to the City of North Platte for a building permit. The city planning department and engineering department refused to review the building plans and specifications on the ground that the 40-foot right-of-way for Leota Street had not been dedicated by the owners of the land. Because the Simp-

sons refused to deed the 40 feet to the City, it never issued a building permit. The Simpsons maintain that, by reason thereof, they lost their lease with Colony Foods, Inc.

The comprehensive plan of the City of North Platte contains a proposal to extend Leota Street east through the intersection of Jeffers Street along and through the south of the property owned by the Simpsons at Leota Parkway East, a major thoroughfare to connect from the western edge of U.S. Highway 83 to the new proposed U.S. Highway 83 bypass to Interstate 80. The evidence disclosed, however, that none of the real estate for Leota Parkway East has been acquired by the City nor is there any indication as to when, if ever, such real estate will be acquired by the City.

The City argues that the requirement of the ordinance adopted pursuant to statute is a reasonable exercise of the city's police power intended for the purpose of promoting the public health, safety, and welfare. In support of that position, the City cites a number of cases in which courts have generally held that a city may, as a condition of approving a subdivision, require the dedication of both internal streets and such external streets as are necessitated and required by reason of the development of the subdivision. While it is true that a city may, in the exercise of its proper police power in an appropriate situation, require the dedication of public areas, it is likewise true that a city may not, under the guise of the police power, take private property for public use without just compensation. In *City of Scottsbluff v. Winters Creek Canal Co.*, 155 Neb. 723, 733, 53 N.W.2d 543, 549 (1952), we cited 37 Am. Jur. *Municipal Corporations* § 286, which stated: "In the same way, property rights may not be arbitrarily interfered with or destroyed, or property taken without compensation, under the guise of municipal police regulations." Neb. Const. art. I, § 21, pro-

vides: "The property of no person shall be taken or damaged for public use without just compensation therefor." We must presume that the Constitution means exactly what it says. McQuillin, in his work on municipal corporations, clearly points out the distinction to be made between the proper exercise of the police power and the improper taking of private property, saying:

> In the exercise of the police power, public authority is empowered to require everyone so to use and enjoy his own property as not to interfere with the general welfare of the community in which he lives. To be valid, a restriction or prohibition imposed by government as to the use or enjoyment of property must be within the reason and principle of this individual duty, and if so the property owner must submit, without remedy, for any inconvenience or loss suffered by him. This is regulation, not a taking. Under the police power the public welfare is promoted by regulating and restricting the use and enjoyment of property by the owner, while under eminent domain, the public welfare is promoted by taking the property from the owner and appropriating to some particular use.

McQuillin, Municipal Corporations § 32.04 (3d. ed. 1977).

Likewise, in the case of *Commonwealth v. P. Coal Co.*, 232 Pa. 141, 149-50, 81 A. 148, 151 (1911), the court pointed out the distinction between eminent domain and the police power, saying:

> The police power is distinguished from the right of eminent domain in that the state, by exercising the latter right, takes private property for public use, thereby entitling the owner to compensation under the constitution, while the police power . . . is exerted . . . by regulating the use and enjoyment of

> property by the owner, or, if he is deprived of his property altogether, it is not taken for public use, but rather destroyed in order to conserve the safety, morals, health or general welfare of the public, and in neither case is the owner entitled to compensation, for the law either regards his loss as damnum absque injuria, or considers him sufficiently compensated by sharing in the general . . . benefits resulting from the exercise of the police power.

The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit. This is best pointed out in the case of *181 Incorporated v. The Salem Cty. Planning Bd.*, 133 N.J. Super. 350, 359, 336 A.2d 501, 506 (1975), wherein the New Jersey court said:

> In short, for the *nexus* test to apply, thus making a compulsory dedication constitutionally valid, the *nexus* must be *rational.* This means it must be substantial, demonstrably clear and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements—not for the purpose of "banking" the land for use in a projected but unscheduled possible future use.

(Emphasis in original). See, also, *Harris v. Salem*

*County Planning Bd.*, 123 N.J. Super. 304, 302 A.2d 552 (1973).

The rationale of the *181 Incorporated* case seems most appropriate herein. The evidence introduced at the time of trial established that, although the comprehensive plan indicated a proposed extension of Leota Street east of the intersection of existing Leota Street and Jeffers Street, no project was immediately contemplated whereby the street would be constructed nor is there any evidence regarding what the particular project would involve. Furthermore, there is no evidence to indicate that the construction of the project sought by Simpson would create such additional traffic as to require going forward with the proposed street project. As the evidence indicates, no other adjacent property owner would be required to dedicate any land for a public street unless a building permit is sought, nor would any other land now be acquired for a public street in the area. It is difficult, if not impossible, to see how this is anything more than a "land banking" operation which is clearly in violation of Neb. Const. art. I, § 21.

While it may be true that the comprehensive plan contemplates such development in the future, we have already declared that a comprehensive plan is nothing more than a guideline and is not binding. See *Copple v. City of Lincoln*, 202 Neb. 152, 274 N.W.2d 520 (1979). The defect with the ordinance may, perhaps, best be appreciated when one considers that, under this ordinance, if the Simpsons were simply asking for a building permit in order to add one more foot to the kitchen of his home located on property in North Platte, he would be required to dedicate 40 feet of his land for street purposes without compensation. In addition, when the balance of the street was acquired, if ever, by eminent domain, the Simpsons would likewise be required to pay taxes to provide the City of North Platte with suf-

ficient funds with which to pay damages to his neighbors. We fail to see how the holding of any of the cases authorizing a city to require dedication of public right-of-way caused by the development of a subdivision can be extended constitutionally to permit the action taken by the City of North Platte under the ordinance.

The fact that one may apply for a variance does nothing to cure the constitutional defect. In the first instance, the language of section 3 of the ordinance makes it clear that a variance may not be given except under the most severe and unusual circumstances, not found present in the instant case and not likely to be found in very many cases. The City argues that the Simpsons should not be heard until he has at least asked for the variance. We have, however, on numerous occasions held that one may not, on the one hand, seek the benefits of an ordinance or statute and, if unsuccessful, then seek to have it declared unconstitutional. *Alumni Control Board v. City of Lincoln,* 179 Neb. 194, 137 N.W.2d 800 (1965); *American Motors Sales Corp. v. Perkins,* 198 Neb. 97, 251 N.W.2d 727 (1977). The Simpsons were correct in refusing to seek a variance and, instead, testing the constitutionality of the ordinance.

The City likewise maintains that the ordinance was adopted pursuant to state statute, particularly § 18-1721. While the statute in question is not now before us, we see little reason why the rules announced today applicable to the ordinance would not likewise be applicable to the statute and would not likewise result in it being declared in violation of Neb. Const. art. I, § 21. There may be circumstances and instances where a city, in the exercise of the protection of the public welfare and in the exercise of its police power, may make reasonable requests upon property owners in connection with the development of their property. Those matters, however, are not before us today and we simply address ourselves to

the single issue presented. A city may not, under the guise of the police power, require a property owner to dedicate private property for some future public purpose as a condition of obtaining a building permit without paying the property owner just compensation, when the requested dedicated property is to be placed in a land bank for future use by the city and such future use is not directly occasioned by the construction sought to be permitted. As so presented in this case, we find that it does not pass constitutional muster and, therefore, must be declared invalid. Accordingly, we reverse the judgment of the District Court and remand the case for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

CLINTON, J., not voting.

BOSLAUGH, J., participating on briefs.

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STATE OF NEBRASKA, APPELLEE, V. DEAN L. BEAM, APPELLANT.

292 N. W. 2d 302

Filed May 13, 1980. No. 42822.

**Hearsay.** Where the declarant is unavailable as a witness, a hearsay statement not specifically covered by any statutory exception to the hearsay rule, but having equivalent circumstantial guarantees of trustworthiness, may be admissible under the provisions of Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1975).

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Thomas M. Kenney and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, Mel Kammerlohr, and Marcia A. Johnson, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN,

BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

McCOWN, J.

The defendant was found guilty by a jury on a charge of second degree murder and sentenced to 15 years imprisonment.

At about 9:10 p.m. on January 15, 1979, the 911 emergency communication division in Omaha received a telephone call. The caller stated in part: "I shot my wife . . . 3817 Monroe . . . get here fast . . . my wife is dying." Two uniformed police officers were first to respond to the call. They arrived at 3817 Monroe Street at 9:13 p.m. They knocked on the door. The defendant refused to let them in. A few moments later the rescue squad personnel arrived. While they were talking with the police officers the defendant opened the door and said: "You guys are too late. I have already shot my wife. You can't help me and you can't help her because she is already dead." The officers pushed the blood-spattered defendant aside and entered the residence, followed by the rescue personnel. The body of the defendant's wife was lying on the kitchen floor with a .22 caliber revolver on the floor beside the body. There were six empty cartridge casings in the cylinder of the gun. There were five bullet holes in the floor in the area near the body and two bullet slug fragments, later identified as being fired from the revolver, were found on the basement floor. While the officers and rescue personnel were in the kitchen the defendant repeatedly stated: "Oh, why did I do it?"

A later autopsy established that the cause of death was a bullet wound in the top of the head. The bullet passed straight down through the brain and lodged at the base of the skull. There were no powder burns or smoke marks around the wound.

A weapons expert examined and test fired the re-

volver. It was a single-action weapon and the hammer had to be fully cocked before the weapon could be fired. It test fired normally, did not fire accidentally, and left either smoke rings or powder rings when fired from a distance of less than 2 feet. In testing, the only way the weapons technician could make the gun discharge without pulling the trigger was to strike it very hard with a brass hammer on the hammer of the gun when it was at rest on the firing pin.

A retired gunsmith and ballistics engineer who testified for the defendant later examined the weapon. He testified that the gun was in a defective condition, was nearly impossible to fire intentionally, and fired accidentally more often than purposely. He had also performed an experiment in which an assistant attempted to pull the gun away from him and the weapon accidentally fired each time that was attempted.

The defendant's testimony was that during the day he had noticed that the revolver was missing from a locked gun case and had requested his wife to get the weapon. She brought it to the kitchen and handed it to him. He testified that he was arguing with her while he was standing near the kitchen table with the revolver in his hand and his wife was seated at the table. His wife reached up, jerked the gun, and caused it to discharge into her head. He recalled only one shot being fired but conceded that he did not remember the events too well because he had had a great deal to drink.

The defendant filed a motion in limine prior to trial to exclude anticipated hearsay evidence of several State's witnesses as to statements made to them by the decedent on various occasions prior to January 15, 1979. At a pretrial hearing, the motion in limine was granted with respect to several witnesses but denied with respect to certain testimony of Sally Rau, Melvin Barnes, and Ellen Primeau.

These three witnesses testified at trial over defendant's objections.

Sally Rau, an attorney, testified that the decedent had had an appointment with her at her office on December 13, 1978. The attorney observed at that time that the defendant's wife was bruised and marked on both of her arms and she took a photograph showing those bruises, which was received in evidence. Defendant's wife told her that the bruises were caused by a beating she had received from her husband the night before. She also told the attorney that she wanted to file for divorce and that she wanted to obtain a restraining order against the defendant, and that there were several weapons at the residence. The attorney obtained the necessary information from the defendant's wife to prepare the petition for divorce and the restraining order and told her to call later if she desired to proceed with a divorce. The attorney was gone for a time during the holidays, and the defendant's wife did not contact her again. The attorney contacted the police when she learned the defendant's wife had been killed. The defendant testified that he remembered arguing with his wife and grabbing her arms and shaking her on December 13, 1978, which might have caused the bruises which the attorney had seen.

Melvin Barnes, a deputy sheriff, testified that at about 1:30 a.m. on January 13, 1979, while he was on duty, he went to investigate a truck parked in a church parking lot behind the church. He found the defendant's wife alone in the truck. She had been crying. In response to his questions, she told him she and her husband had had a fight and he had beaten her up. She also told him that she had no money but only a checkbook. The deputy then took her to a motel and arranged for her to get a room. The motel registration and check receipt were introduced in evidence. The defendant later testified that he had had an argument with his wife on Janu-

ary 12, 1979, when his wife had left home until the following day, but he testified that there had been no violence in connection with that argument.

Ellen Primeau, a coworker with and friend of the defendant's wife, testified that, within a 2-week period before her death, the defendant's wife told her that she had consulted an attorney and intended to obtain a divorce from her husband.

The jury found the defendant guilty of second degree murder. The District Court for Douglas County, Nebraska, sentenced him to 15 years imprisonment and this appeal followed.

The defendant's assignments of error all center on the contention that the admission of the hearsay testimony of Sally Rau, Melvin Barnes, and Ellen Primeau violated the hearsay rule and its exceptions as set out in the Nebraska statutes, and constituted prejudicial error.

Neb. Rev. Stat. § 27-802 (Reissue 1975) provides: "Hearsay is not admissible except as provided by these rules or by other rules adopted by the statutes of the State of Nebraska." The testimony of the three witnesses as to the statements made to them by the decedent was hearsay and is, therefore, inadmissible unless it comes within an exception to the hearsay rules.

Neb. Rev. Stat. § 27-804(2) (Reissue 1975) provides, in part:

> Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . .
>
> (e) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact, (ii) the statement is more

> probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Neb. Rev. Stat. § 27-403 (Reissue 1975) provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Neb. Rev. Stat. § 27-803(22) (Reissue 1975), identical to § 27-804(2)(e), applies to statements which are not excluded by the hearsay rule even though the declarant is available as a witness. Where the declarant is dead, as in the present case, the specific exceptions of both statutes are applicable in determining "equivalent circumstantial guarantees of trustworthiness."

At this point, it should be noted that the statutory procedural requirements dealing with advance notice and an opportunity to be heard were complied with in this case. The only issue here is the admissibility of the statements.

The death of the declarant established the necessity for the introduction of the hearsay statements and the record establishes that the statements were offered as evidence of a material fact and that they were more probative on the point for which they

were offered than any other evidence the State could procure through reasonable efforts.

The critical issue here is whether the circumstances surrounding the making of the hearsay statements by the decedent provided guarantees of trustworthiness comparable to the other specific exceptions set out in §§ 27-803 and 804. One of the primary reasons for the existence of the specific exceptions to the hearsay rule is that the statements were made "[w]here the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed . . . ." 5 Wigmore on Evidence § 1422 (Chadbourn Rev. 1974).

In this case, the statements of the decedent to the attorney were made in the course of a professional consultation for purposes of legal advice and possible litigation. Under such circumstances, it is reasonable to assume that an accurate statement of facts would normally be given. The statements here were further corroborated by other evidence, including the photograph of the bruises. There was no apparent reason to falsify any statement and ample reasons for accuracy and truthfulness. The attorney who testified as to the statements made by decedent was acting in the course of professional employment, was unacquainted with the declarant previously, was a disinterested witness, and can be assumed to have reliably reported the statements made. The evidence of all the surrounding circumstances tends to corroborate the veracity of the declarant's statements and to indicate the absence of incentives to speak falsely.

The statements of the decedent to the deputy sheriff also involved other corroborating evidence and circumstances. The deputy sheriff was in the course of performance of his official duties, a disinterested witness, and not acquainted with the decedent at the time he found her in the truck in a church

parking lot in the middle of the night. She had been crying. She was upset and emotionally disturbed. It is contended that her statements were admissible under the exception for excited utterances even though there is no direct evidence as to the time between the occurrence of the event and the making of the statements. In addition to the fact that she was emotionally disturbed and excited, the evidence established that the declarant was a married woman who resided in the neighborhood with her husband and that she was afraid to return to her residence. The veracity of her statements was also corroborated by evidence that she spent the night in the motel, as shown by the receipt and registration. The statements made to the deputy sheriff were made only 2 days before her death, and the deputy sheriff, as a law enforcement officer, can be assumed to have accurately reported the statements and circumstances. Again, the evidence tends to corroborate the veracity of the declarant's statements and the absence of incentives to speak falsely.

Corroborative circumstantial evidence has been recognized as significant by other courts. See, *United States v. West,* 574 F.2d 1131 (4th Cir. 1978); *United States v. Garner,* F.2d 1141 (4th Cir. 1978), *cert. denied,* 439 U.S. 936 (1978). Weinstein has interpreted those cases to mean that "when hearsay seems to the court highly probative and is corroborated in part, it becomes admissible, and is by the same token immune to confrontation clause challenge." 4 Weinstein's Evidence, United States Rules, 804-129 (1979). If the right to confront and cross-examine the hearsay declarant were necessary in every case, it is obvious that no statement of any deceased declarant would ever be admissible over objection.

We believe the statements of the decedent made to her attorney and the statements made to the deputy sheriff, under the circumstances outlined by the evi-

dence here, had substantial guarantees of trustworthiness equivalent to the guarantees of trustworthiness of some of the other specific hearsay exceptions. The trial court has broad powers of discretion in weighing and balancing the probative value of such evidence and the possible prejudice, and the statements were admissible under the provisions of § 27-804(2)(e).

With respect to the statement of the decedent to Ellen Primeau that she had consulted an attorney and intended to obtain a divorce, there is no evidence which would take that statement out of the ordinary hearsay rule. There is no evidence as to the circumstances under which the statement was made nor is there any corroborative evidence of any kind. There is no evidentiary guarantee of trustworthiness equivalent to any other specific exceptions to the hearsay rule. The statement was hearsay and was not admissible under any of the exceptions to the hearsay rule. Nevertheless, the evidence was merely cumulative and its admission into evidence was not prejudicial.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, J., concurs in result.

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MARGARET OLSON, ADMINISTRATRIX OF THE ESTATE OF EVERETT OLSON, DECEASED, AND MARGARET OLSON, INDIVIDUALLY, APPELLANTS, V. RICHARD N. ENGLAND, APPELLEE.

292 N. W. 2d 48

Filed May 13, 1980. No. 42855.

1. **Foreign Judgments: Service of Process: Collateral Attack.** In an action on a foreign judgment, rendered in proceedings in which there was no service of process on the defendant and no waiver of such service, the defendant may show as a complete defense that

the attorney who entered an appearance for him had no authority to do so.

2. **Jurisdiction.** If a judgment appears on its face to have been entered by a court of general jurisdiction, such jurisdiction over the subject matter and the parties will be presumed, unless disproved by extrinsic evidence or the record itself.
3. **Stipulations: Pretrial Conferences.** Issues stipulated to at a pretrial conference constitute the issues upon which the case is to be tried.
4. **Pretrial Conferences.** The subsequent course of an action is controlled by the agreements made at pretrial conference so long as they remain unmodified.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Lawrence W. Rice, Robert M. Harris, and Randall L. Lippstreu, for appellants.

Robert M. Brenner, for appellee.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and WARREN and FUHRMAN, District Judges.

WARREN, District Judge.

The plaintiffs, Everett Olson and Margaret Olson, brought this action against the defendant, Richard N. England, to register a Colorado judgment in the District Court for Scotts Bluff County, Nebraska. The defendant attacked the jurisdiction of the Colorado court. After trial, the Nebraska court refused to register the judgment and dismissed plaintiffs' petition. Thereafter, on June 14, 1978, Everett Olson died and the action was revived in the name of his administratrix, Margaret Olson. Plaintiffs appeal from an order overruling two separate motions for new trial. We affirm.

The issue on appeal is whether evidence was admissible in the Nebraska court to show that a general appearance in the Colorado court purporting to have been made by an attorney for the defendant was, in fact, made by an attorney who was neither employed by defendant nor authorized to act for him.

On November 29, 1974, the plaintiffs filed suit against the defendant on two promissory notes in the District Court for Grand County, Colorado. The return of the summons by a deputy sheriff recited service on "Mrs. Richard N. England" at "place of residence within Fraser, Colorado" on November 22, 1974. One Jonathan T. Belknap, designating himself as "Attorney for Defendant," filed an answer containing a general denial and two affirmative defenses. Belknap later filed a pretrial statement and, on June 17, 1975, Belknap appeared before the Colorado court, participated in a pretrial conference and approved the pretrial order as to form by signing the same as "Attorney for Defendant." At trial on October 14, 1975, neither defendant nor his attorney appeared. The Colorado court found it had jurisdiction over the defendant and entered judgment against defendant for $8,852.87 which included interest, court costs, and an attorney's fee of $1,075.46.

On October 20, 1977, plaintiffs petitioned the District Court for Scotts Bluff County to register the Colorado judgment. Defendant answered generally denying and alleging as affirmative defenses: (1) That the Colorado court "failed to have jurisdiction over the Defendant and the subject matter of the action;" and (2) That the note referred to in the Colorado judgment was "outlawed by the statute of limitations . . . ." Plaintiffs filed a reply denying the affirmative defenses. A pretrial conference was held on April 7, 1978, following which the District Court entered an order reciting:

> After discussion of the issues, it was determined that the issues to be tried in the trial of the case are:
>
> 1. Whether the District Court in and for the County of Grand and State of Colorado had jurisdiction over the person of the Defendant and the subject matter of the action in rendering judgment on October 14, 1975.

. . .

Exhibits were identified, consisting of the Colorado judgment and Colorado pleadings, including the return of service. Plaintiffs listed themselves as possible witnesses. Defendant listed as his witnesses Mary England, Jonathan T. Belknap, and himself. A jury was waived and the case was set for trial to the court. The pretrial order specifically provided that the parties were "bound by the statements made, orders made and arguments made in this Pre-Trial Order," and "that this Pre-Trial Order shall govern the future conduct of the case . . . ."

At the trial, the testimony of the defendant, his wife, and daughter established that the defendant had separated from his wife in August 1974, due to marital problems; that he left Colorado to find work and was employed and residing in Vernal, Utah, on November 22, 1974, when the summons was "served" in Colorado. The service was further impeached by the uncontradicted testimony that the deputy sheriff left the summons with Mrs. England's 13-year-old daughter, Cynthia Marie England, at a time when Mrs. England was not at home.

The plaintiffs have conceded during oral argument that the purported Colorado service on the defendant was defective. The personal jurisdiction of the Colorado court must, therefore, rest upon the appearances in that court by Jonathan T. Belknap.

The defendant's wife, Mary England, testified to the continuous separation of the parties from August 1974 until they reconciled in January 1976; that defendant never returned to Colorado; and that she was the sole support of herself and her family during the period of separation. She never told defendant of the suit, but took the "papers" to Belknap, the only attorney in Fraser, Colorado, and told him to "do something with them." She never talked to Belknap again and didn't know what he did. Defendant testified that he knew nothing of the suit or

the trial and never employed Belknap nor authorized him to represent him. Plaintiffs called no witnesses to contradict the testimony of the Englands.

The trial court specifically found that the service of process was defective and that the appearance by the attorney in the case in Colorado was not authorized by the defendant.

The principal contention of plaintiffs is that the District Court erred in receiving evidence showing that Belknap's appearance was unauthorized.

There can be no doubt as to the general principle that a judgment of a foreign state can be collaterally attacked by evidence that the court was without jurisdiction.

"Where a judgment appears from the record to be valid, extrinsic evidence is admissible in a collateral attack upon the judgment to show that it is void." Restatement of Judgments § 12.

> A judgment rendered in one State is subject to collateral attack in another State on the ground that the State in which the judgment was rendered had no jurisdiction over the defendant or over the subject matter, even though it appears in the judgment record that the court had jurisdiction and extrinsic evidence is necessary to establish its invalidity. . . . So also, it may be shown that an appearance in the action purporting to be entered by an attorney for the defendant was in fact made by an attorney who was not employed by the defendant or authorized to act for him.

*Id.*, Comment c.

> In an action on a foreign judgment, rendered in proceedings in which there was no service of process on the defendant, and no waiver of such service, the defendant may show, as a complete defense that the attorney who entered an appearance for him in

such proceedings had no authority to do so. *National Exch. Bank v. Wiley,* 3 Neb. (Unoff.) 716, 92 N.W. 582 (1902), syllabus of the court, aff'd, 195 U.S. 257 (1902).

"[W]hen a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is open to inquiry. The party attacking the validity of the judgment has the burden of establishing its invalidity." *Repp v. Repp,* 156 Neb. 45, 52, 54 N.W.2d 238, 242 (1952).

Plaintiffs argue that the defendant's allegation that the Colorado court failed to have jurisdiction over the defendant was a mere conclusion of law and did not raise a justiciable issue upon which the court could receive evidence. Plaintiffs maintain that they had no warning by a fact pleading that defendant intended to rely on proof that the Belknap appearance was unauthorized. They contend that they might have produced evidence at the Nebraska trial to contradict that of the defendant and thus prove Belknap was authorized to appear for defendant in the Colorado court. Plaintiffs cite *Midland-Ross Corp. v. Swartz,* 185 Neb. 484, 486, 176 N.W.2d 735, 736-37 (1970), in which this court said:

> The right to introduce evidence depends upon there being an issue of fact as to which it is relevant. The issues are made by the pleadings; and unless there is an issue of fact before the court, there is no right to introduce evidence to prove or disprove the fact.

The difficulty with plaintiffs' position is that defendant did raise the affirmative defense of lack of jurisdiction over his person when he filed his answer. While the affirmative defense as pleaded was conclusionary in form, plaintiffs made no attempt to require a more specific allegation by either a motion to make more definite and certain or by a demurrer to the affirmative defense as pleaded. Instead, plaintiffs filed a reply in the form of a general denial.

One year later, plaintiffs fully participated in a pretrial conference at which the specific issues were discussed and then summarized in the pretrial order, which defined and limited the *sole issues* to be tried as, whether the Colorado court had jurisdiction over the person of the defendant, and whether the Colorado court had jurisdiction over the subject matter of the action.

Pretrial conferences are sanctioned by this court. See *Pre-Trial Procedure: Formulating Issues,* Neb. Ct. R. V (Rev. 1977). Our rule requires the court to make a record of the proceeding, which recites the action taken at the conference, the amendments allowed to pleadings, and the amendments made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. Frequently, the pretrial conference is informal and a verbatim record may not be made of the discussions between the court and counsel. The pretrial order, while summary in form, is binding upon the parties.

The pretrial order in this case does not specifically mention the precise grounds on which the defendant would attack the in personam jurisdiction of the Colorado court, but the exhibits identified at the pretrial conference included the return to the summons, which showed defective service on its face. Jonathan T. Belknap was listed by the defendant as a witness. It is fair to infer that this left defendant with one apparent basis to attack personal jurisdiction: Belknap's lack of authority. We are convinced of the soundness of this inference by the fact that the trial judge, in his judgment and order, stated that "the pleadings and issues discussed in the pre-trial order clearly raised the issue and the only evidence Plaintiff presented was that authority existed with its cognovit provision." Defendant's counsel, who participated in the pretrial conference, states unequivocally in his appellate brief: "The sub-issues

of the jurisdictional issue (the validity of service and the authority of counsel) were discussed at the pretrial conference, and the Pretrial Order combined them into one issue concerning jurisdiction . . . ." The accuracy of this statement was not denied by plaintiffs' counsel, either by brief or by way of oral argument. Plaintiffs made no claim of surprise at the trial when the evidence was offered relative to Belknap's authority, but instead objected to its competency and materiality on the ground the Colorado judgment was a final judgment no longer subject to appeal. Plaintiffs made no request for a continuance.

Issues stipulated to at a pretrial conference constitute the issues upon which the case is to be tried. In *Kresha Constr. Co., Inc. v. Kresha,* 184 Neb. 188, 166 N.W.2d 589 (1969), the defendant moved at the close of all the evidence for a directed verdict, arguing that the plaintiff had failed in its petition to allege substantial performance. The trial judge overruled the motion stating that, while the pretrial order did not include it, defendants at the pretrial conference had admitted "that the house was completed substantially and had been moved into," *Id.* at 192, 166 N.W.2d at 592, and the court understood the issues to be tried related to extras and unworkmanlike performance. This court found that ruling to be correct.

"The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial. . . . The subsequent course of an action is controlled by the agreements made at pretrial conference so long as they remain unmodified." *Long v. Magnolia Petroleum Co.,* 166 Neb. 410, 418, 89 N.W.2d 245, 251 (1958). See, also, *Western Pipe and Supply, Inc. v. Heart Mountain Oil Co., Inc.,* 179 Neb. 858, 140 N.W.2d 813 (1966).

Under the circumstances present in this case, we

hold that the trial court was correct in receiving evidence relating to the authority of Jonathan T. Belknap to appear for defendant in the Colorado court.

Plaintiffs' remaining contention is that, even if the evidence on lack of authority was properly admitted, the evidence was insufficient to sustain the judgment of the trial court.

"If such judgment on its face appears to be one entered by a court of general jurisdiction, such jurisdiction over the subject matter and the parties will be presumed, unless disproved by extrinsic evidence or by the record itself." *Repp v. Repp, supra* at 52, 54 N.W.2d at 242.

> The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong. . . .
>
> In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

*Aurora Cooperative Elevator Co. v. Larson,* 204 Neb. 755, 758, 285 N.W.2d 498, 500 (1979).

The plaintiffs relied entirely upon the records of the Colorado court. Defendant had the burden of establishing invalidity of the judgment. Here, there is evidence to support the findings of fact, and the judgment of the trial court was not clearly wrong.

AFFIRMED.

EUGENE A. ENGEL AND MARJORIE L. ENGEL, HUSBAND AND WIFE, APPELLANTS, V. RHEN MARSHALL, INC., A NEBRASKA CORPORATION, APPELLEE.

292 N. W. 2d 307

Filed May 13, 1980. No. 42858.

1. **Equity: Appeal and Error.** It is the duty of this court on appeal of an action in equity to try the issues de novo and to reach an independent conclusion without being influenced by the findings of the trial court except to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief on the matters at issue in the case.
2. **Prescriptive Easements.** In order for an easement by prescription to exist, the claimant's use and enjoyment must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement and all requirements must be met for the full prescriptive period of 10 years.
3. **Prescriptive Easements: Acquiescence: Words and Phrases.** Acquiescence on the part of the owner of the servient tenement which is necessary to acquisition of a prescriptive easement means passive assent or submission, quiescence, consent by silence.
4. **Prescriptive Easements.** A prescriptive right is not looked on with favor by the law and it is essential that all of the elements of use and enjoyment necessary to give title to real estate concur in order to create an easement by prescription.
5. **Petitions: Amended Pleadings.** Amendments may be allowed, in the exercise of proper discretion by the court, even after the evidence is closed.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed in part, and in part reversed and remanded with directions.

Christensen Law Offices, P. C., for appellants.

Hubka, Kraviec & Thompson, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, WHITE, and HASTINGS, JJ., and CAPORALE, District Judge.

HASTINGS, J.

Plaintiffs filed this action on August 15, 1978, to enjoin the defendant from continuing to allow the dis-

charge or overflow of water and sewage effluent from defendant's sewage lagoon onto the plaintiffs' land. The defendant's theory of the case was that it had acquired a prescriptive easement over the plaintiffs' land. The trial court agreed with the defendant and, on that basis, denied the request for injunctive relief. Plaintiffs have appealed and their assignments of error generally attack the finding of a prescriptive easement. Additionally, plaintiffs complain that the trial court denied their motion to file an amended petition alleging a second cause of action covering their alleged money damages, made after the parties had rested and the case was submitted. We reverse as to the injunctive relief but affirm as to the amended petition.

It is the duty of this court on appeal of an action in equity to try the issues de novo and to reach an independent conclusion without being influenced by the findings of the trial court except to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief on the matters at issue in the case. *Keim v. Downing,* 157 Neb. 481, 59 N.W.2d 602 (1953). In order to acquire an easement by prescription, the use and enjoyment by the one making such claim must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, all continuing for the full prescriptive period of 10 years. *Jurgensen v. Ainscow,* 155 Neb. 701, 53 N.W.2d 196 (1952).

The plaintiffs, more particularly Marjorie L. Engel, are and, since the 19th day of May 1966, have been the owners of the southwest quarter of Section 3, Township 4 North, Range 6 East of the 6th P. M., Gage County, Nebraska, except the east 600 feet of the west 660 feet of the north 600 feet thereof, which

has been owned by the defendant since April 26, 1965. The west 60 feet is apparently used for public highway purposes. Both conveyances came from a common grantor, Mrs. Engel's father. The plaintiffs make their home on and farm their land; the defendant operates a truck stop and cafe on its premises. The defendant's property is located on the high portion of the quarter section and the natural drainage runs from there diagonally to the southeast across plaintiffs' property.

According to the testimony of Mr. Engel, he was aware of the purchase of the land by the defendant, its use as a truck stop, and the construction of the sewage lagoon. He was aware of overflow and runoff from the lagoon, but it was not all that noticeable nor did it become a problem until about 1974 or 1975. It was not until then that there was ever any running water in the natural drainway other than after a rain. At the time Mr. Engel first noticed a change in the water situation on his property, he discovered that his land along the drainway was always wet with a green colored water which looked like sewage. This was beginning to interfere with the cultivation and productivity of his land. He walked up the drainway and found that the water was coming out of the sewage lagoon. He discovered a drawdown pipe in the lagoon with the cap removed and laying on the ground which was the source of the overflow. He notified Rhen Marshall, defendant's president, who told him that he was having a problem with the lagoon and he would correct it. According to Mr. Engel, the problem was corrected right away. However, as Mr. Engel stated, the flow of water would stop for a short time and then commence again. Each time he would call this to the defendant's attention and again it would be corrected at once. He thought he had complained to the Marshalls 20 or 30 times during the last 4 or 5 years, always with the same result. The last time Mr. Engel

approached the defendant about the overflow problem was during the year 1978, at which time, for the first time, Mr. Marshall told him he didn't think he was required to stop the flow. On cross-examination, Mr. Engel acknowledged that there could have been some water in the drainageway prior to 1974. "It would come at times, but then I - I wasn't looking for any problem. We'd always gotten along real well with Mr. Marshall earlier and that was no reason to suspect anything was wrong." Again, "Whenever I complained earlier he would always said [sic] he'd correct the problem and he always correct [sic] it, yes."

The defendant's version of the problem, expressed through the testimony of Rhen Marshall, didn't vary from that of the plaintiffs in most respects. He did say that the lagoon was constructed in 1965 according to plans approved by the State of Nebraska and was designed so as to overflow from time to time. He claimed that it overflowed on a continuous basis for the first 5 or 6 years, after which he installed a pipe and plug which would stop the overflow so that Mr. Engel could plow a little better. He denied that he did this at Mr. Engel's request, but rather " 'cause he's a neighbor." However, he did admit that he had inserted the plug from time to time after having been asked by Mr. Engel: "Oh, occasionally if I'd miss it, he's come tell me." On cross-examination, Mr. Marshall was asked, "Now . . . during the last four or five years . . . Mr. Engel has repeatedly come over and asked you to stop running water . . . onto his land . . .?" to which he replied "Yes." The defendant's president also admitted that, after this particular action was filed, he quit complying with the plaintiffs' requests.

As we have previously pointed out, Mr. Engel admitted that it was 4 or 5 years previous to May 1979 that he noticed water continuously draining onto his premises. He agreed that there might have been

times before 1974 when there would be occasional water, but he quite apparently had no knowledge then of any use by the defendant that was causing him any serious problems. Knowledge of a condition, it would seem, is necessary before it can be said that one had acquiesced in its continuation. "Acquiescence on the part of the owner which is necessary to acquisition of a prescriptive easement means passive assent or submission, quiescence, consent by silence." *Jurgensen v. Ainscow,* at 709-10, 53 N.W.2d at 201.

With the apparent exceptions beginning immediately after this lawsuit was filed in 1978, on every occasion, 20 or 30 times in number, whenever the plaintiffs asked the defendant to discontinue running overflow water on their land, the defendant complied with these requests. Such compliance on the part of the defendant was consistent with a permissive use by it of the drainway across plaintiffs' property and wholly inconsistent with any recognition on the part of the plaintiffs of any authority in the defendant to demand the same as a matter of right. The mere fact that the plaintiffs "asked" the defendant to quit running overflow water on their premises only on the occasions when the damage was real and obvious, and tolerated such action on other occasions in the spirit of neighborliness, should not now permit the defendant to claim that its use of the drainageway was at all times hostile and adverse. There is nothing in the law which requires one to act in a beastly manner towards a trespasser in insisting upon one's lawful rights. It seems apparent to us that each time the defendant complied with the plaintiffs' request and discontinued the flowage of water onto the latter's property, this interrupted the otherwise continuous nature of defendant's use.

"A prescriptive right is not looked on with favor by the law and it is essential that all the elements of use and enjoyment necessary to give title to real es-

tate concur in order to create an easement by prescription." *Kuhlmann v. Platte Valley Irr. Dist.*, 166 Neb. 493, 512, 89 N.W.2d 768, 780 (1958). The burden which the defendant had to establish the elements of adverseness, continuousness, hostility, and acquiescence has not been met. We arrive at this conclusion after a de novo review of the record, bearing in mind that the trial judge viewed the premises, but also recognizing that what he could see established only the present condition of the premises and in no way could have been useful in determining the existence of the previously mentioned elements of adverse possession.

As to the issue regarding amendment of the plaintiffs' petition, the case cited in their brief fully answers that question. "[A]mendments may be allowed after the evidence is closed." *Swan v. Bowker*, 135 Neb. 405, 412, 281 N.W. 891, 895 (1938). No evidence of dollar values was offered by the plaintiffs in support of the figures contained in the proffered amended petition. Therefore, no opportunity was ever afforded to the defendant to refute the same at that stage of the proceedings. The trial court did not abuse its discretion in denying the request, and its action in that regard is affirmed.

The judgment is reversed and the cause remanded, with directions to issue a permanent injunction in favor of the plaintiffs.

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

STEVEN L. MORFORD AND MORFORD MASONRY, INC., A NEBRASKA CORPORATION, AND MERLE NICOLA, TRUSTEE, APPELLANTS, V. THE CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

292 N. W. 2d 778

Filed May 20, 1980. No. 42618.

1. **Bankruptcy: Courts: Jurisdiction.** Congress did not give bankruptcy courts exclusive jurisdiction over all controversies which in some way affect the debtor's estate.
2. **Bankruptcy: Police Power: Injunction.** Suits for injunctive relief seeking to restrain a governmental unit from enforcing police or regulatory powers are not automatically stayed upon the filing of a bankruptcy petition.
3. _____: _____: _____. It is within the sound discretion of the trial court to determine whether or not a stay of proceedings should be granted upon the filing of a petition in bankruptcy in matters involving the enforcement of police or regulatory powers.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed as modified.

Ronald L. Brown, Brown Law Offices, for appellants.

Herbert M. Fitle, City Attorney, Allen L. Morrow, and Timothy M. Kenny, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, and HASTINGS, JJ., and REAGAN and NORTON, District Judges.

NORTON, District Judge.

This is an appeal from an order of the District Court for Douglas County, Nebraska, dissolving a temporary restraining order and dismissing the action. The judgment of the District Court is affirmed as modified.

The facts are not complicated. On or about June 2, 1978, the City of Omaha, Nebraska, in a separate action, filed a criminal complaint in the municipal court of that city, charging that Steven L. Morford had violated certain ordinances dealing with the use

and occupancy of real property located at 4132 North 79th Street, Omaha. It is apparent from all the facts read together that the charge grew out of a business or industrial use of property located within a residential area. Steven L. Morford was arrested on this complaint and arraignment was fixed for June 30, 1978.

Thereafter, on June 27, 1978, Steven L. Morford and Morford Masonry, Inc., plaintiffs, filed this action in the District Court for Douglas County, Nebraska. In their petition, the plaintiffs alleged, in substance, that Morford Masonry, Inc., was the owner of the hereinbefore noted real property; that this real property had been used continually for those purposes allowed in "Industrial 1" zones by the plaintiff corporation and its predecessors in title since 1934; that the property was not annexed by the City of Omaha until July 24, 1963; that in September 1970, the City acknowledged the right to first industrial uses of this real property based on "grandfather rights" through a notice published and filed with the register of deeds of Douglas County, Nebraska; that the City had notified the plaintiff corporation of its intent to enforce the use and occupancy ordinances with respect to this real property; and that the plaintiffs had no adequate remedy at law and unless relief be granted, they would suffer irreparable injury. The prayer of the petition was for an order temporarily restraining the City from proceeding with criminal prosecution during the pendency of this injunction action; a decree declaring that the property described enjoyed all uses set forth in Industrial 1 zoning under the city code; and for an order permanently enjoining the City from denying the nonconforming use and from interfering therewith. On the same day, a temporary restraining order was issued by the District Court enjoining and restraining the City in this matter.

On July 31, 1978, the City filed its answer in the

form of a general denial, praying for a dismissal of plaintiffs' petition. Several tentative trial dates were fixed by the trial court and continued upon motion of the plaintiffs. On December 19, 1978, plaintiff Morford Masonry, Inc., filed with the District Court a suggestion in bankruptcy. On December 20, 1978, the parties appeared and the District Court ordered trial of the matter to proceed. The plaintiffs, having raised the issue of the pending bankruptcy proceedings, refused to produce any evidence, and the defendant thereupon moved for a dismissal and dissolution of the temporary restraining order, which was sustained. Plaintiffs thereafter filed a motion for new trial, which was overruled, and this appeal resulted. Appellant Nicola, the trustee in bankruptcy, was appointed January 2, 1979, and appeared as a plaintiff in the motion for new trial, but did not request any relief.

At the outset, we note that there is no issue raised on appeal as to the dismissal against the plaintiff Steven L. Morford, and the judgment of the District Court is affirmed in that regard.

The issue presented by the appeal of Morford Masonry, Inc., is whether or not the commencement of bankruptcy proceedings by that corporation subsequent to commencement of this action but prior to trial, entitled it to an automatic stay of this action to permit the trustee in bankruptcy the opportunity to elect whether or not to petition to intervene.

At the time of Morford Masonry's bankruptcy petition, the old bankruptcy code, 11 U.S.C. §§ 1-1103 (1976), was in effect. The section of that code on which the plaintiffs apparently rely is 11 U.S.C. § 29, which reads, in part: "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition . . . ."

The first case dealing with the applicability of that section to a governmental injunction action against an alleged bankrupt was *Brennan v. T & T Trucking Co.*, 396 F. Supp. 615 (N.D.Okla. 1975), in which the court denied the stay because

> [A]n action brought by the Secretary of Labor is primarily directed to promote a strong public policy . . . is convincing authority for a finding by the Court that this action is not brought to collect a debt which otherwise might be dischargeable under the Bankruptcy Act. . . . The Bankruptcy Act is silent as to the staying of an action where the relief sought is in the form of an injunction. Section 11 of the Bankruptcy Act [11 U.S.C. § 29] provides for a stay only where a suit is founded upon a claim where a discharge would release the bankrupt from further liability for the debt. Since no debt is claimed by the Secretary and the relief sought is to prevent the withholding of past wages due and the failure to maintain adequate records, this action does not fall within the staying provisions of § 11 as directed by Rule 401 of the Rules of Bankruptcy Procedure. Where the action is not founded on a dischargeable debt, it should not be stayed.

*Id.* at 618. The same policy arguments apply here.

Under the current bankruptcy code, the question would not arise because § 362 of the code, 11 U.S.C. § 362 (1979), provides that the filing of a petition under § 301 of the code, 11 U.S.C. § 301 (1979), does not operate as a stay of any proceedings by a governmental unit to enforce police or regulatory powers. The action Morford Masonry seeks to stay is an exercise of the City's regulatory powers.

In view of the foregoing, it is apparent that a stay of proceedings in cases involving those issues raised by the plaintiffs is not automatic in nature, but is

within the sound discretion of the trial court, and the decision of that court will not be disturbed in the absence of a clear showing of an abuse of discretion. An examination of the record discloses no abuse of discretion in this case. We conclude that the dismissal of the plaintiffs' petition and the dissolution of the temporary restraining order was proper and should be affirmed, without prejudice to the rights of the parties. In connection therewith, it is noted that subsequent to dismissal of this cause in open court, the trial court entered a written order that went beyond the relief announced in open court. In view of the fact that no evidence was ever adduced during the course of this proceeding, there was no basis for that further relief. We therefore determine that the order of the trial court dated December 20, 1978, should be modified to delete therefrom any relief for the defendant City of Omaha beyond that announced in open court.

The decision of the trial court is affirmed as modified by this opinion.

AFFIRMED AS MODIFIED.

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JAMES COSGROVE AND ANN COSGROVE, APPELLEES, V. MADEMOISELLE FASHIONS, AN ARKANSAS CORPORATION, APPELLANT.

292 N. W. 2d 780

Filed May 20, 1980. No. 42711.

1. **Contracts: Parol Evidence.** When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.
2. **Contracts: Parol Evidence: Conditional Promises.** It is well established that the parol evidence rule does not prevent a party from using contemporaneous or prior negotiations or expressions to

show that the writing was never intended to be operative or that it was intended to be effective only upon the happening of a condition precedent, provided that the condition sought to be proved is not inconsistent with a specific term in the writing.

3. _____: _____: _____. When parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of the agreement; but this does not prevent parties to a written agreement from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of the written agreement is to depend. Even though parol evidence is admissible to show conditions precedent which relate to the delivery or taking effect of a written instrument, if the condition precedent is inconsistent with, or contradictory to, the written instrument, parol evidence thereof is not admissible.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Reversed and remanded with directions.

Carlos E. Schaper, for appellant.

Gary G. Washburn of Stumpff & Washburn, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

This is an appeal from an order of the District Court for Custer County, Nebraska, which affirmed a judgment entered by the county court of Custer County, in a law action, ordering the return of a deposit made on a purchase contract to James and Ann Cosgrove. We reverse and remand.

It appears from the record that on March 17, 1977, Ann Cosgrove contacted John M. Maple, a representative of defendant, with reference to furnishing expertise, inventory, and supplies to establish a jeans store in the Broken Bow area. Maple was a broker for Mademoiselle Fashions, an Arkansas corporation. One of his duties was to explain to prospective

purchasers the program Mademoiselle had for aiding persons to establish businesses in the field of women's fashion. Following this initial contact, Mrs. Cosgrove requested Maple to visit Broken Bow so that she might establish such a business by the use of Mademoiselle's program. Maple did so, arriving in Broken Bow on June 30, 1977. Mrs. Cosgrove went with Maple to the proposed site of the business venture. At that time, Maple was made aware of a zoning problem at the site. Thereafter, they had a meeting with Carl Norden, the bank officer in Broken Bow through whom financing was being arranged. Such financing was to be by a loan approved by the Small Business Administration. Maple received assurances that financing could be quickly arranged, with little or no problems. Mrs. Cosgrove and Maple then went to her husband's, James Cosgrove's, office where the Cosgroves and Maple signed an instrument captioned "Purchase Order," whereby the Cosgroves agreed to purchase a certain starter package from Mademoiselle for a total purchase price of $13,500.

Since the zoning and financing matters were still unresolved, the "Purchase Order" was not dated at that time; likewise, a portion of the agreement which represented the amount of partial payment submitted at the inception of the contract was left blank. A provision of the "Purchase Order" stated:

> This order is NOT subject to cancellation. If less than full payment of the total amount (purchase price) is made herewith, and if purchaser subsequently fails to pay any balance when due (by post marked date), then the amount paid with this Purchase Order may be retained by Mademoiselle and credited to any damages sustained by it by reason of such failure to pay.

Mr. and Mrs. Cosgrove both admitted knowledge of this provision at the time they signed the agreement.

It was agreed that the Cosgroves were to submit the partial payment to Maple when the problems had been resolved, at which time he would date the "Purchase Order," fill in the blank with the amount of partial payment, and transmit the agreement to Mademoiselle for its acceptance.

On or about August 1, 1977, Mrs. Cosgrove submitted a check to Maple in the amount of $2,000 as partial payment on the contract. However, her SBA loan was later disapproved. She thereafter contacted Maple requesting the return of the partial payment, which request was denied, and this action followed.

At trial to the county court, the foregoing sequence of events was related. The record reveals that the Cosgroves further testified that Maple had told them that a partial payment made by another party to Mademoiselle under similar circumstances had been refunded. Maple, on the other hand, testified that he had no knowledge of the return of the partial payment to another party in a different transaction until some time after Mrs. Cosgrove requested the return of her partial payment. Moreover, he testified that he had offered to insert a provision in the "Purchase Order" permitting the return of the partial payment should the zoning problem not be favorably resolved, which offer was refused by the Cosgroves. At no time, however, did Maple make a similar offer with regard to the financing problems. Finally, Norden testified, over objection, that he received the "impression" the partial payment would be returned should financing fail to be obtained, although he could not state whether that assurance had come from Mrs. Cosgrove or Maple. On the basis of the foregoing evidence, the county court found that Mademoiselle was, at the time of the execution of the purchase agreement, aware, through the knowledge of its agent, Maple, that performance of the agreement was impossible without SBA-ap-

proved financing. The court further found that procurement of SBA financing was a condition precedent to the purchase agreement, which condition was never satisfied. The purchase agreement was therefore found to be unenforceable and the Cosgroves granted a judgment against Mademoiselle in the amount of the partial payment, $2,000, and costs of $21.

Mademoiselle appealed to the District Court, which found that the procurement of SBA financing was a condition precedent to the purchase agreement and that failure to obtain SBA financing was not attributable to the fault of the Cosgroves. The District Court affirmed the judgment of the county court. Mademoiselle has appealed to this court, assigning several errors to the proceedings below.

Mademoiselle contends, first, that the parol evidence rule operates to preclude the admission of evidence which tends to vary the provision of the "Purchase Order" earlier set forth. However, we believe that the first question which must be decided herein is whether a contract existed.

> It is well settled that the parol evidence rule does not prevent a party from using contemporaneous or prior negotiations or expressions to show that the writing was never intended to be operative or that it was intended to be effective only upon the happening of a condition precedent, provided that the condition sought to be proved is not inconsistent with a specific term of the writing.

Calamari and Perillo, Contracts 111-12 (2d ed. 1977).

> When parties, without any *fraud* or *mistake,* have deliberately put their engagements in writing, the law declares the writing to be not only the *best*, but the *only evidence* of the agreement; but this does not prevent parties to a written agreement from proving

> that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitues a condition on which the performance of the written agreement is to depend.

*Norman v. Waite,* 30 Neb. 302, 316, 46 N.W. 639, 643 (1890), quoting from *Michels v. Olmstead,* 14 F. 219 (8th Cir. 1882) (emphasis added in *Norman*).

We do not believe that the procurement of SBA-approved financing was a condition upon which the performance of the "Purchase Order" was dependent. "A condition is an event, not certain to occur, which must occur, unless excused, before performance under a contract becomes due." Restatement (Second) of Contracts, § 250 (Tent. Draft No. 7, 1972). Mrs. Cosgrove contended below, and the trial court found, that the procurement of SBA financing had to occur before the "Purchase Order" could become effective and binding on the parties.

The agreement, by its plain terms, became effective on final acceptance by Mademoiselle. Although she did not plead it in her petition, Mrs. Cosgrove argues that the agreement was varied by the actions of Maple and herself to the effect that the procurement of financing was a condition precedent to the agreement's becoming effective.

We believe that the actions of the parties to the agreement did not vary any of the terms of that instrument. By Mr. Cosgrove's own testimony, the Cosgroves decided not to enter into the agreement on June 30, 1977, "because there was [sic] too many circumstances unresolved yet." Moreover, the Cosgroves were given the option of inserting a condition to the formation of the contract with regard to the zoning problem, which option was rejected. Finally, Maple testified that the Cosgroves were to transmit the partial payment to him when the problems with zoning and financing were resolved. The record is

clear that the Cosgroves submitted the partial payment, Mademoiselle accepted such payment, and the "Purchase Order" became a binding contract at that time. More importantly, even assuming *arguendo* that the obtaining of financing by the Cosgroves was a condition precedent to the formation of the contract, it seems clear that the actions of the Cosgroves, described above, in sending in their downpayment to Maple after their previous discussion with reference to the necessity of obtaining an SBA loan, and prior to being informed whether such loan would be granted, would amount to a waiver of that condition. If the obtaining of the SBA loan was of such importance to the Cosgroves at that time that they would not have entered into the contract without knowledge that the loan had been obtained, they would not have sent in their partial payment to Maple without ascertaining what the facts were with reference to such loan. By so doing, they removed any obstacle to the formation of the contract based upon the necessity of obtaining the loan.

From the foregoing, we conclude that the contract came into existence upon Mademoiselle's acceptance. The admission of parol evidence for the purpose of varying the terms of the agreement was error.

> The parole evidence rule is well analyzed in 3 Corbin on Contracts, c. 26, §§ 573-596, p. 356 et seq. That work states the rule in substance to be: "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." § 573, p. 357.
>
> . . . .

> A written contract expressed by clear and unambiguous language is ordinarily not subject to interpretation or construction. Hansen v. E. L. Bruce, Co., 162 Neb. 759, 77 N.W.2d 458.

*Ely Constr. Co. v. S & S Corp.*, 184 Neb. 59, 65-66, 165 N.W.2d 562, 566-67 (1969). See, also, *Voss v. Linn*, 171 Neb. 32, 105 N.W.2d 383 (1960); *Security Savings Bank v. Rhodes*, 107 Neb. 223, 185 N.W. 421 (1921).

It appears to be the general rule that, even though parol evidence is admissible to show conditions precedent which relate to the delivery or taking effect of a written instrument, if the condition precedent is inconsistent with, or contradictory to, the written instrument, parol evidence thereof is not admissible. 30 Am. Jur. 2d *Evidence* § 1038 (1967); 32A C.J.S. *Evidence*, § 935 (1964). See, also, *Meadow Brook Nat. Bank v. Bzura*, 20 App. Div. 2d 287, 246 N.Y.S.2d 787 (1964). In this case, the contract signed by the parties specifically provided: "This order is NOT subject to cancellation." Even if we were to find in this case that the contract was subject to a condition that the purchasers obtain an SBA loan, such condition, we believe, would be inconsistent with, or contradictory to, the provision against cancellation in the contract; and hence, under the rules above cited, parol evidence would not be admissible to show the condition.

In this case, the "Purchase Order" was clear and unambiguous in its terms. Mademoiselle was entitled to retain the partial payment should the Cosgroves fail to live up to the terms of the contract. We conclude the trial court was wrong in ordering a return of the partial payment to the Cosgroves and we, therefore, reverse and remand this matter with directions to enter a judgment in favor of Mademoiselle.

REVERSED AND REMANDED WITH DIRECTIONS.

McCOWN, J., concurring in result.

In this case, the plaintiffs failed to plead or prove that the parties had agreed orally that performance of the contract was subject to the happening of a stated condition. In any event, under the evidence in the record at the time the plaintiffs submitted the check to the defendant's agent, John M. Maple, on August 1, 1977, the contract was completely integrated.

I am concerned, however, with the holding of the majority opinion that if an oral condition precedent is inconsistent with or contradictory to the written instrument, parol evidence thereof is not admissible. That holding runs counter to the modern position reflected in Restatement (Second) of Contracts § 243 (Tent. Draft No. 6, 1971), which states:

> § 243 INTEGRATED AGREEMENT SUBJECT TO ORAL CONDITION.
>
> Where the parties to a written agreement agree orally that performance of the agreement is subject to the happening of a stated condition, the agreement is not integrated with respect to the oral condition.

Comment b to that section states:

> *b. Condition inconsistent with a written term.* The rule of this Section may be regarded as a particular application of the rule of Section 242(2) (b), giving effect to consistent additional terms omitted naturally from a writing. So regarded, it has sometimes been limited to conditions consistent with the written terms. But an oral condition is never completely consistent with a signed written agreement which is complete on its face; in such cases evidence of the oral condition bears directly on the issues whether the writing was adopted as an integrated agreement and if so whether the agreement was completely integrated or

partially integrated. Inconsistency is merely one factor in the preliminary determination of those issues. If the parties orally agree that performance of the written agreement was subject to a condition, either the writing is not an integrated agreement or the agreement is only partially integrated until the condition is met. Even a "merger" clause in the writing, explicitly negating oral terms, does not control the question whether there is an integrated agreement or the scope of the writing.

BOSLAUGH, J., joins in this concurrence.

CLINTON, J., concurring in the result.

I concur in the result. The principle set forth and discussed in the second to last paragraph of the majority opinion governs the result in this case. If a contract is to be subject to a condition precedent, it is a simple matter to so state in the contract or in a separate contemporaneous instrument and to leave out any conflicting requirement.

This is an action at law and such cases are not tried de novo in this court.

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WALTRAUD BENEDICT, APPELLEE, V. GARY A. BENEDICT, APPELLANT.

292 N. W. 2d 565

Filed May 20, 1980. No. 42760.

**Divorce: Decrees: Alimony.** In a proceeding for dissolution of marriage, where the parties by their written agreement and the court by its decree provide that a specific amount of alimony shall be paid for a specified period of time and that the payments are terminable only by the death or remarriage of the recipient, the payment of alimony shall terminate only upon the happening of the event or events set out in the agreement or decree.

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

Chris M. Arps of Rice, Adams, and Arps, for appellant.

E. Dean Hascall of Hascall, Jungers & Garvey, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

MCCOWN, J.

The appellant husband filed a motion to modify a decree of dissolution of marriage by terminating the provisions for the payment of alimony. The District Court, after hearing, denied the motion. The husband has appealed.

On July 18, 1977, a decree of dissolution of marriage was entered by the District Court for Sarpy County, Nebraska. Under the provisions of Neb. Rev. Stat. § 42-366 (Reissue 1978), the decree incorporated a written agreement between the parties. The agreement divided the real and personal property of the parties, provided for the support and custody of two minor children, and provided for alimony as follows:

> 1. Respondent hereby agrees to pay to Petitioner as alimony, commencing August 1, 1977 and continuing for sixty (60) consecutive months thereafter the sum of $735.00 per month, terminable only by the death or remarriage of Petitioner.
>
> 2. Respondent further agrees to pay to the Petitioner as alimony, commencing August 1, 1982, and continuing for sixty-one (61) consecutive months, the sum of $500.00 per month, terminable only by the death or remarriage of Petitioner.

The record establishes that, at the time of the entry of the dissolution decree, the husband was receiving net military retirement pay of approximately $904 per month and a salary of $1,450 per

month as president of a land development company. At the time the husband filed the motion to terminate the alimony provisions, he was unemployed, but at the time of hearing on the motion, he was employed at a salary of $1,400 per month and was receiving net military retirement pay of $980 per month. The record also indicates that the husband had sold or disposed of most of his property and that his net worth was greatly reduced.

The wife testified that her earnings as a real estate saleswoman during 1977 were approximately $5,000 to $6,000 and that her earnings as a real estate saleswoman in 1979, up until the date of the hearing on April 9, 1979, were $1,050. The husband testified that the wife's earnings were more than $9,000 in 1977, but that he had no knowledge as to her earnings at the time of the hearing on the motion.

The District Court indicated that it had no authority under § 42-366 to modify the written agreement of the parties incorporated in the decree and that, in any event, there was insufficient evidence to warrant the modification prayed for, and denied the motion.

The husband contends on appeal that the court had authority to terminate alimony payments under the decree and that there was sufficient evidence of changed circumstances to warrant termination.

The decree was entered under the provisions of § 42-366. The court found that the written agreement of the parties was not unconscionable and incorporated it by reference into the decree.

Subsection (7) of § 42-366 provides: "Except for terms concerning the custody or support of minor children, the decree may expressly preclude or limit modification of terms set forth in the decree." The decree and the agreement in this case specifically provide that the alimony payments are "terminable *only* by the death or remarriage of petitioner." (Emphasis supplied.) Such language precludes the termination of alimony payments for reasons other

than the death or remarriage of the wife and limits the termination to the happening of one of those two events.

Where the parties by their written agreement and the court by its decree provide that a specific amount of alimony shall be paid for a specified period of time and that the payments are terminable only by the death or remarriage of the recipient, the payment of alimony shall terminate only upon the happening of the event or events set out in the agreement or decree. The general principles underlying this interpretation are supported by the case of *Watters v. Foreman,* 204 Neb. 670, 284 N.W.2d 850 (1979).

The trial court also found that, even if the termination of alimony were permissible under the language of the decree, there was insufficient evidence of changed circumstances to warrant modification. We agree.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

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DENNIS R. OCANDER, APPELLEE, V. B-K CORPORATION, A CORPORATION, APPELLANT.

292 N. W. 2d 567

Filed May 20, 1980. No. 42765.

1. **Evidence: Relevance: Pleadings.** The right to introduce evidence depends upon there being an issue of fact as to which it is relevant. The issues are made by the pleadings and, unless there is an issue of fact before the court, there is no right to introduce evidence to prove or disprove the fact.
2. **Evidence: Relevance.** The reception of evidence collateral to the main issue is within the sound legal discretion of the trial court.
3. _____: _____. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
4. _____: _____. Although relevant, evidence may be excluded if

its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

David L. Buelt of Ellick, Spire & Jones, for appellant.

Jon S. Okun and Richard Calkins of Eisenstatt, Higgins, Kinnamon & Okun, P.C., for appellee.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and WARREN and FUHRMAN, District Judges.

FUHRMAN, District Judge.

The plaintiff, Dennis R. Ocander, brought this action against the defendant, B-K Corporation, in the municipal court of Omaha, Nebraska. The petition of the plaintiff prayed for damages, alleging a promise to pay salary and expenses. Trial was had before the municipal court sitting without a jury and judgment entered for plaintiff for $4,298.82 plus costs. Defendant then appealed. After review de novo on the record, the District Court for Douglas County, Nebraska, reduced the judgment to $4,048.82 and costs. Defendant has appealed. We affirm.

Dennis R. Ocander went to work for Consolidated Communications Corporation, Inc., in July 1977, as a salesman who traveled to different cities to sell commercial songs and jingles to be used on radio stations. Mr. Ocander was to be paid a base salary of $300 per week and commissions over that amount. His expenses were also to be reimbursed by Consolidated. In December 1977, Mr. Ocander agreed to a reduction in his base salary to $500 every 2 weeks because of the financial problems Consolidated was having at that time. By the end of 1977, Consolidated was in arrears to Mr. Ocander for expenses and his salary.

Mr. Ocander's evidence was that, in January 1978, he was informed that Tim Kaiser, an employee of B-K Corporation, was coming in to run Consolidated. Mr. Ocander claims that Tim Kaiser assured him that B-K would see to it that his expenses and salary would be paid if he continued to make his sales calls. Mr. Ocander continued to travel for Consolidated in reliance on these representations until the first week of March 1978. He was not paid his expenses or his salary.

B-K introduced evidence by Mr. Kaiser and other B-K personnel categorically denying having made the sort of assurances or promises claimed by Mr. Ocander. Prior to commencement of trial before the municipal court, the parties entered into a stipulation that if any promises were, in fact, made, they were made in behalf of B-K Corporation.

B-K Corporation claims that the trial court erred in its rulings on the scope of evidence properly admissible under appellant's general denial; that the trial court erred in its ruling on the admissibility of appellant's evidence of the bad reputation for truthfulness of one of the appellee's witnesses; and that the District Court erred in its reliance on the conclusions of the trial court when the trial court's conclusions were the product of errors of law.

The first error claimed by the appellant is that much of appellant's evidence was excluded at the trial because of the trial court's unduly restrictive view of the matters at issue. Specifically, the trial court ruled that B-K's use of a general denial in placing the case at issue precluded the introduction of evidence which appellant claimed was necessary to provide background information to properly consider the case.

The appellant contends that background information concerning the reason for the B-K loans to Consolidated and the reason for Mr. Kaiser's presence in the Consolidated offices was necessary to deter-

mine whether it was more probable than not that promises allegedly made by Mr. Kaiser to Mr. Ocander were actually made. The pleadings do not contain any allegations as to the financial arrangements between Consolidated and B-K Corporation. The parties prior to trial had, as noted above, stipulated that if any promises were made, they were made on behalf of B-K. This stipulation limited the issue to whether or not promises were in fact made to Mr. Ocander by the appellant. Any arrangement between Consolidated and B-K was immaterial as to whether or not any promises were actually made. The authority to make these promises was never questioned.

"The right to introduce evidence depends upon there being an issue of fact as to which it is relevant. The issues are made by the pleadings; and unless there is an issue of fact before the court, there is no right to introduce evidence to prove or disprove the fact." *Midland-Ross Corp. v. Swartz,* 185 Neb. 484, 486, 176 N.W.2d 735, 736-37 (1970). This holding was followed in *Timmerman v. Hertz,* 195 Neb. 237, 238 N.W.2d 220 (1976).

It is undisputed that B-K had taken over operational control of Consolidated and that Mr. Kaiser was placed in the Consolidated office as a representative of B-K Corporation. The trial court was informed of the connection that appellant was trying to draw between the financial arrangement of the companies on the issue of whether or not promises were made. The appellant was given an opportunity to make an offer of proof to complete the record.

The trial court's decision was that the excluded testimony was collateral to the main issue and that the financial arrangement between the two companies was immaterial to Mr. Ocander's claim. "The reception of evidence collateral to the main issue is within the sound legal discretion of the trial court." *Balog v. State,* 177 Neb. 826, 831, 131 N.W.2d 402, 407 (1964).

The trial court properly limited the testimony to the issues of fact raised by the pleadings. In light of B-K's stipulation, the trial court correctly decided that the exact circumstances of B-K Corporation's presence in the office of Consolidated were immaterial and collateral to the main issue at trial.

The second alleged error made by the trial court deals with the admissibility of B-K's evidence of the bad reputation for truthfulness of one of Mr. Ocander's witnesses. One of B-K's witnesses at the trial, Frances Thomas, was prepared to testify to the bad reputation for truthfulness of one of Mr. Ocander's witnesses. The municipal court did not allow this evidence into the record.

The admissibility of this impeachment testimony must be governed by the rules of relevancy. Neb. Rev. Stat. § 27-401 (Reissue 1975), part of the Nebraska Evidence Rules, says: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Rev. Stat. § 27-403 (Reissue 1975) says: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Mr. Ocander had presented four witnesses who stated that B-K, through Mr. Kaiser, had promised to pay his salary and expenses and those of the other Consolidated salesman. The testimony sought to be impeached was cumulative. The reputation for truthfulness of one witness did not make the fact testified to more or less probable when several other witnesses had testified in the same manner. Under §§ 27-401 and 403, the trial court was within its discretion in disallowing the testimony.

At most, the exclusion of the opinion was harmless error. This action was not being tried to a jury. The appellant made an offer of proof and the same appears in the record. The trial court heard B-K's witnesses deny that any promises were made to pay salaries and expenses to Mr. Ocander.

B-K Corporation's final assignment of error is that the District Court, on appeal, erred by its reliance on the conclusions of the municipal court when the municipal court's conclusions were the product of errors of law. Having found that the trial court's conclusions were based on proper evidentiary rulings, we find that this assignment of error is without merit.

The District Court properly affirmed, as modified, the judgment of the municipal court.

AFFIRMED.

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WALTER L. STALEY, JR., AND LINDA STALEY, APPELLANTS, V. CITY OF BLAIR, A MUNICIPAL CORPORATION, ALFRED O. SICK, MAYOR OF THE CITY OF BLAIR, WILLIAM GUTSCHOW, JEROME JENNY, STANLEY JENSEN, JAMES LONG, HENRY NEEF, CARL RENNERFELDT, GARY BAKER, AND DARREL JENSEN, MEMBERS OF THE CITY COUNCIL AND BOARD OF ADJUSTMENT OF THE CITY OF BLAIR, AND JOHN O'HANLON, CITY ATTORNEY OF THE CITY OF BLAIR, IMPLEADED WITH PAUL J. GROSSERODE, DOROTHY J. GROSSERODE, AND WASHINGTON COUNTY CATTLE CO., INC., APPELLEES.

292 N. W. 2d 570

Filed May 20, 1980. No. 42792.

1. **Boards of Adjustment: Words and Phrases.** Neb. Rev. Stat. § 19-911 (Cum. Supp. 1978) was amended by L.B. 410, 1975 Neb. Laws, to restrict the application of the term "legislative body" to villages.

2. **Stipulations.** The general rule is that parties have no right to stipulate as to matters of law and such a stipulation, if made, will be disregarded.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Affirmed.

Gordon R. Hauptman of Westergren & Hauptman, and Duane M. Katz of Hunter & Katz, for appellants.

Barlow, Johnson, DeMars & Flodman and John V. Head, for appellees Grosserode and Washington County Cattle Co., Inc.

No appearance for appellees City of Blair, mayor, council and city attorney.

Heard before BOSLAUGH and MCCOWN, JJ., and COLWELL, KNEIFL, and WHITEHEAD, District Judges.

COLWELL, District Judge.

This appeal concerns the jurisdiction of a city of the first class to act as a board of adjustment, pursuant to Neb. Rev. Stat. § 19-911 (Cum. Supp. 1978). The trial court denied such authority. We affirm.

In August 1978, defendants Paul J. and Dorothy J. Grosserode filed an application with the city building inspector of Blair, Nebraska, requesting a special use permit to operate a confined cattle operation within the zoning area of that city. After notice, a hearing was had before the city council of Blair, Nebraska; objectors, including plaintiffs, were heard; and the permit was granted by the council on September 18, 1978. Plaintiffs, Walter L. Staley and Linda Staley, filed their appeal in the District Court for Washington County, Nebraska, pursuant to Neb. Rev. Stat. § 19-912 (Reissue 1977). They named the City of Blair and certain officials as parties defendant and alleged that the action of the city council was illegal, arbitrary, and capricious. The parties stipulated that, at the time of the hearing before the city council, it was acting as a board of adjustment,

as provided in § 19-911. Thereafter, the Grosserodes were made parties defendant by court order; they demurred to the petition, claiming: (a) It failed to state facts sufficient to constitute a cause of action; (b) The court had no jurisdiction over the subject matter; and (c) There was another action for the same cause pending in the same court. The trial court took judicial notice of the fact that the plaintiffs filed, at the same time and in the same court, a petition in error pursuant to Neb. Rev. Stat. § 25-1901 (Reissue 1975), alleging the same matters as the appeal here. However, that fact does not appear on the face of the petition here. The trial court sustained the Grosserodes' demurrer on the grounds of no jurisdiction and it dismissed the plaintiffs' petition.

The only issue here is whether the city council was lawfully sitting and acting as a board of adjustment which would permit plaintiffs to use § 19-912 as the procedure for an appeal and trial de novo on the record as a law case. All parties agree that Blair is a city of the first class. Plaintiffs contend that the stipulation conferred jurisdiction on the City to act as a board of adjustment and that the Grosserodes are estopped from challenging the same.

The relevant statutes that govern boards of adjustment, their membership, powers, and appeal procedures are found in Neb. Rev. Stat. §§ 19-908, 909, and 912 (Reissue 1977) and §§ 19-907, 910, and 911 (Cum. Supp. 1978). A "legislative body" is described in § 19-901 to include first and second class cities and villages. Prior to 1975, § 19-911 provided: "*Such legislative body* may provide by ordinance that it shall constitute a board of adjustment . . . ." (Emphasis supplied.) In 1975, L.B. 410 amended § 19-911 by substituting the following for the above language: "Notwithstanding the provisions of sections 19-907 and 908, *the legislative body of a village* may provide by ordinance that it shall constitute a board of

adjustment . . . ." (Emphasis supplied.) L.B. 410 restricted the application of the term "legislative body" in § 19-911 to the legislative bodies of villages.

Plaintiffs urge that the stipulation of the parties conferred jurisdiction upon the city council to sit and act as a board of adjustment. There is no merit to that contention. The Grosserodes were not parties to the stipulation but, more important, "The general rule is that parties have no right to stipulate as to matters of law and such a stipulation, if made, will be disregarded." *City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co.*, 201 Neb. 405, 407, 268 N.W.2d 98, 101 (1978).

Blair, Nebraska, is a city of the first class and by law, its city council cannot sit as a board of adjustment. The demurrer was properly sustained.

AFFIRMED.

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F. W. JACKMAN, GUARDIAN OF RUTH A. JACKMAN; HERBERT LEE JACKMAN AND MARGARET ANN JACKMAN, HUSBAND AND WIFE; RICHARD LEROY JACKMAN; AND GERALD SCHROEDER AND RAMONA SCHROEDER, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES, V. DAISS, INC., A NEBRASKA CORPORATION; OBERT F. DAISS AND MARGARET E. DAISS, HUSBAND AND WIFE; DAVID SEILER AND KATHRYN SEILER, HUSBAND AND WIFE; JAMES SEILER AND DEBORAH SEILER, HUSBAND AND WIFE; NANCY FOCKEN AND DARREL FOCKEN, WIFE AND HUSBAND; ANNETTE SEILER; KEVIN SEILER, A MINOR; GEORGE H. SEILER, GUARDIAN OF KEVIN SEILER; DOLORES SVOBODA AND DON T. SVOBODA, WIFE AND HUSBAND; DANIEL GENGENBACH AND EVELYN GENGENBACH, HUSBAND AND WIFE; AND ANNA GENGENBACH, APPELLEES AND CROSS-APPELLANTS.

292 N. W. 2d 572

Filed May 20, 1980. No. 42819.

**Equity: Appeal and Error.** In an action in equity, it is the duty of

this court to try the issues of fact de novo on the record and reach an independent conclusion thereon without reference to the findings of the District Court.

Appeal from the District Court for Perkins County: JACK HENDRIX, Judge. Affirmed as modified.

Kay and Satterfield and H. L. Jackman and Richard H. Roberts, for appellants.

McCarthy, McCarthy & Vyhnalek, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

This is an action brought under Neb. Rev. Stat. § 34-301 (Reissue 1978) to determine the boundaries to the northeast quarter of Section 10, Township 9 North, Range 38 West of the 6th P.M. in Perkins County, Nebraska. The plaintiffs are the owners and tenants of the northeast quarter of Section 10. The defendants are the owners or parties otherwise interested in the other land in Section 10 that is adjacent to the northeast quarter.

Only the boundary between the northeast quarter and the southeast quarter of Section 10 remains in dispute and is involved in this appeal. There is a sandy area and a tree area near the east line of the section which has not been farmed by any of the parties. The controversy here concerns the boundary line west of the trees and the sandy knoll or "go back" area.

The plaintiffs claim the boundary has been established by both adverse possession and acquiescence. They allege that the boundary followed an old fence line situated approximately 117 feet south of the line established by the government survey. There appears to have been no dispute concerning the boundary until August 1975, when the defendants erected a new fence along the line established by the govern-

ment survey. The plaintiffs then brought this action.

The trial court found that, since 1938, the farming line between the quarters had been generally in the area claimed by the plaintiffs and established the boundary along a line 91 feet south of the government survey line except for the area near the east line of the section. At that point the boundary runs north to a line established by the Cook survey and follows that line to the east line of the section.

The plaintiffs have appealed and the defendants have cross-appealed.

The evidence is undisputed that there has been a "corner post" located near the center of the section that has been in place for many years. This post is not at the center of the section as determined by the government survey, but is located 117 feet south and 17 feet west of the center as determined by the government survey. The fence between the northwest and southwest quarters, and the fences between the east half and west half of the section all tie into this post. There is some evidence that, many years ago, a fence between the northeast quarter and the southeast quarter ran east from the "corner post."

There is a wire gate in the fence which runs north from the corner post. This gate, which is now approximately 25 feet in width, is fastened to the corner post and may be secured by wire loops to a fence post located approximately 26 feet north of the corner post. Apparently, the trial court used the fencepost now located at the north end of the gate opening as the point at which the boundary should be established.

The evidence shows that the wire gate has varied in width from time to time and there is evidence that at times it did not exceed 16 feet in width. The width of the gate is of some importance because Hank Seiler, a tenant who farmed the southeast quarter, claimed that he came through the gate

from the northwest quarter, placed his equipment in the ground, and began farming west to east across the southeast quarter.

There is considerable evidence that, since 1958, the farming line between the quarters has been along a line approximately 16 feet north of the corner post. Gerald Schroeder, who has farmed the west half of the northeast quarter since 1970 and has farmed the east half of the quarter since 1974, and Jim Stivers, who helped his father farm the west half from 1958 to 1970, both testified that they farmed the west half south to a line approximately 15 or 16 feet north of the corner post. Neither Schroeder nor Stivers farmed with relation to the gate. They both testified that they consistently farmed to a line running approximately 16 feet north of the corner post. In addition to this testimony, the survey made by Virgil Cook on April 21, 1975, established the farming line from 117 feet to 110 feet south of the government survey line. Although the government survey showed the quarters to be approximately equal in area, the tax receipts which are in evidence show that the southeast quarter is a smaller quarter having a deficit of 6 acres. This corresponds with field measurements made by the Agricultural Stabilization and Conservation Service. Also, the aerial photographs which are in evidence tend to support the plaintiffs' claim and corroborate the testimony of the plaintiffs' witnesses.

Since this is an action in equity, it is the duty of this court to try the issues of fact de novo on the record and reach an independent conclusion thereon without reference to the findings of the District Court. Neb. Rev. Stat. § 25-1925 (Reissue 1975); *Campbell v. Buckler,* 192 Neb. 336, 220 N.W.2d 248 (1974).

As we view the record, the evidence as a whole supports the findings of the trial court generally except that the boundary line should commence at a

point 16 feet north of the "corner post" and 101 feet south of the government survey line and then run east until the sandy knoll or "go back" land is reached. At that point the boundary should run north to the line established by the Cook survey and then east along that line to the east line of the section.

The judgment of the District Court is modified to provide that the boundary line between the northeast quarter and the southeast quarter of Section 10 is determined to be as follows: Commencing at a point 16 feet north of the corner post and 101 feet south of the iron pin shown on exhibit 8; running thence east on a line 101 feet south of the survey line to a point designated as 7 plus 00 on said exhibit; running thence north 50 feet to the dotted line on said exhibit 8; running thence east along the dotted line to the east line of the section at a point 45 feet south of the survey line. As so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

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F. FAYE HANSON, APPELLANT, V. ROBERT F. J. ROCKWELL, APPELLEE, STATE OF NEBRASKA, INTERVENOR-APPELLANT.

292 N. W. 2d 786

Filed May 20, 1980. No. 42824.

1. **Child Support.** While the cost of caring for a child is an important consideration in determining child support, the father's ability to make the payments is equally important.
2. **Child Support: Appeal and Error.** The decision of the trial court in awarding child support will not be disturbed on appeal unless there appears a clear basis, in the record, for finding that the trial court abused its discretion.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

John H. Kellogg, Jr., for appellant F. Faye Hanson.

Donald L. Knowles, Douglas County Attorney, and Richard J. Gilloon, for appellant State of Nebraska.

Arthur D. O'Leary and Dwyer, O'Leary & Martin, P.C., for appellee.

Heard before McCOWN and WHITE, JJ., and COLWELL, STANLEY, and SPRAGUE, District Judges.

SPRAGUE, District Judge.

This is an action by petitioner, F. Faye Hanson, seeking to have respondent found to be the father of her child born out of wedlock and to have respondent ordered to pay for the support of the child. After trial on the issue of paternity, the District Court for Douglas County, Nebraska, found respondent to be the father of petitioner's child. The court then heard evidence on the amount of child support respondent should pay to the petitioner.

The petitioner testified that she was employed at a salary of $3 an hour and that she worked approximately 28-29 hours per week. Further, she testified that she received Aid for Dependent Children (ADC) from Douglas County in the sum of $94 per month, as well as a babysitting allowance of $30 per week. Further, the petitioner testified that the county paid for all of her child's medical care and that, in addition, she received food stamps each month which are worth $35. The petitioner's gross income from all of these sources, apart from the amounts paid for medical care, is approximately $648 per month.

The respondent also testified concerning his income and expenses. His gross salary from his principal employment is $1,700 per month and, after deducting amounts for taxes, pension, hospitalization, and police welfare benefits, his net salary is approximately $1,250 per month. From part-time employment, the respondent earns an additional net salary of $200 per month from one job and $83 from another. His total net salary per month is $1,533.

From his net salary, the respondent has to pay certain expenses each month, which total $1,920 and are itemized as follows: $200 for credit loan pay-

ment, $200 for alimony, $750 for child support, $200 for rent, $125 for groceries, $125 for gas and truck maintenance, $50 for children's medical expense, $110 for noncard credit purchases, $35 for credit card purchases, $25 for gas, $50 for utilities, and $50 for miscellaneous expenses.

The respondent's net income is, thus $387 less than he is obligated to pay. It should be noted that he is now paying considerable temporary child support in a pending dissolution action.

The court ordered respondent to pay $15 per week for child support and to pay the petitioner $752.89 as reimbursement for approximately one-half of the expenses incurred for the child by the petitioner for which she was able to present receipts.

On appeal, petitioner contends the court erred in determining that the respondent should pay only $15 per week for the support of their child.

The disparity between the amount respondent is now paying in temporary child support, $750, and the amount he has been ordered to pay in this paternity suit, $15, is obvious. Fifteen dollars a week is inadequate support, but it is necessary to consider the ability of the respondent to pay a larger amount. Present demands on his income do not allow him to meet current obligations. This court has recently held that, while the cost of caring for a child is an important consideration in determining child support, the father's ability to make the payments is equally important. It is not advantageous to either party to place the payment for child support beyond the reach or capacity of the father. *Bird v. Bird*, 205 Neb. 619, 288 N.W.2d 747 (1980).

The decision of the trial court in awarding child support will not be disturbed on appeal unless there appears a clear basis, in the record, for finding that the trial court abused its discretion. *Scarpino v. Scarpino*, 201 Neb. 564, 270 N.W.2d 913 (1978); *Boroff v. Boroff*, 204 Neb. 217, 281 N.W.2d 760 (1979).

The trial court was in a position to have the situation of the parties and their financial circumstances before it. A very complete hearing was held to elicit this evidence. Perhaps it would have been more appropriate for the court to withhold determination of the amount of child support in this paternity suit until such time as permanent child support was awarded in the dissolution action. However, both awards for support are subject to modification and the dissolution action and paternity suit have been presided over by the same court. The trial court is, therefore, presumed to be aware of the total circumstances.

As we view the record, the trial court did not err or abuse its discretion in making the award for child support in this matter. The judgment of the District Court is affirmed and each party is ordered to pay his or her own costs.

AFFIRMED.

WHITE, J., concurs in result.

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DAVE KUHLMAN, APPELLANT, V. EDWARD CARGILE, APPELLEE.

292 N. W. 2d 574

Filed May 20, 1980. No. 42854.

1. **Equity: Jurisdiction.** It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required, and thus avoid unnecessary litigation.
2. **Judgments: Res Judicata.** The conclusiveness of a judicial determination is not affected by the kind of proceeding or form of action in which it was made or by a difference in form or object of the litigation in which the adjudication was made and that in which res judicata is pleaded.
3. ———: ———. Where a judgment on the merits is rendered in favor of the defendant in an action to enforce one of two or more al-

ternative remedies, the plaintiff cannot thereafter maintain an action to enforce another of the remedies.

4. _____: _____. 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.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

George A. Sommer, for appellant.

Robert M. Brenner, for appellee.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and WARREN and FUHRMAN, District Judges.

WARREN, District Judge.

This is an action by the plaintiff, Dave Kuhlman, to recover the balance due on a promissory note executed by the defendant, Edward A. Cargile, filed in the county court of Scotts Bluff County, Nebraska. The county court entered judgment for plaintiff in the amount of $1,974.28 plus interest and costs. Defendant appealed. After trial de novo on the record, the District Court for Scotts Bluff County, Nebraska, reversed, finding that the action was barred by a judgment previously rendered, and dismissed plaintiff's petition. Plaintiff has appealed. We affirm.

The question presented by the appeal is whether the doctrine of res judicata applies to bar an action at law for the balance due on a promissory note, where the prior adjudication between the parties was an equitable suit seeking to establish a constructive or resulting trust based, in part, upon the note indebtedness.

In the former action, plaintiff had sought, in part, to have a constructive trust declared with respect to the south 140 feet of a lot titled in the name of his prospective bride, one Molly Lind, on which he had

built a home. Plaintiff was successful in that respect. However, that portion of his former suit seeking a resulting trust as to the north 68.7 feet of the lot, owned by the defendant and his wife, Fern L. Cargile, was dismissed after trial on the merits. Plaintiff did not appeal that dismissal, but on appeal by Molly Lind, the judgment against her was affirmed in this court. *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978). In the former action, the plaintiff, in his amended petition, had alleged several grounds for establishing a resulting trust on the Cargile portion of the lot. He claimed to have improved it by landscaping and by the extension of an underground sprinkler system from his residence onto the adjacent Cargile lot. He further claimed that he had done favors for defendant, had loaned him money, and on September 8, 1969, had sold him a truck, taking a $13,500 promissory note upon which defendant made installment payments, leaving a balance due when the truck was sold on July 8, 1972, of $1,974.28. Plaintiff alleged, and testified in the first trial, that he had credited the $13,500 promissory note with two payments of $335.96 each in consideration of work performed by the defendant in constructing the basement of plaintiff's home. Plaintiff alleged his belief that the defendant would convey the entire building lot to him, as promised, in consideration of past favors and indebtedness then owed to him by defendant. When the defendant and his wife instead quitclaimed the south 140 feet of the lot to Molly Lind on October 17, 1972, plaintiff sued Molly to impose a constructive trust as to the south 140 feet and joined the Cargiles as defendants seeking a resulting trust to the north 68.7 feet of the building lot. Cargile denied that $1,974.28 was owed on the note, claiming additional payments had been made. Evidence was extensively offered and received at the former trial in support of the allegations. All the various contentions were fully liti-

gated. The District Court found generally for the defendants Cargile and dismissed plaintiff's petition as against the Cargiles.

Plaintiff is now attempting, in this action, to maintain an action at law upon the identical $1,974.28 debt which he unsuccessfully pled as one of the grounds for the resulting trust in the former action. The identical promissory note and payment schedule were offered by the plaintiff and received by the court in both actions. The testimony as to credit for work by the defendant was the same in each action. The defendant offered substantially the same evidence as to claimed additional payments in both cases.

Plaintiff claims that he could not have prayed for a money judgment on the note against the defendant in the first action because he brought that action in equity to establish a constructive or resulting trust. The answer to that contention is clearly stated in the opinion of this court affirming the judgment of the District Court in the first appeal.

> It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation.

*Kuhlman v. Cargile, supra* at 156, 262 N.W.2d at 458.

It is evident that the difference in the two actions, with respect to this defendant, was not in the cause of action, but in the remedy sought by the plaintiff. "The conclusiveness of a judicial determination is not affected by the kind of proceeding or form of action in which it was made or by a difference in form or object of the litigation in which the adjudication was made and that in which res judicata is pleaded." *Niklaus v. Phoenix Indemnity Co.*, 166 Neb. 438, 449-50, 89 N.W.2d 258, 265 (1958). See, also, *City*

*of Wayne v. Adams*, 156 Neb. 297, 56 N.W.2d 117 (1952). "Where a judgment on the merits is rendered in favor of the defendant in an action to enforce one of two or more alternative remedies, the plaintiff cannot thereafter maintain an action to enforce another of the remedies." Restatement of Judgments § 65(1) (1942). See comment c. at 273.

The voluminous record shows that the same evidence was offered with respect to the debt on the promissory note in both the former and present actions.

"[T]he general test to determine identity of causes of action is whether the same evidence will sustain both the present and former action, and when it appears that different proof is required, a judgment in one of them is no bar to the other." *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 675-76, 244 N.W.2d 678, 681 (1976). In *Vantage*, this court extensively set out the public policy considerations inherent in the doctrine of res judicata. It is based on the premise that the interests of the proper administration of justice are best served by limiting parties to one fair trial of an issue or cause. Defendant has previously successfully defended plaintiff's action to impose a resulting trust on a portion of his real estate. He should not now be required to again defend the same cause of action simply because plaintiff now seeks a money judgment, rather than a resulting trust. The plaintiff should not be allowed to reserve for himself another bite of the apple.

> 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 de-

mand, purpose, or subject-matter of the two suits is the same or not.

*Bank of Mead v. St. Paul Fire and Marine Ins. Co.*, 202 Neb. 403, 406, 275 N.W.2d 822, 824-25 (1979).

The District Court was correct in finding that the plaintiff was barred by the judgment rendered in the former action.

AFFIRMED.

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RICHARD E. WITCIG, APPELLEE AND CROSS-APPELLANT, V. FRANCES I. WITCIG, APPELLANT AND CROSS-APPELLEE.

292 N. W. 2d 788

Filed May 28, 1980. No. 42642.

1. **Divorce: Irretrievable Breakdown.** When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together, the marriage is irretrievably broken.
2. **Divorce: Appeal and Error.** While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
3. **Alimony: Property Division: Appeal and Error.** The fixing of alimony or distribution of property rests in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal.
4. **Divorce: Property Division: Legal Title.** Where the parties to an action for dissolution of marriage are unable to agree upon a division of property, the trial court shall make such division as it deems conscionable and fair under all the facts and circumstances, taking into account the equities of the situation, irrespective of how legal title is held.
5. **Divorce: Pensions: Alimony.** A pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement, but may be considered as a source for the payment of alimony.
6. **Attorney's Fees.** The allowance of attorney's fees and costs is discretionary with the trial court and depends upon a consideration of all the facts and circumstances presented.

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

Perry, Perry, Witthoff and Guthery, for appellant.

Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

In this case, Frances I. Witcig appeals and Richard E. Witcig cross-appeals from a decree entered by the District Court for Lancaster County, Nebraska, on January 3, 1979, in a dissolution action between the aforementioned parties. In its decree, the trial court found that the marriage between the parties was irretrievably broken and dissolved the marital relationship. It awarded custody of the minor child, Richard Edward Witcig, Jr., to Frances, subject to reasonable rights of visitation by Richard; ordered Richard to pay child support in the sum of $200 a month until such time as the minor child attained his majority, died, or married, whichever should occur first; and required Richard to continue medical and hospital insurance in effect for the child. The court awarded the residence of the parties in Lincoln, Nebraska, to Frances but required her to assume and pay the mortgage on said property. The court also awarded to Frances all the items of furniture and fixtures located in the residence, a Dodge automobile, all bank accounts and insurance policies in her name, all her merchandise and interest in her Avon products business; and further ordered Richard to pay Frances alimony in the amount of $350 per month until her death or remarriage, with the specific provision that, at such time as Richard retires from his service with the federal government, he shall request that a survivor's annuity be established for Frances in that sum, pay-

able upon petitioner's death by the U. S. Government until such time as Frances dies or remarries, whichever occurs first. The court also required Richard to file a certified copy of the decree under 5 U.S.C. § 8345 (Supp. II 1978). In its decree, the court also provided that Richard was to be relieved of all mortgage obligations upon the home; that he should receive the Oldsmobile automobile and all bank accounts, certificates of deposit, savings bonds, stocks, and insurance policies standing in his name; and that any and all property that either Frances or Richard hold jointly with either or both of their children, as well as property that Richard holds jointly with his sister, was not to be considered marital property subject to division, with the exception that some property and savings accounts held jointly by Richard and the minor child were ordered to be held in trust for the benefit of the minor child. The decree also provided, with reference to certain missing or misplaced U. S. savings bonds, that when and if such bonds were reissued, they should be divided equally between Richard and Frances. Finally, the trial court, in its decree, provided that the costs of the action should be taxed to Richard, with certain exceptions, and ordered Richard to pay partial attorney's fees to Frances' attorney, as well as to his own attorney, and also certain fees for expert witnesses.

In her brief on appeal, Frances makes the following assignments of error: (1) That the court erred in finding the marriage irretrievably broken; (2) That the alimony awarded to her is grossly inadequate and insufficient; (3) That the child support award of $200 a month for the minor child is grossly inadequate; (4) That the property division was patently unfair; (5) That the trial court erred in not considering as marital assets property held jointly by Richard and his sister; (6) That the trial court erred "in not considering an annuity receivable" (Richard's federal pension) as part of the accumu-

lated marital property; (7) That the trial court did not correctly value the assets and receivables in its evaluation of the marital estate; (8) That the judgment was contrary to law; and (9) That the judgment was contrary to the evidence. For reasons hereinafter stated, we affirm the judgment of the trial court.

The parties to this action were married on March 9, 1947. Two children were born as issue of the marriage; however, at the time of trial, only one of the children, Richard E. Witcig, Jr., was a minor. As previously stated, the custody of the minor child was placed in Frances, with visitation rights given to Richard. The action of the trial court in this regard is not an issue on this appeal. The record reveals that the marriage between the parties was a lengthy and, for the most part, a very stormy one. The litigation which ensued was bitter, with recriminations and accusations made by both parties, including charges of physical assaults and infidelity. While it is true that the parties had resided at the same address in Lincoln for 13 years, it is likewise true that Richard and Frances had lived apart for some time, with Richard residing in the basement of the residence, and Frances and the minor child residing in the upper floors. The record reveals that they had sought counseling from various persons throughout the duration of the marriage, but that such counseling had been of little help in their attempts to resolve their difficulties. The parties have agreed on the various items of the marital property with certain exceptions, most notably the value of certain bank accounts and savings bonds, as well as the value of Richard's pension with the Social Security Administration as the result of his financial contributions through his many years of government employment with that agency. Further reference will be made to these items in our discussion of the specific assignments of error.

As previously stated, Frances first assigns as error the action of the District Court in finding that the marriage was irretrievably broken. Specifically, she relies on Neb. Rev. Stat. § 42-361(2) (Reissue 1978), which provides as follows:

> If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation, and shall make a finding whether the marriage is irretrievably broken.

Frances contends that the finding that the marriage was irretrievably broken was erroneous, as only "slight or trivial" reasons were given for the dissolution. The record is undisputed that the parties have not lived together for a long period of time. In *Mathias v. Mathias,* 194 Neb. 598, 600, 234 N.W.2d 212, 213-14 (1975), we stated: "When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together the marriage is irretrievably broken." In *Boroff v. Boroff,* 204 Neb. 217, 218-19, 281 N.W.2d 760, 761-62 (1979), we set forth the standard of review of dissolution actions in this court as follows:

> While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite. Patton v. Patton, 203 Neb. 638, 279 N. W. 2d 627 (1979). Obviously a trial court weighs the credibility of the witnesses and the evidence and determines what evidence should be given the greater weight in arriving at a factual determination on the merits. The testimony need not be accepted in its en-

> tirety and the trier of fact must use a commonsense approach and apply that common knowledge which is understood in the community.

We conclude from the evidence in the record that the marriage of these parties was irretrievably broken and find no merit in the first assignment of error.

Frances also contends that the trial court committed error because the award of the child support was grossly inadequate. This error was not further mentioned in her brief, nor was it presented to this court on oral argument. Neb. Ct. R. 8.a.2(3) (Rev. 1977) provides, in part: "[C]onsideration of the cause will be limited to errors assigned *and discussed.*" (Emphasis supplied.) That being so, under the above rule, we may not and do not consider the question of the alleged inadequacy of the award of child support contained in the decree of the trial court.

Frances next contends that the property award contained in the decree was unreasonable. Specifically, she contends that certain property should have been included in the marital estate and subject to distribution by the court, which was not done. The applicable rules of law with reference to the distribution of property in a decree of dissolution are set out in *Falcone v. Falcone,* 204 Neb. 800, 804-05, 285 N.W.2d 694, 697 (1979), wherein we stated:

> The distribution of property following a decree of dissolution is provided for in section 42-365, R. R. S. 1943: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property *as may be reasonable,* having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contribu-

> tions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. * * *." (Emphasis supplied.) The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion, will not be disturbed on appeal. Phillips v. Phillips, 200 Neb. 253, 263 N. W. 2d 447 (1978); Schmer v. Schmer, 197 Neb. 800, 251 N. W. 2d 167 (1977). This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Blome v. Blome, 201 Neb. 687, 271 N. W. 2d 466 (1978); Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108 (1975).

Frances contends that the property award in this case was unreasonable because the property held by Richard in joint ownership with his sister should have been included in the marital estate. The rule is well established that where the parties to an action for dissolution of marriage are unable to agree upon a division of property, the trial court shall make such division as it deems conscionable and fair under all the facts and circumstances, taking into account the equities of the situation, irrespective of how legal title is held. *Cozette v. Cozette,* 196 Neb. 780, 246 N.W.2d 473 (1976). Richard testified that the property in question was entirely owned by his sister and not by him. The record in this case fails to disclose the extent of the property held jointly by Richard and his sister and also does not reveal whether such holdings were obtained through the use of Richard's property or other property. Frances has failed to establish by evidence the

source of the property held jointly by Richard and his sister and has failed to establish that such property was obtained by any contributions from Richard which otherwise might have been a part of the marital estate. We conclude that the action of the trial court in excluding from the marital estate property held jointly by Richard and his sister was correct, and we reject Frances' claim to the contrary. Similarly, Frances contends that the property held by Richard in joint ownership with his minor son should have been included in the marital estate. Specifically, she contends that such jointly held property represented an attempt to divert a portion of the marital estate and place it beyond her reach. In its decree, the trial court ordered that: "Any and all property that either [Richard] or [Frances] hold jointly with their children . . . is not to be considered and is not considered marital property subject to division hereunder . . . ." It is obvious that the trial court did not believe or find that the transfer of property from Richard to his minor son and himself jointly was an attempt to prevent Frances from receiving her share of the marital property. The record reveals that Richard placed the property jointly in his name and the name of his minor son for the purpose of providing for the education and future needs of the minor child and not in an effort to deplete the marital estate. We conclude that the trial court was reasonable and correct in excluding such property from the marital estate under the evidence in the record.

Finally, Frances assigns as error the failure of the court to consider Richard's pension fund with the federal government as part of the marital estate, subject to a division of the property by the court. This court has previously discussed the question of how pension and pension rights are to be considered and treated in connection with marriage dissolution actions. In *Howard v. Howard,* 196 Neb. 351,

242 N.W.2d 884 (1976), we stated:

> A pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement. . . . There are situations where retirement income must be considered in providing for the care and maintenance of the divorced wife. In those situations, it is considered as a source for the payment of alimony, not as a part of a property settlement. Such a situation is found in Albrecht v. Albrecht (1973), 190 Neb. 392, 208 N. W. 2d 669.

*Id.* at 357-58, 242 N.W.2d at 888.

Also, in *Andersen v. Andersen,* 204 Neb. 796, 798, 285 N.W.2d 692, 694 (1979), we stated: "While earning capacity or expectations of income may properly be considered in an allowance of alimony, they are not proper considerations in determining the appropriate division of property."

We recognize, however, that there are jurisdictions that treat pension interests as marital assets, subject to division by the court. See, for example, *Hutchins v. Hutchins,* 71 Mich. App. 361, 248 N.W.2d 272 (1976); *Pinkowski v. Pinkowski,* 67 Wis. 2d 176, 226 N.W.2d 518 (1975); Foster and Freed, *Spousal Rights in Retirement and Pension Benefits,* 16 J. Family L. 187 (1977-78). However, we are not persuaded by these authorities that our presently adopted rule should be changed. See *Ellis v. Ellis,* 191 Colo. 317, 552 P.2d 506 (1976). Problems inherent in the determination of the value of pension interests and the contingent nature of such interests convince us that the rule we adopted in *Howard* is correct and cause us to reject the cases holding to the contrary. We therefore reaffirm our position that pension interests *may* be considered on the question of alimony allowances, but not in the determination of the

division of marital property. In this case, however, we think it is clear that the trial court did consider Richard's pension interest in the determination of the alimony awarded to Frances. This, we believe, is a necessary conclusion from the very language of paragraph 10 of the court's decree, wherein the court stated:

> 10. The petitioner shall pay to the respondent alimony in the sum of $350.00 per month, effective with the date of this Decree, continuing until such time as the respondent dies or remarries, whichever occurs first, provided, however, that at such time as petitioner retires from his service with the Federal Government he shall request that a survivor's annuity be established for Frances I. Witcig in the sum of $350.00 per month, payable upon Petitioner's death, by the United States Government until such time as Frances I. Witcig dies or remarries, whichever occurs first.

It is clear that the court not only could have considered Richard's pension with respect to alimony, but actually did consider it. In this connection, see, also, Annot., 22 A.L.R.2d 1421 (1952).

Frances also contends, however, that Congress has mandated the inclusion of federal pensions in the marital estate by the adoption of 5 U.S.C. § 8345 (j)(1), which reads as follows:

> (j)(1) Payments under this subchapter which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of

> divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery of any other person.

We do not interpret that section in that manner. The legislative history of that section makes it clear that the purpose of that statute was to permit federal cooperation with state law and court orders, and to remove federal preemption from the area. It does not in any manner mandate the inclusion of federal pensions in the marital estate as Frances contends. See S. Rep. No. 95-1084, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 1379.

We believe that the alimony awarded by the trial court to Frances in the amount of $350 per month until her death or remarriage was reasonable and proper under the circumstances. The record reveals that her estimated living expenses were $578 per month. Although it appears she was unemployed at the time of the trial, it further appears that she was capable of obtaining employment at the minimum wage level at that time and, with the improvement of her typing skills, would be able to obtain better employment. In addition, she continues to be involved in the sale of Avon products which, according to the evidence in the record, produces an average monthly income to her of approximately $186. The trial court did not abuse its discretion in this regard.

Frances also contends that she should have been awarded alimony in gross in this matter. It is true that this court on many previous occasions has expressed the view that alimony awards payable in a form of an annuity are not favored, although they may be appropriate in certain circumstances. See, *Starr v. Starr*, 201 Neb. 683, 271 N.W.2d 464 (1978); *Magruder v. Magruder,* 190 Neb. 573, 209 N.W.2d 585 (1973); *Card v. Card,* 174 Neb. 124, 116 N.W.2d 21 (1962); *Metschke v. Metschke,* 146 Neb. 461, 20

N.W.2d 238 (1945). We have not, however, ever held that they were illegal per se, and have recognized that, in certain circumstances, they may be proper, even though not generally preferred. In the instant case we see no compelling reason for changing the alimony award of the trial court and defer to its judgment in the matter.

We now turn our attention to Richard's cross-appeal. He also contends that the award of alimony was unreasonable under the circumstances. In view of what we have earlier stated with regard to this issue during our examination of Frances' assignments, we reject Richard's claim.

Finally, Richard contends that the trial court committed error in awarding fees for expert witnesses and attorney's fees to Frances. The allowance of fees and costs is discretionary with the trial court and depends upon a consideration of all the facts and circumstances presented. *Friedenbach v. Friedenbach,* 204 Neb. 586, 284 N.W.2d 285 (1979); *Tavlin v. Tavlin,* 194 Neb. 98, 230 N.W.2d 108 (1975). Although the award appears to be generous, in view of the extensive discovery shown in the record, we do not believe that the court abused its discretion. We, therefore, reject Richard's claim of error in this respect.

In view of what we have stated above, the judgment of the District Court must be affirmed.

AFFIRMED.

McCOWN, J., concurs in result.

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D. K. MEYER CORPORATION, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. BEVCO, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE.

292 N. W. 2d 773

Filed May 28, 1980. No. 42731.

1. **Contracts: Change Orders: Waiver.** Where the parties ignore a provision in the contract that requires change orders to be in writ-

ing, it will not furnish a defense to a claim for compensation for the additional work performed.

2. **Contracts: Intention of the Parties.** The interpretation given a contract by the parties themselves while engaged in the performance of the contract, is one of the best indications of the true intent of the parties and, ordinarily, that construction of the contract should be enforced.
3. **Contracts: Construction Contracts: Contractors and Subcontractors.** A provision in a construction subcontract permitting the contractor to withhold payments to his subcontractor until payment is received from the owner should not be construed in such a manner as to deny money rightfully due the subcontractor which was withheld as a result of a dispute between the contractor and the owner not directly involving the subcontractor.
4. **Prejudgment Interest.** Prejudgment interest should be awarded in an action for a liquidated sum which represents a balance owing on a contract and which action is decided in the claimant's favor.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed as modified.

Larry R. Frank, for appellant.

James B. Cavanagh of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

This matter involves an appeal by Bevco, Inc., and a cross-appeal by D. K. Meyer Corporation from an order of the District Court for Douglas County, Nebraska, affirming a judgment rendered by the Omaha municipal court in favor of Meyer for money due it from Bevco on a construction project. We affirm as modified.

It appears from the record that the Church of the Holy Spirit in Plattsmouth, Nebraska, engaged an architectural firm to draft plans and specifications for the purpose of constructing the Holy Spirit Parish Center. Bids were subsequently let, with Bevco

being awarded the general contract. Bevco, in turn, let subcontracts for portions of the work to various parties under the contract. A roof support structure was to be fabricated by two different subcontractors and Meyer was awarded the subcontract for the complete erection of the roof support structure, consisting of the structural steel, steel space grid, open web joists, metal decking, and miscellaneous and ornamental metals. The total amount to be paid Meyer for its work under the contract was $10,550. The actual building was erected according to the plans and specifications. Likewise, the roof support structure was fabricated according to the specifications and plans. However, when Meyer attempted to place the roof support structure in place, it did not fit on the building as was required by the plans and specifications.

Measurements of the building were again taken and it was determined that the structure was dimensionally correct. In fact, the steel space grid support structure was of a standardized dimension, but did not fit into the building as planned by the architect. All parties to the construction project agreed that modifications were necessary for the completion of the project, which modifications were performed by Meyer, without objections by Bevco. While it is not clear from the record which party specifically authorized the modifications, it is, however, apparent from the evidence adduced at trial that the parties, including Meyer and Bevco, inferentially agreed to the modifications. Meyer incurred additional expenses in performing the modifications in a total amount of $3,891.40. This action arose from the refusal of Bevco to pay the additional costs incurred by Meyer as a result of the modifications performed by it.

On the basis of the foregoing evidence, the municipal court found for Meyer in the amount of $3,891.40 and costs in the amount of $44. The Dis-

trict Court affirmed this judgment and Bevco has appealed to this court, assigning two errors.

Bevco contends that error was committed by the lower court because the work was performed by Meyer without its first receiving a written change order pursuant to the contract entered into by Bevco and Meyer. Said contract was a "Standard Sub-Contract Agreement," which provided in relevant part: "[T]hat no extra work shall be allowed or changes made by the Sub-Contractor, or paid for by the Contractor unless and until authorized by the Contractor or his superintendent in writing before the work and/or changes are begun." It is undisputed that a written change order for the modifications performed was never given to Meyer. However, we conclude that the failure to obtain a written change order does not bar Meyer's recovery herein. In *Griffin v. Geneva Industries, Inc.*, 193 Neb. 694, 696-97, 228 N.W.2d 880, 882 (1975), we stated:

> It is well-established that the parties to a contract may avoid such a provision where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of the provision, or the party claiming the benefit of the provision is estopped to rely on it. Annotation, 2 A. L. R. 3d 620.
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> The evidence is clear that the defendant knew about the additional work performed by the plaintiff and its conduct indicated approval and authorization for the work to proceed. Under these circumstances the defendant cannot now contend that the plaintiff is not entitled to compensation because he failed to obtain prior approval of a quotation for the additional work. Where the parties ignore such a provision in the contract it will not furnish a defense to a claim for compensation for the additional work

performed. McGowan v. City Malt Co., 89 Neb. 10, 130 N.W. 965.

See, also, Annot., 2 A.L.R.3d 620 (1965); and Annot., 66 A.L.R. 649 (1930).

The record sustains the conclusion that the parties herein ignored the provision of the contract requiring a written change order prior to the modification of the project. "The interpretation given a contract by the parties themselves while engaged in the performance of the contract is one of the best indications of the true intent of the parties and, ordinarily, that construction of the contract should be enforced." *Richards v. Bycroft,* 197 Neb. 478, 481, 249 N.W.2d 743, 745 (1977).

The job supervisor from Meyer testified that the work performed in the modifications was not originally contemplated in the contract. The project manager from Bevco testified that the modifications caused Meyer to incur costs not originally contemplated in the contract for erection of the steel space grid. Moreover, correspondence between Bevco and the architectural firm which designed the building indicates knowledge and acceptance of the extra costs incurred by Meyer and a request by Bevco to the architect that a change order be issued to Bevco for the costs of said modifications. In fact, in its request for a change order, Bevco demanded a 7 percent markup for itself on the costs of modification, but the request for the change order was denied. Whether or not the owner chose to modify its contract with Bevco in regard to any written change orders is immaterial on the question of whether Bevco's actions amounted to a modification of its own contract with Meyer. We believe that Bevco's actions clearly demonstrated a modification of the contract and recognized that Meyer was due money for the extra costs incurred as a result of the modifications. We, therefore, reject Bevco's assignment of error to the contrary.

Bevco also contends that error occurred because the contract further conditioned Meyer's payment on receipt of payment by Bevco from the owner. The contract provided, in relevant part: "That the Contractor shall not be liable for, nor bound in any respect to the Sub-Contractor for the payment to him of his monthly or final estimates of any moneys in excess of the amount which the Contractor receives from the Owner for the Sub-Contractor's work." The record is clear that Bevco has paid Meyer for all the work called for by the subcontract, but that Meyer has not been paid for the additional or extra labor and work incurred in the corrections and modifications referred to above. There is no dispute that the owner has not paid Bevco in full for all money due Bevco for work done on the project, but there is evidence in the record strongly indicating that the failure or refusal to pay Bevco in full was due to other matters in dispute between the owner and Bevco, in addition to the claim of Meyer for additional compensation for the extra work done in remedying the defects referred to. In *Midland Engineering Co. v. John A. Hall Const. Co.,* 398 F. Supp. 981 (N.D. Ind. 1975), the court was faced with a similar problem and had occasion to interpret a provision in a subcontract similar to that set out above. The provision contained in the subcontract involved in that case read as follows: "[T]he last payment, which the said contractor shall pay to said subcontractor immediately after said material and labor installed by said subcontractor to have been completed, approved by said architect, and final payment received by the contractor . . . ." *Id.* at 993. In interpreting the above provisions, that court stated:

> Clauses such as Paragraph 15 are not intended to provide the contractor with an eternal excuse for nonpayment. They have been construed by the courts on several

> occasions to simply provide the contractor with a reasonable time within which to obtain payment from the owner before he is contractually bound to the subcontractors for immediate payment. The interpretation for which Hall presses has been rejected many times. See, e. g., *Thomas J. Dyer v. Bishop Int'l Eng. Co.*, 303 F.2d 655 (6th Cir. 1962); *Byler v. Great Amer. Ins. Co.*, 395 F.2d 273 (10th Cir. 1968) (following *Dyer*).
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> . . . .
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> Under the rule for which Hall argues, it would not be inconceivable that a malefic general contractor might intentionally maintain a dispute with the owner which would cause the owner to refuse to make payment; the general contractor could thereby avail himself for several years of funds to which he has no right. The *Dyer* rule precludes such an intolerable state of affairs.

*Id.* at 993-94.

*Midland Engineering* was cited with approval by Judge Van Pelt, Senior District Judge, in *Culligan Corporation v. Transamerica Insurance Company*, 580 F.2d 251, 254, (7th Cir. 1978), as follows:

> We find further support for our position in *Midland Engineering Co. v. John A. Hall Construction Co.*, 398 F.Supp. 981 (N. D. Ind. 1975). In that case the various subcontractors' work had been completed or substantially completed, and approved by the architect. Final payment had not been received by the general contractor, so he withheld final payment from the subcontractors on the basis that the subcontracts provided that final payment would not be made until the general contractor received payment. Despite the clear language of the subcontract, the court found that the lan-

> guage merely provided the contractor with a reasonable time within which to obtain payment from the owner. The Indiana courts again indicated a concern with preventing
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> > money rightfully due to the subcontractors from becoming interminably tied up in a dispute between the contractor and the owner to which the subcontractors are not parties.

We do not believe that Meyer should be precluded from obtaining payment for the extra work it performed by virtue of the contract provision in its subcontract with Bevco. Nor do we believe that the provision in question was intended to delay the payment for extra work performed by a subcontractor and it should not be used in this case as an excuse for not paying Meyer. Meyer has long since been paid in full for the work specifically called for by his contract and, while there may still be disputes between Bevco and the owner which result in Bevco not having collected the money due it under its contract with the owner, that fact, under the authorities above set out, should not preclude Meyer, as subcontractor, from recovering from the contractor. We, therefore, conclude that Bevco's claim to the contrary is without merit.

Having found no merit in Bevco's errors on appeal, we now examine Meyer's cross-appeal. Meyer contends that the lower court committed error in failing to award it prejudgment interest. In the petition filed in the municipal court, Meyer asked for a judgment in the amount of $3,891.40 with prejudgment interest from June 6, 1977, the date upon which Meyer submitted its claim for the extra work to Bevco. The claim herein appears to be liquidated and one which normally would be a claim for which Meyer could recover prejudgment interest. In that regard, see *King v. Sky Harbor Air Service, Inc.*, 204 Neb. 4, 281 N.W.2d 209 (1979); *Wiebe Constr. Co. v.*

*School Dist. of Millard,* 198 Neb. 730, 255 N.W.2d 413 (1977); *Abbott v. Abbott,* 188 Neb. 61, 195 N.W.2d 204 (1972). In this case, the record is clear that there has never been a dispute between the parties that the extra work performed by Meyer was necessary and was performed by him; nor was there at any time any dispute as to the reasonable value of the services performed. The only dispute between the parties involved the question of who was liable to pay Meyer. Likewise, the only issues raised and contested in the District Court and brought to this court on appeal, were with reference to the interpretation of the two provisions of the subcontract as to the necessity of obtaining written approval for the performance of extra work and the one just discussed as to the necessity of payment by the owner before the contractor is required to pay the subcontractor.

The evidence and exhibits in this case clearly indicate that Meyer submitted an itemized list of the dates and nature of the work done in correcting the deficiencies involved, which list also contains an itemized breakdown of the amounts charged for the various items of work. It is clear from the record that Meyer sent this list to Bevco on or about June 6, 1977, but Bevco refused to pay the invoice. It also is clear, however, that Bevco did send the bill on to the owner for payment and, as previously stated, added a profit margin of 7 percent to the items in the bill for its own purposes.

While the District Court did not award the prejudgment interest to Meyer for which it prayed, there is nothing in the record that specifically indicates that it either approved or disapproved the granting of such interest. We believe that the amount claimed by Meyer for the extra work was a liquidated claim, at least as of June 6, 1977, and that the court should have allowed prejudgment interest to Meyer in its judgment. It is, therefore, necessary

that the judgment be modified to include such prejudgment interest.

In view of what we stated above, we conclude that the judgment of the District Court, affirming the judgment of the municipal court, must be affirmed, with the exception of the allowance of prejudgment interest; and we, therefore, remand this matter to the District Court with directions to amend its judgment to allow such interest.

AFFIRMED AS MODIFIED.

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WILMA LAURA MURDOCH, APPELLANT, V. JOHN WILLIAM MURDOCH, APPELLEE.

292 N. W. 2d 795

Filed May 28, 1980. No. 42826.

1. **Child Custody.** In the determination of custody and visitation matters the primary concern is the best interests of the children.
2. **Child Custody: Appeal and Error.** A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.
3. _____: _____. The determination of the trial court with respect to changing the custody of minor children will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
4. **Recusal: Appeal and Error.** A trial judge's overruling of a motion for change of judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Stanley D. Cohen, for appellant.

William W. Griffin, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, WHITE, and HASTINGS, JJ., and CAPORALE, District Judge.

KRIVOSHA, C. J.

Appellant, Wilma Laura Murdoch, appeals from an order of the District Court for Holt County, Nebraska, denying her petition to modify a decree previously entered by the District Court for Holt County, Nebraska, as to custody of one of the minor children of the parties and from a further order of the court suspending Wilma's rights of visitation with the minor children until further order of the court. Wilma assigns three specific errors. She maintains that: (1) The trial court erred in failing to disqualify itself on application by Wilma; (2) The trial court abused its discretion in failing to modify the decree as to custody of one of the minor children of the parties, Jennifer Murdoch; and (3) The trial court abused its discretion in suspending Wilma's rights of visitation of all the children, including Jennifer. We have reviewed the files and records in this case and conclude that the assignments are without merit and that the action of the District Court should be affirmed.

The parties have previously been before this court and the facts underlying the ultimate dissolution of the marriage are set out in detail in that case and need not be repeated here. See *Murdoch v. Murdoch,* 200 Neb. 429, 264 N.W.2d 183 (1978). The instant action was commenced by Wilma seeking to have the decree modified to provide that she receive permanent custody of Jennifer, who had previously been awarded to her former husband, John William Murdoch. The evidence, as presented to us, indicates that following the initial decree the parties continued to have difficulty concerning the custody of the children and visitation by Wilma. The record reflects further that, at some point in time subsequent to the entry of the initial decree, John was transferred by his employer to Red Deer, Alberta, Canada, and, before moving, made application to and obtained permission of the District Court to re-

move Jennifer with him to Canada. Wilma continued to exercise reasonable rights of visitation during the summer as specifically prescribed by the trial court. The record reflects, however, that on each instance that Jennifer came to visit Wilma, there was difficulty in obtaining her return to John. The court was aware and mindful of this problem and the traumatic effect it was having on Jennifer.

Little purpose would be served in either this case or any case in the future to detail all the claims made by Wilma concerning the care and custody of Jennifer. Suffice it to say that there is a conflict in the evidence. We cannot, as a matter of law, say that the trial court's conclusions were either incorrect or constituted an abuse of discretion. In reviewing this matter we are bound by certain principles of law heretofore declared by this court, including the legal principle that, in the determination of custody and visitation matters, the primary concern is the best interests of the children. *Casper v. Casper,* 198 Neb. 615, 254 N.W.2d 407 (1977); *Young v. Young,* 195 Neb. 163, 237 N.W.2d 135 (1976). Likewise, a decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. The determination of the trial court with respect to changing the custody of minor children will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. See, *Bokelman v. Bokelman,* 202 Neb. 17, 272 N.W.2d 916 (1979); *Carper v. Rokus,* 194 Neb. 113, 230 N.W.2d 468 (1975). As we have indicated, our examination of the record does not satisfy any of the requirements for reversing the judgment of the trial court refusing to modify the custody of Jennifer. On that basis, therefore, we must accept as proper the action of the trial court and affirm the judgment

in that regard.

We turn next to Wilma's next assignment of error, namely that the trial court should have disqualified itself because it could not be fair and impartial. Our reading of the record indicates to us quite the contrary. Notwithstanding the fact that Wilma and her counsel repeatedly attempted to incite the trial court, it refused to accept the bait. If anything, it may be said that the trial court displayed the patience of Job. We have recently said that a trial judge's overruling of a motion for change of judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. See *State v. Costello,* 199 Neb. 43, 256 N.W.2d 97 (1977). An examination of the record fails to disclose how or in what manner the trial court was either biased or prejudiced in this matter as a matter of law. There is simply no evidence of any bias or prejudice. The assignment is totally frivolous and without merit.

We turn then to the last assignment. The trial court, on John's motion, suspended Wilma's rights of visitation until further order of the court.

The trial court concluded that Wilma would not cooperate insofar as visitation was concerned and would continue to require John to bring legal proceedings after each visitation. Further, the court felt that Wilma and her current husband would pursue a practice of attempting to alienate the children from John and would attempt to instill a false fear and dislike in the children for John and his current wife. We cannot say that the record would not justify such a view. Quite to the contrary, such a conclusion by the trial court was reasonable under the circumstances. The record indicates, and it was conceded at the time of argument, that John's employment in Canada was only temporary and that he and the children would be returning to Nebraska soon. While we believe that the matter of suspend-

ing complete visitation of a parent with a child is an extreme measure and should not often or lightly be done, we do believe that the record in this case, under the specific facts, would support the trial court's action. The right of visitation is subject to continuous review by the court under Neb. Rev. Stat. § 42-364 (Reissue 1978), and if and when John and the children return to Nebraska, Wilma may once again, if she desires, petition the court for the right to exercise visitation with some or all of the children. It is apparent, however, that the trial court could not rely upon Wilma to return the children to Canada and, therefore, was unwilling to take any further chances in that regard.

For these reasons, we believe that the judgment of the trial court in each and every respect was correct and should be affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. CHRIS VAN EGMOND, APPELLANT.

293 N. W. 2d 72

Filed May 28, 1980. No. 42837.

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

Walter Matejka, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

Appellant, Chris Van Egmond, appeals from an order of the District Court for Madison County, Nebraska, affirming a judgment of the county court of

Madison County, Nebraska, finding appellant guilty of resisting or abusing an officer in the performance of his duty in violation of Neb. Rev. Stat. § 28-729 (Reissue 1975). We affirm.

The evidence discloses that on September 24, 1978, about 2 or 2:30 a.m., the sheriff of Madison County was awakened by a telephone call from his dispatcher telling him about a complaint of a loud party and shooting going on at 2300 South First Street, outside the city limits of Norfolk, Nebraska. The sheriff picked up a deputy and together they rode to the scene of the complaint. The automobile they were driving was marked to indicate it was the sheriff's automobile; it had a star on the side and a red light on the roof of the vehicle. Both the sheriff and his deputy were in uniform. They pulled into the driveway of the subject property where they encountered 12 to 15 people around a bonfire. The deputy testified that he attempted to get out of the car at the same time as the sheriff but that as he did so he was shoved back in the car by the appellant who pushed the door with his leg and hip. The appellant then made some obscene statements to the deputy who reached back and got his flashlight and shined it in the appellant's eyes. Appellant grabbed the flashlight and threw it some 40 or 50 feet. The deputy then drew his revolver at which time appellant encouraged the deputy to shoot him.

Appellant admitted at the trial that he had used his knee to keep the door from opening all the way, but denied that he had ever slammed it shut. He likewise admitted that it was possible that he had said some obscenities to the deputy. He further admitted he grabbed the flashlight from the deputy's hand and threw it over his shoulder. Appellant offered no evidence which could in any manner justify his actions or behavior toward the deputy.

The appellant was convicted after trial in the county court and sentenced to 30 days in the county

jail. Upon appeal, the District Court affirmed the county court decision.

Appellant assigns as error: (1) That the trial court erred in not dismissing the action for failure of the prosecutor to make a prima facie case; and (2) The trial court erred in overruling the motion for a new trial. In essence, the assignments are one and the same and we need consider only the first.

Appellant was specifically charged under § 28-729, which provides:

> Whoever abuses any judge or resists or abuses any sheriff, constable or any other officer in the execution of his office, shall be fined in any sum not exceeding one hundred dollars or be imprisoned in the jail of the county not exceeding three months.

In *State v. Davis,* 195 Neb. 361, 362, 237 N.W.2d 885, 886 (1976), we held: "Under this statute the offense is complete if the evidence shows either an assault or a resisting of any law enforcement officer while engaged in the performance of his official duties." The *Davis* case was brought under Neb. Rev. Stat. § 28-729.01 (Reissue 1975), but the reasoning of the *Davis* case applies equally to § 28-729. The record fails to disclose any justification or reason for the appellant's preventing the deputy from leaving the vehicle while attempting to perform his official duties, nor any justification for grabbing the deputy's flashlight and throwing it away, nor any justification for verbally assaulting the deputy with obscenities. Appellant clearly was intending to prevent the deputy from performing his official duties and, in doing so, abused the deputy.

In *State v. Boss,* 195 Neb. 467, 238 N.W.2d 639 (1976), we held that one who grabbed the hand and wrist of an officer and called him a "dirty son-of-a-bitch" and then struggled against the officer when he subsequently tried to handcuff him and hit the officer on the side of the head, had indeed abused the

officer within the meaning of § 28-729. While, to be sure, the action of the appellant herein was not as severe as that in the *Boss* case, nevertheless, but for the actual physical assault on the deputy in the *Boss* case, the activity of the appellant in this case was similar to that of the *Boss* case and clearly displayed abuse of a deputy in the execution of his office.

The most that the appellant can offer in support of his position is that the evidence was in conflict as to just how far he went in dealing with the deputy. However, in *State v. Carter,* 205 Neb. 407, 409, 288 N.W.2d 35, 36 (1980), we said:

> [I]t is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Taking the view most favorable to the State in this case, it appears that the deputy was on the premises in the exercise of his official duties and in an attempt to preserve the peace. Both the county court, initially, and the District Court, on appeal, were justified in their conclusions and on appeal to this court such conclusions should not now be disturbed. If anything, it would appear that the court was lenient in sentencing the appellant. Officers in the exercise of their official duties should not be abused.

AFFIRMED.

WENDELL R. WENTLING, SURVIVING SPOUSE AND ADMINISTRATOR OF THE ESTATE OF DORTHA ANN WENTLING, DECEASED, APPELLANT, V. DAVID E. JENNY, M.D., AND B. M. STEVENSON, M.D., APPELLEES.

293 N. W. 2d 76

Filed June 3, 1980. No. 42628.

1. **Expert Witnesses: Medical Malpractice: Standard of Care.** A specialist from one medical community is competent to testify as an expert witness in a medical negligence case as to the standard of care or skill required in another community, if the witness has knowledge or familiarity with the practice and standard in similar communities.
2. **Medical Malpractice: Standard of Care.** In the treatment and diagnosis of certain common prevailing diseases, the medical standards of care and skill are national, rather than local or regional.

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

John T. Carpenter and James R. Coe of Carpenter, Fitzgerald & Coe, P.C., for appellant.

Harold W. Kay and Stephen W. Kay of Kay & Satterfield, and Knapp, Mues & Sidwell, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is a medical negligence action brought by Wendell R. Wentling as surviving spouse and as administrator of the estate of his deceased wife, Dortha Ann Wentling, against David E. Jenny, M.D., and B. M. Stevenson, M.D., alleging that the defendants were negligent in failing to timely diagnose and treat carcinoma of the right breast. The jury returned a verdict in favor of both defendants against the plaintiff. Plaintiff filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, which was overruled. For

the reasons stated herein, the verdict is set aside and a new trial is ordered.

It is not necessary to review in detail all the facts involved in the foregoing incident. The essential facts are as follows.

The decedent was under the care of Dr. Jenny, a family practitioner in Alma, Nebraska, from June 1972 through December 1974. Dr. Jenny found a mass in decedent's right breast in April 1974, cysts in June 1974, and an enlarged axillary node in October 1974. Dr. Jenny referred the decedent to Dr. Stevenson, a general surgeon practicing principally at the Kearney Clinic, Kearney, Nebraska. Dr. Stevenson first saw the decedent as an outpatient in Alma, Nebraska, in April 1974. At that time he found cysts in the decedent's breast. In October 1974, he also detected the enlarged axillary node. Prior to the examination, Dr. Stevenson did not receive any history from Dr. Jenny as to decedent's complaints or of her past medical history. During their joint medical care, which continued for approximately 8 months, the physicians did not discuss the care and treatment of the decedent's condition with each other. The record discloses that neither doctor undertook biopsies nor any clinical diagnostic means to determine the nature of Mrs. Wentling's condition.

In December 1974, the decedent sought medical advice from Dr. Charles G. Gross in Cambridge, Nebraska. This physician performed a biopsy which established carcinoma of the breast. After various surgical procedures and radiation treatments, Mrs. Wentling died on December 3, 1975.

During the course of the trial, expert testimony was given by Dr. Robert Brittain, a surgeon licensed in Colorado, and certified by the American Board of Surgeons. He testified that he practiced general surgery for approximately 17 years and during that time he diagnosed and treated females afflicted with cancer of the breast. Dr. Brittain stated he was

acquainted with the accepted medical standards of medical practice in communities like Alma, Nebraska, as they existed in 1974 and 1975. While he was in private practice in Colorado, he received referrals from Nebraska physicians on patients with particular reference to female patients with cancer. In addition, he instructed medically, general practitioners, general surgeons, and family doctors from the State of Nebraska as well as performed breast surgery in communities similar to Alma, Nebraska.

Defense counsel objected to Dr. Brittain's competency to testify to the standard of care required in Alma, Nebraska. The objection was sustained and an offer of proof was made. It was Dr. Brittain's opinion that neither Dr. Jenny nor Dr. Stevenson met the standard of recognized medical care in Alma, Nebraska, in that they allowed, for approximately 130 days, the patient to go untreated, unadvised, and with no interim examination. Furthermore, the doctors were professionally negligent in not undertaking an immediate biopsy or any clinical diagnostic means to determine the nature of the lymph node but permitted the patient to leave unattended with the only instructions to be reexamined in 2 or 3 weeks.

The record further indicates that Dr. Brittain would have testified that in April 1974, it was his opinion the decedent had a 95 percent to a 100 percent chance of cancer. If the cancer had been properly diagnosed and treated, the decedent would have had a 75 percent survival rate. By May 1974, there was a 100 percent chance of cancer with a survival rate of 70 percent. If the cancer had been properly diagnosed and treated in June 1974, the decedent would have had a survival rate of between 85 percent and 68 percent. And finally, Dr. Brittain would have stated that if the cancer had been treated in October 1974, the decedent would have had a 15 percent chance of survival.

Dr. Brittain would have stated, according to the offer of proof, that there had evolved a national rather than local or geographical standard of medical care in treatment of cancer of the breast. Such a malady is treated the same whether the recipient of the disease and the location of the treatment is in Miami, Florida, or Alma, Nebraska.

While plaintiff assigns several errors, this review is limited to the court's refusal to allow plaintiff's medical expert, Dr. Robert Brittain, to testify about the accepted standard of medical care required of the practice of medicine in Alma, Nebraska.

In light of Dr. Brittain's testimony that he performed breast surgery in rural towns similar to Alma, Nebraska, and that he took referrals from doctors in western Nebraska, he demonstrated sufficient knowledge to testify to the standard of care of the community where defendants' acts were performed. Even if the "locality" rule is applied, that rule requires only that the expert have knowledge of the defendant's community, not that he have actually practiced in the area. "There are no state lines recognized in the Nebraska rules which speak in terms of 'similar localities' and 'similar communities.' " *Kortus v. Jensen,* 195 Neb. 261, 269, 237 N.W.2d 845, 850 (1976).

Not only did Dr. Brittain demonstrate sufficient knowledge to testify because of his background and contacts with rural towns similar to Alma, but the nature of the disease and its treatment further supports Dr. Brittain's competence to testify. Cancer is a commonly prevailing disease with common characteristics. If practices within a certain specialty do not vary significantly throughout the country, there is no policy justification for the locality rule.

"We recognize that medical standards of care and skill are becoming national, rather than local or regional." *Id.*

Another factor contributing to Dr. Brittain's competency to testify is his status as a certified specialist. Both Dr. Stevenson and Dr. Brittain are certified by the American Board of Surgeons. To become a member, a physician must complete requirements in his specialty. The same standards are applied nationally to these specialists.

In light of the growing standardization in medical education, training, and communication, it is a misuse of the rules of evidence to arbitrarily restrict expert witnesses to those who practice in the same community. Dean Prosser notes the following in regard to the locality rule:

> The older decisions sometimes stated this as a standard of the "same locality;" but this is now quite generally recognized as too narrow. Later cases expanded it to speak of "the same or similar localities," thus including other towns of the same general type. The present tendency is to abandon any such formula, and treat the size and character of the community, in instructing the jury, as merely one factor to be taken into account in applying the general professional standard.

W. Prosser, Law of Torts 166 (3d ed. 1964), quoted in *Douglas v. Bussabarger,* 73 Wash. 2d 476, 490, 438 P. 2d 829, 838 (1968).

In *Kortus v. Jensen,* we said evidence that the expert had never practiced in the defendant's community goes to the weight to be accorded the evidence by the trier of fact; it does not keep the plaintiff's expert from testifying to a general standard of skill in the defendant's community if he testifies that he is familiar with that standard. See, also, *Raitt v. Johns Hopkins Hospital,* 274 Md. 489, 336 A.2d 90 (1975); *Douglas v. Bussabarger, supra.*

The crux of the matter is that the standards to which Dr. Brittain proposed to testify are minimum

standards applicable wherever the diagnosis and treatment of cancer of the breast occur. It is error to exclude an expert's testimony solely because he did not actually practice or reside in a community.

The verdict is set aside and the cause remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

BOSLAUGH, J., dissenting.

I am unable to agree with the majority opinion in this case for several reasons.

The plaintiff's second amended petition alleged the defendants' standard of care toward the plaintiff's decedent fell below the "standards of accepted medical practice in the community of Alma, Nebraska," because the defendants failed to make a timely and reasonable medical examination of the decedent; failed to diagnose carcinoma of the breast; failed to undertake timely medical treatment for carcinoma; and failed to take a biopsy of the mass in decedent's right breast and the enlarged lymph node in decedent's right axilla.

The record shows Dr. Jenny examined the decedent on June 30, 1972, July 10, 1973, and April 25, 1974. At the July 10, 1973, examination Dr. Jenny found small, "BB" size, cysts in both breasts. On April 25, 1974, Dr. Jenny found a large, smooth, freely movable, irregular mass in the right breast. Dr. Jenny believed the decedent had fibrocystic disease, a diagnosis that was later confirmed by physicians who treated the decedent in Denver, Colorado. However, as a precautionary measure, Dr. Jenny referred the decedent to Dr. Stevenson, a surgeon from Kearney, Nebraska.

Dr. Stevenson examined the decedent at Alma on April 30, 1974. Dr. Jenny was not present during the examination, but his partner, Dr. Long, was present. Dr. Stevenson found no dominant nodule but detected

fine multinodularity in both breasts. Dr. Stevenson instructed the decedent to see Dr. Jenny after her next menstrual period.

Dr. Jenny again examined the decedent on June 19, 1974. The breasts were normal at that time except for the presence of multiple cysts. There was no mass, nodule, or lump at that time, and no enlarged node in either axilla.

On October 29, 1974, the decedent consulted Dr. Jenny in regard to a lump in her right axilla, or armpit, that she had first noticed 3 weeks earlier. Dr. Jenny examined the decedent's breasts which appeared to be normal, there being nothing dominant in either breast. Nevertheless, Dr. Jenny referred the decedent to Dr. Stevenson who examined the decedent that same day.

Dr. Stevenson found nothing dominant in either breast, but instructed the decedent to return in 2 to 3 weeks for a further examination. If the node were still enlarged at that time, Dr. Stevenson would arrange for a biopsy to be done at Kearney, Nebraska. The decedent did not return as requested and was not seen again by Dr. Jenny or Dr. Stevenson.

This case turns on the question of whether the defendants or either of them were negligent in failing to diagnose cancer in the decedent. There could be no negligence in failing to treat a disease which was never diagnosed.

At the time Dr. Jenny detected a mass in the decedent's breast, and the enlarged node in the axilla, he referred her to Dr. Stevenson. The plaintiff's claim of negligence in this regard is that Dr. Jenny failed to discuss his findings with Dr. Stevenson prior to Dr. Stevenson's examination of the decedent. There is no evidence that this, in any way, prejudiced the examination of the decedent by Dr. Stevenson. The evidence is clear that Dr. Stevenson knew what the decedent's complaints were and there is no evidence that Dr. Jenny's alleged negligence in failing to dis-

cuss his findings with Dr. Stevenson was of any consequence whatever. There is a complete absence of evidence of causation in this regard. The motion to dismiss as to the defendant Jenny should have been sustained.

The witness Dr. Brittain, called by the plaintiff, attempted to testify as to the standard of care in Alma, Nebraska. It was demonstrated, however, that Dr. Brittain had no knowledge or information concerning the facilities available at Alma for use in making a diagnosis of the decedent's condition. While the treatment for a disease may be more or less standardized, it is self-evident that the diagnostic procedures to be followed in a particular community will vary depending upon the facilities available. It is difficult to see how Dr. Brittain could testify as to the standard of care in communities similar to Alma if he was unfamiliar with the facilities at Alma.

A trial court has some discretion in determining whether an expert witness has an adequate basis upon which to express an opinion. In view of Dr. Brittain's unfamiliarity with the facilities available in Alma, Nebraska, it was within the discretion of the trial court to exclude his testimony as to the proper standard of care in that community in regard to diagnostic procedures.

The evidence in this case shows that at the times Dr. Stevenson examined the decedent she had no dominant mass in either breast. In other words, there was nothing in the breast to biopsy on either occasion. With respect to the node in the axilla, Dr. Stevenson did not believe an immediate biopsy was required because there was no dominant mass in either breast. The decedent, however, failed to return in 2 to 3 weeks as instructed, and in fact delayed a biopsy until January 28, 1975, approximately 90 days after her last examination by Dr. Stevenson, although she was aware of a lump in her right breast early in December 1974.

The judgment of the District Court should be affirmed.

CLINTON, J., dissenting.

I respectfully dissent from the majority opinion for the reason that there was no error in the court's refusal to receive the offer of the opinion of Dr. Robert Brittain. I agree with the dissent of Boslaugh, J., insofar as it pertains to the defendant, David E. Jenny, M.D. There was no evidence presented or offered which made a case submissible to the jury as to the defendant Dr. Jenny. The jury verdict in favor of both defendants should, therefore, be permitted to stand. In addition, the majority opinion, inadvertently perhaps, casts a shadow upon the validity of Neb. Rev. Stat. § 44-2810 (Reissue 1978), defining malpractice and professional negligence, which section, although not governing this case because it does not apply to causes of action accruing before the effective date of the statute, will apply in other malpractice cases. The three matters mentioned above will be discussed seriatim.

Even if it be accepted that Dr. Brittain was qualified to testify by being familiar with the standard of care required in Alma, Harlan County, Nebraska, and that the local standard is in this instance the same as the national standard, the offer of Dr. Brittain's testimony in question and answer form was properly refused because the questions and the proffered answers and opinion contained assumptions which were not supported by the evidence.

In *Clearwater Corp. v. City of Lincoln,* 202 Neb. 796, 277 N.W.2d 236 (1979), we said:

> The opinion of an expert witness lacked probative value if the assumptions for it were shown to be not true. [Citation omitted.]
>
> The value of the opinion of an expert witness was dependent on, and was no stronger than, the facts on which it was predicated. Such an opinion had no probative force un-

> less the assumptions upon which it was based were shown to be true.

*Id.* at 802, 277 N.W.2d at 240. In that same case, we also said:

> Expert testimony should not be received, or if received should be stricken, if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.
>
> Where the opinion testimony of an expert witness does not have a sound and reasonable basis it should be stricken.

*Id.*, syllabus of the court.

We point out in this dissent just three of the assumptions not supported by the evidence in this record. The offer assumes that at the time of the examination by Dr. Stevenson on April 30, 1974, there was a "dominant" mass in the upper, outer quadrant of the patient's right breast and that it would have been found had the two doctors been in communication at that time. Dr. Stevenson's testimony was positive that the "large, smooth, freely movable, irregular mass in the upper outer quadrant of the right breast" was no longer there on that examination. It did not exist. There was, therefore, nothing to biopsy. When the patient returned to see Dr. Jenny on June 19, 1974, the mass, which he had detected on April 25, 1974, and which caused him to refer the patient to Dr. Stevenson, no longer existed. There was on these dates, then, nothing to biopsy. The evidence of the plaintiff's own expert, a general practitioner, is that a "smooth irregular mass would not make one think of a primary diagnosis of carcinoma . . . ."

The offer, including the questions, assumes that Dr. Jenny and Dr. Stevenson "medically abandoned" the patient for a period of 130 days. A careful examination of the record shows that the 130-day period

referred to is June 19, 1974, to October 29, 1974. On the latter day the patient returned to see Dr. Jenny. She had detected an enlarged node in her right armpit about 3 weeks earlier. At that time Dr. Jenny again examined the breasts. They were normal. He found the node in the right armpit and on the same day referred her to Dr. Stevenson who examined her the same day. There is no evidence that either of the defendants "medically abandoned" the patient. Under the pleaded allegations, negligent abandonment was not an issue. In any event, the quoted words were a statement of a conclusion not designed to elicit an opinion or fact and was, in the context used, pejorative and had no proper place in the question.

In several instances the offer does not separate the possible liability and claims of negligence as to the two defendants. For example, the offer used such phrases in several places as "did either defendant Dr. Jenny or Stevenson meet the standard of recognized medical care in Harlan County . . . ." It is, of course, elementary that a defendant is liable only for his own negligence and not that of another, absent an agency or some other relationship which makes one vicariously liable. There is no such evidence here.

It seems to be the universal rule that a physician who, being unable to take care of a patient, sends a substitute or who refers a patient to a specialist because the patient's ailment is or may be outside his field of competence, is not liable for the negligence of the physician to whom referral is made. A lengthy annotation on this and related principles appears at 85 A.L.R.2d 889 (1962). See, §§ 6-10 of that annotation and cases discussed both in the main volume and the 1979 supplement, especially *McCay v. Mitchell,* 62 Tenn. App. 424, 463 S.W.2d 710 (1970); *Nelson v. Sandell,* 202 Iowa 109, 209 N.W. 440 (1926); *Mayer v. Hipke,* 183 Wis. 382, 197 N.W. 333 (1924).

The plaintiff's own expert witness testified that Dr. Jenny satisfied his obligation of care when he referred the patient promptly to Dr. Stevenson. This, the undisputed evidence shows, he did on April 25, 1974, when he first noticed the irregular, freely movable mass, and again on October 29, 1974, when the enlarged node in the armpit was found. The plaintiff's expert, Dr. Williams, described the relationship as a referral and not as a consultation, and testified that when a physician makes a prompt referral to a specialist, he has then satisfied his obligation of care. There is no claim made in this case that the referral was made to an incompetent specialist.

Many of the proffered questions were vague and confusing. Objections were made to the offers which were inclusive of the deficiencies we have discussed as well as others. Without regard to the question of whether the standard is local or national, or the competency of Dr. Brittain to express an opinion because of his familiarity with the standard, the offer was properly rejected for other good reasons.

As we have already noted in connection with our discussion of the admissibility of the offer of Dr. Brittain's testimony in its failure to separate the liability of the two defendants, the plaintiff's own evidence shows that Dr. Jenny, a general practitioner, satisfied his obligations when he, on two occasions, referred the patient to a specialist. It is pure conjecture to argue that, if Dr. Jenny had communicated with Dr. Stevenson, something additional would have been found which would have led to an earlier diagnosis.

This leads us to the discussion of § 44-2810, which became effective July 10, 1976. The majority opinion says:

> If practices within a certain specialty do not vary significantly throughout the country,

there is no policy justification for the locality rule.

"We recognize that medical standards of care and skill are becoming national, rather than local or regional." [*Kortus v. Jensen,* 195 Neb. 261, 269, 237 N.W.2d 845, 850 (1976).]

*Kortus v. Jensen,* 195 Neb. 261, 237 N.W.2d 845 (1976), was released January 22, 1976. I would accept the statement that, in the specialties, especially, it is probably true that in the diagnosis and treatment of certain diseases, national and local standards of care may be the same. However, that is necessarily a question of fact to be determined in each particular case based upon the testimony.

Section 44-2810 provides:

> Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in his or in similar localities. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a health care provider in a particular community, the test shall be that which health care providers, in the same community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances.

I do not believe that the statement in the opinion about the lack of "policy justification for the locality rule" should be construed as limiting the applicability of § 44-2810 when there is, in fact, a difference in standards between localities. This, it seems to me, would also relate to the availability of technological equipment. Every specialist and hospital can-

not, e.g., have a body-scanner.

The statement in the majority opinion quoted above seems to saddle Dr. Jenny with the standard of care of a specialist, which he is not.

Dr. Jenny was entitled to have a verdict directed in his favor. There being no error in refusing the proffered opinion of Dr. Brittain, the jury verdict for both defendants should be affirmed.

BOSLAUGH, J., concurs in this dissent.

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MICHAEL L. SORTINO, APPELLEE AND CROSS-APPELLANT, V. ROY D. PAYNTER, CROSS-APPELLEE, AND SHARI K. ELDER, APPELLANT.

292 N. W. 2d 916

Filed June 3, 1980. No. 42777.

1. **Appeal and Error.** When a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
2. _____. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed in part, and in part reversed.

Gross, Welch, Vinardi, Kauffman, Day & Langdon, for appellant.

Frank Meares, for appellee.

Heard before WHITE and MCCOWN, JJ., and COLWELL, STANLEY, and SPRAGUE, District Judges.

SPRAGUE, District Judge.

The appellee and cross-appellant, Michael Sortino, brought an action for personal injuries arising out of an automobile incident against Roy D. Paynter, cross-appellee, and Shari K. Elder, appellant.

The petition alleged that at about midnight on February 9, 1977, Sortino, driving his van-type vehicle, was approaching 78th Street on Pacific Street in Omaha, Nebraska, when he observed a collision between Paynter and Elder. When, after the accident, the Paynter vehicle continued west without stopping, Sortino and another driver turned around and began to pursue it. Elder also pursued the Paynter vehicle westbound on Pacific Street from 78th. The Paynter and Sortino vehicles collided during the pursuit. When all the vehicles reached the vicinity of 81st and 82nd Streets on Pacific, there was a brief truce in the vehicular battle followed by a collision of the Sortino and Elder vehicles. Paynter made another hasty, if battered, retreat.

The question of the negligence of the defendants and damages, if any, sustained by the plaintiff were submitted to the jury, which returned a verdict in favor of both defendants.

Plaintiff filed a motion for new trial and such motion was sustained as to Elder, and overruled as to Paynter.

Elder filed a notice of appeal and Sortino cross-appealed against Paynter.

In addition to the three parties involved, testimony was given by two witnesses who observed various stages in the sequence of events. The testimony of the various witnesses conflicts and is disputed. Further recitation of this testimony would serve no useful purpose except to make any motorist quite thankful he was not proceeding down Pacific Street at the time and date in question.

Elder contends the court erred in sustaining Sortino's motion for new trial. This court agrees.

The record reveals no error prejudicial to the rights of Sortino. The evidence raised issues of fact. The jury chose to believe Elder's version of the facts. There was ample evidence to support its findings.

When a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Greenberg v. Fireman's Fund Ins. Co.*, 150 Neb. 695, 35 N.W.2d 772 (1949).

The trial court was correct in overruling Sortino's motion for new trial as to Paynter. Issues of fact were raised as to the cause of that collision. The jury weighed the evidence and returned a verdict in favor of Paynter. Although in conflict, there was sufficient evidence to support this verdict.

A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. *CIT Financial Services of Kansas v. Egging Co.*, 198 Neb. 514, 253 N.W.2d 840 (1977).

The judgment of the trial court sustaining Sortino's motion for new trial as to Elder is reversed. The jury verdict in favor of Elder is reinstated. The judgment of the trial court as to Paynter is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

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BETTY JO VAN PELT, APPELLANT, V. WILLIAM VAN PELT, APPELLEE.

292 N. W. 2d 917

Filed June 3, 1980. No. 42782.

1. **Divorce: Alimony: Property Division.** Where a judgment for alimony is awarded the court should, if possible, divide the property in such a manner as to provide the means to permit the payment of the alimony judgment.
2. _____: _____: _____. An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and

wife as to be capable of a present vesting and to constitute an absolute judgment where the decree expressly precludes modification.

3. **Divorce: Alimony: Property Division: Appeal and Error.** In a proceeding for dissolution of marriage, the fixing of alimony or distribution of property rests in the sound discretion of the trial court, and in the absence of an abuse of discretion will not be disturbed on appeal.

4. _____: _____: _____: _____. In a proceeding for dissolution of marriage, this court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Robert M. Brenner, for appellant.

C. Morris Gillespie, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is an action for dissolution of marriage. The District Court for Scotts Bluff County, Nebraska, entered its decree dissolving the marriage, granting custody of the minor child to the wife, and awarding child support. The decree also made a property division and awarded alimony in gross to the wife. The wife has appealed, challenging the property division and alimony provisions of the decree.

The parties were married September 18, 1955. They had three children, only one of whom was still a minor at the time the wife filed the petition for dissolution of marriage on October 19, 1978. The minor child, Roy Lee, was born February 21, 1970.

The husband, who was 43 years old at the time of trial, is a mechanic who owns and operates his own implement repair business in the small village of McGrew, Nebraska. He has one employee. During the course of the marriage, the wife was primarily a housewife and mother, although she also kept rec-

ords and ran errands for the implement repair business.

The wife, who was 41 years old at the time of trial, has a high school equivalency degree and, at the time of trial, was taking CETA-financed business courses at Nebraska Western College in order to qualify herself for better jobs. At the time of trial, she was receiving $2.50 per hour from CETA for 13 hours of weekly course attendance and was also earning $2.90 per hour for part-time work at an elevator located between Scottsbluff and Gering, Nebraska, where she worked 10 to 15 hours per week. She had gross earnings of approximately $250 to $300 per month.

The parties' joint income tax returns for the years 1973 through 1977 showed adjusted gross income of $9,566.81, $14,547.10, $22,885.01, $21,004.56, and $14,211.45 respectively. The husband's net business income for 1977 was $14,535, and the evidence was that the business income for 1978 was substantially similar.

The parties stipulated as to the values of the majority of the items of property involved, as well as to the amount of debts. There was some minor conflict as to the value of some of the real estate and the business inventory. The appraised, stipulated, or book values of the property and assets of the husband's implement repair business was approximately $45,000, which included the business building and real estate appraised at $18,000. Business debts and taxes, including certain other stipulated debts were approximately $28,000. Household goods and furnishings, automobiles, pickup trucks, and a boat and trailer were valued at approximately $14,000, but were subject to encumbrances of approximately $5,000. Several lots in McGrew and the mobile home of the parties located on one of the parcels, were valued at a figure between $13,500 and $16,500, but had encumbrances of approximately $6,000 against

them. The husband also owned life insurance policies having a value of approximately $3,500.

The decree of the District Court granted custody of the minor son to the wife and required the husband to pay to the wife the sum of $200 per month until the minor child reaches the age of 19, marries, dies, or becomes self-supporting, and required the husband to maintain in force a health insurance policy covering the minor child, who has allergies that require daily and weekly medication. No issue as to child support is raised in this appeal.

The decree also made a division of property which awarded to each party his or her own personal effects and bank accounts, which were nominal in amount. The decree awarded to the husband all the business assets of the husband's implement repair business, which included the business building and real estate, equipment, inventory, and accounts receivable. Those assets had an approximate value of $45,000. The decree also required the husband to pay all business accounts, debts, and taxes, including certain other stipulated debts, in the total amount of approximately $28,000. The decree also awarded the husband two pickup trucks, an automobile, and a boat and trailer having a combined value of $8,775, subject to encumbrances of $4,381.84. The life insurance policies owned by the husband, having a value of approximately $3,500, were also awarded to him.

The decree awarded to the wife all household goods and furnishings and a pickup truck with camper attachment having a combined value of $5,650, subject to a mortgage of $985.76, which the wife was directed to pay.

The decree also required that the lots in McGrew and the mobile home of the parties located on one of the parcels were to be sold within 90 days and the net proceeds divided equally between the parties.

The decree also required the husband to pay to the wife as alimony the sum of $100 per month for a period of 121 months. The decree recited that the alimony granted was to be deemed alimony in gross and was not to be affected or terminated by the marriage or death of either party. The alimony did not bear interest except for delinquent payments.

The wife has appealed, contending that the District Court abused its discretion in making an inequitable property division and awarding insufficient alimony. The argument is that the alimony award in this case, even though it is alimony in gross, should not be considered as a part of any property settlement but strictly as alimony. The wife wishes to limit the consideration of the fairness of the property settlement to the property divided in kind.

The record establishes that the net value of the property distributed in kind was approximately $30,000. Of that total net value, the husband received approximately $25,000, of which $17,000 was the net value of the business assets. The wife received approximately $5,000. In addition, the wife's evidence was that the husband and wife would each receive approximately $4,500 from the proceeds of the property ordered to be sold. The record also shows that the wife withdrew $1,500 from the bank accounts at the time of filing the petition here, and that she received temporary allowances of $500 per month for approximately 6 months prior to trial.

It seems obvious that, in making the award of alimony in gross, the court treated it primarily as a part of the property settlement and, by assigning all the business property to the husband, the court provided him the means of paying the alimony judgment to the wife and also provided for a retraining period for the wife. Where a wife is awarded a judgment for alimony, the court should, if possible, divide the property in such a manner as to permit the husband the means of paying the judgment

awarded the wife. *Olson v. Olson,* 195 Neb. 8, 236 N.W.2d 618 (1975).

Under a prior statute, this court held that an unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment. *Karrer v. Karrer,* 190 Neb. 610, 211 N.W.2d 116 (1973). Under the terms of Neb. Rev. Stat. §§ 42-365 and 42-366 (Reissue 1978), we believe that rule must be extended to those cases in which the decree expressly precludes modification. The terms of the decree in the present case expressly designate the alimony judgment as alimony in gross and expressly preclude modification.

The rules for determining alimony or division of property in a dissolution of marriage action provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case and courts will consider all pertinent facts in reaching an award that is just and equitable. *Corn v. Corn,* 190 Neb. 383, 208 N.W.2d 678 (1973).

In the present case, if the alimony in gross is included at the face amount of the $12,100 judgment, the wife will receive something more than half of the property. Even if the alimony in gross be computed at present worth, the wife will receive almost half of the property.

The fixing of alimony or distribution of property rests in the sound discretion of the trial court and, in the absence of an abuse of discretion, will not be disturbed on appeal. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. *Rinderknecht v. Rinderknecht,* 204 Neb. 648, 284 N.W.2d

569 (1979). The award of alimony and the division of property in the present case were not patently unfair on the record, nor was there any abuse of discretion on the part of the trial court.

The judgment of the District Court is affirmed. The wife is awarded a fee of $750 for the services of her attorney in this court.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. CHRIS VAN EGMOND, APPELLANT.

293 N. W. 2d 74

Filed June 3, 1980. No. 42836.

**Identification Procedures: Photographs.** Any suggestiveness of a photographic identification procedure must be considered harmless error where no evidence or showing is made that the in-court identification was dependent on the photographic lineup.

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

Walter Matejka, for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

WHITE, J.

The appellant was tried on a charge of assault and battery in the county court of Madison County, Nebraska, without a jury. The county court found the appellant guilty and sentenced him to a term of 3 months in the county jail. The appellant filed an appeal to the District Court for Madison County. The judgment and sentence were upheld. Appellant appeals.

Appellant raises two errors in this court: (1) The

trial court erred in admitting impermissibly suggestive photographic evidence; and (2) The conviction is not sustained by sufficient evidence.

The facts in the case believed by the trial court would tend to show the following. On Saturday, May 6, 1978, LaVerne Opkis, his wife, Ellen, and Lawrence and Luane Kumm of Creighton, Nebraska, drove to the city of Norfolk, Nebraska. They first went to eat at a local pizza house at approximately 9 p.m. and, at 10 p.m., they drove to the Red Bull tavern where they stayed until slightly before closing at about 1 a.m. Ellen Opkis was operating the Opkis family automobile down Norfolk Avenue, the main street of Norfolk. They passed the Red Arrow tavern when a shopping cart was pushed from the side of the street striking the front fender of the automobile. Ellen Opkis stopped the car approximately 1 block away at a gasoline station on the corner and they all got out of the car to view the dent in the fender. The two men, LaVerne Opkis and Lawrence Kumm, decided to walk back to the Red Arrow to find out who caused the damage to the car. There were several motorcyclists in front of the tavern. LaVerne Opkis signaled one motorcyclist. He told the man, later identified in open court by Opkis as his assailant, that someone had pushed a shopping cart into his car. The appellant, Chris Van Egmond, responded by asking LaVerne Opkis what he could do about it. Then, while standing, but still on his motorcycle, he struck LaVerne Opkis in the face with his fist, knocking him to the ground. LaVerne Opkis testified that, while he was lying on the pavement after being struck, the appellant kicked him several times. Lawrence Kumm, who was a witness to the incident, identified Chris Van Egmond in court as the assailant. Ellen Opkis and Luane Kumm stated that they saw LaVerne Opkis walk down the block and engage in conversation with the appellant. Neither observed the appel-

lant strike Mr. Opkis but Mrs. Opkis did observe a fight going on. Both women came to the scene and engaged in conversation with the appellant, who was then standing over LaVerne Opkis. In court, they identified the appellant, Chris Van Egmond, as the person who had been standing over LaVerne Opkis. Shortly after LaVerne Opkis left to accost the appellant, Ellen Opkis, through the use of a CB radio, summoned the Norfolk police department. Although not in response to this call, Officers Kenneth Drahota and Herb Angell of the Norfolk police department were cruising down Norfolk Avenue and passed the scene. They testified that they had previously known Chris Van Egmond and that each could positively identify him as the person standing over LaVerne Opkis at the time. Appellant is described as 25 years old, 6 feet 2 inches tall, 200 pounds, a construction worker, and a member of the Jokers Wild Motorcycle Club.

The first assignment of error relates to a photographic lineup which took place at the Norfolk police department on May 9, 1978, by Officer Tom Higgenbotham, an investigator of the Norfolk police department. Officer Higgenbotham testified that he put together a photo lineup from the Norfolk police department photo file, including a photograph of the appellant. The Kumms and the Opkises were brought into a room and, although they knew the photographs were from police files, they were not permitted to view the police record or the reason for which any of the photographed persons had been arrested by the Norfolk police department. It was the identification made of Chris Van Egmond by the Opkises and Kumms to which appellant particularly objects. The trial court had the photographs before it, as we have. Generally, the photographs each portray a white male in his 20's with medium to long hair, and a combination of moustache and/or beard. The trial court was convinced that the photographs,

in themselves, were not impermissibly suggestive and we agree. The question, as raised by the appellant, is whether or not it was appropriate that the four witnesses should be permitted the identification process at the same time. Officer Higgenbotham testified that he first handed the lineup photographs to Lawrence Kumm and instructed him that the suspect could or could not be among them. Mr. Kumm identified the appellant. The photograph identified was not seen by LaVerne Opkis. The photographs were then handed to LaVerne Opkis who went through them and identified the appellant. It is entirely possible, according to the officer, that the women did see the photograph identified by their husbands. Mrs. Opkis and Mrs. Kumm examined the photographs together and identified the appellant as the assailant. No evidence or showing was in the record that the in-court identification was dependent on the photographic lineup, even assuming that all or any part of it was impermissibly suggestive. There is nothing to suggest that the photographic lineup, insofar as LaVerne Opkis and Lawrence Kumm were concerned, was impermissibly suggestive. While it may be the best practice, as suggested by the appellant's counsel, where there are two or more witnesses to require each to view the photographs separately out of the presence and hearing of the others, N. R. Sobel, *Eye-Witness Identification; Legal and Practical Problems* (1972), and *Hazards of Photoidentification,* 28 Okla. L. Rev. 858 (1975), the identification procedure used for Mrs. Opkis' and Mrs. Kumm's photographic identification was not impermissibly suggestive. Any suggestiveness of the identification procedure must be considered harmless error in view of the overwhelming identification of the appellant as the assailant. *Chapman v. California,* 386 U.S. 18 (1967). In the instant case, the appellant was identified as the assailant by six persons, including two police officers,

who each had an ample opportunity to identify him as the person at the scene. The first assignment of error is without merit.

Essentially, the testimony of the appellant and his witnesses was to the effect that Mr. Opkis, not the appellant, was the assailant. According to the appellant, LaVerne Opkis swung first and, if the appellant struck him at all, it was in self-defense. Another witness for the appellant claimed that it was he, and not the appellant, that probably struck Mr. Opkis. The injuries to Mr. Opkis were described by the trial court as serious. There was ample evidence to sustain the trial court's judgment of conviction.

Having noted in the presentence investigation a long history of assaults and violence, we cannot say that the sentence of 3 months in the county jail was excessive. The judgment and sentence are affirmed.

AFFIRMED.

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WILLIAM E. LINDGREN AND DONNA LINDGREN, HUSBAND AND WIFE, APPELLEES, V. CITY OF GERING, NEBRASKA, A MUNICIPAL CORPORATION, AND GERING IRRIGATION DISTRICT, APPELLANTS.

292 N. W. 2d 921

Filed June 3, 1980. Nos. 42887, 42892.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In an appeal to the Supreme Court of an action brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 to 2416 and 2418 to 2420 (Reissue 1977) and 2417 (Cum. Supp. 1978), the finding of the trial court will not be disturbed unless it is clearly wrong.
2. **Evidence: Judgments: Appeal and Error.** In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in that party's favor and that party is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

3. **Strict Liability: Irrigation Districts.** An irrigation district is liable for seepage damage under Neb. Const. art. I, § 21, without regard to negligence.
4. **Negligence: Irrigation Systems.** The owner of an irrigation ditch or canal is required to exercise ordinary care in the construction, maintenance, and operation thereof. Otherwise stated, the measure of care which an owner is bound to use is that which ordinarily prudent people exercise under like circumstances when the risk is their own, or such as a prudent person, with due regard for the rights of others, and the risk of the undertaking, would exercise in conveying through an artificial channel a substance, such as water, that possesses detrimental and destructive, as well as beneficial and productive qualities, unless properly restrained. If the requisite degree of care is not exercised, the proprietor may be held liable for all damage proximately resulting from the wrongful act or omission.
5. **Negligence: Joint Tortfeasors.** Where the negligence of two or more persons concurs producing a single indivisible injury, such persons are jointly and severally liable although there was no common duty, common design, or concerted action.
6. **Negligence: Joint Tortfeasors: Proximate Cause.** If the negligence charged does nothing more than furnish a condition by which the injury is made possible, and if an injury is caused by the subsequent independent act of a third person made possible by such condition, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.
7. **Evidence: Appeal and Error.** A party may not properly assign as error on appeal the admission of evidence if no objection or motion to strike was made at trial.
8. **Judgments: Findings of Fact.** Under the provisions of Neb. Rev. Stat. § 25-1127 (Reissue 1975), the court is not obligated to answer specific interrogatories propounded to the court by a litigant, but is merely required, when requested, to make such specific findings of fact as the trial court concludes are appropriate and necessary to resolve the action.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

James W. Ellison, James M. Mathis, and Alan D. Carlson of Holtorf, Hansen, Kovarik, & Nuttleman, P.C., for appellant City of Gering.

Jim Zimmerman of Atkins, Ferguson, Hahn, Zimmerman, & Carney, for appellant Gering Irrigation District.

James R. Hancock and Richard S. Kleager of Hancock Law Offices, for appellees.

Heard before KRIVOSHA, C. J., BRODKEY, WHITE, and HASTINGS, JJ., and CAPORALE, District Judge.

KRIVOSHA, C. J.

The appellants, the City of Gering, Nebraska, a municipal corporation, and Gering Irrigation District, each have appealed from an order of the District Court for Scotts Bluff County, Nebraska, entered after a trial to the court, finding the City and the District jointly and severally liable to William E. Lindgren and Donna Lindgren in the amount of $3,481 under the provisions of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 to 2416 and 2418 to 2420 (Reissue 1977) and 2417 (Cum. Supp. 1978). Each appellant has individually appealed maintaining that, if there is any liability, it is the liability of the other. In addition, each appellant maintains that the Lindgrens were contributorily negligent and are, therefore, precluded as a matter of law from recovering. Further, each of the appellants maintains that the evidence concerning damages was insufficient to permit the court to make an award and, finally, that the trial court erred in refusing to answer some 22 questions put to it by the District, presumably pursuant to the provisions of Neb. Rev. Stat. § 25-1127 (Reissue 1975). For the reasons more particularly set out in this opinion, we believe that the trial court was correct in all respects and that the judgment should be affirmed.

The evidence, as disclosed by the record, was sufficient for the court to find the following: That the Lindgrens own a residence on a lot which lies approximately 200 feet east of the District's canal which runs north and south alongside a row of houses paralleling 21st Street in Gering, Nebraska. The District's canal is approximately 16 feet wide.

The east bank has a service road on it approximately 15 feet wide. The interior of the canal is 8 feet deep from the top of the service road to its bottom. The level of water in the canal is usually from 3 to 3½ feet below the top or surface of the road except after heavy rains. The service road lies about 4 feet above the surface of the land to the rear of the Lindgrens' house.

On August 1, 1976, an employee of the District, while "riding the ditch," observed a whirlpool in the water in the canal immediately behind the Lindgren house, which he felt indicated a break in the bank. He returned to the District shop and obtained a backhoe for the purpose of repairing the bank. He then returned to the canal with the backhoe. While making the repair, he found a pipe which was approximately 1 to 1¼ inches in diameter and about 20 feet long, buried in the road next to the canal. He dug the pipe out, took dirt from the east side of the bank with the backhoe and dumped it where he had pulled the pipe out. He then drove across the fill to tamp it down. Experts called to testify stated that, in their opinion, the repair to the canal was improper. The evidence tends to bear this out because the following day, August 2, 1976, an employee of the City received a call at about 5:30 a.m. from a Gering resident, not the Lindgrens, complaining of water in the basement. Seeking out the source of this flooding, the employee eventually found the break in the District's ditch. He observed a 9-foot-wide break in the ditch bank at that point, with water pouring through it.

The water was washing out of the ditch and swirling around a manhole, located immediately east of the ditch, which stood above the terminus of the City's sewer line in that area. Extending out from this buried terminus in different directions were three short "stub-outs," extension points built on to provide for future expansion of the system but which

were supposed to have been temporarily plugged and watertight.

The water from the ditch had filled all of the sewer lines and manholes from 21st Street to 10th Street and had backed up into many homes through the sewer lines. The sewer lines and the manholes were owned and maintained by the City.

Later, the employee saw water running into the manhole area and going "straight down." He removed the manhole cover, looked down inside, and saw water running in from the west stub-out. It was the opinion of this employee, an expert witness, that the stub-out had not been properly covered and that, had it been properly covered, the water would not have found its way into the Lindgrens' basement.

After the breakout, the Lindgrens found in their basement 10 inches of water which came up through the sanitary sewer. There was also sand, mud, and raw sewage brought into the basement through the sewer. Mr. Lindgren itemized the various items that were damaged and gave his opinion as to their value. He concluded that the total amount of his damages was $3,481.

The court could further find from the evidence that, in the spring of 1971, Mr. Lindgren obtained permission from the then manager of the District to draw water for his garden out of the District canal by means of a pipe. Mr. Lindgren claimed that he obtained a pipe about 2 inches in diameter and from 16 to 18 feet long and laid the pipe across the top of the road and then, using 45-degree elbows on each end, ran one extension down into the water and another extension down on the other side to a buried plastic pipe which led to his garden. The length of pipe across the road was buried at a depth of about 4 inches but could be felt by anyone using the road. Any person driving along the ditch road, including a ditch rider employed by the District, could see the pipe since it stuck out 12 to 18 inches on either side of

the road. Mr. Lindgren irrigated his garden that way during the summers of 1971, 1972, and 1973. In the summer of 1974, he became discouraged with the pipe system and used it only occasionally that year. He discontinued its use in 1975.

In the spring of 1973, the ditch company struck the pipe with its sloper machine, tearing it out and bending it. Mr. Lindgren was angry, since he felt he had had permission to keep it there, and several times went to the District office to complain to the manager but was unable to see him. He told the manager's secretary that, if the District wanted to clean the ditch, they should notify him prior to doing so and he would remove the pipe. In any event, the evidence would justify a finding that the District was aware that the pipe was there, as it was aware that others had also inserted pipes into the canal. A former manager testified that he tore one out for Mr. Lindgren either 2 years in a row or 3 years in a row and constantly was tearing out pipes up and down the canal. Furthermore, he testified that the ditch riders were instructed to look every day for such pipes.

In examining the matter before us, insofar as the liability of either the District or the City is concerned, we must keep in mind that on appeal to the Supreme Court of an action brought under the Political Subdivisions Tort Claims Act, the finding of the trial court will not be disturbed unless it is clearly wrong. See, *Steel Containers, Inc. v. Omaha P. P. Dist.,* 198 Neb. 81, 251 N.W.2d 669 (1977); *Daniels v. Andersen,* 195 Neb. 95, 237 N.W.2d 397 (1975); *Christensen v. City of Tekamah,* 201 Neb. 344, 268 N.W.2d 93 (1978). Furthermore, we have many times said that:

> "In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact

> must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence." [Citations omitted.]

See *Daniels v. Andersen, supra* at 98, 237 N.W.2d at 400.

We turn first to the liability, if any, of the District. Under the holdings of our previous decisions, an irrigation district is liable for seepage damage under Neb. Const. art. I, § 21, without regard to negligence. See, *Halstead v. Farmers Irr. Dist.*, 200 Neb. 314, 263 N.W.2d 475 (1978); *Applegate v. Platte Valley Public Power and Irrigation District*, 136 Neb. 280, 285 N.W. 585 (1939); *Baum v. County of Scotts Bluff*, 169 Neb. 816, 101 N.W.2d 455 (1960). Even in the absence of evidence of negligence, we would have affirmed the trial court's finding of liability on the part of the District, and nothing we say herein should be interpreted as a departure from our previous holdings in that regard. This case, however, need not be decided on the basis of strict liability, due to the fact that the Lindgrens pleaded and proved specific acts of negligence sufficient to satisfy the trial court and with which we agree. The evidence seems to be clear beyond dispute that the District, having been made aware of the break in the canal, failed to properly repair it. This was virtually conceded by the District and certainly established by reason of the difficulties encountered on the following day.

> [T]he owner of an irrigation ditch or canal is required to exercise ordinary care in the construction, maintenance, and operation thereof. Otherwise stated, the measure of care that he is bound to use is that which ordinarily prudent men exercise under like circumstances when the risk is their own, or such as a prudent man, with due regard for the rights of others and the risk of his undertaking, would exercise in conveying

> through an artificial channel a substance, such as water, that possesses detrimental and destructive as well as beneficial and productive qualities, unless properly restrained. If the requisite degree of care is not exercised, the proprietor may be held liable for all damage proximately resulting from the wrongful act or omission . . . .

45 Am. Jur. 2d *Irrigation* § 82 (1969). See *Hilzer v. Farmers Irrigation Dist.*, 156 Neb. 398, 56 N.W.2d 457 (1953). Under such a rule of law, it seems clear beyond question that the court was correct in finding the District liable for having failed to properly maintain the canal and for failing to properly repair the break once it came to the District's attention. Such evidence was sufficient for the trial court to hold the District negligent and liable to the Lindgrens. On either ground, absolute liability of an irrigation district for seepage or specific acts of negligence, the trial court's holding was correct.

We then turn to the question of the negligence of the City. In that regard, the evidence was virtually without dispute that a stub-out at the end of the sewer pipe had not been properly capped and that, had it been properly capped, the water would not have been able to find its way into the sewer pipe and into the basements of the adjoining homes. Certainly the City was mindful of the fact that the manhole was located close to the canal and that, if water did escape from the canal, it would find its way into the sewer by reason of the City's failure to properly cap the stub-out.

Both the District and the City were individually negligent in the performance of their respective duties owed to the Lindgrens. Either defendant's negligence may properly be said to be a proximate cause of the resulting injury and damage. Where the negligence of two or more persons concurs, producing a single indivisible injury, such persons are

jointly and severally liable although there was no common duty, common design, or concerted action. See, *Grantham v. Watson Bros. Transportation Co.*, 142 Neb. 362, 6 N.W.2d 372 (1942), *rehearing denied*, 142 Neb. 367, 9 N.W.2d 157 (1943); *Hendren v. Hill*, 131 Neb. 163, 267 N.W. 340 (1936); *Schweppe v. Uhl*, 97 Neb. 328, 149 N.W. 789 (1914).

Insofar as the matter of the Lindgrens' alleged contributory negligence is concerned, the evidence supports the trial court's finding that they were not contributorily negligent. In the first instance, the evidence would establish that the District was aware of the existence of the pipe and, therefore, should have been mindful of it. But, more important than that, the evidence discloses that, when the District first became aware of the breach in the canal wall, water had not yet entered the manhole. It is clear, therefore, that whatever acts the Lindgrens may have committed initially were not a proximate cause of the ultimate damage but, at most, were a condition. Even if it could be said that the presence of the pipe initially precipitated a weakening of the canal, though the evidence is in conflict on that point, it is clear from the evidence that all of that matter could have come to an end had the District, on the one hand, properly repaired the canal when it discovered the breach and the City, on the other hand, properly capped the stub-out when it constructed the sewer. As we stated in *Steenbock v. Omaha Country Club*, 110 Neb. 794, 796, 195 N.W. 117, 118 (1923):

> It is not sufficient that the negligence charged does nothing more than furnish a condition by which the injury is made possible, and if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.

The Lindgrens' acts, not being a proximate cause

of the subsequent injury and damage, could not constitute contributory negligence.

> "Contributory negligence . . . is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause . . . of the injury complained of. . . ." [Citation omitted.]

*Novak v. Laptad,* 152 Neb. 87, 94-95, 40 N.W.2d 331, 335 (1949).

We, therefore, believe that the trial court was perfectly correct in finding that each of the appellants was liable for the damages suffered by the Lindgrens and that the Lindgrens were not contributorily negligent.

We turn then to the next issue, that being the measure of damages. Both of the appellants maintain that the trial court should not have considered the evidence of damages because the appellee failed to introduce evidence as to whether the property could have been repaired. They argue that, until it is shown that the property cannot be repaired, one may not show the loss of value. Whatever may be the rule generally, the evidence in the present case supports a finding that most, if not all, the property, having been covered with 10 inches of water, raw sewage, and sand, had to be disposed of. But more importantly, it does not appear that we need to consider that claim. While each of the parties, in their assignments of error, maintain that the evidence came in over objection, the record fails to disclose any objections made by the parties during the testimony, except for one with regard to a damaged rug, or any motion to strike the evidence at the conclusion of the testimony. While an objection was raised with regard to the rug, it was later conceded by all that the rug was totally destroyed and required replacement.

We have frequently said that "a party may not properly assign as error on appeal the admission of evidence where no objection was made thereto at trial." *Scudder v. Haug,* 201 Neb. 107, 111, 266 N.W.2d 232, 235 (1978). See, also, *Breiner v. Olson,* 195 Neb. 120, 237 N.W.2d 118 (1975). "One who fails to object or to move to strike testimony may not predicate error on its admission." *Pauley Lumber Co. v. City of Nebraska City,* 190 Neb. 94, 95, 206 N.W.2d 326, 327 (1973). See, also, *Meyer v. Moell,* 186 Neb. 397, 183 N.W.2d 480 (1971). Since the appellants failed to object or move to strike, the evidence was properly admissible. Once properly admissible, it was proper for the court to consider such evidence. The judgment as to damages, being based upon sufficient evidence in the record, must be affirmed.

We now turn to the last assignment of error. The District submitted to the trial court a request to answer 22 specific questions concerning the lawsuit. The trial court refused to answer each individually, though it did make specific findings of fact and conclusions of law. Appellants argue that, under the provisions of Neb. Rev. Stat. § 25-1127 (Reissue 1975), upon request of a party, the trial court is obligated to answer each specific question posed to the court. We believe that the appellants have misconceived the language of the applicable section. Section 25-1127 provides as follows:

> Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law.

This statute simply provides that, in an action tried to the court, the litigants may request the trial court to make specific findings of fact rather than making a general finding for one of the parties. What those findings of fact should be and how they should be made is dependent upon the finder of fact. Under the provisions of § 25-1127, the court is not obligated to answer specific interrogatories propounded to it by a litigant, but is merely required, when requested, to make such specific findings of fact as the trial court concludes are appropriate and necessary to resolve the action. That the trial court did. There was no error.

For these reasons, therefore, the judgment of the trial court is, in all respects, affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. JESSEE TRAVIS ROUSE, APPELLANT.

293 N. W. 2d 83

Filed June 3, 1980. No. 43014.

1. **Guilty Pleas.** A defendant should not be permitted to withdraw a plea of guilty or nolo contendere absent proof that such withdrawal is necessary to correct a manifest injustice.
2. **Guilty Pleas: Appeal and Error: Criminal Appeals.** The standards to be followed by trial judges before accepting a guilty plea are not per se rules, with which the failure to technically comply will mandate an automatic reversal.
3. **Post Conviction Act: Appeal and Error: Criminal Appeals.** A motion to vacate a judgment and sentence under the post conviction act cannot be used as a substitute for an appeal or to secure a review of issues already litigated.
4. **Post Conviction Act.** Relief under the post conviction act is limited to cases in which there was a denial or infringement of a prisoner's rights such as to render the judgment void or voidable under the Constitution of Nebraska or of the United States.
5. **Indeterminate Sentences: Sentences.** An indeterminate sentence imposed for a crime, where not authorized by statute, is erroneous but not void.

6. _____: _____. An indeterminate sentence not authorized under the circumstances may still be a valid sentence for the maximum term included therein.
7. **Post Conviction Act: Criminal Appeals: Appeal and Error.** By failing to challenge the indeterminateness of a sentence directly in an appeal, a defendant has waived the right to contest it in a post conviction review.

Appeal from the District Court for Garden County: ALFRED J. KORTUM, Judge. Affirmed.

Jessee Travis Rouse, pro se.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

HASTINGS, J.

Defendant has submitted a brief pro se appealing from an order of the District Court for Garden County, Nebraska, denying his motion for post conviction relief. We affirm.

On December 11, 1972, while represented by counsel, defendant pleaded guilty to an amended information charging him with second degree murder. The District Court accepted the defendant's plea and sentenced him to imprisonment in the Nebraska Penal and Correctional Complex for a term of not less than 16 nor more than 20 years. Although failing to specifically assign any errors in his brief, defendant does argue (1) That his rights to due process and equal protection were violated when the trial court accepted his plea of guilty and entered judgment thereon without advising the defendant of the statutory minimum and maximum penalties for second degree murder, and (2) That the provisions of Neb. Rev. Stat. § 83-1,105 (Cum. Supp. 1972) as to indeterminate sentencing did not apply to a sentence for second degree murder under the provisions of

Neb. Rev. Stat. § 28-402 (Reissue 1975).

The plea of guilty to the second degree murder charge was the result of a plea bargain arrangement between defendant's counsel and the county attorney of Garden County. Defendant had originally been charged with six felony counts: first degree murder, felony murder, three counts of burglary, and one count of escape. The charges were the result of a series of incidents which occurred on April 8, 1971, in Oshkosh, Nebraska, when three establishments were burglarized and a police officer, Richard Vandermate, was shot and killed. The defendant had originally pleaded not guilty and not guilty by reason of insanity to all six charges.

During the arraignment proceedings on the amended information, Judge Kuns, the trial judge, questioned the defendant about his understanding of the consequences of a guilty plea and the voluntariness of the same. The defendant answered that he understood that, in return for the guilty plea he would enter to the second degree murder charge, the State would drop all the other charges, including that of first degree murder. He also said that he understood that, while he was in custody pending trial, the death penalty for first degree murder had been declared unconstitutional. The following colloquy then took place between the court and the defendant:

> Q. And that as a part of the arrangement, that each side would ask the Court to fix the eventual sentence at a certain limit?
>
> A. It is.
>
> Q. And was it your understanding that the agreements made between your attorneys and the prosecuting attorneys were not binding on the Court and that the Court did not participate in the conferences?
>
> A. Yes, sir.
>
> Q. But that the Court would consider the

recommendations?
A. Yes, sir.

Two letters exchanged between prosecution and defense counsels with regard to the plea agreement were made a part of the record. Judge Kuns asked the defendant whether he had seen the letters before and the defendant replied that he had seen copies of them.

> THE COURT: I see. And they reflect correctly the matters which your attorneys have discussed with you before this hearing was held?
> THE DEFENDANT: Yes, sir.
> THE COURT: And you approve of the statements and arrangements that they have made on your behalf?
> THE DEFENDANT: Yes, sir.

The letters outline the arrangement and state that the prosecution would not ask the court for a sentence of more than 20 years and would not oppose a sentence as low as 16 years upon recommendation of defense counsel.

The court took great care to ask the defendant whether he was aware that, by pleading guilty, he was giving up the right to a jury trial and the right of confrontation, and to assure that he understood the burden of proof that would have to be met by the prosecution in a jury trial. The court questioned the defendant about his education and learned he had 11½ years of schooling, that he could read and write, and that at one time he was a representative of Garden County at a national conference on crime and delinquency. An adequate factual basis supporting the plea of guilty was also established.

The defendant's first assignment of error is that the court did not inform him of the statutory minimum and maximum sentences for second degree murder, which are 10 years and life. The defendant relies on *State v. Turner,* 186 Neb. 424, 183 N.W.2d

763 (1971), in which we adopted the ABA Standards Relating to Pleas of Guilty (1968 Approved Draft) as the minimum procedure in the taking of such pleas. He argues that, unless the court has informed the defendant of the statutory penalty, the defendant could not have made a voluntary and intelligent decision to plead guilty to the charge.

Reliance is also placed on *State v. Curnyn,* 202 Neb. 135, 140, 274 N.W.2d 157, 161 (1979), in which we stated: "It is difficult to conceive how a guilty plea can be voluntary and intelligent unless and until the defendant is informed or is made aware of the possible penalties to which he may be subjected by making such a plea."

It should be noted that the constitutional requirement is that the plea be voluntary and intelligent and that the determination of that fact be reliably established. *State v. Lewis,* 192 Neb. 518, 222 N.W.2d 815 (1974). The criterion is whether or not the defendant understands the relevant factors involved in pleading guilty. We have stated that, before accepting such a plea, the judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the *possible penalty,* and the *effect of his plea. State v. Turner, supra.*

> The standards recommend that a defendant be allowed to withdraw his plea of guilty or nolo contendere upon timely motion if he proves that withdrawal is necessary to correct a manifest injustice. . . . In the absence of proof by the defendant of such manifest injustice, the defendant should not be permitted to withdraw her plea.

*State v. Lewis* at 522, 222 N.W.2d at 818.

The standards we recommend for trial judges to follow before accepting a guilty plea are not per se rules, with which the failure to technically comply would mandate an automatic reversal. If it can be

determined that the defendant understood the nature of the charge, the possible penalty, and the effect of his plea, then there is no manifest injustice that would require that the defendant be permitted to withdraw his plea. By so holding, we follow the lead of the U.S. Supreme Court. In *Boykin v. Alabama,* 395 U.S. 238 (1969), the court held it was plain error for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary.

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.

*Id.* at 243-44.

The voluntariness of a plea can be determined only by considering all the relevant circumstances surrounding it.

> The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:
>
> " '[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).' 242 F.2d at page 115."

*Brady v. United States,* 397 U.S. 742, 755 (1970).

The U.S. Supreme Court more recently had the opportunity to rule upon the issue of whether a convic-

tion based on a guilty plea is subject to collateral attack whenever it can be shown that F. R. Crim. P. 11 was violated when the plea was accepted. *United States v. Timmreck,* 441 U.S. 780 (1979). Rule 11 provides, in pertinent part:

> Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.

In *Timmreck,* the defendant, acting on advice of counsel, pleaded guilty. When the judge addressed the defendant, he explained that the defendant could receive a sentence of 15 years imprisonment and a $25,000 fine, but the judge failed to describe the mandatory special parole term of at least 3 years required by the applicable statute. The judge accepted the guilty plea and sentenced the defendant to 10 years imprisonment plus a special parole of 5 years and a fine of $5,000. Other charges against the defendant were dismissed pursuant to the plea bargain with the prosecutor. The defendant neither objected to the sentence nor appealed from the conviction.

Two years later, the defendant brought a habeas corpus action to vacate the sentence on the ground that the trial judge had violated Rule 11 by accepting the plea without informing the defendant of the mandatory special parole term. After a hearing, the U.S. District Court denied the motion to vacate, recognizing that a violation of Rule 11 had occurred but concluding that the defendant had not been prejudiced since he had received a sentence within the maximum described to him at the time the guilty plea was accepted. *Timmreck v. United States,* 423

F. Supp. 537 (E.D. Mich. 1976).

The Court of Appeals reversed, holding that a violation of Rule 11 will support a collateral attack on a conviction based on a guilty plea even when there is neither constitutional error nor any showing of special prejudice to the defendant. *Timmreck v. United States,* 577 F.2d 372 (6th Cir. 1978). The U.S. Supreme Court reversed the Court of Appeals, following its reasoning in *Hill v. United States,* 368 U.S. 424 (1962), that this was not a fundamental defect which resulted in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure.

> Respondent does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty. His only claim is of a technical violation of the rule.

*United States v. Timmreck, supra* at 784.

The application of a per se rule for technical errors was also rejected in *Keel v. United States,* 585 F.2d 110 (5th Cir. 1978). Keel was originally indicted for attempted bank robbery and for jeopardizing the life of a bank employee with the use of a dangerous weapon and initially pleaded not guilty. On the day set for trial, counsel informed the judge that a plea bargain arrangement had been reached, whereby the prosecutor would recommend a 12-year sentence on a plea of guilty and would not oppose a 10-year sentence. The court accepted the plea and imposed the recommended 12-year sentence. During the Rule 11 hearing, the judge inadvertently informed the defendant that the maximum sentence which could be imposed upon conviction was 45 years imprisonment rather than 25 years. No appeal was taken and, just over a year later, the defendant brought a habeas corpus action to set aside the sentence. The Fifth Circuit Court of Appeals re-

jected a per se rule requiring literal compliance with the language of the rule for the taking of a valid guilty plea.

> Regardless of what principle of law is applied in direct appeals, we hold that when a collateral attack is made on a guilty plea for failure of the district court to literally comply with new Rule 11, the defendant must show prejudice in order to qualify for [28 U.S.C.] § 2255 [1976] relief. In the absence of a fundamental defect which inherently results in the miscarriage of justice, or an omission inconsistent with the demands of fair procedure, relief cannot be given in a collateral attack on a guilty plea conviction based on failure of Rule 11 compliance when the plea was taken.

*Keel* at 113.

In the instant case, the defendant alleges in his motion for post conviction relief that he was never advised or informed by the court of the statutory maximum and minimum penalties for second degree murder and that he did not know what those penalties were. The defendant does not allege that, if he had been so informed by the trial court, he would not have pleaded guilty. The allegation is of a technical failure of the trial court to comply with the minimum standards that we have adopted for the acceptance of guilty pleas. The defendant must allege and prove that such an omission has resulted in prejudice to him, constituting manifest injustice that would require this court to give him the opportunity to withdraw the plea. As we stated in *State v. Clingerman,* 180 Neb. 344, 351, 142 N.W.2d 765, 770 (1966), the post conviction act, Neb. Rev. Stat. §§ 29-3001 to 3004 (Reissue 1975), was

> intended to provide relief in those cases where a miscarriage of justice may have occurred, and not to be a procedure to secure

> a routine review for any defendant dissatisfied with his sentence. To hold otherwise will be to permit defendants to misuse and abuse a remedy intended to provide relief for those exceptional cases where the rights of a defendant have been ignored or abused.

The defendant, Rouse, engaged in a plea bargain arrangement with the prosecutor as a result of which he was arraigned on one felony rather than six. The U.S. Supreme Court has recognized the advantages of plea arrangements, both to defendants and to the prosecution. For example, in *Brady v. United States, supra* at 752, the court said:

> It is this mutuality of advantage that perhaps explains that well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to a judge or jury.

The defendant was well aware of the arrangements made between his counsel and the prosecution for a plea of guilty in exchange for dropping six felony charges and substituting a second degree murder charge. Included in the letter from the defendant's attorney to the county attorney was the following language: "Judge Kuns informed me that if there was any misunderstanding or disagreement as to acceptance of the plea on the basis that we had agreed upon, that he would permit us to withdraw the plea of guilty and reinstate the plea of not guilty." The defendant had read and approved this arrangement. He knew that his sentence would be between 16 and 20 years or he would have the opportunity to withdraw the guilty plea and reinstate the plea of not guilty. In this situation, the defendant was fully aware of the probable penalty and the consequences of his plea. In fact, the defendant got the

sentence he had bargained for. Any error on the part of the trial judge in failing to inform the defendant of the statutory penalty did not prejudice the rights of the defendant or result in manifest injustice. Without more, the technical failure of the trial judge to inform the defendant of the statutory penalties is not enough for reversal.

The second assignment of error urges the point that the trial court imposed an indeterminate sentence for second degree murder rather than a sentence for a definite term of years not less than 10, or for a term of life, contrary to our holding in *State v. Laravie,* 192 Neb. 625, 223 N.W.2d 435 (1974). The defendant raises this error for the first time on appeal from the denial of his motion for post conviction relief. The defendant did not file a direct appeal from his conviction in the District Court. A motion to vacate a judgment and sentence under the post conviction act cannot be used as a substitute for an appeal or to secure a review of issues already litigated. Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel and were not raised in direct appeal, those issues will not ordinarily be considered in a post conviction review. *State v. Suggett,* 200 Neb. 693, 264 N.W.2d 876 (1978). Relief under the post conviction act is limited to cases in which there was a denial or infringement of a prisoner's rights such as to render the judgment void or voidable under the Constitution of Nebraska or of the United States. *State v. Miles,* 194 Neb. 128, 230 N.W.2d 227 (1975). An indeterminate sentence imposed for a crime, where not authorized by statute, is erroneous but not void. *Draper v. Sigler,* 177 Neb. 726, 131 N.W.2d 131 (1964). A sentence of not less than 16 years nor more than 20 years made under the provisions of the indeterminate sentence law of this state is a definite sentence for 20 years. *Studley v. Studley,* 129 Neb. 784, 263 N.W. 139 (1935).

Such sentence was at most erroneous, but not void, and was a valid sentence for 20 years. By failing to challenge the indeterminateness of the sentence directly in an appeal, the defendant waived the right to contest it in a post conviction review. *State v. Oziah,* 198 Neb. 423, 253 N.W.2d 48 (1977).

The judgment of the District Court in denying post conviction relief was correct and is affirmed.

AFFIRMED.

WHITE, J., dissenting.

In *State v. Turner,* 186 Neb. 424, 183 N.W.2d 763 (1971), we said that the procedure in a guilty plea must, *at a minimum,* conform to the procedures contained in the ABA Standards Relating to Pleas of Guilty (1968 Approved Draft). We imposed the new standards for taking guilty pleas in order to conform our plea-taking procedures to those required by *Boykin v. Alabama,* 395 U.S. 238 (1969).

The majority cites *State v. Lewis,* 192 Neb. 518, 222 N.W.2d 815 (1974), for the proposition that the plea must be voluntary and intelligent. *Lewis* goes further. Even when there is an implication in the record that the defendant, in fact, knew the consequences of her plea, the judge is still required to advise the defendant of possible penalties.

> The standards recommend that a defendant be allowed to withdraw his plea of guilty or nolo contendere upon timely motion if he proves that withdrawal is necessary to correct a manifest injustice. American Bar Association Standards Relating to Pleas of Guilty, § 2.1. The standards provide that one of the items which may constitute manifest injustice is a failure to be advised of penal consequences of a plea.

*Lewis* at 522, 222 N.W.2d at 818. In *Lewis,* we found that there was not substantial compliance with ABA Standards Relating to Pleas of Guilty § 1.4(c) because of the failure of the court to advise the defend-

ant of the penalties before accepting her plea.

The constitutional requirement for the procedure in a guilty plea is that the plea be voluntary and intelligent and the determination of the fact be readily determined. *Boykin v. Alabama, supra; State v. Turner, supra.* In *State v. Curnyn,* 202 Neb. 135, 274 N.W.2d 157 (1979), we considered whether the conviction and sentence of the defendant must be vacated and set aside because of the failure of the court, during arraignment, to inform the defendant of the range of penalties for the offense of burglary. Quoting *Lewis,* we stated:

> The practice of advising a defendant who is about to enter a plea to a felony of the possible penalties on conviction, although not made mandatory by any statute in this state, is one of long standing in this jurisdiction and antedates the adoption of the standards in State v. Turner, *supra.*

*Curnyn* at 139, 274 N.W.2d at 160.

> [Where] the extent of the defendant's knowledge of the applicable penalties is a matter in dispute and cannot be clearly determined from the record of this case without indulging in inferences, we deem it advisable, without vacating and setting aside defendant's conviction and sentence, to remand this matter to the trial court with leave to the defendant to apply to the trial court to withdraw his plea.

*Curnyn* at 140, 274 N.W.2d at 161.

In *State v. Svoboda,* 199 Neb. 452, 455, 259 N.W.2d 609, 611 (1977), we considered whether the defendant's guilty pleas were involuntary because of the trial court's participation in plea bargaining discussions. Remanding the case for further proceedings, we said: "The Post Conviction Act provides that unless the motions and files and records of the case show that the prisoner is entitled to no relief, the

court shall grant a prompt hearing." We held that since the files and records of the case did not affirmatively establish that the defendant was entitled to no relief, the District Court should have granted an evidentiary hearing.

The instant case should be governed by the principles set out in *Lewis, supra, Curnyn, supra,* and *Svoboda, supra.* The majority opinion does not comply with these standards. Because of the failure to affirmatively show the knowledge of minimum and maximum penalty, the record fails to establish that the defendant entered his plea understandingly and voluntarily and it also fails to affirmatively establish that the defendant's allegations do not entitle him to relief. See, also, *State v. Flye,* 201 Neb. 115, 266 N.W.2d 237 (1978); *State v. Ford,* 198 Neb. 376, 252 N.W. 2d 643 (1977).

The majority opinion attempts to diminish the requirement that the judge advise the defendant of the maximum possible penalty. This approach is not supported by the ABA Standards nor the advisory rules for trial judges. In the comment to § 1.4(c)(i) and (ii) of the ABA Standards, the drafters state: "The emphasis in the case law has been upon the requirement that the judge inform the defendant of the maximum possible punishment. This is understandable, as it is ignorance of the maximum which is most likely to serve as a basis for withdrawal of the plea." The Nebraska Bench Book XVIII-9 (1976) provides that the judge should ask the defendant to state on the record the penalty for the offense. "[This is the] bare minimum to meet the American Bar Association's and Nebraska Supreme Court's requirements."

There is nearly universal agreement that the defendant must know the minimum and maximum sentence a judge may impose. Bond, Plea Bargaining and Guilty Pleas, § 3.39 (1978). *State v. Jackson,* 17 Ariz. App. 533, 499 P.2d 111 (1972) (case remanded

for hearing to see if defendant in fact knew penalty where record does not show advice); *Dunlap v. United States,* 462 F.2d 163 (5th Cir. 1972) (defendant may withdraw plea and plead anew where record does not show advice on penalties); *United States v. Perwo,* 433 F.2d 1301 (5th Cir. 1970) (defendant must know the precise limits of the maximum possible penalty instead of substantially where the outer limits were).

The case should be remanded for a hearing to determine whether, in fact, the defendant knew the penalty limits. *State v. Curnyn, supra.*

McCOWN and BRODKEY, JJ., join in this dissent.

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BONNIE GRAY ET AL., APPELLEES, V. DELENE MAXWELL, JOHN DOE (REAL NAME UNKNOWN), AND JANE DOE (REAL NAME UNKNOWN), APPELLANTS.

293 N. W. 2d 90

Filed June 10, 1980. No. 42609.

1. **Evidence: Hearsay.** An extra-judicial statement not offered to prove the truth of the matter asserted is not hearsay.
2. **Habeas Corpus: Child Custody: Appeal and Error.** In reviewing a decision in a habeas corpus case involving the custody of a child, it is necessary that this court try the case de novo on the record, giving great weight, however, to the findings of the trial court where the evidence is in irreconcilable conflict.
3. **Habeas Corpus: Child Custody.** Proceedings in habeas corpus to obtain custody of a child are governed by considerations of expediency and equity, and should not be bound by technical rules.
4. **Public Policy: Adoption: Medical Expenses.** It is not contrary to public policy for persons wishing to adopt a child to make provision with its mother before birth to pay hospital and medical expenses in connection with the care of the mother and the child.
5. **Relinquishment: Adoption.** An agreement to pay a mother, in return for the relinquishment of her child, a sum equal to the amount of the hospital and medical expenses which have already been paid by another, constitutes an unwarranted payment of consideration which vitiates the relinquishment.
6. **Relinquishment: Adoption: Voluntariness.** A relinquishment of

a child for adoption which is not executed voluntarily may be revoked if such action is taken within a reasonable period of time.

7. **Parental Rights.** Generally speaking, it is in the best interests of a minor child that it should be in the care of the natural parent, assuming that such parent has not been shown to be unfit to perform parental duties or that such parent has not forfeited such parental rights by abandonment or otherwise.
8. **Relinquishment: Adoption: Abandonment: Parental Rights.** As a general rule, the relinquishment of a child in exchange for an unwarranted payment of consideration to a parent is tantamount to an abandonment of that child.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed as modified.

James B. Cavanagh of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for appellants John and Jane Doe.

Paul L. Douglas, Attorney General, and Lynne Rae Fritz, for appellant Delene Maxwell.

Ronald L. Brown and Maureen Fitzgerald Brown of Brown Law Offices and Teresa Luther of Luther & Beaurivage, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

HASTINGS, J.

The relator, Bonnie Gray, brought this habeas corpus action to regain custody of her minor child from the respondents, John and Jane Doe, prospective adoptive parents. The child had been placed with them by virtue of a relinquishment signed and acknowledged by the relator. The trial court found generally in favor of the relator and ordered the child returned to her. The respondents have appealed. Also named as a party and appearing as an appellant in this action is Delene Maxwell, the conciliation court counselor of the District Court for Douglas County, Nebraska. Although Mrs. Maxwell has disclaimed any interest in the ultimate disposi-

tion of this case, she does dispute any findings of the trial court which could be interpreted as finding her guilty of any wrongdoing in this case.

The respondents, Does, have assigned as errors the following actions of the trial court: (1) The reception into evidence of a tape recording of certain telephone conversations; (2) The finding of an agency relationship between the Does and Mrs. Maxwell; (3) The finding of the existence of a transaction for the sale of a child which vitiated the relinquishment; (4) Findings made outside the scope of the issues presented by the pleadings; (5) The finding that reimbursement of medical expenses to the relinquishing mother constitutes consideration for the sale of a child; and (6) A finding that the relinquishment was not valid and not unrevocable. We affirm as modified.

Mrs. Gray was a 25-year-old married woman who, however, was separated from her husband and was in the process of getting a divorce. She had two daughters, the issue of that marriage, and some 8 years earlier had given birth to a child out of wedlock which she had relinquished for adoption. The child involved here was born on June 28, 1978, and was presumably the issue of a live-in arrangement which Mrs. Gray had as a housekeeper for a man who was also in the process of obtaining a divorce, and who had custody of the children of his marriage. As a representative of the court, Mrs. Maxwell had an interest in the welfare of those particular children, and as a result of home visitations, she became acquainted with Mrs. Gray.

According to Mrs. Gray's testimony, Mrs. Maxwell knew of the pregnancy as early as the middle of October 1977, and in January of the following year told the relator that she had a nice family who would like to have the baby. She went on to say that Mrs. Maxwell called her into her office one morning in March or April around 8 o'clock, and took her over

to see a district judge whom Bonnie Gray had known and who supposedly knew the people who were interested in the adoption. The relator acknowledged to the judge at that time that she was going to give up the baby, and he inquired of her condition and the health of the father. She told the judge that she wanted to place the child with a good family, but didn't want to go through an agency.

Bonnie Gray also testified that Mrs. Maxwell and others, on many occasions prior to the birth of the child, suggested that she would be unable to care for the child; that by keeping the child she would destroy any hope of reconciliation with her husband; that she was no good for the baby; and that her ADC payments and food stamps would be discontinued. The relator also insisted that she was promised a payment of $1,500 for relinquishing the child and, on other occasions, claimed that she would be given a check for the amount of the hospital and physician's bills in the approximate sum of $1,400, and that the welfare agency would pay all the bills.

On Saturday, July 1, 1978, Mrs. Gray checked out of the hospital with the baby, went immediately to an attorney's office, and according to her, handed the baby over to Mrs. Maxwell, signed the relinquishment, and left. She was not given any money. Later that afternoon, or the next day, she said she realized what a foolish thing she had done, and thereafter called the attorney to ask for the return of the baby. He was not home, but did call her back on Sunday, at which time she told him "that I wanted my baby back and I told him of the deal that Mrs. Maxwell had said to me and the way she had talked to me and made offers and things like that."

Finally, Mrs. Gray identified a tape recording which she had made of two telephone conversations between herself and Mrs. Maxwell which, it was claimed, would corroborate the relator's allegations. There never was any real question that the voices on

the tape were those of Mrs. Gray and Mrs. Maxwell, but there was a real dispute as to which one of the parties had placed the calls. The respondents, Does, objected on the grounds that, although the conversations may have been admissions of Mrs. Maxwell, they were not binding on the Does because of lack of evidence of an agency relationship and, therefore, as to them, the conversations were hearsay. The receipt into evidence of this tape and a finding by the trial court of an agency relationship were assigned as errors.

Although we were unable to detect any evidence of wrongdoing on the part of Mrs. Maxwell from the contents of the recorded telephone conversations, and, as a matter of fact they consisted mostly of self-serving statements on the part of Mrs. Gray, the legitimate purpose in offering the tape in evidence was not to prove the truth of any assertion made, i.e., that the Does were offering a consideration for the relinquishment of the baby or that Mrs. Maxwell was acting as their agent. To the contrary, the evidence of such conversations was offered to corroborate the allegations made by the relator that such statements were made to her, and, ultimately to establish whether or not they had an effect upon the voluntariness of her acknowledgment of the relinquishment. An extra-judicial statement not offered to prove the truth of the matter asserted is not hearsay. Neb. Rev. Stat. § 27-801(3) (Reissue 1975). Important to our final decision is a determination of whether or not the relator was influenced by coercion, harassment, and promises of compensation to the point where the voluntary nature of the relinquishment was destroyed. In our consideration, it is immaterial whether any statements made by Mrs. Maxwell were as an agent of the Does or on her own behalf. The determination of the existence of any such agency not being relevant to a final determination in this case, it could in no way constitute preju-

dicial error. The tape recordings were not hearsay, and were properly received in evidence.

The testimony of Mrs. Maxwell was very brief. She denied ever threatening Bonnie Gray with the loss of ADC or food stamp benefits, denied any coercion or harassment of any nature, and denied any discussion of a payment of a consideration for the adoption of relator's child. She said she did not locate the prospective adoptive parents, but that it was either the district judge to whom Mrs. Gray had talked, or the lawyer who supervised the execution of the relinquishment, who was in touch with the Does. Apparently, although not completely clear from the record, the first contact Mrs. Maxwell had with Bonnie Gray directly relating to the mechanical aspects of this particular adoption was when the relator called her from the hospital on Friday following the birth of her child. She did concede that she had told Mrs. Gray that the adoptive parents should pay the medical costs and that the lawyer through whose offices the relinquishment was signed would be responsible for paying the bills, and that if she had paid them, he would be responsible for reimbursing her in whatever amount she had paid. Mrs. Maxwell had no quarrel with the identity of the voices in the recorded phone calls, but did deny that she had placed the calls and insisted that they were initiated by Mrs. Gray.

The lawyer who handled the execution of the relinquishment denied that he used any pressure or influence to obtain the relinquishment and denied that he in any way was representing the prospective adoptive parents. He insisted that he was representing the interests of Bonnie Gray, although his representation in that regard was not as a result of a specific retainer, but a carryover from his acting in her behalf on a prior matter.

John and Jane Doe both testified in their own behalf and recited that they had talked to the particu-

lar district judge previously mentioned some 3 years earlier about their desire to adopt a baby and that they received a call from him about the middle of May to the effect that a girl had been in his office who was pregnant and was interested in giving up the child. The judge inquired if they were still interested in an adoption and, when told that they were, he said he would send Mrs. Maxwell out to make an investigation of their home. She did make that investigation. The next thing that happened, according to their testimony, is that Mrs. Maxwell called them and told them that the girl had had the baby and they would be bringing it out on Saturday.

The judge testified by deposition that he remembers Mrs. Maxwell bringing Bonnie Gray to his office because the latter wanted to ask his advice about giving the baby for adoption. He said that he advised her not to give up the child if it was being done to win back her husband and that, if things didn't work out and she wanted the child back, that would be the worst thing she could do, i.e., to allow someone to become attached to the child and then demand it back. He said that he never talked to her again.

In reviewing a decision in a habeas corpus case involving the custody of a child, it is necessary that we try the case de novo on the record, giving great weight, however, to the findings of the trial court where the evidence is in irreconcilable conflict. *Raymond v. Cotner,* 175 Neb. 158, 120 N.W.2d 892 (1963).

The respondents, Does, claim that the trial judge erred in deciding issues not presented in the pleading. This is amplified by statements in their brief that

> Ms. Gray alleged that the coercion and undue influence were "manifested" in the form of promises of the payment of a sum of money which sum was never paid. . . . Nor

> does the pleading or the issues presented in the Petition include any issues as to the payment of money in consideration for the relinquishment and surrender of a child so as to constitute the sale of a child.

Whatever conclusion is reached, whether it be that the promises of payment amounted to coercion and undue influence as alleged by the relator, or constituted a prohibited sale as found by the trial court, there is no question but that the critical facts were contained within the petition. We have repeatedly said that proceedings in habeas corpus to obtain custody of a child are governed by considerations of expediency and equity, and should not be bound by technical rules. *Green v. Green,* 178 Neb. 207, 132 N.W.2d 380 (1965).

We do agree with the contention advanced by the Does and adopt the reasoning of *Barwin v. Reidy,* 62 N.M. 183, 307 P.2d 175 (1957), cited by them, that it is not contrary to public policy for persons wishing to adopt a child to make provisions with its mother before birth to pay hospital and medical expenses in connection with the care of the mother and the child. However, the findings by the trial court were that Mrs. Gray was to receive funds for payment of various expenses which had been paid in full or in part by the Department of Public Welfare and such amounts would therefore constitute the payment of a consideration for the relinquishment.

We have no hesitancy in agreeing with the trial judge that an agreement to pay a mother, in return for the relinquishment of her child, a sum equal to the amount of the hospital and medical expenses which have already been paid by another, constitutes an unwarranted payment of consideration which vitiates the relinquishment. *Barwin v. Reidy, supra.* However, the trial court also found that Mrs. Gray had been promised a separate payment of $1,500 for the same purpose. The testimony of the

witnesses both as to the payment of a consideration and as to evidence of coercion and harassment was in hopeless conflict and the trial judge, having observed the witnesses, chose to believe Mrs. Gray to the exclusion of the others. We cannot say that he was arbitrary, unreasonable, or even wrong in so doing. We conclude that the record supports his finding that the relinquishment of the child in this instance was done in consideration of a promise to pay a sum of money in excess of the legitimate expenses of confinement and birth, which is against public policy and vitiates the relinquishment previously given.

Finally, the respondents, Does, complain that the trial judge erred in finding that the relinquishment was not valid and was revocable, and cite in support of that proposition the cases of *Batt v. Nebraska Children's Home Society,* 185 Neb. 124, 174 N.W.2d 88 (1970), and *Kane v. United Catholic Social Services,* 187 Neb. 467, 191 N.W.2d 824 (1971). However, in the former case, there was a 5-month interval between the relinquishment and the attempt to revoke. In both cases, the mother was faced with Neb. Rev. Stat. § 43-106.01 (Reissue 1978), which provides that once a child has been relinquished in writing to the Department of Public Welfare or to a licensed child placement agency, and the latter has, in writing, accepted full responsibility for such child, the parent shall be relieved of all responsibilities for and rights over such child. The second case, *Kane v. United Catholic Social Services, supra,* emphasized that portion of the statute which states "and have no rights over such child" and interpreted that to mean "[t]he relinquishment *if voluntary*, as it is here, is not revocable." *Id.* at 470, 191 N.W.2d at 825 (emphasis supplied). The distinction is that, in this case, we find the evidence established that the relinquishment was not voluntary and revocation was attempted in a matter of hours. Additionally, the stat-

ute governing a private placement, as in this case, was Neb. Rev. Stat. § 43-111 (Reissue 1978): "Except as provided in section 43-106.01, after a decree of adoption has been entered, the natural parents of the adopted child shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such adopted child . . . ." This would suggest a vastly different expressed legislative intent as to the finality of a child relinquishment to a private person as opposed to one made to the Department of Public Welfare or a licensed adoption agency.

Since we have determined that the relinquishment was invalid, the Does no longer have any standing to contest the custody of this child. However, there remains the question that is present in every habeas corpus case involving child custody: the best interests of the child. We said in *Eravi v. Bohnert,* 201 Neb. 99, 106, 266 N.W.2d 228, 231 (1978): "Generally speaking, it is in the best interests of the child that he should be in the care of his natural parent." That assumes, of course, that it is not shown that such parent is unfit to perform parental duties, or that such parent has not forfeited such right by abandonment or otherwise. *State ex rel. Cochrane v. Blanco,* 177 Neb. 149, 128 N.W.2d 615 (1964). As suggested in *Barwin v. Reidy, supra,* we can think of few more drastic ways in which children can be abandoned than by selling them. We recognize that relator may have reconsidered her relinquishment because of more honorable reasons than failure of consideration. However, we do not believe that her continuing fitness can be determined simply because of a lack of evidence to show the otherwise unfitness of the relator. We, therefore, believe that a hearing should be held to affirmatively determine the question of relator's fitness as a parent, in light of all of these circumstances and the best interests of the child, and that at such hearing an attorney be ap-

pointed to represent the interests of the child. We, therefore, modify the trial court's decree to that extent and remand the cause for such hearing. Otherwise, the judgment is affirmed.

AFFIRMED AS MODIFIED.

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HAROLD L. GROSVENOR, APPELLEE, V. MILDRED E. GROSVENOR, APPELLANT.

293 N. W. 2d 96

Filed June 10, 1980. No. 42734.

1. **Statutes: Legislative Intent.** Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention.
2. _____: _____. The purpose of all rules or maxims for the construction or interpretation of statutes is to discover the true intention of the law, and the rules or canons of construction are merely aids for ascertaining legislative intent. The rules of construction are neither ironclad nor inflexible, and must yield to manifestations of a contrary intent.
3. _____: _____. The legislative intention is to be determined from the 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 deduced from the whole will prevail over that of a particular part considered separately.
4. **Divorce: Property Division: Judgments.** Neb. Rev. Stat. § 42-371(4) (Reissue 1978) gives to a court which has entered a judgment for property division payable in installments, authority to release or subordinate the judgment under the conditions prescribed by the statute.
5. **Judgments.** In the absence of statutory authority, a court ordinarily has no power to correct, amend, open, or vacate a valid judgment after the expiration of the term.
6. **Judgments: Statutes.** Statutes providing for the modification of vested judgments apply only to judgments rendered after the statute takes effect.
7. **Equal Protection: Constitutional Law.** Equal protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same.

8. _____: _____. No state shall deny to any person within its jurisdiction the equal protection of the laws.
9. **Police Power: Equal Protection: Constitutional Law: Liens.** The lien of a judgment is statutory and not a fundamental or basic right. Legislation affecting judgment liens is, on its face, economic and social welfare legislation. The standard by which a court reviews a classification established by such legislation is whether it has a rational basis and is at least arguably related to a legitimate function of government not prohibited by the Constitution.
10. _____: _____: _____: _____. There are sufficient differences between judgment liens in marriage dissolution cases and other types of judgments to support the legislative determination that such liens are entitled to a treatment different from judgments generally.

Appeal from the District Court for Dixon County: FRANCIS J. KNEIFL, Judge. Affirmed.

C. J. Galvin, for appellant.

Donald A. Fitch, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an appeal from an order in a marriage dissolution proceeding entered under the provisions of Neb. Rev. Stat. § 42-371(4) (Reissue 1978), subordinating the lien of a previously entered monetary judgment, payable in installments, granted to the respondent wife in lieu of a division of property. The District Court for Dixon County, Nebraska, granted the relief requested and the wife, the judgment creditor, has appealed. She makes two principal contentions: (1) Section 42-371(4) is unconstitutional because it permits the court to order the release or subordination of judgments of certain types, i.e., those granted in marriage dissolution actions, while other judgment creditors cannot be so compelled; and (2) Section 42-371(4), properly construed, does not include the release of a monetary judgment granted in a division of marital property. We find

the appellant's contentions are not meritorious and affirm.

Section 42-371(4) provides:

> Whenever a judgment creditor under sections 42-347 to 42-379 refuses to execute a release of the judgment as provided in this section, the person desiring such release may file an application for the relief desired. A copy of the application and a notice of hearing shall be served on the judgment creditor either personally or by registered or certified mail no less than ten days before the date of hearing. If the court finds that the release is not requested for the purpose of avoiding payment and that the release will not unduly reduce the security, the court may release property from the judgment lien. As a condition for such release, the court may require the posting of a bond with the clerk in an amount fixed by the court, guaranteeing payment of the judgment.

On March 19, 1975, the District Court modified the previous judgment in the dissolution proceeding and overruled a pending motion for a new trial. The modification decree, insofar as is pertinent to this appeal, made an award to the wife in the sum of $67,500, payable $7,500 forthwith and the balance in equal annual installments of $6,000, together with interest on the unpaid balance. The court, in its decree, made it clear that the monetary judgment was a division of property by specifically noting that it was making no award of alimony.

Thereafter, the appellee, who is the owner of several tracts of farmland, filed this proceeding under the provisions of § 42-371(4), asking that the judgment lien above described be subordinated to the lien of a mortgage which he proposed to make to the Federal Land Bank upon an 80-acre tract owned by

him and also to subordinate the judgment lien to the same mortgage on another 80-acre tract which he proposed to purchase with the loan proceeds. At the time of the filing of the application, the balance of the judgment was $36,000, plus interest, and payments were current. The evidence would indicate that other unencumbered property owned by the appellee provided adequate security for the balance owing, and that he has not been delinquent in his previous payments.

A brief account of the legislative history of statutes for release or subordination of judgment liens in domestic relations cases is somewhat enlightening and tends to indicate the reasons why the Legislature has treated the lien of such judgments differently from the liens of other types of judgments. An examination of that history also enables one to answer the contention of the applicant that the provisions do not apply to monetary awards which are given as a division of property.

The following principles govern the interpretation of the statutes:

> Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. [Citation omitted.] The legislative intention is to be determined from the 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 deduced from the whole will prevail over that of a particular part considered separately. [Citation omitted.]
>
> "The purpose of all rules or maxims as to the construction or interpretation of statutes is to discover the true intention of the law, and the rules or canons of construction are merely aids for ascertaining legislative in-

> tent. The rules of construction are neither ironclad nor inflexible, and must yield to manifestations of a contrary intent." [Citation omitted.]

*Equal Opportunity Commission v. Weyerhaeuser Co.*, 198 Neb. 104, 109, 251 N.W.2d 730, 733 (1977).

It is convenient to begin that history with the statement of this court in *Harrington v. Grieser*, 154 Neb. 685, 689, 48 N.W.2d 753, 755 (1951):

> For many years after the Legislature established that alimony and child support payments, including future payments, should be liens it made no provision respecting the court's authority to release or in any way change the priority thereof. Then, in 1935, the Legislature provided if certain conditions were found to exist, none of which were here found to exist as the basis for the court's order of August 8, 1946, that then the court would have authority to enter an order respecting the priority thereof or to subordinate it to the lien of a mortgage, the proceeds of which are to be used solely for the specific purposes as therein set forth. Laws 1935, c. 94, p. 316, now section 42-324, R. S. 1943. The Legislature during its 1951 session broadened the court's authority in this respect with reference to child support. See L. B. 299, appearing as Laws 1951, c. 125.

From time to time, the Legislature has seen fit to make changes. In 1953, provision was made for the court to order release of child support judgments. 1953 Neb. Laws, c. 141, § 1. In 1967, provision was made for the release of the lien of a judgment for alimony. 1967 Neb. Laws, c. 72, §§ 1-3. In 1972, the Legislature made additional changes in the law pertaining to the release of liens, including putting subsection (4) of § 42-371 in the form previously quoted. 1972 Neb. Laws, L.B. 820, § 25. The introductory

phrase of subsection (4), "Whenever a judgment creditor under sections 42-347 to 42-379 refuses . . . ," by its literal language, includes judgment creditors for support in cases of legal separation, § 42-368 (Reissue 1978), judgment creditors for temporary and permanent support payments or alimony, § 42-369 (Reissue 1978), judgment creditors for child support, § 42-364 (Reissue 1978), and judgment creditors for alimony, § 42-365 (Reissue 1974). All these sections were part of L.B. 820.

In 1974, the Legislature amended § 42-365 by including orders for division of property in the form of a monetary judgment. 1974 Neb. Laws, L.B. 1015, § 5, codified as § 42-365 (Reissue 1978).

In 1975, the Legislature added the following language to Neb. Rev. Stat. § 42-371(1):

> The judgment debtor may petition the court which rendered the original judgment for an order releasing the lien as to specific property. The court shall grant the relief prayed for in the petition upon a showing by the judgment debtor that sufficient property shall remain subject to the lien to cover all child support due and that which may become due.

1975 Neb. Laws, L.B. 212, § 2.

A close examination of L.B. 820 indicates that it is not a model of clarity. Section 25 of L.B. 820, codified as § 42-371, provides, in part: "All judgments and *orders for payment of money under this act* shall be liens upon property as in other actions . . . ." (Emphasis supplied.) This obviously includes money judgments in lieu of property division in kind. The note of ambiguity is introduced by subsection (4) of § 42-371 (L.B. 820, § 25(4)), which provides: "Whenever a judgment creditor *under this act* refuses to execute a release of a judgment as provided in *this section,* the person desiring such release may file an application for the relief desired."

(Emphasis supplied.) The provisions pertaining to release in "this section," as previously noted, are: "The judgment creditor may execute a partial or total release of the judgment, generally or on specific property. Release of judgments for child support must be approved by the court which rendered the judgment." 1972 Neb. Laws, L.B. 820, § 25(1).

> The judgment debtor may petition the court which rendered the original judgment for an order releasing the lien as to specific property. The court shall grant the relief prayed for in the petition upon a showing by the judgment debtor that sufficient property shall remain subject to the lien to cover all child support due and that which may become due.

1975 Neb. Laws, L.B. 212, § 2. It appears that the statute might be read to mean that the release by the judgment creditor is voluntary except only in the case of judgments for child support.

Further lack of clarity results from the fact that provisions providing the time when liens for child support and alimony terminate have been inserted between the sections providing the remedy when a judgment creditor refuses to make a release as authorized in this section. However, reading all of the statutory provisions, which are clearly in pari materia, together, leads to the firm conclusion that the Legislature intended the liens for all three categories of money judgment, to wit, child support, alimony, and property division, to be subject to release with court approval. The language in § 42-371(4), "If the court finds that the release is not requested for the purpose of avoiding payment and that the release will not unduly reduce the security," together with language from L.B. 820, § 25(1), "All judgments and orders for payment of money under this act," clearly shows that the Legislature was referring to monetary judgments of all three classes which

were subsisting liens.

At common law, judgments were subject to vacation or modification only during the term in which rendered. *Hamaker v. Patrick,* 123 Neb. 809, 244 N.W. 420 (1932); 49 C.J.S. *Judgments* § 229 (1947). In the absence of statutory authority, a court ordinarily has no power to correct, amend, open, or vacate a valid judgment after the expiration of the term. *Hamaker v. Patrick, supra; State, ex rel. Spillman, v. Commercial State Bank,* 143 Neb. 490, 10 N.W.2d 268 (1943). Statutes providing for the modification of vested judgments apply only to judgments rendered after the statute takes effect. *Karrer v. Karrer,* 190 Neb. 610, 211 N.W.2d 116 (1973). All the provisions we have earlier discussed were in effect when the judgment here involved was entered.

The appellant's contention that the provisions of § 42-371(4) do not apply to monetary awards given as part of a property settlement therefore must fail.

The appellant's basic argument on the constitutional question is that the respondent is deprived of equal protection of the laws contrary to the provisions of the state and federal Constitutions because the State of Nebraska has treated judgment creditors under the marriage dissolution act differently than other judgment creditors. In the former class, the Legislature has authorized the court, in a proper case, to order the release or change the priority of a judgment lien. This is not true in the case of other types of judgment creditors. She, therefore, argues that the legislation is arbitrary and the classification is constitutionally impermissible.

We now turn to the constitutional issue raised by the appellant. Equal protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same. Tussman & tenBroek, *The Equal Protection of the Laws,* 37 Cal. L. Rev. 341 (1949). "No State shall . . . deny

to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

It is well to note in the beginning of the discussion of the constitutional issue that the lien of a judgment is a creation of statute subject to legislative control and did not exist at common law. 49 C.J.S. *Judgments* § 454 (1947); *Greene v. Rice,* 32 Idaho 504, 186 P. 249 (1919). It cannot, therefore, be said that the right to the lien of a judgment is a fundamental or basic right. It is, on its face, economic and social welfare legislation.

The standard by which a court reviews a classification established by such legislation is whether it has a rational basis and is at least arguably related to a legitimate function of government not prohibited by the Constitution. *Nebbia v. New York,* 291 U.S. 502 (1934); *New Orleans v. Dukes,* 427 U.S. 297 (1976); *Vance v. Bradley,* 440 U.S. 93 (1979).

The two classifications which are established by the judgment lien laws of Nebraska are, insofar as pertinent to the question raised here, (1) monetary judgment creditors arising in marriage dissolution proceedings and (2) all other monetary judgment creditors.

In this case, the subject matter of the legislation suggests the purposes for difference in treatment. Marriage dissolution relates to the family unit and the support of spouse and child. Frequently, real property used in business or for investment is the source of funds which must be used to pay obligations which continue over a long period of time, e.g., child support, alimony, or monetary amounts payable in installments in lieu of property division. Sometimes borrowing is necessary to keep a farm or other business operating. Expansion by buying additional property may be necessary or advisable. All this may be necessitated in order to insure continued support of family members, including the separated parties as well as the children. In contrast, the

ordinary monetary judgment rests upon an obligation previously incurred and usually payable in one sum immediately, with payment discharging the judgment obligation completely.

The differences above noted are clearly sufficient to support the legislative judgment that judgment liens in marriage dissolution cases are entitled to different treatment.

The briefs of the parties cite no cases directly in point and we have found none. However, the following cases pertaining to lien classifications tend to support the conclusion we have reached. *Green v. Rice, supra; Olson v. Oneida Mines Co.,* 153 Minn. 80, 189 N.W. 455 (1922); *Johnson v. Livingston,* 65 So. 2d 744 (Fla. 1953); *Suber v. Alaska State Bond Committee,* 414 P.2d 546 (Alaska 1966).

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. GARY P. KENNEDY, APPELLANT.

293 N. W. 2d 71

Filed March 11, 1980. Nos. 42737, 42738.

Rehearing Denied June 10, 1980.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Motion for rehearing overruled.

Michael L. Lazer of Levy & Lazer, for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

PER CURIAM.

Upon motion for rehearing, the opinion previously adopted by this court, appearing at 205 Neb. 714, 289 N.W.2d 765 (1980), is hereby modified by deleting therefrom the last sentence of the first full para-

graph on page 718, "Defendant did not perfect a direct appeal," and substituting therefor "Although defendant filed a notice of appeal and argued excessiveness of his sentence, he did not include such argued excessiveness of his sentence within his assignment of errors."

The opinion is further modified by adding on page 719, immediately preceding the final sentence of the opinion announcing the decision of the court, the following: "The charge of shooting with intent to kill, wound, or maim did not arise out of the same incident which formed the basis for the earlier charge of assault with intent to rob. Accordingly, there is no legitimate reason why the two sentences should not have been made to run consecutively. Defendant has a history of criminal and violent conduct going back to 1967, including at least two previous periods of incarceration at the Nebraska Penal and Correctional Complex. The shooting was directed at two police officers who were approaching the defendant to question him about a burglary and felonious assault and was not precipitated by any action of the officers. At the time of the offense, Neb. Rev. Stat. § 28-410 (Reissue 1975) provided for a sentence of from 1 to 50 years. The sentence imposed here did not constitute an abuse of discretion, and, being within the limits of the statute, it must be affirmed. *State v. Crouch,* 205 Neb. 781, 290 N.W.2d 207 (1980)." The motion for rehearing is overruled.

MOTION FOR REHEARING OVERRULED.

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RICHARD A. WOODSMALL, APPELLANT, V. MARIJO, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS MARIJO STABLES, AND JOSEPH CIESLIK, APPELLEES.

293 N. W. 2d 378

Filed June 10, 1980. No. 42755.

1. **Directed Verdict: Appeal and Error.** The party against whom a

verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be drawn from the evidence presented.

2. **Directed Verdict: Negligence.** Questions of negligence, contributory negligence, and assumption of the risk are for the trier of facts, but where reasonable minds can draw but one conclusion from the facts adduced with regard to those issues, a directed verdict is proper.
3. **Directed Verdict.** The trial court should only decide a question as a matter of law, and not submit the issue to the jury, when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
4. **Negligence.** A person who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
5. _____. To constitute want of due care, it is not required that a person should have anticipated the precise risk which occurred; it is sufficient that he has placed himself in a position of known danger where there was no need for him to be, or that he knew or should have known that substantial injury was likely to result from his act.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded for new trial.

Mary Cannon Veed of Matthews & Cannon, P.C., for appellant.

Walsh, Walentine & Miles, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

This is an action brought by Richard A. Woodsmall, plaintiff below and appellant herein, against Joseph Cieslik and Marijo, Inc., doing business as Marijo Stables, defendants below and appellees herein, for personal injuries suffered as the result of certain negligent actions on the part of Joseph Cieslik and Marijo, Inc. At the conclusion of the plaintiff's case, the trial court directed verdicts in favor of both Cieslik and Marijo, which orders have been ap-

pealed to this court. We reverse and remand.

It appears from the record that Woodsmall was a logistics officer on the Airborne Command Post of the U.S. Air Force. In an effort to find an occupation which he might engage in after his retirement from the service, Woodsmall answered an advertisement placed by Marijo for a stable manager and he attained the position in August 1975. Marijo, a corporation entirely owned by Cieslik and his wife, at that time operated a livery stable with a capacity for housing 20 horses, although only about 6 horses were being boarded at the time Woodsmall became stable manager. As compensation for this position, Woodsmall received a small salary as well as free board for two horses which he owned.

Shortly after Woodsmall began his employment with Marijo, he became aware of the fact that Marijo's reputation as a stable was not the best and he desired to improve Marijo's reputation and build up the business into a profitable operation. To further these goals, Woodsmall and Cieslik agreed to build a pole barn for the purpose of increasing the capacity of the stables. It was further agreed that the cost of construction would be divided between the two men.

Construction on the structure began on December 4, 1975. The two men were using a post hole auger driven by a tractor-mounted power take-off to dig the holes for the supporting structure of the shed. Both the tractor and auger were the property of a plumbing company owned and operated by Cieslik, although the tractor had been used previously by Woodsmall in connection with his Marijo duties. The two men dug four or five holes, with Cieslik operating the tractor and Woodsmall aligning the post hole auger. After the first hole, Cieslik directed Woodsmall to place pressure on a bar mounting the auger to the tractor to assist the auger in commencing the hole and told Woodsmall:

You're going to have to apply pressure to

> the bar to help it get started. It won't dig or grasp by itself. . . . Be aware that is a dangerous piece of equipment. Keep free of the auger as much as you can, but we've still got to get pressure on the top to get it started.

Woodsmall admitted receiving these directions. Woodsmall noted, however, that he was required to exert greater pressure on each hole than he had on the prior hole to get the auger to start digging.

The evidence reveals that, on the last hole, Woodsmall's clothing became entangled on a bolt holding the universal joint of the driveshaft onto the gear box of the auger. Before the power take-off could be disengaged and stopped, Woodsmall sustained abdominal injuries, resulting in the loss of his spleen and the permanent loss of certain abdominal muscles. Woodsmall was incapacitated for approximately 2 months, after which time he returned to his Air Force duties. He subsequently returned to work for Marijo and continued working there until late June 1976.

Woodsmall thereafter commenced this action, alleging in his second amended petition that Cieslik was negligent in failing to properly instruct Woodsmall in the safe operation of the auger, in failing to maintain a proper lookout so as to be able to stop the machinery when Woodsmall became entangled, in failing to provide safe equipment, and in failing to use the safety shield provided by the manufacturer of the equipment. Woodsmall further alleged that Marijo was negligent in failing to provide safe equipment and that the negligent actions of Cieslik should be imputed to Marijo, his principal. Cieslik answered, denying Woodsmall's claims and affirmatively alleging that Woodsmall's injuries were caused by contributory negligence and assumption of the risk. Marijo also denied Woodsmall's claims and alleged that any injuries resulted from Woodsmall's contributory negligence. Following presen-

tation of Woodsmall's evidence, Cieslik and Marijo both moved for directed verdicts in their favor. The trial court granted Marijo's motion on the following grounds: (1) That, if an employer-employee relationship existed between Marijo and Woodsmall, no subject matter jurisdiction existed in the District Court, because such jurisdiction would be vested exclusively in the Nebraska Workmen's Compensation Court; (2) That Woodsmall failed to prove that Marijo provided unsafe equipment because the equipment was, in fact, the property of the plumbing company; and (3) That Woodsmall was guilty of contributory negligence. The trial court granted Cieslik's motion on the grounds: (1) That even if an unreasonable risk of danger existed, Cieslik discharged any duty he owed to Woodsmall by giving him adequate warning as to the danger; and (2) That the evidence established that Woodsmall had been contributorily negligent. Woodsmall has appealed these rulings, contending that the lower court committed error, as hereinafter discussed.

Woodsmall first contends that the trial court committed error in directing a verdict for Marijo on the ground that it lacked jurisdiction over the subject matter of the action. See *Peak v. Bosse,* 202 Neb. 1, 272 N.W.2d 750 (1978). Specifically, Woodsmall contends that the finding that the action was outside the court's jurisdiction because of the provisions of the workmen's compensation act was erroneous because the pleadings filed in this action do not contain any allegations whatsoever of an employment relationship between Woodsmall and Marijo and no such relationship was claimed or even raised as an issue at the trial.

We believe that Woodsmall has misconstrued the order of the trial court. In ruling on the motions for directed verdicts, the trial court stated:

> *[I]f* in fact there's an employee-employer relationship, then this court doesn't have

> jurisdiction. The sole jurisdiction is vested in the Workmen's Compensation Court, and all other rights, liabilities, and so forth of the various parties, the employer-employee, are vested there and they're exclusive and they cannot maintain an action at law. (Emphasis supplied.)

The operative word, of course, is "if." We believe that the trial court was expressing a concern with regard to whether the action was being presented in the proper forum and was not ruling that it had no subject matter jurisdiction. Clearly, if that were the situation, the proper action for the trial court to take would have been to dismiss the action on that ground and not to direct verdicts on the merits. We are, therefore, convinced that the trial court did not base its direction of the verdicts on the jurisdictional grounds.

However, even assuming *arguendo* that the trial court did direct a verdict on the ground that it had no subject matter jurisdiction over this matter, we cannot conclude from a review of the record that an employment relationship existed between the parties at the time of the accident and, therefore, the trial court did have subject matter jurisdiction. On oral argument, the parties have agreed that none of them was claiming or contending that an employment relationship existed between Woodsmall and Marijo at any time. We recognize, however, that, notwithstanding this fact, the rule is clear that parties to an action cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent. See, *Anderson v. Story,* 53 Neb. 259, 73 N.W. 735 (1898); *Plunkett v. Parsons,* 143 Neb. 535, 10 N.W.2d 469 (1943); *Ostler v. City of Omaha,* 179 Neb. 515, 138 N.W.2d 826 (1965). From our review of the record, we do not believe that the parties have attempted to do so in this case.

The evidence is somewhat conflicting as to the re-

lationship of the parties at the time of the injury. Woodsmall and his wife both testified that they were "employed" by Cieslik, not Marijo. While it is true that discussions with regard to the construction of a pasture barn were initiated because the stable had been forced to turn away prospective business because of a lack of space, it is likewise true that the discussions which resulted in the ultimate decision to build were prompted by a business opportunity beneficial to Woodsmall. Woodsmall testified that Cieslik was in charge of the construction of the structure and that the latter was directing his actions at the time of the accident. Cieslik, on the other hand, testified that Woodsmall had *hired* him for the specific job of excavating the holes for the pole barn. It is important to note, however, that not only did Woodsmall offer to split the costs of construction of the structure, but he also provided materials for the roof. It would seem highly unlikely that an employee would offer to split the costs of construction of a facility with an employer, where that facility was built solely for the benefit of the employer. Therefore, even assuming that the trial court did find that an employment relationship existed between Woodsmall and Marijo, we believe that such finding was clearly against the weight of the evidence and was clearly wrong. However, since the trial court also based its findings on other grounds, we must also examine the other reasons given for the direction of a verdict in Marijo's favor.

The court directed its verdict in favor of Marijo for the reason that it found Woodsmall to be contributorily negligent as a matter of law. Woodsmall contends that such finding was erroneous and that the evidence created a jury question on this issue. The rule is well established that the party against whom a verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably

be drawn from the evidence presented. See, *Novotny v. McClintick, ante* p. 99, 291 N.W.2d 252 (1980); *Foremost Insurance Company v. Allied Financial Services, Inc.,* 205 Neb. 153, 286 N.W.2d 740 (1980). Ordinarily, questions of negligence, contributory negligence, and assumption of the risk are for the trier of facts, but where reasonable minds can draw but one conclusion from the facts adduced with regard to those issues, a directed verdict is proper. See, *Garcia v. Howard,* 200 Neb. 57, 262 N.W.2d 190 (1978); *McCready v. Al Eighmy Dodge,* 197 Neb. 684, 205 N.W.2d 640 (1977). However, the trial court should only decide a question as a matter of law, and not submit the issue to the jury, when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Foremost Insurance Company v. Allied Financial Services, Inc., supra; Stevens v. Kasik,* 201 Neb. 338, 267 N.W.2d 533 (1978).

From our review of the record, we believe the trial court was in error in finding Woodsmall to be contributorily negligent as a matter of law. It is the rule, as this court has often stated, that a person who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. See, *Garcia v. Howard, supra; Krehnke v. Farmers Union Co-Op. Assn.,* 199 Neb. 632, 260 N.W.2d 601 (1977). It is also the rule that to constitute want of due care, it is not required that a person should have anticipated the precise risk which occurred; it is sufficient that he placed himself in a position of known danger where there was no need for him to be, or that he knew or should have known that substantial injury was likely to result from his act. See, *Jensen v. Hawkins Constr. Co.,* 193 Neb. 220, 226 N.W.2d 346 (1975); *Omaha Nat. Bank v. Omaha P. P. Dist.,* 186 Neb. 6, 180 N.W.2d 229 (1970).

In this case, however, we believe that a jury question was presented with regard to whether Woodsmall placed himself in an area of known danger. Woodsmall's expert witness testified that, if a person had knowledge of the rotating driveshaft and the bolt connecting the driveshaft to the gear box of the post hole auger, that person would have knowledge of a hazard. He further testified that the bolt was very difficult to see when the equipment was operated under conditions similar to those in existence at the time of the accident and that the universal joint tended to take on the appearance of a solid, round object when rotating. He likewise stated that hazardous conditions existed on the equipment in three areas, i.e., the actual auger blades, the rotating universal joint, and the rotating bolt connecting the universal joint to the gear box of the equipment. There is evidence that Woodsmall had little mechanical knowledge, although he had received a college degree in sociology. He testified that he was not aware of the existence of either the rotating universal joint or the bolt connecting it to the auger's gear box. Moreover, he testified that he understood Cieslik's warning of danger to be directed solely toward the actual blades of the equipment. Cieslik admitted on redirect examination that his warning did not include the bolt or the universal joint. We believe that a question existed as to whether Woodsmall's actions constituted more than slight negligence when compared to the negligent actions, if any, of Cieslik and/or Marijo. Those questions are for determination by the trier of facts upon a consideration of all the evidence. We conclude that the trial court erred in directing the verdict for Marijo and Cieslik on this ground.

Finally, the trial court directed a verdict in favor of Marijo on the ground that Woodsmall failed to establish that the equipment was, in fact, owned by Marijo. While it is true that the equipment was pur-

chased by an entity other than Marijo, it is likewise true that Cieslik provided the tractor for the digging of the post holes and that Woodsmall had used the same tractor and other equipment in the furtherance of Marijo's business on prior occasions. We believe that a question of fact was created by the evidence which requires resolution by the trier of facts and that the trial court committed error in directing a verdict for Marijo on this issue.

With regard to the direction of a verdict in favor of Cieslik, we believe it stands in no better light. As earlier indicated, a fact question existed with reference to the contributory negligence of Woodsmall, if any. We believe it was error to remove that question from the jury's consideration. Likewise, we are not convinced that reasonable minds could draw only one conclusion with reference to the warning issued to Woodsmall by Cieslik. *Fangmeyer v. Reinwald,* 200 Neb. 120, 263 N.W.2d 428, (1978); *Krehnke v. Farmers Union Co-Op. Assn., supra; C.C. Natvig's Sons, Inc. v. Summers,* 198 Neb. 741, 255 N.W.2d 272 (1977). We believe that the jury should have had the opportunity to determine exactly what danger Cieslik warned Woodsmall about and whether that warning encompassed the ultimate cause of Woodsmall's injury. The trial court likewise committed error in this regard.

For the reasons stated above, we reverse the judgment of the trial court and remand this matter for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

CLINTON, J., not participating.

BOSLAUGH, J., dissenting.

In my opinion, the negligence of the plaintiff was more than slight as a matter of law.

# IN RE INTEREST OF GARY L. DURAND, A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. GARY L. DURAND, APPELLANT.

293 N. W. 2d 383

Filed June 10, 1980. No. 42796.

1. **Criminal Intent: Criminal Complaints and Informations.** The mere allegation of intent to commit one of the crimes enumerated in Neb. Rev. Stat. § 28-533 (Reissue 1975), unaccompanied by any allegations of overt acts toward its accomplishment, is defective.
2. **Criminal Complaints and Informations.** Defects or omissions in indictments or informations which are of such a fundamental character as to make the indictment wholly invalid are generally not subject to waiver by the accused.
3. **Miranda Rights: Constitutional Law: Right to Counsel.** Once *Miranda* warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.
4. _____: _____: _____. The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.
5. _____: _____: _____. The general rule applicable to custodial interrogations by the police is that if the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease.

Appeal from the Separate Juvenile Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and dismissed.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

Donald L. Knowles, Douglas County Attorney, and Marjorie A. Records, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an appeal from the Separate Juvenile Court of Douglas County, Nebraska, finding Gary L. Durand, Jr., a minor, to be a child within the meaning of Neb. Rev. Stat. § 43-202(3)(b) (Reissue 1978)

and placing defendant on probation for a term of 6 months. The minor appeals and assigns two errors: (1) That the Separate Juvenile Court committed reversible error in adjudicating Gary L. Durand pursuant to § 43-202(3)(b) to have violated a law of the State constituting a felony, to wit Neb. Rev. Stat. § 28-533 (Reissue 1975), when the petition fails to charge essential elements of the statutory offense; and (2) That the court erred in overruling defendant's motion to suppress certain statements to a police officer. We reverse.

Section 43-202(3)(b) gives to the juvenile courts "concurrent original jurisdiction with the district court as to any child under the age of eighteen years at the time he has violated any law of the state constituting a felony . . . ."

Section 28-533 (repealed in 1979) provided:

> Whoever willfully and maliciously, either in the daytime or night season, enters any dwelling house . . . and *attempts* to kill, disfigure or maim any person, or rob or steal, stab, [or] commit a rape . . ., shall, upon conviction thereof, be sentenced to the Nebraska Penal and Correctional Complex for any term not more than twenty years nor less than three years.

(Emphasis supplied.) The essential elements of the crime are: entry and an attempt to commit one of the enumerated acts. The entry is unlawful if proved to be with an intent to steal. *State v. Baker,* 183 Neb. 499, 161 N.W.2d 864 (1968), *cert. denied,* 394 U.S. 949 (1969). This statute embraces an unlawful entry of a building followed by commission or an attempt to commit one of the specific acts enumerated. *Fredericksen v. Dickson,* 148 Neb. 739, 29 N.W.2d 334 (1947); *McElhaney v. Fenton,* 115 Neb. 299, 212 N.W. 612 (1927). The mere allegation of intent to commit one of the enumerated crimes, unaccompanied by any allegations of overt acts towards its accomplish-

ment, is insufficient. *Smith v. State,* 68 Neb. 204, 94 N.W. 106 (1903).

The petition in the Separate Juvenile Court alleged that: "On or about November 30, 1978, said child did willfully and maliciously enter a dwelling, occupied by Marie Book, located at or near 3048 Redick Avenue, in the City of Omaha, Douglas County, Nebraska, with the intent to steal." It is obvious that the petition was defective insofar as it purported to accuse the minor of committing a crime. The mere entry of a building with the intent to steal, absent any attempt or the commission of a crime, is without the statute; it is not proscribed by the statute. Defects or omissions in indictments or informations which are of such a fundamental character as to make the indictment wholly invalid are generally not subject to waiver by the accused. *Gibbs v. Johns,* 183 Neb. 618, 163 N.W.2d 110 (1968).

The State cites a number of cases for the proposition that the accused waives all defects which may be excepted to if he enters a motion to quash, a plea in abatement, a demurrer to an information, a plea in bar, or a plea to the general issue. In *State v. Etchison,* 190 Neb. 629, 211 N.W.2d 405 (1973), the opinion recites that a motion to quash was denied after a plea of not guilty had been entered by the defendant. This court held that the motion to quash by reason of an alleged insufficiency of the information was properly denied. The opinion fails to disclose the alleged deficiency, specifically whether it was the omission, as here, of one of the essential elements of the crime charged or was a mere technical defect as in *State v. Gilman,* 181 Neb. 390, 148 N.W.2d 847 (1967). In that case, after a verdict, a motion to quash was properly overruled on the grounds that the complaint was unverified. In *State v. Fiegl,* 184 Neb. 704, 171 N.W.2d 643 (1969), the court again held that all defects that may be excepted to by a motion to quash an information are

taken to be waived if the defendant pleads the general issue. That opinion also fails to set forth whether the defect was merely a technical one or whether one of the essential elements of the crime was not charged. These cases cited by the State are not persuasive. The information or, as in this case, the petition is so defective that it omits one of the essential elements of the crime itself so as to charge no crime at all. The accused cannot be said to have waived any right to strike the information or to quash the information or petition on the rather tenuous pretext that he has pled to a noncrime. The defendant's first assignment of error is meritorious and requires reversal.

A discussion of the second assignment of error requires a recitation of the facts. The defendant was arrested and, at 1 p.m. on December 20, 1978, he was taken into the interrogation room of the Omaha police department for questioning by Raymond Swiercek, a detective with the burglary unit of the Omaha police department. After advising the defendant of his right to remain silent and his right to a lawyer, the officer asked the defendant, "Knowing your rights in this matter, are you willing to make a statement to me now?" The response was, "No." The officer did not cease conversation with the defendant. Instead, he showed him police reports of other crimes. He again advised him of his rights 23 minutes later. At that time, the defendant agreed to make a statement. The defendant's statement implicated him in a theft of money. A written statement was obtained at approximately 3:30 p.m. the same day.

At the defendant's suppression hearing, Officer Swiercek gave the following testimony:

> Q. Did he tell you why he was going to give this statement to you?
>
> A. He - yes, he did want some consideration and he asked for consideration.
>
> Q. Okay. Consideration - what did this con-

sideration pertain to as you -

A. Other burglaries that we knew him to be involved in.

The defendant was employed on occasion to do yard work and odd jobs at the home of Marie Book at 3048 Redick Avenue. On November 30, 1978, he had done yard work for her and she discovered him in her bedroom. After he left, she called police, who asked her to check her purse. When she did so, she discovered $10 in change missing. Gary's presence in the bedroom was without her consent.

The standards for the admissibility of incriminating statements were first definitively set out in *Miranda v. Arizona,* 384 U.S. 436 (1966). Concerning a suspect's assertion of his right to remain silent, *Miranda* stated:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

*Id.* at 473-74.

In the recent case of *Rhode Island v. Innis,* 100 S. Ct. 1682 (1980), the defendant made a self-incriminating response while he was under arrest in a police car. The defendant had been advised of his *Miranda* rights, and he stated that he understood his rights and wanted to speak with a lawyer. While enroute to the station, two officers engaged in a con-

versation concerning a missing shotgun, allegedly used in the commission of the crime. One of the officers stated that there were "a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves." *Id.* at 1686. Defendant stated he would show the officers where the gun was located. Upon returning to the scene of the arrest, the defendant was again informed of his rights. Determining that the defendant was not "interrogated" in violation of his right under *Miranda* to remain silent until he had consulted with a lawyer, the court said:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

*Id.* at 1689.

Turning to the facts of the present case, we conclude the defendant was subject to the functional equivalent of questioning after he requested an attorney and had an absolute right to have any interrogation cease until an attorney was present. The police officer should have known that showing the defendant the police reports was likely to elicit an incriminating response from the defendant. If a suspect is told he has a right to have an attorney present during interrogation and he chooses to cut off questioning until counsel can be obtained, his choice must be "scrupulously honored" by the police. *Michigan v. Mosley,* 423 U.S. 96 (1975).

In *Michigan v. Mosley,* the defendant was arrested by Detroit robbery bureau detectives, who advised him of his *Miranda* rights and were told by him that he did not want to respond to questions about the robberies for which he was arrested. The interrogation then ceased and the defendant was jailed. After an interval of more than 2 hours, the defendant was again given the *Miranda* warnings, interrogated by a homicide bureau detective about a homicide unrelated to the robberies, and confessed to the homicide. Determining that the confession was admissible, the court said:

> This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

*Id.* at 105-06. Elsewhere in *Michigan v. Mosley,* the court said that: "To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned." *Id.* at 102.

The State asserts that, since there was no real interrogation, simply a recitation of other crimes of which the defendant was accused, somehow this process did not violate the rule of *Miranda.* We disagree. Rather, the implication is that there arose the threat of other prosecutions for other crimes.

This was a direct and contributing factor to the statement and demonstrates its involuntariness. Indeed, that is confirmed by the fact that consideration "was given to the appellant" with reference to the other crimes, i.e., the detective agreed not to press charges on other suspected burglaries.

The general rule applicable to custodial interrogations by the police is that, if the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. *Miranda v. Arizona, supra; State v. Fuller,* 203 Neb. 233, 278 N.W.2d 756 (1979). An interrogation occurs when the subject is placed under a compulsion to speak. *State v. Weinacht,* 203 Neb. 124, 277 N.W. 2d 567 (1979). It is obvious that the defendant was placed under a compulsion to speak and that he was interrogated. A 23-minute interval between assertions of rights under *Miranda v. Arizona, supra,* violates the spirit of that decision and is in direct contravention of *Michigan v. Mosely, supra.* The assignment of error is meritorious. The confession should not have been admitted.

The order of the Separate Juvenile Court is reversed and dismissed.

REVERSED AND DISMISSED.

BOSLAUGH, J., concurring.

I concur in the judgment. The failure of the information to state a crime may be raised at any time. *Nelson v. State,* 167 Neb. 575, 94 N.W.2d 1 (1959). The "consideration" offered to the defendant was an inducement which prevented the statement from being voluntary. *State v. Smith,* 203 Neb. 64, 277 N.W.2d 441 (1979).

CLINTON, J., joins in this concurrence.

HELEN M. AHRENS AND ELDEN AHRENS, WIFE AND HUSBAND, APPELLEES, V. STEVEN K. DYE ET AL., APPELLANTS, IMPLEADED WITH KARL R. DYE ET AL., APPELLEES.

293 N. W. 2d 388

Filed June 10, 1980. No. 42798.

1. **Tenants in Common.** Tenants in common can deal with third parties just as fully as owners of property held individually.
2. **Tenants in Common: Contracts.** One tenant in common cannot ordinarily bind his cotenants by a contract with a third party unless he is duly authorized or unless his act is thereafter ratified.
3. **Contracts: Ratification.** Ratification is the acceptance by remaining cotenants of benefits or rents under a lease executed by one cotenant.
4. **Tenants in Common.** If a tenant in common does nothing to mislead a third person, or the conduct of the tenant is not such as to warrant a third person's reliance, the tenant is not estopped to assert that he is not bound by unauthorized acts of his cotenants.
5. **Landlords and Tenants: Growing Crops.** A tenant who plants crops knowing the terms of the lease will expire before they can be harvested loses all his interest in the crop upon termination of the lease.

Appeal from the District Court for Burt County: WALTER G. HUBER, Judge. Reversed and remanded with directions.

Roy I. Anderson and Gregory P. Drew, for appellants.

David B. Latenser, for appellees Ahrens and Karl R. Dye.

Heard before MCCOWN and WHITE, JJ., and COLWELL, STANLEY, and SPRAGUE, District Judges.

WHITE, J.

This is an appeal from an order of the District Court overruling a motion for a second new trial. We reverse and reinstate the original judgment.

This appeal arises from an action in partition filed in the District Court for Burt County, Nebraska. By decree dated June 6, 1978, the court confirmed the ownership interests of the real property. The prop-

erty was owned by John A. Dye, who died testate on June 9, 1974. By the terms of his will, the property descended as follows: a one-third interest to Helen M. Ahrens; a one-third interest to Karl R. Dye; a one-sixth interest to Steven K. Dye, and a one-sixth interest to David A. Dye. Following the death of John A. Dye, David A. Dye and Steven K. Dye and Steven's spouse, Deborah Dye, conveyed their interest in said real estate to Joan E. Siemonsma and Steven K. Dye, mother and son, as joint tenants.

The land was leased to a tenant November 25, 1974. The agreement named Karl R. Dye, Helen M. Ahrens, David A. Dye, and Steven K. Dye as landlords and Elden Ahrens (hereafter Elden) as tenant. A notice to quit was served on Elden and Helen M. Ahrens, appellees, on August 29, 1977, by the appellants. The June 6, 1978, decree determined that this notice served to terminate Elden's tenancy as to appellants' share of the land on March 1, 1978, but did not terminate the interest of landlord and tenant between Helen M. Ahrens and Karl R. Dye and Elden. This land was sold by the referee at a partition sale to Elden and Helen M. Ahrens and Karl R. Dye. The sale included all rights to the growing crops on the land. In November 1978, the appellees filed their application for the payment by the referee to Elden, as tenant, for the reasonable value of his services rendered as tenant in the production of crops which had been sold. The appellants objected to the application and urged that their distributive share of the proceeds be taken free and clear of any claim for compensation by the tenant for services or expenditures. On November 13, 1978, the court entered an order finding the value of the growing crops on the premises and that appellants' objection should be sustained. The referee was ordered to pay Elden, as tenant, the sum of $13,775 to be deducted from the distributive shares of Helen M. Ahrens and Karl R. Dye. Subsequently, appellees

filed a motion for new trial. On January 2, 1979, the District Court sustained the motion for new trial and entered an amended judgment ordering the referee to pay to Elden for his services as tenant $20,662.50, to be deducted from the distributive shares of all the owners, including the appellants. Appellants requested a new trial; the court overruled their motion. From this order, appellants appeal.

In their brief on appeal, appellants raise several assignments of error, but the principal contention of error is the court's finding that Elden was a tenant of the appellants and thus entitled to reimbursement for his services and expenses from their distributive shares. For the reasons stated herein, we reverse.

Generally speaking, tenants in common can deal with third parties just as fully as owners of property held individually. Annot., 51 A.L.R.2d 388 (1957); *Swint v. Oil Co.,* 184 Pa. 202, 38 A. 1021 (1897). After the notice to quit was served on Elden, the court correctly concluded that Elden's tenancy as to appellants share of the land was terminated. The notice to quit did not operate to terminate the interest of landlord and tenant between Helen M. Ahrens and Karl R. Dye and Elden. Elden testified he did not consider the appellants bound by the 1978 lease nor was there any agreement between Elden and the Appellants concerning the costs of fertilizer or chemicals subsequent to the notice to quit.

Since there is no agency relationship between cotenants, it is clear that one of them cannot ordinarily bind his cotenants by contracts with a third person unless he is duly authorized or unless his act is thereafter ratified. *Jewel Tea Co. v. Eagle Realty Co.,* 70 F. Supp. 918 (D. Neb. 1947). See Volkmer, *Nebraska Law of Concurrent Ownership,* 13 Creighton L. Rev. 513 (1979). Appellees contend that the acceptance by Steven K. Dye and Joan E. Siemonsma of the proceeds of the sale of the crops and the benefits of Elden's services operated to ratify the lease

agreement and to subject the distributive shares of Steven K. Dye and Joan E. Siemonsma to the reasonable value of services rendered by Elden. "Ratification" has been defined as the acceptance by remaining cotenants of benefits or rents under a lease executed by one cotenant. *Jewel Tea Co. v. Eagle Realty Co., supra.* The record contains no affirmative evidence of ratification subsequent to the court's determination of interests on June 6, 1978. If a tenant in common does nothing to mislead a third person or conduct of the tenant is not such as to warrant a third person's reliance, the tenant is not estopped to assert that he is not bound by unauthorized acts of his cotenant. *First Nat. Bank v. Morgan,* 172 Neb. 849, 112 N.W.2d 26 (1961); Annot., 93 A.L.R.2d 352 (1964); 86 C.J.S. *Tenancy in Common* § 129 (1954). Absent some affirmative evidence, we cannot assume ratification. The acceptance by the appellants of their distributive share, which included the proceeds of the sale of crops, is not sufficient to constitute ratification. It is well established that a tenant who plants crops knowing the terms of his lease will expire before they can be harvested loses all his interest in the crop upon termination of the lease. *Goings v. Gerken,* 200 Neb. 247, 263 N.W.2d 655 (1978); *Peterson v. Vak,* 160 Neb. 450, 70 N.W.2d 436 (1955). Elden did receive $13,775 for his services and costs from the distributive shares of Helen M. Ahrens and Karl R. Dye, pursuant to their lease agreement. The pertinent rule is stated in *Trowbridge v. Donner,* 152 Neb. 206, 212, 40 N.W.2d 655, 659 (1950):

> While such a lease as this [a lease of realty by one tenant-in-common without ratification of the cotenants] may be upheld under certain conditions in a contest between the lessor and the lessee, yet it is universally held that such a lease may be avoided by any of the tenants in common who did not

execute it or subsequently ratify its execution.

Therefore, the judgment is reversed and the cause remanded with directions that the trial court reinstate the order of November 13, 1978.

REVERSED AND REMANDED WITH DIRECTIONS.

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STATE SECURITIES COMPANY, A CORPORATION, APPELLANT, V. ARTHUR A. DARINGER ET AL., APPELLEES, AND CHARLES AND LORENE HINDMAN, HUSBAND AND WIFE, APPELLANTS.

293 N. W. 2d 102

Filed June 10, 1980. No. 42803.

1. **Foreclosure: Real Estate Sales Contracts.** A contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered and such procedure would not offend against justice and equity.
2. _____: _____. A plea for strict foreclosure is addressed to the sound legal discretion of the court and will be granted only where it would be inequitable and unjust to refuse it.
3. **Assignments.** An assignee acquires only the rights of the assignor.
4. **Options to Buy or Sell.** Options to buy or sell real estate should be strictly construed and not extended beyond the express provisions thereof.
5. _____. The exercise of an option to buy or sell real estate must be absolute, unambiguous, without condition or reservation, and in accordance with the offer made.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

R. P. Cathcart of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellant State Securities.

Leonard J. Germer and Lance J. Johnson, for appellants Hindman.

Richard D. Sievers of Marti, Dalton, Bruckner,

O'Gara & Keating, P.C., for appellees Twentieth Century and Brzon.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This was an action for specific performance of an option to purchase real estate in Jefferson County, Nebraska. The parties actively involved in this appeal are Charles and Lorene Hindman, contract sellers of the land; George Brzon and Twentieth Century, Inc., contract purchasers of the land; and the plaintiff, State Securities Company, a remote assignee of a lease containing an option to purchase.

The evidence shows that, in 1965, the Hindmans entered into a written contract for the sale of a part of the property to George Brzon. Mrs. Hindman's parents, Joe and Emma Tuma, entered into a similar agreement with Brzon, for the sale of the balance of the property. Mrs. Hindman succeeded to all rights in the Tuma real estate and the Tuma contracts on the death of her parents.

Brzon conveyed his interest in the disputed property to Twentieth Century, Inc., which in turn entered into a written contract for the sale of the real estate to Christian D. and Patricia A. Ulrich. On January 27, 1971, the Ulrichs leased the property for 3 years to Kenneth C. and Janice M. Burwell and Lyle E. and Linda J. Burwell. The lease granted the Burwells an option to purchase the real estate and the right to renew the lease and purchase option at the end of the 3-year period.

Subsequent to the Ulrich-Burwell lease, the Ulrichs entered into an agreement with the Haddam Elevator Company, Inc., assigning Haddam $4,762.87, plus interest, out of the sale proceeds of the land in the event that the Burwells exercised their option to purchase. In the event the option was not exercised, Haddam's assignment was to be a lien against the land.

In April 1972, the Burwells assigned their lease to Arthur A. and Judith L. Daringer. Under this assignment, the Daringers acquired the balance of the term of lease, including the option to purchase and the right of renewal. On May 8, 1972, the Daringers assigned the lease to the plaintiff, State Securities Company. The evidence indicates the assignment by the Daringers was made to secure an extension of credit from State Securities to the Daringers. Although the Daringers executed two later assignments, they both conformed to the May 8, 1972, assignment and assigned only the Daringers' interest in the Ulrich-Burwell lease.

On August 16, 1972, the Ulrichs conveyed their interest in the land to Duane J. Bliss. On March 6, 1974, after the expiration of the Ulrich-Burwell lease, Bliss entered into a new lease with the Daringers for another 3-year term which again included an option to purchase the property. In 1977, Bliss conveyed his interest in the property back to Twentieth Century.

In 1975, the plaintiff decided to exercise the option to purchase the property and obtained the abstracts of title to the property. It attempted to obtain a payoff figure on the real estate from the escrow agent. The plaintiff commenced this action on July 22, 1977, to compel specific performance of the purchase option.

The amended petition alleged the assignment by the Daringers to the plaintiff on May 8, 1972, of the Ulrich-Burwell lease, dated January 27, 1971, which had been assigned to the Daringers on April 21, 1972. A copy of the Bliss-Daringer lease, dated March 6, 1974, was attached to the amended petition *but the plaintiff alleged its rights were derived through the assignment on April 21, 1972, of the Ulrich-Burwell lease, dated January 27, 1971.*

The answer of the Hindmans alleged a breach of the contracts for the sale of the property and

prayed for strict foreclosure.

The answer of Brzon and Twentieth Century, Inc., alleged that neither the option to purchase contained in the Ulrich-Burwell lease, nor the option under the Bliss-Daringer lease had been exercised. It prayed that Twentieth Century, Inc., be adjudged to be the owner of the property.

The District Court found that the Hindmans had the legal title to the property and that equitable title was vested in Twentieth Century subject to the lien of the Haddam Elevator Company. Twentieth Century was given 90 days to pay the balance due under the Hindman and Tuma contracts of sale and discharge the lien of the Haddam Elevator Company. Upon payment of the proper amounts into court, title to the property was to be quieted in Twentieth Century. If the sums were not paid within the time specified, the property was to be sold to satisfy the amounts due the Hindmans and the elevator company. The Hindmans' plea for strict foreclosure was denied. The plaintiff and the Hindmans have appealed.

In denying the Hindmans' plea for strict foreclosure, the District Court found, and the evidence shows, that the property had a value of approximately $250,000, an amount far in excess of the amount due the Hindmans, which was approximately $50,000.

Strict foreclosure was not an appropriate remedy under the circumstances in this case. A contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered and such procedure would not offend against justice and equity. *Riffey v. Schulke,* 193 Neb. 317, 227 N.W.2d 4 (1975). A plea for strict foreclosure is addressed to the sound legal discretion of the court and will be granted only where it

would be inequitable and unjust to refuse it. *Ruhl v. Johnson,* 154 Neb. 810, 49 N.W.2d 687 (1951).

The remaining issues are whether the plaintiff had an option to purchase the property and, if it did, whether it exercised the option. Central to the question of whether the plaintiffs had a valid option to purchase the property in 1975 is whether the Bliss-Daringer lease executed in 1974 was a renewal of the 1971 Ulrich-Burwell lease or an entirely new lease.

The District Court found that the option to purchase under the Ulrich-Burwell lease was never exercised and expired when the lease terminated without renewal. The lease which Daringer obtained from Bliss in 1974 was a new agreement and not subject to the plaintiff's assignment from Daringer. The District Court found that the plaintiff had no option to purchase the real estate in 1975, the time it attempted to exercise the option.

The court further found that, even if it were assumed the plaintiff had owned an option to purchase the property, it failed to exercise it. Neither its actions nor the actions of anyone on its behalf amounted to an exercise of the option. At most, the evidence revealed only preliminary discussion with respect to a proposed exercise of the option.

The Ulrich-Burwell lease provided for renewal in writing on or before the November 1 preceding the termination date of the lease, February 26, 1974. The Daringers gave no notice to anyone of their intention to renew the Ulrich-Burwell lease before it expired, so that lease expired by its own terms. On March 6, 1974, a new lease between the Daringers and Bliss was executed. This lease provided the date of possession was the date of execution by the lessor and clearly was not a renewal of the Ulrich-Burwell lease. The assignment, through which the plaintiff claimed its option to purchase, assigned all of the Daringers' rights, title, and interest in the contract dated April 21, 1972, between the Daringers

and the Burwells. When the Ulrich-Burwell lease expired, the option contained in it was extinguished. The Daringers could not have exercised in 1975 the option to purchase contained in the 1971 lease and the plaintiff, as their assignee, could not do so either. An assignee acquires only the rights of the assignor. *Hansen v. E. L. Bruce Co.*, 162 Neb. 759, 77 N.W.2d 458 (1956); *Babson v. Village of Ulysses*, 155 Neb. 492, 52 N.W.2d 320 (1952).

The record further shows that the plaintiff never exercised any option. Even if the plaintiff had held a valid option, it failed to exercise it. In order to exercise the option to purchase under the Bliss-Daringer lease, the lessee was required to give written notification of its intention to exercise the option and immediately enter into a written agreement for purchase. The plaintiff did nothing more than obtain the abstracts of title and attempt to obtain a payoff figure. Options should be strictly construed and not extended beyond the express provisions thereof. *Wright v. Barclay*, 151 Neb. 94, 36 N.W.2d 645 (1949). The exercise of an option to buy or sell real estate must be absolute, unambiguous, without condition or reservation, and in accordance with the offer made. *Master Laboratories, Inc. v. Chesnut*, 154 Neb. 749, 49 N.W.2d 693 (1951). The plaintiff's actions were clearly insufficient to constitute an exercise of the option.

In view of the conclusions which we have reached on issues considered by the District Court, it is unnecessary to consider the effect of the fact that the assignments from the Daringers to the plaintiff were made for the purpose of securing advances to the Daringers by the plaintiff.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C. J., not participating.

KENNETH SHREVES, AS TRUSTEE IN BANKRUPTCY FOR JOHN J. SALONIS MASONRY, INC., BANKRUPT, APPELLANT, V. D. R. ANDERSON CONSTRUCTORS, INC., APPELLEE.

293 N. W. 2d 106

Filed June 10, 1980. No. 42842.

1. **Appeal and Error: Jury Verdicts.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceeding in which it was secured.
2. **Appeal and Error: Motions for New Trial.** The standard of judicial review of a trial court's order granting a new trial is whether or not the trial court abused its discretion. By its terms, this discretion is necessarily broader than a narrowly isolated and rigid examination of the merits of each alleged error in the record. A combination of errors, each of which, in itself, might not be grounds for granting a new trial, may result in a finding by the trial judge that justice will be served by retrying the issues in the case.
3. _____: _____. This court will not ordinarily disturb a trial court's order granting a new trial, and will not disturb it at all unless it clearly appears that no tenable grounds existed therefor.
4. **Contracts: Change Orders: Waiver.** The parties to a construction contract which requires written change orders may avoid such provisions where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of the provisions, or the party claiming the benefit of the provisions is estopped to rely upon them.
5. _____: _____: _____. Where the parties ignore provisions in a written construction contract requiring change orders to be in writing, it will not furnish a defense to a claim for compensation for the additional work performed.
6. **Pleadings: Burden of Proof.** A party will not be permitted to plead one cause of action and, upon trial, rely upon proof establishing another. In order that a recovery may be had in an action, the pleadings and the proof must agree.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

James E. Lang of Marer, Venteicher, Strasheim, Laughlin, & Murray, P.C., for appellant.

Malcolm D. Young of Young & White, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN,

CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

McCOWN, J.

This is an action by the bankruptcy representative of a subcontractor against a contractor to recover money allegedly due under a written subcontract. The jury returned a verdict for the plaintiff in the sum of $15,079.11. The District Court sustained defendant's motion for a new trial and vacated the jury verdict. The plaintiff has appealed.

The plaintiff is the trustee in bankruptcy of John J. Salonis Masonry, Inc., a Nebraska corporation. On July 24, 1974, Salonis entered into a written subcontract with the defendant, D. R. Anderson Constructors, Inc., the general contractor, to perform the work specified in the contract in accordance with the plans and specifications for the construction of a school building in Omaha, Nebraska. The subcontract price was $183,900. Two subsequent deletions were made from the subcontract requirements by written change orders which reduced the total contract amount to $182,357.

Section 4 of the written contract provides:

> Changes. The contractor may at any time by written order of Contractor's authorized representative, and without notice to the Subcontractor's sureties, make changes in, additions to and omissions from the work to be performed and materials to be furnished under this Subcontract, and the Subcontractor shall promptly proceed with the performance of this Subcontract as so changed. Any increase or decrease in the Subcontract price resulting from such changes shall be agreed upon in writing by the parties hereto. Any claim for adjustment of the subcontract price under this Section must be made in writing within ten days from the date such changes are ordered. The Subcontract

price shall be equitably adjusted on account of any such changes, subject to any applicable provisions of the contract between the Contractor and the Owner.

Plaintiff's petition alleged that Salonis fully performed all the work specified in the subcontract. The petition also alleged that Salonis had performed additional masonry work for the defendant.

Plaintiff alleged that the defendant orally requested Salonis to do certain additional work because of defective work of the Ray Martin Company, another subcontractor, and promised that Salonis would be paid for the additional work requested. It was alleged that the fair value of the additional Martin work was $8,356.

The petition also alleged that the defendant requested that Salonis performed additional work of cutting approximately 1,500 blocks and promised to compensate Salonis for its labor. The fair value of the labor was alleged to be $1,500.

The petition also alleged that the defendant requested that Salonis perform additional work of in replacing and patching in connection with electrical and other masonry contract work and promised that Salonis would be compensated for the labor and materials furnished, and the fair value of that work was $2,875.

The petition alleged that defendant had paid Salonis the total sum of $179,489.89 for the work under the contract and prayed judgment against the defendant for the sum of $4,410.11 due for the work specified in the subcontract, and for the sum of $12,731 due for the additional labor and material furnished in connection with the additional work referred to in the petition.

The defendant's answer denied that Salonis had properly completed the specified work under the contract. The answer also generally denied all the allegations of additional work except for the Martin

work. The defendant admitted that it had requested Salonis to perform additional masonry work resulting from the defective work of the Ray Martin Company and had promised that Salonis would be paid for the proper labor and material expended on the Martin work. The defendant affirmatively alleged that Salonis performed certain work upon the Martin project but that, in spite of numerous requests by the defendant to Salonis to furnish an itemized list of material and labor expended in the performance of the additional Martin work, Salonis had failed to provide the defendant with any data upon which the reasonable value of said work and materials could be ascertained.

The evidence of Salonis at trial was that the defendant's representatives verbally requested him to perform the three items of additional masonry work, told him to keep track of his time and materials, and promised that he would be paid for the work. Salonis testified that he computed the cost for the Martin portion of the work which, including overhead and a 10-percent profit, totaled $8,356, and that he orally reported that amount to the defendant's project supervisor. Salonis admitted that he had never submitted written claims for any part of the extra work and materials and conceded that he had not submitted time cards nor material invoices for the Martin work, nor responded to the requests for that information, except to tell the defendant that he had already given him all the information he had as he did not keep explicit records of equipment and materials used.

The defendant's evidence supported the allegations of its answer and indicated that the defendant had not requested the additional work except for the Martin portion of it, and that the other additional work was in connection with the principal contract.

The case was pleaded and tried by both parties as a single cause of action on the basic written sub-

contract. Although the facts were pleaded and the evidence tended to establish that some oral modifications of the written contract might have been made, neither party specifically pleaded modification of the written contract nor waiver of any of its provisions, nor did the plaintiff plead or set out any separate cause of action for quantum meruit.

At the conclusion of the plaintiff's evidence, the plaintiff moved to amend its petition to allege that the defendant's conduct in requesting additional work and agreeing to pay for it waived the requirement of written change orders and the requirement that claims for adjustment of the subcontract price must be made in writing within 10 days from the date such changes were ordered. The plaintiff's motion to amend also included a request to amend the petition by setting out a separate alternative count on the basis of quantum meruit for the additional work. The defendant objected on the ground that there was no evidence to support a modification or waiver of the written contract and that it was too late. The court concluded that the proposed amendments injected additional issues into the case and denied the motion.

The defendant proceeded with the introduction of its evidence and, at the close of all the evidence, the proposed jury instructions were presented to counsel for both parties before submission of the cause. Instruction No. 6 instructed the jury that the plaintiff could satisfy its burden of proof by proving performance and compliance with the terms and conditions of the written subcontract or, in the alternative, that the parties to the contract could avoid the provisions of the written contract by such words, acts, or conduct from which the jury might find that the parties waived, modified, rescinded, abrogated, or abandoned the provisions of the contract. The instruction also authorized the jury to return a verdict for the plaintiff if the jury found that plaintiff had proven

either of the alternatives by a preponderance of the evidence. The defendant objected to the instruction.

Thereafter counsel proceeded to argue the case to the jury and plaintiff's counsel strenuously argued that the amounts claimed for the additional work performed constituted a fair and reasonable price for the work done. As a result of the argument, the court determined it necessary to add to the proposed instructions instruction No. 7A which instructed the jury that the question of whether Salonis did or did not perform certain additional labor and furnish additional materials and whether or not any claim or request for payment was for a price that was fair and reasonable was not pertinent and should not be considered. Neither counsel objected to instruction No. 7A. Instruction No. 6 and instruction No. 7A were both given to the jury. The jury returned a verdict for the plaintiff in the amount of $15,079.11.

The defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The District Court sustained the motion for a new trial and the plaintiff has appealed.

Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceeding in which it was secured. *Fellows v. Buffalo County,* 181 Neb. 269, 147 N.W.2d 801 (1967).

The standard of judicial review of a trial court's order granting a new trial is whether or not the trial court abused its discretion. By its terms, this discretion is necessarily broader than a narrowly isolated and rigid examination of the merits of each alleged error in the record. A combination of errors, for example, each of which, in itself, might not be grounds for granting a new trial, may result in a finding by the trial judge that justice will be served by retrying the issues in the case. This court will

not ordinarily disturb a trial court's order granting a new trial, and will not disturb it at all unless it clearly appears that no tenable grounds existed therefor. *County of Hall ex rel. Wisely v. McDermott,* 204 Neb. 589, 284 N.W.2d 287 (1979).

In the present case, the confusion in the pleading and trial of the issues is apparent. Plaintiff did not plead that any specific provision of the written contract had been modified or waived, nor did he plead quantum meruit as an alternative cause of action, but rested his claim on the written contract. Defendant also failed to plead what specific portions of the written agreement were modified or waived as to the Martin work, or whether that work was under a separate and distinct contract.

Plaintiff relies upon the established rule in this state that the parties to a construction contract which requires written change orders may avoid such provisions where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of the provisions, or the party claiming the benefit of the provisions is estopped to rely upon them. *Griffin v. Geneva Industries, Inc.,* 193 Neb. 694, 228 N.W.2d 880 (1975).

We have very recently held that, where the parties ignore provisions in a written contract requiring change orders to be in writing, it will not furnish a defense to a claim for compensation for the additional work performed. *D. K. Meyer Corp. v. Bevco, Inc., ante* p. 318, 292 N.W.2d 773 (1980).

An extensive annotation in 2 A.L.R.3d 620 (1965), covers a great many cases dealing with the effect of stipulations in a construction contract that alterations or extras must be ordered in writing. The many factual variations which may constitute modifications or waivers of provisions of the written contract or instead constitute a new and valid contract independent from the original contract serve to emphasize the importance of pleading and proof of a

specific cause of action, or of separate and distinct causes of action.

We have consistently held that a party will not be permitted to plead one cause of action and upon trial rely on proof establishing another. In order that a recovery may be had in an action, the pleadings and the proof must agree. Consequently, a plaintiff may not plead a cause of action on an express agreement and then, over objection, prove and recover on a cause of quantum meruit. *Lincoln Service & Supply, Inc. v. Lorenzen,* 171 Neb. 671, 107 N.W.2d 333 (1961).

Ample tenable grounds existed for the trial court's order granting a new trial and the court did not abuse its discretion.

AFFIRMED.

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ROBERT K. LAMBERTUS, APPELLANT, V. MELVIN BUCKLEY, APPELLEE.

293 N. W. 2d 110

Filed June 10, 1980. No. 42891.

1. **Jury Verdicts.** A jury's understanding of the instructions of the court is a matter that inheres in the verdict and cannot be classified as extraneous, prejudicial information improperly brought to the jury's attention.
2. _____. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. Such matters are commonly held to inhere in the verdict.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Affirmed.

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

David A. Bush of Kay & Satterfield, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

In this appeal, a trial was had to a jury on the plaintiff's petition praying for judgment against the defendant for the value of certain corn which the plaintiff alleged was delivered to the defendant and not paid for. The jury deliberated for 6 hours and returned a 10-2 verdict in favor of the defendant. The plaintiff appeals and assigns one error: That the trial court erred in refusing to receive in evidence affidavits of five jurors reciting that they misunderstood and misapplied the court's instruction No. 10. The court's instruction No. 10 is as follows:

> You are instructed that you may not arrive at a quotient verdict, because such verdicts are invalid. A "quotient verdict" is one where you, the jurors, for the purpose of arriving at a verdict agree that each should write on his or her ballot a sum representing his or her judgment; and that you, the jurors, will be bound by the result; and that the average of such sum shall be the verdict. As I have previously charged you, you may not arrive at such a verdict.

The plaintiff conceded that the instruction was proper. We affirm.

Neb. Rev. Stat. § 27-606(2) (Reissue 1975), Rule 606 (2) of the Nebraska Rules of Evidence, provides that:

> 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.

The jury's understanding of the instructions of the court is a matter that inheres in the verdict and cannot be classified as extraneous, prejudicial information improperly brought to the jury's attention. The statute codified a rule adopted by this court in *Palmer v. Parmele,* 104 Neb. 30, 175 N.W. 649 (1919). This court said: "An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. Such matters are commonly held to inhere in the verdict." *Id.* at 34, 175 N.W. at 650. See, also, *Selders v. Armentrout,* 192 Neb. 291, 220 N.W.2d 222 (1974); *Carpenter v. Sun Indemnity Co.,* 138 Neb. 552, 293 N.W. 400 (1940); *Kohrt v. Hammond,* 160 Neb. 347, 70 N.W.2d 102 (1955).

In *Farmers Co-op. El. Ass'n Non-Stock, Big Springs, Neb. v. Strand,* 382 F.2d 224, 230, (8th Cir. 1967), it was stated:

> Defendant moved for a new trial upon the basis of facts asserted in an affidavit of one of the jurors to the effect that the jurors discussed the likelihood of insurance coverage and its effect and that *they gave inadequate consideration to and misinterpreted the court's instructions.* Defendant also asked that the members of the jury be summoned for examination. The court properly denied such a request and the motion for new trial.
>
> The items set out in the juror's affidavit

> all related to matters which took place in the jury room and which inhere in the verdict. It is a well-established rule in the federal courts and the Nebraska court that a jury verdict may not be impeached as to occurrences in the jury room which inhere in the verdict by an affidavit of a juror.

(Emphasis supplied.)

The plaintiff's assignment of error is without merit. The trial court was correct in refusing to admit the affidavits of the jurors in evidence and the matter is affirmed.

AFFIRMED.

KRIVOSHA, C. J., participating on briefs.

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MORRIS MILLS, DOING BUSINESS AS GREAT PLAINS FENCE COMPANY, APPELLEE, V. DENNY WIEKHORST EXCAVATING, INC., A NEBRASKA CORPORATION; CITY OF YORK, NEBRASKA; AND NATIONAL SURETY COMPANY, APPELLANTS.

293 N. W. 2d 112

Filed June 10, 1980. No. 42893.

1. **Contracts: Actions on Contracts: Substantial Performance.** As a general rule, a party cannot maintain an action on a contract without prior substantial compliance on his part. If there has been substantial performance, an action may be maintained without prejudice to any showing of damages by the other party for less than full and complete performance.
2. **Contracts: Partial Performance: Quantum Meruit.** Where there has been part performance and the adverse party appropriated and retained the work performed, the value of the labor or property received and accepted, less the damages for the failure to fully perform, may be recovered.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

Frost & Myers, for appellants.

Ben L. Anderson of Anderson, Ferneau & Anderson, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This was a suit on a contract by a subcontractor, Morris Mills, against the general contractor, Denny Wiekhorst Excavating, Inc.; the owner, City of York, Nebraska; and the surety on the general contractor's performance bond, National Surety Company.

The contract between the plaintiff and Wiekhorst required the plaintiff to furnish all labor and materials required to erect and install the perimeter fence for a park project at York, Nebraska, for the sum of $6,200. The amended petition alleged the plaintiff had completed the contract and had furnished additional work and materials in the amount of $4,151. The plaintiff admitted partial payment of $2,635 and claimed a balance due of $7,716, plus $49.50 for recording a mechanic's lien.

The answer of Wiekhorst alleged that the plaintiff had stopped work on the project because of an injury and had requested Wiekhorst to complete the work; that Wiekhorst furnished labor and materials in the amount of $3,471.39; and that the balance due the plaintiff on the contract was $93.61. Wiekhorst denied that the plaintiff had performed any extra work at the request of Wiekhorst.

A jury was waived and the matter was tried to the court.

The evidence was in conflict on nearly all material questions of fact. The plaintiff testified that he was called to the job site by the defendant a number of times when there was little or no work that could be performed because of the status of the other work on the project. Parts of the fence that he completed had to be replaced because of damage occurring af-

ter it had been installed. The plaintiff denied that Wiekhorst had completed the work, or that Wiekhorst had been requested to complete the work, and testified that he, the plaintiff, had completed the job.

Dennis Wiekhorst testified generally in accordance with the allegations of the answer and contradicted the testimony of the plaintiff.

Since this was an action at law, the findings of the trial court must be sustained if there was sufficient evidence to support them.

The trial court found the plaintiff was not entitled to a mechanic's lien as against the city and dismissed the petition as to that defendant. The trial court further found that the plaintiff had failed to prove that he had fully performed the contract or that his failure to perform was due to the acts and omissions of Wiekhorst; that the plaintiff was entitled to recover the reasonable value of his partial performance which was $4,650; and that the balance due the plaintiff was $2,015. Wiekhorst and the surety company have appealed.

The defendant contends the award of damages made by the trial court was not supported by the record and that the trial court erred in failing to allow a setoff to the defendant for the cost of completing the work.

As a general rule, a party cannot maintain an action on a contract without prior substantial compliance on his part. If there has been substantial performance, an action may be maintained without prejudice to any showing of damages by the other party for less than full and complete performance. *Schweitz v. Robatham,* 194 Neb. 668, 234 N.W.2d 834 (1975); *Rickertsen v. Carskadon,* 172 Neb. 46, 108 N.W.2d 392 (1961). Where there has been part performance and the adverse party appropriated and retained the work performed, the value of the labor or property received and accepted, less the damages for the failure to perform, may be recovered. *West*

*v. Van Pelt,* 34 Neb. 63, 51 N.W. 313 (1892).

Although the trial court did not make a specific finding that there had been substantial performance by the plaintiff, the evidence would sustain a finding to that effect and the damages awarded amount to 75 percent of the contract price. Wiekhorst testified the plaintiff's work was 30 percent complete with 70 percent of the posts installed at the time the plaintiff was injured. The plaintiff testified that the job had been substantially completed at that time; that the defendant did very little work on the fence; and that the plaintiff returned to the job and completed it.

The trial court may have concluded that the damages claimed by the defendant for completion of the work were excessive. The damages claimed included charges for subsistence, overhead, outside labor, and materials and supplies which were questionable or supported by vouchers not produced at the trial.

As we view the record, it sustains the judgment of the trial court and the judgment must be affirmed.

AFFIRMED.

KRIVOSHA, C. J., participating on briefs.

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STATE OF NEBRASKA, APPELLEE, V. JOHN LONG, APPELLANT.

293 N. W. 2d 391

Filed June 10, 1980. No. 42900.

1. **Judicial Notice: Municipal Ordinances.** This court will not take judicial notice of a municipal ordinance which does not appear in the record.
2. **Presumptions: Municipal Ordinances.** The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record.
3. **Pretrial Motions: Speedy Trials.** The time from filing to final disposition of pretrial motions is excluded in computing the time for trial.

4. **Equal Protection: Constitutional Law: Discrimination.** To establish arbitrary discrimination inimical to constitutional equality, there must be more than an intentional and repeated failure to enforce legislation against others as it is sought to be enforced against the person claiming discrimination.
5. _____: _____: _____. There must be more than a showing that a law or ordinance has not been enforced against others or that it is sought to be enforced against the person claiming discrimination. A finding of unlawful selective enforcement must be based upon an unjustifiable standard such as race, religion, or other arbitrary classification.
6. **Double Jeopardy.** Where it has been determined in a previous prosecution that an essential element of a crime did not exist, any subsequent prosecution for a different offense involving the same element is barred.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

Hal W. Anderson of Berry, Anderson & Creager, for appellant.

Norman Langemach, Jr., City Prosecutor, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

The defendant was convicted in municipal court on four separate complaints of violating sections of the municipal code of Lincoln, Nebraska, which prohibit the display of a mechanical amusement device for public use without a permit or allowing the use of such a device without the name and address of the owner affixed to the machine. The complaints were consolidated for trial and, upon appeal to the District Court for Lancaster County, Nebraska, the judgment on each complaint was affirmed.

The defendant has appealed to this court and contends that the ordinances in question were invalid;

the evidence was not sufficient to support the judgments; he was denied his statutory right to a speedy trial; he was denied equal protection of the law because of selective prosecution; and the prosecutions were barred because of a finding of not guilty in a prior prosecution involving a similar element of the offenses.

The charges filed against the defendant are a part of the record, but the ordinances involved in the prosecution are not contained in the record. This court will not take judicial notice of a municipal ordinance which does not appear in the record. *State v. Korf,* 201 Neb. 64, 266 N.W.2d 86 (1978). The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. *State v. Sator,* 194 Neb. 120, 230 N.W.2d 224 (1975). Upon the record before us, there is no basis upon which it could be said the ordinances were unconstitutional, vague, or overbroad.

The evidence shows that the defendant and his wife own 80 percent of the capital stock of Indoor Recreation Enterprises, Inc., a corporation which operates the Golden Cue Recreation Center, Four Star Billiard Supply, and Checkmate Stereo Discount Club, all at 1907 O Street in Lincoln. On October 20 and 21 and November 4, 1976, police officers entered the premises at 1907 O Street and operated pinball machines and other mechanical amusement devices which did not have the owner's name and address or a permit affixed. The officers were admitted to the premises where the machines were located after signing a "membership list." Except for an age requirement excluding persons under 18 years of age, there was no other requirement for admission to the premises.

On November 5, 1976, police officers entered the premises with a search warrant issued in connection with alleged illegal consumption of alcohol on the

premises. At that time the officers seized four mechanical amusement devices which were on the premises.

The defendant argues that the prosecution should have been against the corporation which operated the premises where the machines were located. Although the corporation may have been subject to prosecution, that would not be a defense in this case. Apparently, the ordinances apply to any person who permits the machines to be displayed for public use. The evidence shows the defendant was involved in the active operation of the premises and was subject to prosecution under the ordinances.

With respect to the defendant's claim that he was denied his statutory right to a speedy trial, the record shows no violation of Neb. Rev. Stat. § 29-1207 (Reissue 1975). The time from filing to final disposition of pretrial motions is excluded in computing the time for trial. *State v. Stewart*, 195 Neb. 90, 236 N.W.2d 834 (1975). After excluding the periods of time not chargeable to the State, including time for briefing of pretrial motions filed by the defendant and time during which such motions were under submission to the court, the record shows the defendant was tried within the 6-month period prescribed by the statute.

The defendant's claim of denial of equal protection of the law was raised by a pretrial motion. There is no record of any evidence which may have been offered in support of the motion, but at the trial the defendant made several offers of proof. These offers of proof related to other violators in similar circumstances who were not prosecuted, police awareness of other violators, and enforcement against the defendant on an arbitrary and capricious basis. There was no offer to prove the basis for the alleged discrimination.

To establish arbitrary discrimination inimical to constitutional equality, there must be more than an

intentional and repeated failure to enforce legislation against others as it is sought to be enforced against the person claiming discrimination. *Arrigo v. City of Lincoln,* 154 Neb. 537, 48 N.W.2d 643 (1951). There must be more than a showing that a law or ordinance has not been enforced against others and that it is sought to be enforced against the person claiming discrimination. *City of Omaha v. Lewis & Smith Drug Co., Inc.,* 156 Neb. 650, 57 N.W.2d 269 (1953). A finding of unlawful selective enforcement must be based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *Oyler v. Boles,* 368 U.S. 448 (1962).

To support a defense of selective or discriminatory prosecution, the defendant must show not only that others similarly situated have not been prosecuted, but that the selection of the defendant for prosecution has been invidious or in bad faith, based upon considerations such as race, religion, or the desire to prevent his exercise of his constitutional rights. *United States v. Berrios,* 501 F.2d 1207 (2d. Cir. 1974).

A discriminatory purpose will not be presumed; there must be a showing of clear and intentional discrimination. *Snowden v. Hughes,* 321 U.S. 1 (1944). See, also, *Shock v. Tester,* 405 F.2d 852 (8th Cir. 1969). The motion and the offers of proof made in this case were not sufficient to satisfy these requirements.

The defendant's claim of collateral estoppel is based upon the finding of not guilty in the prosecution of the defendant for allowing consumption of alcohol upon unlicensed premises open to the public on November 5, 1976. The record shows that the November 5, 1976, complaint in this case was based upon facts occurring at the same time as the alleged alcohol violation. The issue in the alcohol case was whether the premises were open to the public. The finding of not guilty in the alcohol case was a find-

ing that, at the time the machines were seized on November 5, 1976, the premises were not open to the public. Where it has been determined in a previous prosecution that an essential element of a crime did not exist, any subsequent prosecution for a different offense involving the same element is barred. *Ashe v. Swenson,* 397 U.S. 436 (1970).

As to the other complaints, the evidence was sufficient to support a finding that the membership requirement was a sham or subterfuge and the machines were available for public use within the meaning of the ordinances on October 20 and 21 and November 4, 1976. See *State, ex rel. City of Friend, v. Friend Recreation Club,* 123 Neb. 740, 243 N.W. 876 (1932).

The judgments on the complaints alleging offenses on October 20 and 21 and November 4, 1976, are affirmed. The judgment on the complaint alleging offenses on November 5, 1976, is reversed and the cause remanded with directions to dismiss the complaint.

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

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STATE OF NEBRASKA, APPELLEE, V. MICHAEL E. SCOTT, APPELLANT.

293 N. W. 2d 114

Filed June 10, 1980. No. 43032.

1. **Blood, Breath, and Urine Tests: Evidence: Foundation: Drunk Driving.** Before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by

the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements.

2. **Criminal Complaints and Informations.** An information or complaint must inform the accused with reasonable certainty of the charge against him so that he may prepare his defense and be enabled to plead the judgment as a bar to a later prosecution for the same offense.

Appeal from the District Court for York County: WILLIAM H. NORTON, Judge. Reversed and remanded with directions to dismiss.

Stephen K. Yungblut of Rosenberg & Yungblut, for appellant.

Paul L. Douglas, Attorney General, and Shanler D. Cronk, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

Defendant, Michael E. Scott, was convicted in the county court of York County of the offense of operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine, second offense, contrary to Neb. Rev. Stat. § 39-669.07 (Reissue 1978). He was sentenced to 60 days in the county jail, fined $300, and had his driver's license suspended for 1 year. Defendant appealed to the District Court, which affirmed the conviction and sentence.

On December 29, 1978, a patrolman in York, Nebraska, stopped a pickup truck driven by the defendant for traveling at 36 miles per hour in a 25-mile-per-hour speed zone. When the defendant got out of the pickup, he staggered slightly and had difficulty in getting out his billfold to present his operator's license. The officer detected an odor of alcohol and

administered a field sobriety test to the defendant. The defendant had some difficulty touching his finger to his nose and walking toe-to-heel, two portions of the test. In the officer's opinion, the defendant was intoxicated. The officer placed defendant under arrest and had him taken to the sheriff's office where the officer administered a breath test on a gas chromatograph "Intoximeter Mark IV."

The officer detailed the test procedures which he followed. The evidence established that the testing device was in proper working order at the time of the test and that the officer held a current permit from the Nebraska Department of Health to operate breath analysis devices. The evidence failed to establish that the test administered to the defendant was performed according to methods approved by the Nebraska Department of Health, as required by statute. The officer testified that the machine analyzed the defendant's breath and gave both a digital and graph paper reading of .226 alcohol content.

The defendant was convicted by the county court and sentencted to 60 days in the county jail, fined $300, and his operator's license revoked for a period of 1 year.

The defendant contends that the evidence of the test results in the operation of the gas chromatograph did not comply with statutory requirements. During oral argument, the defendant contended that the case is controlled by the very recent case of *State v. Gerber, ante* p. 75, 291 N.W.2d 403 (1980). That case held that, before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and inter-

preting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements.

In the case now before us, the evidence fails to establish that the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health. Consequently, *Gerber* is controlling.

The State contends that, even though the test results might be inadmissible, the testimony of the police officer as to the circumstances surrounding the arrest of the defendant was sufficient to support a conviction on a charge of driving while under the influence of alcohol. The State relies upon the case of *State v. Jablonski,* 199 Neb. 341, 258 N.W.2d 918 (1977), which held that even in the absence of any breathalyzer tests, other evidence was sufficient to sustain a conviction on a charge of being under the influence of alcoholic liquor.

The critical difference between *Jablonski* and the case now before us lies in the charges made. In *Jablonski,* the defendant was charged, in the language of the statute, with operating a motor vehicle while under the influence of alcoholic liquor, or drugs, or while he had ten-hundredths of one percent or more by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine. In the present case, the complaint charged only that the defendant did "unlawfully drive or be in actual physical control of a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his blood, as shown by chemical analysis of his blood, breath or urine." Under the single charge made in the present case, the only critical issue was whether the defendant had the

charged amount of alcohol in his blood while operating his truck. The admissible evidence failed to establish that charge.

The testimony of the officer may have been sufficient evidence to convict the defendant on a charge of driving while under the influence of alcohol and it was clearly admissible under the charge made, but it failed to establish that the defendant had ten-hundredths of one percent or more by weight of alcohol in his blood.

This court has consistently held that an information must inform the accused with reasonable certainty of the charge against him so that he may prepare his defense and be enabled to plead the judgment as a bar to a later prosecution for the same offense. *May v. State,* 153 Neb. 369, 372, 44 N.W.2d 636, 638 (1950). As we said in that case:

> [The information] must state expressly and directly each fact that is an essential element of the crime intended to be charged so that the accused will not be required to go beyond the information to learn the nature of the charge against him or the issue he must meet, and it cannot be aided by intendment, by anything stated therein by way of mere recital, or by inference or implication.

Under the charge in the present case, in the absence of the test, there was no evidence that the defendant had ten-hundredths of one percent or more by weight of alcohol in his blood.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

KRIVOSHA, C. J., not participating.

DALE DOCKENDORF, DOING BUSINESS AS CORSICA LIVESTOCK SALES CO., APPELLANT, V. LAVOY ORNER ET AL., APPELLEES.

293 N. W. 2d 395

Filed June 17, 1980. No. 42579.

1. **Contracts.** The proper construction of a written contract is generally a question of law to be determined by the courts.
2. _____. In construing a written instrument, the court must look to the agreement in its entirety.
3. **Notice: Liability.** Where the giving of a notice of loss within the prescribed time is made a condition precedent to liability, failure to comply with such provision prevents recovery.
4. **Summary Judgment.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity, expense, and delay of trial, those cases where there is no genuine claim or defense.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Kneifl, Kneifl & Forrest, for appellant.

Knudsen, Berkheimer, Beam, Richardson & Endacott, for appellee U.S.F.&G.

Heard before KRIVOSHA, C. J., BRODKEY and WHITE, JJ., and RONIN and GARDEN, District Judges.

GARDEN, District Judge.

This is an appeal from an order of the District Court for Lancaster County, Nebraska, sustaining a motion for summary judgment filed by the defendant United States Fidelity & Guaranty Company (U.S.F.&G.) to plaintiff's third amended petition to recover on a surety bond.

Plaintiff's petition sets forth two causes of action, the first sounding in contract for the unpaid purchase price for cattle sold and delivered by plaintiff to other defendants and against defendant U.S.F.&G. as surety. The second cause of action alleges misrepresentation and fraud on the part of other defendants, and alleges that such fraud and misrepresenta-

tion was known or should have been known to the defendant U.S.F.&G.

The facts of the case are that on July 8, 1974, defendant U.S.F.&G., as surety, and defendant Donald Moran, as principal, entered into the surety agreement, which is the subject of this appeal. Defendant Moran was registered as a cattle dealer with the Nebraska Department of Agriculture. The bond was required for licensing and registration, both with the Nebraska agency and with the Packers and Stockyards Administration, U.S. Department of Agriculture. See, Nebraska Livestock Dealers Licensing Act, Neb. Rev. Stat. §§ 54-1701 to 11 (Reissue 1978); federal packers and stockyards act, 7 U.S.C. §§ 201-17a (1976), and regulations promulgated thereunder, particularly 9 C.F.R. § 20.33 (1977).

LaVoy Orner, an additional defendant in this action, held an agent's card from the Nebraska Department of Agriculture, issued under defendant Moran's name and bond.

Defendant Orner testified in his deposition that he had done business under the name "Don Moran Livestock" after his own bond was revoked by the packers and stockyards agency in April 1975 and he became registered under Mr. Moran's name, to use Mr. Moran's bond.

During 1974 and 1975, Herbert Andrews, an additional defendant herein, worked for Mr. Orner, and traveled for him to Corsica, South Dakota, to purchase cattle at the Corsica Livestock Sales Co. barn.

From December 1974 through September 18, 1975, Mr. Orner, through his agent, Herbert Andrews, purchased cattle from the Corsica, South Dakota, sales auction, charging some of the purchases. After January 1975, these purchases were charged under the name of Donald Moran, and the cattle were sold under Donald Moran's bond. Mr. Orner further testified in his deposition that he had no way of disputing the amount claimed due by the plaintiff, $115,733.92.

Herbert Andrews testified in his deposition that he worked as LaVoy Orner's agent and carried an agency card issued by the Nebraska Department of Agriculture and given to him by Mr. Orner. Mr. Andrews worked for Mr. Orner for a period from 1972 through 1975, except for a period of 10 to 12 weeks. In 1975, his Nebraska agency card was changed and he worked under the name "Donald Moran Livestock." Both Donald Moran and LaVoy Orner had told him to purchase cattle. Mr. Andrews met the plaintiff in 1973 or 1974 and purchased cattle from the plaintiff, as agent for Mr. Orner and Mr. Moran. The plaintiff also sold a substantial amount of cattle over the telephone to Mr. Orner but in Mr. Moran's name. For a period of time, Mr. Andrews was charging cattle for Mr. Orner every week at the plaintiff's sale ring.

Plaintiff brought his action on March 18, 1976, against the defendants upon their default in payment for the balance due in the sum of $57,061.30 for cattle purchased during the period of December 1974 to October 1975 and against U.S.F.&G., on the surety bond issued to defendant Donald Moran, alleging that the said surety is liable for its principal's default in payment to a maximum amount of the bond in the sum of $18,000.00. The petition was later amended to allege a balance due of $115,733.92.

Defendant U.S.F.&G. filed an answer in the foregoing action, in which it "allege[d] affirmatively that plaintiff did not file a claim in writing within 120 days of any of the transactions complained of as required by the bond, and is, therefore, not entitled to recover anything from this defendant." U.S.F.&G. thereafter filed a motion for summary judgment and a hearing was held thereon on September 7, 1978. On December 27, 1978, the District Court sustained the motion for summary judgment as to both causes of action and dismissed both causes of action. It is from that order that the plaintiff has appealed to

this court. For the reasons hereinafter stated, we affirm the action of the District Court.

The bond in question contained the following conditions:

> (d) Any claim for recovery on this bond must be filed in writing with either the Surety, or the Trustee if one is named, or the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, Washington, D.C. 20250, and whichever of these parties receives such a claim shall notify the other such party or parties at the earliest practicable date. All claims must be filed within 120 days of the date of the transaction on which claim is made. Suit thereon shall not be commenced in less than 180 or more than 547 days (*which is approximately 18 months*) from the date of the transaction on which the claim is based.
>
> . . . .
>
> (f) The Surety shall not be liable to pay any claim for recovery on this bond if it is not filed in writing within 120 days from the date of the transaction on which the claim is based, or if suit thereon is commenced less than 180 or more than 547 days (*which is approximately 18 months*) from the date of the transaction on which the claim is based.

(Emphasis in original.)

Plaintiff did not file a claim in writing within 120 days and, as a result thereof, defendant U.S.F.&G. contends, plaintiff is barred from recovery. Plaintiff takes the position that the failure to file the claim pursuant to condition (d) does not bar recovery so long as suit is commenced not less than 180 days nor more than 547 days from the date of the transaction on which the claim is based. We agree

with the interpretation of U.S.F.&G.

It is well settled in Nebraska that "[t]he proper construction of a written contract is a question of law to be determined by the courts." *Durand Associates, Inc. v. Guardian Inv. Co.,* 186 Neb. 349, 353, 183 N.W.2d 246, 249 (1971). The proper role of the trial court and the jury in matters of interpretation of agreements was set out by this court in *Don J. McMurray Co. v. Wiesman,* 199 Neb. 494, 497-98, 260 N.W.2d 196, 199 (1977):

> The trier of fact is to determine a question of interpretation of an integrated agreement if the question depends on the credibility of extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence. [Citations omitted.] When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law. [Citations omitted.]

Plaintiff does not contend that any actions or words of the parties or other events outside the language of the bond are in any way relevant to an interpretation of the meaning of the bond's provisions. There is no suggestion that any extrinsic evidence could be relied upon to aid in the interpretation of the bond. Therefore, there is no issue of fact for a jury, and resolution of the meaning of the bond is a matter of law for this court to determine.

A basic tenet of contract construction is that a contract's meaning is to be ascertained by examining the contract document as a whole. As this court held in *First Mid America, Inc. v. Palmer,* 197 Neb. 224, 248 N.W.2d 30 (1976), in construing a written instrument, the court must look to the agreement in its entirety.

The language of paragraph (d) of the bond, quoted above, was not chosen by the insurer, but was recom-

mended by the federal government through regulations promulgated by the Secretary of Agriculture under the authority of the packers and stockyards act. The entire bond is identical to the form suggested in a note following 9 C.F.R. § 201.33, one of those regulations. When viewed as a whole, the bond in question is not ambiguous. The conditions prescribed by the bond are two in nature. The first is the timely filing of a claim in writing. The second relates to the timeframe within which litigation must be commenced. Both conditions must be complied with to allow recovery under the bond.

Notice-of-loss provisions are common in fidelity policies and bonds and, as this court has recognized, the generally accepted rule of law is that, in the absence of a statute to the contrary, they are valid and enforceable. "Where the giving of notice of loss within the prescribed time is made a condition precedent to liability, failure to comply with such provision prevents recovery . . . ." 45 C.J.S. *Insurance* § 1092 (1946).

It is clear that in the present case plaintiff failed to file a claim in writing within 120 days of the date of the transaction on which claim is made. Since plaintiff failed to satisfy the first condition, recovery under the bond will not be allowed.

As previously stated, this case was disposed of by the trial court on a motion for summary judgment filed by the defendant U.S.F.&G. That motion was sustained. The rule is that a summary judgment may be granted only where there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1975). No fact issues remain as to either of plaintiff's causes of action as against the defendant U.S.F.&G. All defendant U.S.F.&G. did was to issue the bond. It performed no acts from which it could be concluded that it, in any way, defrauded plaintiff. Accordingly, the judgment for

U.S.F.&G. should be affirmed.

The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity, expense, and delay of trial, those cases where there is no genuine claim or defense. *Partridge v. Younghein,* 202 Neb. 756, 277 N.W.2d 100 (1979).

In view of what we have stated above, we affirm the judgment of the trial court.

AFFIRMED.

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ANTHONY A. FINK AND MARY M. FINK, APPELLANTS, V. DONALD E. DENBECK AND DARLENE C. DENBECK, APPELLEES.

293 N. W. 2d 398

Filed June 17, 1980. No. 42650.

1. **Uniform Commercial Code: Breach of Contract: Real Estate.** Nebraska U.C.C. § 2-607(3) (Reissue 1971), which provides that a buyer of "goods" must, within a reasonable time after he discovers or should have discovered a breach, notify the seller of the breach or be barred of remedy, does not apply to sales of real estate.
2. **Breach of Contract.** The general rule is that a demand for performance of a contract is not necessary previous to bringing suit for breach unless required by the terms of the contract or its peculiar nature.
3. **Breach of Contract: Damages.** The general measure of damages for breach of contract is the amount which will compensate the party for the loss which the breach entailed.
4. **Breach of Contract: Damages: Breach of Warranty: Real Estate.** In the case of a breach of warranty of the condition of real property sold, whether the measure is the cost of repair or the difference in value with and without the defect depends upon the facts. If the defect may be remedied, the ordinary measure is the cost of remedying the defect, not to exceed the value of the property.
5. _____: _____: _____: _____. Whether the theory of recovery in an action on contract is breach of warranty as to the condition of improvements on real estate or misrepresentation as to their condition, the measure of damages is the cost of remedying the defect if that will fully compensate for the loss suffered.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Reversed and remanded with directions.

Edward E. Hannon of Cronin, Hannon & Symonds, for appellants.

Arlen D. Magnuson, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an action by the plaintiffs, Fink, who had purchased a residential property from the defendants, Denbeck, for damages on account of breach of a warranty contained in the contract of sale and for alleged misrepresentations made by the defendants that the basement was free of moisture seepage. The plaintiffs prayed for monetary damages in the sum of $5,039, the amount claimed to be necessary to correct the seepage problem by the construction of an exterior perimeter trench drain system. The defendants' answer included a general denial, and further alleged that the plaintiffs did not, previous to the commencement of the action, give any notice of "alleged moisture in the basement." They stated that any moisture in the basement "was the result of acts of God and that the defendants are not . . . responsible for any alleged damage in accordance with the contract that has been attached to the plaintiff's petition."

The contract contained the following warranty: "Seller warrants basement to be dry from outside moisture for a period of one year." The execution of the contract and the fact that it contained the warranty were admitted by the defendants. Plaintiffs introduced evidence to show that, on two separate occasions in the period covered by the warranty, outside water seeped through basement walls and the slab, and that the condition would continue un-

less repairs were made.

Two issues only were submitted to the jury: (1) Did the plaintiffs prove by a preponderance of the evidence that there was such an amount of water seepage during the period covered by the warranty as amounted to a failure of the basement " ' to be dry from outside moisture for a period of one year,' " and (2) The fair and reasonable cost on the last day of the warranty period of placing the residence in such condition that the basement is " 'dry from outside moisture.' " The jury rendered a verdict for the plaintiffs in the sum of $2,350.

Both sides filed motions for a new trial. The plaintiffs' motion assigned as error: (1) The refusal of the court to permit amendment of the plaintiffs' petition to include as an alternate measure of damages the difference in the value of the property with the defect and the value had it been as represented, and to permit evidence on that issue; (2) Failure to instruct the jury on the issue of misrepresentation; and (3) Action of the court in setting aside the jury verdict. The defendants, in their motion, assigned various errors, including failure of proof and failure to grant a motion for a directed verdict at the close of the plaintiffs' case.

The court found that it ought to have granted the defendants' motion for a directed verdict because the plaintiffs failed to make "a demand" upon the defendants prior to commencing the action. It then set aside the verdict and dismissed the plaintiffs' petition. Plaintiffs ask the court to either grant them a new trial or reinstate the jury verdict. We reverse and remand with directions to reinstate the verdict.

Two issues are determinative of the appeal. First, was the trial court justified in setting aside the verdict and dismissing the plaintiffs' petition? and, second, if it was not, were the plaintiffs prejudiced by the refusal of the court to permit the jury to consider a cause founded upon misrepresentation and a

measure of damages founded upon difference in market value of the property?

The defendants argue that, under the provisions of Nebraska U.C.C. § 2-607(3) (Reissue 1971), a buyer must give notice of breach within a reasonable time after discovery and, therefore, the trial court was correct in setting aside the verdict. The plaintiffs seem to concede that § 2-607(3) governs, but respond that, in an action founded upon misrepresentation, no notice is required. Therefore, plaintiffs were damaged by the court's refusal to submit the misrepresentation issue and to allow damages based upon the difference in the value of the property with and without the defect.

Insofar as the applicability of the Uniform Commercial Code is concerned, both parties are mistaken. Section 2-607(3) pertains only to the sale of "goods." "Goods," as defined in the Uniform Commercial Code, §§ 2-105, 106, and 107, does not include real property.

The Uniform Commercial Code not being applicable, we must determine whether, in an action on a warranty as to the condition of improvements on real property contained in a contract for the purchase of the real estate, there exists any requirement in the law that it is a condition precedent to an action that plaintiffs give notice of the defect, or make demand of some sort, before commencing a suit.

The general rule is that a demand for performance is not necessary unless required by the terms of the contract or its peculiar nature. *Peckham v. Deans,* 186 Neb. 190, 181 N.W.2d 851 (1970). See, 17A C.J.S. *Contracts* § 478 (1963); 17 Am. Jur. 2d *Contracts* § 356 (1964). In this case, the warranty was absolute. There was no contractual provision for notice. The law would imply none, for the defendants were not required to perform any act. Liability accrued for damages in accord with the appropriate

measure of the case immediately after the warranty was breached by the occurrence of seepage. Even in the case of warranties in connection with the sale of personal property, absent code provisions, failure to give notice does not bar the right to damages. *A.F.P. Co. v. Davenport V. & P. Wks.,* 172 Iowa 683, 154 N.W. 1031 (1915).

Further, the law does not require the doing of a useless act. The defendants, in their answer, denied there was any defect. Demand for payment of damages would have been unavailing. *American Income Ins. Co. v. Kindlesparker,* 110 Ind. App. 517, 37 N.E.2d 304 (1941).

The defendants have not cited to us any case which supports their position relative to notice or demand. Neither did the trial court cite authority in support of the reason it gave for setting aside the judgment.

The plaintiffs were not prejudiced by the trial court's refusal to permit consideration of a cause founded solely upon misrepresentation because: (1) Under the evidence in this case, the measure of damages is the same whether the cause was founded upon misrepresentation or express warranty, i.e., the reasonable cost of remedying the defect, or the difference in value of the property with or without the defect, whichever is less; and (2) An action on an express warranty of condition and one founded essentially on a misrepresentation of condition inducing the contract are essentially the same in their purpose, since the misrepresentation gives rise to an implied warranty.

The principle which underlies the determination of the proper measure of compensatory damages has several times been stated by this court. The measure of damages in the case of a breach of contract is the amount which will compensate the injured party for the loss which the breach has entailed. *Numon v. Stevens,* 162 Neb. 339, 76 N.W.2d

232 (1956); *Davenport v. Intermountain R. L. & P. Co.*, 108 Neb. 387, 187 N.W. 905 (1922). In the latter case we said:

> The basic principle of the law of damages is that such compensation in money shall be allowed for the loss sustained as will restore the loser to the same value of property status as he occupied just preceding the loss. No hard and fast rule can be laid down for all cases as to the measure of damages in case of the destruction of a building by fire. In some cases the property might not have any market value, or the building might not be a part of the real estate, or, in case of partial destruction, a restoration of the building might be advisable, in which cases different rules would apply.

*Id.* at 393, 187 N.W. at 907.

Which measure of damages is to be applied, i.e., cost of repairs or difference in value with or without defect or injury, depends upon the evidence in the particular case. Where the defect may be remedied, the ordinary measure is the cost of restoring the property to its former condition or remedying the defect. *Wendt v. Yant Construction Co.*, 125 Neb. 277, 249 N.W. 599 (1933); *Numon v. Stevens, supra; Koyen v. Citizens Nat. Bank*, 107 Neb. 274, 185 N.W. 413 (1921). In cases where the defect or damage cannot be remedied, the usual measure of damages is the difference in value between the thing as represented and its actual value. *Welch v. Reeves*, 142 Neb. 171, 5 N.W.2d 275 (1942). In the case of temporary injury to real estate, the measure is the loss sustained and includes cost of repairs not exceeding the diminution in value. *Hunt v. Chicago, B. & Q. R.R. Co.*, 180 Neb. 375, 143 N.W.2d 263 (1966). An injury to a structure on real estate capable of reasonable repairs if fully compensated by a sum sufficient to make the repairs. *Mikkelsen v. Fischer*, 347

S.W.2d 525 (Ky. 1961).

In this case, the plaintiffs' own evidence on the cost of remedying the defect and its offer of proof of the difference in value of the residence with or without the defect show that the cost of repairs was the lesser and would, in effect, make the plaintiffs whole.

We have earlier noted in our statement of the case that, because the making of the warranty was undenied at trial, the only fact questions submitted to the jury were (1) Did seepage occur? and (2) What is the reasonable cost of repair to prevent such seepage? Even though the plaintiffs may have been entitled to recover on an alternate theory of misrepresentation relied upon by them, the measure of damages in such a case is the same as in the case of express warranty under the facts before us. It follows that they were not prejudiced by the court's ruling in connection with the alternative theory of recovery.

The two alternative theories are essentially the same. Some courts have held that a false representation made concerning the subject matter of a contract or as to any material matter concerning the same are ordinarily the equivalent of a warranty. *Callahan Construction Co. v. The United States,* 47 Ct. Cl. 177 (1912).

There appearing in the record or in the law no justification for the court's action in setting aside the verdict and dismissing the plaintiffs' petition and the plaintiffs not having been prejudiced by the court's other rulings, the cause is remanded with directions to reinstate the jury verdict, rather than for a new trial. We note that no assignment was made as to the sufficiency of the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.