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# REPORTS OF CASES

DECIDED BETWEEN

JUNE 21, 1982 and DECEMBER 9, 1982

IN THE

# Supreme Court of Nebraska

JANUARY TERM 1982 and SEPTEMBER TERM 1982

## VOLUME CCXII

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DONALD C. PATTON

OFFICIAL REPORTER

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For the benefit of the State of Nebraska

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## CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

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No. 44373: **Jordan v. Starks.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 44464: **Karstens v. State.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellants.

No. 44465: **Buffington v. State.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44526: **Tripp v. Washington County Bd. of Supervisors.** Stipulation allowed; reversed and remanded for new trial by order of the court.

No. 81-571: **Pribil v. Pribil.** Stipulation for dismissal of appeal allowed; appeal dismissed without prejudice at costs of appellant.

No. 81-600: **Rogers v. Kaminski.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; appeal bond of appellant to be released and discharged; each party to pay own costs.

No. 81-605: **Rubin Development Co. v. Trump, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 81-606: **Fraternal Order of Police v. County of Sarpy.** By order of the court, the judgment of the District Court is vacated and the appeal herein is dismissed at costs of appellant.

No. 81-673: **State v. Verzani.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-681: **State v. Martinez.** Affirmed; see Rule 20.

No. 81-697: **State v. Rolling.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 81-742: **State v. Miller.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-759: **State v. Robinson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-789: **State v. Johnson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-815: **Darling v. Asplundh Tree Expert Co.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 81-830: **State v. Stewart.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-862: **State v. Buckner.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 81-874: **County of Douglas v. Local No. 2088, AFSCME.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 81-888: **5103 Leavenworth, Inc. v. Nebraska Liquor Control Comm.** Motion of appellee for dismissal of appeal sustained; appeal dismissed as moot at costs of appellant.

No. 81-889: **Hobrock v. Hobrock.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 81-920: **State v. Gibbs.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 81-926: **Bain v. Bain.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 81-928: **State v. Tucker.** Affirmed; see Rule 20.

No. 81-930: **State v. Hand.** Motion of court-

appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-011: **In re Interest of Shearer, Shearer v. Lancaster County Board of Mental Health.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-020: **Brown v. Immanuel Medical Center.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-032: **State v. Randall.** Affirmed; see Rule 20.

No. 82-047: **Schoneboom v. Schoneboom.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-048: **State v. Pena.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8); motion of appellant for leave to proceed pro se overruled.

No. 82-051: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-061: **State v. Little.** Affirmed; see Rule 20.

No. 82-072: **State v. Towne.** Affirmed; see Rule 20.

No. 82-083: **State v. Wallingford.** Judgement affirmed; see Rule 20.

No. 82-086: **State v. Burgess.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-089: **State v. Auger.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-091: **State v. Hipple.** Affirmed; see Rule 20.

No. 82-094: **State v. Rath.** Affirmed; see Rule 7A.

No. 82-103: **Griffin v. McFarland.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-106: **State v. Dickson.** Motion of appellees for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-110: **State v. Bahrs.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-111: **In re Interest of Karr, Doran v. Karr.** Judgment vacated and case remanded by order of the court.

No. 82-114: **State v. Jones.** Affirmed; see Rule 20.

No. 82-118: **White v. White.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 82-141: **State v. Clark.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-158: **State v. Hackett.** Motion of court-appointed counsel to withdraw sustained; judgment affirmed; see Rule 20-A(8).

No. 82-164: **State v. Pettite.** Affirmed; see Rule 20.

No. 82-167: **State v. Knowles.** Affirmed; see Rule 20.

No. 82-171: **State v. Lee.** Judgment affirmed; see Rule 20.

No. 82-172: **Long v. Village of McCool Junction.** Dismissed for failure to file briefs.

No. 82-173: **State v. Dickson.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 82-183: **State v. McClintic.** Affirmed; see Rule 20.

No. 82-185: **Caffrey v. Dutton.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellants.

Nos. 82-193 & 82-194: **Hooker v. Medlin; Heft v. Medlin.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-196: **State v. Kowalski.** Judgment affirmed; see Rule 20.

No. 82-198: **State v. Charter.** Affirmed; see Rule 20.

No. 82-199: **IFG Leasing Co. v. Beefmaker Cattle Co.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

Nos. 82-202, 82-203: **State v. Hoemann.** Affirmed; see Rule 20.

No. 82-205: **State v. Mann.** Affirmed; see Rule 20.

No. 82-209: **State v. Kahler.** Motion and stipulation to dismiss appeal sustained; appeal dismissed.

No. 82-210: **State v. Archer.** Affirmed; see Rule 20.

No. 82-211: **Ristow v. School District of Battle Creek.** Motion for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-212: **State v. Meier.** Affirmed; see Rule 20.

No. 82-219: **State v. Robinson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-220: **Fritzler v. Employers Mutual Casualty Co.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-228: **Homan v. Homan.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 82-234: **State v. Lengyel.** Affirmed; see Rule 20.

No. 82-237: **State v. Howland.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-238: **State v. O'Neal.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-241: **State ex rel. Myers v. Peterson.** Motion of appellant for dismissal of appeal sustained;

appeal dismissed at costs of appellant.

No. 82-244: **State v. Moyer.** Motion of court-appointed counsel to withdraw sustained; judgment affirmed; see Rule 20-A(8).

No. 82-247: **Christopher's Landing, Inc. v. Determan.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 82-251: **State v. Samuels.** Dismissed for failure to file briefs.

No. 82-254: **State v. Brengelman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-255: **State v. Brown.** Dismissed for failure to file briefs.

No. 82-259: **State v. Witt.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-262: **State v. Tyson.** Affirmed; see Rule 20.

No. 82-266: **Leisy v. Larson.** Dismissed for failure to file briefs.

No. 82-267: **Smith v. Smith.** Affirmed as modified by order of the court.

No. 82-268: **State v. Haynes.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-269: **State v. Barrett.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-278: **State v. Vetro.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-279: **Revitch v. Carl A. Anderson, Inc.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 82-282: **State v. Hrbek.** Motion of court-appointed counsel for leave to withdraw appearance

sustained; judgment affirmed; see Rule 3B(4).

No. 82-283: **State v. Byrd.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-288: **State v. Anderson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 82-294: **State v. Fentress.** Affirmed; see Rule 20.

No. 82-295: **State v. Biesecker.** Affirmed; see Rule 7A.

No. 82-296: **State v. Clark.** Affirmed; see Rule 7A.

No. 82-297: **State v. Venable.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-298: **State v. Spencer.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-300: **State v. Branch.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-307: **State v. Welles.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-309: **State v. Davis.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-314: **Tallant v. Tallant.** Affirmed as modified by order of the court.

No. 82-317: **Flott v. City of Omaha.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 82-318: **State v. Mikulecky.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-319: **State v. Coleman.** Dismissed for failure to file briefs.

No. 82-320: **Brewer v. Brewer.** Motion of appellant for dismissal of appeal sustained; appeal dis-

missed at costs of appellant.

No. 82-324: **In re 1981-82 County Tax Levy, Iske v. County Bd. of Equalization.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-328: **State v. Mata.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-334: **State v. Swift.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-338: **Cleveland v. Cleveland.** Affirmed as modified by order of the court.

No. 82-342: **Heitman v. Huss.** Dismissed for failure to file briefs.

No. 82-343: **Valadez v. Valadez.** Affirmed as modified by order of the court.

No. 82-346: **Huse Publishing Co. v. Hanlon.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-350: **Zerbe v. Schaefer.** Motion of appellants for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 82-353: **Jensen v. Owens.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 82-358: **Sherwood v. Brown.** Motion of appellees for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

Nos. 82-363 & 82-364: **State v. Murry.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-365: **State v. Connerly.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-367: **State v. Ebberson.** Dismissed for failure to file briefs.

No. 82-370: **Schwenck v. Western Electric Co.**

Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-372: **State v. Gray.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-373: **State v. Minshall.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-374: **Bichlmeier v. Lower Elkhorn NRD.** Stipulation to dismiss appeal sustained; appeal dismissed.

No. 82-381: **State v. DuFour.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-384: **Fenimore v. Sorensen.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 82-386: **State v. Quandt.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 82-387: **Bauer v. Bauer.** Affirmed as modified by order of the court.

No. 82-388: **Determan v. Christopher's Landing, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 82-391: **State v. Lyncook.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-392: **State v. Kellogg.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-393: **State v. Tunstall.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-395: **Bowers v. Bowers.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-396: **In re Estate of Cavett, Johnson v. Reddish.** Stipulation for dismissal of appeal al-

lowed; appeal dismissed at costs of appellant.

No. 82-398: **State v. Fitzgerald.** Dismissed for failure to file briefs.

No. 82-401: **Stuhy v. Gustav Thieszen Irr. Co.** Dismissed for failure to file briefs.

No. 82-402: **Schlecte v. Gustav Thieszen Irr. Co.** Dismissed for failure to file briefs.

No. 82-407: **State v. Vore.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-410: **State v. Byrd.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-413: **State v. Cox.** Affirmed; see Rule 7A.

No. 82-415: **State v. Friend.** Affirmed; see Rule 20.

No. 82-418: **State v. Ebert.** Affirmed; see Rule 7A.

No. 82-419: **State v. Paul.** Affirmed; see Rule 7A.

No. 82-420: **State v. Yakle.** Affirmed; see Rule 7A.

No. 82-425: **State v. Kissack.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-426: **Dantes v. Brentwood Homes, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-427: **Haynes v. Lively.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-428: **Slangel v. Slangel.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-430: **Stiefel v. Copeland.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-431: **Milbank Mutual Insurance Co. v. Universal Underwriters Insurance Co.** Stipulation for dismissal of appeal allowed; appeal dismissed at

costs of appellant.

No. 82-432: **Baker v. Hinky Dinky.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-434: **Irvington Industrial v. Raymond.** Motion of appellants for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellants.

No. 82-436: **In re Interest of Betz, State v. Betz.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-439: **Diers v. Bituminous Fire and Marine Insurance Co.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 82-443: **Raffety v. Raffety.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-444: **State v. Krutilek.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-445: **State v. Larsen.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-446: **State v. Bennett.** Affirmed; see Rule 20.

No. 82-447: **State v. Kennedy.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-451: **Cornette v. Massey-Ferguson, Inc.** Motion of appellees for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 82-452: **Williams v. First National Bank of Omaha.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 82-456: **State ex rel. Hood v. Massa.** Motion of appellee for summary dismissal sustained; ap-

peal dismissed; see Rule 20-A(1).

No. 82-457: **Crawford v. Crawford.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-464: **State v. Copple.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-465: **The Lincoln Telephone & Telegraph Co. v. Rose.** Joint motion for dismissal of appeal allowed; appeal dismissed at costs of appellants.

No. 82-467: **State v. Krutilek.** Motion for dismissal of appeal sustained; appeal dismissed.

No. 82-468: **State v. Lockett.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-470: **State v. Gilmore.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice.

No. 82-474: **Huck v. Mud.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-475: **Maenner Co. v. M & M Realty Co.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 82-476: **Friendt v. Friendt.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-477: **Kiely v. Adams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-479: **State v. George.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-480: **State ex rel. NSBA v. Harmon.** Order of disbarment entered.

No. 82-482: **World Insurance Co. v. Slaughter.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-483: **State v. Anderson.** Affirmed; see Rule 7A.

No. 82-485: **State Dept. of Labor v. Krausnick.** By order of the court, appeal dismissed at costs of appellant.

No. 82-489: **Wright v. Gateway Realty of Hastings.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-490: **G&T Drywall, Inc., v. Village Homes, Inc.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 82-491: **State v. Byrd.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-493: **State v. Hamann.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed.

No. 82-496: **In re Appeal, Satterfield v. County Board of Equalization.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-501: **Sorenson v. Lower Niobrara NRD.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 82-504: **McGreevy v. Holzapfel.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-508: **Farmers State Bank v. Davison.** Affirmed as modified by order of the court.

No. 82-511: **ITT Life Ins. Co. v. Hopfensperger.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 82-512: **State v. Brown.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 82-514: **State v. Mitchell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-517: **State v. Barris.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-518: **State v. Martin.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-520: **State v. Fowler.** Motion of appellant for dismissal of appeal sustained; appeal dismissed without prejudice.

No. 82-521: **Stock v. Stock.** Affirmed as modified by order of the court.

No. 82-522: **State v. Jackson.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 7B(1).

No. 82-531: **Evans v. City of Omaha.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

Nos. 82-535, 82-536: **State v. Bregg.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-543: **Williams v. Goodyear Tire & Rubber Co.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-545: **Inland Investment Co. v. Alnor, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-549: **Seberger v. Kolar.** Joint motion for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 82-555: **Nielsen v. Nielsen.** Affirmed as modified by order of the court.

No. 82-563: **Friendt v. Friendt.** Stipulation for dismissal of appeal allowed; appeal dismissed without prejudice; each party to pay own costs.

No. 82-564: **National American Insurance Co. v. Anders.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-568: **Civilian Management v. City of Omaha.** Affirmed as modified.

No. 82-571: **Smith v. MFA Mutual Insurance Co.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 82-573: **Pierce v. Pierce.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-575: **State v. Etherton.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-588: **Travelers Indemnity Co. v. Heim.** Motion of appellee for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-595: **Nelson v. Stover.** Reversed and remanded by order of the court.

No. 82-599: **Adams v. School District No. 1.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-604: **Herran v. Schmidt.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 82-606: **State v. Fuqua.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-616: **Wiles v. Millenkamp.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 82-618: **Allen v. Allen.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed without prejudice; each party to pay own costs.

No. 82-625: **State v. Mesenbrink.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-628: **Becic v. Denny's Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-632: **Smith v. Smith.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-635: **Rosenbalm v. Sedlacek.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 82-643: **Cruise v. Cruise.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-649: **Tyler v. Douglas County Social Services.** Stipulation for dismissal of appeal allowed; appeal dismissed.

No. 82-655: **Dailey v. Peters.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 82-683: **Omaha National Bank v. Benson Drive-In Corp.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-688: **Schuff v. Lavigne.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

JANUARY TERM, 1982

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## STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. THOMAS J. GORHAM, RESPONDENT.

321 N.W.2d 55

Filed June 21, 1982. No. 82-459.

Original action. Judgment of disbarment.

PER CURIAM.

This matter came on upon the complaint against Thomas J. Gorham of Lincoln, Nebraska, made by the Committee on Inquiry in the Third Judicial District, and his voluntary surrender of license and consent to the entry of a disciplinary order against him.

Upon due consideration thereof, it is ordered by the court, based upon the charges described in the complaint and the respondent's voluntary surrender of his license, waiver of disciplinary proceedings, and consent to the entry of an order of disbarment, that said Thomas J. Gorham be, and he hereby is, disbarred.

Dated this 21st day of June 1982.

JUDGMENT OF DISBARMENT.

MARY JANE KOUBEK, APPELLEE AND CROSS-APPELLANT, V. JOHN STANLEY KOUBEK, APPELLANT AND CROSS-APPELLEE.

321 N.W.2d 55

Filed June 25, 1982. No. 44005.

1. **Divorce: Property Division.** The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable.
2. _____: _____. Generally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so when the marriage is of long duration and the parties are the parents of all the children involved.
3. **Property Division: Alimony.** How property, inherited by a party during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved.
4. _____: _____. The division of property and the issue of alimony are to be determined upon the consideration of all the facts and circumstances.
5. **Divorce: Attorney Fees.** In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court and depends on a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Affirmed.

Tedd C. Huston and David C. Huston, for appellant.

Robert E. Roeder, for appellee.

Heard before MCCOWN, HASTINGS, and CAPORALE, JJ., and STUART and HIPPE, D. JJ.

STUART, D.J.

This dissolution of marriage action was brought by the appellee, Mary Jane Koubek (Mary Jane), against the appellant, John Stanley Koubek (John),

in January 1979. Trial was had and final decree was rendered on November 6, 1980. This decree dissolved the marriage, awarded custody of the minor children to Mary Jane, subject to John's right of reasonable visitation, ordered John to pay $125 per month per child as child support, divided the property, awarded alimony to Mary Jane, and ordered John to pay certain attorney fees. John appealed, assigning as error the division of property, the awarding of alimony, and the awarding to Mary Jane of a life estate in the residence and 1 acre of land on the "home place." Mary Jane cross-appealed, assigning as error the division of property, the awarding of only $125 per month per child as child support, and the refusal to award Mary Jane's present attorney a fee for his services.

John and Mary Jane were married on December 25, 1955. As a result of this union, there are nine living children, of which six were still minors at the time of the marriage dissolution. This was the first marriage for both parties, and at the time of dissolution, after almost 25 years of marriage, John was 50 years of age and Mary Jane was 42 years of age. Each party had substantial health problems. Mary Jane was grossly obese, with circulatory problems, and had a possible need for abdominal surgery. John had open heart surgery in 1973 and now suffers from diabetes.

At the time of the marriage neither party had any substantial assets. After the marriage John entered a farming partnership with his father and since then has been actively engaged in farming. John inherited a 480-acre farm at the time of his father's death in 1964 (the "home place"). Since that time the parties have purchased three additional farms totaling 480 acres. In addition, the parties have acquired four school land leases totaling 2,080 acres. John has become a successful corn farmer and cattlefeeder, and operates a total of approximately

3,500 acres. At the time of John's inheritance of the "home place" in 1964, it had an appraised value of $46,660. Since that time there have been improvements made on this farm, costing between $29,325.33 and $136,577.51. The higher figure is that testified to by Mary Jane, which figure is seriously contested by John, who testified to the lower figure. The trial court did not make a specific finding on this point, but an examination of the record indicates that John's testimony appears more credible here. At the time of the decree the "home place" had a value of $295,030. The total assets of the parties were between $874,000 and $922,000. The debts of the parties totaled $471,000 to $476,000. Therefore, the net worth of the parties at the time of the trial was between $403,000 and $446,000.

The court awarded Mary Jane a 1977 Dodge van, all the furniture and household goods, one quarter section of land, and one-half of five lots and a mobile home located at Lake McConaughy. The court also awarded Mary Jane the life use of the residence and not to exceed 1 acre of land located on the "home place," or, in the alternative, granted John the option to purchase a home for Mary Jane, to be approved by her or the trial court, in Arnold, Nebraska, at a cost not to exceed $40,000. The above-described property awarded to Mary Jane had a value of between $113,000 and $117,000. All other property of the parties was awarded to John, and John was ordered to assume all of the debts of the parties and ordered to pay two of Mary Jane's former attorneys their fees in the sum of $4,000.25. In addition, John was ordered to pay Mary Jane $60,000 alimony, payable $500 per month for 12 months, then $750 per month for 72 months, all payments without interest.

The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be

precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable. *Matlock v. Matlock,* 205 Neb. 357, 287 N.W.2d 690 (1980). Generally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so when the marriage is of long duration and the parties are the parents of all the children involved. *Ragains v. Ragains,* 204 Neb. 50, 281 N.W.2d 516 (1979); *Knigge v. Knigge,* 204 Neb. 421, 282 N.W.2d 581 (1979). This court is not inclined to disturb the division of the property made by the trial court unless it is patently unfair on the record. *Johnson v. Johnson,* 209 Neb. 317, 307 N.W.2d 783 (1981); *Ritter v. Ritter,* 205 Neb. 668, 289 N.W.2d 526 (1980). How property, inherited by a party during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. *Matlock v. Matlock, supra.* The property awarded to Mary Jane on the division of the property is clearly within the guidelines set forth above. Such award is not patently unfair. Therefore, we affirm the trial court's division of property.

The next assignment of error is the awarding of $60,000 alimony to Mary Jane. It should be noted that although John is a successful farmer, farming many acres of corn, and has accumulated a substantial investment in machinery with which to accomplish this purpose, the parties also have very considerable debts which the court ordered John to assume. The courts will avoid a division of property which will destroy or damage the ability of one of the parties to earn a livelihood, or which will destroy the value of property. In dividing the property here, the trial court awarded 160 acres to Mary Jane, of a total land ownership of 960 acres, and also awarded

the 2,080 acres of school land leases to John. The division of property and the issue of alimony are to be determined upon the consideration of all the facts and circumstances. *Ragains v. Ragains, supra; Sullivan v. Sullivan,* 192 Neb. 841, 224 N.W.2d 542 (1975); *Boroff v. Boroff,* 197 Neb. 641, 250 N.W.2d 613 (1977). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion under Neb. Rev. Stat. § 42-365 (Cum. Supp. 1980), as well as the former decisions of this court, is one of reasonableness. The property division and the alimony awarded Mary Jane total approximately $175,000. However, when considering this amount, it must be reduced since the alimony is payable over a term, without interest. Upon an examination of the record, we feel that the trial court's decision was reasonable, and in this regard it is affirmed.

John complains that the court awarded Mary Jane a life estate in the house, garage, and yard, consisting of 1 acre, located on the "home place," which he points out is the farm he inherited from his father. The farmyard at this location is also the center of John's farming and cattlefeeding operations. This was the residence of the parties at the time of the separation. Upon separation, John moved out and into a house located on another of their farms. However, the court gave John the option of purchasing Mary Jane a comparable home in Arnold, Nebraska, costing not more than $40,000. Obviously, Mary Jane and the minor children must live somewhere; the trial court was confronted with the difficult problem of allowing Mary Jane to continue to utilize the residence on the "home place" (which is already set up as a "going operation") or of requiring further capital expenditure of a move to town when the debt of the parties already exceeds one-half of their assets. This is a decision better made by John than by the trial court. Therefore, John was given the op-

tion of allowing them to continue to live in the residence on the "home place" or of purchasing them a home in Arnold. In the event that Mary Jane will not agree to the suitability of such home, John may seek the approval of the trial court. The decision of the trial court was reasonable, and in this respect it is affirmed.

Mary Jane complains that the allowance of $125 per month per child as child support is inadequate. The only evidence presented regarding John's income for a full year was the year 1979 when the parties' net income was $20,292. John has had substantial reverses in the past, since he is engaged in farming, a business that has large risks. Mary Jane testified the crop was completely hailed out in the year 1975. They lost $70,000 in 1974 on feedlot cattle because of a drop in prices. In 1977 they suffered a partial hail loss. At the time of the trial, John was handling approximately 3,500 acres, of which he had planted 450 acres to irrigated corn and 1,250 acres to dryland corn. He testified that his dryland corn for the year 1980 would yield between 20 and 30 bushels per acre. He was required to assume $471,000 in debts. We are of the opinion that with John's huge debt and uncertain income this was a reasonable amount for child support.

Mary Jane complains that her present attorney was not allowed an attorney fee. She retained four different attorneys in the trial of this case. The court ordered John to pay her first attorney a fee in the amount of $1,714.60, and also required him to pay her second attorney a fee in the amount of $2,285.65. The court refused to have John pay either her third attorney or her present attorney. In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court and depends on a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the par-

ties, and the general equities of the situation. *Brown v. Brown,* 199 Neb. 394, 259 N.W.2d 24 (1977). We cannot say that the award of attorney fees in this case was an abuse of discretion.

The decree of the District Court is affirmed in all respects. Mary Jane is awarded the sum of $1,000 for the services of her attorney in this court.

AFFIRMED.

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THEODORE D. ERIKSEN ET AL., APPELLEES AND CROSS-APPELLANTS, V. BRAD RAY ET AL., APPELLEES, SCHOOL DISTRICT NO. 14 OF BURT COUNTY ET AL., APPELLANTS AND CROSS-APPELLEES.

321 N.W.2d 59

Filed June 25, 1982. No. 44033.

1. **Schools and School Districts.** While the requirements concerning the giving of notice or the holding of a hearing preliminary to the special election conducted in connection with a school reorganization by the election method will be strictly enforced in a direct action instituted before an election, once the election is held, absent a showing of fraud or evidence that electors were prevented from giving a full and free expression of their will at the election, they are merely directory.
2. ———. Where legal voters of a school district involved in a school reorganization by the election method wish to contest the reorganization, after the special election has been held, it must be done by an election contest pursuant to Neb. Rev. Stat. §§ 32-1001 et seq. (Reissue 1978). This is the exclusive method by which such actions must be taken.
3. **Declaratory Judgments.** Where an exclusive remedy is provided, the Uniform Declaratory Judgments Act does not provide an additional remedy. A declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and exclusive statutory remedy.

Appeal from the District Court for Burt County: WALTER G. HUBER, Judge. Reversed and dismissed.

James B. Gessford of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P. C., for appellants School Dist. No. 14 et al.

Bradley D. Holtorf of Sidner, Svoboda, Schilke, Wiseman & Thomson, for appellees Theodore Eriksen et al.

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

KRIVOSHA, C.J.

This appeal grows out of a suit for a declaratory judgment filed by Theodore D. Eriksen and others who are taxpayers and voters owning real property and residing within School District Nos. 14 and 46 of Burt County, Nebraska, to determine the validity of a plan for the reorganization of School District Nos. 14, 17, 43, 46, 48, 52, and 62, all in Burt County, Nebraska. School District Nos. 17, 43, 46, 48, 52, and 62 were Class I school districts, and School District No. 14 was a Class III school district. The method employed for the reorganization was by the election method, pursuant to the provisions of Neb. Rev. Stat. §§ 79-426.01 to 79-426.22 (Reissue 1976). Following trial to the court, over the objection of the members of the Burt County Committee for School District Reorganization, the individual school districts involved, and the school board members of the Oakland-Craig School District, the trial court found that a suit for declaratory judgment was an appropriate method to test the questions raised by the suit. The trial court further held that the plan of reorganization was null and void due to the fact that certain preliminary steps, required to be taken prior to submitting the issue to the electors, which were not taken, were mandatory. We believe that the trial court was in error with regard to its determination concerning the use of a declaratory judgment, and therefore reverse and dismiss the action.

The parties concede that the facts of the case are not substantially in dispute, though they do dispute the legal effect of the facts. The record discloses that a proposal for reorganization was filed in the of-

fice of the Burt County superintendent of schools on July 10, 1980. The county reorganization committee then scheduled a public hearing and meeting on August 4, 1980. Notice of the public hearing was published on July 17, 1980, more than 10 days prior to the hearing, in The Burt County Plaindealer, Oakland Independent and Republican, and Lyons Mirror-Sun. Notice of the public hearing was also posted at the Burt County Courthouse, at all schoolhouses involved, two public places in Oakland, Nebraska, and one public place in Craig.

The county committee held the hearing and meeting. At the meeting the proposal was discussed, and the county committee tentatively agreed upon and approved the plan. After the hearing and meeting the proper officials formally signed the proposed plan and filed it, with its maps and boundaries, with the county superintendent as required by § 79-426.08(2). The county superintendent, however, failed to give notice of the filing of the maps and statement as required by § 79-426.08(3). There is no evidence that anyone was misled by his failure to give notice of the filing.

The proposed plan, as tentatively agreed upon and approved by the county reorganization committee, called for the merger of the Class I School District Nos. 17, 43, 46, 48, 52, and 62 into the Class III School District No. 14. It further provided that School District No. 14 would, prior to the merger, obtain the approval of its voters to issue bonds for a new elementary school, and that the liability for these bonds would remain the responsibility of School District No. 14 as it existed prior to the merger, not to be assumed by the enlarged district. See § 79-426.17. The proposed plan was conditioned upon both approval of the bond election by the voters of School District No. 14 as well as the ultimate approval of the entire plan by the electors of the various districts involved. As required by statute, the plan was then sent to the

state reorganization committee and approved by it on September 5, 1980. See § 79-426.12.

The county committee then scheduled a public meeting for September 8, 1980, at 4 p.m. It posted notice of the meeting on August 28, 1980, on all of the schoolhouses involved and published notice of the meeting in the Oakland Independent on September 4, 1980. At this meeting the committee designated the proposed plan as the final approved plan and set October 14, 1980, as the date at which the plan would be submitted to a vote of all the interested parties as required by law. See §§ 79-426.13 and 79-426.15.

On the evening of September 8, 1980, School District No. 14 held a board meeting and passed a resolution calling for a bond election to be held on October 7, 1980. The question to be presented to the voters was whether district No. 14 should issue $1.95 million in bonds for a new elementary school. The resolution provided that the bonds would not be issued unless the reorganization plan was approved by all the interested groups. Notice of this meeting was published in the Oakland Independent on September 4, 1980. Additionally, various notices of the bond election, sample ballots, and school board proceedings were published in the Oakland Independent. The bond election was held in School District No. 14 on October 7, 1980, and was approved by the electors by a vote of 494 in favor of the bond issue and 389 opposed.

In the meantime, the notices of the reorganization election and sample ballots relating to that election were published. As previously stated, this election was held on October 14, 1980, and resulted in the proposition being approved. The voters in School District Nos. 17, 43, 46, 48, 52, and 62 voted 125 in favor and 111 against, and the voters in School District No. 14 voted 492 in favor and 385 against. Pursuant to statute, the county superintendent entered an order on November 7, 1980, carrying the plan into

effect. § 79-426.18. Thereafter, the appellees filed this action.

The first question we must address is whether an action for a declaratory judgment, pursuant to Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1979), was an appropriate remedy to contest a school reorganization accomplished by the election method. For purposes of examining this question it is critical that one recognize the distinction between effecting a school reorganization by what is commonly referred to as the "petition method" as opposed to effecting a reorganization by the "election method." The differences are important. While in both instances the electors of the affected districts have a voice, their manner of exercising that voice is significantly different. While the ultimate authority for changing the boundaries by either the petition method or the election method rests with the electors of the several districts involved, the effect of their action is quite different. Under the petition method, once a sufficient number of legal voters of each district have signed a petition, the superintendent must then act in accordance with the statute. See Neb. Rev. Stat. § 79-402 (Reissue 1976). Under the petition form of reorganization, the provisions of the statutes are mandatory and jurisdictional and the failure to comply with the requirements set out in the statutes generally causes the action taken by the county superintendent to be void. See *State ex rel. Larson v. Morrison,* 155 Neb. 309, 51 N.W.2d 626 (1952). Likewise, where proper petitions are filed, it is the mandatory duty of the superintendent to hold a hearing and, if the petitions are sufficient, to change the boundaries as requested. See *School Dist. No. 49 v. Kreidler,* 165 Neb. 761, 87 N.W.2d 429 (1958).

On the other hand, under the election method, a plan of reorganization is not effected until it is submitted at a special election to all the electors of the

districts within the county whose boundaries are in any manner changed by the plan of reorganization and approved by a majority of all electors voting within each voting unit included in the proposed plan. § 79-426.15. It is this final special election which causes the reorganization to take place, and requirements regarding the giving of notice and the holding of preliminary hearings prior to the special election, while important, are not jurisdictional.

Under the petition method, absent a valid petition, no jurisdiction vests in the county superintendent to change the boundaries. Under the election method it is the election itself which vests the jurisdiction in the county superintendent to make the changes. While, under the election method, one may bring an appropriate action *before* the special election is held, contesting the holding of the election because of a violation of the statute, it is clear that absent evidence of fraud or evidence that a voter was prevented from expressing his free will at the poll, once the election is held, preliminary requirements concerning the giving of notice, including the giving of the notice of the filing of a plan pursuant to § 79-426.08(3) or the manner in which the election is to be held, are merely directory and not jurisdictional. In *School District No. 49 v. School District No. 65-R,* 159 Neb. 262, 275-76, 66 N.W.2d 561, 570 (1954), we said: " 'The statutory provisions as to the place of holding the election and the manner of changing the voting places are mandatory upon the officers charged with that duty, and will be strictly enforced in a direct action instituted before an election, but after an election such statutory requirements are directory, unless it appears that the failure to hold elections at the place resulted in fraud and prevented the electors from giving a full and free expression of their will at the election, * * *.' " See, also, 26 Am. Jur. 2d *Elections* § 198 (1966). The errors, if any, alleged by appellees in this case were

of the type that made them only directory and not mandatory once the election was held. There is no evidence that any of the parties affected by this election were in any way misled or defrauded by reason of the failure of the superintendent to give notice of the filing of the plan. Nor is there any evidence that any elector was defrauded or misled by reason of there being a failure to perform any other preliminary matter to which appellees objected. Counsel for appellees conceded at oral argument before this court that the appellees in this case were fully aware of all the facts involved in the election but wished to take their chances with the outcome of the election before contesting the reorganization by filing suit.

We believe the more appropriate rule in cases of reorganization by election to be that, while the requirements concerning the giving of notice or the holding of a hearing preliminary to the special election will be strictly enforced in a direct action instituted before an election, once the election is held, absent a showing of fraud or evidence that electors were prevented from giving a full and free expression of their will at the election, they are merely directory. Once we recognize the distinction between reorganization by petition and reorganization by election, it becomes clear that the county school reorganization committee had jurisdiction to hold the special election and the county superintendent had authority to order the reorganization.

Regardless of how appellees may choose to characterize their action in the instant case, it was indeed a suit to contest the special election and as such should have been brought as an election contest as provided in Neb. Rev. Stat. §§ 32-1001 et seq. (Reissue 1978). See *Arends v. Whitten,* 172 Neb. 297, 109 N.W.2d 363 (1961). While there may have been some confusion by our earlier decisions in this matter, we now declare the rule to be that where legal voters of a school district involved in a school re-

organization by the election method wish to contest the reorganization, *after* the special election has been held, it must be done by an election contest pursuant to § 32-1001 et seq. This is the exclusive method by which such actions must be taken. The reasons for such holding should be obvious. There is a need that the issues be quickly resolved. The short periods provided for by the election contest statutes are designed specifically for the purpose of attempting to provide certainty to government and to determine as quickly as possible whether in fact the will of the people is to be carried out or the defects alleged are of such nature as to void the election and the subsequent reorganization. That should be done as quickly as possible.

Disregarding the provisions of statutes regarding an election contest and, instead, instituting an action for declaratory judgment thwarts such a goal and should not be permitted. Such a position is not new to our law and should come as no surprise. In *Murphy v. Holt County Committee of Reorganization,* 181 Neb. 182, 147 N.W.2d 522 (1966), we observed that the purpose of the Uniform Declaratory Judgments Act is to provide a procedure for the speedy determination of issues which would otherwise be delayed to the possible injury of the parties. We created no new cause of action and provided no cumulative remedy. Nor did we intend to permit the avoidance of an election contest where appropriate. That is why, in part, we said in *Scudder v. County of Buffalo,* 170 Neb. 293, 296, 102 N.W.2d 447, 450 (1960): "Where an exclusive remedy is provided, the declaratory judgment act does not provide an additional remedy. A declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and exclusive statutory remedy." The trial court should have determined that the election contest was the exclusive remedy in this case and should have dismissed the action when

requested by appellants. We do so now. The action is reversed and dismissed.

REVERSED AND DISMISSED.

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ATLAS STEEL & WIRE CORPORATION, A CORPORATION, APPELLANT, V. L & M CONSTRUCTION CHEMICALS, INC., A CORPORATION, ET AL., APPELLEES.

321 N.W.2d 64

Filed June 25, 1982. No. 44178.

1. **Judgments: Appeal and Error.** 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.
2. **Judgments.** Where trial is to the court, a general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts.
3. **Judgments: Evidence.** 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.

Appeal from the District Court for Douglas County: THEODORE W. RICHLING, Judge. Affirmed.

Douglas E. Quinn of Thompson, Crounse and Pieper, for appellant.

William M. Homan, for appellee L & M.

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

HASTINGS, J.

This is an action brought by the plaintiff, Atlas Steel & Wire Corporation, to recover an amount allegedly due under an oral contract for the purchase of goods entered into between Atlas and Jack Bolin. L & M Construction Chemicals, Inc., was named as a defendant in the action, along with Bolin, Lawrence

E. Schwietz, and J & L Supply & Steel Company. A jury trial was waived and a trial to the court resulted in a judgment in favor of L & M and against the plaintiff Atlas. It is this judgment only which forms the basis of the appeal by Atlas. The only issue facing the court is whether sufficient evidence existed to hold L & M liable to Atlas for payments due under the contract. We affirm.

J & L Supply was a business entity formed by Bolin and Schwietz under what was loosely called an "oral agreement to make a partnership." Its office was located at 1219 South Gallatin Street, Jackson, Mississippi. According to Schwietz, under the terms of their "oral partnership" Bolin was not empowered to purchase goods on credit without Schwietz's prior approval and he, Schwietz, had not given such approval for the purchase of the goods which formed the subject matter of this lawsuit.

Schwietz was the president of L & M Construction Chemicals, Inc., an Omaha, Nebraska, corporation with its principal and only place of business in Omaha. According to Schwietz, Bolin has no connection with L & M, and L & M had no connection with J & L.

According to the testimony of Alfred Theriot, an agent of Atlas, during January of 1979 he received, in his capacity as Atlas' agent, an order from Bolin for certain goods on a J & L Supply & Steel Company purchase order form. Theriot claimed that he then informed Bolin that the goods would not be sold on credit due to J & L's lack of a credit history. He went on to say that Bolin responded by telling him to contact Schwietz at L & M in Omaha. Upon making such contact and informing Schwietz that the dollar amount of the order was approximately $9,500, Theriot claimed that Schwietz instructed him to ship the goods to Bolin and invoice L & M. As a result of that conversation, Theriot said, the goods were shipped.

The record reveals that in April of 1979, a check for $1,000 was received by Atlas in the mail, contained in a J & L letterhead envelope with the name L & M written over the top of the printing and mailed from Omaha. Mr. Theriot did not say who signed the check or what name was contained on the check itself. Theriot did go on to say that he wrote to Schwietz inquiring about the balance of the account, but received no response. Two phone calls were made to Schwietz by Theriot, according to the testimony of the latter, the first without response, and being told on the second that Schwietz would get back to him. He never did.

According to the testimony of Mr. Schwietz, he recalled receiving only one demand letter from Atlas, which letter he was sure would have been forwarded to Bolin. He also recalled receiving a telephone call from Mr. Theriot in May regarding the sale of these goods, but he advised Theriot at that time that the partnership had been dissolved and that Bolin had assumed full responsibility for all of J & L's merchandise. Mr. Schwietz categorically denied ever talking over the telephone to Mr. Theriot, other than the one call in May, and in corroboration of this statement, he submitted his telephone log which he alleged contained all calls received by him since the first of January of 1979, with the caller's name and an explanation of the subject of the call noted on the log. No other call from Theriot appeared on that log. Mr. Schwietz did admit to having issued the $1,000 check to Atlas on J & L Supply's Jackson, Mississippi, checking account, but claimed that he did so only because Bolin had informed him that he, Bolin, was in a position to sell the merchandise and that he had funds to cover the amount paid.

It should be apparent from this recitation of the record that there was a direct dispute between the only two witnesses who testified as to whether or not there was ever an agreement that L & M was to pur-

chase or would furnish credit for the purchase of the merchandise with which we are here concerned.

As stated in *Aurora Cooperative Elevator Co. v. Larson,* 204 Neb. 755, 758, 285 N.W.2d 498, 500-01 (1979): "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. Where trial is to the court, a general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. . . .

"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."

On the basis of this record, we cannot say that the findings and judgment of the District Court were clearly wrong. Accordingly, we affirm its judgment in this action.

AFFIRMED.

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GEORGE W. HODSON, JR., APPELLANT, V. VERN JOHNSON, APPELLEE.

321 N.W.2d 417

Filed June 25, 1982. No. 44185.

**Small Claims Court: Appeal and Error.** On appeal from the small claims court to the District Court, there is no requirement for the filing of a new petition, nor provision for taking of a default for failure to answer a new petition absent an order from the District Court directing the filing of a new petition and answer thereto.

Appeal from the District Court for Loup County: JAMES R. KELLY, Judge. Affirmed.

George Rhodes, for appellant.

Joseph M. Casson, for appellee.

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

WHITE, J.

This is an action by the plaintiff employee, George W. Hodson, Jr., against defendant employer, Vern Johnson, for wages. Plaintiff filed a complaint in the small claims division of the Loup County Court seeking wages due him for 49 hours of work he performed for the defendant during a particular week at an hourly rate of $3.75 per hour with time and a half for hours worked in excess of 40 hours per week. The defendant filed a counterclaim and setoff in the amount of $818.10, alleging that plaintiff "Exercised negligent work on my time. . . ."

The small claims court found for the plaintiff and entered judgment for $199.50 plus costs. From that adverse decision, the defendant filed a notice of appeal and appeal bond in the small claims court and filed the small claims court transcript in the District Court. The plaintiff thereafter filed a petition in the District Court asking the District Court to affirm the small claims court's findings. On Tuesday, December 16, 1980, the plaintiff, without notice to the defendant, moved in open court for a default judgment. The District Court granted the plaintiff's ex parte motion and affirmed the judgment of the small claims court. On December 23, 1980, the defendant filed an application to set aside the default judgment, along with his answer and counterclaim. After hearing was had on the application and the resistance thereto, the District Court found that the defendant had failed to show that he had a meritorious defense recognized by the law of this state and denied the defendant's application to set aside the default judgment. Thereafter the defendant filed a

motion for new trial. On March 24, 1981, the District Court found that it had abused its discretion in finding that the defendant had failed to show a meritorious defense recognized by the law in this state, vacated its previous order denying the application to set aside the default judgment, and set aside the default judgment. From that ruling, the plaintiff appeals. We affirm.

The method of appeal from an adverse judgment of the small claims court in this case was governed by Neb. Rev. Stat. § 24-527 (Cum. Supp. 1980) and Neb. Rev. Stat. §§ 24-542 to 24-544 (Reissue 1979). The steps necessary to perfect an appeal were (1) the filing of a notice of appeal, and service of the same on the opposition parties or their attorney of record, (2) posting of a cash bond or entering an undertaking to the opposite party, and (3) filing a transcript within 30 days of the entry of judgment. "Filing of the transcript shall constitute filing of the appeal with the district court." § 24-544.

On appeal from the small claims court to the District Court, there is no requirement for the filing of a new petition in the District Court, nor provision for taking of a default for failure to answer a new petition absent an order from the District Court directing the filing of a new petition and an answer thereto. The procedure used by plaintiff appears to be totally unwarranted by the statutes. As the trial court was without authority to enter the default, it follows that it was correct in setting aside the default and setting the matter for trial.

We do not pass on the ruling of the District Court that the answer stated a meritorious defense, as that matter is not properly before us.

AFFIRMED.

CLAYTON D. NOLL, BY DARRELL E. NOLL, HIS ATTORNEY IN FACT AND NEXT FRIEND, APPELLANT, V. VALLEY COUNTY HOSPITAL ET AL., APPELLEES.

321 N.W.2d 66

Filed June 25, 1982. No. 44211.

1. **Judgments: Appeal and Error.** The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong.
2. **Political Subdivisions Tort Claims Act.** An action under the Political Subdivisions Tort Claims Act is similar to a law action in which a jury has been waived and is governed by the same rules.

Appeal from the District Court for Valley County: JAMES R. KELLY, Judge. Affirmed.

Van Steenburg, Brower, Chaloupka, Mullin & Holyoke, and J. Marvin Weems, P.C., for appellant.

Gregory G. Jensen, for appellee County of Valley.

John A. Wagoner, for appellee Valley County Hospital.

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

WHITE, J.

This is an action for damages brought under the Nebraska Political Subdivisions Tort Claims Act on behalf of the plaintiff, Clayton D. Noll, by his attorney in fact and son, Darrell E. Noll, to recover for personal injuries the former sustained when he fell in the Valley County Hospital and nursing home parking lot. The case was tried to the court without a jury as required by Neb. Rev. Stat. § 23-2406 (Reissue 1977). Both defendants moved to dismiss the petition after the close of the plaintiff's evidence. Valley County Hospital's motion was denied and County of Valley's motion was granted. After trial, the District Court found that (1) there was only a possibility that the plaintiff tripped in a hole in the parking lot, (2) the preponderance of the evidence

does not prove that the present condition of Clayton D. Noll was caused by the fall, and (3) there was contributory negligence on behalf of the plaintiff to bar recovery. The court found for the defendant Valley County Hospital. We affirm.

An action under the Political Subdivisions Tort Claims Act is similar to a law action in which a jury has been waived and is governed by the same rules. *Buttner v. Omaha P. P. Dist.,* 193 Neb. 515, 227 N.W.2d 862 (1975).

" 'It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court will review the judgment rendered, will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed [on appeal] unless clearly wrong. * * *

" 'The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong.' " *Buttner v. Omaha P. P. Dist., supra* at 517-18, 227 N.W.2d at 864; *Stauffer v. Wilson,* 182 Neb. 129, 153 N.W.2d 454 (1967).

In determining whether the evidence supports the findings of the trial court, 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. *Crawford v. Ham,* 209 Neb. 802, 311 N.W.2d 896 (1981); *Aurora Cooperative Elevator Co. v. Larson,* 204 Neb. 755, 285 N.W.2d 498 (1979); *Gehrke v. General Theatre Corp.,* 207 Neb. 301, 298 N.W.2d 773 (1980).

The facts viewed most favorably to the successful party are as follows: In February 1974 the plaintiff, Clayton D. Noll, was diagnosed as having Parkinson's disease. He suffered from the normal symp-

toms of this disease, which include a shuffling gait, a stooped posture, trembling hands, and retropulsion, which is falling backwards. After his wife died in 1976 it was decided that Clayton Noll should enter the Valley County nursing home as he could not take care of himself. He entered the nursing home in December 1976. Between December 2, 1976, and April 30, 1978, Clayton was allowed to walk unassisted around the nursing home and outside the nursing home. During this period he experienced nine reported falls. Five of those falls occurred within the last 2 months prior to April 30, 1978. On April 30, 1978, Clayton fell in the Valley County nursing home parking lot and broke his right hip. At the time of the fall, he was 85 years old and was still suffering from Parkinson's disease and arteriosclerosis. Since the fall Clayton has undergone a hip replacement and is classified as a total invalid, unable to walk unassisted as he did before and unable to feed or clothe himself.

This action was brought by Clayton's son, Darrell Noll, to recover for the personal injuries Clayton sustained when he fell. The petition alleges that Clayton tripped in a hole in the Valley County nursing home parking lot. He also alleges that the Valley County nursing home was negligent in failing to properly maintain its parking lot.

The trial court found that there is only a possibility that the plaintiff had tripped in the hole. We find sufficient evidence in the record to support the trial court's finding that the plaintiff had failed to prove that he had tripped in the hole and that his injuries were proximately caused by tripping in the hole. There was testimony by several witnesses as to Clayton's walking ability prior to the fall. One witness said that she held her breath every time Clayton walked. There was medical evidence with regard to Clayton's condition and ability to walk, as well as the symptoms of Parkinson's disease with

which he was afflicted. Those witnesses that came to his aid after he fell said that they found him in a sitting position with his foot resting in the hole. None of the witnesses knew for sure whether his foot had come to rest in the hole prior to the fall or after the fall. The trial court's finding was amply supported by the evidence and was not clearly wrong.

In view of our finding, it is unnecessary to discuss the plaintiff's other assignments of error as they will not affect the outcome of this appeal.

AFFIRMED.

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TIMOTHY R. HAUCK, APPELLEE, V. MICHAEL SAMUS ET AL., APPELLANTS.

321 N.W.2d 68

Filed June 25, 1982. No. 44251.

**Vendor and Vendee: Fraud.** Generally, a vendor of real property is not guilty of fraud for a failure to disclose material, latent defects which are unknown to him, but where the evidence shows he was aware of circumstances from which a reasonable inference could be drawn that he either knew or should have been aware of the fact that latent, defective conditions existed, he is liable to the purchaser.

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

John F. Akin of Pierson, Ackerman, Fitchett & Akin, for appellants.

John F. Recknor of Barlow, Johnson, DeMars & Flodman, for appellee.

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

PER CURIAM.

This was an action for damages for false representations arising out of the sale of a residence property

to the plaintiff, Timothy R. Hauck. The property in question was located at 1817 Benton Street in Lincoln, Nebraska.

The residence, which was completed in January 1977, was built by the defendants Michael Samus and Vonnie Samus who operated under the name of Trendsetter Homes. Trendsetter Homes, Inc., was organized in March 1978 and was the owner of the property at the time it was sold to the plaintiff.

The property was purchased by Leo R. Nissen on April 1, 1977. Commencing in June 1977 a number of problems developed with water in the basement, "shifting in the house, cracks, doors wouldn't close, things like that." In 1978 the seller repurchased the house from Nissen. A number of improvements were then made in an attempt to correct the water problem.

The property was listed for sale with the Multiple Listing Service with Vonnie Samus shown as the listing agent. In August 1978 John Edward McVay, a salesman employed by Equity Homes Realty, showed the property to the plaintiff. The plaintiff also inspected the property with his stepfather, Don Dunkel, who was in the construction business.

The plaintiff and Dunkel noticed a small puddle of water on the floor in the basement. At the plaintiff's request, McVay called Vonnie Samus and inquired concerning the source of the water. According to McVay, Vonnie Samus said the water had come from a pipe leading to a water softener which had been removed by Nissen and there were no other water problems. The statements of Vonnie Samus were related to the plaintiff by McVay.

The plaintiff signed a written offer to purchase, which was submitted to the owner. The owner submitted a counteroffer with an addendum to the contract which later was signed by the plaintiff and Michael Samuskewicz (Samus). Paragraph 4 of the addendum provided: "Being that the home is pre-

owned and one and a half (1½) years old seller can not guarantee the home." A price of $46,500 was agreed upon and the acceptance of the offer to purchase was signed by Mr. and Mrs. Samuskewicz (Samus).

After the plaintiff moved into the property, he had difficulty with water coming through the basement walls and the west wall of the garage shifting. When the driveway and garage floor were removed, it was discovered that a large crack had developed in the foundation wall of the garage on the north side near the northwest corner of the garage. The crack in the garage foundation was covered by the garage floor and driveway and could not be seen until the floor and driveway had been removed.

This action was commenced October 1, 1979. The jury returned a verdict for the plaintiff in the amount of $13,858. The defendants have appealed and contend that the verdict and judgment are not sustained by the evidence to the extent that the plaintiff recovered damages for the cost of repairing the garage foundation. The defendants allege that $3,400 represented the cost of repairing the basement and $10,458 represented the cost of repairing the garage foundation.

Before the plaintiff could recover in this action he was required to prove that the defendants had made a false representation, knowing that it was false, or making it recklessly without any knowledge of its truth and as a positive assertion, with the intention that it be acted upon, that it was acted upon, and that injury resulted. *Moser v. Jeffrey,* 194 Neb. 132, 231 N.W.2d 106 (1975). Specifically, the defendants argue that there was no evidence from which the jury could find that the defendants knew of a crack in the foundation wall of the garage or recklessly made a statement as to its condition.

There is no evidence of any statement by the defendants, or their agent McVay, relating directly to

the foundation wall of the garage. Although there is some conflict in the evidence, the jury could find that Mrs. Samus told McVay, who in turn told the plaintiff, there were no other water problems with the property. The plaintiff then decided to purchase the property in reliance upon this statement.

In view of the severe water problems that had occurred while Nissen owned the property, the jury could infer the defendants had no basis upon which to state that no water problems existed. Although a vendor of real property is not guilty of fraud for a failure to disclose material, latent defects which are unknown to him, where the evidence shows he was aware of circumstances from which a reasonable inference could be drawn that he either knew or should have been aware of the fact that latent, defective conditions existed, he is liable to the purchaser. *Dargue v. Chaput,* 166 Neb. 69, 88 N.W.2d 148 (1958).

We conclude that the evidence supports the verdict and the judgment must be affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

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NORMAN DEAN PARDE, APPELLEE, V. ELEANOR ELAINE PARDE, APPELLANT.

321 N.W.2d 70

Filed June 25, 1982. No. 44480.

Appeal from the District Court for Lancaster County: ROBERT T. FINN, Judge. Affirmed.

Miles W. Johnston, Jr., and Johnston, Barber & Wherry, for appellant.

Robert M. O'Gara of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

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NEBRASKA FEDERAL SAVINGS AND LOAN ASSOCIATION, APPELLEE, V. ROBERT L. PATTERSON ET AL., APPELLANTS.

321 N.W.2d 71

Filed June 25, 1982. No. 44528.

**Judicial Sales: Appeal and Error.** An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

Quintin S. Hughes, for appellants.

Morsman, Fike, Davis & Schleich, P.C., for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The defendant landowners appeal from the order of the District Court confirming the sale of the property upon foreclosure of a mortgage to the plaintiff

mortgagee. The decree of foreclosure, entered December 2, 1980, found there was then due the plaintiff $34,008.44. Upon the stipulation of the parties, execution of the judgment was stayed as provided in Neb. Rev. Stat. § 25-1506 (Reissue 1979).

An order of sale was issued on March 3, 1981, and the property was sold to the plaintiff for $29,000 on April 6, 1981. An objection to confirmation was filed on April 24, 1981, alleging that the bid did not represent the fair value of the property and that another sale would produce a larger bid. At the hearing on the motion to confirm on June 2, 1981, the plaintiff waived any right to a deficiency judgment by increasing its bid to the amount due under the decree, and the sale was confirmed.

The principal evidence in support of the objection to confirmation was the testimony of the defendant Margaret A. Patterson that the value of the property was at least $55,000 to $60,000. There was no satisfactory evidence that the property was not sold for its fair value, under the circumstances and conditions of the sale, or that a subsequent sale would realize a greater amount. See Neb. Rev. Stat. § 25-1531 (Reissue 1979).

An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale. *Central Savings Bank v. First Cadco Corp.,* 186 Neb. 112, 181 N.W.2d 261 (1970).

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE A. BEANS, APPELLANT.

321 N.W.2d 72

Filed June 25, 1982. No. 81-622.

1. **Pleas: Mental Competency.** The question of whether or not a defendant is competent to stand trial or to enter a plea is one of fact to be determined by the trial court, and the means employed in resolving the question are discretionary with the trial court.
2. **Pleas.** The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
3. **Mental Competency: Appeal and Error.** The determination of the finder of fact on the issue of competency will not be disturbed unless there is insufficient evidence to support the findings. The test of mental capacity to plead or stand trial is the same.
4. **Effectiveness of Counsel.** The present test of the effective assistance of counsel is that counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.
5. _____. Prejudice is an essential element of a claim of ineffective assistance of counsel and a defendant must show that he was prejudiced in the defense of the case by the actions or inactions of his counsel.
6. **Post Conviction: Appeal and Error.** A person seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

John T. Tarrell, and David B. Downing, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

MCCOWN, J.

This is a post conviction case. The defendant's motion to vacate a conviction and sentence of life imprisonment for first degree murder was denied after hearing.

The 41-year-old defendant shot and killed his wife on April 29, 1976, in their home in Kearney, Nebraska. The defendant and his wife had been married for 18 years, but were in the process of a divorce action at the time. There had been several altercations between the defendant and his wife prior to the shooting and the defendant had been cited twice and jailed once for civil contempt in the divorce proceeding.

The defendant and his wife had each purchased a gun prior to the incident of April 29, 1976. On the evening of April 29, 1976, the defendant and his wife, two of their four children, a nephew of the wife, and a friend of hers were present in the family home where the wife was living. The defendant had placed a loaded gun in his waistband before entering the house. His wife had her gun in her purse. The two became involved in a heated argument. The defendant's wife reached into her purse for her gun and the defendant pulled his gun and shot into the wall to demonstrate that it was loaded. A short time later defendant's wife again reached into her purse and was holding her gun in her hand. The defendant tried to knock her gun aside and then shot his wife with his own gun, wounding her fatally.

The defendant was arrested that evening and appeared without an attorney in the county court of Buffalo County the next day and entered a plea of not guilty. The court appointed Gary L. Giese of the Buffalo County public defender's office to represent the defendant. Giese met with the defendant for approximately an hour and a half shortly after learning of the appointment. Giese explained to the defendant the charge, his rights, and possible defenses, including insanity, capacity, intoxication, and self-defense. Giese testified at the post conviction hearing that the defendant was lucid and communicative, and that the defendant asserted that he did not wish to do anything other than plead guilty to first

degree murder. The defendant maintained that position thereafter throughout the entire original criminal proceeding.

On May 4, 1976, Giese arranged for a Kearney psychiatrist to talk with the defendant, and discussed an examination at the Lincoln Regional Center. On May 5, 1976, hearing was held in the District Court to consider defendant's motion for a hearing to determine competency, which had been filed by Giese. On May 6, 1976, the District Court granted the motion for a hearing to determine competency and ordered that a psychiatric evaluation be made of the defendant at the Lincoln Regional Center for a period not to exceed 60 days. The defendant was admitted to the Regional Center on May 7, 1976, and on July 12, 1976, counsel stipulated to the defendant's continued treatment for up to 90 days at the Regional Center.

During the early part of May 1976 Giese reviewed the police reports and statements of the investigating officers and the witnesses at the scene of the murder, and also discussed and reviewed the matter with the defendant. He did not personally interview the eyewitnesses at that time because the reports and the defendant's account corresponded exactly. He testified that if, in fact, the case was to be tried, as he believed it should be, he would have interviewed or deposed all the witnesses prior to trial.

On August 18, 1976, the defendant was arraigned. Giese had met with the defendant on the previous day, but the defendant was represented at the arraignment by a different representative of the public defender's office because Giese was out of town. At the arraignment the defendant pleaded guilty to the charge of first degree murder. The court reviewed the defendant's constitutional rights with the defendant personally, inquired as to whether the defendant still desired to plead guilty, and the defendant again stated that he did. The court refused to accept the

guilty plea until the court could determine the defendant's mental competency to make the plea and committed the defendant to the Department of Corrections for further evaluation for the purpose of determining his competency to enter the plea of guilty as charged.

On October 6, 1976, the court held a hearing on its own motion to determine the defendant's competency. Giese introduced into evidence a letter report dated September 28, 1976, addressed to the District Court, from Dr. Woytassek, a psychiatrist at the Lincoln Regional Center, stating that the defendant was not at that time mentally capable of standing trial or aiding in his own defense, but expressing the belief that he would improve and become capable of standing trial within 3 to 6 months. At the hearing Giese advised the court that the defendant was dissatisfied with the opinion that the defendant was incompetent and had requested that an evaluation by a second psychiatrist be obtained. The court refused to appoint a second psychiatrist.

The defendant testified that Giese deserted him at the Regional Center and up until December 1976. Giese testified that he met with the defendant at the Regional Center three or four times, trying to convince him to change his mind about pleading guilty to first degree murder, and that he emphasized the importance of a defense, possibly self-defense. He also testified that he met with the defendant before each hearing that took place and that he also attempted to persuade the defendant to plead not guilty rather than guilty.

Giese testified that he discussed the possibility of a plea bargain and pleading guilty to a lesser-included offense, both with the defendant and with the prosecutor, but neither was interested. The defendant rejected the suggestion and continued to insist on pleading guilty to first degree murder. The prosecutor testified that he would not have changed

the first degree murder charge.

A further competency hearing was held on December 23, 1976. The prosecution introduced another letter from Dr. Woytassek to the court dated December 8, 1976, stating that the Lincoln Regional Center team, which consisted of two psychiatrists and two psychologists, found that defendant was then capable of standing trial and cooperating with his attorney. Giese objected to a declaration of the defendant's competence on the basis that the defendant was not willing to participate or cooperate in his own defense. The court determined that the defendant was then competent and fixed the arraignment for December 27, 1976.

At the arraignment hearing the District Court reviewed all his constitutional rights with the defendant personally. In answer to questioning by the court the defendant also acknowledged that he had discussed with Giese the nature of the charge, the possible penalties, possible defenses, and evidence. The defendant then pleaded guilty to first degree murder. Giese informed the court that defendant's plea of guilty was made against the advice of his counsel. The arraignment hearing was continued until January 4, 1977, as to the factual basis for the charge.

At the hearing on January 4, 1977, the prosecution introduced evidence substantially reflecting the evidence of the murder detailed previously. Giese informed the court that the defendant had consistently refused to cooperate with his attorney, and had no desire to defend himself in the matter. The District Court then found that the defendant's plea of guilty was voluntarily, knowingly, and intelligently made, and that there was a factual basis to support the charge. The court thereupon accepted the plea of guilty and on January 20, 1977, sentenced the defendant to life imprisonment.

Immediately following sentencing Giese discussed

with the defendant the possibility of filing a motion for a new trial and the appeal process and the times involved. The defendant specifically refused to allow Giese to file a motion for new trial or appeal, and signed a waiver absolving the public defender's office from any responsibility in prosecuting the appeal. The waiver was filed with the court.

On direct appeal by other counsel this court held that the defendant was precluded from raising the issues alleged as error because of a failure to file a motion for new trial, and affirmed the conviction and sentence. *State v. Beans,* 199 Neb. 807, 261 N.W.2d 749 (1978).

On December 16, 1980, the defendant filed his motion to vacate conviction and sentence under the Nebraska Post Conviction Act. On May 27, 1981, following an evidentiary hearing, the District Court again found that the guilty plea of the defendant was made voluntarily, knowingly, and intelligently, and that there was a factual basis to support the plea. The court also found that the evidence was sufficient to establish the mental competency of the defendant to plead or to stand trial. The court specifically found that Giese advised the defendant to plead not guilty and objected to the entry of defendant's guilty plea and that defendant refused to cooperate with his counsel. The court also found that Giese discussed with the defendant possible defenses, including the question of premeditation, the element of intent to kill or to do bodily harm, and the possible defense of self-defense, and that the investigation made by counsel was adequate under the circumstances of the case. The court determined that the defendant had failed to establish his allegations and, therefore, denied defendant's motion to vacate the conviction and sentence. This appeal followed.

The defendant contends that the court erred in finding that he was mentally competent to enter the plea of guilty and in finding that his guilty plea was

a knowing, voluntary, and intelligent choice among the alternative courses of action available. Defendant also contends that he was denied the effective assistance of counsel. That claim rests primarily upon the allegation that defense counsel failed to make sufficient investigation of the facts of the homicide or to interview witnesses personally, failed to challenge written reports, failed to secure a second evaluation of the mental competence of the defendant, and permitted the defendant to plead guilty without an attempt at a plea bargain.

The question of whether or not a defendant is competent to stand trial or to enter a plea is one of fact to be determined by the trial court, and the means employed in resolving the question are discretionary with the trial court. *Marteney v. State,* 210 Neb. 172, 313 N.W.2d 449 (1981).

The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *State v. Shepard,* 208 Neb. 188, 302 N.W.2d 703 (1981).

In the present case the same psychiatrists and psychologists who had earlier found the defendant to be incompetent to stand trial found that the defendant was competent prior to the hearing in December 1976. There was not then or now any testimony in the record by any qualified witness that the defendant was not competent to plead or stand trial in December 1976 or January 1977. The only evidence offered by the defendant at the post conviction hearing was the testimony of a psychologist who had examined some of the Regional Center's records as to the defendant. He testified that, in his opinion, the procedures used to determine the defendant's mental competence, as reflected in those reports, were inadequate. The psychologist had not examined the defendant and admitted that the records he had examined did not include all records in the Regional Center.

The determination of the finder of fact on the issue of competency will not be disturbed unless there is insufficient evidence to support the findings. The test of mental capacity to plead or stand trial is the same. *State v. Quarrels,* 211 Neb. 204, 318 N.W.2d 76 (1982). In the present case there is ample evidence in the record to support the trial court's finding that the defendant was mentally competent to plead and that his plea was voluntary.

The defendant's basic complaint as to the ineffectiveness of counsel is based on the ground that he did not conduct a prompt investigation of the circumstances of the crime and did not personally interview the witnesses before the guilty plea was entered. The defendant relies upon ABA Standards for Criminal Justice with respect to the duty to investigate.

The evidence shows, however, that the investigation defense counsel had made had already persuaded him that the defendant should not plead guilty to a first degree murder charge. The record establishes without any doubt that the defendant himself consistently insisted that he wanted to plead guilty to first degree murder and he would not consider other alternatives. Defense counsel attempted to persuade the defendant to plead not guilty and go to trial, or to consider a plea bargain and plead guilty to a lesser-included offense. As the trial court found in this post conviction hearing, defense counsel advised the defendant to enter his plea of not guilty to the first degree murder charge and objected to the entry of the guilty plea by the defendant when it was made. Under the circumstances reflected by this record, a complete and thorough investigation by the defendant's counsel prior to the entry of the defendant's guilty plea would not have changed the result of the arraignment, nor would it have altered the advice or the course of action which counsel took. As the trial court found: "The Defend-

ant cannot now complain that the Court-appointed attorney permitted him to enter a plea of guilty when the evidence shows that the Defendant's attorney did in fact oppose the entry of the guilty plea and did encourage the Defendant to enter his plea of not guilty."

The present test of the effective assistance of counsel is that counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client. Prejudice is an essential element of a claim of ineffective assistance of counsel and a defendant must show that he was prejudiced in the defense of the case by the actions or inactions of his counsel. *State v. Lang,* 202 Neb. 9, 272 N.W.2d 775 (1978).

A person seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous. *State v. Rust,* 208 Neb. 320, 303 N.W.2d 490 (1981).

In the present case the evidence fails to establish a basis for relief and fails to establish that defendant was prejudiced in the defense of his case by the action or inaction of his counsel. The evidence reflects that the defendant had the effective assistance of counsel who consistently attempted to protect the interests of his client. Any prejudice to the defendant in the defense of his case came from his own actions in refusing to follow the advice of his counsel. The findings of the District Court are not clearly erroneous.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

SNYDER INDUSTRIES, INC., APPELLANT, V. WESLEY V. OTTO AND JOHN R. HANLON, COMMISSIONER OF LABOR OF THE STATE OF NEBRASKA, APPELLEES.

321 N.W.2d 77

Filed June 25, 1982. No. 81-667.

1. **Employment Security Law.** Under the Nebraska Employment Security Law at Neb. Rev. Stat. § 48-628 (Reissue 1978), a discharged employee is totally disqualified for unemployment benefits if such employee was guilty of misconduct connected with the working relationship which was gross, flagrant, and willful.
2. _____. Misconduct under the Nebraska Employment Security Law requires a deliberate, willful, or wanton disregard of an employer's interest or of the standards of behavior which the employer has a right to expect of employees.
3. _____. In order for the violation of an employment rule laid down by the employer to constitute misconduct under the Nebraska Employment Security Law, such rule must be a reasonable one, which means that it must bear a reasonable relationship to the employer's interest.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Johnston, Barber & Wherry, for appellant.

No appearance for appellee Otto.

Pamela A. Mattson, for appellee Hanlon.

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

HASTINGS, J.

The appellee Wesley V. Otto was employed by the appellant, Snyder Industries, Inc., from October 29, 1973, to August 5, 1980. Otto was terminated from his employment on this latter date for failing to comply with a policy established by management, which prohibited current employees from associating with former employees. Otto filed a claim for unemployment compensation benefits under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978). A claims deputy allowed the

claim. On appeal by Snyder to the Nebraska Appeal Tribunal, the decision of the claims deputy was affirmed. In turn, the District Court affirmed the action of the Nebraska Appeal Tribunal. Snyder has appealed to this court, alleging generally that Otto was not entitled to unemployment benefits because his discharge arose out of a knowing, deliberate, and willful violation of the company's rules. We affirm.

According to the testimony of Harvey Schwartz, the personnel manager at Snyder, Otto had been employed as credit and transportation manager. Larry Snyder, the president of the appellant company, testified that Snyder Industries had established a policy prohibiting current employees from associating with ex-employees, especially those persons employed by competitors. This policy had been verbally communicated to the different employees during staff meetings. Snyder testified further that numerous leaks of information from the business to competitors had developed in 1979, and that one of the persons to whom management believed the information had been leaked was a former employee with whom Otto had been associating. However, he did not say that Mr. Otto was one of the suspected leaks.

On August 5, 1980, Mr. Snyder confronted Otto in the latter's office, reminded him of the policy, and informed Otto that he understood that Otto had gone on a vacation with an ex-employee of Snyder's who was now in competition with the company and with whom the company currently was engaged in litigation. Otto admitted that he had in fact taken such a vacation, and in answering a query from Snyder to the effect that did he not think he should be a little more discriminating in the people with whom he associated, Otto in effect told Snyder that he could not tell him who his friends were to be. The upshot of the conversation was that Otto was fired right then and there, and he picked up his personal things and left.

In explaining why the policy was never reduced to writing, Mr. Snyder said that it was a bad situation because the employees became very defensive when told that they could not bowl with an ex-employee or should not associate with an ex-employee who is a competitor. However, he repeated under examination by the hearing examiner that he had absolutely no knowledge of Mr. Otto ever having leaked information to competitors.

Mr. Otto also testified at the hearing before the Nebraska Appeal Tribunal. He admitted that he had knowledge of the company policy. He denied categorically that he had ever dispersed any company information to the ex-employee in question. Otto stated he had known this particular man for 13 years, and, as a matter of fact, it was he who had been instrumental in getting Otto to come to work for Snyder. The particular vacation that the two of them took together had originally been planned from 5 years earlier, but because of an injury to one of Otto's children, it was not taken until 1980. Otto testified that one of the things he and the ex-employee had agreed upon following the latter's departure from Snyder's employment was that there would be no shoptalk between the two. Besides professing absolute loyalty to Snyder, Otto also testified that he did not possess a great amount of knowledge concerning the manufacturing process due to his position as manager of credit and transportation.

There is no question raised on this appeal as to the authority of Snyder to discharge an employee. The only thing which we must decide is whether this can be done without the employee becoming eligible for unemployment compensation benefits. Section 48-628 provides in part that an employee shall be totally disqualified for benefits if the employee discharged was guilty of misconduct connected with his work which was "gross, flagrant, and willful."

The appellee Commissioner of Labor argues that

in order for an employee to become ineligible for benefits because of a violation of a work rule, the rule must be reasonable. Although admitting that this precise issue is one of first impression in this jurisdiction, the commissioner bases his argument on the case of *Bristol v. Hanlon,* 210 Neb. 37, 312 N.W.2d 694 (1981). Therein, we defined the term "misconduct" as requiring a "deliberate, willful, or wanton disregard of an *employer's interest* or of the standards of *behavior which the employer has a right to expect of his employees* . . . ." (Emphasis supplied.) *Id.* at 41, 312 N.W.2d at 696.

The Wisconsin court has dealt directly with the rule advocated by the commissioner. In *Gregory v. Anderson,* 14 Wis. 2d 130, 109 N.W.2d 675 (1961), the plaintiff was engaged in the business of servicing vending machines in taverns. His automobile liability insurance had been canceled because of the nature of his business. However, upon instigating and enforcing a rule which prohibited the employees from drinking alcoholic beverages on or off the job, and which was agreed to in writing by Anderson, Gregory was enabled to obtain the necessary insurance. Anderson was arrested for drunken driving some 6 months later. However, with the approval of the insurance company, Anderson was given another chance. Anderson was fired 1 year later after his involvement in an accident in which he admitted that he had been drinking.

In denying Anderson benefits because of misconduct, the court pointed out that the rule itself was probably the decisive factor in inducing the insurance company to provide coverage, and that Anderson was aware of the purpose of the rule. The court said: "In order for violation of a rule laid down by the employer to constitute misconduct under such statute, such rule must be a reasonable one. When such rule relates to conduct of the employee during off-duty hours, it must bear a reasonable relation-

ship to the employer's interests in order to be reasonable." *Id.* at 137, 109 N.W.2d at 679.

On an appeal under the Employment Security Law, we must consider the cause de novo on the record, which means that it is our duty to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof. *Glionna v. Chizek,* 204 Neb. 37, 281 N.W.2d 220 (1979).

If, in fact, Snyder's production secrets were being obtained by competitors, it would be more logical to believe that such was being accomplished by the hiring away of Snyder's employees rather than through the association of current employees with former employees. The rule with which we are here concerned would not prevent such practices. Furthermore, the basis for the rule involved loses all sense of reason when one substitutes husband and wife, or father and son, for the two friends involved in the relationship forbidden here.

We do not believe that a rule which forbids *all* contact between friends and acquaintances in the interest of preventing "leaks" of production secrets simply on the basis that one or the other is no longer an employee of the company bears a reasonable relationship to the employer's interest. Therefore, one who is discharged for violating such an unreasonable rule is not guilty of "misconduct" as that term is used in the Nebraska Employment Security Law. Accordingly, the judgment of the District Court is affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. LEO J. KELLY, APPELLANT.

321 N.W.2d 80

Filed June 25, 1982. No. 81-796.

1. **Courts: Records.** The municipal courts are courts of record, and transcripts of their records, duly certified, are evidence of the facts contained therein.
2. _____: _____. Such certified records may be used to prove a judgment of conviction.
3. _____: _____. Ordinarily such a certified record imports absolute verity absent proof that the same is incorrect.
4. **Records: Prior Convictions.** An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.
5. **Prior Convictions.** The validity of former misdemeanor convictions cannot be collaterally attacked in a proceeding for additional punishment under the repeater statute on a subsequent conviction, for the reason that the former convictions are valid until reversed.

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

Dennis R. Keefe, Lancaster County Public Defender, and Jerry Soucie, for appellant.

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

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

CAPORALE, J.

The defendant-appellant, Leo J. Kelly, was charged with the offense of operating a motor vehicle while under the influence of alcoholic liquor, third offense. He was found guilty by a jury, and following the District Court's determination that this was his third offense, Kelly was sentenced to a term of 1 year in an institution under the jurisdiction of the Nebraska Department of Correctional Services, ordered to pay the costs of this action, and ordered

not to drive a motor vehicle for 1 year from and after final discharge or confinement adjudged, whichever is later. He has appealed to this court challenging the validity of a prior misdemeanor conviction used to enhance his penalty, on the ground that the record of that conviction (1) fails to disclose that he was present at the time the guilty plea was entered, (2) fails to identify the attorney who entered the plea and fails to show he was authorized to do so, (3) fails to disclose a factual basis for the plea, (4) fails to show that the guilty plea was entered voluntarily, and (5) that the evidence was not sufficient to sustain the trial court's finding that he had twice been previously convicted of driving while under the influence of alcoholic liquor.

Neb. Rev. Stat. § 39-669.07 (Reissue 1978) provides in part: "It shall be unlawful for any person to operate or be in the actual physical custody of any motor vehicle while under the influence of alcoholic liquor . . . . (1) If such conviction is for a first offense, such person shall be guilty of a Class IIIA misdemeanor . . . (2) if such conviction is for a second offense such person shall be guilty of a Class III misdemeanor . . . and (3) if such conviction is for a third offense, or subsequent offense thereafter, such person shall be guilty of a Class IV felony . . . ."

The evidence admitted at the hearing consists of two certified copies of prior convictions of defendant for driving while intoxicated. The first exhibit, not challenged by defendant on appeal, consists of a third offense DWI charge on January 2, 1975. The record reflects that Kelly pled guilty to the charge and was subsequently placed on probation for a period of 3 years. Exhibit 2 consists of defendant's May 25, 1973, conviction in the Lincoln Municipal Court on a driving while intoxicated offense. He was sentenced to 30 days in jail and ordered not to drive any motor vehicle for a period of 6 months.

We determine that the allegations of error raised

by the defendant are not meritorious. Defendant does not challenge the authenticity of the certified records admitted by the trial court; rather, his objection raises a collateral attack upon the judgment rendered in the municipal court. In *State v. Voight,* 206 Neb. 829, 831-32, 295 N.W.2d 112, 114 (1980), this court stated: "The municipal courts are courts of record, Neb. Rev. Stat. § 26-101 (Reissue 1979), and transcripts of their records, duly certified, are evidence of the facts stated therein, Neb. Rev. Stat. §§ 26-110, 27-902, 27-1005 (Reissue 1979). Such certified records may be used to prove a judgment of conviction. See *State v. Orosco,* [199 Neb. 532, 260 N.W.2d 303 (1977)]. Ordinarily, such a certified record imports absolute verity absent proof that the same is incorrect. See *State v. Morford,* 192 Neb. 412, 222 N.W.2d 117 (1974)." See, also, *State v. Marlenee,* 199 Neb. 543, 259 N.W. 923 (1977), in which we held that an authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.

Furthermore, in *State v. Voight, supra,* we cited the rule that the validity of former misdemeanor convictions cannot be collaterally attacked in a proceeding for additional punishment under the repeater statute on a subsequent conviction, for the reason that the former convictions are valid until reversed. Under § 39-669.07, where proof has been made of defendant's conviction of a prior misdemeanor violation of that statute, the defendant cannot raise a collateral attack upon that conviction.

For these reasons we conclude that the instant appeal is frivolous and the decision of the trial court must be affirmed.

AFFIRMED.

RICHARD LOVE, APPELLANT, V. CINDY LOVE, APPELLEE.
321 N.W.2d 82

Filed June 25, 1982. No. 81-864.

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

Richard H. Osborne, for appellant.

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellee.

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

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. DAVID W. LANDERS, APPELLANT.
321 N.W.2d 418

Filed June 25, 1982. No. 81-878.

1. **Post Conviction.** The history of post conviction relief in this state has now made it amply clear that one is not entitled to post conviction relief merely on his own bald assertions or because he believes that he did not enjoy a perfect trial.
2. **Post Conviction: Proof.** In a post conviction relief proceeding the burden of proof is upon the movant to establish a basis for the relief, and where such a burden is not met a denial of that requested relief is required.
3. **Post Conviction: Effectiveness of Counsel: Proof.** In post conviction relief cases the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence.
4. **Effectiveness of Counsel: Proof.** Where one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced one.

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

David W. Landers, pro se.

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

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

KRIVOSHA, C.J.

The appellant, David W. Landers (Landers), appeals from an order entered by the District Court for Douglas County, Nebraska, denying Landers' request for post conviction relief pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1979). We affirm.

Landers was initially charged in a three-count information. Count I charged him with robbery, count II charged him with use of a firearm in the commission of a felony, and count III charged him with shooting with intent to kill, wound, or maim. Following a trial, the jury found him guilty of all three counts and the trial court sentenced him on count I to imprisonment for a period of not less than 15 nor more than 50 years, on count II to imprisonment for a term of not less than 3 nor more than 10 years, the sentence to run consecutive to the sentence in count I, and on count III to a term of imprisonment of not less than 15 nor more than 50 years, said sentence to run concurrently with the sentence in count I.

Landers did not file a direct appeal, but did thereafter file a petition for post conviction relief, maintaining, in essence, that he had received ineffective assistance of counsel. In particular, he maintained that his counsel failed to pursue a defense of not guilty by reason of insanity. The trial court held such an evidentiary hearing in the post conviction action as desired by Landers and, following the evi-

dentiary hearing, found that Landers had failed to show any ineffective assistance of counsel and that "the evidence at the trial and at the hearing on [the application for post conviction relief] clearly convinces this Court that there was no evidence available to defense counsel or readily discoverable by defense counsel that would justify defending on the grounds of insanity, which is the primary claim of the defendant." Accordingly, the trial court dismissed the petition for post conviction relief.

The history of post conviction relief in this state has now made it amply clear that one is not entitled to post conviction relief merely on his own bald assertions or because he believes that he did not enjoy a perfect trial. We have frequently held that in a post conviction relief proceeding the burden of proof is upon the movant to establish a basis for the relief, and where such a burden is not met a denial of that requested relief is required. See, *State v. Holloman,* 209 Neb. 828, 311 N.W.2d 914 (1981); *State v. Pankey,* 208 Neb. 377, 303 N.W.2d 305 (1981). Furthermore, we have frequently held in post conviction relief cases that the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. See *State v. Kelly,* 190 Neb. 41, 205 N.W.2d 646 (1973). And, finally, we have said where one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced one. See, *State v. Colgrove,* 207 Neb. 496, 299 N.W.2d 753 (1980); *State v. Harlan,* 205 Neb. 676, 289 N.W.2d 531 (1980); *State v. Holtan,* 205 Neb. 314, 287 N.W.2d 671 (1980). The record in this case, such as it is, fails to disclose how trial counsel failed to act in a reasonably competent manner in regard to the insanity defense. Landers presented no evidence in the post conviction hearing that any such insanity defense existed or how the failure to introduce such a defense at the trial on the merits prejudiced him. The depositions of both his

court-appointed counsel and a psychiatrist employed to examine Landers before trial, introduced at the post conviction hearing, amply disclose that trial counsel made reasonable efforts to obtain evidence concerning Landers' criminal insanity but that no such evidence existed.

In *State v. Holtan, supra* at 321, 287 N.W.2d at 676, we said: "[T]he defendant maintains that counsel was inadequate in that he did not subpoena witnesses from the state of Washington who would have testified as to his good character. The record, however, fails to disclose what, if anything, the witnesses would have testified to had they been called. What they might have testified to at best was the defendant's hope and wish. In the absence of evidence to disclose what the witnesses would have testified to, we are unable to establish any prejudice and therefore unable to establish any error." Likewise, in *State v. Kelly, supra,* where the defendant claimed that his attorney had failed to interview and obtain witnesses to establish a defense based on consent, we said at 44, 205 N.W.2d at 648: "The defendant utterly failed to establish this allegation. None of the four witnesses identified by him as supporting this defense were called to testify at this hearing nor was their failure to be called as witnesses explained. There was an utter lack of corroboration of the allegation and contention that neither force nor nonconsent were involved in his admitted sexual act with the prosecutrix."

In the instant case Landers presented no evidence that any psychiatrist would have testified that he was legally insane at the time the crime was committed. Having therefore failed to meet his burden, the trial court had no other alternative but to dismiss the petition. The judgment of the trial court is affirmed.

AFFIRMED.

MARY E. TRUMAN, APPELLEE, V. CLAUDE JOE MARTIN, APPELLANT.

321 N.W.2d 420

Filed July 2, 1982. No. 43905.

1. **Equity: Appeal and Error.** In equity actions, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court.
2. **Contracts: Rescission.** The cancellation, abandonment, or rescission of a written contract may not only be written but it may also be oral. Moreover, an implied agreement to rescind a contract may be given effect, and the assent of the parties to rescission may be shown by their acts or conduct, and the surrounding circumstances. Accordingly, in determining whether a rescission took place, the courts look not only to the language of the parties but to all the circumstances.
3. **Equity: Appeal and Error.** On an appeal from a judgment in equity, when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other.

Appeal from the District Court for Pierce County: RICHARD P. GARDEN, Judge. Affirmed.

Thomas H. DeLay and Mueting & DeLay, for appellant.

Jewell, Otte, Gatz, Collins & Domina, for appellee.

Heard before KRIVOSHA, C.J., and HASTINGS, J., and COADY and FAHRNBRUCH, D. JJ., and RONIN, D.J., Retired.

FAHRNBRUCH, D.J.

Plaintiff, Mary E. Truman, brought an equity action in the Pierce County District Court to establish that a joint venture and partnership existed between her and the defendant, Claude Joe Martin, and for an accounting.

The trial court found that a joint venture and partnership did exist from January 1, 1975, to February 5, 1977, in regard to a restaurant business, and en-

tered judgment for the plaintiff on the accounting. The trial court found that there was no partnership or joint venture between the parties in regard to other businesses of the defendant. Defendant appealed. We affirm.

In equity actions, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. *Weiss v. Meyer,* 208 Neb. 429, 303 N.W.2d 765 (1981); *Layher v. Dove,* 207 Neb. 736, 301 N.W.2d 90 (1981).

The parties judicially admitted in the pleadings that effective January 1, 1975, they entered into an oral joint venture and partnership agreement for the leasing and operation of a restaurant known as "Pete's Truck Stop." The agreement provided that everything was to be "split down the middle." It is undisputed that the parties operated the restaurant as a joint venture and partnership until May 27, 1975, when the parties entered into a written agreement settling their "financial differences and personal obligations." Pursuant to the written settlement agreement the defendant paid to the plaintiff the sum of $500.

Whether the settlement agreement on May 27, 1975, was rescinded by the parties and the joint venture and partnership reinstated is the first issue to be resolved.

" 'The cancellation, abandonment, or rescission of a written contract may not only be written but it may also be oral. Moreover, an implied agreement to rescind a contract may be given effect, and the assent of the parties to rescission may be shown by their acts or conduct, and the surrounding circumstances. Accordingly, in determining whether a rescission took place, the courts look not only to the language of the parties, but to all the circumstances.' " *Davco Realty Co. v. Picnic Foods, Inc.,*

198 Neb. 193, 199-200, 252 N.W.2d 142, 147 (1977), quoting 17A C.J.S. *Contracts* § 388 (1963).

The record establishes that the parties in this case had a cohabital relationship beginning in March 1974. Prior to January 1, 1975, the parties entered into an oral joint venture and partnership arrangement to operate "Pete's Truck Stop." Between January 1, 1975, and May 27, 1975, the defendant made all management decisions and plaintiff supplied her labors in furtherance of the business in accordance with the oral agreement of the parties. The cohabital relationship between the parties also terminated on or about May 27, 1975, when plaintiff moved into her daughter's home where plaintiff lived for between 10 days and 2 weeks.

Defendant testified that during the 10-day to 2-week period plaintiff was living with her daughter, defendant visited the home only to visit the plaintiff's daughter and granddaughter. He further testified that nothing was ever said about resuming the personal or business relationship between himself and the plaintiff. Plaintiff testified that defendant came to the daughter's home and asked plaintiff to return the settlement money he had given her, asked her to return to him, and that everything would be the same as before in regard to their personal and business relationships. Plaintiff testified that she resumed the personal and business relationship and turned over to defendant $450 to $460 of the $500 settlement she had received from defendant, the balance having been spent for groceries. Plaintiff's testimony was corroborated in substance by her eldest daughter and in part by a younger daughter, both of whom testified that defendant had visited plaintiff on numerous occasions while plaintiff was living in her daughter's home and that defendant had urged plaintiff to return to the same relationship that defendant and plaintiff had prior to May 27, 1975. The trial court by its judgment accepted

plaintiff's version of the facts. "On an appeal from a judgment in equity, when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other." *Weber v. Swenson,* 207 Neb. 35, 42, 295 N.W.2d 688, 692 (1980).

It is undisputed that plaintiff resumed her cohabital relationship with defendant and performed the same labors in the restaurant that she had performed between January 1, 1975, and May 27, 1975. Plaintiff testified that she was to receive a salary for her work, that checks were issued but that the proceeds of the paychecks were turned over to the defendant. The defendant testified that major portions of the checks were turned over to him but claimed that it was for board and room of plaintiff. Other than the fact that defendant had removed plaintiff's name from the business account and from a note, "Pete's Truck Stop" was operated in the same manner as it had been between January 1, 1975, and May 27, 1975, until February 5, 1977, when the defendant ousted plaintiff.

We find that the settlement agreement dated May 27, 1975, was rescinded not only by the language of the parties but by their conduct and all the circumstances surrounding this case, and affirm the trial court in finding that a joint venture and partnership arrangement continued from January 1, 1975, to February 5, 1977, between the parties in regard to the restaurant business.

Subsequent to opening the restaurant business, the defendant also operated a bar, a tree trimming business, and an irrigation supply business. The trial court found that the plaintiff failed in her burden of proof to show that these three businesses were in partnership or a joint venture. Unless the agreement prohibits it, there is nothing inherently wrong

with a partner engaging, in good faith, in enterprises in his own behalf other than the line of trade or business in which the partnership is engaged. His partners are not entitled to share in the profits from such enterprises. See 68 C.J.S. *Partnership* § 106 (1950). There is no credible evidence that the partnership with plaintiff suffered on account of defendant's other business activities or that the agreement between the parties prohibited such outside activities. After a careful review of the record, we agree with the trial court that the plaintiff failed to prove that the bar and the tree trimming and irrigation supply businesses were included in the joint venture and partnership agreement.

We turn to the matter of the accounting in regard to the restaurant. Neb. Rev. Stat. § 67-340 (Reissue 1976) provides in substance that upon dissolution of a partnership, the liabilities shall rank in order of payment as follows: (1) Payment to creditors other than partners; (2) Payment to partners other than for capital and profits; (3) Payment to partners in respect to capital; and (4) Payment to partners in respect to profits.

The trial court set over all the assets of the partnership to the defendant subject to payment of liabilities payable to creditors other than the partners. In requiring the defendant to pay the liabilities of the partnership to creditors other than the partners, the trial court thereby complied with the first step of the statute. Resolution of steps two and three depends almost entirely upon the credibility of the parties' testimony as to the amount contributed in either category by each of the parties, the purpose of the contribution, and the source of the money. There is evidence from which it can be concluded that each of the parties contributed virtually the same amount in regard to combined categories two and three and any difference was offset by the trial court setting over the restaurant assets and liabilities other than

to partners to the defendant. There being a conflict on a material fact and the trial court having had the advantage of hearing and seeing the witnesses, we accept the trial court's findings in that regard. *Weber v. Swenson,* 207 Neb. 35, 295 N.W.2d 688 (1980). The trial court found that there was a "wash" in categories two and three, and we so find. Although the trial court did not specify definite amounts in categories two and three, the finding of a "wash" in those categories does not affect the ultimate amount each partner receives.

While the records of the operation of the restaurant are not as detailed as they might be, the evidence is sufficient to establish that the profits of the operation for the period of January 1, 1975, to February 5, 1977, were $30,626.99 which should be evenly divided between the partners. The trial court entered judgment in favor of the plaintiff and against the defendant in the amount of $15,313.50 and impressed a lien on the assets of the restaurant in that amount.

The trial court's findings on both the law and the facts were correct in the ultimate results and its judgment is affirmed.

AFFIRMED.

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FIRST MID AMERICA INC., A CORPORATION, AND KIRKPATRICK-PETTIS SMITH POLIAN INC., A CORPORATION, APPELLANTS, V. MCI COMMUNICATIONS CORPORATION, A CORPORATION, APPELLEE.

321 N.W.2d 424

Filed July 2, 1982. No. 43957.

1. **Summary Judgment.** Judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law.

2. **Contracts.** The validity of a contract, the obligations thereof, and the capacity of the parties thereto are to be determined by the lex loci contractus unless there is something in the contract which is prohibited by express statute or infringes upon some positive rule of public policy.
3. **Parol Evidence.** The use of parol evidence is limited to the purpose of connecting the written memoranda and showing the party to be charged assented to the unsigned documents.

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

Alan E. Peterson of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

Murray Ogborn and Robert L. Bals of Nelson & Harding, for appellee.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and HAMILTON and CASE, D. JJ.

CASE, D.J.

This action is based on an alleged oral contract entered into in New York State by two investment banking-brokerage firms, First Mid America Inc. (FMA), and Kirkpatrick-Pettis Smith Polian Inc. (KPSP), both based in Nebraska. FMA and KPSP claimed that they were due the sum of $150,000 as a finder's fee for assisting the appellee, MCI Communications Corporation (MCI), in acquiring control over a Nebraska communications service company called N-Triple-C Inc. (NCCC).

MCI was a specialized common carrier operating a network providing voice, data facsimile, and teleprinter services to, among others, New York, Newark, Philadelphia, Pittsburgh, Cleveland, Detroit, Toledo, South Bend, Chicago, and St. Louis. NCCC was a common carrier microwave network in the central United States providing communications services to, among others, Chicago, Des Moines,

Davenport, Omaha, Lincoln, Kansas City, Dallas, Tulsa, and Oklahoma City.

The District Court granted MCI's motion for summary judgment, based on the New York statute of frauds.

The parties are in agreement that the validity of a contract is to be determined by the lex loci contractus unless there is something in the contract which is prohibited by express statute or infringes on some positive rule of public policy. See *Jorgensen v. Crandell,* 134 Neb. 33, 277 N.W. 785 (1938). Finding no such prohibition, we examine this case on the basis of the New York statute of frauds.

The New York statute of frauds, 23A N.Y. Gen. Oblig. Law § 5-701 (McKinney 1978), provides in pertinent part: "a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: . . . 10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman."

The evidence, as disclosed by the depositions and affidavits offered in connection with the motion for summary judgment, is insufficient as a matter of

law to satisfy the requirements of the New York statute of frauds.

Appellants argue that if several documents prepared by MCI are considered together, aided by parol evidence from appellants, the requirements of the New York statute of frauds are satisfied. We think not.

The sufficiency of a memorandum to satisfy the statute of frauds has been interpreted many times in the New York courts. In *Ginsberg Machine Co. v. J. & H. Label Processing Corp.,* 341 F.2d 825 (2nd Cir. 1965), the court, in an interpretation of what type of note or memorandum was sufficient to satisfy the statute, stated that it must, on its face and without the addition of parol evidence, contain the essential terms of the agreement. The court described the agreement in that case as vague, indefinite, and incomplete, and that the void was too great as to the omissions.

The appellants here cite a group of cases which they argue support their claim that the requirement that all material and essential terms must be set out in writing be relaxed. In each of the cited cases, the defendant had acknowledged in writing that the plaintiff had in fact performed the obligation, and each is distinguishable from the factual situation here. Because performance was acknowledged in the cases cited, it is understandable the rule would be relaxed requiring that all material and essential terms be set out in writing and acknowledged by the party to be charged. There is no acknowledgment of performance in the present case.

In *Crabtree v. Elizabeth Arden Sales Corp.,* 305 N.Y. 48, 110 N.E.2d 551 (1953), the court held the requirement of a writing could be satisfied by a collection of written memoranda which must contain all the essential terms of the oral agreement. One of these writings must be signed by the party to be charged.

The *Crabtree* case further stated the use of parol evidence is limited to the purpose of connecting the written memoranda and showing the party to be charged had assented to the unsigned documents. Here the parol evidence is being used to set out the essential terms of the oral agreement, which we believe to be contrary to the holdings in the *Crabtree* case.

The appellants rely strongly on the more recent case of *Seidman v. Dean Witter & Co.,* 70 A.D.2d 845, 418 N.Y.S.2d 6 (1979). We note in that case the following language at 845, 418 N.Y.S.2d at 7-8: "We find, however, that there are writings, one of which is subscribed by defendant, which, when taken together, encompass the material terms of the agreement and are sufficient to satisfy the statute," citing the *Crabtree* case as authority.

In our examination of the written documents, we fail to find that the writings satisfied the requirement that the documents, when taken together, shall encompass the material terms of the agreement. Rather, the material terms of the agreement here are supplied by the parol evidence and are therefore insufficient to satisfy the requirements of the statute of frauds. Judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979).

Where, as here, no genuine material issue of fact exists and MCI is entitled to judgment as a matter of law, the judgment granting summary judgment to the appellee in the District Court was correct. See *Mueller v. Shacklett,* 156 Neb. 881, 58 N.W.2d 344 (1953). The judgment is affirmed.

AFFIRMED.

PATRICIA ARNESON, APPELLANT, V. CEDAR COUNTY, NEBRASKA, APPELLEE.

321 N.W.2d 427

Filed July 2, 1982. No. 43976.

1. **Taxation: Appeal and Error.** An appeal from a county board of equalization is heard as in equity and is tried de novo in this court.
2. _____: _____. The presumption that a board of equalization has faithfully performed its official duties disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption.
3. **Taxation: Valuation: Proof.** The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.

Appeal from the District Court for Cedar County: FRANCIS J. KNEIFL, Judge. Affirmed.

Kenneth M. Olds of Olds, Swarts and Ensz, for appellant.

Mark Behm, Cedar County Attorney, for appellee.

Heard before KRIVOSHA, C.J., and HASTINGS, J., and COADY and FAHRNBRUCH, D. JJ., and RONIN, D.J., Retired.

COADY, D.J.

This appeal involves a dispute over the valuation for tax purposes of 80 acres of farmland in Cedar County, Nebraska, owned by the appellant, Patricia Ewing Arneson. In 1978 the county board of equalization raised the assessed value of her land, hereinafter referred to as the north eighty, from $7,125 to $11,190, after having changed its classification from dryland to irrigated land.

The plaintiff appealed that decision to the District Court for Cedar County, where the original decision was affirmed. The plaintiff has appealed to this court. We affirm the District Court.

Appellant's north eighty lies directly north and adjoins the eighty owned by her mother, hereinafter referred to as the south eighty. Both tracts are farmed by the same tenant and are managed by appellant's father, David Ewing, doing business as Midwest Land Company, and hereinafter referred to as manager. There is an irrigation well on the south eighty and the tenant did apply some water on the north eighty in 1978 with the permission of all concerned. A water winch system is owned by the tenant.

Both tracts suffer a two-pole electric highline which appears to run across the middle of the tracts and which prevents the use of a center pivot irrigation system. The water winch system sprinkles 90 rows at a time but destroys at least three rows at each location. Pictures of the north eighty indicate that the ground is too rolling for economical flood or gated pipe irrigation. There was expert opinion evidence indicating that a water winch system is an inferior watering system.

The county board of equalization relied upon the guidelines for irrigated land in the state manual supplied to the county assessor, and did consider soil conditions and types on the farm. There is a whiff of evidence that production records are inherent in the guidelines. Aerial photos and ASCS records were considered.

The manager testified for the appellant that the 1978 market value of the north eighty was $22,040 (approximately $275 an acre). The appellee did not choose to produce any comparable sales at trial in the District Court or to introduce any opinions indicating actual value. The evidence, on the one hand, and the lack of evidence, on the other, does cause us to pause. But, after searching the whole record and the briefs, we must point out that the appellant is not arguing that her land has been valued in excess of its actual value, and there is no evidence reflecting

such excess upon which we could rely.

Almost all of the appellant's argument, as well as evidence, is negative, and she appears to rely mainly upon the dissent in *Otradovsky v. Board of Equalization,* 206 Neb. 559, 294 N.W.2d 334 (1980), and upon the decision in *Gradoville v. Board of Equalization,* 207 Neb. 615, 301 N.W.2d 62 (1981). See, also, *Hastings Building Co. v. Board of Equalization,* 190 Neb. 63, 206 N.W.2d 338 (1973). We will repeat some of the black letter law set forth in those cases.

An appeal from a county board of equalization is heard as in equity and is tried de novo in this court. The presumption that a board of equalization has faithfully performed its official duties disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant on appeal from the action of the board. See *Gradoville v. Board of Equalization, supra.*

Upon consideration of the evidence, we would agree that the negative evidence in this case does erase the above-mentioned presumption. With that concession, appellant interprets her citation of a number of cases as authority for this court to overrule the county board and District Court: *Weller v. Valley County,* 141 Neb. 69, 2 N.W.2d 606 (1942); *Swanson v. Board of Equalization,* 142 Neb. 506, 6 N.W.2d 777 (1942); *Leech, Inc. v. Board of Equalization,* 176 Neb. 841, 127 N.W.2d 917 (1964); *Richards v. Board of Equalization,* 178 Neb. 537, 134 N.W.2d 56 (1965); *Boss Hotels Co. v. County of Hall,* 183 Neb. 19, 157 N.W.2d 868 (1968); *Chudomelka v. Board of Equalization,* 187 Neb. 542, 192 N.W.2d 403 (1971); *Hastings Building Co. v. Board of Equalization, supra;* and *Gradoville v. Board of Equalization, supra.* After studying those cases, the reader will recognize

that in each and every case there was evidence in the record upon which the court, de novo, could determine the actual value of the specific property being taxed. We repeated in *Hastings Building Co. v. Board of Equalization, supra* at 71, 206 N.W.2d at 343, that " 'The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.' "

AFFIRMED.

FAHRNBRUCH, D.J., dissenting.

I respectfully dissent. This is a case of "omitted irrigation" being placed on the land by the county assessor and then assessed. The type of "irrigation" assessed does not add one cent to the value of the land.

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LEROY WEYANT & SONS, INC., APPELLEE AND CROSS-APPELLANT, V. HOWARD R. HARVEY, DOING BUSINESS AS ORANGE BOWL, APPELLANT AND CROSS-APPELLEE.
LEROY WEYANT & SONS, INC., APPELLEE AND CROSS-APPELLANT, V. CLASSIC LANES OF GERING, INC., APPELLANT AND CROSS-APPELLEE.

321 N.W.2d 429

Filed July 2, 1982. Nos. 44171, 44172.

1. **Contracts: Damages.** Damages are recoverable for losses caused by breach of contract only to the extent that the evidence affords a sufficient basis of ascertaining their amount in money with reasonable certainty.
2. **Damages: Proof.** The plaintiff has the burden to prove the amount of damages with as much certainty as the case permits.

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

Raymond, Olsen, Coll & Ediger, P.C., for appellants.

Harris & Lippstreu, for appellee.

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

PER CURIAM.

These cases, which were consolidated for trial in the District Court and for briefing and argument in this court, were suits on contracts involving advertising in bowling establishments. The plaintiff, LeRoy Weyant & Sons, Inc., contracts with bowling alleys to furnish equipment and supplies in return for the right to sell advertising displays at the alley.

Case No. 44171 was an action against Howard R. Harvey, doing business as the Orange Bowl. One contract provided the plaintiff would furnish a "Maxie Display Unit" to the defendant in return for the plaintiff's right to sell advertising for a 6-year period. The contract was dated May 23, 1978, but no advertising was to be sold until August 1979.

A second contract provided the plaintiff would furnish a "Promo Bowling Promotional Display Unit" to the defendant and pay the defendant 10 percent of the advertising sold the first year. In return the defendant agreed to install the unit and display the advertising furnished by the plaintiff for a period of 3 years.

A third contract provided the plaintiff would furnish transparent plastic score projector sheets to the defendant, which the defendant agreed to use for a period of 3 years.

The plaintiff also agreed to pay the defendant's dues to the National Bowling Proprietors Association and furnish "money envelopes and captain sheets."

In June or July of 1979 the defendant refused to permit the plaintiff to proceed under the contracts,

claiming that the plaintiff had breached the contracts. The plaintiff then commenced an action to recover its damages for the alleged breach of contract.

Case No. 44172 involves a set of similar contracts with Classic Lanes of Gering, Inc. When the defendant in that case refused to proceed with the contracts, the plaintiff commenced an action for breach of contract against Classic Lanes.

The evidence was in conflict and presented questions of credibility for the trier of fact. The trial court found generally for the plaintiff and against both defendants. The plaintiff recovered a judgment in the amount of $21,224.40 against the defendant Harvey, and a judgment in the amount of $19,666.40 against Classic Lanes. Both defendants have appealed. The plaintiff has cross-appealed.

As we view the record, the principal issue on appeal relates to the amount of damages awarded to the plaintiff. LeRoy James Weyant, Jr., the owner of the plaintiff, testified in detail as to how he computed the damages. He testified as to the revenue from advertising sold, costs and expenses paid, and expenses which would be saved since the contracts would not be performed. His testimony, however, omitted an important item of cost or expense to the plaintiff.

Weyant testified that the advertising was sold by independent contractors. Richard R. Dawes, an independent contractor and sales representative for the plaintiff, testified that he was paid a percentage of the sales. The record does not disclose the amount of the commission which was paid to the sales representative by the plaintiff. It is obvious that this would be an important item of expense which would be saved if the contracts were not performed.

Damages are recoverable for losses caused by breach of contract only to the extent that the evi-

dence affords a sufficient basis of ascertaining their amount in money with reasonable certainty. *Ridenour v. Kuker,* 185 Neb. 321, 175 N.W.2d 287 (1970).

The plaintiff has the burden to prove the amount of damages with as much certainty as the case permits. *Tyler v. Olson Bros. Mfg. Co., Inc.,* 201 Neb. 79, 266 N.W.2d 216 (1978). Here an important element in the computation of lost profits was omitted from the evidence.

In the *Ridenour* case we concluded that the evidence in two of the cases established the right of the plaintiffs to recover damages, but would not sustain the verdicts for the amount of damages awarded. In those cases the judgments were reversed and the causes remanded for a new trial on the issue of damages only.

We conclude that the judgments should be reversed and the causes remanded for a new trial on the issue of damages. It is unnecessary to consider the issues raised by the cross-appeal.

REVERSED AND REMANDED FOR A NEW TRIAL.

CAPORALE, J., dissenting.

I dissent. The majority acknowledges that the burden is upon the plaintiff to prove its damages with as much certainty as the case permits; acknowledges plaintiff simply failed to adduce any evidence on an element required to compute those damages, namely, one of its cost items; and then, having enlightened plaintiff as to the requirements for proving its measure of recovery, blithely remands the cases for new trial on the damages issue.

The case which the majority cites in order to justify forsaking its proper role as adjudicator, and instead joining forces with plaintiff's counsel, *Ridenour v. Kuker,* 185 Neb. 321, 175 N.W.2d 287 (1970), supports no such action. The causes in *Ridenour* were remanded for a new trial on the issue of damages not because plaintiff had failed to prove a necessary element of the damage computation but,

rather, because the jury went beyond the limits set by the evidence before it.

*Suhr v. City of Scribner,* 202 Neb. 364, 275 N.W.2d 596 (1979), *appeal after remand* 207 Neb. 24, 295 N.W.2d 302 (1980), is particularly instructive. Therein, plaintiff failed to adduce evidence from which the jury could determine the damages caused by his wrongful eviction and failed to adduce evidence as to the net rental value of the storage facilities which he was required to move. This court ruled the issue of damages on those matters should have been removed from the jury, and then remanded with directions to enter judgment in the amount of $10 as nominal damages, together with costs, as a consequence of the wrongful eviction. It did not, having instructed plaintiff how to prove damages, then remand for a new trial on that issue.

Thus, if the cases at hand had been tried to a jury, *Suhr* tells us we would have reversed and dismissed because of a failure of proof on the issue of damages. There is no rational basis for applying a different rule here merely because the trial was to a judge. A lack of evidence is a lack of evidence, regardless of who the trier of fact may be.

We have held that in a breach of contract case the plaintiff must not only show his right of recovery, he must also prove the elements and facts which compose the measure of his recovery. *Midlands Transp. Co. v. Apple Lines, Inc.,* 188 Neb. 435, 197 N.W.2d 646 (1972). Almost, but not quite, proving the measure of recovery should be treated no differently than almost, but not quite, proving the right to recover. See *Coco v. Austin Co., post* p. 95, 321 N.W.2d 448 (1982), dismissing a workmen's compensation case because of failure of proof on the issue of causation. The majority opinion in the instant cases does violence both to the *Midlands* rule and to the concept of an impartial judiciary.

Admittedly, the majority's action in the present

case is not without precedent. For example, in *Bass v. Boetel & Co.*, 191 Neb. 733, 217 N.W.2d 804 (1974), this court, Clinton, J., dissenting, reversed and remanded for a new trial because there was insufficient evidence to support the jury's award of damages and because the jury had not been instructed with regard thereto. On the other hand, in *Dana F. Cole & Co. v. Byerly,* 211 Neb. 903, 320 N.W.2d 916 (1982), a failure of proof as to damages resulted in a judgment being rendered against the plaintiff in that regard, and not in a new trial being ordered on that issue.

It appears our holdings in this regard have not been consistent; accordingly, the bar may be forgiven if it is confused as to exactly what its responsibilities are in proving damages and what the consequences of failing to prove them may be.

I would remove that confusion by reversing and dismissing these cases.

CLINTON and WHITE, JJ., join in this dissent.

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HAVELOCK BANK OF LINCOLN, APPELLANT, V. DUANE L. BARGEN, APPELLEE.

321 N.W.2d 432

Filed July 2, 1982. No. 44196.

1. **Contracts.** A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration, and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof.
2. _____. The modification of a contract which substantially changes the liability of the parties ordinarily requires mutual assent to be effective.
3. **Jury Instructions.** Jury instructions are to be read as a whole, and if they fairly submit the case they are not erroneous. A trial court is not required to give a requested instruction which unduly emphasizes a part of the evidence in the case.
4. **Appeal and Error.** In a law action it is not within the province of

the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact.

5. **Verdicts: Appeal and Error.** 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 Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

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

Stephen J. Ahl of Barlow, Johnson, DeMars & Flodman, for appellee.

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

MCCOWN, J.

This is an action by the plaintiff bank to enforce a personal guaranty agreement executed by the defendant in connection with credit extended to a corporation. The jury returned a verdict for the plaintiff bank in the amount of $2,816.90. The bank has appealed.

The defendant, Duane L. Bargen, was the vice president and a director of Air Structures, Inc., and the owner of approximately 18 percent of its stock. The corporation manufactured blower assemblies for inflatable domes. In February 1978 the corporation had determined that operations would require $20,000 short-term and $80,000 long-term financing. The defendant and John Farrar, the president of the corporation, met with Gordon V. Kuhn, the president and chief executive officer of the plaintiff bank, to discuss the financing. The testimony of defendant and Farrar was that the financing discussed was a total loan package of $100,000, that the personal guaranties would be based on that total, composed of $80,000 long-term and $20,000 short-term debt, and that each stockholder of the corporation was to be liable for guaranteeing the fraction of the total

$100,000 which corresponded to his stock interest. Kuhn's testimony was that the only direct credit negotiated was the $20,000 short-term borrowing plus consideration of additional credit at a later time. Kuhn advised the corporate officers that the bank would require a security interest in various assets of the corporation as collateral, as well as personal guaranties from principals of the corporation. He denied that the personal guaranties were based upon a total loan package of $100,000.

Personal guaranties were prepared by the bank and sent out to the principal stockholders of the corporation for signature. There were apparently seven individual guaranties sent out by the bank totaling $100,500. Each guaranty provided that, in consideration of credit given to the corporation, prompt payment up to the stated amount in the instrument was guaranteed on any and all notes, renewals, and other indebtedness of the corporation. The amount of each individual guaranty was in approximately the same percentage of $100,000 as the stock ownership of the individual in the corporation. By April 27, 1978, the bank had received five individual guaranties totaling $73,500. The defendant's guaranty in the sum of $18,000 was one of the five. Two guaranties, one for $7,000 and one apparently for $20,000, were never returned to the bank.

On May 1, 1978, Air Structures, Inc., executed a $20,000 note to the bank and a financing statement and security agreement giving the bank a security interest in certain equipment, inventory, and accounts receivable of the corporation. The bank delivered the $20,000 to the corporation on the same date.

The corporate officers testified that Kuhn informed them shortly thereafter that the bank would not advance the entire $100,000 and requested the corporation to establish who would be responsible for the outstanding $20,000 loan. Later in May 1978

the corporation held a meeting regarding the $20,000 loan and adopted a verbal resolution setting out the stock ownership of each shareholder and the percentage of debt responsibility of each. On June 6, 1978, a letter was sent to Kuhn at the bank. The letter stated: "Please consider this as an update to the Investor Guarantees earlier written. It has been adopted as a corporate resolution to have each of the investors, by percentage of ownership, be responsible for their share of the Havelock short term debt.

"It is then understood the individuals listed below shall be responsible as indicated: . . . ." Then followed the names of stockholders, each showing the number of shares of stock owned and the percentage of ownership, rounded to the nearest percentage point. The individual percentages totaled 100 percent. The defendant was listed as the owner of 1,300 of the 6,950 shares, and his percentage was rounded to 19 percent. The responsibility of each shareholder was to include principal and interest.

On June 7, 1978, Kuhn replied on behalf of the bank, acknowledging receipt of the letter of June 6, and stated that in the event of default "we understand that the individuals will assume their proportionate share of any loss . . . that the bank might incur." Kuhn testified that he acknowledged receipt of the letter of June 6 and gave his approval of the distribution.

On September 1, 1978, the $20,000 note was renewed until December 11, 1978, and on that date was again renewed to June 9, 1979. On December 30, 1978, the two smaller stockholders listed in the letter of June 6, 1978, paid $2,160 to the bank, which was their percentage of responsibility outlined in the June 6, 1978, letter. They were released by the bank from their liabilities on the $20,000 loan guaranties.

In a letter dated January 11, 1979, Kuhn advised the president of the corporation that the two smaller stockholders had been released from their guaran-

ties and that when the other guarantors paid their guaranteed portion of the corporate debt they would relieve themselves of any further obligation on their guaranties. In the same letter the bank declared the loan in default and demanded payment in full. Kuhn also wrote to the 20 percent stockholder who had never executed any guaranty and advised him that payment of his proportionate liability in accordance with the June 6, 1978, letter would release him from liability to the bank.

The parties stipulated that the principal amount due and owing on the $20,000 note is $12,669.17 plus interest, which at time of trial was $2,394.49. Air Structures, Inc., is insolvent and unable to make any further payment on the note.

The bank brought this action against the defendant Bargen on his individual guaranty of April 27, 1978, seeking to collect the full amount of the corporate indebtedness. The case was tried before a jury. The jury found that the defendant's guaranty became a guaranty based upon the proportionate stock ownership of each stockholder and returned its verdict for the plaintiff in the amount of $2,369.13 plus $447.77 interest, for a total of $2,816.90. The plaintiff has appealed.

The jury was instructed that if it found for the plaintiff and found that the guaranty of the defendant applied to the full obligation of Air Structures, Inc., it was to enter judgment of $12,669.17 principal and $2,394.49 interest, for a total of $15,063.66. The jury was also instructed that the burden was upon the defendant to prove by a preponderance of the evidence that the purported guaranty was modified after its execution. The jury was likewise instructed that if it found by a preponderance of the evidence that the defendant's guaranty was enforceable but was modified and became a guaranty upon the proportionate stock ownership of each stockholder, its verdict would be for the plaintiff in the

amount of $2,369.13 plus $447.77 interest, for a total of $2,816.90. Counsel had no objection to these instructions and, by agreement and stipulation of counsel, forms of verdict were submitted accordingly, together with a third form of verdict finding in favor of the defendant.

The plaintiff bank contends that the defendant's $18,000 guaranty was absolute, that the bank did not have the requisite intent to modify the agreement, and that there was no consideration for any modification. The bank also contends that the court erred in failing to sustain its motion to withdraw the issue of modification from the jury and in failing to instruct the jury in accordance with the bank's contentions.

A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. *W. Wright, Inc. v. Korshoj Corp.,* 197 Neb. 692, 250 N.W.2d 894 (1977).

The modification of a contract which substantially changes the liability of the parties ordinarily requires mutual assent to be effective. *Westbrook v. Masonic Manor,* 185 Neb. 660, 178 N.W.2d 280 (1970).

In the case at bar no breach of the guaranty or loan agreement had occurred at the time of modification except for the bank's announcement that it would not advance any long-term credit in the future, which resulted in defendant's demands for a revision of the agreement. The evidence is more than sufficient for the jury to have found that the bank's letter of June 7, 1978, expressed an assent to the modification proposal made on behalf of the individual guarantors and stockholders. The evidence also indicated that the bank's assent to the modification or new agreement or agreements was established by its conduct in accepting payments from

two individual stockholders for their shares of the $20,000 guaranty and releasing them from liability in accordance with the terms of the modification.

The bank contends that the court erred in failing to instruct the jury that the defendant's guaranty was an absolute personal guaranty for all sums not exceeding $18,000 without regard to the existence of guaranties of other persons and without regard to other forms of security. The trial court found that the bank's requested instruction tended to take the issue of modification from the jury, and therefore instructed the jury that if it found that the guaranty of the defendant applied to the full indebtedness of Air Structures, Inc., it should enter judgment for the plaintiff for the specified full amount. The court also instructed the jury that if it found that the defendant's guaranty was modified and became a guaranty upon the proportionate stock ownership of each stockholder, its verdict would be for the plaintiff in a specified proportionate amount. Neither instruction was objected to and both were tacitly approved by counsel. The instruction as to modification correctly stated the law and properly submitted the issue of modification to the jury. Jury instructions are to be read as a whole, and if they fairly submit the case they are not erroneous. A trial court is not required to give a requested instruction which unduly emphasizes a part of the evidence in the case. *First Mid America, Inc. v. Palmer,* 197 Neb. 224, 248 N.W.2d 30 (1976).

In the instant case there was substantial evidence to indicate that the parties either made a new and changed agreement with respect to the guaranty or modified the earlier agreement. The issue was a factual one and the jury's verdict indicates that it accepted the defendant's version of the facts. In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted

fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it. *Lockhart v. Continental Cheese, Inc.*, 203 Neb. 331, 278 N.W.2d 604 (1979).

The case before us is a law action tried to a jury. The verdict of the jury turned upon a determination of the factual issues based on conflicting evidence. The instructions covered the issues and fairly submitted the case to the jury. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. A verdict by a jury based upon conflicting evidence will not be set aside unless it is clearly wrong. *Trout v. Olson Bros. Mfg. Co.*, 209 Neb. 477, 308 N.W.2d 522 (1981).

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

CLINTON, J., concurring.

I do not believe it is correct to refer to the contract between the bank and the guarantors as executory. The loan had been made. Only the guaranty was executory. It seems to me the evidence supports a novation, i.e., the bank accepted new obligations in place of the old, and the jury verdict is supported by the evidence. See 66 C.J.S. *Novation* § 1 c. (1950).

CAPORALE, J., joins in this concurrence.

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ALAN J. BENDER ET AL., APPELLEES, V. JULIA JAMES, APPELLANT, STONES, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

321 N.W.2d 436

Filed July 2, 1982. No. 44228.

1. **Summary Judgment.** On a motion for summary judgment, the question which must be decided is whether or not there is a genuine

issue as to any material fact, and not how that issue is to be decided.

2. **Landlords and Tenants: Estoppel.** A tenant cannot, while occupying the premises, deny his landlord's title.
3. **Landlords and Tenants: Adverse Possession.** If possession of real estate is entered upon by one as a tenant under an agreement with the owner, the occupant cannot assert ownership by adverse possession until he first surrenders possession, or the tenant, by some unequivocal act, notifies the landlord that he no longer holds under the agreement made.
4. **Landlords and Tenants: Acquiescence.** The establishment of a real estate boundary line by acquiescence involves more than a mere establishment of a line by one party and the taking of possession by such party. It involves the idea that the landlord, with knowledge of the line so established and the possession taken, assents thereto, and this may be shown by conduct, by words, or even by the silence of the landlord. However, there must be something in the record to show that the party charged with acquiescence consented to the act of the other in establishing the line and assuming possession.
5. _____: _____. Acquiescence involves the idea of notice or knowledge of conditions, and the evidence must disclose that, with such notice and knowledge, the one charged with acquiescence did something that indicated an assent to such conditions and an acquiescence therein.

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

Stephen C. Hansen of Luckey, Sipple & Hansen, for appellant.

Robert J. Bothe of Tessendorf, Milbourn, Fehringer & Bothe, P.C., for appellees Bender.

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

HASTINGS, J.

Plaintiffs brought this action in the District Court seeking to quiet title to a strip of farmland included within their record ownership, but which the defendant Julia James claimed by adverse possession. From an order granting plaintiff's motion for summary judgment and granting the relief requested in the petition, the defendant has appealed. We affirm.

The plaintiffs, Alan J., Larry J., and Richard J. Bender, are the record title owners of the south half of the southeast quarter and the west half of the northwest quarter of the southeast quarter, all in Section 20, Township 19 North, Range 3 West of the 6th P.M., Platte County, Nebraska. They acquired title in March of 1979 by warranty deed from Ruth Bearberg, a single person and now deceased. Ruth was a daughter and legal heir of John James, deceased. The defendant Julia James, a widow, is the record titleholder of the east half of the northwest quarter of the southeast quarter and the northeast quarter of the southeast quarter, also in Section 20, Township 19 North, Range 3 West of the 6th P.M., Platte County, Nebraska. In other words, the northern boundary of the plaintiffs' land and the southern boundary of the defendant's land form the same line. Julia's husband was Harold James, a son and legal heir of John James and, of course, a brother of Ruth Bearberg. Harold died in August of 1971. The defendant Stones, Inc., was the tenant of both Ruth Bearberg and Julia James between 1971 and 1979, has no interest in this litigation, and will not be referred to again. Therefore, when we speak of the defendant, we are referring to Julia James.

On a motion for summary judgment, the question which must be decided is whether or not there is a genuine issue as to any material fact, and not how that issue is to be decided. *Hanzlik v. Paustian,* 211 Neb. 322, 318 N.W.2d 712 (1982).

The record made upon which the motion for summary judgment was granted consists of an abstract of title; tax receipts showing that the parties, or their predecessors in title, had been paying the real estate taxes on the property as their ownership appeared of record; a plat of a survey; the pleadings; and the deposition of Julia James.

As suggested earlier, John James had been the owner of the entire southeast quarter, the property

with which we are here concerned. He died on April 16, 1936, and by his will left his property to his various children, including Ruth Bearberg and Harold James. These children executed various deeds between and among themselves, rearranging title to the various parcels of land, so that the title to the two tracts which are the subject of this litigation became vested as described above.

According to the testimony of Mrs. James, in 1933 she and her husband Harold moved onto the farm owned by the father, John James, and farmed the entire quarter section as tenants of John. After John's death, as she testified, Harold continued to farm the quarter section, but now as owner of a portion of it and as the tenant of his sister Ruth as to the balance. This arrangement continued, apparently, until Harold's death in 1971.

It was Mrs. James' testimony that her husband farmed his sister Ruth's land on a typical sharecrop rental basis. She did not know if Ruth ever went over the crops with her husband Harold, but insisted that she never made any complaints. Mrs. James also said that the crop rows on the land that belonged to Ruth Bearberg were always planted north and south, and that on their own land, east and west. The record does not disclose whether or not that same practice had been followed when Harold James farmed the entire quarter section as a tenant of his father. However, it seems apparent that it is the line formed by this change in direction of crop rows that the defendant insists forms the boundary between her land and that of the plaintiffs. This means that the defendant is claiming 3.1 acres consisting of a strip of land ranging in width from 63 feet to 75 feet along the extreme northern edge of the plaintiffs' land as it is described of record.

The only evidence of any notice to Ruth Bearberg of a hostile claim against her property by her brother Harold was furnished by the defendant's testimony.

She stated that her sister-in-law Ruth used to come out to the farm from Chicago once a year, but in "the last few years she didn't come out." Ruth was never told that there was a problem with the property line because Harold and Julia James always thought that the now disputed strip belonged to them. However, Mrs. James did admit that Ruth was supposed to have owned 100 acres and she and her husband Harold 60 acres, and that the crops were always split on that basis. According to Mrs. James' testimony, her husband and his sister Ruth always got along very well, "she was always satisfied, never a complaint," and she always accepted whatever Harold said. As she stated, her husband would divide the crops according to the percentages by means of his computed estimates, would sell his sister Ruth's share, and send her a check for the proceeds.

The defendant's claim is based both on adverse possession and acquiescence on the part of plaintiffs' predecessor in title, Ruth Bearberg. Her first contention can be disposed of rather summarily. As stated in *Carson v. Broady,* 56 Neb. 648, 651, 77 N.W. 80, 81 (1898): "It is an ancient and well settled rule of law that a tenant cannot, while occupying the premises, deny his landlord's title." More recently, we have said that if possession of real estate is entered upon by one as a tenant under an agreement with the owner, the occupant cannot assert ownership by adverse possession until he first surrenders possession, or the tenant, by some unequivocal act, notifies the landlord that he no longer holds under the agreement made. *Jackson v. Eichenberger,* 189 Neb. 777, 205 N.W.2d 349 (1973). Defendant's claim of adverse possession is without merit.

There is no genuine issue of fact relating to Harold James' possession under a lease agreement. The question then becomes one of whether or not the running of the crop rows in different directions was an

unequivocal act on the part of Harold sufficient to constitute notice to his landlord Ruth that he was no longer holding the disputed strip under the lease agreement. The record does not disclose when this method of planting was commenced. If it was first established while Harold was a tenant of his father, that fact is completely immaterial. In order to amount to notice as to Ruth, the record must disclose that at some time after she became the owner this method of planting was commenced, and, therefore, she was made aware of an adverse claim on the part of her brother. The plaintiffs' evidence establishes undisputed record title in themselves, and therefore a prima facie showing for summary judgment has been established. The defendant has raised as an affirmative defense the claim of adverse possession. The defendant has failed to offer competent evidence that there is a genuine issue as to that fact. *Hanzlik v. Paustian,* 211 Neb. 322, 318 N.W.2d 712 (1982). Defendant's claim of adverse possession is without merit.

Regarding the defendant's claim based upon acquiescence, that doctrine involves more than a mere establishment of a line by one party, and the taking of possession by him. " 'It involves the idea that the other [landlord], with knowledge of the line so established and the possession taken, assents thereto, and this may be shown by his conduct, by his words, or even by his silence. There must, however, be something in the record to show that the party, charged with acquiescence, consented to the act of the other in establishing the line and assuming possession. Acquiescence means a *consent* to the conditions, and involves *knowledge* of the conditions. . . . Acquiescence involves the idea of notice or knowledge of conditions, and the evidence must disclose that with such notice and knowledge he *did something that indicated an assent* to such conditions and an acquiescence therein.' " (Emphasis supplied.) *Hakanson*

*v. Manders,* 158 Neb. 392, 397, 63 N.W.2d 436, 439 (1954). Undisputed evidence that Ruth Bearberg was never told that there was a problem with the property line, that she owned a full 100 acres and was paid rental on that basis, and that she always got along with her brother and always accepted whatever Harold said hardly demonstrates notice of the establishment of a boundary line prejudicial to her interests, and an acquiescence thereto.

The judgment of the District Court in granting summary judgment was correct and is affirmed.

AFFIRMED.

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UNION PACIFIC LAND RESOURCES CORPORATION, A CORPORATION, APPELLANT, V. PARK TOWNE, LTD., A CORPORATION, ET AL., APPELLEES.

321 N.W.2d 440

Filed July 2, 1982. No. 44265.

1. **Deeds.** Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties.
2. **Vendor and Vendee: Damages.** Where there is a delay in delivering possession to the vendee and the vendee has not elected to rescind, the vendee may be entitled to an abatement of the purchase price for damages resulting from the failure of the vendor to deliver possession in accordance with the contract.

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

Gordon M. Ryan of Ryan, Seidler & Langdon, for appellant.

Robert G. Decker, for appellees.

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

BOSLAUGH, J.

The plaintiff, Union Pacific Land Resources Corporation, appeals from the order of the District Court dismissing its petition at the close of the plaintiff's evidence. The action was brought to recover the balance of the purchase price due the plaintiff for an irregular tract of land in Kansas City, Kansas, sold to the defendant Park Towne, Ltd. The plaintiff also sued the defendant Joe A. Pace upon a check signed by Pace and delivered to the plaintiff as a part of the transaction.

The plaintiff and the defendant Park Towne, Ltd., entered into a contract for the sale of the property on November 30, 1972. On December 29, 1972, the plaintiff's representative, Alfred Simonsen, and the defendant Pace and his counsel met in Kansas City, Missouri, to close the sale. Pace was the president of Park Towne, Ltd.

Simonsen delivered to Pace a special warranty deed describing the property, and received in exchange from Pace a check for $389,141.59, the amount of the agreed purchase price in full. The check was signed "Joe A. Pace" and, on its face, appeared to be a personal check of Pace. Plaintiff deposited the check through normal banking channels, but on January 9, 1973, the check was returned to the plaintiff unpaid, with a notation from the bank stating "Insufficient Funds" and "Funds not available for disbursement."

On March 28, 1973, the plaintiff's counsel, Byron Strattan, met with defendant Pace and his counsel again in Kansas City, Missouri, in an effort to collect the amount due the plaintiff. Strattan testified that defendant Pace initially stated there was a problem with the legal description of the property, but after a

40- or 45-minute discussion Pace agreed there " 'is no title problem at this time and there is no description problem and that that problem no longer exists.' " Strattan thereupon again demanded the purchase price. Pace then "raised the subject that we are required to build them a road." The defendants' amended answers allege an oral agreement with the city of Kansas City, Kansas, by the plaintiff to pave a portion of 65th Street abutting adjoining property owned by Park Towne, Ltd. The defendants also allege an oral agreement that Park Towne, Ltd., was required to pay only $350,000 of the purchase price until it was notified that the paving was complete.

Strattan testified no such agreement was entered into at the March 28, 1973, meeting. There was some discussion about paving at that meeting, but the plaintiff's position throughout was that if there was an agreement to pave, it had nothing to do with the sale of the property. Strattan testified Pace said that he did not have enough money to pay the entire purchase price, but that he had $350,000 available at that time. Strattan accepted the $350,000, but told Pace that the remainder of the purchase price must be paid within 4 to 6 weeks. Pace continued to argue that payment of the balance due was contingent upon the 65th Street paving. Strattan again stated that the paving had nothing to do with the sale of the property, and the balance of the purchase price would have to be paid within a reasonable time or the plaintiff would sue.

The record shows the special warranty deed delivered to Pace on December 29, 1972, was recorded on January 12, 1973. A quitclaim deed from Upland Industries Corporation to the plaintiff, covering a small portion of the property conveyed to the defendants by the special warranty deed, was recorded the same day, shortly before the warranty deed. The record further shows that a mortgage from Park

Towne, Ltd., to the Ozark National Life Insurance was recorded on March 21, 1973. Park Towne, Ltd., conveyed the property to Carlsberg Mobile Home Properties by a warranty deed dated October 24, 1972, which was recorded on March 23, 1973.

The record also shows that the plaintiff had leased the property to a farmer for the year 1973, and had received $1,200 rental for that year. However, an engineer employed by the plaintiff, who was engaged in paving 65th Street abutting the adjoining property, testified that from 1973 to 1980 a mobile home park was in operation on the property for a majority of the time. It is undisputed that Park Towne, Ltd., purchased the property for use as a mobile home park.

At the close of the plaintiff's evidence, the trial court dismissed the petition as to both defendants. As to the defendant Park Towne, Ltd., the trial court found "the special warranty deed did not convey or attempt to convey to the defendant, Park Towne, the total of the real estate set forth in [the contract], and that it was necessary for the defendant to secure from the plaintiff . . . the quitclaim deed to part of the real estate covered by Exhibit 5, since the special warranty deed did not cover the entire—the real estate—the total real estate in the transaction." The trial court also found that the contract for sale contained "other terms and conditions . . . other than the delivery of the special warranty deed," and that "plaintiff has failed to prove by a preponderance of competent evidence that the plaintiff has fulfilled, completed and complied with all the terms and conditions of the negotiations and contract between the parties." Finally, the court found that the farm lease on the property prevented the plaintiff from delivering possession of the property on December 29, 1972.

As to the defendant Pace, the trial court found that, by virtue of the coded account numbers on the

check, "The Court knows from the hearings on the two previous hearings [sic] herein referred to that the check was in fact written on the corporate account of Park Towne, Ltd."

In determining whether motions to dismiss, made at the close of the plaintiff's evidence, should be sustained, the evidence must be viewed in the light most favorable to the plaintiff. All conflicts must be resolved in favor of the plaintiff, and the plaintiff is entitled to the benefit of all reasonable inferences that may be deduced from the evidence.

As to the defendant Park Towne, Ltd., the evidence shows the defendant accepted a deed to the property on December 29, 1972, which deed it retained and recorded on January 12, 1973. The evidence further shows the defendant mortgaged the property and conveyed it to a third party on March 23, 1973. The description in the deed to the defendant conformed to the description contained in the contract between the parties and was the description used by the defendant to mortgage and convey the property to third parties.

On December 29, 1972, when the defendant Park Towne, Ltd., accepted the deed to the property from the plaintiff, its president Pace delivered a check in full payment of the purchase price to the plaintiff. This is strong evidence that there were no "side agreements" between the parties in regard to the sale of the property.

In *Hoke v. Welsh,* 162 Neb. 831, 834-35, 77 N.W.2d 659, 661 (1956), we said: " '[u]pon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will

be held to truly express the intentions of the parties.' " See, also, *Beren Corp. v. Spader,* 198 Neb. 677, 255 N.W.2d 247 (1977); *City of Papillion v. Schram,* 204 Neb. 110, 281 N.W.2d 528 (1979). The law is the same in both Kansas, the site of the property, and Missouri, the place where the deed was delivered and the check accepted. "[T]he presumption is that all oral understandings and agreements leading up to the execution of a deed are merged in the deed . . . . [A]mbiguity in a conveyance does not appear until application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which of two or more meanings is the proper meaning." *Siegel v. Hackler, Administrator,* 181 Kan. 316, 319, 310 P.2d 914, 917 (1957); *Griffith v. Byers Construction Co.,* 212 Kan. 65, 510 P.2d 198 (1973); *S. G. Payne & Company v. Nowak,* 465 S.W.2d 17 (Mo. App. 1971).

Here the plaintiff executed and delivered an unambiguous deed, which the defendants accepted and recorded, giving a check for the full amount in exchange and later mortgaging and conveying the property. Although the trial court relied in part upon the quitclaim deed from Upland Industries as demonstrating that the plaintiff could not convey all of the land described in the deed delivered on December 29, 1972, it should be noted that the quitclaim deed was dated December 15, 1972, nearly 2 weeks before the closing. Simonsen, the plaintiff's representative at the closing, testified that he did not recall any objection made to the deed or the legal description. At the March 28 meeting, the parties agreed that there was no title problem. At this time Park Towne, Ltd., had already recorded the deed and exercised ownership over the property. By the time of the suit, Park Towne, Ltd., was not justified in relying upon any title problem in refusing to pay the remainder of the purchase price. The evidence establishes as a matter of law that the defend-

ants' claims in regard to errors in description were sham defenses.

After delivery and acceptance of the deed, the real estate contract was merged into the deed. " 'It has been held that articles of agreement for the conveyance of land are in their nature executory and the acceptance of a deed in pursuance thereof is to be deemed prima facie an execution of the contract and the agreement thereby becomes void and of no further effect.' " *Webb v. Graham,* 212 Kan. 364, 366, 510 P.2d 1195, 1197 (1973). In *Griffith v. Byers Construction Co., supra* at 69, 510 P.2d at 202 (1973), the Kansas Supreme Court held: "[W]hen express covenants are placed in a deed additional covenants can not be implied from facts or circumstances surrounding the execution and delivery of the deed. . . . [T]he tendency of modern decisions is not to imply covenants which might and ought to have been expressed by the parties if intended." In *S. G. Payne & Company v. Nowak, supra* at 19, the court stated: "[W]hen the deeds were executed and delivered, they were accepted as performance of the executory contract of sale. All prior commitments were merged into the deeds unless, by express contract, certain matters were held open to be completed at a later time." Although the contract here contained certain conditions in addition to delivery of the warranty deed, the deed itself was not made subject to any of those conditions. Furthermore, the evidence does not show the parties "held open" any other matters "by express contract" "to be completed at a later time." The plaintiff's evidence shows delivery and acceptance of the deed, and no further agreements with respect to the real estate. The contract was merged into the deed and the plaintiff was entitled to a finding by the trial court that the contract for sale had been executed by delivery and acceptance of the deed.

The trial court found that the farm lease on the

property prevented the plaintiff from delivering possession on December 27, 1972. The plaintiff's counsel freely admitted that the defendants were entitled to credit for any damages resulting from a delay in obtaining possession. " 'Where the vendor is unable to convey the property which he has agreed to convey because of a defect in the quality or quantity of the estate which he possesses and the vendee has entered into the contract without knowledge or notice of the deficiency or defect in the vendor's title, he may ordinarily have specific performance of the contract as to whatever interest the vendor has with such abatement of the purchase price as shall be proportionate to the diminution in value of the subject matter, to be determined by the court from competent evidence adduced . . . .' " *Smith v. Hornkohl,* 166 Neb. 702, 708, 90 N.W.2d 347, 352 (1958). In *Hoke v. Welsh,* 162 Neb. 831, 837, 77 N.W.2d 659, 663 (1956), the court noted: "The defendants, upon discovery of the shortage in the land conveyed, sought to rescind and tendered back the purchase price. The remedy ordinarily is to grant the purchaser an abatement of the purchase price in case of a deficiency in quantity." *Accord, Ray v. Wooster,* 270 S.W.2d 743 (Mo. 1954).

In the present case, Park Towne, Ltd., did not seek to rescind or tender back the deed, but simply refused to pay the $39,141.59 balance of the purchase price. There was no evidence from which the trial court could have found that the defendants were entitled to abatement of the purchase price in that particular amount. By granting the defendants' motions, the trial court in effect awarded an abatement in that amount.

There is no support in the record for the trial court's finding that the presence of Park Towne's coded account number on the check for $389,141.59, signed "Joe A. Pace," established that the defendant Pace was not personally liable on the check. In

the remarks which accompanied the court's announcement of its decision, the court stated: "The Court is required to take judicial notice of commercial practices. It is not uncommon practice on transactions such as this for an account to be opened and for checks to be used that are not the formal printed checks of a corporation. The Court knows from the hearings on the two previous hearings [sic] herein referred to that the check was in fact written on the corporate account of Park Towne, Ltd."

The plaintiff was entitled to have all the allegations of its petition which were supported by the evidence taken as proved. In the present state of the record, the plaintiff was entitled to a finding that the check was the personal obligation of Pace. See Neb. U.C.C. §§ 3-413(2), 3-802(1)(b), 3-403(2) (Reissue 1980). There is nothing in the record to support a finding that the magnetically coded numbers on the check identified it as drawn on the defendant Park Towne's account.

The rulings on the motions of the defendants were erroneous. The judgment of the District Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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ROSE MARIE REIFSCHNEIDER, APPELLANT, V. NEBRASKA METHODIST HOSPITAL, A CORPORATION, APPELLEE.

321 N.W.2d 445

Filed July 2, 1982. No. 44304.

1. **Summary Judgment.** Summary judgment is a proper remedy if the pleadings and evidence received at the hearing on the motion show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
2. **Specific Performance.** 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. **Contracts: Specific Performance.** The right to specific perform-

ance may be lost by abandonment of the contract and by conduct inconsistent with the right to relief.

4. **Contracts.** An abandonment of a contract may be effected by acts of one of the parties thereto, which are inconsistent with its existence, and acquiesced in by the other party.
5. **Contracts: Specific Performance.** Where the wronged party has elected to abandon a settlement agreement, he cannot thereafter maintain a suit for specific performance of it.

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

Cynthia G. Irmer of Matthews, Cannon & Riedmann, for appellant.

Gerald P. Laughlin and Jonathan R. Breuning of Baird, Holm, McEachen, Pedersen & Hamann, for appellee.

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

BOSLAUGH, J.

The plaintiff, Rose Marie Reifschneider, appeals from an order of the trial court granting the defendant's motion for summary judgment and dismissing the plaintiff's petition.

The plaintiff filed this action in contract against the defendant, Nebraska Methodist Hospital, alleging that on April 4, 1977, the plaintiff entered the defendant's hospital as an emergency patient, suffering from convulsions and faintness. The amended petition alleged that the plaintiff was placed on a rolling stretcher by employees of the defendant and left unattended, whereupon she fell from the cart and suffered severe injuries to her face and jaw. It further alleged that the plaintiff and her father, acting as her agent, made an oral agreement with the defendant's managing officer that the defendant would pay all of the plaintiff's expenses associated with her injuries in exchange for the plaintiff's refraining from suing the defendant for damages.

The amended petition further alleged that the de-

fendant performed its part of the agreement until July 1978, when it orally repudiated the alleged agreement. The plaintiff then commenced this action, demanding specific performance of the settlement agreement. On May 1, 1980, the plaintiff brought a separate action in tort against the defendant and others, seeking damages because of the injuries suffered in the fall.

The defendant's amended answer alleged the filing of the damage action as a defense to the specific performance suit. In its motion for summary judgment, the defendant argued that by filing the damage action the plaintiff abandoned the settlement agreement and caused a failure of consideration on her part, since the only consideration for the settlement agreement consisted of her refraining from suing the defendant in tort for damages. The petition filed in the damage action was made a part of the motion for summary judgment. The trial court sustained the motion for summary judgment, finding as a matter of law that the plaintiff had abandoned the settlement agreement by filing the damage action. The plaintiff's motion for new trial was overruled and this appeal followed. We affirm.

Summary judgment is a proper remedy "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Neb. Rev. Stat. § 25-1332 (Reissue 1979); *Manzer v. Pentico,* 209 Neb. 364, 307 N.W.2d 812 (1981).

In the present case the plaintiff's petition sought specific performance of the alleged settlement agreement. "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. . . . The right to specific performance may be lost by abandonment

of the contract and by conduct inconsistent with the right to relief." *James J. Parks Co. v. Lakin,* 206 Neb. 184, 188, 292 N.W.2d 21, 24 (1980). Thus, if the pleadings and evidence received at the hearing on the motion for summary judgment demonstrate that the plaintiff was not in a position to perform her obligation under the settlement agreement, the trial court was correct in granting the defendant's motion for summary judgment.

If the plaintiff abandoned the settlement agreement, she lost any right to specific performance. *James J. Parks Co., supra.* " 'An abandonment of a contract may be effected by acts of one of the parties thereto, which are inconsistent with its existence and acquiesced in by the other party.' " *Nelson v. Cross,* 152 Neb. 197, 203, 40 N.W.2d 663, 666 (1950). " 'The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted. An abandonment of a contract need not be express but may be inferred from the conduct of the parties and the attendant circumstances.' " *Davco Realty Co. v. Picnic Foods, Inc.,* 198 Neb. 193, 199, 252 N.W.2d 142, 147 (1977).

The plaintiff argues that abandonment of a contract is a question of fact and it was error for the trial court to decide that issue as a matter of law. However, the only evidence presented at the hearing on the motion for summary judgment consisted of certified copies of two of the petitions in the tort action. As noted in *Bafico v. Southern Pacific,* 244 Or. 341, 345, 417 P.2d 392, 394 (1966), "plaintiff's right to sue the defendant upon the alleged [settlement] agreement . . . is available only upon the precedent condition that he refrain from maintaining an action against the defendant upon the claimed tort liability. Such restraint provided the sole consideration for the claimed promise to pay and when plaintiff no

longer withheld action on the claimed tort liability, the consideration failed and the alleged covenant became a nullity. When he instituted the tort action he effectively abandoned the compromise agreement." *Levy v. Massachusetts Accident Co.,* 124 N.J. Eq. 420, 431, 2 A.2d 341, 347 (1938), states: "Obviously the contract cannot, at one and the same time, be both in force and not in force. The wronged party has the *right* to choose which it shall be, but he also has the corresponding *duty* of making such choice . . . . Where the wronged party has elected to terminate the contract, he cannot subsequently maintain a suit for specific performance thereof." (Emphasis in original.) As to the matter of the plaintiff's intent to abandon the contract, "we must judge the intent of the parties by what they did and said, rather than by some secret, undisclosed intention they may have had . . . ." *Brown v. Hughes,* 251 Iowa 444, 449, 99 N.W.2d 305, 308 (1959).

The pleadings and exhibits presented to the trial court on the motion for summary judgment demonstrated that the plaintiff had abandoned the settlement agreement and caused a failure of consideration for it by filing the damage action. The record sustains the trial court's finding of abandonment as a matter of law, and the summary judgment in favor of the defendant.

The judgment of the District Court is affirmed.

AFFIRMED.

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THOMAS J. COCO, APPELLANT, V. AUSTIN COMPANY AND GENERAL ACCIDENT GROUP, APPELLEES.

321 N.W.2d 448

Filed July 2, 1982. No. 81-568.

1. **Workmen's Compensation: Proof.** Under the Nebraska workmen's compensation law, the claimant seeking compensation has

the burden of proving by a preponderance of the evidence that an injury received arising out of and in the course of his employment was the proximate cause of the disability for which benefits are sought.

2. **Workmen's Compensation: Expert Witnesses.** The cause of an injury or disability not objective in character requires proof by expert testimony or other appropriate scientific means.
3. **Workmen's Compensation.** The following provision of Neb. Rev. Stat. § 48-120 (Reissue 1978), "Whenever the court deems it necessary, in order to assist it in resolving any issue of medical fact or opinion, it shall cause the employee to be examined by a physician or physicians selected by the court and obtain from such physician or physicians a report upon the condition or matter which is the subject of inquiry. The court may charge the cost of such examination to the carrier," confers a discretionary power upon the Workmen's Compensation Court which is to be exercised when medical questions arise relevant to the matters to which § 48-120 relates.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Daniel K. Powers, for appellant.

Theodore J. Stouffer of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

CLINTON, J.

This is an appeal from the Nebraska Workmen's Compensation Court which, on rehearing, denied the plaintiff's claim for permanent disability alleged to have arisen from an injury suffered on October 5, 1978, while the plaintiff was employed as a carpenter by the defendant Austin. The plaintiff on appeal to this court makes the following assignments of error: (1) The Workmen's Compensation Court erred in requiring the plaintiff to present medical evidence to show a causal connection between an admitted compensable injury and an obvious disability that resulted therefrom. (2) The court erred in dismissing plaintiff's petition, and should have instead required

the plaintiff to submit to a medical examination at the employer's expense. We affirm the judgment of the Workmen's Compensation Court.

After hearing before the one-judge Workmen's Compensation Court the plaintiff received an award for temporary total disability for 2⁶/₇ weeks at $155 per week and the sum of $14.61 per week for 297¹/₇ weeks for permanent partial disability. together with medical expense. On rehearing, the three-judge court denied the claim for disability and dismissed the claimant's petition. Paragraph IV of the judgment of dismissal was as follows: "The issue herein is whether there is a causal connection between the plaintiff's present alleged disability and his accident and injury of October 5, 1978. The plaintiff testified that he is presently unable to work as a carpenter. The plaintiff further testified that after his release to return to work in November, 1978, he subsequently worked for Simpson Company and suffered pain in the same area of his back while lifting a miter box.

"The plaintiff offered no medical evidence to show a causal connection between his alleged disability and his alleged accident and injury of October 5, 1978. Due to the nature of plaintiff's alleged injury, such medical evidence is required. See *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 and *Mack v. Dale Electronics, Inc.*, 209 Neb. 367. The plaintiff has failed to maintain his burden of proof and his petition must therefore be dismissed."

The plaintiff testified that on October 5, 1978, he injured his back while working for Austin when he lifted a heavy plywood form used for forming concrete. Although he finished work that day, he was unable to work for a time thereafter. After physical therapy and treatment from a chiropractic physician and others, he was released to return to work in November. Thereafter he worked for two different

employers for periods of about 5 weeks. In each case the employment was terminated because the work was finished. While employed by Simpson, he lifted a miter box and again suffered a similar back pain. He did a little work thereafter from time to time. He testified that the pain of the original injury had never left him, that he was unable to lift anything, and that without being able to lift he could not function as a carpenter. He further testified he had no other skills, having been a carpenter for a period of 35 years. He offered no medical testimony.

In *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980), we said: "Under the Nebraska Workmen's Compensation Law, the claimant seeking compensation has the burden of proof to establish by a preponderance of the evidence that an injury received arising out of and in the course of his employment was the proximate cause of the disability for which benefits are sought. . . . The cause of an injury or disability not objective in character requires proof by expert testimony or other appropriate scientific means." (Syllabi of the court.) See, also, *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981).

The plaintiff argues that if the Workmen's Compensation Court deemed medical evidence necessary, it should have had the plaintiff examined by a physician and received the reports of the physician on the issue. He relies upon the following provision of Neb. Rev. Stat. § 48-120 (Reissue 1978): "Whenever the court deems it necessary, in order to assist it in resolving any issue of medical fact or opinion, it shall cause the employee to be examined by a physician or physicians selected by the court and obtain from such physician or physicians a report upon the condition or matter which is the subject of inquiry. The court may charge the cost of such examination to the carrier." He cites no case authority supporting his interpretation of the purpose of § 48-120.

The burden of proof in a workmen's compensation proceeding is upon the claimant. *McCann v. Holy Sepulchre Cemetery Assn., supra.* The plaintiff cites no authority which supports a construction of the above provision making it the duty of the court to supply an absence of proof. Its literal language applies only to the resolution of issues of medical fact or opinion. Furthermore, from the context of the entire statute in which the above provision appears, it is clear that it is intended to apply only in cases where liability has been established and there arise medical issues concerning such things as refusal of medical treatment or the necessity or sufficiency of medical treatment.

We hold that the above provision of § 48-120 grants to the court a discretionary power to be exercised in the circumstances to which the general subject matter of § 48-120 pertains.

The judgment is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. BRUCE GLASENAPP, APPELLANT.

321 N.W.2d 450

Filed July 2, 1982. No. 81-685.

1. **Post Conviction.** An evidentiary hearing in a post conviction proceeding is not required where the files and records in the case show that the prisoner is entitled to no relief.
2. _____. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States.
3. _____. In order to state a cause of action for post conviction relief, the prisoner must allege facts which, if proved, constitute an infringement of his constitutional rights. Allegations which are mere conclusions are insufficient.

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

Bruce Glasenapp, pro se.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

CLINTON, J.

This appeal arises from an application to the District Court for Douglas County for post conviction relief under the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). The District Court denied an evidentiary hearing and the relief requested on the ground that the files and records in the case showed that the applicant was entitled to no relief. § 29-3001; *State v. Gero,* 186 Neb. 379, 183 N.W.2d 274 (1971).

On March 12, 1980, the defendant entered a plea of nolo contendere to a charge of manslaughter and on July 25, 1980, was sentenced to imprisonment for a term of 10 years. On direct appeal to this court we affirmed the conviction under Neb. Ct. R. 1.e.(1) (Rev. 1977) on the ground that the appeal was frivolous.

Section 29-3001 affords relief where there has been a denial or infringement of the rights of the prisoner which renders the judgment void or voidable under the Constitution of this state or the Constitution of the United States. *State v. Miles,* 194 Neb. 128, 230 N.W.2d 227 (1975). In order to state a cause of action, the application for relief must allege facts which, if proved, constitute an infringement of the prisoner's constitutional rights. Allegations which are mere conclusions are insufficient. *State v. Warner,* 181 Neb. 538, 149 N.W.2d 438 (1967).

In addition to alleging various legal conclusions, the application in this case makes the following factual allegations which defendant apparently urges constitute a showing that he was deprived of effective assistance of counsel before and during the proceedings leading up to his conviction: (1) The

defendant's appointed counsel did not fully investigate the circumstances "in which [the] crime was comitted [sic]," and he failed to call the defendant to testify in his own behalf. (2) The defendant was taken to court while under powerful medication for extreme arthritis pain. (3) Defense counsel erroneously told the court at the arraignment that the defendant "is not going to be able to give the court a factual basis on what happened." (4) Mr. Hattery, a state witness, was not called to testify and counsel did not question this witness. (5) Facts which, depending upon details of proof, might constitute a defense of self-defense.

The inference to be drawn from the foregoing allegations is that the defendant contends he is innocent of the charge of which he was convicted and that his attorney served him badly by permitting him to plead nolo contendere. The record of the arraignment proceedings contradicts such a conclusion.

Defendant was first charged with second degree murder. The charge was, as part of a plea bargain, reduced to manslaughter. The record of the arraignment proceedings establishes without any question that defendant participated very alertly in those proceedings and that his plea was knowingly and voluntarily entered, following a full and complete explanation of the nature of the charge, the possible penalties, and his various constitutional rights.

The record further affirmatively establishes that defense counsel advised defendant that in his opinion statements the defendant had given to the police could not be used against him; that a serious question existed concerning the legality of the search which produced the shotgun used in the killing, found in the defendant's room, and its subsequent admission into evidence; and that defendant, after discussing these matters with counsel, waived the

right to suppression hearings on those issues. Defendant acknowledged that he was intoxicated at the time of the shooting, that counsel discussed the extent to which the intoxication might constitute a defense, and that defendant understood the import thereof. He nonetheless entered his plea of nolo contendere.

Defendant was present when the State outlined to the court the nature of its proof which was based upon eyewitness testimony. This outline indicated that one witness was present in the defendant's hotel room with defendant, that he saw defendant take the loaded shotgun from his room and go into the hallway, that he saw defendant point the weapon and pull the trigger, and that he heard the discharge. He also heard the defendant say that "he was going to shoot that son of a bitch," or something to that effect. Another witness, a hotel clerk who was familiar with defendant's voice, heard a voice which she recognized as that of the defendant say, "I am going to kill that nigger." Immediately thereafter, she heard the gunshot. The victim was found dead of gunshot wounds in the stomach in the hallway a short distance outside defendant's room. He appears to have been passing down the hallway at the time he was shot. Defendant has furnished, in connection with his application, a diagram showing the position where the body was found in the hallway a short distance outside defendant's room. Defendant heard the State's explanation of its evidence and was immediately thereafter asked by the court, "Do you have any questions at this time, Mr. Glasenapp, anything you wish to ask about anything that has happened either here today or at any time since your arrest on this charge?" to which defendant responded, "I don't believe so, Your Honor."

Previously, defendant heard his own counsel's explanation that, in the light of counsel's review of the evidence, defendant was pleading guilty to the re-

duced charge because he believed it was in his own interest to do so. Defendant was then asked by his own counsel whether he agreed with that. He responded, "Yes. We discussed that this morning."

The record affirmatively establishes that the defendant is entitled to no relief. The court did not err in denying an evidentiary hearing on the application.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. HAROLD LAMONT OTEY, APPELLANT.

321 N.W.2d 453

Filed July 2, 1982. No. 81-768.

1. **Post Conviction: Appeal and Error.** It is well established that one seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
2. **Post Conviction.** A motion for post conviction relief may be heard without requiring the production of the prisoner.
3. **Effectiveness of Counsel.** In order for one to maintain a claim of ineffective counsel, the record must affirmatively support the claim.
4. _____. The two-part test to determine whether an attorney has effectively counseled a criminal defendant is that counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region and must also conscientiously protect his client's interests.
5. **Effectiveness of Counsel: Proof.** A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.
6. **Effectiveness of Counsel: Witnesses: Testimony.** A claim of prejudice based upon an alleged failure to call witnesses is not sustained in the absence of evidence as to what the witnesses' expected testimony would be.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Michael L. Schleich, of Morsman, Fike, Davis & Schleich, P.C., for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

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

PER CURIAM.

The defendant, Harold Lamont Otey, appeals from the order of the District Court denying his motion for post conviction relief.

In 1978 the defendant was convicted of first degree murder in the perpetration of a sexual assault and sentenced to death. The judgment was affirmed by this court in *State v. Otey,* 205 Neb. 90, 287 N.W.2d 36 (1979).

On September 23, 1980, he filed a motion in the District Court for post conviction relief. An evidentiary hearing was held on June 29, 1981. The defendant was not present at this hearing but his testimony was received by deposition. The motion was denied on September 24, 1981.

The defendant contends it was error for the trial court to refuse to permit the defendant to attend the hearing, and that the record shows he was denied the effective assistance of counsel at the original trial.

It is well established that one seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous. *State v. Paulson,* 211 Neb. 711, 320 N.W.2d 115 (1982).

Neb. Rev. Stat. § 29-3001 (Reissue 1979) provides that a motion for post conviction relief may be heard "without requiring the production of the prisoner." In *State v. Woods,* 180 Neb. 282, 142 N.W.2d 339 (1966), we held that although a prisoner could not be

prevented from testifying in support of his motion, he had no right to be personally present at an evidentiary hearing on the motion. See, also, *State v. Wells,* 197 Neb. 584, 249 N.W.2d 904 (1977), and *Davis v. State,* 51 Neb. 301, 70 N.W. 984 (1897), relating to the right to be present at the hearing on a motion for a new trial.

We conclude it was not error for the trial court to require that the defendant's testimony be presented by deposition.

The defendant alleges he was deprived of the effective assistance of counsel because his trial counsel failed to adequately prepare for trial; failed to request that all stages of the proceeding be recorded and transcribed; advised the jury that the defendant would testify in his own behalf when in fact that decision had not been made or discussed with the defendant; and failed to object to the introduction of photographs offered by the State.

The defendant had the burden to show that his trial counsel did not perform at least as well as one with ordinary criminal law skill and training and that he was prejudiced by the action or inaction of his counsel. The rule was stated in *State v. Journey,* 207 Neb. 717, 723, 301 N.W.2d 82, 87 (1981), as follows: "Nebraska employs a two-part test for determining whether an attorney has effectively counseled a criminal defendant. First, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Counsel must also conscientiously protect his client's interests. *State v. Leadinghorse,* 192 Neb. 485, 222 N.W.2d 573 (1974); *State v. Lang,* 202 Neb. 9, 272 N.W.2d 775 (1978). A defendant challenging competency of counsel has the burden to establish it. *State v. Auger & Uitts,* 200 Neb. 53, 262 N.W.2d 187 (1978). In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. *State v. Mays,* 203

Neb. 487, 279 N.W.2d 146 (1979); *State v. Lang, supra; State v. Bartlett,* 199 Neb. 471, 259 N.W.2d 917 (1977)."

As we said in *State v. Meredith, post* p. 109, 321 N.W.2d 456 (1982), in order for one to maintain a claim of ineffective counsel, the record must affirmatively support the claim.

The assistant public defender who represented the defendant at the trial testified at the evidentiary hearing on the motion that he consulted with the defendant approximately a dozen times before trial. He discussed the police reports with the defendant and asked him for the names of witnesses, what his side of the story was, and if he had an alibi. With regard to the stereo which had been stolen from the victim's apartment, the defendant gave counsel three different stories, all conflicting.

In *State v. Holtan,* 205 Neb. 314, 287 N.W.2d 671 (1980), we pointed out that the adequacy of counsel cannot be determined solely on the basis of the amount of time spent interviewing the defendant. As in that case, the defendant in this case has failed to show how, had counsel discussed the case with the defendant any more than he did, anything different would have occurred.

In regard to witnesses, the defendant gave his counsel the "nicknames of people scattered all over the country." The defendant did not provide names and addresses of witnesses or tell his counsel what would be the testimony of these people. In the absence of evidence as to what the witnesses would have testified to, the defendant failed to establish prejudice.

The defendant's counsel further testified that he did not know whether the defendant would testify at the trial, so in his opening statement counsel told the jury that the defense would be able to explain the many confessions the defendant had made, but did not state how the explanation would be made. Coun-

sel testified that he hoped the defendant would not testify because the defendant had made many conflicting statements and counsel was unsure what the defendant would say. Counsel was of the opinion that it would not have been to the defendant's benefit if he had testified.

The defendant relies in part upon a newspaper account of the trial as proof that the defendant's counsel told the jury in his opening statement that the defendant would testify. The newspaper account does not quote counsel verbatim and, apparently, was the newspaper reporter's interpretation or conclusion from the remarks of counsel in the opening statement.

There is no requirement, in the absence of a request, that all stages of the proceeding be recorded, and the defendant has made no showing of prejudice of any kind other than in regard to his claim concerning the alleged statement of counsel in his opening statement.

The photographs which the defendant claims should have been objected to were admissible. Counsel may have believed it to be to the defendant's advantage as a matter of trial strategy to not object to evidence which was admissible.

In his deposition the defendant claims that he could have called "a host of character witnesses" at his sentencing hearing if he had known that he had a right to present such evidence. Again, there is no showing as to names and addresses of witnesses, or what they would testify to, other than perhaps a woman known only as "Shirley" with whom the defendant had stayed on several occasions.

In *State v. Landers, ante* p. 48, 51, 321 N.W.2d 418, 420 (1982), we said: "In *State v. Holtan, supra* [205 Neb.] at 321, 287 N.W.2d at 676, we said: '[T]he defendant maintains that counsel was inadequate in that he did not subpoena witnesses from the state of Washington who would have testified as to

his good character. The record, however, fails to disclose what, if anything, the witnesses would have testified to had they been called. What they might have testified to at best was the defendant's hope and wish. In the absence of evidence to disclose what the witnesses would have testified to, we are unable to establish any prejudice and therefore unable to establish any error.' Likewise, in *State v. Kelly, supra,* where the defendant claimed that his attorney had failed to interview and obtain witnesses to establish a defense based on consent, we said at [190 Neb.] 44, 205 N.W.2d at 648: 'The defendant utterly failed to establish this allegation. None of the four witnesses identified by him as supporting this defense were called to testify at this hearing nor was their failure to be called as witnesses explained. There was an utter lack of corroboration of the allegation and contention that neither force nor nonconsent were involved in his admitted sexual act with the prosecutrix.' "

The evidence in this case falls far short of that required to compel the District Court to grant post conviction relief on any of the contentions advanced by the defendant.

Some mention should be made of the posture of the case at the time counsel was appointed to represent the defendant. After his arrest, the defendant had, on a number of occasions, admitted committing the murder. The police had assembled a mass of evidence, circumstantial and direct, which identified the defendant as the murderer. Counsel testified that the defendant, at his first interview, said "quite frankly that he wanted to plead guilty, get it over with." In other words, the defendant did not claim that he was innocent, gave counsel no facts which could be the basis for a defense, and was of little help in any of the preparations for trial. Against this background, defendant's claims made now that

he did not have adequate assistance of counsel are not persuasive.

The judgment of the District Court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. JOHN MEREDITH, APPELLANT.

321 N.W.2d 456

Filed July 2, 1982. No. 81-788.

1. **Post Conviction.** A court may properly deny an evidentiary hearing upon a motion to vacate a conviction filed under Neb. Rev. Stat. § 29-3001 (Reissue 1979) upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief.
2. _____. 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 further review of issues already litigated.

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

Anthony S. Troia of the Troia Law Offices, for appellant.

Paul L. Douglas, Attorney General, and Lynne Fritz, for appellee.

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

WHITE, J.

The appellant, John Meredith, appeals from an order entered by the District Court for Douglas County, Nebraska, denying Meredith's request for post conviction relief filed pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1979). We affirm the judgment of the District Court denying the appellant an evidentiary hearing.

A court may properly deny an evidentiary hearing

upon a motion to vacate a conviction filed under § 29-3001 upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief. *State v. Miles,* 202 Neb. 126, 274 N.W.2d 153 (1979); *State v. Fincher,* 189 Neb. 746, 204 N.W.2d 927 (1973).

The appellant was found guilty of attempted robbery by a jury. He was also found to be an habitual criminal and was sentenced to a term of from 15 to 25 years in the Nebraska Penal and Correctional Complex. He prosecuted an appeal to this court in *State v. Meredith,* 208 Neb. 637, 304 N.W.2d 926 (1981). We affirmed his conviction and sentence.

In paragraph 5 of the appellant's motion to vacate and set aside the conviction, he alleges that he was inadequately represented by trial counsel. In *State v. Shepard,* 208 Neb. 188, 192, 302 N.W.2d 703, 706 (1981), we stated: "[T]he standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client. . . . In order for one to maintain ineffective counsel the record must affirmatively support the claim."

The appellant alleges that he was inadequately represented by counsel's failure to file a motion to suppress a video filmstrip which was shown to the jury. A review of the record reveals that the appellant was represented by competent and effective counsel throughout all proceedings. This issue was not raised in appellant's motion for new trial or assignments of error on appeal. The filing of the motion to suppress would have been a useless waste of time. The record in this case does not support the claim.

In paragraph 6 of his motion the appellant alleges

that the information against him was fatally defective. This was the same issue the appellant raised in his direct appeal to this court. In *State v. Peery,* 208 Neb. 639, 640, 305 N.W.2d 354, 355 (1981), we said: "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 further review of issues already litigated." See, also, *State v. Weiland,* 190 Neb. 111, 206 N.W.2d 336 (1973). Appellant's allegation that the information was defective is not a proper issue under the Post Conviction Act and is therefore without merit.

Finally, in paragraph 7 of his motion the appellant complains that he was denied a fair and impartial trial when the trial court failed to grant him a new trial based on newly discovered evidence. The appellant failed to raise this issue on appeal; therefore, the holding in *Peery, supra,* is also applicable here. If the appellant was dissatisfied with the ruling on his motion for new trial, he should have addressed that issue in his direct appeal. We will not allow a motion to vacate a judgment or sentence under the Post Conviction Act to be used as a substitute for an appeal.

We have reviewed the whole record and find that it affirmatively shows that there was no denial or infringement of the appellant's rights rendering the judgment void or voidable under either the Constitution of the State of Nebraska or the Constitution of the United States. The judgment of the District Court was correct, and it is hereby affirmed.

AFFIRMED.

MARY L. MCBRIDE, APPELLANT, V. CITY OF MCCOOK, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

321 N.W.2d 905

Filed July 9, 1982. No. 44213.

1. **Employment Contracts: Statute of Frauds.** An oral contract of employment for a term of 18 months is within the statute of frauds.
2. _____: _____. A written memorandum sufficient to satisfy the statute of frauds must contain the essential terms of the contract.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

Herbert J. Friedman and James R. Harris of Friedman Law Offices, for appellant.

G. Peter Burger of Mousel & Burger, P.C., for appellee.

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

BOSLAUGH, J.

This was an action for damages for breach of an alleged oral contract of employment. The trial court sustained a general demurrer to the plaintiff's amended petition. The plaintiff elected to stand upon the amended petition and the action was dismissed.

The amended petition alleged the plaintiff had entered into an oral contract with the defendant City to be employed by it as a block grant administrator for a term of 18 months. The plaintiff alleged her salary was to be $10,500 per year, with a $3,000 bonus at the end of the first year, and fringe benefits, including Blue Cross insurance. She alleged she had been damaged in the amount of $15,465 for lost wages, $1,500 for health insurance, plus general damages.

Since the alleged contract, by its terms, was "not to be performed within one year from the making thereof," it was subject to the statute of frauds. Neb. Rev. Stat. § 36-202 (Reissue 1978); *Montgomery*

*v. Quantum Labs, Inc.*, 198 Neb. 160, 251 N.W.2d 892 (1977). The statute provides in part that such an agreement is void unless it, "or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith."

The plaintiff attempts to avoid the bar of the statute by arguing that a memorandum existed which satisfied the statute, and her employment from February 1, 1979, to July 17, 1979, approximately 5½ months, was sufficient part performance to take the contract out of the statute.

The written memorandum incorporated by reference in the amended petition was a classified advertisement published in the McCook Daily Gazette. The advertisement was not a sufficient memorandum to satisfy the statute because it did not contain the essential terms of the contract, such as salary. These are essential requirements of a memorandum. See *David v. Tucker*, 196 Neb. 575, 244 N.W.2d 197 (1976).

The employment for 5½ months was not sufficient part performance to permit enforcement of the oral contract for its full term. The general rule is that part performance of services under an oral contract not to be performed in 1 year is not sufficient to remove the contract from the operation of the statute of frauds as to the part which is still executory, and an action may not be maintained for the breach of the entire contract. Annot., 6 A.L.R.2d 1053 § 8 (1949); 73 Am. Jur. 2d *Statute of Frauds* § 506 (1974).

In *Montgomery v. Quantum Labs, Inc., supra*, a case involving a 15-month oral contract of employment, we said at 162-63, 251 N.W.2d at 894: "The threshold question is then whether or not the contract between Montgomery and Quantum, if oral, was a contract which could be performed within the period of 1 year and thus be exempt from the Statute of Frauds. The contract, according to Montgomery's testimony, was signed by him in the latter part

of August or early September 1972, and called for his immediate employment for a period from September 1, 1972, to December 1, 1973, a total of 15 months. The contract is for a period in excess of 1 year. It is subject to the terms of the act and unenforceable if it is an oral contract. Restatement, Contracts 2d, Tent. Dr. No. 4, section 198, which is unchanged from the original section 198 of Restatement, is as follows: '(1) Where any promise in a contract cannot be fully performed *within a year from the time the contract is made,* all promises in the contract are within the Statute of Frauds until one party to the contract completes his performance.

" '(2) When one party to a contract has completed his performance, the one-year provision of the Statute does not prevent enforcement of the promises of the other parties.' (Emphasis supplied.)"

The oral contract of employment alleged by the plaintiff was unenforceable under the statute of frauds. The amended petition was subject to demurrer. The judgment of the District Court is affirmed.

AFFIRMED.

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MYRNA PYKE, APPELLEE AND CROSS-APPELLANT, V. JAMES A. PYKE, JR., APPELLANT AND CROSS-APPELLEE.

321 N.W.2d 906

Filed July 9, 1982. No. 44239.

1. **Alimony: Property Division.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful

employment without interfering with the interests of any minor children in the custody of such party.

2. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in Neb. Rev. Stat. § 42-365 (Cum. Supp. 1980) make it appropriate.
3. _____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion under the statute, as well as under the former decisions of this court, is one of reasonableness. The relevant considerations will vary from case to case.
4. _____. Where the situation of the parties and the contingencies are such that the amount of alimony cannot be placed in a lump sum without danger that such allowance may prove unjust or inequitable to one or the other of the parties, it is therefore proper for the courts to provide for the payment of a stated sum at fixed times over an indefinite period.
5. **Divorce: Pensions.** Federal law precludes a state court from awarding a nonmilitary spouse a portion of a military spouse's government pension.
6. **Divorce: Alimony: Pensions.** A trial court, in determining what, if any, alimony should be awarded a spouse, may recognize that the spouse ordered to pay the alimony may have, by way of income for his own maintenance and support, a military pension or may have the proceeds of a military pension from which he may be able to make alimony payments, although the court cannot award an interest in the pension to the nonmilitary spouse.

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

Thomas J. Garvey of Hascall, Jungers & Garvey, for appellant.

Albert L. Feldman of Harris, Feldman, Stumpf & Pavel, for appellee.

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

KRIVOSHA, C.J.

The appellant, James A. Pyke, Jr. (appellant husband), appeals from a decree entered by the District Court for Sarpy County, Nebraska, on March 26, 1981. The decree dissolved the marriage of appellant husband and his wife, Myrna Pyke (appellee

wife), and further provided for the division of the property owned by the parties. In addition, the court awarded alimony to appellee wife. This appeal involves only the issue of the alimony awarded. We affirm.

James and Myrna Pyke were married in Floydada, Texas, on August 11, 1956. Two children were born of the marriage, both of whom have now reached their legal majority. One of the sons is fully employed and the other is a student at the University of Nebraska-Lincoln.

Appellant husband is a lieutenant colonel in the U.S. Air Force with 26 years of service. He is presently 47 years of age and has annual earnings from the Air Force in the amount of $39,000. Appellee wife, who is 45 years of age, has engaged, to some limited extent, in selling real estate and has had gross earnings of approximately $4,000 per year. Additionally, she has been employed in the past as a secretary in the civil service with a grade of GS-3, although she was eligible to be employed as a GS-4. The record discloses that the assets accumulated by the parties during their marriage consisted of $81,000 in cash and additional personalty in the amount of approximately $10,000. In addition, appellant husband will be eligible to receive a federal military retirement upon his separation from the service, which the record indicates is anticipated in approximately 2 years.

With regard to the matter of alimony, the court decree specifically provided as follows: "The respondent is presently a Lt. Col. in the United States Air Force, earning an annual salary of $39,000, and the petitioner, although unemployed at the present time, is capable of earning approximately $7,000 per year based upon the present current prevailing minimum wage. That based upon the foregoing earning capacity of the parties, the court finds that the respondent should pay to the petitioner as permanent

alimony the sum of $850 per month, commencing March 1, 1981, and a like amount on the first day of each month thereafter until the death of the respondent or the petitioner, or until further order of the court." The court specifically found that the alimony was not to terminate automatically upon the remarriage of the appellee wife but that such remarriage could be considered as a change of circumstance to be considered by the court at some future time, together with any other relevant circumstances in regard to the earning capacity of either of the parties.

The trial court further specifically found that although appellant husband, by reason of his service in the U.S. Air Force, would, upon retirement in 1983, receive the sum of $1,991.28 per month, said retirement pay was not an asset to be divided by the court but could be considered as a fund available to appellant husband for the payment of alimony.

Appellant husband argues to the court that the trial court erred in both setting the alimony at the sum of $850 per month and in not limiting it to a fixed time. He argues that the alimony should have been fixed at $650 per month for a set number of months. Our examination of the record does not lead us to that conclusion.

Neb. Rev. Stat. § 42-365 (Cum. Supp. 1980) specifically details how and when the trial court is to consider awarding alimony. The section, reflective of our case holdings, provides in part as follows: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the sup-

ported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party." See *Tuttle v. Tuttle,* 193 Neb. 397, 227 N.W.2d 27 (1975). In 1980 the Legislature of Nebraska amended § 42-365 and added a new paragraph which more fully indicated the Legislature's intent in adopting the section. The amendment provides as follows: "While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the *continued maintenance* or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate." (Emphasis supplied.) It seems clear to us that by amending this section the Legislature intended that the trial court, in the first instance, and this court, on review, were to look at the overall circumstances of the parties and to attempt, if possible, to provide for the award of alimony for such period of time and under such conditions as would minimize any substantial and unnecessary disruption in the lives of the parties occasioned by reason of the dissolution of marriage. That is not to say that the court is, in every instance, to grant to one of the spouses a lifetime annuity. It is simply to say that in each case the court must make an examination of the circumstances and attempt to enter an order which is fair and equitable under the circumstances. That notion is not new to the law.

Specifically, in *Magruder v. Magruder,* 190 Neb. 573, 576, 209 N.W.2d 585, 587 (1973), we said: "In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criteria under the statute as well as under the

former decisions of this court is one of reasonableness. The relevant considerations will vary from case to case." And in *Baird v. Baird,* 196 Neb. 124, 125, 241 N.W.2d 543, 545 (1976), we said: "In determining whether alimony should be awarded, the ultimate test is one of reasonableness."

As we examine the record in this case, taking into account the factors which we are required to consider in accordance with § 42-365, we cannot say that the trial court was incorrect in its award of $850 per month, nor do we believe that in reviewing the record de novo we should modify that award.

Appellant husband argues that the trial court has granted to the appellee wife a lifetime annuity, which should not be permitted, citing to us our decision in *Cole v. Cole,* 208 Neb. 562, 567, 304 N.W.2d 398, 401 (1981), wherein we said: "[A]llowance of alimony in the form of an annuity or requiring the husband to pay a fixed sum for an indefinite period of time is not favored, although we have on occasion upheld such awards where we deem them necessary or desirable." See, also, *Witcig v. Witcig,* 206 Neb. 307, 292 N.W.2d 788 (1980). The deficiencies, however, in appellant husband's argument in this regard are twofold. In the first instance, the court has not made the payment of alimony a "lifetime annuity" as suggested by appellant husband. The alimony is to terminate upon the death of either party, and may terminate upon the remarriage of appellee wife. Moreover, the decree specifically provides that the decree is subject to modification upon further order of the court. This modification may be considered by the court whenever there is any change reflected by "other relevant circumstances in regard to the earning capacity of either of the parties." If, upon retirement from the military by appellant husband, his income is significantly altered from that which it now is, the court may, under the decree, modify the

alimony, either decreasing it or increasing it as the circumstances justify.

The record in this case discloses that the appellee wife is probably entitled to receive alimony for more than 2 years. The court, however, is faced with a situation where it appears on the record at this time that the earning ability of both of the parties may be significantly changed during that time. It would appear that where, as here, the court is now mindful that a significant event is to occur in the near future which may alter the earning abilities of either of the parties, but the court is unable to determine what that amount is, an order such as that entered by the court in this case is appropriate.

In *Dunlap v. Dunlap,* 145 Neb. 735, 742, 18 N.W.2d 51, 54 (1945), we said: "There are cases, and we have so held, where the situation of the parties and the contingencies are such that the amount of alimony cannot be placed in a lump sum without danger that such allowance may prove unjust or inequitable to one or the other of the parties and it is therefore proper for the court to provide for the payment of a stated sum at fixed periods over an indefinite period." We believe that, like *Dunlap,* the situation in the instant case justifies the action taken by the trial court. In effect, the trial court is at liberty to review the matter upon appellant husband's retirement from the military service, should either party desire such a review to take place, but is not required to make such review unless asked to do so by one or the other of the parties.

One final issue is raised by the parties in this case, although, admittedly, the trial court properly handled the issue. The issue concerns itself with the trial court's determination that appellant husband's military retirement pay is not an asset to be divided by the court but may be considered as a fund available to appellant husband for the payment of alimony. We believe the trial court's analysis in that

regard in this case was correct, notwithstanding the action of our Legislature in adopting Neb. Rev. Stat. § 42-366(8) (Cum. Supp. 1980) and our decision in *Kullbom v. Kullbom,* 209 Neb. 145, 306 N.W.2d 844 (1981). In 1980 the Legislature amended § 42-366(8) to provide as follows: "If the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate. The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested."

All of this occurred, however, prior to the time the U.S. Supreme Court issued its opinion, on June 26, 1981, in *McCarty v. McCarty,* 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981). In the *McCarty* case, the U.S. Supreme Court held that federal law precludes a state court from awarding a nonmilitary spouse a portion of the military spouse's government pension. In effect, the U.S. Supreme Court said in *McCarty* that military pensions are not to be considered part of the marital estate. We are bound by that decision and must afford federal military pensions an exemption from the provisions of § 42-366, notwithstanding the language of the section. However, a trial court, in determining what, if any, alimony should be awarded a spouse, may recognize that the spouse ordered to pay the alimony may have, by way of income for his own maintenance and support, a military pension or may have the proceeds of a military pension from which he may be able to make alimony payments, although the court cannot award an interest in the pension to the nonmilitary spouse. This is precisely what the trial court did in this case, and we believe it was, in all respects, correct. The judgment of the trial court is affirmed.

AFFIRMED.

McCOWN, J., concurring in part, and in part dissenting.

I concur in that portion of the majority opinion which determines that a military retirement pension is not an asset to be divided by the court or considered as a part of the marital estate, but may be considered as a source of income for the payment of alimony.

I dissent from that portion of the opinion which approves a decree which requires the husband to pay "as permanent alimony the sum of $850 per month . . . until the death of the respondent or the petitioner, or until further order of the court," and also provides that "alimony should not terminate automatically upon the remarriage of the petitioner, but that such remarriage may be considered as a change of circumstances to be considered by the court at some future date . . . ."

The majority opinion concedes that a permanent alimony award is contrary to the general rule in this state that allowance of alimony in the form of an annuity or requiring a husband to pay a fixed sum for an indefinite period of time is not favored. See *Cole v. Cole,* 208 Neb. 562, 304 N.W.2d 398 (1981).

Ordinarily the allowance of permanent alimony has been limited to cases in which the health of the recipient made such an allowance appropriate at the time of the dissolution of marriage. In the present case the recipient of alimony is 45 years old, at least normally healthy, and has been previously employed. Under such circumstances I see no justification for providing alimony of more than $10,000 per year for a longer period than 10 years at most.

The major problem with the decree in the present case, however, is that this court has now approved a provision that support alimony does not terminate automatically upon remarriage. Instead, the decree here provides that some future court may decide the effect of remarriage and at that time de-

termine whether or not alimony should be reduced, terminated, or continued.

Neb. Rev. Stat. § 42-365 (Cum. Supp. 1980) provides in part: "Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient." The legislative policy reflected in that statute is clear. Unless the parties agree or there are unusual or special circumstances which are to be determined by the trial court at the time of entry of the decree, an alimony award terminates upon the remarriage of the recipient.

I find no justifiable or logical reason in the case at bar why the permanent alimony should not terminate upon remarriage. If future courts must now engage in the judicial process of determining whether a particular remarriage does or does not require the termination or reduction of permanent alimony support payments from a former spouse, there will be no end to the problems which are created. The trial court at the time of the entry of a dissolution decree should specify that alimony payments for support will not terminate upon remarriage only if there are special circumstances requiring such a provision at the time of dissolution, but the trial court should not leave the termination decision to some future court. To defer the issue of determining the obligations of support and maintenance required by consecutive marriages replaces specificity with uncertainty and confusion and ignores the realities of modern marital support provisions. Alimony payments in this case should terminate on remarriage of the recipient.

CLINTON, J., joins in this concurrence and dissent.

ANITRIA G. CARRUTH, APPELLANT, V. DANIEL D. CARRUTH, APPELLEE.

321 N.W.2d 912

Filed July 9, 1982. No. 44267.

**Alimony.** One of the elements to be considered in the allowance of alimony is the earning capacity of the husband.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed as modified.

Michael N. Schirber of Schirber Law Office, P.C., for appellant.

No appearance for appellee.

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

CAPORALE, J.

In this action for dissolution of the marriage of the parties, the appellant wife, Anitria G. Carruth, appeals from that portion of the decree of the District Court of Nebraska, Second Judicial District, in and for Sarpy County, which relates to the division of property and awards certain allowances to her. We affirm the decree of the trial court, as modified.

As of the date of trial, January 6, 1981, appellant was 41 years of age and appellee, Daniel D. Carruth, was 48 years of age. They were married on June 10, 1961, and have four minor children ages 17, 16, 11, and 5 as of the date of dissolution. The appellant is a college graduate with a degree in psychology and earns a gross salary of $950 per month, yielding a net income of approximately $610 per month. The appellee is a retired major from the U. S. Air Force and receives a gross pension of $1,315 per month. He is not presently employed and has sought no employment, but testified that he could earn $1,000 per month.

The trial court awarded the family residence having an equity of approximately $37,736, household

goods valued at $3,701, an automobile having an equity of about $300, and alimony in the sum of $100 per year to Mrs. Carruth.

The decree ordered Mr. Carruth to pay child support of $200 per month for each of the two younger children and $100 per month for each of the two older children, for a total of $600 per month in child support payments. Mr. Carruth was awarded his military pension having a value, if he lives out his full life expectancy, of about $400,000. He was ordered to pay the family debts, except for the two mortgages on the residence and the mortgage on the automobile awarded to Mrs. Carruth.

We review this matter de novo. *Puetz v. Puetz,* 211 Neb. 674, 319 N.W.2d 761 (1982). In that connection we observe that one of the elements to be considered in the allowance of alimony is the earning capacity of the husband. *Kosnopfl v. Kosnopfl,* 206 Neb. 524, 293 N.W.2d 854 (1980); *Wheeler v. Wheeler,* 193 Neb. 615, 228 N.W.2d 594 (1975); *Stevens v. Stevens,* 184 Neb. 370, 167 N.W.2d 761 (1969); *Sowder v. Sowder,* 179 Neb. 29, 136 N.W.2d 231 (1965).

Although appellee's income is $1,315 per month, his earning capacity is $2,315 per month. See *Pyke v. Pyke, ante* p. 114, 321 N.W.2d 906 (1982).

Although Mrs. Carruth has earning capacity and is currently employed, the evidence establishes that her reasonable monthly expenses exceed her income and that Mr. Carruth's earning capacity is such that he can contribute more than $100 per year toward the support of his former wife.

Accordingly, we modify that portion of the District Court's decree which awards the appellant alimony of $100 per year and order the appellee to pay, through the office of the clerk of the District Court of Nebraska, Second Judicial District, in and for Sarpy County, alimony in the sum of $200 per month commencing the first day of July 1982, and a like amount

on the first day of each month thereafter until the death of the appellant or appellee, or until further order of the District Court. Remarriage of appellant shall not automatically terminate said alimony, but the court may consider the fact of appellant's remarriage in determining whether there has been such a change in circumstances as to warrant a modification or termination of alimony.

Appellant is awarded the sum of $750 to apply toward her attorney fees for services rendered in this court.

AFFIRMED AS MODIFIED.

McCOWN, J., dissenting.

I dissent from that portion of the opinion which provides that the alimony award does not terminate automatically upon the remarriage of the recipient. My reasons are set out in my dissent in *Pyke v. Pyke, ante* p. 114, 321 N.W.2d 906 (1982).

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SHARON COLTON, M.D., APPELLANT, V. JOHN L. DEWEY, M.D., APPELLEE.

321 N.W.2d 913

Filed July 9, 1982. No. 44446.

1. **Legislature.** The Legislature may make a reasonable classification of persons for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class, relative to the subject of legislation, which render the enactment appropriate.
2. **Limitations of Actions: Medical Malpractice.** The 10-year period of repose contained in the professional negligence statute of limitations, Neb. Rev. Stat. § 25-222 (Reissue 1979), rests upon a valid distinction between professional and other activities.
3. **Limitations of Actions.** A statute of limitations is a statute of repose designed to prevent recovery on stale demands.
4. **Limitations of Actions: Due Process.** Due process does not demand an awareness of a right of action before a period of limitations may run against it.
5. **Limitations of Actions: Constitutional Law.** The requirement of Neb. Const. art. I, § 13, that all courts be open and every person

have a remedy by due process of law for any injury to his person, does not mean that limits may not be imposed upon the time within which one must ask courts to act.

6. **Legislature.** The Legislature is free to create and abolish rights so long as no vested right is disturbed.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Michael G. Goodman and Martin A. Cannon of Matthews, Cannon & Riedmann, P.C., for appellant.

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

William E. Gast and Thomas J. Jenkins of Gast & Kielty, and Paul F. Peters of Taylor, Hornstein & Peters, amici curiae.

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

CAPORALE, J.

This appeal involves a medical malpractice case brought by Dr. Sharon Colton, appellant, against Dr. John L. Dewey, appellee. The District Court of Nebraska, Fourth Judicial District, in and for Douglas County, sustained the appellee's demurrer and dismissed appellant's petition. We affirm.

The petition alleges that from 1961 through 1965 the appellee treated Dr. Colton's chronic asthma by X-rays of, and injections of X-ray radiation particles into, her chest. The petition further alleges the treatments subjected appellant to "known hazards or [sic] resultant malignancy, were experimental in nature, and were not recognized among competent medical practitioners as having any usefulness in the treating of ailments such as plaintiff presented." Appellant further alleges that appellee affirmatively misrepresented the effect of the therapy upon her.

On October 29, 1979, during a routine physical examination, appellant was discovered to have breast cancer. She was required to undergo a bilateral

simple mastectomy and node excision in the right axilla. The suit from which this appeal arises was filed December 12, 1980.

Appellee contends this action is barred by Neb. Rev. Stat. § 25-222 (Reissue 1979), which provides: "Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided,* if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further,* that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action."

Appellant contends the 10-year period of repose does not apply; and, further, if it were to apply it is unconstitutional in that, first, it constitutes special legislation in violation of the Nebraska Constitution; second, it violates the equal protection clause of the U.S. Constitution and due process clause of the Nebraska Constitution; and third, it denies her the right of access to the courts guaranteed by the Nebraska Constitution.

We first address appellant's constitutional arguments. We have held that under the provisions of Neb. Const. art. I, § 16, and art. III, § 18, the Legislature may make a reasonable classification of persons for purposes of legislation concerning them, but

that the classification must rest upon real differences of situation and circumstances surrounding the members of the class, relative to the subject of legislation, which render the enactment appropriate. We have also held that the 2-year period of limitation contained in the statute under consideration rests upon valid distinctions between professional and other activities. *Taylor v. Karrer,* 196 Neb. 581, 244 N.W.2d 201 (1976). The classification of professionals being valid for the purpose of limiting the time within which suit may be brought, appellant's argument that the period of repose constitutes special legislation falls. It has long been the rule of this state that a statute of limitations is a statute of repose designed to prevent recovery on stale demands. *Spath v. Morrow,* 174 Neb. 38, 115 N.W.2d 581 (1962); *In re Estate of Anderson,* 148 Neb. 436, 27 N.W.2d 632 (1947).

To the extent appellant relies on the special legislation argument to support her claim that the period of repose violates the due process clause (art. I, § 3) of the Nebraska Constitution and equal protection clause (amend. XIV, § 1) of the U.S. Constitution, that claim too must fall for the reasons discussed above. Nor does due process demand an awareness of a right of action before a period of limitations may run against it. *Landgraff v. Wagner,* 26 Ariz. App. 49, 546 P.2d 26 (1976). We find no merit in appellant's due process and equal protection claims.

Likewise, we find no merit in her third constitutional argument. The requirement of Neb. Const. art. I, § 13, that all courts be open and every person have a remedy by due process of law for any injury to his person, does not mean that limits may not be imposed upon the time within which one must ask courts to act. See *Drainage District v. Chicago, B. & Q. R. Co.,* 96 Neb. 1, 146 N.W. 1055 (1914), holding a statute allowing a drainage district 2 years following ascertainment of just compensation by appraisers

within which to enter upon and appropriate land to be valid.

A review of the history leading to enactment of the period of repose is instructive. In *Spath v. Morrow, supra,* we held that an action for malpractice did not accrue until a patient discovered, or in the exercise of reasonable diligence should have discovered, the malpractice. Thereafter, the Legislature limited that period of discovery to 10 years. The question simply becomes one of whether the Legislature has the power to do so. It has long been the law of this state that the Legislature is free to create and abolish rights so long as no vested right is disturbed. *Campbell v. City of Lincoln,* 195 Neb. 703, 240 N.W.2d 339 (1976); *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.,* 192 Neb. 431, 222 N.W.2d 125 (1974); *State v. Heldenbrand,* 62 Neb. 136, 87 N.W. 25 (1901). In the words of the Supreme Court of New Jersey in *Rosenberg v. Town of North Bergen,* 61 N.J. 190, 199-200, 293 A.2d 662, 667 (1972), considering the same arguments as made by appellant in the instant case, which held a similar statute valid as applied to an architect: "It does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovery. The injured party literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress. The function of the statute is thus rather to define substantive rights than to alter or modify a remedy. The Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed."

We find the enactment of the 10-year period of repose in question to have been a valid exercise of legislative power.

Having found the period of repose to be constitu-

tional, we must now address the question as to whether it applies to the allegations in this case. Appellant's argument that it does not rests on her claim that appellee had, by virtue of the fiduciary relationship which exists between a medical practitioner and the patient, a continuing duty to warn her of the hazards presented by the treatment. Therefore, according to appellant, the failure to warn her of the carcinogenic risk constituted ongoing negligence; that is to say, appellee failed to render the required professional service each and every day until such time as he would have warned her of the hazard. The difficulty with this argument is that appellant would have whatever fiduciary relationship may exist between physician and patient extend beyond the duration of the physician-patient connection itself. We disagree; the wrongful act of which appellant complains took place no later than when the course of treatment ended in 1965. See *Doyle v. Planned Parenthood of Seattle-King Cty.*, 31 Wash. App. 126, 639 P.2d 240 (1982), holding, under a "date of the alleged wrongful act" statute, that negligence did not continue beyond the existence of the physician-patient relationship. Indeed, to hold otherwise would be to effectively write the period of repose out of existence.

Remaining for consideration is whether appellant's allegation that appellee affirmatively misrepresented the effect of the treatment takes this case out of the professional negligence period of limitations as to that claim. Our earlier rulings establish that it does not. Perhaps most directly in point is *Stacey v. Pantano,* 177 Neb. 694, 131 N.W.2d 163 (1964), which held that the 2-year malpractice statute of limitations rather than the 4-year fraud statute of limitations applied where damages were alleged to have resulted from false representations of the physician as to the cause of a postoperative condition. Therein we stated that any professional mis-

conduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is "malpractice" and comes within the professional or malpractice statute of limitations. See, also, *Swassing v. Baum,* 195 Neb. 651, 240 N.W.2d 24 (1976).

The trial court was correct in sustaining appellee's demurrer and dismissing appellant's petition.

AFFIRMED.

WHITE, J., dissenting.

Assuming, as we must for the purposes of the demurrer, that all well-pleaded facts in the petition are true, the majority now holds that where life-threatening procedures are followed by a physician, no duty exists beyond the end of the treatment to inform the patient of the danger so that adequate steps might be taken to minimize the risk. The holding rewards unconscionable conduct and violates the most basic rules of public policy and common humanity.

I am authorized to state that Krivosha, C.J., joins in this dissent.

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KAREN CARLSON, APPELLANT, V. JOHN L. DEWEY, M.D., AND WAYNE M. HULL, M.D., APPELLEES.

321 N.W.2d 458

Filed July 9, 1982. No. 81-860.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Michael G. Goodman and Martin A. Cannon of Matthews, Cannon & Riedmann, P.C., for appellant.

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

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

CAPORALE, J.

This appeal involves a medical malpractice case brought by Karen Carlson, appellant, against Drs. John L. Dewey and Wayne M. Hull. The District Court of Nebraska, Fourth Judicial District, in and for Douglas County, sustained the appellees' demurrers and dismissed appellant's petition. We affirm.

Except that the course of treatment in this case extended from 1955 through 1962 and that there is no claim of affirmative misrepresentation of the effect of treatment, the allegations are essentially the same as those in *Colton v. Dewey, ante* p. 126, 321 N.W.2d 913 (1982). This suit was filed October 15, 1981.

The rules of law which determined the resolution of *Colton v. Dewey, supra,* are dispositive of this case.

The trial court was correct in sustaining appellees' demurrers and dismissing appellant's petition.

AFFIRMED.

WHITE, J., dissenting.

Assuming, as we must for the purposes of the demurrers, that all well-pleaded facts in the petition are true, the majority now holds that where life-threatening procedures are followed by a physician, no duty exists beyond the end of the treatment to inform the patient of the danger so that adequate steps might be taken to minimize the risk. The holding rewards unconscionable conduct and violates the most basic rules of public policy and common humanity.

I am authorized to state that Krivosha, C.J., joins in this dissent.

ESTHER LARSON, E. HENRIETTA REDFERN AND BILL REDFERN, AND THELMA ADAMSON AND HARVEY ADAMSON, APPELLEES, V. RICHARD A. BEDKE AND HELEN K. BEDKE, APPELLANTS.

322 N.W.2d 367

Filed July 16, 1982. No. 43655.

SUPPLEMENTAL OPINION

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Nye, Hervert, Jorgenson & Watson, P.C., for appellants.

Jacobsen, Orr & Nelson, and Moller R. Johnson, for appellees.

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

PER CURIAM.

In our original opinion (211 Neb. 247, 318 N.W.2d 253 (1982)) we reversed and vacated an order of the District Court for Buffalo County entered nunc pro tunc, having concluded that the order was an attempt to correct a judicial error which is not a proper matter for correction nunc pro tunc. Upon motion for rehearing we conclude that, although the legal principles announced in our original opinion are entirely correct, the record does, in fact, show that the error being corrected was a clerical omission by counsel and not a judicial error. We therefore modify our opinion and affirm the action of the District Court in entering the nunc pro tunc order.

The following principles are applicable: "A court of record has the inherent authority to amend its records so as to make them conform to the facts. The power extends as well to the supplying of omissions as to the correcting of mistakes, and in the exercise of the power the court is not confined to an examination of the judge's minutes or other written

evidence; it may proceed upon any satisfactory evidence, oral or written." *Fisher v. Minor,* 159 Neb. 247, 66 N.W.2d 557 (1954) (syllabus of the court). "More specifically it has been held that the purpose of a nunc pro tunc entry is to correct mistakes of the clerk or other court officer, or inadvertences of counsel, or to settle defects or omissions in the record, so that it will show what actually took place." 21 C.J.S. *Courts* § 227 at 423 (1940). Some courts hold that orders nunc pro tunc can be based upon the judge's recollection; others hold otherwise. "[A]lthough, where it appears from written evidence that judgment was rendered or other action taken, parol proof may be resorted to for the purpose of ascertaining the character, terms, and conditions of such action, the personal knowledge and recollection of the court being admissible for such purpose. As distinguished from those cases which require written evidence as a basis for entries nunc pro tunc, there exists authority to the effect that such entries may be made on any competent evidence, although it be wholly outside the record, such as the memory of the court alone, or recollection of the court together with other parol evidence." 21 C.J.S., *supra* at 426. *Fisher v. Minor, supra,* is cited by C.J.S. for the proposition that "such entries may be made on any competent evidence."

The transcript shows that by pretrial order, prescriptive title to the portion of the garage occupied by the Bedkes was made an issue. Included in the evidence introduced at the hearing on the application for entry of the order nunc pro tunc was the following: (1) The pretrial order. It made title to the portion of the garage occupied by Larson but located on the Bedke property an issue. (2) The trial docket. The entry of November 27, 1979, deals only with an easement in general terms. The entry of December 21, 1979, simply notes order modified and motion for new trial overruled. Neither of these is incon-

sistent with the position that the failure to include in the journal entry an order disposing of the quiet title issue was simply an omission. (3) The journal entry of November 27, 1979, which recites in its findings: "At the west end of the driveway there was a garage with two doors facing to the east. The South 7.85 feet of the garage was located upon Lot 2. The North 16.35 feet of the garage was located on Lot 1. From 1937 until 1949, the occupants of the two adjoining lots used the driveway as a joint driveway and each occupied their one-half of the driveway [sic]." It is clear that the reference to driveway is a patent error and the word intended to be used was garage. This journal entry also contains the following in its findings: "As late as one year ago the Plaintiff Esther Larson's son-in-law used her half of the garage for his vehicle . . . ." The modified journal entry of December 21, 1979, contains the same findings. Neither journal entry disposes of the issue of title to the portion of the garage occupied by Larson but located on the Bedke lot. (4) The motion for new trial. It contains a request for a modified judgment and attaches a proposed order. That proposed order contains the same recitals with reference to the garage which are previously mentioned, but the order portion deals only with an easement to the front of the garage. It proposes to quiet title to the rest of the lot in the Bedkes. (5) A notice to Larson to vacate the 4.5 feet of the garage and a copy of a petition in ejectment. (6) The bill of exceptions from the original trial. It shows, as the original opinion notes, that the one-half of the garage occupied by Larson lies partly on the Larson lot and partly on the Bedke lot. (7) The bill of exceptions relating to the hearing on the application for the order nunc pro tunc. It contains the following recital by the court: "[B]ut I understand that the motion for nunc pro tunc goes not to the review of the addition but to see where the error has been established in

the rendition of it from what was intended. That was the purpose of nunc pro tunc." (8) The record showing that the journal entry of December 21, 1979, was drafted by counsel for the Bedkes.

It is to be observed that in each of the journal entries, findings were made on the issue of prescriptive title to a portion of the garage. These findings supported a finding of adverse possession. The findings, however, were not implemented in the order portion of the journal entry.

It now seems clear to us that the failure to deal with the issue of title to a portion of the garage was a simple omission. It seems further clearly inferable that this was an omission of counsel in drafting the journal entry. Nothing in the docket entries contradicts the showing of mere "omission."

Our original opinion is accordingly modified, and the portion thereof vacating the order nunc pro tunc is withdrawn and the order of the District Court entered nunc pro tunc on May 7, 1980, is reinstated.

AFFIRMED.

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CITY OF HASTINGS, APPELLEE, V. JERRY SPADY PONTIAC-CADILLAC, INC., A CORPORATION, APPELLANT.

322 N.W.2d 369

Filed July 16, 1982. No. 43958.

1. **Equity: Appeal and Error.** Appeal of an equitable action is reviewable de novo by this court, bearing in mind that the trial court had the opportunity to observe the witnesses and their manner of testifying and therefore was in a better position to determine the credibility of the evidence and the weight to be accredited thereto.
2. **Attorney and Client.** An attorney must not while representing a client do anything knowingly that is inconsistent with the terms of his employment or contrary to the best interests of his client.
3. _____. Notice to, or knowledge of, facts by an attorney is notice to, or knowledge of, his client.
4. _____. An attorney cannot purchase or negotiate for an interest in land in which his own client is interested.

5. **Trusts.** A constructive trust will be imposed against those who knowingly aid or participate in a breach of trust.
6. **Sales: Vendor and Vendee.** A bona fide purchaser exists where the purchaser takes without knowledge or notice of any suspicious circumstances which would put a prudent man upon inquiry.

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

Thomas J. Mullen of Whelan, Foote & Scherr, P.C., for appellant.

M. J. Bruckner and W. Scott Davis of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellee.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and HAMILTON and CASE, D. JJ.

HAMILTON, D.J.

This is an action brought by the appellee, City of Hastings, in equity to impress a constructive trust upon real property purchased by appellant, Jerry Spady Pontiac-Cadillac, Inc., from the Missouri Improvement Company, a subsidiary of Missouri Pacific Railroad Company. The District Court found generally for the City of Hastings and imposed a constructive trust.

During 1977 and part of 1978 Duane Stromer was city attorney for the City of Hastings, and during said period was also attorney for Jerry Spady Pontiac-Cadillac, Inc.

In 1976 the planning director for the City of Hastings began the development of the Hastings comprehensive plan. As part of this plan it was contemplated that F Street would be extended along property owned by the Missouri Pacific Railroad Company, but no longer used as railroad right-of-way. This extension of F Street was a material part of the comprehensive plan, since it would provide the city with its only major thoroughfare crossing the city from east to west in the south part of town.

The extension of F Street was clearly shown on the

comprehensive plan that was submitted to the Hastings Planning Commission in March of 1977, which was attended by Duane Stromer in his capacity as city attorney. It became obvious at this point in time that the acquisition of the abandoned railroad right-of-way by the City of Hastings was an absolute necessity to accomplish the intent and purposes of the comprehensive plan insofar as it applied to the extension of F Street.

The records of the Missouri Pacific Railroad Company reflect that the first contact by Duane Stromer with the company was on July 12, 1977, when Stromer advised the company that he was city attorney for the City of Hastings and that he was inquiring whether or not the company would sell the abandoned property to the city for a street. Duane Stromer maintains his first contact with the Missouri Pacific was on April 2, 1977, when he made inquiry on his own behalf. City officials were unaware of these activities and had never authorized Stromer to negotiate for the purchase of the property.

During the same period of time the city planning director had made contact with Missouri Pacific officials and expressed the city's interest in obtaining the abandoned right-of-way for street purposes. On July 21, 1977, the director informed the city engineering committee of the city's need to acquire the property and the willingness of the Missouri Pacific to sell. The minutes of this meeting were provided to the mayor and members of the city council.

In August of 1977 Duane Stromer made a written offer to purchase the property for $6,890, which was rejected. In correspondence to the Missouri Pacific on September 6, 1977, Stromer advised the Missouri Pacific that the City of Hastings was not interested in purchasing the property because a decision had been made not to put a street through in that area. Stromer further advised that his offer was made

personally without regard to the City of Hastings. The record reflects this to be a deliberate falsehood, for at the very same time the city planning director was, with city approval, obtaining appraisals so as to submit an offer of purchase to the Missouri Pacific.

On September 21, 1977, by letter, Stromer accepted an offer of the Missouri Pacific and agreed to pay $10,900 for the property. On September 22, 1977, the engineering committee of the city council held a meeting. The F Street property was on the agenda. Duane Stromer requested of the committee chairman that he be put on the agenda. At the meeting Stromer informed the committee that he had acquired the property and that he would be willing to transfer the property to the city for what he had in it, which was stated to be approximately $20,000.

It was at this point that the city council first learned of Stromer's conduct and an apparent conflict of interest. The mayor discussed the matter with Stromer and then advised the council that Stromer had agreed to get out of the transaction and to allow the city to proceed with its acquisition of the property.

On October 12, 1977, Stromer wrote to the Missouri Pacific and made the following statement: "Apparently, the City of Hastings, Nebraska is now interested in purchasing the said land which I did not know about at the time we began negotiations in April. To avoid any possible conflict, I must withdraw my offer to purchase the said land."

Before the letter arrived Mr. Henderson of the Missouri Pacific received a telephone call from Stromer advising him to disregard the letter when he received it. Stromer further advised Mr. Henderson that the deal was still on and he wanted the deed to be issued to the Bonnavilla Plaza Corporation. This corporation was wholly owned by Jerry Spady.

During November and December Stromer had advised the Missouri Pacific he was checking the title and that the money would be sent as soon as the title check had been completed. The City of Hastings, during this period, had completed appraisals on the property and had agreed to offer the Missouri Pacific the sum of $18,000. The matter was placed on the agenda for the city council meeting of January 9, 1978. The motion to offer the $18,000 was passed on said date. On that same date Stromer obtained a check from Jerry Spady Pontiac-Cadillac, Inc., in the amount of $10,900 and forwarded the check to the Missouri Pacific, requesting that the property be deeded to Jerry Spady Pontiac-Cadillac, Inc., which was done, and the deed was mailed to Stromer on February 8, 1978.

At no time prior to or during the January 9 city council meeting did Stromer mention to the city council what his current activities were with regard to the property. The city learned of the sale on March 6, 1978, in a letter from the Missouri Pacific, which stated: "Last August we received a letter from Duane L. Stromer, Attorney of Hastings, Nebraska, making a bid for the property and in a telephone conversation with him immediately thereafter, we were led to understand that he was part-time attorney for the City of Hastings and the purpose of obtaining this property was for street right of way purposes in order to insure the permanent establishment of F Street west of Burlington.

"Upon receipt of your letter, I investigated and find that Mr. Stromer, in contact with our St. Louis offices, requested that the title to the property on the deed be conveyed to Jerry Spady Pontiac-Cadillac, Inc. and the consideration of $10,900.00."

Upon receipt of this letter the City of Hastings first learned that Stromer had not withdrawn from the conflict of interest problem and, upon request by

city officials, Stromer resigned as city attorney on April 8, 1978.

The record reflects that at no time had the City of Hastings ever authorized Duane Stromer to negotiate on its behalf, nor had the city any knowledge that Stromer was representing to others that he was negotiating on its behalf.

Duane Stromer and Jerry Spady, president of appellant corporation, denied knowing that the city was interested in the property. Stromer contends that his interest was for personal investment and the possibility of building duplexes on the property. Spady indicates that Stromer approached him some 2 or 3 months before he purchased the property and informed him that the city was no longer interested in the property and proposed that he and Spady purchase the property on an equal share basis as an investment. Thereafter, Stromer could not afford to financially participate and Spady undertook the purchase on his own.

It is interesting to note that after the purchase Jerry Spady in negotiations with city officials, who were still interested in acquiring the property for the City of Hastings, indicated that the property had a value of $80,000.

The appellant assigns error that can be summarized by stating that the trial court's findings are not sustained by sufficient evidence and that the trial court's findings are contrary to law.

This appeal of an equitable action is reviewable de novo by this court, bearing in mind that the trial court had the opportunity to observe the witnesses and their manner of testifying and therefore was in a better position to determine the credibility of the evidence and the weight to be accredited thereto. *Baker v. Buglewicz,* 205 Neb. 656, 289 N.W.2d 519 (1980).

It is fundamental law that an attorney must not while representing a client do anything knowingly

that is inconsistent with the terms of his employment or contrary to the best interests of his client. "An attorney is by virtue of his office disqualified from representing interests which are adverse in the sense that they are hostile, antagonistic, or in conflict with each other." 7A C.J.S. *Attorney & Client* § 150 at 206 (1980).

The facts in the record show that all negotiations with the Missouri Pacific for the purchase of the property in question were conducted by Duane Stromer representing to the sellers that he was representing the City of Hastings, himself, or the appellant. At all times during said negotiations Duane Stromer had actual knowledge that his employer, the City of Hastings, was interested in and intended to purchase the subject property. Duane Stromer, as city attorney, had a fiduciary duty to his employer not to act in a manner inconsistent with the employer's best interests. Clearly the action of Duane Stromer to actively participate in the acquisition of property either for himself personally or for a third-party client, when he had actual knowledge that his employer was not only interested in purchasing the property but considered it a necessity to accomplish the intent and purpose of the employer's comprehensive plan, was a breach of his fiduciary duty to his employer.

An attorney cannot purchase or negotiate for an interest in land in which his own client is interested. *Olson v. Lamb,* 56 Neb. 104, 76 N.W. 433 (1898); *James v. McNair,* 164 Neb. 1, 81 N.W.2d 813 (1957).

The breach of fiduciary duty having been so clearly established, the City of Hastings was required to show only that Jerry Spady Pontiac-Cadillac, Inc., was not a bona fide purchaser for value. The trial court must have concluded that appellant had either actual or constructive knowledge of the City of Hastings' equitable claim to the property. The record before us requires such a finding. The letter of

Duane Stromer to the Missouri Pacific on October 12, 1977, specifically refers to the City of Hastings' interest in the property, and although actual knowledge is not necessary, it is inconceivable that with the close personal association of Duane Stromer with Jerry Spady, as reflected in this record, appellant did not have actual knowledge of the equitable claim of the City of Hastings. Jerry Spady had actual knowledge that Duane Stromer was representing the City of Hastings and at the same time representing him.

It is clear that notice to, or knowledge of facts by, an attorney is notice to, or knowledge of, his client. 7A C.J.S. *Attorney & Client* § 182 (1980).

The actual knowledge of Duane Stromer of the city's interest in that property is imputed to his client, appellant herein, and that knowledge and notice of Stromer's breach of fiduciary duty negates any claim of being a bona fide purchaser for value by the appellant.

A bona fide purchaser exists where the purchaser takes without knowledge or notice of any suspicious circumstances which would put a prudent man upon inquiry. *Love v. Fauquet,* 184 Neb. 250, 166 N.W.2d 742 (1969); *Hein v. W. T. Rawleigh Co.,* 167 Neb. 176, 92 N.W.2d 185 (1958).

Where, as here, the titleholder of real estate takes title to property with actual or constructive knowledge of the breach of a fiduciary duty by an attorney to his client amounting to fraud, the court will impose a constructive trust upon the titleholder and require that title be transferred to the defrauded party.

A constructive trust will be imposed against those who knowingly aid or participate in a breach of trust. *Schepers v. Lautenschlager,* 173 Neb. 107, 112 N.W.2d 767 (1962). To rule otherwise would permit wrongdoers to be unjustly enriched or otherwise benefit parties who have obtained property with ac-

tual or constructive knowledge of the fraudulent actions of their agent in acquiring the property.

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

AFFIRMED.

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H. F. JACOBBERGER, APPELLANT, V. LEE TERRY, DOUGLAS COUNTY ELECTION COMMISSIONER, APPELLEE.

322 N.W.2d 620

Filed July 16, 1982. No. 44068.

SUPPLEMENTAL OPINION

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

R. A. Skochdopole and William R. Johnson of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Donald L. Knowles, Douglas County Attorney, and Daniel G. Crouchley and John Q. Powers, for appellee.

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

HASTINGS, J.

On the court's own motion, the following portion of its opinion found at 211 Neb. 878, 889, 320 N.W.2d 903, 909 (1982), will be deleted:

"The appellant raises the following sentence from the trial court's order as the basis for the final assignment of error: 'That LB 329 requires any city of the metropolitan class to have a city-council form of government and to elect its council members by district.' It was upon this reasoning that the trial court based its conclusion that L.B. 329 did not violate article III, § 18.

"It is clear from the provisions of L.B. 329 and

§§ 19-401 et seq. that both are applicable to cities of the metropolitan class. In that respect, the trial court's order appears to be in error. However, 'It is a familiar principle that a proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.' *Strauss v. Square D Co.*, 201 Neb. 571, 576, 270 N.W.2d 917, 920 (1978). We have also stated in the past that 'Where a correct judgment or order has been made, the mere fact that it contains erroneous declarations of law does not require reversal.' *Lux v. Mental Health Board of Polk County,* 202 Neb. 106, 110, 274 N.W.2d 141, 144-45 (1979). While the trial court may have misstated the scope of L.B. 329, its conclusion regarding the law's validity under article III, § 18, was, as we noted above, correct. Consequently, its decision will not be overturned on this basis."

The following language is substituted therefor:

"The foregoing discussion, it seems to us, makes superfluous the appellant's final assignment of error that the trial court erred in its finding 'That LB 329 requires any city of the metropolitan class to have a city-council form of government and to elect its council members by district.' It was upon this reasoning that the trial court apparently based its conclusion that L.B. 329 did not violate article III, § 18.

"If the trial court was correct in such finding, obviously the challenged legislation is neither special nor local in nature because all cities of the metropolitan class now existing or hereinafter coming into being would be treated the same. If the appellant is correct and a city now having a commission form of government can, because of population growth, become a city of the metropolitan class and retain its existing form of government, as we have explained above, the Legislature has a reasonable basis for distinguishing between the commission form of city government and all other forms of city government for metropolitan class cities."

Additionally, the following sentence, "Finally, we will not overturn what we find to be a correct finding by the trial court in spite of what appears to be a misstatement of the law in the court's order," found at 890, 320 N.W.2d at 909, is deleted.

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FARMERS UNION COOPERATIVE ASSOCIATION, A NEBRASKA CORPORATION, NICKERSON, NEBRASKA, APPELLANT, V. MID-STATES CONSTRUCTION COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.

322 N.W.2d 373

Filed July 16, 1982. No. 44243.

1. **Corporations: Limitations of Actions.** Where a corporation has in fact been dissolved and no longer exists as a legal entity, the rule of its incapacity to sue or be sued applies regardless of the mode of dissolution whether by judicial decree or otherwise.
2. **Principal and Surety.** A surety cannot be held beyond the precise terms of its contract. Any intention on the part of the surety to assume a further and continued liability must be found in the words of the contract made. It is not a matter of inference, but of express statement. The liability of a surety, therefore, is measured by, and will not be extended beyond, the strict terms of its contract.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Robert M. Hillis of Yost, Schafersman, Yost, Lamme & Hillis, for appellant.

C. L. Robinson of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee Peerless.

Harry B. Otis of Gaines, Otis, Haggart, Mullen & Carta, for appellee Mid-States.

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

WHITE, J.

This is an appeal from an order in which the trial

court granted the defendants' motions for summary judgment, dismissed the plaintiff's first and third causes of action, and sustained a demurrer to the plaintiff's second cause of action. Plaintiff appeals and assigns as error the dismissal of its petition.

A discussion of the facts elicited in the depositions and pleadings is necessary for an understanding of this complicated matter.

Plaintiff, Farmers Union Cooperative Association (Co-op), entered into a contract on February 7, 1966, with Mid-States Construction Company (Mid-States), a Nebraska corporation. The contract obligated Mid-States to erect a 250,000 bushel capacity concrete grain elevator at Nickerson, Nebraska. At paragraphs 2, 3, and 9, the contract provided: "2. The Contractor shall furnish a Contractor's Performance and three year(s) Maintenance Bond covering the above work, the premium for which shall be paid for by the Owner exclusive of this Contract Price.

"3. The Contractor warrants that for a period of 3 year(s) from the date of the Contract that he will be responsible for any structural failure in the building(s), either partial or complete, and will keep in good repair the work contracted to be done, all as may be caused by faulty design, inadequate plans or by defective materials, work or workmanship, except such minor apparent defects as are inherent with this type of construction, and it being understood that Equipment furnished by the Contractor shall be Guaranteed to the Owner only to the extent to which it is Guaranteed to the Contractor by the Equipment Manufacturer.

. . . .

"9. The work shall commence within 15 days after the Contract is signed and estimated to be substantially complete, to an operational condition, . . . by Aug. 31, 1966 subject only to conditions of paragraph 7 above, or 11 below."

The defendant Peerless Insurance Company (Peerless) furnished a bond, pursuant to the contract between Co-op and Mid-States, on March 9, 1966. The bond recited in pertinent part: "WHEREAS, the above bounden Principal has entered into a certain written contract with the above named Obligee, dated the 7th day of February 1966 to construct a complete reinforced concrete grain elevator of 250,000 bushel capacity, as per terms of contract[,] which contract is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein.

"Now, therefore, the condition of the above obligation is such, that if the above bounden Principal shall well and truly keep, do and perform, each and every, all and singular, the matters and things in said contract set forth and specified to be by the said Principal kept, done and performed at the time and in the manner in said contract specified, and shall pay over, make good and reimburse to the above named Obligee, all loss and damage which said Obligee may sustain by reason of failure or default on the part of said Principal, then this obligation shall be void; otherwise, to be and remain in full force and effect."

Mid-States completed construction of the elevator in June 1966 and Co-op assumed possession at that time.

Mid-States was dissolved by the Secretary of State for nonpayment of taxes on August 3, 1970, and has not been revived.

On November 28, 1977, an incident occurred which precipitated this litigation. A large segment of the concrete in the elevator broke away, leaving a large hole in the elevator.

On January 3, 1979, Co-op filed suit in the District Court for Dodge County against Mid-States and Peerless. Service was had on "Harry B. Otis, Registered Agent," for Mid-States and on the Director of

Insurance for the State of Nebraska as agent for Peerless.

In the petition, Co-op asserted three separate theories of action, which it labeled causes of action, against both defendants. In its first cause of action, Co-op asserted that the defendants fraudulently represented to Co-op that the elevator's specifications were adequate and that the plans were specifically followed, but that in fact substantial amounts of horizontal reinforcing steel were not installed in the structure, thereby causing the breakout in the elevator side. In the second cause of action, essentially the same facts were alleged as a breach of the contract to construct the elevator according to the plans and in a workmanlike manner. In the third cause of action, the Co-op sought recovery on a theory of negligent construction.

A special appearance by Mid-States was overruled. Further service was attempted on Mid-States by delivering summonses to persons designated as trustees and assignees of Mid-States. Mid-States filed a motion for summary judgment, which was sustained. The defendant Peerless's demurrer to the second cause of action was sustained, and its motion for summary judgment as to the first and third causes of action was also sustained and the petition of Co-op dismissed.

We will first consider the court's action with respect to Mid-States. Implicit in the trial court's consideration of this matter, quite apart from obvious questions relating to statutes of limitations, is the status of a dissolved corporation. Various procedures for the dissolution of a corporation are provided for by Nebraska statutes. Mid-States was dissolved pursuant to the provisions of Neb. Rev. Stat. § 21-323 (Reissue 1970) for nonpayment of taxes. In addition, the statutes provided for dissolution voluntarily by the stockholders, Neb. Rev. Stat. § 21-2082 (Reissue 1970), and for involuntary dissolu-

tion by the action of the Attorney General, Neb. Rev. Stat. § 21-2093 (Reissue 1977), or by shareholders or creditors, Neb. Rev. Stat. § 21-2096 (Reissue 1977).

Mid-States was dissolved for nonpayment of taxes nearly 9 years before suit and 7 years prior to the failure of the elevator. Neb. Rev. Stat. § 21-20,104 (Reissue 1977) provides in part: "The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, (2) by a decree of court when the court has not liquidated the assets and business of the corporation as provided in sections 21-2001 to 21-20,134, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution."

In discussing the question of whether a dissolved corporation can be sued after the specified period by statute has passed, we said in *Christensen v. Boss,* 179 Neb. 429, 435-36, 138 N.W.2d 716, 720 (1965) (a voluntary dissolution case): "At common law a corporation's capacity to sue or be sued terminates when the corporation is legally dissolved. See, 16A Fletcher, Cyclopedia Corporations (Perm. Ed.), § 8142, p. 311; Beasley v. Fox, 173 F.2d 920; Leiserson & Adler, Inc. v. Keam (Ky.), 266 S.W.2d 352; In re National Surety Co., 286 N.Y. 216, 36 N.E.2d 119.

"Where a corporation has in fact been dissolved and no longer exists as a legal entity, the rule of its incapacity to sue or be sued applies regardless of the mode of dissolution whether by judicial decree or otherwise. See, 16A Fletcher, Cyclopedia Corporations (Perm. Ed.), § 8142, p. 315; MacAffer v. Boston & Maine R.R. Co., 268 N.Y. 400, 197 N.E. 328. In the absence of statutory provisions to the contrary no action at law can be maintained by or against it as a

corporate body or in its corporate name. See, 16A Fletcher, Cyclopedia Corporations (Perm. Ed.), § 8142, p. 312; Peoria Engraving Co. v. Streator Cold Storage Door Co., 221 Iowa 690, 266 N.W. 548; Garrett v. Pilgrim Mines Co., 47 Idaho 595, 277 P. 567; Meramec Spring Park Co. v. Gibson, 268 Mo. 394, 188 S.W. 179; Pendleton v. Russell, 144 U.S. 640, 12 S. Ct. 743, 36 L. Ed. 574." We there held that a suit not brought within the 5-year statutory period as provided by Neb. Rev. Stat. § 21-186 (Reissue 1962) was subject to dismissal.

We acknowledge that a number of states have held that a corporation whose charter is revoked for nonpayment of taxes is a de facto corporation and continues legal existence during the forfeiture period. However, a corporation is a creature of the Legislature. Any change in substantive law relating to the status of such a dissolved corporation is particularly within its domain.

The petition was properly dismissed against Mid-States; thus other errors assigned as to it need not be discussed.

In discussing the actions against Peerless, we first observe that no allegations specifically describing either fraud, negligence, or breach of contract are directed against Peerless. The liability of Peerless to Co-op is described by the surety bond it executed and the pertinent provisions of the contract incorporated by reference.

The guarantee undertaken by Peerless appears to be (1) performance of the contract by August 31, 1966, and (2) a warranty from defects for a period of 3 years after performance. The contract is quite clear that Peerless will guarantee the Co-op "for a period of 3 year(s) from the date of the Contract . . . for any structural failure in the building(s) . . . ."

"General or indefinite words in the instrument as to the time during which the surety shall remain liable will be limited by a recital specifying the time

during which the prescribed duty is to be performed by the principal." 74 Am. Jur. 2d *Suretyship* § 29 at 31 (1974).

In *Rawleigh Co. v. Smith,* 142 Neb. 529, 531, 9 N.W.2d 286, 287 (1943), in discussing the liability of a surety, we said: "A surety cannot be held beyond the precise terms of his contract. Any intention on the part of the surety to assume a further and continued liability must be found in the words of the contract made. It is not a matter of inference, but of express statement. The liability of a surety, therefore, is measured by, and will not be extended beyond, the strict terms of his contract."

Putting aside obvious questions of the statute of limitations, Peerless guaranteed the structure for 3 years; it does not make any difference for the purposes of this opinion whether from the date of the contract as recited or from the date of completion. There was no structural failure within the 3-year period guaranteed by Peerless. Co-op must seek relief under, and we must enforce only, that guarantee which was actually promised. No structural defect having arisen within the contract period, the trial court was correct in its dismissal of the action against Peerless.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

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LLOYD E. BEASLEY, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

322 N.W.2d 377

Filed July 16, 1982. No. 44248.

1. **Administrative Law: Appeal and Error.** Where an administrative body has acted within its jurisdiction and there is some competent evidence to support its findings and order, the order will be affirmed.

2. **Administrative Hearings: Evidence.** That which is relevant, admissible, and tends to establish the facts in issue is competent evidence in the context of administrative hearings.
3. **Administrative Law: Rules of Evidence.** The investigation conducted by an administrative body is not intended to be carried out in observance of the technical rules adopted by courts of law.

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

Thomas J. Young, for appellant.

Herbert M. Fitle, City Attorney, and Kent N. Whinnery, for appellees.

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

CAPORALE, J.

This appeal arises from a determination by the District Court of Nebraska, Fourth Judicial District, in and for Douglas County, affirming a decision of the Omaha Personnel Board (Board) which upheld the termination of plaintiff-appellant Lloyd E. Beasley's employment as a manager in Omaha's housing and community development department.

Appellant asserts the District Court erred in finding, as did the Board, that appellant's separation from employment was in compliance with the applicable city ordinance. Further, that the District Court erred in finding that the evidence adduced before the Board was sufficient to constitute a basis for the termination; specifically, in finding that there was a "lack of funds" and that appellant was the "least qualified" employee. We find the assignments of error to be without merit and affirm the order of the District Court.

We first examine the scope of judicial review in an appeal by a proceeding in error which questions the decision of an administrative body, such as the personnel board of a municipality. The law in this regard is well settled. Where an administrative body

has acted within its jurisdiction and there is some competent evidence to support its findings and order, the order will be affirmed. *Stradley v. City of Omaha,* 201 Neb. 378, 267 N.W.2d 541 (1978); *Shepherd v. City of Omaha,* 194 Neb. 813, 235 N.W.2d 873 (1975). No claim is made that the Board did not act within its jurisdiction. The nature of evidence deemed competent in the context of administrative hearings has also been established. It is that which is relevant, admissible, and tends to establish the facts in issue; however, the investigation conducted by an administrative body is not intended to be carried out in observance of the technical rules adopted by courts of law. *Shepherd v. City of Omaha, supra; Munk v. Frink,* 81 Neb. 631, 116 N.W. 525 (1908).

With those rules in mind, we find that the record before the Board reveals appellant's employment was terminated, because of a lack of funds, by letter on January 31, 1979, effective that same date. He was provided with 30 days' separation pay. The appellant and another employee were selected for separation from employment because they were found to be "least qualified." Although appellant had a supervisory job title and classification, he performed no supervisory duties; he performed fewer duties and had less responsibility than another employee with an identical title and position; and over a period of time other employees had assumed various parts of his job. He had been the subject of numerous performance evaluations over a period of time which consistently resulted in low scores. He had, under three different supervisors, consistently been assigned fewer projects than other employees of his rank. Nonetheless, his performance continued to show a low output, both qualitatively and quantitatively. Appellant was perceived by peers and others as being unmotivated, and he did not inspire confidence.

The lack of adequate funds to maintain appellant's position originated with a reduction of $25,000 in the housing and community development department budget in September of 1978. An evaluation of the personnel in the division in which the reduction had occurred was begun, following which the choice of individuals to be separated was made.

Section 7.04.835 of the Omaha Municipal Code (1959) provides as follows: "A department head may separate any employee without prejudice because of lack of funds or curtailment of work, after giving notice of at least ten working days to such employee. However, no regular employee shall be separated from any department while there are provisional, probationary or temporary employees serving in the same class of positions in that department. Whenever a classified position is abolished or a reduction in force becomes necessary, lay offs shall be in reverse order of total service with the City when the qualifications of the employees to perform the available work are substantially equal; otherwise the employees best qualified to perform the work shall be retained. Such departures from the regular reduction in force procedures and the reasons therefor shall be reported to the Personnel Director. Any employee adversely affected by such an action may appeal to the Personnel Board."

Appellant argues first that the separation did not comply with the ordinance's 10-day notice requirement and that had it done so, money would have been available at the end of that 10-day period to continue his employment as the result of other vacancies which occurred. That argument is not persuasive. The notice requirement provides an employee some time while still receiving full pay within which to seek other employment. In this instance appellant was paid for 30 days without being required to work at all after he had received the notice of separation. Nor is there any merit in the

claim that events took place after the notice of separation which obviated the basis for the termination. So long as a department head acts in good faith based upon the realities of his budget at the time he acts, he is not required to review his decision in light of subsequent events. See *Sibert v. City of Omaha,* 201 Neb. 399, 267 N.W.2d 753 (1978), wherein Sibert was discharged from his employment based partly on a physician's statement that it was not likely that he could continue to perform the strenuous work which the position required without sustaining additional injuries. Plaintiff thereafter, and subsequent to his discharge, obtained another letter from the physician which said he was "probably" capable of returning to work, provided he wear a body support. We rejected that "after the fact" attempt to remove the cause for discharge. Moreover, it is not clear from the record that the personnel vacancies occurring after appellant's termination would continue to remain unfilled, although there was testimony with respect to a vacancy created by one resignation that no plan existed to fill it at this time.

Appellant further argues he was prejudiced inasmuch as his separation was not reported to the personnel director as required by the applicable ordinance. This too is moot; appellant has had the benefit of an appeal to the Board.

The remainder of appellant's argument is answered by the fact that the quantum of evidence which exists satisfies the "some competent evidence" requirement to support a finding that he fell into the "least qualified" category.

The rationale is not unlike that in *Ackerman v. Civil Service Commission,* 177 Neb. 232, 234-35, 128 N.W.2d 588, 590 (1964), wherein, in discussing the powers of the civil service commission, we said: "The act vests a wide discretion in the civil service commission but does not vest a similar discretion in the district court. The statute does not contemplate

that the appeal to the district court shall be a trial de novo similar to the review on appeal of an action in equity. The purpose of the appeal to the district court is to permit the employee to obtain a determination only as to whether the order of the commission was made in good faith for cause. If the evidence in the district court is sufficient to show that the order of the commission was made in good faith for cause, then the order of the commission must be affirmed.

"In this case the only evidence which was introduced in the district court was the record of the testimony and exhibits which were received at the hearing before the civil service commission. Thus, the inquiry here is limited to whether this evidence was sufficient to sustain a finding of cause for discharge."

Given the scope of judicial review of administrative determinations, the District Court was compelled to affirm the Board, and we are compelled to affirm the District Court.

AFFIRMED.

WHITE, J., concurs in the result.

KRIVOSHA, C.J., dissenting.

I find that I must respectfully dissent from the majority in this case. I do so not because I disagree with the majority's declaration as to the law but, rather, as to its application of the facts in this case. As amply noted by the majority, the record in this case establishes the fact that the appellant was indeed "least qualified" to perform the tasks for which he was hired. The record further discloses that the City did not have the necessary courage to take the appropriate action and discharge the employee for cause but, rather, relied upon a makeshift argument concerning a reduction in funds. It is difficult, if not impossible, to imagine that one who rose to the rank of supervisor and had seniority near the very top of the list among 15 employees was not

entitled to be "bumped down" to the lowest job in the department. If, indeed, everyone in the department was more qualified than the appellant, it would appear that he should have long ago been discharged for cause. My reason for objecting to the action taken by the majority is that I do not believe that an ordinance of the type involved herein should be used as a means of relieving city management of its responsibility to manage, or of permitting city management to avoid the responsibility of proving cause, by creating a "reduction in funds" or a "reduction in work." I believe that the City has a direct responsibility to manage its affairs and to discharge employees for cause when such cause exists. The right of an employee to be laid off in reverse order of total service, pursuant to the provisions of § 7.04.835 of the Omaha Municipal Code (1959), is totally and completely made ineffective when we permit a municipality to discharge a supervisor on the basis of "reduction in funds" or "reduction in work" because the city maintains that the supervisor who has been employed for a number of years is less qualified than any other person employed in the department.

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SHARON RAWSON, APPELLANT, V. CITY OF OMAHA, NEBRASKA, APPELLEE.

322 N.W.2d 381

Filed July 16, 1982. No. 44274.

1. **Subrogation.** The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability.
2. _____. The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve

the ends of justice and to do equity in the particular case under consideration. It does not rest on contract and no general rule can be laid down which will afford a test for its application in all cases. The facts and circumstances of each case determine whether the doctrine is applicable.

3. _____. One is not a volunteer when he has an interest of his own to protect. And a payment is not voluntary when made under compulsion, as where one is forced to pay the debt or claim for which another is primarily liable.
4. _____. A person who has paid the debt of another in response to the threat of civil proceedings by a third person, whether or not the third person is acting in good faith, is entitled to restitution from the other if the payor acted to avoid trouble and expense.
5. _____. Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lienholder.
6. _____. One who is sued for alleged negligence and who, in an effort to save his property, including the expenditure of attorney fees, enters into a reasonable settlement is not a volunteer and is entitled to seek reimbursement under the doctrine of equitable subrogation.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded with directions.

Daniel P. Chesire of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Herbert M. Fitle, City Attorney, and Richard A. Cerveny, for appellee.

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

KRIVOSHA, C.J.

This is an appeal from a judgment entered by the District Court for Douglas County, Nebraska, which, in essence, found that while the appellant, Sharon Rawson, had paid to third parties money for damages caused solely by the negligence of the appellee, City of Omaha (City), she could not recover that money from the City under the theory of contribu-

tion. She has now appealed that judgment and, upon consideration of the case, we find that the judgment of the trial court should be reversed and remanded with directions.

The record discloses that Rawson was operating her motor vehicle west on Blondo Street in Omaha, Nebraska, on February 24, 1978. As she approached the 7300 block, her right front tire suddenly struck a large pothole in the street, causing her to lose control of her vehicle. Her vehicle then crossed the centerline and struck the left rear of a pickup owned and operated by Rollie Rogers. Rawson's vehicle then continued westbound and the left front of her vehicle struck the left front of a vehicle owned and operated by Fred Black. Black was accompanied by his daughter, Jean Clary, and her two sons, Brian and Michael. The collision with Black's vehicle spun Rawson's vehicle around and it came to rest in the westbound lane of traffic pointing in an eastward direction approximately 270 feet from the location of the pothole.

As a result of the accident Rogers made a claim for property damage against Rawson in the amount of $492.41. Black also made a claim for property damage to his vehicle and for his personal injury against Rawson. Black subsequently filed a lawsuit against Rawson which was settled without trial for the sum of $11,215.50. A second suit filed by Black's daughter and her children against Rawson was likewise settled for the sum of $1,665. Rawson was required to pay to the various claimants the total sum of $13,372.91 in settlement of all the claims that were made against her as a result of the accidents. In addition, the Rawson vehicle was a total loss.

Rawson then filed a written claim with the City pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977). The City never responded to the claim and it was

necessary for Rawson to withdraw her claim and file this lawsuit.

Her petition alleged three causes of action against the City. In her first cause of action Rawson sought damages for the loss of her vehicle. In her second cause of action she prayed for contribution from the City for the reason that she was compelled to pay the various claimants for their property damage and personal injuries arising out of the accident. Rawson alleged that the City was liable for contribution on the ground that the City was jointly liable to the claimants to whom she alone had paid a fair and reasonable settlement. Rawson further alleged that her payment to the claimants had conferred a benefit upon the City.

In her third cause of action Rawson prayed that the City indemnify her in the total amount of $13,372.50, being the amount that she was required to pay the various claimants.

The City demurred to Rawson's second cause of action, seeking contribution, and also demurred to her third cause of action, seeking indemnity, on the ground that neither stated a cause of action. The trial court overruled the demurrer as to the second cause of action and sustained the demurrer as to the third cause of action. The third cause of action was then dismissed. Trial was thereafter had on the first and second causes of action.

At trial, the City's counsel agreed that the sums paid by Rawson in settlement of the claims were fair and reasonable. The City also agreed that Rawson's claim was properly made pursuant to the Political Subdivisions Tort Claims Act and that the City did not act on the claim, thereby resulting in Rawson withdrawing the claim after 6 months and timely filing her lawsuit. The only issue the City contested was its liability to Rawson's claim for damages under both her first and second causes of action.

In the City's answer to Rawson's second cause of

action, it denied the existence of any negligence on its part and alleged that the sole proximate cause of the accident and the injury sustained to the various third persons with whom Rawson settled was a result of Rawson's negligence. The City then set out a number of specific allegations of negligence similar to those raised in defense of Rawson's first cause of action. The City also alleged that the defect in the road was a condition and not a cause of the accident, and that Rawson had the last clear chance to avoid the accident. The City finally alleged that if there was no negligence on behalf of Rawson, then she was a mere volunteer in settling with the claimants and therefore should not be entitled to any contribution. Following the trial, the trial court held that the sole proximate cause of the accident was the negligence of the City. The trial court's finding that the sole proximate cause of the accident was the negligence of the City will not be disturbed on appeal unless clearly wrong. See *Lee v. City of Omaha,* 209 Neb. 345, 307 N.W.2d 800 (1981). We cannot say it was clearly wrong. As a result of its finding, the trial court ordered the City to pay Rawson the loss related to her motor vehicle. That is not involved in this appeal and is final and binding on the City. The trial court then held that because Rawson was not at all negligent, and the negligence was solely that of the City, Rawson could not recover from the City under the theory of contribution.

While we believe the trial court was correct in its conclusion that, generally, in order for a party to recover contribution after a settlement of a claim by one of the parties, there must be a common liability proved to exist between both the party settling the claim and the party from whom contribution is being sought (18 Am. Jur. 2d *Contribution* § 47 (1965); *Allied Mutual Casualty Co. v. Long,* 252 Iowa 829, 107 N.W.2d 682 (1961); *Western Casualty & S. Co. v. Milwaukee G. C. Co.,* 213 Wis. 302, 251 N.W.

491 (1933)), we believe that Rawson was nevertheless entitled to recover back the money she had paid in settlement of the claims under the doctrine of equitable subrogation.

In the case of *Cagle, Inc. v. Sammons,* 198 Neb. 595, 602, 254 N.W.2d 398, 403 (1977), we recognized the doctrine of equitable subrogation, writing: " 'The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability.' Sheridan v. Dudden Implement, Inc., 174 Neb. 578, 119 N.W.2d 64 (1962). The doctrine applies where a party is compelled to pay the debt of a third person to protect his own rights or interest, or to save his own property. Luikart v. Buck, 131 Neb. 866, 270 N.W. 495 (1936); 73 Am. Jur. 2d, Subrogation, § 11, p. 605. The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract and no general rule can be laid down which will afford a test for its application in all cases. The facts and circumstances of each case determine whether the doctrine is applicable. Rapp v. Rapp, 173 Neb. 136, 112 N.W.2d 777 (1962); Jones v. Rhodes, 162 Neb. 169, 75 N.W.2d 616 (1956); Equitable Life Assurance Society of the United States v. Person, 135 Neb. 800, 284 N.W. 260 (1939)."

And in 73 Am. Jur. 2d *Subrogation* § 4 at 600-01 (1974), it is observed: "Subrogation, in so far as it grows out of the equities of the parties, has much in common with certain other equitable doctrines. . . .

"Equity seeks by subrogation, as it does by reimbursement, contribution, and exoneration, to pre-

vent the unearned enrichment of one party at the expense of another by creating a relation somewhat analogous to a constructive trust in favor of the subrogee, or party making payment, in all legal rights held by the creditor. . . .

"Subrogation effects an assignment by operation of law and so it is sometimes termed 'equitable assignment.' But it has been regarded as differing from an ordinary assignment of the debt in that such assignment assumes the continued existence of the debt, while subrogation follows upon its payment. However, it has been asserted that regardless of whether a transfer is technically called assignment or subrogation or equitable assignment or assignment by operation of law, its ultimate effect is the same: to pass the title to a cause of action from one person to another."

While it is true that subrogation is never awarded in equity to one who is merely a volunteer in paying the debt of another (*Sharp v. Citizens Bank of Stanton,* 70 Neb. 758, 98 N.W. 50 (1904); 73 Am. Jur. 2d *Subrogation* § 23 (1974)), one who pays the debt of another in order to protect his own property or interest is not considered a volunteer for purposes of equitable subrogation. At 73 Am. Jur. 2d *Subrogation* § 24 at 613 (1974), we find: "Generally speaking, the party making payment is a volunteer if, in so doing, he has no right or interest of his own to protect, and acts without obligation, moral or legal, and without being requested by anyone liable on the obligation. . . .

"One is not a volunteer when he has an interest of his own to protect. And a payment is not voluntary when made under compulsion, as where one is forced to pay the debt or claim for which another is primarily liable."

A similar view has been adopted by courts with regard to restitution. The Restatement of Restitution § 71 at 290 (1937) notes: "A person who has paid

the debt of another in response to the threat of civil proceedings by a third person, whether or not the third person is acting in good faith, is entitled to restitution from the other if the payor acted to avoid trouble and expense." We perceive of no reason why a similar rule should not be adopted in connection with the doctrine of equitable subrogation. See 73 Am. Jur. 2d *Subrogation* § 25 (1974).

A case similar to the case at bar is *Alamida v. Wilson,* 53 Hawaii 398, 495 P.2d 585 (1972), decided by the Supreme Court of Hawaii. In permitting the plaintiff, who was found not to be a joint tort-feasor, the right to recover, the court said at 403, 495 P.2d at 589: "Although we think that there can be no recovery on the theory of *contribution,* we do think that Morse and Keawe are entitled to recover from the co-defendants found liable, in this case the County, on the equitable principle of *subrogation* . . . ." (Emphasis in original.) The court then cited with approval the statement from the Restatement, *supra,* and further cited the statement contained in the Restatement of Restitution § 162 (1937) to the effect: " 'Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lienholder.' " *Alamida v. Wilson, supra* at 404, 495 P.2d at 590.

We believe it would produce a totally illogical rule if we were to say that one who is slightly negligent may recover under the doctrine of contribution or indemnification, depending upon the facts, but one who is not at all negligent, but who is sued and therefore makes payment, may not recover at all.

Obviously, in the instant case, Rawson was not a volunteer as that term in the law is understood. Rawson was a party defendant to two lawsuits which,

until the cases were decided, might have determined that she was liable for an amount substantially in excess of that which was in fact paid. One should have the right to settle a lawsuit in which there is a reasonable doubt concerning liability and not be required to incur all of the expenses of litigation to conclusion before being entitled to seek subrogation. To hold otherwise would be to discourage settlements and to promote litigation, a concept which should be discouraged by the courts. We believe it is not inappropriate to hold that one who is sued for alleged negligence and who, in an effort to save his property, including the expenditure of attorney fees, enters into a reasonable settlement is not a volunteer and is entitled to seek reimbursement under the doctrine of equitable subrogation. Were we to hold otherwise we would declare that the appellant herein, though found to be totally free of any negligence, must bear the total expenses which should have otherwise been paid by the City. It occurs to us that to hold otherwise would result in unjust enrichment to the City and was the very reason for creating the doctrine of equitable subrogation. The party ultimately determined to be liable is not in any manner prejudiced by our holding. All of the defenses which were available to the defendant, had it been sued in the first instance, are still available when sued by one seeking subrogation. We believe that the judgment of the trial court on the second cause of action should be reversed and the cause remanded with instructions to enter judgment for Rawson and against the City of Omaha on her second cause of action.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I dissent. The opinion extends the subrogation doctrine beyond its purposes. An unresolved tort liability is not a debt. The existence of a debt is basic to the right of subrogation. The right of con-

tribution can ordinarily be enforced and legally determined by third-party procedure. Neb. Rev. Stat. § 25-331 (Reissue 1979); *Royal Ind. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975). Although joinder may not be possible in all cases, I would not extend subrogation simply to meet the requirements of those special instances.

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JOSE R. MARTINEZ, APPELLEE, V. HARRY "PETE" PETERSON, DIRECTOR OF MOTOR VEHICLES, ET AL., APPELLANTS.

322 N.W.2d 386

Filed July 16, 1982. No. 44302.

1. **Implied Consent Law.** A licensee who did not understand that he was being asked to submit to a chemical test because he cannot read, speak, or understand the English language cannot be said to have refused to take the test under our implied consent law.
2. **Appeal and Error.** Where there is irreconcilable conflict in the evidence on a material issue, the reviewing court will, in determining the weight of the evidence of the witnesses, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of the facts rather than the other.
3. **Motions for New Trial.** Evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for new trial on the ground of newly discovered evidence.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

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

John R. Brogan of Brogan, McCluskey & Wolstenholm, for appellee.

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

WHITE, J.

The Director of Motor Vehicles appeals from an

order of the District Court for York County, Nebraska, which reversed and set aside an order by the director revoking the operator's license and driving privileges of the appellee for a period of 6 months for failure to submit to a chemical test of his blood or urine. We affirm.

In his petition on appeal to the District Court, Jose R. Martinez alleged that he does not speak or understand the English language and did not understand the explanation of the arresting officer concerning the "Implied Consent Law." Martinez further alleged that the action of the director was erroneous because he was not effectively advised of his rights by the arresting officer because the arresting officer did not explain his rights to him in Spanish and he did not have a written explanation of the implied consent law written in Spanish. Finally, Martinez alleged that he did not refuse to submit to a chemical test of his blood, breath, or urine.

At the trial in the District Court, Martinez moved for the appointment of an interpreter under Neb. Rev. Stat. §§ 25-2401 to 25-2406 (Reissue 1979). Martinez testified that he had been born and raised in Mexico and was 27 years old. At the time of his arrest on August 3, 1980, he was employed at the Sunflower Beef Packing Company in York, Nebraska. Martinez testified that he could not read English nor could he understand the English language except for simple statements spoken slowly. The court found that the appellee satisfied the requirements of § 25-2401, found that an interpreter should be appointed for the purposes of the appeal, and appointed Luciano Medel as interpreter.

On the night of August 3, 1980, Officer Gary D. Underhill of the York Police Department was called to the scene of an accident at Fifth and Lincoln Avenues, York, Nebraska. A witness to the accident gave a description to the officer of a vehicle that had struck a parked vehicle and then left the scene of the

accident. The witness accompanied the officer and identified a vehicle parked at 1204 Lincoln Avenue as the vehicle that had been involved in the accident. Officer Underhill found the appellee asleep in the front seat of the vehicle. Officer Underhill stated that "Mr. Martinez had appeared to be under the influence of alcohol. . . . Mr. Martinez appeared to have been ill because there was vomit within the interior and out the outside door, there was some on his clothing." The officer also testified that there was a strong odor of alcohol and the appellee needed assistance getting out of the car.

At that point Martinez was placed under arrest and transported to the York Police Department. Upon arrival at the police department, Martinez was read the standard implied consent form. In addition to reading the form to Martinez, Underhill attempted to explain in detail Martinez' responsibility to take the chemical test and what the penalties would be if he did not. Officer Underhill testified that the Breathalyzer test was not available so the appellee was given a choice between a blood or urine test. Underhill testified that Martinez' response was that he wanted the officer to make the decision for him. The officer advised Martinez that he could not do so, that Martinez needed to do it himself. Officer Underhill testified that he interpreted Martinez to say that he would not be willing to do anything that would take his license away from him. Underhill also testified that after explaining to the appellee that he would have to make his own decision with regard to which chemical test he would submit to, the appellee responded once again that he wanted the officer to make the decision for him and if the officer did not, he would not make one.

Mr. Martinez was asked on direct examination: "Q. Did you understand that the police officers were asking you to give them a test of your blood or your urine? A. (By Mr. Medel) They were speak-

ing very fast and I cannot understand. Q. Did you understand that giving that test was necessary in order for you to keep your driver's license? A. (By Mr. Medel) No, I did not understand that." Martinez also testified that he quit school at the age of 10 just after finishing his elementary education, which was up to the sixth grade in Mexico.

Martinez was also asked the question, "On the night that the police officer talked to you, did you refuse to permit a test of your blood, breath, or urine? A. (By Mr. Medel) I did not understand them. Q. Did you refuse anything that you understood they were asking you? A. (By Mr. Medel) No."

In Nebraska a conditional or qualified refusal to take a test to determine the alcohol content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act. *Wohlgemuth v. Pearson,* 204 Neb. 687, 285 N.W.2d 102 (1979); *Winter v. Peterson,* 208 Neb. 785, 305 N.W.2d 803 (1981).

A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it. *Wohlgemuth v. Pearson, supra; Winter v. Peterson, supra.* To constitute a refusal to submit to a chemical test required under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. There is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasonable judgment as to what course of action to take. *Wohlgemuth v. Pearson, supra; Winter v. Peterson, supra.*

In this case a conflict exists in the evidence as to

whether or not the appellee understood that he was being asked to submit to a test of his blood or urine. In *Zadina v. Weedlun,* 187 Neb. 361, 362, 190 N.W.2d 857, 858 (1971), this court stated: "Where there is irreconcilable conflict in the evidence on a material issue, the reviewing court will, in determining the weight of the evidence of the witnesses, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of facts rather than the other."

The District Court had the opportunity to see and hear the appellee and Officer Underhill testify. The inability of the appellee to understand and communicate in the English language was observed by the trial court. The fact that a person may understand simple words or statements in English which are spoken slowly does not necessarily mean that he is proficient in the English language. The trial court obviously concluded from the testimony of the appellee that he understood neither that he was being asked to submit to a test nor the consequences of refusing to submit to the test.

The State urges us to adopt the rule in *State v. Hurbean,* 23 Ohio App. 2d 119, 261 N.E.2d 290, 298 (1970), in which the Court of Appeals of Ohio stated: "We hold that a person who voluntarily operates a motor vehicle upon the highways of this state is estopped, in a proceeding under Section 4511.19.1, Revised Code, to assert insufficient language skill to comprehend the request and advice provided in Section 4511.19.1 (C), Revised Code, when received in the statutory manner and form." We are unwilling to adopt such a rule in this state. We believe the appellee in this case did not refuse to submit to a chemical test only because he lacked the understanding that he was being asked to take a test. The appellee's testimony was consistent with what happened when he was arrested. When asked about receiving a letter from the Department of Motor Ve-

hicles on or about August 16, 1980, the appellee testified that he received it but was not able to read it, and that he did not ask anyone to read it to him and he did not understand that there was going to be a hearing on August 26, 1980, in Grand Island, Nebraska. He then received a second letter from the Department of Motor Vehicles containing a copy of the order revoking his driver's license. Again he could not read the letter. Finally, he took the letters to a Catholic priest in York, Nebraska, who could speak and read Spanish. The priest informed the appellee as to the contents of the letters and referred him to local counsel.

The appellants also assigned as error the District Court's failure to grant their motion for new trial. Appellants filed a motion for new trial based on newly discovered evidence. In *Wagner v. Loup River Public Power District,* 150 Neb. 7, 33 N.W.2d 300 (1948), this court stated: "Evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for a new trial on the ground of newly discovered evidence." (Syllabus of the court.)

"Newly discovered evidence within the purview of [Neb. Rev. Stat. § 25-1142 (Reissue 1979)] is evidence in existence at the time of the trial, but which could not, by reasonable diligence, have been procured." See *Wagner v. Loup River Public Power District, supra* at 11, 33 N.W.2d at 303.

The newly discovered evidence offered by the appellants here was evidence of facts occurring after the trial. Trial was held on November 20, 1980. The facts upon which the appellants base their motion for new trial occurred on December 1, 1980, and are therefore not newly discovered evidence.

For the reasons stated, the judgment of the trial court in setting aside the order of the Director of Motor Vehicles revoking the operator's license and driving privileges of the appellee is hereby affirmed.

AFFIRMED.

# DONALD J. BAUER, APPELLANT, V. HARRY "PETE" PETERSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

322 N.W.2d 389

Filed July 16, 1982. No. 44315.

1. **Implied Consent Law: Appeal and Error.** On appeal from the revocation of a motor vehicle operator's license under our implied consent statute, the Nebraska Supreme Court reviews the findings of the trial court de novo.
2. **Implied Consent Law: Proof.** In such a proceeding, the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal.
3. **Implied Consent Law.** A refusal to submit to a test for purposes of the implied consent law occurs when the licensee, upon being asked to take the test, conducts himself in a way which would justify a reasonable person in the officer's position in believing that the licensee understood that he had been asked to take a test and that he had manifested an unwillingness to take it.
4. **Implied Consent Law: Appeal and Error.** Although we review such cases de novo, where there is a conflict in the evidence, great weight is given the fact that the trial court had the opportunity to see, hear, and observe the witnesses and the presentation of evidence firsthand in deciding which body of evidence deserved the greater credibility.

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

Arlen D. Magnuson, for appellant.

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

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

CAPORALE, J.

This appeal originates from the dismissal by the District Court of Nebraska, Fifteenth Judicial District, in and for Holt County, of plaintiff-appellant's petition which sought reversal of an order by the Nebraska Department of Motor Vehicles revoking appellant's privilege to drive. We affirm.

Appellant, Donald J. Bauer, has assigned 15 pur-

ported errors, but has failed to discuss any in his argument other than a challenge to the sufficiency of the evidence to support the revocation. Therefore, pursuant to Rule 8.a.2.(3) of this court, we consider only that assignment. *State v. Beckner,* 211 Neb. 442, 318 N.W.2d 889 (1982).

On appeal from the revocation of a motor vehicle operator's license under our implied consent statute, this court reviews the findings of the trial court de novo. In such a proceeding, the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal. *Hehn v. State,* 206 Neb. 34, 290 N.W.2d 813 (1980); *Wohlgemuth v. Pearson,* 204 Neb. 687, 285 N.W.2d 102 (1979).

Neb. Rev. Stat. § 39-669.08 (Reissue 1978) provides in pertinent part as follows: "(1) Any person who operates or has in his actual physical control a motor vehicle upon a public highway in this state shall be deemed to have given his consent to submit to a chemical test of his blood, urine, or breath, for the purpose of determining the amount of alcoholic content in his body fluid."

Neb. Rev. Stat. § 39-669.09 (Reissue 1978) provides in pertinent part: "The law enforcement officer who requires a chemical blood, breath, or urine test pursuant to section 39-669.08 may direct whether the test shall be of blood, breath, or urine; *Provided,* that when the officer directs that the test shall be of a person's blood or urine, such person may choose whether the test shall be of his blood or urine."

Neb. Rev. Stat. § 39-669.15 (Reissue 1978) provides in pertinent part: "If a person arrested pursuant to section 39-669.08 refuses to submit to the chemical test of blood, breath, or urine required by that section, the test shall not be given and the arresting officer shall make a sworn report to the Director of Motor Vehicles."

Neb. Rev. Stat. § 39-669.16 (Reissue 1978) provides in pertinent part: "Upon receipt of the officer's re-

port of such refusal, the Director of Motor Vehicles shall notify such person of a date for hearing before him as to the reasonableness of the refusal to submit to the test. . . . After granting the person an opportunity to be heard on such issue, if it is not shown to the director that such refusal to submit to such chemical test was reasonable, the director shall summarily revoke the motor vehicle operator's license or nonresident operating privilege of such person for a period of six months from the date of such order."

The record reveals that appellant was stopped by Nebraska State Patrol Officer Norbert Liebig for speeding and received an appropriate citation therefor. Evidence was also adduced regarding the weaving of appellant's vehicle across the centerline, the presence of alcohol on appellant's breath, and the slurred speech of appellant. Appellant was given a preliminary breath test at the scene, which he failed. He was then arrested. Following the refusal of appellant to give either a blood or urine sample, the Department of Motor Vehicles, in due course, issued an order revoking appellant's driving privileges.

In his argument appellant stresses two points: that he was denied the choice between a blood and urine test and that he did offer to provide a urine test. The record reveals that he was afforded the opportunity to choose between a blood or urine test. The testimony of the arresting officer consistently is to the effect that he gave appellant such a choice. Further, the postarrest advisement form, which appellant read himself and had read verbatim to him by the arresting officer, recites that when a test of the blood or urine is required, the licensee may choose which of the two it shall be. It is true that when the form was first presented to appellant at the scene of the arrest, it only contained the word "blood" in the space provided for the type of test re-

quired; however, the officer testified that each time he requested a test he gave appellant a choice of blood or urine. Although appellant testified he did not see the word "urine" on the form until the hearing before the Department of Motor Vehicles, the officer testified he wrote it in the form at the sheriff's office. With respect to appellant's claimed offer to give a urine sample, the officer testified that the offer was made only if appellant would not have to go to jail. Upon being informed he would have to spend time in jail, appellant said: "In that case, forget it." A refusal to submit to a test for purposes of the implied consent law occurs when the licensee, upon being asked to take the test, conducts himself in a way which would justify a reasonable person in the officer's position in believing that the licensee understood that he had been asked to take a test and that he had manifested an unwillingness to take it. *Wohlgemuth v. Pearson,* 204 Neb. 687, 285 N.W.2d 102 (1979); *Winter v. Peterson,* 208 Neb. 785, 305 N.W.2d 803 (1981).

Although we review this case de novo, where there is a conflict in the evidence, great weight is given the fact that the trial court had the opportunity to see, hear, and observe the witnesses and the presentation of evidence firsthand in deciding which body of evidence deserved the greater credibility. *Zadina v. Weedlun,* 187 Neb. 361, 190 N.W.2d 857 (1971).

We find appellant was properly informed of his choice between a blood and urine test, that he only conditionally offered to provide a urine test, and that he therefore refused to take the test as required by statute. The subsequent order of the department revoking licensee's privilege to drive was therefore proper.

The action of the District Court was correct and is affirmed.

AFFIRMED.

BETTY WALLROFF, APPELLEE, V. LAVERNE DOUGHERTY, APPELLANT.

322 N.W.2d 392

Filed July 16, 1982. No. 44355.

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 that he has substantially complied with the terms of the contract, including proof that he is ready, able, and willing to perform his obligations under the contract.

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

Daniel E. Wherry and Miles W. Johnston of Johnston, Barber & Wherry, for appellant.

No appearance for appellee.

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

PER CURIAM.

This is an appeal in an action for specific performance of a contract for the sale of real estate. On April 27, 1980, the defendant, LaVerne Dougherty, was the high bidder at the auction sale of a residence property in Lincoln, Nebraska. Following the auction the defendant entered into a written contract to purchase the property from the plaintiff, Betty Wallroff. The contract provided that it was "Subject, however, and on condition that the owner thereof has good, valid and marketable title, in fee simple . . . ." The contract further provided, "Seller shall furnish to Purchaser either a complete abstract of title (certified to date by a bonded abstracter) or a title insurance commitment (binder), as determined by Seller."

When the defendant failed to perform, the plaintiff

commenced this action on May 15, 1980.

The petition alleged that "At all times mentioned herein plaintiff owned and still owns in fee simple absolute" the property sold to the defendant. The defendant's answer, filed June 16, 1980, admitted the plaintiff's allegations of ownership but alleged the purchase agreement had been rescinded because the garage on the property had been condemned by the city of Lincoln and the residence was infested with termites.

The fact was that the plaintiff was only a contract purchaser of the property and the purchase contract was of record. On October 3, 1980, the plaintiff's contract vendors commenced an action in the same court, alleging the plaintiff was in default and praying for foreclosure of the contract.

On February 18, 1981, the specific performance case came on for trial. The plaintiff testified that she had bought the property "on contract with the deed in August of 1975," but admitted that she had been sued by the contract vendors. A copy of the petition filed in the action to foreclose the plaintiff's land contract was received in evidence.

On February 27, 1981, the trial court found that the plaintiff was entitled to specific performance and ordered the defendant to perform the contract within 30 days. Thereafter, the defendant filed a motion for new trial, a motion to set aside the judgment and grant a new trial, a motion to set aside the judgment of specific performance and enter an order of dismissal of the plaintiff's petition, and a motion to declare the judgment void for lack of jurisdiction and fraud and either dismiss plaintiff's petition or order a new trial, all of which were overruled. The defendant then appealed to this court.

The action being equitable in nature, it is for review de novo in this court.

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. *James J. Parks Co. v. Lakin,* 206 Neb. 184, 292 N.W.2d 21 (1980).

A party seeking specific performance must show that he has substantially complied with the terms of the contract, including proof that he is ready, able, and willing to perform his obligations under the contract. *Tedco Development Corp. v. Overland Hills, Inc.,* 200 Neb. 748, 266 N.W.2d 56 (1978); *James J. Parks Co. v. Lakin, supra.* Upon the record in this case, we believe the plaintiff is not entitled to specific performance.

The contract in this case was subject to the condition that the plaintiff have good, valid, and marketable title, in fee simple, to the property and that an abstract of title or title insurance be supplied to the purchaser. It is undisputed that the plaintiff failed to satisfy or perform these requirements.

There is a distinction between a mere lien upon the property and an absence of legal title in the vendor. See, *McNeny v. Campbell,* 81 Neb. 754, 116 N.W. 671 (1908), *rehearing denied* 81 Neb. 761, 117 N.W. 885; 77 Am. Jur. 2d *Vendor and Purchaser* §§ 12 and 176 (1975). The judgment in this case was not binding upon the plaintiff's contract vendors, and her contract was in litigation at the time of the trial in this case.

It is unnecessary to discuss the other contentions of the parties. The judgment of the District Court is reversed and the cause remanded with directions to dismiss the petition of the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE EX REL. ROLLAND JAKES, JR., APPELLANT, V. NEBRASKA BOARD OF PAROLE ET AL., APPELLEES.

322 N.W.2d 394

Filed July 16, 1982. No. 44389.

**Mandamus.** A writ of mandamus is a proper remedy to compel an official to act only when the duty to act is imposed upon the official by law, when the duty continues to exist at the time the writ is applied for, and when the duty is clearly expressed in the law.

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

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and Lynne Fritz, for appellees.

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

HASTINGS, J.

The appellant, Rolland Jakes, Jr., filed this action in the Lancaster County District Court seeking the issuance of a writ of mandamus to compel the appellees to give him credit against his sentence for time served following the revocation of his parole on January 3, 1977. The District Court denied the request for the writ and dismissed the appellant's petition, finding that a writ of mandamus was not the proper remedy in this instance. The appellant has assigned numerous errors on this appeal which can be summarized generally into a claim that the trial court erred in failing to find that the appellant had a legal right to the relief requested; in finding that Neb. Rev. Stat. § 83-1,123 (Reissue 1981) did not impose a clear, unequivocal, and mandatory duty on the appellees to grant the sought-after credits against his sentence; and that it was error not to issue the writ of mandamus and to dismiss the petition. We affirm.

The appellant was initially incarcerated in the Nebraska Penal Complex on January 26, 1971, to a term of not less than 5 nor more than 10 years on a conviction for escape. He was released on parole to Minnesota on or about November 21, 1974, but was arrested by Minnesota authorities on December 11, 1974, and charged with aggravated assault. Appellant pled guilty to this charge and, pursuant to plea negotiations, was sentenced on March 26, 1975, to a term not to exceed 7½ years, said sentence to run "concurrent" with any time to be served by appellant in Nebraska. On July 27, 1976, a probable cause hearing relating to a possible violation of appellant's Nebraska parole was conducted for Nebraska by a Minnesota hearing officer and resulted in a finding of probable cause that the appellant had indeed violated his Nebraska parole. Appellant was returned to Nebraska on December 7, 1976, pursuant to the provisions of the Interstate Corrections Compact, Neb. Rev. Stat. § 29-3401 (Reissue 1979).

Upon appellant's return to Nebraska the appellee Board of Parole conducted an initial hearing on the revocation of appellant's parole on December 21, 1976, which was continued following the appellant's request that his attorney be present. A second hearing was held on January 3, 1977, and resulted in the revocation of appellant's Nebraska parole. It would appear from the record that at all times after December 7, 1976, appellant remained incarcerated in the Nebraska Penal Complex. As a matter of fact, the records of the Board of Parole, which were offered and received into evidence, indicate that the Board reviewed appellant's record on three different occasions between January and March 1978, with the final review resulting in a deferral of appellant's case until March 1979. In May 1979 he was paroled by Nebraska, although he violated that parole soon thereafter and was again incarcerated. In the meantime, on April 11, 1978, the Minnesota authori-

ties paroled the appellant on the sentence received on the aggravated assault charge. However, appellant remained in custody in the Nebraska Penal Complex to serve the time remaining on his original Nebraska sentence for the escape conviction, except for the parole in May of 1979.

The request which forms the basis for this mandamus action is that of the appellant that the Board of Parole be compelled to give him credit against the time remaining on his original Nebraska sentence for the period between January 3, 1977, the date on which his Nebraska parole was revoked, and April 11, 1978, when the appellant was paroled by the Minnesota authorities. Both parties agree that the appellant was physically incarcerated in the Nebraska Penal Complex during this period. The dispute arises from the differing interpretations each party has given to the authority and duty of the Board following the revocation of a parolee's parole.

The emphasis the parties have placed upon the Board of Parole's duty following the revocation of parole is not misplaced in light of the well-established prerequisites for the issuance of a writ of mandamus. A writ of mandamus is a proper remedy to compel an official to act only when the duty to act is imposed upon the official by law, when the duty continues to exist at the time the writ is applied for, and when the duty is clearly expressed in the law. *Singleton v. Kimball County Board of Commissioners,* 203 Neb. 429, 279 N.W.2d 112 (1979); *State ex rel. Goossen v. Board of Supervisors,* 198 Neb. 9, 251 N.W.2d 655 (1977).

The appellant asserts in this action that the Board of Parole had a clear duty imposed upon it by § 83-1,123 to "recommit" him for the remainder of his Nebraska prison term once they revoked his parole on January 3, 1977. The terms of this section provide that "(1) A parolee whose parole is revoked shall: (a) Be recommitted for the remainder of his

maximum prison term, deducting the period served on parole prior to the violation . . . ." We must also note, however, that actual physical custody of the former parolee is apparently an essential element to the commencement of the running of his sentence upon revocation of parole. This conclusion arises from the fact that the former parolee is considered "an escaped prisoner until apprehended and returned to the Department of Correctional Services" and, furthermore, "until the date of his arrest for the custody of the Board of Parole" no time after a delinquency of parole is declared shall be counted as a portion of time served. § 83-1,123(1)(b) and (2). The essence of actual physical custody is made all the more apparent by the fact that the Board of Parole is continuously in the "*legal* custody and control" of all persons discharged on parole. (Emphasis supplied.) Neb. Rev. Stat. § 83-1,121 (Reissue 1981). Consequently, although the Board of Parole may have "legal custody" of a parolee, it is readily apparent that actual physical custody, effectuated by an "arrest" or "apprehension" of the parole violator, is necessary before "recommitment" is possible.

The peculiar circumstances surrounding this set of facts makes the foregoing analysis particularly important. As noted, the appellant's presence in Nebraska was accomplished under the Interstate Corrections Compact. The provisions of the compact provide that inmates confined under the terms of the compact "shall at all times be subject to the jurisdiction of the sending State [Minnesota] and may at any time be removed therefrom for transfer to a prison or other institution within the sending State . . . ." § 29-3401, art. IV(c). The appellee relies on this provision in support of its contention that it could not recommit the appellant since it did not have actual custody or control of appellant until the latter's parole by Minnesota on April 11, 1978. In do-

ing so, however, appellee ignores another provision of the compact which limits the sending state's power of removal in the following manner: "[I]f at the time the sending State [Minnesota] seeks to remove an inmate from an institution in the receiving State [Nebraska] there is pending against the inmate within such State any criminal charge or if the inmate is formally accused of having committed within such State a criminal offense, the inmate shall not be returned without the consent of the receiving State until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense." § 29-3401, art. V(a). Under such a provision the State of Nebraska may very well have been able to retain possession of the appellant for the duration of his Nebraska sentence had Minnesota sought to remove him from this state.

In any event, it is apparent from the foregoing discussion that the appellant's exact status and the appellee's exact duty in relation thereto are far from clear. As noted in our discussion of the prerequisites for a writ of mandamus, an official's duty must be clearly expressed in the law before a writ is properly issued. While the Board of Parole may have a clear duty to recommit a parolee to serve the remainder of his sentence following the revocation of his parole, we do not even reach that point under the present set of facts. Whether or not the Board has a clear duty to recommit the appellant depends upon whether the appellant has been arrested for the "custody of the Board of Parole" and "apprehended and returned to the Department of Correctional Services." § 83-1,123. Until the appellant's status is clearly established in that respect under the Interstate Corrections Compact and the laws governing the Board of Parole, the Board does not have a clear duty to act under the law, and the appellant was not entitled to a writ of mandamus.

The foregoing conclusion is all the more appropri-

ate in light of the general rule that mandamus is an extraordinary remedy which is not awarded as a matter of right and will not issue where there is another plain and adequate remedy available. *State ex rel. Newbold v. County of Buffalo,* 202 Neb. 813, 277 N.W.2d 246 (1979). The discussion above makes it readily apparent that the appellant is one "whose rights, status or other legal relations are affected by a statute." Neb. Rev. Stat. § 25-21,150 (Reissue 1979). As such, appellant is entitled to have his rights or status under the law determined in an action seeking a declaratory judgment pursuant to the Uniform Declaratory Judgments Act. Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1979). Furthermore, as noted by the trial court, appellant may, at the appropriate time, file a petition in habeas corpus to contest the lawfulness of his continued imprisonment.

We have held in the past that "where a specific duty is provided by statute, mandamus may be invoked to enforce it if denied; and the party entitled to such relief will not be forced to pursue his remedy by circuitous and dilatory action at law." *State ex rel. Simpson v. Vondrasek,* 203 Neb. 693, 701-02, 279 N.W.2d 860, 866 (1979). However, in this instance there is no such "specific duty" which has not been performed by the appellee Board of Parole. Until the appellant's status under the law is determined, a task more appropriately achieved in an action for a declaratory judgment, no such clear or specific duty shall be present. The judgment of the trial court is hereby affirmed.

AFFIRMED.

KENNETH O. POLLARD, APPELLEE AND CROSS-APPELLANT, V. WRIGHT'S TREE SERVICE, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, NEBRASKA SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLANT AND CROSS-APPELLEE.

322 N.W.2d 397

Filed July 16, 1982. No. 81-575.

1. **Workmen's Compensation: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
2. _____: _____. The findings of fact made by the Workmen's Compensation Court after rehearing have the force and effect of a jury verdict and will not be set aside on appeal unless clearly wrong.
3. **Workmen's Compensation: Second Injury Fund.** In a workmen's compensation case the State and the Second Injury Fund may be impleaded as parties after the initial hearing in the Workmen's Compensation Court and prior to the de novo rehearing, in the absence of proof of prejudice.
4. **Workmen's Compensation.** Under the Workmen's Compensation Act an award which is payable periodically for 6 months or more is subject to modification on the ground of increase or decrease of incapacity due solely to the injury.
5. _____. In a modification proceeding in a workmen's compensation case, the whole question of the employee's physical condition can again be inquired into as of that time.
6. **Workmen's Compensation: Second Injury Fund: Attorney Fees.** Within the meaning of Neb. Rev. Stat. § 48-125 (Reissue 1978) the Nebraska Second Injury Fund is an "employer," and if, on appeal to the Supreme Court, the fund fails to obtain any reduction in the amount of the award of the Workmen's Compensation Court on rehearing, the employee is entitled to a reasonable sum as attorney fees in this court, to be assessed against the Second Injury Fund.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed and remanded with directions.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellant.

John R. Timmermier of Schmid, Ford, Mooney & Frederick, for appellee Wright's.

Michael P. Cavel of Stave, Cavel & Coffey, P.C., for appellee Pollard.

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

MCCOWN, J.

This is a workmen's compensation case. At the initial hearing in the Workmen's Compensation Court the plaintiff was found entitled to benefits under the workmen's compensation law and received an award for temporary total disability to the date of the hearing and for so long as he remained totally disabled, and directed that if total disability ceases he was entitled to statutory amounts of compensation for any residual permanent partial disability. The employer impleaded the Second Injury Fund and made application for rehearing. On rehearing before a three-judge panel the court made an award to plaintiff against the employer for temporary total disability to January 22, 1981, and 7½ percent permanent partial disability to the body as a whole thereafter. The remaining portion of a total disability award was assessed against the Nebraska Second Injury Fund for the duration of plaintiff's total disability. The Second Injury Fund has appealed.

The plaintiff, who was 63 years old at the time of hearing, slipped and fell on January 17, 1979, while clearing brush in the course of his employment by Wright's Tree Service, Inc. He was hospitalized immediately and treated extensively thereafter. As a result of the fall he sustained an injury to his neck which, in and of itself, would have produced a 5 to 10 percent permanent partial disability to the body as a whole. The evidence showed, however, that the plaintiff had undergone three operations between 1972 and 1976 for cervical disc injuries. The first operation was for an injury in 1972, incurred while working for another employer, for which he received workmen's compensation. The two later surgical operations arose from automobile accidents. His

employer at the time of the accident involved here was aware of the previous injuries and the plaintiff's resulting partial disability when plaintiff was hired in January 1978. There was also evidence that the plaintiff had a history of episodes in which he stared into space and fell to the ground and was unable to move. The plaintiff's doctor testified that the fall of January 17, 1979, contributed in a material and substantial way to aggravate plaintiff's preexisting cervical spondylosis, and that the 1979 fall caused more disability than it would have to a patient who had not had the previous injuries.

At the initial hearing before the compensation court on October 6, 1980, the Nebraska Second Injury Fund was not a party. Following the entry of the total disability award on November 5, 1980, the employer made application for rehearing and impleaded the Nebraska Second Injury Fund. The Second Injury Fund filed a motion to strike the employer's amended answer and third-party petition on the ground that the compensation court had no jurisdiction over the Second Injury Fund unless it was impleaded prior to the initial hearing before the single judge. The Workmen's Compensation Court overruled the motion of the Second Injury Fund on March 25, 1981, on condition that the employer, Wright's Tree Service, Inc., pay court reporter and witness fees which might be reasonably required by the Second Injury Fund, and also pay temporary total disability benefits to the plaintiff as required by the initial award until such time as the rehearing took place. The employer accepted the conditions and the Second Injury Fund filed its answer. On April 21, 1981, the case was tried on rehearing.

On July 16, 1981, the Workmen's Compensation Court on rehearing found that the plaintiff had had three surgeries involving laminectomies and fusions resulting in a permanent disability rating of 30 to 35 percent, and that the plaintiff had a permanent par-

tial disability which would support a rating of 25 percent loss of earning power or more as a result of the surgeries, and that the defendant had knowledge of said permanent partial disability at the time the plaintiff was hired in 1978, as established by written records. The court further found that the plaintiff was totally disabled as the combined result of the injury to his back on January 17, 1979, superimposed on the previous permanent partial disability, and that since the injury of January 17, 1979, would of itself have caused only a 7½ percent permanent partial disability to the plaintiff's body as a whole, the defendant Nebraska Second Injury Fund was liable for the additional disability.

The court further found that as a result of the accident and injury of January 17, 1979, the plaintiff was unable to perform work for which he had previous training or experience and was entitled to vocational rehabilitation services. The court further found that as a result of the accident and injury of January 17, 1979, the plaintiff incurred hospital and medical expenses of more than $12,000, and was temporarily totally disabled to and including January 22, 1981, a period of 105⅐ weeks.

The court on rehearing therefore ordered that the plaintiff recover from the defendant Wright's Tree Service, Inc., the sum of $150.13 per week for 105⅐ weeks of temporary total disability, and thereafter and in addition thereto, the sum of $11.26 per week for 194⅘ weeks for 7½ percent permanent partial disability to plaintiff's body as a whole. The court gave credit for compensation and medical expenses paid.

The court also ordered that the plaintiff recover from the defendant Nebraska Second Injury Fund, commencing January 23, 1981, the sum of $138.87 per week for 194⅘ weeks, and thereafter and in addition thereto, the sum of $150.13 per week for the duration of plaintiff's total disability.

The Second Injury Fund first argues that there is insufficient competent evidence that plaintiff's injury arose out of his employment, and it is contended that his history of "drop attacks" enhances the degree of proof required to establish that the injury arose out of and in the course of the employment.

In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. The findings of fact made by the Workmen's Compensation Court after rehearing have the force and effect of a jury verdict and will not be set aside on appeal unless clearly wrong. *Rogers v. Hansen,* 211 Neb. 132, 317 N.W.2d 905 (1982). There is ample evidence in the record in the present case to support the compensation court's finding that the plaintiff suffered an injury arising out of and in the course of his employment.

The Second Injury Fund next contends that the compensation court did not acquire jurisdiction over the Second Injury Fund because the fund was not impleaded as a party prior to the initial hearing in the Workmen's Compensation Court. The fund relies upon Neb. Rev. Stat. § 48-128 (Reissue 1978), which provides in part: "In all cases where a claim is asserted by the state on behalf of the Second Injury Fund against an employer or employer's insurer under this section, or where a claim is made against said Second Injury Fund, the State of Nebraska shall be impleaded as a party plaintiff or defendant, as the case may require, and when so impleaded as a defendant, service of summons shall be had upon the Attorney General. It shall be the duty of the Attorney General to act as attorney for the state."

The foregoing requirements were all met in this case. There is no requirement in the statute that

the Nebraska Second Injury Fund be impleaded prior to the initial hearing in the Workmen's Compensation Court. Under current Nebraska statutes the Workmen's Compensation Court on rehearing proceeds to hear the cause de novo. See Neb. Rev. Stat. § 48-179 (Reissue 1978). There is no evidence in the record that the Second Injury Fund did not have time to investigate the case, prepare a defense, or prepare for trial at the rehearing, and the record shows that Wright's Tree Service, Inc., was required to pay the costs of taking any depositions reasonably required by the Second Injury Fund in preparing for trial, and the fund, in fact, participated in an additional deposition of plaintiff's doctor. There can be no question but that the compensation court had subject matter jurisdiction and also had jurisdiction of the parties. To hold that the Workmen's Compensation Court has no jurisdiction over the Second Injury Fund unless the fund is impleaded prior to the initial hearing in the Workmen's Compensation Court would write requirements into the statute which are not expressed, and restrict the liabilities of the Second Injury Fund without justification. In a workmen's compensation case the state and the Second Injury Fund may be impleaded as parties after the initial hearing in the Workmen's Compensation Court and prior to the de novo rehearing, in the absence of proof of prejudice.

Finally, the Second Injury Fund contends that because the Workmen's Compensation Court on rehearing did not specifically find that the plaintiff's total disability after January 22, 1981, was permanent, the Second Injury Fund is not liable until such a finding is made. Essentially, the fund argues that the requirement of vocational rehabilitation indicates that total disability at the present time might be reduced to some lesser percentage of partial permanent disability in the future as the result of such training, and that therefore present total dis-

ability is not a fixed, stable, or nonrecoverable disability and consequently is not permanent. It argues that unless there is a finding that total disability is permanent, it must be regarded as temporary and the fund cannot be held liable until that specific finding of fixed and permanent disability is made. We disagree.

The findings of the Workmen's Compensation Court on rehearing were that, as a result of the accident and injury of January 17, 1979, the plaintiff was temporarily totally disabled from the date of the accident to and including January 22, 1981, and thereafter sustained a 7½ percent permanent partial disability to the body as a whole which, combined with his preexisting disability, resulted in the plaintiff becoming totally disabled from and including January 23, 1981, to the date of rehearing, and that plaintiff would continue to be totally disabled for an indefinite future period of time.

Prior to 1971 § 48-128 limited recovery against the Second Injury Fund to cases of permanent total disability. The section was amended in 1971 to provide for recovery against the Second Injury Fund in cases of partial permanent disability as well as in cases of total permanent disability. Consequently, in the present case the Second Injury Fund is liable for the payment of all permanent disability in excess of the 7½ percent permanent partial disability charged to the employer. Whether the ultimate amount of permanent disability after rehabilitation is 60 percent, 80 percent, or total, the Second Injury Fund is liable for it.

The record reflects that the medical treatment for plaintiff's physical injuries has been completed and the employer has been assessed with that cost. The only further medical treatment contemplated is for the purpose of pain rehabilitation. Under such circumstances there should be little question but that the physical injuries currently present are perma-

nent rather than temporary. The plaintiff should not be denied compensation for what is currently total permanent disability simply because his employability and earning capacity might become enhanced by rehabilitation and his permanent disability possibly reduced at some time in the future. Neb. Rev. Stat. § 48-141 (Reissue 1978) provides that the amount of any compensation award payable periodically for 6 months or more may be modified at any time after 6 months from the date of the award, on application by either party, "on the ground of increase or decrease of incapacity due solely to the injury . . . ." See, also, *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976). That case also held that in a modification proceeding in a workmen's compensation case, the whole question of the employee's physical condition can again be inquired into as of that time. The award against the Second Injury Fund in the present case was for permanent disability and was properly entered.

The Workmen's Compensation Court on rehearing determined that Wright's Tree Service, Inc., obtained a reduction in the amount of the award at the rehearing in the compensation court and therefore did not award an attorney fee to plaintiff's attorney. Neb. Rev. Stat. § 48-125 (Reissue 1978) provides in part: "In the event the employer files an application for a rehearing before the compensation court en banc from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court sitting en banc may allow the employee a reasonable attorney's fee to be taxed at costs against the employer for such rehearing, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court." It seems clear that "reduction in the amount of such award" ordinarily refers to the total

amount of the award to the employee and not to a reduction in the amount to be paid by a specific defendant who is liable to pay a portion of the award. In this case there was no reduction in the total amount of the award to the plaintiff. The only change which occurred was that the Second Injury Fund was held liable for a portion of the award rather than the tree service, which was liable alone on the initial award. The action of the compensation court in refusing to make an award of attorney fees to the plaintiff was in error.

In this court it is contended that no attorney fees can be allowed to plaintiff's attorney because only the Second Injury Fund appealed and the statute refers only to the "employer." The Second Injury Fund, within the meaning of § 48-125, is an employer, and if, on appeal to this court, it fails to obtain any reduction in the amount of the award of the Workmen's Compensation Court on rehearing, the employee is entitled to a reasonable sum as attorney fees in this court, to be assessed against the Second Injury Fund.

The judgment and award of the Workmen's Compensation Court on rehearing was correct and is affirmed. The cause is remanded to the Workmen's Compensation Court with directions to award the plaintiff a reasonable sum as attorney fees for the rehearing in that court. Plaintiff is allowed a fee of $1,000 for the services of his attorney in this court.

AFFIRMED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., not participating.

# WILLIAM FISHER, JR., ET AL., APPELLEES, V. LOWER PLATTE NORTH NATURAL RESOURCES DISTRICT, APPELLANT.

# IN RE APPEAL OF TROUBLE CREEK/RAWHIDE WATERSHEDS, INC.

# TROUBLE CREEK/RAWHIDE WATERSHEDS, INC., ET AL., APPELLEES, V. LOWER PLATTE NORTH NATURAL RESOURCES DISTRICT, APPELLANT.

322 N.W.2d 403

Filed July 16, 1982. Nos. 81-710, 81-711.

1. **Natural Resources Districts: Appeal and Error.** The determination of the feasibility of a general benefit project by the board of directors of a natural resources district, and the adoption and implementation of such a project, is a legislative function and is not within the scope of judicial review where the specific statutory requirements for such action have been met.
2. **Natural Resources Districts: Legislature.** The adoption and implementation of a general benefit project by a natural resources district is an exercise of a power which is legislative in nature, and the requirements of due process that apply to judicial or quasi-judicial proceedings are not applicable.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN and BRYCE BARTU, Judges. Reversed and remanded with instructions.

George E. Svoboda, P.C., of Sidner, Svoboda, Schilke, Wiseman & Thomsen, for appellant.

Edward F. Fogarty of Fogarty, Lund & Gross, for appellees Fisher et al.

David J. Cullan of Cullan, Cullan & Morrison, for appellees Trouble Creek et al.

Paul L. Douglas, Attorney General, and G. Roderick Anderson, and James R. Cook, for amicus curiae Natural Resources Commission.

Robert B. Crosby and Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester, for amicus curiae Neb. Assn. of Natural Resources Districts.

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

McCOWN, J.

This appeal involves two cases which were consolidated for trial in the District Court, both of which are appeals from an order of the Lower Platte North Natural Resources District dated March 6, 1980, which denied a petition of William Fisher, Jr., and 15 other landowners of the district to create a flood control project as a special assessment improvement project. See Neb. Rev. Stat. § 2-3255 (Reissue 1977). The denial was based on the ground that the same flood control project requested by the Fisher petition had already been approved and adopted by the district as a general benefit project and was in the process of implementation. The District Court entered summary judgment for the plaintiffs in both cases and the district has appealed.

The district is a natural resources district organized and existing under the laws of Nebraska. The flood control project involved is generally known as the Rawhide project and is located in the Rawhide Creek watershed in Dodge County, Nebraska, north and west of the city of Fremont.

The district conducted preliminary studies on the flood control project in 1973 and 1974. After notice to landowners, the district applied to the Nebraska Natural Resources Commission for funding for the project. After hearing before the commission, at which both proponents and objectors appeared, the project was approved by the commission and the application of the district was granted on June 7, 1978. The formal agreement between the commission and the district was signed and became effective on October 10, 1978. The current funding agreement recites that the Natural Resources Commission has determined that the costs were eligible for state current funding under the appropriate statutes as a general benefit flood control project. The board of directors of the district proceeded to discuss implementation of the project at various meetings there-

after, and various landowners and their counsel appeared at the meetings and were given an opportunity to state and express their objections. The board of directors of the district proceeded with the implementation of the project.

In August 1979 William Fisher, Jr., and 15 other landowners filed a petition with the district pursuant to Neb. Rev. Stat. §§ 2-3252 et seq. (Reissue 1977) to grant a special assessment improvement project area. The project requested by the petition was the identical flood control project already being implemented as a general benefit project of the district. The Fisher petition asserted that the project was in compliance with the goals of the state water plan but requested that it be funded by a special assessment to the landowners within the project area. Trouble Creek/Rawhide Watersheds, Inc., an organization of landowners opposed to the flood control project, filed an objection to the Fisher petition.

The district held hearings on the Fisher petition on September 28, 1979, November 27, 1979, and January 10, 1980, and notice was published of the estimated assessment to landowners. The landowners who had filed the Fisher petition produced no evidence in support of their petition and, at the first hearing on September 28, 1979, advised the board of directors that they would not offer proof in support of their petition and that they joined the objectors to the petition. Some persons appeared at the hearings in favor of the project on a general benefit basis and some objecting landowners, including Trouble Creek/Rawhide Watersheds, Inc., presented objections to the entire flood control project, including challenging the legality of the approval and implementation of the general benefit project.

On March 6, 1980, the district found that the special benefit project requested in the Fisher petition was physically the same project which the district had in process, which project had been approved

and adopted by the district as a general benefit project which had the approval of the Nebraska Natural Resources Commission and other state agencies, and also had approval of appropriate federal agencies. The district also found that the general benefit project conformed with the goals, criteria, and policies of the state water plan and the requirements of the statutes of Nebraska. The district then denied the establishment of the improvement project area requested by the petitioners.

The Fisher landowners appealed from the order of March 6, 1980. Trouble Creek/Rawhide Watersheds, Inc., also appealed, challenging the overruling of certain motions based on its allegations of illegality in the creation of the general benefit project by the district. The cases were consolidated in the District Court for trial and have remained consolidated in this appeal.

The District Court, after hearing on motions for summary judgment filed by the landowner groups and the submission of evidence, affidavits, and written briefs, found that the Rawhide flood control project is a general benefit project created by the defendant, Lower Platte North Natural Resources District, within its boundaries under authority and by procedure of the natural resources act. The court also found that the improvement project area proposed by the landowners was a special benefit project upon procedures authorized by the natural resources act, and that neither the Nebraska Natural Resources Commission nor the Lower Platte North Natural Resources District had adopted rules and regulations establishing minimum feasibility standards or minimum due process standards of notice and hearing for the creation of general benefit projects and/or special benefit projects.

The District Court determined that the creation of the general benefit project and denial of the creation of the special benefit project were upon unlawful procedure in violation of the petitioners' constitu-

tional rights of due process, and entered judgment that the orders creating the general benefit project and denying the creation of the special benefit project be set aside and vacated, and that the matters be remanded to the district for further consideration consistent with the judgment of the District Court.

The district contends that its action in establishing and implementing the general benefit flood control project was an exercise of legislative power and authority. It argues that judicial notice and hearing and the establishment of minimum feasibility standards were not required for the establishment or implementation of the general benefit project. The district also contends that the District Court had no jurisdiction because a general benefit flood control project cannot be collaterally attacked by attempting to establish a special assessment improvement project area for carrying out the same project.

Neb. Rev. Stat. § 2-3229 (Reissue 1977) sets out the many purposes of natural resources districts, one of which is to develop and execute plans, facilities, works, and programs relating to flood prevention and control through the exercise of the powers and authority contained in the natural resources act. Under that section plans and programs are to be in conformance with the goals, criteria, and policies of the state water plan as developed by the Nebraska Natural Resources Commission. To insure that those goals are met, the section also provides that a properly designated district planning body for the area affected and the central state planning agency shall each be given 30 days to review and comment upon the plans and programs. Failure to reply within 30 days by either of the planning bodies shall be conclusive that the proposed plans and programs have been endorsed.

Neb. Rev. Stat. §§ 2-3230 to 2-3250 (Reissue 1977) grant to each district power and authority to engage in a broad spectrum of activities in carrying out the purposes of the district.

Section 2-3252 grants to each district the power and authority to establish improvement project areas within the district for the benefit of landowners within such improvement areas. The cost is to be recovered by special assessment under procedures provided in §§ 2-3252 to 2-3254 instead of by general tax funds levied pursuant to other sections. The last sentence of § 2-3252 provides: "Projects of a general benefit to a district may be developed and executed without the establishment of a project improvement area."

Section 2-3266 provides that the Nebraska Natural Resources Commission may allocate funds to agencies or political subdivisions when the program or project appears to be of general public benefit.

The record in this case shows that the Natural Resources Commission, after hearing, determined not only that the flood control project for which the district had applied for funding was in conformance with the goals, criteria, and policies of the state water plan but also that it was of general public benefit and eligible for state grant funding. The record also indicates that partial federal funding was obtained. The record does not reveal the breach of any statutory requirement for establishing, implementing, or funding the general benefit flood control project which the actions here seek to challenge. It must be assumed, in the absence of evidence to the contrary, that the public bodies and agencies involved here have performed their duties as required by law.

The landowners in the present cases overlook the fact that the board of directors of the district, in initiating, adopting, and implementing the general benefit flood control project, was acting in a legislative capacity and in accordance with the statutes setting forth the procedures required to be followed in taking such action. In *Winter v. Lower Elkhorn Nat. Resources Dist.*, 206 Neb. 70, 291 N.W.2d 245 (1980), the contention was made that the project

there involved was not economically feasible, technically feasible, environmentally sound, or in accordance with the Nebraska state water plan. This court said: "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." *Id.* at 73, 291 N.W.2d at 247.

In *Twin Loups Reclamation & Irr. District v. Blessing,* 202 Neb. 513, 515, 276 N.W.2d 185, 187 (1979), this court said: "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 projects 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."

In *Stones v. Plattsmouth Airport Authority,* 193 Neb. 552, 228 N.W.2d 129 (1975), which dealt with the selection of a site for an airport, this court held that the selection of a site for a public improvement is an exercise of a power which is legislative in nature, and the requirements of due process that apply to judicial or quasi-judicial proceedings are not applicable.

The determination of the feasibility of a general benefit project by the board of directors of a natural resources district, and the adoption and implementation of such a project, is a legislative function and is not within the scope of judicial review where the specific statutory requirements for such action have been met.

The adoption and implementation of a general benefit project by a natural resources district is an exercise of a power which is legislative in nature, and the requirements of due process that apply to

judicial or quasi-judicial proceedings are not applicable.

The Legislature has granted to natural resources districts broad power and authority to establish general benefit projects within specified statutory limits. Where, as here, a general benefit project has been duly and regularly adopted and implemented by a natural resources district, individual landowners of the district cannot properly file a petition for the adoption of the identical project as an improvement project area to be funded by special assessment. In the case at bar the admissions of the petitioning landowners that they actually were objectors to their own petition demonstrated an abuse of judicial process and constituted a collateral attack on the legislative action of the district in creating the general benefit project.

In view of the foregoing it is unnecessary to discuss the remaining issues raised in the briefs.

The judgment of the District Court in each case is reversed and the causes are remanded to the District Court with instructions to dismiss the actions.

REVERSED AND REMANDED WITH INSTRUCTIONS.

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STATE OF NEBRASKA, APPELLEE, V. DAVID STRANGHOENER, APPELLANT.

322 N.W.2d 407

Filed July 16, 1982. No. 81-731.

1. **Post Conviction: Appeal and Error.** One seeking post conviction relief has the burden of establishing the basis for such relief. The findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
2. _____: _____. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions.
3. **Pleas: Waiver.** A voluntary guilty plea waives every defense to

the charge, whether the defense is procedural, statutory, or constitutional.

4. **Effectiveness of Counsel.** Where the claim of ineffective counsel is made, one must show how or in what manner the alleged inadequacy prejudiced him.

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

David Stranghoener, pro se.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for appellee.

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

KRIVOSHA, C.J.

The appellant, David Stranghoener, has appealed from an order entered by the District Court for Sarpy County, Nebraska, denying his request for post conviction relief. The trial court, after reviewing the motion, the records, and the files of the case, concluded that Stranghoener was entitled to no relief and denied his motion for post conviction relief without an evidentiary hearing. We affirm.

This is Stranghoener's second appearance in this court. We have earlier passed upon his direct appeal, where the facts of the case are set out in greater detail. See *State v. Stranghoener,* 208 Neb. 598, 304 N.W.2d 679 (1981). For purposes of this appeal it is sufficient to relate that Stranghoener was originally charged with first degree murder. The charge was subsequently amended to second degree murder pursuant to a plea bargain entered into between Stranghoener and the State. Stranghoener pled guilty to the amended charge before the trial court on January 14, 1980, and was sentenced to a term of 20 years in prison.

He has now filed for post conviction relief pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1979), alleging a host of claims

mostly in broad conclusionary terms and without specific factual allegations of the nature that would entitle him to any relief. This action seeking post conviction relief is filed pro se and is almost identical to the petition filed by Dennis J. Paulson, a codefendant in the original case. We have recently denied post conviction relief to Paulson. See *State v. Paulson,* 211 Neb. 711, 320 N.W.2d 115 (1982). As we noted in the *Paulson* case, *supra* at 713, 320 N.W.2d at 117: "It is well established that one seeking post conviction relief has the burden of establishing the basis for such relief and that the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous." See, also, *Marteney v. State,* 210 Neb. 172, 313 N.W.2d 449 (1981); *State v. Rust,* 208 Neb. 320, 303 N.W.2d 490 (1981).

Furthermore, we have frequently held that a defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions. *State v. Shepard,* 208 Neb. 188, 302 N.W.2d 703 (1981); *State v. Cole,* 207 Neb. 318, 298 N.W.2d 776 (1980). Many of the claims now made by Stranghoener could have been included in his direct appeal if, in fact, such claims really existed. They may not now be raised and can be disregarded by us.

Likewise, in *Paulson, supra,* we again repeated our earlier announced rule to the effect that a voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional, citing *State v. Coleman,* 209 Neb. 823, 311 N.W.2d 911 (1981), and *State v. Country,* 202 Neb. 509, 276 N.W.2d 110 (1979). It is only where a defendant maintains that his guilty plea was as a result of ineffective assistance of counsel that we consider claims which otherwise would have been waived by

a plea of guilty. See *State v. Hall,* 188 Neb. 130, 195 N.W.2d 201 (1972). However, where the claim of ineffective counsel is made, one must likewise show how or in what manner the alleged inadequacy prejudiced him. *State v. Holloman,* 209 Neb. 828, 311 N.W.2d 914 (1981); *State v. Colgrove,* 207 Neb. 496, 299 N.W.2d 753 (1980).

As in *Paulson,* an examination of the record in this case convinces us that the grounds urged by Stranghoener for post conviction relief are wholly frivolous. The record in this case clearly establishes that Stranghoener's counsel did the best a criminal defense lawyer could have done, given the strength of the case against his client. The transcript of the preliminary hearing is particularly revealing on this point. Stranghoener's attorney was one of six attorneys representing six codefendants at the consolidated preliminary hearings. Stranghoener's attorney cross-examined the prosecution's witnesses, called his own witnesses, objected to evidence and testimony, and moved for dismissal of the information. His attorney was at least as active and effective as the others. Nowhere in the record from any of the proceedings held either in the county court or the District Court is there any evidence to support the petitioner's allegations that his attorney conspired with the prosecution to convict him. Based on the record, the conclusion is inescapable that Stranghoener has failed to sustain his burden of showing ineffectiveness of counsel.

Our reexamination of the record in this case, as we originally examined it in the direct appeal case, leaves no doubt that Stranghoener was adequately and fully represented by counsel and the trial court was correct in determining that there was no legitimate basis upon which Stranghoener's action for post conviction relief might lie. The record discloses no fatal defect of the type that was not waived by entering the guilty plea. Nor does the record re-

veal any basis for his claim that he was not effectively represented by adequate counsel. Quite to the contrary, the record makes it clear that he was most adequately represented and is fortunate that he was not tried and convicted of first degree murder, as originally charged.

Similarly, Stranghoener has failed to establish his entitlement in District Court to an evidentiary hearing to attempt to broaden the record to encompass facts not raised in previous proceedings. It is true, and we have so held, that in a post conviction proceeding the files and records of the case must affirmatively establish that the prisoner is entitled to no relief or an evidentiary hearing must be granted. *State v. Svoboda,* 199 Neb. 452, 259 N.W.2d 609 (1977); *State v. Ford,* 198 Neb. 376, 252 N.W.2d 643 (1977). Likewise, where a petition alleges facts which, if true, would allow relief, but the record is silent respecting those allegations, the District Court is bound to hear the petitioner's evidence. See *State v. Svoboda, supra.* However, this standard does not require the court to grant an evidentiary hearing on the basis of bare conclusory allegations. See *State v. Paulson,* 211 Neb. 711, 320 N.W.2d 115 (1982).

Typical of Stranghoener's allegations going to ineffectiveness of counsel is the charge that "Petitioner's counsel threatened him on many occasions, that he would testify against him if he did anything against said counsel." While liberal judicial imagination could conceive facts consistent with this allegation which, if true, might show an involuntary guilty plea induced by counsel's misconduct, the District Court is not required by § 29-3001 to engage in such speculation in deciding whether an evidentiary hearing should be granted. Lacking allegations of fact specific enough to permit the trial court to make a preliminary determination of the question relating to violations of Stranghoener's constitutional rights, the District Court correctly rejected

his request for an evidentiary hearing. For the same reason, rejection by the trial court of Stranghoener's motion for appointment of counsel in this proceeding was proper, as that decision rests with the discretion of the District Court.

The order of the trial court denying post conviction relief is affirmed.

AFFIRMED.

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IN RE INTEREST OF ALLEN REED, A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. ALLEN REED, JR., APPELLANT.
322 N.W.2d 411

Filed July 16, 1982. No. 81-737.

1. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile proceeding to this court is heard de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses.
2. **Parental Rights.** In considering cases of child neglect, the best interests of the child are paramount and parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.
3. _____. Although parental rights may not be terminated solely because a parent has been incarcerated for the commission of a crime, the fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated.
4. _____. A parent's moral conduct is a valid consideration in a determination of parental fitness.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Richard J. Gilloon of Schicker & Leahy, for appellant.

Donald L. Knowles, Douglas County Attorney, and Christopher E. Kelly, for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

Allen Reed, Jr., the natural father of Allen Calvin Reed, a minor, has appealed from an order of the separate juvenile court of Douglas County which terminated appellant's parental rights over the minor child. He assigns as error the court's finding that the minor child was neglected within the meaning of Neb. Rev. Stat. §§ 43-202(2) and 43-209(2) (Reissue 1978) insofar as the appellant was concerned and the finding that it was in the best interests of the minor child to terminate such parental rights.

The parental rights of the natural mother of Allen Calvin Reed, born April 22, 1975, were terminated on February 19, 1980, which order was affirmed by this court in the case of *In re Interest of Campbell,* 208 Neb. 374, 303 N.W.2d 513 (1981). A reference to that opinion will reveal the relevant facts which justified that order.

The present action was filed on June 11, 1981, and a hearing was held on August 3, resulting in the entry of a final order terminating the appellant's rights as father of the child on August 5, 1981.

The appellant testified at the hearing that he had been in jail since July 1977, and was currently confined in the Nebraska Penal Complex in Lincoln. He also admitted to being the father of the minor child and that at one time he had been married to the child's mother, Louise Campbell. The record is unclear as to when the appellant and Louise Campbell separated, but the appellant admitted he had stopped seeing his son in 1977. Furthermore, the appellant testified that he never gave his wife money for the support of this child or of the other children then living in the appellant's household, and the record makes it apparent that some support was fur-

nished through Aid to Dependent Children. However, the appellant did claim to have made grocery money available for the children during the period he had been employed in Sioux City and that he had bought the children toys and "whatever I think that they needed."

According to the record, appellant is currently serving a sentence of not less than 12 nor more than 15 years for shooting with the intent to wound, kill, or maim, and, as admitted by him, there were approximately 80 entries on his computer list of contacts with law enforcement agencies. However, he stated that most of these were for traffic tickets, although he did admit to being incarcerated in the penitentiary on two occasions as an adult, and once as a juvenile, and to having spent quite a bit of time in jail as a result of some of the other offenses. When asked if he had not had his share of troubles with the law, his answer was, "Not really, not no more than anybody else."

The appellant insisted that he had made several unsuccessful attempts to locate his minor child. With respect to the lack of support, the appellant testified, on the one hand, that if he had had any money for this child's support he did not know where to send it. However, upon questioning by the court, he admitted that he had contacted the welfare office and knew that he could send money for the support of his child, yet he had failed to do so. At the time of the hearing in August of 1981, the appellant had not seen nor had any contact with his child for 4 years. The appellant stated that he had married someone whom he met while in the penitentiary in June 1981, and that between himself and his current wife the child could be taken care of. There is no indication in the record that the appellant's present wife has ever seen the minor child.

"An appeal of a juvenile proceeding to this court is heard de novo upon the record; and the findings of

fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses." *In re Interest of Kain,* 209 Neb. 229, 233, 307 N.W.2d 119, 122 (1981). In cases of child neglect, we have repeatedly held that the best interests of the child are paramount and that parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. *In re Interest of Witherspoon,* 208 Neb. 755, 305 N.W.2d 644 (1981).

The appellant in effect argues that although it may have been proper to have terminated the parental rights as to the mother of the child, it has never been shown that he was unfit, or neglected the child. The answer to that contention, of course, is that for the first 2 years of the child's life, he was aware of the improper treatment that was being given the child by the mother. We have stated before that both parents are obligated to perform the parental duties and the father cannot delegate those duties to the mother of the child and expect to be held harmless if she neglects the child. *In re Interest of Kimsey,* 208 Neb. 193, 302 N.W.2d 707 (1981).

It is also argued by the appellant that his parental rights may not be terminated solely because of his incarceration for the commission of a crime. However, we have said that the fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated. *In re Interest of Wagner and Russell,* 209 Neb. 33, 305 N.W.2d 900 (1981). Furthermore, we cannot disregard the appellant's conduct which resulted in his incarceration, nor the thoroughly indifferent attitude with which he regarded his "normal lifestyle" which had resulted in 80 contacts with law enforcement officials. Certainly a parent's moral conduct is a valid consideration in a determination

of parental fitness. *Matter of M. B.,* 288 N.W.2d 773 (S.D. 1980).

After 7 years of waiting, this child has a right to grow up in a healthy and wholesome environment, and each day's delay in providing such environment causes such right to become increasingly unobtainable. *In re Interest of Carlson,* 207 Neb. 540, 299 N.W.2d 760 (1980). To delay further a final decision on this issue would be unthinkable. We will not gamble with this child's future by making him await an uncertain and improbable parental rehabilitation. *State v. Souza-Spittler,* 204 Neb. 503, 283 N.W.2d 48 (1979). There is nothing in the record to support a reasonable conclusion that even considering the fact of appellant's remarriage we could expect any change in circumstances beneficial to this child.

From a de novo review of the record, we are convinced that the action of the juvenile court in terminating parental rights is supported by clear and convincing evidence. Its judgment is affirmed.

AFFIRMED.

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DONNA R. EGAN, FORMERLY DONNA R. MCCOWN, APPELLANT, V. HAL BAUER ET AL., APPELLEES.
322 N.W.2d 413

Filed July 16, 1982. No. 81-900.

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

Stanley D. Cohen, for appellant.

Karen B. Flowers, for appellees.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This is a professional malpractice action. The District Court sustained a motion for summary judgment on the ground that the action was barred by the statute of limitations.

The alleged malpractice consisted of the preparation of a quitclaim deed in December 1977 from the plaintiff to herself and her then husband as joint tenants with right of survivorship. The plaintiff asserts that she wanted her husband to have her property in the event of her death and that the deed was not to be recorded. The deed was recorded on January 3, 1978, and mailed to the plaintiff with the recording stamp on it. Plaintiff and her husband were divorced in 1979. In October 1979 plaintiff received notice from the sheriff of Lancaster County advising her that he had levied upon the property for a judgment against her former husband. Plaintiff then employed another attorney. This malpractice action was filed on August 7, 1980.

The defendants pleaded the defense of the statute of limitations, Neb. Rev. Stat. § 25-222 (Reissue 1979). The District Court, after hearing and introduction of evidence and exhibits, found that the evidence established that plaintiff's cause of action was barred by the statute of limitations, and entered summary judgment in favor of the defendants and dismissed plaintiff's petition. Plaintiff has appealed.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. EUGENE L. HUNT, APPELLANT.

322 N.W.2d 621

Filed July 23, 1982. No. 43955.

1. **Effectiveness of Counsel.** The party challenging the adequacy of criminal trial representation has the burden of proof in showing incompetence, if any, therein. He must also show that such incompetence prejudiced his defense.
2. **Identification Procedures.** The determination as to whether identification procedures were unnecessarily suggestive and conducive to a substantial likelihood of irreparably mistaken identification is to be made by a consideration of the totality of the circumstances surrounding the procedures used.
3. **Effectiveness of Counsel.** The standard for deciding whether defense counsel provided adequate representation in a criminal proceeding is whether he performed at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and whether he conscientiously protected the interests of his client.
4. **Confessions.** In order for a confession to be admissible, it must have been freely and voluntarily given and must not have been obtained by threat or promise.
5. **Confessions: Appeal and Error.** The admission into evidence of a confession constitutes an independent determination by the trial court that the confession was voluntarily made. Such determination will not be set aside on appeal unless such finding is "clearly erroneous."

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

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

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

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

CAPORALE, J.

This appeal results from the judgment of conviction entered by the District Court of Nebraska, Fourth Judicial District, in and for Douglas County, pursuant to a jury verdict finding the defendant-

appellant, Eugene L. Hunt, also known as Earl Campbell, guilty of first degree sexual assault. By some bewildering procedure unknown to our rules, this case was presented in a single brief, which also deals with appeals in case No. 43885 which arise from other separate criminal trials involving this same defendant. Nevertheless, we, on this occasion, review the matter.

Defendant asserts he was denied effective assistance of counsel and that the trial court erred in admitting his confession. We find these claims to be without merit and affirm the judgment of the trial court.

The claim that counsel was ineffective rests upon the fact that no action was taken to suppress the pretrial eyewitness identification of defendant by the victim.

It appears the 13-year-old victim was abducted at gunpoint on February 21, 1980, from a bus stop while en route to her babysitting job. The perpetrator took her to a house where he sexually penetrated her three separate times, tied her, and left her at the scene.

The identification of the defendant began with a composite drawing made by the police based upon the victim's description. That description included characteristics not displayed by defendant. At a three-photograph display the victim selected an individual other than the defendant as the possible perpetrator, but could not be certain as she could not tell whether he had gold teeth. She was later shown five photographs which included defendant but did not include the individual she had previously selected as the possible perpetrator. At this time she selected defendant as the possible perpetrator and later identified him at a lineup whereat she initially failed to make an identification because she had forgotten to bring her eyeglasses and, being nearsighted, was unable to see well enough until after

she moved closer to the viewing window.

Defendant argues that because his attorney did not seek suppression of the pretrial eyewitness identification, he was without the effective assistance of counsel and therefore his defense was prejudiced. It is the law in this jurisdiction that the party challenging the adequacy of criminal trial representation has the burden of proof in showing incompetence, if any, therein. He must also show that such incompetence prejudiced his defense. *State v. Journey,* 207 Neb. 717, 301 N.W.2d 82 (1981); *State v. Auger & Uitts,* 200 Neb. 53, 262 N.W.2d 187 (1978); *State v. Lang,* 202 Neb. 9, 272 N.W.2d 775 (1978). See, also, *Ford v. Parratt,* 638 F.2d 1115 (1981).

We first examine the test for ascertaining the validity of the identifications. In *State v. Harris,* 205 Neb. 844, 290 N.W.2d 645 (1980), we said that the determination as to whether identification procedures were unnecessarily suggestive and conducive to a substantial likelihood of irreparably mistaken identification is to be made by a consideration of the totality of the circumstances surrounding the procedures used. See, also, *State v. Joseph,* 202 Neb. 268, 274 N.W.2d 880 (1979); *Simmons v. United States,* 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

The standard for deciding whether defense counsel provided adequate representation in a criminal proceeding is whether he performed at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and whether he conscientiously protected the interests of his client. *State v. Rust,* 208 Neb. 320, 303 N.W.2d 490 (1981). We are unable to conclude on review that the photographic array and the lineup were so suggestive that a motion to suppress should have been sustained. No incompetence or prejudice therefore can be implied by the failure of trial counsel to submit a motion that would not be successful.

We next consider defendant's contention that the

admission of his confession into evidence was improper. It is the law in Nebraska that in order for a confession to be admissible, it must have been freely and voluntarily given and must not have been obtained by threat or promise. *State v. Hunsberger,* 211 Neb. 667, 319 N.W.2d 757 (1982); *State v. McDonald,* 195 Neb. 625, 240 N.W.2d 8 (1976). It is also the law that the admission into evidence of a confession constitutes an independent determination by the trial court that the confession was voluntarily made. Such determination will not be set aside on appeal unless such finding is "clearly erroneous." *State v. Hunsberger, supra; State v. Williams,* 205 Neb. 56, 287 N.W.2d 18 (1979).

Defendant testified that at the time he was arrested, between 7 and 8 p.m. on May 6, 1980, he sustained injury, and that when he was brought to the police station some 15 to 20 minutes after the arrest, he had bruises on an arm and his legs and was spitting blood. Upon arriving at the station, according to defendant, and while he was spitting blood, Detective Farmer began questioning him almost immediately; that *Miranda* warnings were not given until after some period of interrogation; and that questioning continued, without medical attention and without the offer of food or drink, until about 2 a.m. the next day. He testified that he was willing to say something then because he was tired and hurt. He testified that he simply reiterated what the police had told him about the crime. On the other hand, Detective Farmer testified that defendant was arrested following a struggle during which defendant received a few scrapes to his legs and an elbow. Upon arrival at the police station Detective Farmer obtained reports and performed other tasks and did not talk with defendant until shortly before 11 p.m. Detective Farmer further testified that he did not talk with defendant for any length of time before the *Miranda* warnings were given at 10:52 p.m. Accord-

ing to Farmer, defendant was alert and made no complaints of being hungry, thirsty, or tired. No inducements were given, no threats were made, and no physical abuse administered; nor was defendant coerced in any way to give a confession. After a lengthy interview defendant gave the recorded confession in question at about 2 a.m. the day following his arrest.

It is obvious that the trial court and jury resolved the conflict in the evidence concerning the circumstances surrounding the giving of the confession against the defendant. In view of the record we cannot say that the trial court's determination that the confession was freely, voluntarily, and knowingly given is clearly erroneous.

The judgment of the trial court is affirmed.

AFFIRMED.

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ROBERT A. TICHENOR, APPELLEE, V. J. J. LOHAUS, DOING BUSINESS AS JACK AND JERRY'S PARKING, APPELLANT.

322 N.W.2d 629

Filed July 23, 1982. No. 44224.

1. **Negligence: Invitor-Invitee.** Even though a dangerous condition on land may be open and obvious or known by an invitee, the possessor of the land may owe a duty of reasonable care to the invitee if the circumstances are such that he should expect that the invitee will fail to protect himself against the hazard.
2. _____: _____. Generally, an invitee, who has knowledge of a dangerous condition on the premises or where the dangerous condition is obvious, is negligent as a matter of law if he fails to use reasonable care to avoid injury. However, to constitute negligence as a matter of law the intentional exposure must be unreasonable.
3. _____: _____. If the defendant possessor of land has made the invitee's exercise of a right or privilege impossible unless he exposes himself to risk of bodily harm, the invitee is not guilty of contributory negligence in so doing unless he acts unreasonably.
4. _____: _____. Among the matters which must be considered in

determining whether the invitee is guilty of negligence is the effect of distracting events or circumstances.

5. **Negligence: Juries.** Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Larry E. Welch and Joseph E. Jones of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellant.

John P. Inserra of Inserra Law Office, P.C., for appellee.

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

CLINTON, J.

The plaintiff-appellee brought this action in the District Court for Douglas County for personal injuries allegedly caused by the defendant's negligent maintenance of an icy parking lot ramp. The issues of the defendant's negligence, contributory negligence of the plaintiff, assumption of risk by the plaintiff, and plaintiff's damages were submitted to a jury after the evidence was presented. The jury returned a verdict for the plaintiff in the amount of $25,000, and the defendant appeals from that judgment to this court.

The defendant parking lot operator asserts that his motion for a directed verdict should have been granted because: (1) The evidence was insufficient to show that the defendant breached any duty owed to the plaintiff because the plaintiff had as much knowledge of the condition of the ramp as did the defendant. (2) The evidence showed that the plaintiff was guilty of contributory negligence as a matter of law. (3) The evidence demonstrated as a matter of law that the plaintiff assumed the risk of injury.

The evidence established the following facts, either directly and without dispute or by reasonable inference from the evidence. The plaintiff, Robert A. Tichenor, was employed by the Union Pacific Railroad Company at its headquarters at 1416 Dodge Street, Omaha, Nebraska. The defendant, J. J. Lohaus, was the operator of the Jack and Jerry's Parking lot. He, likewise, was employed by the Union Pacific Railroad at its headquarters. Plaintiff paid to the defendant the sum of $10 per month for the right to park his automobile in the lot. The parking lot is bordered by Davenport Street on the south, 13th Street on the east, 14th Street on the west, and an Interstate ramp on the north. The only sidewalk adjacent to the parking lot is on the Davenport Street side. The topography of the land is such that the western part of the lot, that is, the portion nearest 14th Street and the Union Pacific headquarters building, is below the level of Davenport Street and 14th Street by as much as 12 feet. The eastern portion of the lot adjacent to 13th Street is only slightly below street level. Access to and egress from the lot is accomplished by means of a curb cut on Davenport Street midway between 13th and 14th Streets leading onto an earthern ramp. The ramp itself, which is parallel to Davenport Street on the south side of the parking lot, is about 80 to 90 feet in length and descends westerly at a grade of 10 percent; that is, it drops about 1 foot for each 10 feet of its length. Abutting the ramp on the south and adjacent to the sidewalk is a stone retaining wall. The ramp is wider than is necessary to permit the passage of one car but not quite wide enough to permit the passage of two. It is covered with earth and gravel as is most of the lot.

On the morning of the accident, February 14, 1979, the plaintiff entered the parking lot by way of the ramp and noted the icy condition of the ramp and the lot. He proceeded slowly down the ramp and

parked his car along the west retaining wall. He got out of his car and proceeded up the icy and slick ramp without incident. There had been no precipitation that day, and the sidewalks and streets were clear once he exited the lot.

At the end of the plaintiff's workday, he left Union Pacific headquarters around 5:15 p.m. and headed for his car. It was still daylight and the sidewalks were clear. But when the plaintiff arrived at the parking lot, he noted the conditions had changed on the ramp. It appeared as though something had been placed on the ramp to cause melting so that the ramp was muddy where cars had traveled, but slick and icy on either side of the traveled way. The temperature was below the freezing mark. The plaintiff began picking his way down the center of the ramp. He was wearing steel-toed engineer boots with rubber soles. Shortly after he started down the ramp, he became aware that a car or cars were approaching the ramp to depart. He then moved to the left toward the retaining wall in order that the cars might pass. As he moved to the side, his left foot stepped on a patch of ice, and he fell on the ramp about 2 to 3 feet from the adjacent retaining wall, suffering a fractured ankle. Two men, one of them Peter Larmon, whose car was approaching the ramp and who saw the plaintiff fall, came to his aid, loaded him into Mr. Larmon's van, and took him to Saint Joseph Hospital.

One of the allegations of negligence contained in the plaintiff's petition was that the defendant failed to adequately clear the ramp so that it would afford a reasonably safe passage. The defendant argues that he owed no duty to the plaintiff because the hazards of the icy ramp were as well known and apparent to the plaintiff as to the defendant. He relies upon the principles stated in Restatement (Second) of Torts § 343 (1965), which provides: "A possessor of land is subject to liability for physical harm

caused to his invitees by a condition on the land if, but only if, he

"(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

"(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

"(c) fails to exercise reasonable care to protect them against the danger." He cites precedents of this court which have applied the principles of that section. *Syas v. Nebraska Methodist Hospital Foundation,* 209 Neb. 201, 307 N.W.2d 112 (1981); *Crawford v. Soennichsen,* 175 Neb. 87, 120 N.W.2d 578 (1963).

It is to be noted that subsection (b) of § 343 contains alternatives. Despite the fact that the danger may be open and obvious or known, the possessor of the land may owe the duty if he should expect that the invitee will fail to protect himself against the hazard. In this case the evidence would permit the jury to infer that the ramp was the only established way for persons, after parking their cars or returning to get them, to leave and enter the lot; that the ramp was for simultaneous use by vehicles and persons on foot; that a person on foot might be required to make way for vehicles entering or leaving; and that in such circumstances the invitee might fail or be unable to protect himself against the hazard resulting from icy conditions. The defendant fails to mention that § 343 is not a complete statement of the applicable rules. Restatement (Second) of Torts § 343 A (1965) discusses the matter of known or obvious dangers on the land and the duty of the possessor. It provides, among other things, that the possessor is not liable to invitees for physical harm caused to them by a condition on the land whose danger is known, unless the possessor should anticipate the harm despite such knowledge on the part of

the invitee. The commentary to the above section discusses the ordinary cases where the possessor owes no duty. However, in commentary f. at 220, it discusses the other cases: "There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

"Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk."

The Restatement contains several illustrations which include cases of distraction and necessary use notwithstanding knowledge of the condition.

We conclude that because of the circumstances and necessity of use in this case, reasonable minds could differ as to whether the defendant failed to fulfill his duty adequately. Where reasonable minds can differ, then a jury question is presented. The defendant raises the issue of the plaintiff's use of a

possible alternative route. We will discuss his contention in that respect when we reach the issues of contributory negligence and assumption of risk.

Generally, an invitee, who has knowledge of a dangerous condition on the premises or where the dangerous condition is obvious, is negligent as a matter of law if he fails to use reasonable care to avoid injury. *Mendoza v. Aguilera,* 184 Neb. 94, 165 N.W.2d 360 (1969). Stated in another way, the intentional exposure to the known risk must be unreasonable. "In order that it may be unreasonable it is necessary that a reasonable man in his position would not expose himself to it. This in turn depends upon the comparison between the quantum of danger, including both the probability of harm and its gravity, which the plaintiff realizes or has reason to realize will be involved in the condition created by the defendant, with the value which the law attaches to the advantage which will be lost if the danger is not encountered. In many cases the plaintiff is confronted with the necessity of either foregoing the exercise of a right or privilege or encountering a danger which he realizes or has reason to realize is involved in the condition created by the defendant, as to which see § 473." Restatement (Second) of Torts § 466, Comment on Clause (a)c. at 512 (1965). Restatement (Second) of Torts § 473 (1965) says: "If the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless he exposes himself to a risk of bodily harm, the plaintiff is not guilty of contributory negligence in so doing unless he acts unreasonably." Nebraska law is in accord with the above principle. *McCarty v. Morrow,* 173 Neb. 643, 114 N.W.2d 512 (1962); *Halliday v. Raymond,* 147 Neb. 179, 22 N.W.2d 614 (1946); *Johnson v. Anoka-Butte Lumber Co.,* 141 Neb. 851, 5 N.W.2d 114 (1942); *Carlson v. Roberts,* 133 Neb. 166, 274 N.W. 473 (1937).

Another circumstance in which the invitee is not

guilty of contributory negligence as a matter of law is sometimes referred to as the momentary distraction exception. This court has recognized that exception. *Brown v. Slack,* 159 Neb. 142, 65 N.W.2d 382 (1954); *Glenn v. Grant Co.,* 129 Neb. 173, 260 N.W. 811 (1935). See, also, 65A C.J.S. *Negligence* § 120(2), nn. 17, 17.10, and 17.20 (1966). The principle is well stated in the Minnesota case of *Mayzlik v. Lansing Elevator Co.,* 241 Minn. 468, 477, 63 N.W.2d 380, 386 (1954), where the court said, after referring to the general rule that the invitee is generally guilty of contributory negligence in not looking where he is stepping: "That rule is not applicable in all situations. We have held that, even though plaintiff did not look where she was stepping, a jury might find that she had exercised due care inasmuch as there were distracting circumstances present. Lincoln v. Cambridge-Radisson Co. 235 Minn. 20, 49 N.W.(2d) 1. The rule is that, when there is some distraction or other reason which will excuse the failure to see that which is in plain sight, it can be said that a person has exercised that degree of care required by an ordinarily prudent person. Johnson v. Brand Stores, Inc. 241 Minn. 388, 63 N.W.(2d) 370. Under the evidence here the jury could have found that plaintiff's attention was distracted by the overflowing of the grain and that in his haste to correct the situation he was exercising due care under the circumstances when the accident occurred."

A case from this court in which all of the above principles were involved is *Sullivan v. Geo. A. Hormel and Co.,* 208 Neb. 262, 303 N.W.2d 476 (1981). There an employee of a subcontractor brought an action against the general contractor, who was in control of the premises, to recover for personal injuries when the plaintiff slipped and fell on icy and debris-covered steps, a condition of which he was aware. The employee was required to use these steps in going to and in leaving the premises on

which he worked. We said: " 'Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury.' " *Id.* at 273, 303 N.W.2d at 482.

The plaintiff testified that when he sensed that a motor vehicle was approaching the ramp he moved to his left to make way for it and that he did not see the icy spot until he was just about to place his foot down, at which point he could no longer stop.

Larmon testified as to the following: His van was approaching the ramp. He saw the plaintiff on the ground and described the scene, saying, "[H]e wasn't really laying, he was spinning. So he had evidently just fallen, because he was still turning when I saw him, and he was like going around in a circle." Larmon continued up the ramp so as to assist the plaintiff and stopped the van beside him. Larmon, when asked about the condition of the ramp where he stopped, replied, "Well, when I stopped I don't remember having any trouble walking around the van behind it to help pick him up, but when we tried loading him in the van it was slick right there where he was laying."

The defendant argues that the plaintiff, instead of using the ramp, should have proceeded to the southeast corner of the parking lot where entry would have been safer. The basis for this contention is Larmon's testimony as follows: "Yes, it is fairly level. It is a little slight drop down to the lot, but not very much. It is almost level. I have never went that way even in the summertime or anything, but you can get in that way, yes." This evidence does not indicate that the plaintiff was contributorily negligent as a matter of law. There is no evidence as to indicate the condition of the ground or the safety of the entrance at the southeast corner. That point

was clearly not the established entry or exit for those on foot. It furthermore was not a point by which the plaintiff passed as he came from his work to the lot. Under the circumstances, whether a reasonable man would have investigated the alternative route would be a question for the jury to consider in its determination of the issue of the plaintiff's contributory negligence. In this case the plaintiff had purchased from the defendant the right to use the lot. It was necessary to his employment that he have such a place to park his car while at work. This is not a case where the way was so dangerous that it can be said as a matter of law that no reasonable man would use it. See Restatement (Second) of Torts § 343 A, Comments b. and c. (1965).

We hold that under the evidence the issue of the plaintiff's contributory negligence was a jury question.

The defendant, in support of his contention that the plaintiff assumed the risk of injury, cites four cases: *Fritchley v. Love-Courson Drilling Co., Inc.,* 177 Neb. 455, 129 N.W.2d 515 (1964); *Mason v. Western Power & Gas Co.,* 183 Neb. 392, 160 N.W.2d 204 (1968); *Leary v. Martin K. Eby Constr. Co., Inc.,* 191 Neb. 575, 216 N.W.2d 750 (1974); and *Schwartz v. Selvage,* 203 Neb. 158, 277 N.W.2d 681 (1979). Although this court in the first two above cases used language indicating the plaintiff was guilty of both contributory negligence and the assumption of risk, an examination of the facts therein indicates to us that contributory negligence was the real issue, not the assumption of risk. The other two cases do not even discuss assumption of risk. There is a distinction between contributory negligence and assumption of risk. See *Landrum v. Roddy,* 143 Neb. 934, 12 N.W.2d 82 (1943). Generally, assumption of risk does not involve an issue of the exercise of reasonable care, but relates to the voluntary undertaking of a known risk even though otherwise in the exer-

cise of reasonable care to avoid injury. We need not further elaborate that distinction here. The facts here do not present an issue of assumption of risk.

The trial court did not err in submitting the issues to the jury and in denying the defendant's motion for a directed verdict.

AFFIRMED.

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ROBERT SCHUTZ, JR., APPELLEE, V. THOMAS J. HUNT ET AL., APPELLANTS.

322 N.W.2d 414

Filed July 23, 1982. No. 44250.

1. **Motions to Dismiss.** A party against whom a motion to dismiss is made 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, and if there is any evidence which will sustain a finding for the plaintiff, it may not be disregarded and the case decided as a matter of law.
2. **Negligence.** The violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law, but is evidence of negligence to be considered by the jury in connection with other circumstances in evidence.
3. **Evidence: Juries.** Where different minds may reasonably draw different conclusions from the adduced evidence or if there is a conflict in the evidence as to whether or not they establish negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to a jury.

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

Healey, Brown, Wieland, Kluender, McCord, Atwood & Jacobs, for appellants.

Bauer, Galter, Geier, Flowers & Thompson, and Koenig & Murray, for appellee.

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

CLINTON, J.

The plaintiff Schutz, a pedestrian, brought this action seeking damages for personal injuries suffered when he was struck by an automobile operated by the defendant Thomas J. Hunt. The jury returned a verdict for the plaintiff, and judgment was entered thereon. The defendants have appealed to this court, claiming the trial court erred in not directing a verdict against the plaintiff on the ground that the plaintiff was, as a matter of law, guilty of contributory negligence more than slight which was a proximate cause of the accident and injuries. In more specific terms, the defendants contend the plaintiff was "casually" standing in a lane for automobile traffic with his back turned toward the approaching traffic and failed to keep a lookout for his own safety. We affirm.

The standard which governs our review in this case is the following: " '[A] party against whom a motion to dismiss is made 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, and if there is any evidence which will sustain a finding for the plaintiff, it may not be disregarded and the case decided as a matter of law.' " *Beebe v. Sorensen Sand & Gravel Co.*, 209 Neb. 559, 566, 308 N.W.2d 829, 833 (1981).

From the evidence the jury could find the following facts. Seventh Street in Fairbury, where the accident occurred, runs east and west and abuts the Fairbury High School property on the south. The street is a two-lane paved street of "average" width. Parallel parking adjacent to the curb is permitted on the south side of the street only. Abutting the street on the north is a parking strip which affords diagonal off-street parking for student cars. The centerline of the street is not marked.

A marked crosswalk located in the center of the block between J Street to the west and K Street to

the east runs across Seventh Street from the school grounds and parking strip to the south side of the street where a "snack bar" at which some students take their lunch is located. Ordinarily during the noon hour large numbers of students cross the street at the crosswalk and elsewhere, some congregating in groups in and along Seventh Street.

The accident happened shortly before the end of the noon break. At that time one Miller, a friend of Schutz and a fellow student, had his car parked on the south side of Seventh Street parallel to the curb some distance east of the crosswalk. That distance is not shown with exactness. But the evidence does show another car was parked just east of the crosswalk, and immediately between was a private driveway. Just east of the driveway was the Miller car. One estimate in the testimony is that the Miller car was about 50 to 60 feet east of the crosswalk. At the time of the accident, Miller was leaning against the front fender of his car. West of Miller was Schutz, who was standing 2 or 3 feet from the car. He was facing the east. A third student was standing near Miller, but closer to the car. The three students were conversing and had been in the same position for perhaps 5 minutes.

The defendant Hunt was also a student at Fairbury High School. Hunt, accompanied by another student, was driving around in Hunt's car with Hunt at the wheel. Hunt turned onto Seventh Street at the intersection west of the crosswalk. According to his own admission, as he approached the crosswalk there were about 100 students along and in Seventh Street, half of whom were either crossing the street at various points or congregating in small groups in the street. Hunt testified that he stopped the car at the crosswalk, and after so doing proceeded, swerving first to the left to avoid pedestrians and then to the right to avoid others. He saw Schutz when he stopped at the crosswalk. As he swerved to the

right he struck Schutz, knocking him up onto the hood or right fender of the car, from which position Schutz rolled off to the right. He did not apply the brakes or sound a warning with his horn. After first seeing Schutz when Hunt stopped at the crosswalk, he did not see him again until the car struck Schutz. The front of the Hunt car was not damaged, but, according to Hunt's testimony, Schutz' elbow struck the fender, making a shallow indentation about the diameter of a baseball. Hunt stopped his car at a point where, through the rear window, he could see Schutz on the pavement struggling to get up. Schutz suffered severe injuries and was taken to a clinic and later to a hospital. Hunt testified he left the scene after being told that Schutz was O.K. Shortly thereafter, he returned to the school and let his passenger out. He further testified that he then learned for the first time that Schutz had been hurt and he then left to find out where Schutz had been taken.

The defendants' position is that Schutz was guilty of contributory negligence more than slight as a matter of law because he stood in a traffic lane with his back to oncoming traffic and did not keep a lookout. A reasonable inference from the evidence is that Schutz did not look to the rear during the time he was talking to his two friends. Defendants cite *Van Ornum v. Moran,* 186 Neb. 418, 183 N.W.2d 759 (1971), where we said: "One who attempts to cross a street between intersections without keeping a constant lookout for his own safety in all directions of anticipated danger is ordinarily guilty of negligence of such a character as will bar a recovery as a matter of law.

"The requirement 'to look' means to look at a time and place when to look would be effective.

"Crossing a street between intersections is not limited to a curb-to-curb crossing of the street; it includes crossing from a curb to a safety zone, entering the street and stopping or standing in the line of

traffic, and otherwise exposing his person to the flow of vehicular traffic in the absence of an emergency justifying such action." (Syllabi of the court.) In that case the plaintiff's decedent, Devaney, a bus-driver, after finding that his bus and another bus were having difficulty in getting onto 18th Street in Omaha because of heavy traffic, walked into the street during a short gap in the traffic, standing in the middle of the traffic lane with his back to oncoming traffic, and motioned to the driver of the other bus to move his bus from the bus depot exit into the street. The other driver did not do so because of the heavy traffic. Devaney turned his head to the rear and at that moment was struck by the defendant's automobile. We held Devaney's negligence was more than slight as a matter of law and recovery was barred. Defendants cite other cases of similar import; for example, *Wilson v. Wiggins,* 155 Neb. 382, 52 N.W.2d 248 (1952).

Received in evidence for the purpose of instructing the jury were ordinances of the city of Fairbury, which provide in part: "5-204. Jay Walking. No pedestrian shall cross any street at a place other than a crosswalk, nor cross any street intersection diagonally."

"5-212. . . . The driver of a vehicle on any street shall yield the right-of-way to a pedestrian crossing such street within any clearly marked crosswalk, or at any regular pedestrian crossing at the end of a block where the movement of traffic is being regulated by traffic officers or traffic direction devices. Every pedestrian crossing a street at any point other than a pedestrian crossing, crosswalk, or intersection shall yield the right-of-way to vehicles upon the street."

There is conflicting evidence as to whether Schutz crossed the street from the school before assuming the position in which he was hit. In a deposition he testified he had crossed the street at a point other than

the crosswalk to eat at the snack bar and had then gone to talk to Miller. At trial he testified that his deposition testimony was mistaken, and, in fact, after checking he had found that he had eaten lunch at home and had returned to school, parking his pickup on the south side of the street before proceeding to the point where the accident occurred. In any event, it was not the crossing of the street, but location and failure to maintain a lookout which could arguably be a proximate cause of the accident.

The plaintiff argues that the cases cited by the defendants are inapplicable and distinguishable, calling to attention our holdings in *Brenning v. Remington,* 136 Neb. 883, 287 N.W. 776 (1939); *Caldwell v. Heckathorn,* 176 Neb. 704, 127 N.W.2d 182 (1964); and *Simet v. Sage,* 208 Neb. 13, 301 N.W.2d 600 (1981). The first two of these cases involve situations where the pedestrian was walking longitudinally along the edges of the road or street with his back to the traffic and was struck by an automobile going the same direction. In both cases we held that the question of the plaintiff pedestrian's contributory negligence presented a jury question, saying in *Caldwell v. Heckathorn, supra:* "A party has 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." (Syllabus of the court.) In *Brenning v. Remington, supra,* we stated: "It will be noted that neither ordinance nor statute has application to a pedestrian except when in the act of crossing the highway. It is equally obvious that the many cases cited by counsel pertaining to accidents occurring while crossing highways afford no help in view of the issues in the present case." 136 Neb. at 890, 287 N.W. at 780.

In *Simet v. Sage, supra,* the evidence was conflicting. One version of the evidence was that the plaintiff pedestrian started to cross the street between intersections and heard a horn "toot." At that time

he turned and started back to the curb, the defendant's auto then being about a block away. We held that the trial court properly submitted the issue of the plaintiff's contributory negligence to the jury, and rejected the contention that the plaintiff should, as a matter of law, have been held to be guilty of contributory negligence more than slight.

*Thomison v. Buehler,* 147 Neb. 811, 25 N.W.2d 391 (1946), involved the following fact situation. Plaintiff, on a pickup truck, was escorting and preceding a large dragline being hauled down the highway on a flatbed truck. It was necessary from time to time for the plaintiff and those working with him to raise wires which crossed the roadway so that the boom of the dragline could pass beneath. Usually this was done from the box of the pickup where the plaintiff was riding. At one point, however, he found it necessary to dismount from the truck to the pavement and walk backwards while he guided the truckdriver underneath wires. He was in the center of the two-lane highway when he was struck by a vehicle coming from his rear. We held that the question of the plaintiff's contributory negligence was a jury question, and said: "Where different minds may reasonably draw different conclusions from the adduced evidence or if there is a conflict in the evidence as to whether or not they establish negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to a jury." (Syllabus of the court.)

In this case we hold, for the reasons which follow, that the plaintiff was not guilty of contributory negligence more than slight which barred his recovery as a matter of law, but that the question of his negligence and the degree thereof was a question for the jury. As we have observed, the evidence indicates the plaintiff was not crossing the street at the time, but was standing near (his own testimony was 2

feet) a properly parked automobile at the south curb. He was not standing in the middle of the lane of traffic, and there was adequate room (except for pedestrian congestion) for an automobile to pass. The street was crowded with pedestrians, as we have already noted. Plaintiff was aware of that fact. He was not bound, as a matter of law, to anticipate that under the circumstances he would in effect be run down by an automobile whose driver was also well aware of the congested state of the street. The defendants urge that the plaintiff's contributory negligence cannot be determined by focusing on the conduct of the defendant driver. We agree with that statement. We hold, however, that under the evidence in this case, the condition of pedestrian traffic, the plaintiff's awareness of it, and his knowledge that the condition would be apparent to any motor vehicle operator using the street are circumstances which the jury was entitled to consider in judging the plaintiff's contributory negligence.

Even if it be assumed that the jaywalking ordinance is relevant to the evidentiary situation we have here, the following rule is applicable: "This court has held many times that the violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law but is evidence of negligence to be considered by the jury in connection with other circumstances in evidence." *Doan v. Hoppe,* 133 Neb. 767, 771, 277 N.W. 64, 66 (1938).

AFFIRMED.

# NORTH STAR LODGE #227, A.F. & A.M., A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. THE CITY OF LINCOLN, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

322 N.W.2d 419

Filed July 23, 1982. No. 44359.

1. **Statutes: Intent.** When the language used in a statute is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers.
2. **Statutes.** It is a basic rule of construction that effect is to be given, if possible, to every word, clause, and sentence of a statute.
3. **Special Assessments: Constitutional Law.** The Constitution of the State of Nebraska, art. VIII, § 6, requires that real property, when specially assessed, be assessed according to the benefits received.
4. **Special Assessments: Words and Phrases.** The phrase "assessable unit" as used in Neb. Rev. Stat. § 19-4027 (Cum. Supp. 1980) does not mean "front foot," but rather means "lot or parcel."

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

C. Arlen Beam of Knudsen, Berkheimer, Beam, Richardson & Endacott, for appellants.

William F. Austin, City Attorney, for appellees.

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

CAPORALE, J.

This is an appeal from an order of the District Court of Nebraska, Third Judicial District, in and for Lancaster County, dismissing plaintiffs-appellants' amended petition.

Appellants, as real property owners and taxpayers of the city of Lincoln, filed an amended petition which, among other things, collaterally attacked the validity of ordinance No. 13006 adopted by the defendant-appellee City of Lincoln, which ordinance created Business Improvement District No. 2. The amended petition alleged, inter alia, that the

defendant-appellee City improperly applied the phrase "assessable unit" found in Neb. Rev. Stat. § 19-4027 (Cum. Supp. 1980). The defendants-appellees demurred on the ground that the amended petition failed to state facts sufficient to constitute a cause of action. The demurrers were sustained and appellants elected to stand on their amended petition. We agree that the City improperly applied the phrase "assessable unit" and reverse the order of the District Court.

We turn to Neb. Rev. Stat. § 19-4024 (Cum. Supp. 1980), which reads: "Upon receiving the recommendation from the business improvement board, the city council after consulting with the planning commission if the city has a planning commission may create one or more business improvement districts by adopting a resolution of intention to establish a district or districts. The resolution shall contain the following information:

"(1) A description of the boundaries of any proposed district;

"(2) The time and place of a hearing to be held by the city council to consider establishment of a district or districts;

"(3) The proposed public facilities and improvements to be made or maintained within any such district; and

"(4) The proposed or estimated costs for improvements and facilities within any district, and the method by which the revenue shall be raised.

"The notice of intention shall recite that the method of raising revenue shall be fair and equitable. In the use of a general license and occupation tax, the tax shall be based primarily on the square footage of the owner's and user's place of business. In the use of a special assessment, the assessment shall be based upon the special benefit to the property within the district."

Neb. Rev. Stat. §§ 19-4025 and 19-4027 (Cum. Supp.

1980) provide for the conduct of a hearing concerning the creation of the district. Section 19-4027 further provides: "If a special assessment is to be used, proceedings shall terminate if written protest is made prior to the close of the hearing by the owners of over fifty per cent of the assessable units in the proposed district. If an occupation tax is to be used, proceedings shall terminate if protest is made by over fifty per cent of the users of space in the proposed district."

Neb. Rev. Stat. § 19-4029 (Cum. Supp. 1980) provides in pertinent part: "The city council, following the hearing, may establish or reject any proposed district or districts. If the city council decides to establish any district, it shall adopt an ordinance to that effect. This ordinance shall contain the following information:

. . . .

"(6) A statement that the businesses and professions in the area established by the ordinance shall be subject to the general business license and occupation tax or that the real property in the area will be subject to the special assessment authorized by sections 19-4015 to 19-4038;

"(7) The method of proposed assessment to be imposed within the district or the initial rate of the license and occupation tax to be imposed . . . ."

Appellants allege that on September 2, 1980, the Lincoln city council adopted resolution A-67094 which constituted the statutorily required notice of intent to create Business Improvement District No. 2 relating to certain properties fronting on North 48th Street from the centerline of Huntington Avenue to the centerline of Madison Avenue for the construction and maintenance of certain aesthetic amenities. The resolution further provided that the method of raising the revenue required would be fair and equitable, and assessments were proposed to be levied by the front-foot method. On September 29,

1980, a public hearing was held at which was filed a written protest by owners of over one-half of the lots and/or partial lots in the proposed district. Subsequently, the defendant City determined that the protestants owned but 46 percent of the front footage in the proposed district; determined that "assessable unit" as used in § 19-4027 meant "front foot along 48th Street"; concluded therefore that less than one-half of the owners of the assessable units protested; and adopted the ordinance creating the business improvement district at issue.

The question presented relates not only to whether "assessable unit" as used in § 19-4027 was correctly applied by the City but also at what point in the process of creating a business improvement district the term is to be applied.

A reading of § 19-4024 indicates that the reference in subsection (4) thereof to the method by which revenue shall be raised is tied to and further clarified and expanded upon by the paragraph which follows it. We therefore construe § 19-4024(4) and the paragraph following it as one delineated passage; the alternatives referred to in § 19-4024(4) consist of a choice between a general license and occupation tax and a special assessment tax.

In view of the foregoing, it becomes clear that the City acted prematurely in adopting the front-foot method of special assessment as the means of raising the needed revenue in its notice of intent to create the district. The only choice proper and necessary at that stage of the process was a choice between a general license and occupation tax and a special assessment tax. The proper time for a choice as to what method of special assessment is to be used, if such is the route decided upon, is at the time of adoption of the creating ordinance, as set forth in § 19-4029. Such a reading is consistent with § 19-4029(6) and (7). Therein, subsection (6) refers to the two broad choices, either a general business

license and occupation tax or a special assessment tax; subsection (7) mandates a more specific statement after the initial choice has been made, requiring inclusion of the method by which the special assessment is to be imposed, or inclusion of the rate at which the general business and occupation tax is to be imposed. This being the case, it was not statutorily proper for the defendant City to have determined the adequacy of protests on the basis of front-foot ownership.

We next consider the correct meaning of the term "assessable units" as used in the instant statute. The term is not defined in the statute and has no independent, clear meaning of its own; it is ambiguous. When the language used in a statute is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers. *PPG Industries Canada Ltd. v. Kreuscher,* 204 Neb. 220, 281 N.W.2d 762 (1979). Whatever the term "assessable unit" means, it is clear that it does not mean "front foot." As originally introduced before the Legislature the pertinent language of L.B. 251 read as follows: "Proceedings shall terminate if protest is made by the owners of over fifty per cent of the assessable front footage in the proposed district." The subsequent amendment replaced the phrase "assessable front footage" with the phrase "assessable units." Legislative Journal, 86th Leg., 1st Sess. 1894 (May 7, 1979). It is also noteworthy that this same legislative session used the term "front footage" in Neb. Rev. Stat. § 19-4026 (Cum. Supp. 1980) of the act wherein 30 percent of the assessable front footage is able to petition a city council in order to create a district. Since it is a basic rule of construction that effect is to be given, if possible, to every word, clause, and sentence of a statute, *Ulbrick v. City of Nebraska City,* 180 Neb. 229, 141 N.W.2d 849 (1966), it follows that "front foot" and "assessable unit" may

not be used interchangeably. This is what the appellees' interpretation would require.

Having said what an assessable unit is not, we now consider what it is. The Constitution of the State of Nebraska, art. VIII, § 6, requires that real property, when specially assessed, be assessed according to the benefits received. *Brown Real Estate Co. v. Lancaster County,* 110 Neb. 665, 194 N.W. 897 (1923), interpreted this language to require a delineation of the resulting assessments on a lot or parcel basis, each lot or parcel bearing an assessment proportionate to the benefit which it receives. This approach also comports with the commonsense meaning of the term since, as appellants urge, only a lot or parcel of lots can be foreclosed upon in the event of nonpayment of taxes; front feet are capable of being separately assessed, but not separately foreclosed upon. In a statute providing for special assessment of real estate based upon the benefits accruing thereto, it is reasonable to assume, in the absence of a contrary indication, that had the Legislature meant some other basis of assessment, they would have said so.

The record in this case indicates that had the statute been properly interpreted and followed, the proceedings which appellants have contested would have terminated at the initial creation hearing, due to the filing of written protests by more than the statutorily required 50 percent of assessable unit owners. It follows therefrom that the adoption of ordinance No. 13006 was invalid, and that actions taken thereunder were done without authority sufficient to sustain them.

The foregoing analysis being dispositive of the instant appeal, it is not necessary to address the other issues raised by appellants.

We reverse the order of dismissal and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

AMBROSE HENRY HATTING, APPELLANT, V. FARMERS COOPERATIVE ASSOCIATION, APPELLEE.

322 N.W.2d 423

Filed July 23, 1982. No. 81-696.

1. **Workmen's Compensation: Appeal and Error.** The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case.
2. _____: _____. In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom.
3. **Workmen's Compensation: Proof.** An award for permanent disability cannot be based on mere possibilities.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Scott H. Hughes and Kenneth Sacks of Perkins, Sacks, Hannan and Hughes, and Sandra Inkster, for appellant.

Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

KRIVOSHA, C.J.

The appellant, Ambrose Henry Hatting, appeals from a judgment entered on rehearing by a three-judge Workmen's Compensation Court dismissing Hatting's petition seeking recovery for an alleged accident arising out of and in the course of his employment. We affirm.

Hatting had been employed by Farmers Cooperative Association (Farmers) since approximately 1972. In 1978 Hatting was responsible for overseeing Farmers' fertilizer department. This required him to store fertilizer in various compartments within a

large warehouse building. In addition, Hatting was required to mix the fertilizer and make deliveries to customers.

On March 24, 1978, Hatting came to work at approximately 7 a.m. The previous day some coemployees had piled a rather large amount of bulk fertilizer in front of the warehouse's only large overhead door. Using a small tractor-like payloader, Hatting undertook to move the fertilizer from in front of the door to the receptacles within the warehouse where it was to be stored.

Hatting testified that he had worked for approximately 1 to 1½ hours when he began experiencing lightheadedness, which he later believed was due to carbon monoxide fumes. Without difficulty, he dismounted from the payloader and went outside the warehouse for some fresh air. After approximately 30 to 45 minutes, Hatting returned to his job on the payloader where he continued working for approximately another hour. He testified that he again began feeling lightheaded and everything around him seemed to be occurring in slow motion. Hatting again dismounted from the payloader. He maintains that he recalls falling several times between the work area and the office area through which he had to pass. However, he does not recall striking his head at any time until he reached the doorway to the office area.

He testified that when he reached the office doorway he fell against the left side of the door frame, striking the left side of his face, and then fell on his right elbow. Hatting then was able to contact his supervisor and was taken by a friend to the office of his personal physician. His physician ordered him hospitalized. Hatting was dismissed on April 1, 1978, from the hospital. Hatting displayed no outward signs of having sustained a recent injury to his head, and no treatment for a head injury or carbon monoxide poisoning was given to him during this hospital stay.

On April 26, 1978, Hatting was rehospitalized. A visual examination of Hatting disclosed an abrasion on the right forehead near the hairline and a small hematoma on the right upper eyelid. Neither of these injuries was apparent during his earlier hospitalization. X-rays disclosed a fracture on the right frontal area of the head. Following a CAT scan, appellant's condition was diagnosed as a skull fracture of the right temporoparietal bone and an acute intracerebral hematoma with possible subdural hematoma of the left temporal lobe. A left frontotemporoparietal craniotomy was performed on April 29, 1978, and a subdural hematoma and an intracerebral hematoma on the left side were removed. Since March 24, 1978, Hatting has not engaged in any gainful employment. He thereafter filed a petition in the Nebraska Workmen's Compensation Court, claiming that the subdural hematoma and intracerebral hematoma, diagnosed for the first time following hospitalization on April 26, 1978, were caused by the accident which occurred on March 24, 1978, and arose out of and in the course of his employment with Farmers. Following a hearing, the one-judge court entered an award in favor of Hatting. On appeal to a three-judge court, the award was set aside. Specifically, the three-judge court found that Hatting had a history of head injuries and epilepsy. The court further found that the alleged accident on March 24, 1978, produced no evidence of any skull injury, but, rather, that when Hatting was admitted to the hospital on April 26, 1978, he advised the hospital staff he had been in a fight. Hatting's treating physician was unable to state with a degree of medical certainty that the injury for which he received treatment on April 29, 1978, was caused by a fall on March 24, 1978. It was the three-judge court's opinion that Hatting had simply failed to sustain his burden of proving that the injury for which he was treated on April 29, 1978, and which has resulted in

his disability, was related to the accident which he allegedly sustained on March 24, 1978.

As we begin our examination of this appeal, we are compelled to keep in mind several basic principles regarding a review of a decision entered by a three-judge Workmen's Compensation Court. Neb. Rev. Stat. § 48-185 (Reissue 1978) specifically provides: "The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case." Moreover, in *Kudera v. Minnesota Mining & Manuf. Co.,* 201 Neb. 235, 238, 266 N.W.2d 915, 917 (1978), we said: "This court is not free in workmen's compensation cases to weigh the facts anew. Our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong." And in *Hyatt v. Kay Windsor, Inc.,* 198 Neb. 580, 584, 254 N.W.2d 92, 95 (1977), we said: "In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom."

An examination of the record in this case leaves no doubt that there was indeed a bona fide dispute with regard to the facts and the cause of Hatting's injury. When Hatting first appeared at the hospital on March 24, 1978, he revealed no evidence of any recent injury to his skull. It was not until he reappeared at the hospital on April 26, 1978, that there were any visible signs of injury. The explanation given for the injury observable on April 26, 1978, and further supported by X-rays and a CAT scan, is a statement in the medical records, apparently given by Hatting to the attending physician, that he was in a fight.

Hatting now argues that the compensation court should have disregarded the evidence contained in the medical record because it is not reliable. He further argues that the testimony of the expert presented by Farmers, a neurosurgeon who examined Hatting at the request of Farmers, should be disregarded. In essence, Hatting argues that the facts of the case entitled him to an award as a matter of law. While we are inclined to agree with Hatting that the testimony presented by the expert for Farmers was discredited and probably should be disregarded, we are unable to nevertheless reach the conclusion urged upon us by Hatting. The reason that we are unable to do so is due to the fact that the employer has no burden to prove that the injury was *not* caused by the accident but, rather, that the employee must prove that the injury *was* caused by an accident arising out of and in the course of his employment. See, *James v. Rainchief Constr. Co.*, 197 Neb. 818, 251 N.W.2d 367 (1977); *Inserra v. Village Inn Pancake House,* 197 Neb. 168, 247 N.W.2d 625 (1976). In the instant case, a reading of the record discloses that Hatting's treating physician and trial expert, a neurosurgeon, was unable to testify with a reasonable degree of medical certainty that the injury suffered by Hatting on April 26, 1978, arose out of and in the course of Hatting's employment and was related to the alleged fall which occurred on March 24, 1978. The most that Hatting's treating physician would say is that the March 24, 1978, accident could have caused the hematoma which was surgically removed. He testified that it was medically "possible" that a blow to Hatting's head on March 24, 1978, could cause the hematoma which was later found and was operated upon on April 29, 1978. That an injury could have possibly been caused by an employment accident is not sufficient to meet the burden imposed upon an employee in order to recover under our Workmen's Compensation Act. In *Cam-*

*arillo v. Iowa Beef Processors, Inc.*, 201 Neb. 238, 266 N.W.2d 917 (1978), we held that medical testimony that an employee's injury was "possibly" a combination of the employee's congenital condition and an accident was not sufficient. In doing so we said at 243, 266 N.W.2d at 919: "The evidence in this case on behalf of the plaintiff does not even meet the standard of 'probability' in Welke v. City of Ainsworth, *supra*. An award for permanent disability cannot be based on mere possibilities."

And, recently, in *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981), we held that a workmen's compensation award cannot be based upon possibility or speculation. The fact that Hatting's alleged accident may possibly have been the cause of his condition is not sufficient for him to sustain his burden of proof under Nebraska workmen's compensation laws. We cannot agree with appellant that he was entitled to judgment as a matter of law under the evidence in this case. The most that we can say is that there was presented a bona fide question of fact concerning how the injury occurred, which the compensation court was required to resolve. We reach that conclusion even disregarding the testimony of the expert provided by Farmers. As we observed in *Erving v. Tri-Con Industries*, 210 Neb. 339, 344, 314 N.W.2d 253, 256 (1982): "The testimony of all the witnesses at best produced a conflict which the compensation court as the trier of fact had to resolve." And, as we have already noted, once the trier of fact resolves those questions of fact, on appeal we are required to leave those findings untouched unless we can say they are clearly wrong as a matter of law. We are simply unable to do so in this case. For that reason, the judgment of the compensation court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN W. CALDER, APPELLANT.

322 N.W.2d 426

Filed July 23, 1982. No. 81-740.

1. **Probation and Parole.** At a preliminary hearing to determine whether or not probable cause exists to detain a probationer on a charge of probation violation, a probationer is entitled to notice of the alleged violations of probation, an opportunity to appear and to present evidence in his own behalf, the conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing.
2. _____. Although the formal notice of alleged probation violations is deficient, if it can be determined from the record that the probationer did in fact have sufficient actual notice of the violations charged against him so as to enable him to prepare a defense, the requirements of due process have been satisfied.
3. _____. The requirement of an impartial and independent hearing officer is satisfied if such officer is someone not directly involved in making recommendations concerning the initial arrest of the accused on the revocation charge or in making the report of the probation violations.
4. _____. There is no requirement that such hearing officer be a judicial officer.
5. _____. The preliminary hearing need only be held reasonably near the place of the arrest or alleged violations so as to enable the probationer to obtain and present evidence in his own behalf.
6. _____. In order to contest the location of the preliminary hearing, it is necessary that the probationer allege and prove some demonstrative prejudice.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Jerry N. Stehlik, Buffalo County Deputy Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr, for appellee.

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

HASTINGS, J.

The defendant has appealed from an order of the District Court for Buffalo County, which revoked his

probation on previous convictions of second degree forgery and burglary, and sentenced him to terms of imprisonment in the Nebraska Penal and Correctional Complex for 0 to 2 years and 1 to 5 years, respectively, to be served consecutively.

The defendant assigns as error that: (1) The court erred in not providing sufficient notice of probation violation; (2) The court erred in failing to provide and order an independent hearing officer to hold the preliminary hearing on the motion to revoke probation; and (3) The court erred in not affording defendant a preliminary hearing on the motion to revoke probation at or near the place of the violation or his arrest. We affirm.

On April 15, 1981, the defendant, while represented by counsel, entered pleas of guilty to the second degree forgery and burglary charges pursuant to a plea bargain in which three other burglary charges and one misdemeanor charge of theft were dismissed. On May 22, 1981, following a presentence investigation, the court sentenced the defendant to a term of probation of 36 months. The order of probation, which the defendant acknowledged and accepted, contained, among other conditions, the following: "That he shall refrain from all unlawful conduct." On July 29, 1981, the Buffalo County attorney filed a motion to revoke the probation. The motion recited the execution of the order of probation, referred to the prohibition against unlawful conduct, and alleged that the defendant violated the terms of such probation inasmuch as on the 16th day of July 1981, the defendant was convicted in the county court of Seward County on one count of theft, one count of second degree forgery, one count of forgery less than $75, and one count of attempted forgery of less than $75.

On August 10, 1981, the defendant appeared before the Honorable DeWayne Wolfe, Judge of the District Court for Buffalo County, at which time the court

made this inquiry of the defendant: "You understand, Mr. Calder, motion has been filed in this Court to revoke your probation which was previously granted by this Court on May 22, 1981, for the basis that under the motion which I assume you may have received a copy of, a conviction of theft, of second degree forgery, and another count of forgery, another count of attempted forgery. Apparently in Seward County, Nebraska." In response to that question the defendant replied: "Yes, sir." At that same time, and upon request of the defendant, the court appointed the office of the public defender as defense attorney.

According to the written digest of the preliminary hearing, the hearing was held on September 1, 1981, before Donna Erpelding, hearing officer, who was also the deputy clerk of the District Court. It was held pursuant to a written notice served upon the defendant on August 28, 1981. The notice recited the time and place of hearing, the purpose of the hearing (to determine whether probable cause exists to believe that the defendant committed acts which might constitute a violation of probation), the defendant's right to confront and call witnesses, and the right to have an attorney present. The notice also contained a statement of the specific rules of probation allegedly violated, to wit, "That he [defendant] shall refrain from all unlawful conduct." Attached to the digest of the hearing were various judicial documents from the county court of Seward County containing the arraignments, pleas, and sentencing on the four misdemeanors. Following the preliminary hearing, the defendant was ordered detained pending bond.

On September 8, 1981, a final hearing on the motion to revoke probation was held before the Buffalo County District Court and copies of the various proceedings in Seward County were received in evidence. Also, there was testimony to the effect that

the defendant had told the probation officer that he had committed the specific acts. The defendant did not testify.

In *State v. Ferree,* 207 Neb. 593, 299 N.W.2d 777 (1980), quoting from *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), we said: " 'At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, the conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing.' " *Id.* at 596, 299 N.W.2d at 779.

The formal notice of the preliminary hearing was deficient as to setting forth the facts constituting the alleged violations. However, it is perfectly clear from the record that on an earlier date, as referred to above, the defendant acknowledged his familiarity with the motion to revoke, which contained the specific alleged violations. He was also informed of these same facts by the district judge in open court. We said in *State v. Buttner,* 180 Neb. 529, 143 N.W.2d 907 (1966), that due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense. Although that case involved the sufficiency of an indictment, there is no reason why the same reasoning would not apply to a notice to revoke probation. Considering the notice served on the defendant, together with the earlier recitation to the defendant by the judge in open court detailing the acts alleged to have been violations of the probation order, we believe that the defendant had actual notice of the claimed violations sufficient to comport with due process.

In regard to the identity of the officer who held the preliminary hearing, all that *Gagnon v. Scarpelli, supra,* and *Morrissey v. Brewer,* 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), require is that

such officer be someone not directly involved in making recommendations concerning the initial arrest of the accused on the revocation charge or in making the report of the probation violations. But the defendant insists that a deputy clerk of the District Court is not an impartial and independent officer as required by law, and cites in support of that statement *State v. Kartman,* 192 Neb. 803, 224 N.W.2d 753 (1975). The following quotations from that opinion should answer the defendant's objection: "The hearing must be before an impartial and independent officer but not necessarily a judicial officer." *Id.* at 805, 224 N.W.2d at 755. "The trial court designated the clerk of the District Court as the hearing officer . . . . From our examination of the record we find no prejudice to the defendant in any of the proceedings relating to the preliminary hearing." *Id.* at 806, 224 N.W.2d at 755. There is nothing in the record to suggest that the deputy clerk was in any way directly involved in making recommendations concerning the initial arrest or in making the report on the probation violations, or that she was in any way subject to influence by anyone involved in this case.

Finally, the defendant complains that the District Court failed to hold the preliminary hearing at or near the place of violation or arrest. In the first place, there is nothing in the record to indicate where defendant's arrest was made. Secondly, in *State v. Ferree, supra,* we rejected the defendant's claim that a hearing could not be held in Holt County when the alleged violation and arrest occurred in Lancaster County. Even assuming that the arrest and violations occurred in Seward County we are not now prepared to say that the hearing could not be held in Buffalo County. By simply alleging that he was required to attend the preliminary hearing in Buffalo County rather than in Seward County, as we stated in *State v. Ferree, supra,* the defendant

" 'has alleged no demonstrative prejudice, and we can perceive none.' " *Id.* at 596, 299 N.W.2d at 779.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

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IN RE INTEREST OF HOLLENBECK, A CHILD UNDER THE AGE OF 18 YEARS.
STATE OF NEBRASKA, APPELLEE, V. RUTH DOROTHY L. HOLLENBECK, APPELLANT.
322 N.W.2d 635

Filed July 23, 1982. No. 81-758.

1. **Parental Rights: Appeal and Error.** An order terminating parental rights to children is reviewed de novo upon the record in this court.
2. **Parental Rights.** An order terminating parental rights to children must be supported by clear and convincing evidence.
3. _____. Parental rights may be terminated for substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Wilbur C. Smith of Smith & Hansen, for appellant.

Donald L. Knowles, Douglas County Attorney, and Christopher E. Kelly, for appellee.

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

PER CURIAM.

The appellant, Ruth Dorothy L. Hollenbeck, who is the mother of the child in interest, appeals from an order of the separate juvenile court terminating her parental rights in her youngest daughter. The father's parental rights were also terminated by this order, but he has not appealed.

On September 11, 1980, a petition was filed in the separate juvenile court, alleging the child in interest, who was born December 13, 1974, was a child within the meaning of Neb. Rev. Stat. §§ 43-202(2)(b) and 43-209(2) (Reissue 1978), in that she was a child under 18 years of age lacking proper parental care by reason of the fault or habits of her parents. The petition specifically alleged that the father had sexually abused the child; that the mother was aware of the father's propensities to sexually abuse his daughters, yet refused to remove or protect the child; that the child, at age 5, displayed inappropriate sexual behavior; and that both parents had on numerous occasions left the child without adult supervision or protection for prolonged periods of time. On the date the petition was filed the child was placed in immediate temporary foster care.

At the detention hearing held on September 22, 1980, the child in interest testified in chambers, in the presence of the court and her guardian ad litem, that her mother worked all day and that her father was her babysitter, and that from the time she was 4 or 5 years old her father would leave her at home alone for periods of time during the day. On one of these occasions, during the winter, she was locked out of the house and had to remain outside approximately an hour until he returned home. Also at this hearing an 8-year-old neighbor child testified that on one occasion she saw the child in interest, the father, and another unrelated child in the pool in the Hollenbeck's backyard and that the father removed the swimming suits of both the child in interest and the neighbor child and fondled their breasts and vaginal areas. Following this hearing the court ordered that the child remain in foster care pending an adjudication hearing.

The appellant's answer, filed March 2, 1981, denied the allegations of the petition and alleged that divorce or separation from her husband was con-

trary to her religious faith, that she was employed, and that her husband had a 100 percent service-connected disability. It further alleged that the child's inappropriate sexual behavior could be attributed to the normal curiosity of a small child "and should not be interpreted in any other way."

An adjudication hearing was held on March 9 and 10, 1981. The evidence adduced at this hearing showed that the child in interest was the youngest of the four children of the parents and that a petition filed in the interest of all four children in 1977 alleged acts of sexual abuse by the father upon the two older daughters and refusal by the mother to acknowledge the incest problem in the family. All four children were removed from the home at that time. Later, the allegations of sexual abuse were stricken from the petition by the county attorney. The parents then admitted the remaining allegations that the three older children were homeless or destitute, or without proper support through no fault of the parents, and the three older children were placed in foster care. The child in interest here was returned to the parents.

At the time of the present case the middle daughter remained in foster care, the oldest daughter was emancipated, and the son was incarcerated in the Lincoln Correctional Center.

At the adjudication hearing both of the older daughters testified as to the father's sexual abuse of them. The oldest daughter testified that she had told her mother about these occurrences at one time, but that the mother did not appear to understand. Thereafter, this daughter did not attempt to again discuss the problem with her mother. However, this daughter did testify in her mother's presence at a mental health board hearing, well before the events alleged in the instant petition, that her father had sexually abused her. At one point she told the appellant that, in order to get the older children back,

the appellant would have to divorce the father. The appellant's only comment to this was that she did not know what to do. The middle daughter also testified that she had been sexually abused by the father, but did not attempt to discuss it with the appellant because the appellant had seemed to ignore the older daughter. The middle daughter further testified that the child in interest had told her that she had been sexually fondled by the father. The child in interest testified in chambers that her father had sexually abused her.

The foster mother of the child in interest testified the child had told her that the father had molested her. In addition, the foster mother testified that the child would have nightmares after visits with both parents, during which she would cry out, "Daddy, don't. Please don't do that." When awakened, she would not remember the dreams. The nightmares did not occur when she visited only with her mother.

Several witnesses testified to unusual sexually oriented behavior on the child's part, both before and after she had been placed in foster care. Testimony on this issue came from playmates, the playmates' parents, and the child's foster mother. From the relating of these activities at the hearing, it can hardly be said that these activities and the child's vocabulary of sexual idiom were attributable "to the normal curiosity of a small child." The foster mother testified that she had worked with many children who were the victims of incest, but she had never seen one with as much "acting-out" behavior as demonstrated by this child.

Several neighbors testified that they often saw the child in interest, at age 4 or 5, walking around the neighborhood and crossing busy streets by herself. One neighbor, her former babysitter, testified that on several occasions she saw the child cross arterial intersections by herself when, according to the child, she had been sent by her father to mail a letter. This

witness stated that she spoke to the appellant about these incidents but the pattern continued. Another neighbor testified that the child in interest was at her house, playing with the neighbor's son, for long periods of time 3 or 4 days a week, without either parent checking on her whereabouts. This neighbor also testified that at times she would feed the child lunch, because other times when she had sent the child home for lunch, she saw her "zigzagging" back and forth across the street to other neighbors' houses until she found one that would feed her lunch. A neighbor also testified that the child once said that she did not want to go home because her father made her take naps all the time and that she did not want to go home to take naps.

The mother testified that this was the first time she had heard anything about sexual abuse of any of the children by the father. When pressed, she made a semantic distinction between "hearing" about the allegations and "reading" them in the numerous petitions and other papers involved in this proceeding and the previous proceeding concerning the older children. She stated that she did not believe the oldest daughter's testimony at the mental health board hearing, apparently because the daughter was not under oath at the time. It appeared from her testimony that she still did not believe the father had sexually abused any of the daughters and, if permitted by the court, she felt that it would be safe for the child in interest to return home where the father would be her primary caretaker. It is undisputed that the appellant did not contact any agencies to seek either family or individual counseling for herself or the child.

The evidence also showed that after the child in interest was placed in foster care and prior to the adjudication hearing, a 1-day evaluation of the mother and the child was conducted by the Nebraska Psychiatric Institute (hereafter NPI) at the request of

the State. The mother, foster mother, and the caseworker from the Department of Public Welfare were interviewed by Ben Cacioppo, a psychiatric social worker at NPI, while the child was separately interviewed by other NPI staff members. Cacioppo, who was called as a witness for the mother, testified that, as to the mother, "there seemed to be a lack of recognition of the seriousness of the issues for which the child was brought to us, and some denial of those issues." On cross-examination, he termed the mother's denial "massive," noting that the mother flatly denied any incest problem in the family, even "in light of all the past history of this case . . . ."

After the adjudication hearing the trial court struck count II A. of the petition, as irrelevant with reference to this child. It then specifically found the other allegations of the petition had been proved by clear and convincing evidence, and found the child in interest to be a child within the meaning of §§ 43-202(2)(b) and 43-209(2). The matter was continued pending a disposition hearing.

The disposition hearing was held July 2, 1981. At this hearing the guardian ad litem of the child and the chief service officer for the juvenile court both testified that they felt the appellant was not amenable to rehabilitation and recommended that her parental rights be terminated. They based their opinion on her continuing denial of an incest problem within the family, and the fact that for over 4 years she had not investigated the allegations of incest regarding her husband, had left the child in interest in his care in spite of the previous court proceedings in the interest of the older children, and had never attempted to seek counseling in the matter. A written report prepared by these two witnesses and a Child Protective Services worker, another court service officer, and a Department of Public Welfare foster care worker recommended termination of both parents' parental rights. On July 6, 1981, the court

found that neither parent was "amenable for [sic] treatment that would enable them to become adequate parents," and terminated their parental rights in the child in interest.

A hearing on the appellant's motion for new trial was held on October 7, 1981. At this hearing the appellant testified that she had divorced her husband in July 1981, sold the family home in Omaha, and had moved to Glenwood, Iowa, where she was living with relatives. She testified that she had divorced her husband because he was unreasonable and did nothing but rant about the court case. Although she testified as to what she termed her "future plans," with an eye toward regaining custody of her two younger daughters, such "plans" contained only a vague reference to counseling, and she was not participating in counseling at the time of the hearing.

Also at this hearing there was testimony that the middle daughter had run away from the foster home where she and the child in interest had been staying and that the child in interest had been moved to a different foster home. A document from a Veterans Administration hospital in San Diego, received in evidence at this hearing, showed that the father had undergone treatment at that facility and had been discharged on September 1, 1981. Finally, although the appellant did eventually admit on cross-examination that she now believed that her husband had sexually abused their daughters, this admission came only reluctantly and only after a lengthy exchange with the guardian ad litem, who was questioning her. Following this hearing the separate juvenile court overruled the mother's motion for new trial. This appeal followed.

The appellant's first assignment of error argues that she was denied due process of law "(a) . . . when acts which constitute the sexual [sic] incest complained of had been adjudicated and dismissed

in a prior case and the minor child . . . was released to her natural parents . . ." and that "(b) Due process of law has been violated when the alleged acts of sexual [sic] incest were committed in the calendar year of 1976, and Section 29-110 R.R.S. Neb. 1943, provides that the statute of limitations runs three years after the alleged acts of incest."

As to assignment (b), Neb. Rev. Stat. Ch. 29 (Reissue 1979) deals only with criminal procedure. This case is not a criminal prosecution and the cited "statute of limitations" has no application.

As to assignment (a), the petition alleged acts of incest by the father against this child which took place after the 1977 proceeding, and that the appellant had failed to remove or protect this child from the father when she knew that the older daughters had "continually related incidents of being sexually [abused] by" the father. It is clear from the petition that the allegations against the mother were not those of the father's incest against the older daughters but, rather, allegations that, despite her notice of the father's propensities, she had taken no steps to protect the child. Assignment (a) stems from an incorrect reading of the petition, and does not support the appellant's claim of denial of due process. The entire assignment is without merit.

The appellant's second assignment is similar to the first, in that she argues that the court should have struck count II B.1. of the petition "for the reason that these matters had previously been adjudicated . . . ." Count II B.1. states: "B. [Appellant], natural mother of said child, has failed and/or refused to remove or protect [the child in interest], being fully cognizant of the propensity of [the father] . . . for sexually molesting and manipulating his daughters, from [the father], towit:

"1. [The older daughters] have continually related incidents of being sexually [abused] by . . . natural father of said child, while in the care and

custody of [the parents] . . . ."

The previous adjudication to which the appellant refers in this assignment is described earlier in this opinion. Again, it must be noted that although the allegations of incest from the previous petition were dismissed by the county attorney, count II B.1. of the petition in the present case does not allege those acts of incest as part of the mother's neglect of the child in interest. Here it is alleged that, despite notice to her from the older daughters of the father's incestuous behavior against them, the mother took no steps to protect this child from a similar fate. The "relating" of incidents by the older daughters, as alleged in the challenged count, occurred after the 1977 proceeding. The issue was not adjudicated in the previous matter, and the trial court did not err in refusing to strike count II B.1. of the petition.

The appellant next assigns as error that the trial court erred in applying Neb. Rev. Stat. § 27-303 (Reissue 1979) of the "*Criminal Rule of Evidence* to form basis for its adjudication order to custody matters *civil in nature* and using past patterns of behaviour to demonstrate 'proof of motive, opportunity, intent, preparation, plan, knowledge (and) absence of mistake or accident.' "

In its order of April 29, 1981, which followed the adjudication hearing, the trial court stated: "The past pattern of behavior is relevant to the matters at issue herein for it demonstrates on the part of both parents 'proof of motive, opportunity, intent, preparation, plan, knowledge (and) absence of mistake or accident,' 27-303, R.R.S. 1943." The cited section actually comes from Neb. Rev. Stat. § 27-404(2) (Reissue 1979).

As to considering evidence of past patterns of behavior in making the adjudication, Neb. Rev. Stat. § 43-206.03(2) (Reissue 1978) states: "The adjudication portion of hearings shall be conducted by the judge without a jury, applying the customary rules

of evidence in use in trials without a jury." Section 27-404 is a part of the "customary rules of evidence," and thus it was not error for the trial court to receive such evidence at the adjudication hearing. In addition, Neb. Rev. Stat. § 43-218 (Reissue 1978) states: "This act shall be liberally construed to the end that its purpose may be carried out as provided in section 43-201." In this case, evidence of patterns of behavior were clearly relevant to the allegations against the appellant with reference to her notice of the father's actions. The assignment is without merit.

The appellant also assigns as error that the court "accepted opinion from lay witness where medical and psychiatric testimony was available to prevent prejudice." Apparently, the appellant is arguing that the court's refusal, based on lack of foundation, to receive in evidence certain medical records of the father was prejudicial to her. However, the appellant's rights were terminated because she had notice of the father's incestuous behavior and still refused to acknowledge the situation and protect the child. Evidence of the father's condition was irrelevant to the mother's case. This assignment is also without merit.

Finally, the appellant argues that the adjudication and disposition orders were contrary to the law and the evidence. The separate juvenile court specifically found that the allegations of the petition had been proved by clear and convincing evidence. "An appeal of a juvenile case is heard in this court by trial de novo upon the record; notwithstanding, findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses . . . ." *State v. Logan,* 204 Neb. 204, 206, 281 N.W.2d 753, 754 (1979).

Parental rights may be terminated for substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and

protection. *In re Interest of Hiatt,* 209 Neb. 195, 307 N.W.2d 108 (1981). The evidence which has been summarized was clear and convincing and supports the adjudication order and the disposition order.

As to the disposition order the evidence demonstrates that the appellant steadfastly refused to recognize the incest problem which existed in the family, despite the fact the family had been in court over that problem for more than 4 years. While the appellant testified at one point that she would divorce her husband "if necessary" in order to keep custody of the child in interest, she gave no indication that she considered it necessary until after her parental rights had been terminated by the order of July 6. Indeed, during the entire 4½ years the family was in court, she testified that she did not consider the possibility that the allegations against the father were true. In the face of all of these events, the evidence is overwhelming that the appellant did not confront the father about the allegations of incest and left the child in interest in the care of the father while she worked and went to school. The appellant's own witness testified that she utilized a "massive denial" mechanism in dealing with the entire matter. Even as late as the hearing on the motion for new trial, the appellant was barely able to admit that she now believed that her husband molested the daughters. That hearing also demonstrated that her belated divorce took place not because of the father's incestuous activities but because the appellant could no longer put up with "his bellyaching." Although the appellant argues that because of the divorce and its accompanying restraining order the father is now out of her life, the evidence shows the father is no longer an inpatient in any treatment facility and there is no assurance that he will not return to the family.

The appellant also argues that, prior to terminating her parental rights, the court should have de-

vised a rehabilitation plan for her. However, "[t]here is no requirement that the court must implement a rehabilitation plan for the parent of a child found to be dependent and neglected, and particularly if such a plan has very little chance of success and it would not be in the best interests of the child." *In re Interest of Carlson,* 207 Neb. 540, 543, 299 N.W.2d 760, 762 (1980). There we also noted: "The . . . children [in interest] were receiving no protection from recurrent sexual abuse. They were being exposed to completely unsatisfactory social conditions at home. They have a right to grow up in a healthy and wholesome environment. Each day's delay in making them available for permanent placement in such satisfactory surroundings causes such right to become increasingly unobtainable." *Id.* at 543, 299 N.W.2d at 762.

The same principle applies in this case. At the disposition hearing written reports and testimony indicated that any rehabilitation plan the court could devise for the appellant would have very little chance for success because she refused to recognize the incest problem. As we noted in *State v. Duran,* 204 Neb. 546, 552-54, 283 N.W.2d 382, 386-87 (1979): "The dispositional hearing affords the trial court an opportunity for a wide-ranging review of a child's complete social history apart from the basic circumstance of the adjudication hearing. It looks only to what is in the child's best interests for such child's future.

. . . .

". . . In reviewing the family history of appellant and the difficulties and present status of her other . . . children, the trial court correctly concluded that rehabilitative efforts would serve no useful purpose. We learn from the past. . . . The issue in a disposition hearing where a child has been found to be neglected or dependent is not the adjudicated offense with which the children are involved, but rather a

broader concern of overall conduct of the children and their parents and what ought to be done to correct the situation in the best interests of the children. . . . [T]he court must be concerned with the effect which the actions of a parent may create on the impressionable minds of young children."

In the instant case the trial court correctly focused on the mother's refusal to acknowledge the incest problem in determining what action it should take in the best interests of the child. The court did not abuse its discretion in terminating the appellant's parental rights in this child, and was correct in overruling her motion for new trial.

The appellant's assignments of error are without merit. The action of the separate juvenile court was correct in all respects and is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

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STATE OF NEBRASKA, APPELLEE, V. JOE ALBERT MUNN, APPELLANT.

322 N.W.2d 429

Filed July 23, 1982. No. 81-769.

1. **Constitutional Law: Prosecutorial Misconduct.** Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the double jeopardy clause.
2. **Rules of Evidence.** Neb. Rev. Stat. § 27-902 (Reissue 1979) governs the admissibility of a court decree from another state.

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

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

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

WHITE, J.

The defendant was charged by information with a violation of Neb. Rev. Stat. § 28-706(6) (Reissue 1979), felony criminal nonsupport, and was convicted after a jury trial. The defendant assigns two errors: (1) The trial court erred in overruling defendant's plea in bar on the basis of former jeopardy; and (2) The trial court erred in admitting an attested copy of a decree of dissolution of marriage from the District Court for the City and County of Denver, Colorado.

Defendant was first brought to trial before a jury on August 21, 1981. During the opening statement the county attorney stated to the jury that he was personally convinced that there was sufficient evidence to justify a verdict of guilty. Defendant's counsel, after conferring with defendant, thereupon moved for a mistrial and the mistrial was declared. On August 24, 1981, the defendant was again brought to trial. The defendant, by his counsel, filed a plea in bar, suggesting that since the error upon which the mistrial was declared had been procured by the prosecuting attorney, jeopardy had attached and the State could not again bring him to trial. The trial court overruled the plea in bar.

After briefs were submitted on appeal, defendant's counsel called to this court's attention the decision of *Oregon v. Kennedy*, ___ U.S. ___, ___, 102 S. Ct. 2083, 2089, 72 L. Ed. 2d 416 (1982), in which the Court held: "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. A defendant's motion for a mistrial constitutes 'a deliberate election on his

part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.' . . . Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, '[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.' . . . Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of Double Jeopardy to a second trial after having succeeded in aborting the first on his own motion." Defendant conceded that he did not meet the burden of establishing that the prosecutor's overzealous opening argument was given with intent to goad defendant into a mistrial motion. Defendant has abandoned his claim of former jeopardy based on the U.S. Constitution. He asserts, but does not argue, the proposition of Neb. Const. art. I, § 12, that "No person shall be compelled, in any criminal case, to give evidence against himself, or be twice put in jeopardy for the same offense." While it is true that a jury was impaneled and sworn in the first trial, counsel is able to cite no case, and we are unable to discover any in Nebraska, in which a standard higher than that of the U.S. Supreme Court in *Oregon v. Kennedy, supra,* would obtain in this state. It has always been the rule in Nebraska that when a jury is unable to agree and is discharged, the retrial of the defendant does not violate the constitutional guarantee of article 1, § 12. *Shaffer v. State,* 123 Neb. 121, 242 N.W. 364 (1932). The assignment of error is without merit.

The next assignment of error involves the construction of the proper relationship between Neb. Rev. Stat. § 27-902 (Reissue 1979) of the Nebraska Rules of Evidence and Neb. Rev. Stat. § 25-1286 (Reissue 1979). The State successfully introduced, over the objection of the defendant, a copy of a separation

agreement and decree of dissolution of marriage entered by the District Court for the City and County of Denver, Colorado. On the copy there appears the seal of the District Court with the following inscription: "District Court City & County of Denver, Colo. Certified to be a full, true and correct copy of the original in my custody. July 24, 1979 /s/ Dean A. Nakorpm [sic] Clerk of the District Court by /s/ Joe N. Vaughn [sic], Deputy Clerk. Court Seal."

Section 25-1286 provides: "That of a sister state [judicial records] may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of a judge, chief justice, or presiding magistrate, that the attestation is in due form of law." Munn strenuously argues, and it is apparent from the face of the exhibit, that there is no certificate of a judge, chief justice, or presiding magistrate that the attestation is in due form. However, the State argues that § 27-902(1) specifically allows the introduction of the exhibit. In pertinent part that section provides: "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: (1) A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof . . . or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution."

Attest is defined by Black's Law Dictionary 117 (5th ed. 1979): "[T]he technical word by which, in the practice in many of the states, a certifying officer gives assurance of the genuineness and correctness of a copy. Thus, an 'attested' copy of a document is one which has been examined and compared with the original, with a certificate or memorandum of its correctness, signed by the persons who have examined it."

The positions of the various parties are clearly drawn. Under § 27-902(1) of the Nebraska Rules of Evidence the attested copy of the record is admissible; however, under § 25-1286 the document would appear not to be admissible. Counsel for the defendant urges us to construe the sections of the statute in pari materia. He points out specifically that while adjacent sections of § 25-1286 were repealed at the time of the adoption of the Nebraska Rules of Evidence, this section was not specifically repealed by the Legislature.

The State argues that by the adoption of the Nebraska Rules of Evidence § 25-1286 was repealed by implication. Although not argued, we are conscious of Neb. Const. art. III, § 14, and that part of it which reads: "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."

Neb. Rev. Stat. § 27-101 (Reissue 1979) provides: "These rules govern proceedings in the courts of the State of Nebraska, except to the extent and with the exceptions stated in section 27-1101." (Exceptions not material to this action.)

Neb. Rev. Stat. § 27-102 (Reissue 1979) states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." The Nebraska Rules of Evidence are by their terms designed to guide the trial courts in the admission of evidence before all courts of this state except in selected proceedings. They constitute an independent and complete act. An exception to article III, § 14, has always been where an independent act is not unconstitutional for failure to mention and repeal other sections of the statutes. *Aschenbrenner v. Nebraska P.P. Dist.*, 206 Neb. 157, 291 N.W.2d

720 (1980); *State ex rel. Douglas v. Gradwohl,* 194 Neb. 745, 235 N.W.2d 854 (1975); *Live Stock Nat. Bank v. Jackson,* 137 Neb. 161, 288 N.W. 515 (1939); *Department of Banking v. Foe,* 136 Neb. 422, 286 N.W. 264 (1939); *Hinman v. Temple,* 133 Neb. 268, 274 N.W. 605 (1937).

We therefore hold that the adoption of the Nebraska Rules of Evidence repealed § 25-1286. The exhibit was properly received. The assignment of error is without merit. The judgment of the District Court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. LOREN BARTHOLOMEW, APPELLANT.

322 N.W.2d 432

Filed July 23, 1982. No. 81-782.

1. **Circumstantial Evidence.** Where circumstantial evidence is utilized to prove an essential element of a crime, it is not required that the State disprove every hypothesis but that of guilt.
2. **Appeal and Error: Convictions.** This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilty beyond a reasonable doubt.
3. **Jury Instructions.** All of the instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
4. _____. Whenever a Nebraska Jury Instruction is applicable in a particular case and, from a consideration of the facts and prevailing law, the trial court determines that the jury should be instucted on the particular subject, the Nebraska Jury Instruction shall be used.
5. **Jury Instructions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
6. _____: _____. The mere statement of a defendant that the giving

of an instruction was prejudicial, without proof of such prejudice, does not constitute sufficient grounds for the reversal of a conviction.

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

Charles W. Balsiger, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

HASTINGS, J.

The defendant, Loren Bartholomew, was charged in the county court of Gage County with misdemeanor assault in the third degree, a violation of Neb. Rev. Stat. § 28-310(1)(a) (Reissue 1979), in that he "intentionally, knowingly, or recklessly cause[d] bodily injury to Pam Styers." He was tried to a jury, which returned a verdict of guilty. The court sentenced him to a term of 30 days in the county jail. In the District Court the judgment of conviction and the sentence imposed were affirmed.

The appellant has appealed to this court, specifying 13 separate errors. However, the alleged errors argued in the brief, and the only ones which we will consider on appeal, may be condensed to three: (1) Sufficiency of the evidence to support the verdict of guilty; (2) Failure of the court to instruct the jury that one of the elements of the crime which the State must prove beyond a reasonable doubt is the lack of justification for the use of force on the part of the defendant; and (3) Erroneous instruction regarding the affirmative defense of justification. We affirm.

The victim of this assault was 15-year-old Pamela Jean Styers. According to her testimony, the defendant is her uncle and she and her 17-year-old brother had been living with the defendant in his

trailer home in Beatrice. At about 8 a.m. on February 24, 1981, according to the victim, she was standing in the schoolyard, in front of the library, talking to a friend. All of a sudden, the defendant pulled up and came over to her, grabbed her by the hair, started hitting her, and forcibly placed her in the truck. She testified that he said, "I'm going to kill you," and started hitting her with his fists. The defendant then started driving down the street and continued to beat on her, both with his fists and by kicking her. Shortly thereafter, as related by the victim, the defendant stopped the truck and told her to get out, and he then took off a heavy leather belt and started beating her with the belt. She grabbed the belt and he threw it down and then got on top of her and started hitting her again. She claims that the beating went on for 15 or 20 minutes.

The victim contended that the blows were causing her pain, that she attempted to defend herself by hitting back at the defendant with her fist, and that she suffered bruises to her back, the facial area, and in the areas of the trunk, the arms, and her head.

According to the testimony of two independent witnesses, sisters who were students at the Southeast Community College at Fairbury, they observed the incident described by the victim. They said that about 8 o'clock they were driving down the street, following this pickup truck which then stopped, and as they drove by they recognized the defendant as the driver. They first saw him hitting some object which was located in the passenger seat. All they could see at first was hair and they thought that it was a dog he was striking. It made a sufficient impression upon the witnesses that they stopped their car in order to get the license number so they could notify the humane society. The witnesses described the blows as quite severe. In a short time they were able to observe that the object in the passenger seat was a girl, and the two sisters recognized her as the victim.

Several pictures of the victim were taken by a female employee of the Beatrice Police Department on the day of the assault, which were received in evidence and which show a great deal of bruising about various parts of the victim's body.

The mother of the victim testified and identified what was captioned a power of attorney, whereby she granted to the defendant power of attorney regarding the care, custody, and property of the victim under Neb. Rev. Stat. § 30-2604 (Reissue 1979).

The defendant testified in his own defense and stated that his niece, the victim, had not shown up at home all night the evening of February 23rd. According to the defendant, he did find the victim in the schoolyard, in front of the library, at about 7:45 a.m., and in what he described as a polite manner he tried to get her to get into the truck with him, but that she cursed at him and he had to forcibly put her into the truck. However, he denied pulling her hair or hitting her. According to his testimony, all the time he was driving, the victim continued to reach over to grab the steering wheel, striking out at him, and finally she caused him to lose control of the truck. Once the truck stopped, he said that he reached over and swatted her with an open hand. He denied that he ever struck the victim with his fist. He also denied that he ever took his belt off or that he ever struck her with his belt. The defendant testified that he felt responsible for his niece and it was not until after the victim struck him in the groin that he had any intention to physically discipline her.

As a part of his attack on the sufficiency of the evidence, the defendant insists that any conclusion that the victim's injuries were caused by the defendant must be based on circumstantial evidence. He goes on to argue that where such evidence is relied upon to prove an essential element of the crime, it must be of such nature as to exclude any other rea-

sonable conclusion than that of guilt of the accused. Although we believe that it was not necessary for the State in this instance to rely upon circumstantial evidence to support the defendant's conviction, we should point out that the rule advanced by the defendant is no longer the law in Nebraska. "The State is not required to disprove every hypothesis but that of guilt." *State v. Buchanan,* 210 Neb. 20, 28, 312 N.W.2d 684, 689 (1981).

It should be apparent from the brief recital of the facts above that the evidence was in conflict as to whether the defendant or the victim was the aggressor; the nature of the blows struck by the defendant; the severity of the injuries, if any, sustained by the victim; and whether or not the defendant was justified in using the force that he did. Assuming that the jury was properly instructed, the evidence was clearly sufficient to support the jury's verdict of guilty. We will not interfere with a conviction based upon evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilty beyond a reasonable doubt. *State v. Ohler,* 208 Neb. 742, 305 N.W.2d 637 (1981).

By instruction No. 4, the trial court instructed the jury in part: "The material elements which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged are: 1. That the defendant did intentionally, knowingly, or recklessly cause bodily injury to Pam Styers. 2. That he did so on or about the 24th day of February, 1981. 3. That he did so in the County of Gage, State of Nebraska. The state has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements necessary for conviction."

The defendant argues that he "requested the Court [to] instruct the jury concerning lack of justification for the use of force as a material element of the

crime charged," which the court failed to do. However, he overlooks instruction No. 11. In that instruction, the court set forth the various definitions relating to and circumstances under which acts of force may comprise the defense of justification as set forth in Neb. Rev. Stat. §§ 28-1406 et seq. (Reissue 1979). The instruction then concludes with the approved language of NJI 14.33 (Supp. 1975): "The State has the burden to prove by the evidence beyond a reasonable doubt that the force of the defendant claimed by him as a defense was not justified; there is no burden on the defendant to prove that his act of force was justified."

Reading instruction Nos. 4 and 11 together, it is apparent that the jury was required to find, beyond a reasonable doubt, that the State had proven lack of justification on the part of the defendant before it could find him guilty of the crime charged. "All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error." *State v. Bear Runner,* 198 Neb. 368, 373, 252 N.W.2d 638, 642 (1977).

The defendant's final assignment of error claims that the court's instruction No. 11, as to the defense of justification, was erroneous. A portion of that instruction is set out as follows: "1. Unlawful force shall mean force which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or would constitute such offense except for a defense such as the absence of intent or negligence, not amounting to a privilege to use the force. 2. The use of force upon or toward another is justified when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion. *However, when the person threatened or attacked uses more force than*

*permitted by the above definition of self-defense, he is guilty of unlawful conduct and is criminally responsible therefor.*" (Emphasis supplied.) It is the part set out in italics of which the defendant complains. The approved language of NJI 14.33 (Supp. 1975) was in fact included in a later portion of the court's instruction No. 11: "However, if the force used by the defendant, as shown by the evidence, was more than the justification described in this instruction, such force is not justified."

The rules adopted by this court with reference to jury instructions require that whenever a Nebraska Jury Instruction is applicable and, from a consideration of the facts and prevailing law, the trial court determines that the jury should be instructed on the particular subject, the Nebraska Jury Instruction shall be used. NJI at IX (1969). The complained of portion of the court's instruction previously set forth clearly does not conform to NJI 14.33 and should not have been given.

However, we must not overlook the fact, as pointed out earlier in this opinion, that instruction No. 4 required the jury, before it could find the defendant guilty, to find beyond a reasonable doubt that the defendant did "intentionally, knowingly, or recklessly cause bodily injury to Pam Styers," and, by instruction No. 11, that the State must prove beyond a reasonable doubt that the force which the defendant claimed he used was not justified. It would naturally follow that if the jury found the defendant knowingly caused bodily injury to the victim by using force not justified under the instructions, the jury must find him guilty. That is precisely what the criticized language, read together with instruction Nos. 4 and 11, directed the jury to do. Even though the court should not have used the precise language that it did, before such error can be considered as a ground for reversal, it must be considered prejudicial to the rights of the defendant. "De-

fendant has failed to show how he was in fact prejudiced by the instruction as given. Other than the mere statement that the instruction was prejudicial, defendant has adduced no proof of prejudice that could be a ground for reversal." *State v. O'Kelly,* 193 Neb. 390, 393, 227 N.W.2d 415, 418 (1975).

Another portion of instruction No. 11 adequately informed the jury of the nature of the defense of justification insofar as it is applicable to the parental relationship involving a minor child. In other words, in order for the defense to be available under those circumstances, it required the jury to find that the defendant was responsible for the general care and supervision of the victim, and that any force which he used was for the purpose of promoting the minor's welfare, including her punishment. The instruction also directed that the use of force is not justified "when it is designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress, or gross degradation." The defendant does not complain of that portion of the instruction, but does insist that the evidence was insufficient to support a guilty verdict because it failed to show that there was a substantial risk of causing one of the enumerated results. There are two answers to that contention. As we have previously indicated, the evidence was in conflict as to the severity of the injuries and the availability of the defense of justification, and was clearly a jury question. Secondly, the jury could have found that whatever force was employed was not used for the purpose of promoting the victim's welfare, which would make unnecessary the consideration of the "substantial risk" test.

The judgment and sentence of the District Court were correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS E. FREEMAN, APPELLANT.

322 N.W.2d 437

Filed July 23, 1982. No. 81-794.

**Post Conviction: Sentences.** Matters relating to sentences imposed within statutory limits or matters already litigated in the direct appeal are not a basis for post conviction relief.

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

Thomas E. Freeman, pro se.

Paul L. Douglas, Attorney General, and Mark D. Starr, for appellee.

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

MCCOWN, J.

This is a post conviction action. The defendant's "petition for reduction of sentence" was treated as an application for post conviction relief. The District Court denied post conviction relief, and the defendant has appealed.

The defendant was found guilty of second degree murder by a jury on April 14, 1977, and was sentenced to life imprisonment. On direct appeal to this court, among other alleged errors, the defendant contended that his sentence was excessive. The conviction and sentence were affirmed by this court in *State v. Freeman,* 201 Neb. 382, 267 N.W.2d 544 (1978).

On September 11, 1981, defendant filed a petition for reduction of sentence and two briefs arguing that his sentence was excessive. The District Court found that the issues raised had already been passed upon by this court in the direct appeal and denied post conviction relief.

Matters relating to sentences imposed within statutory limits or matters already litigated in the di-

rect appeal are not a basis for post conviction relief. *State v. Walker,* 197 Neb. 381, 248 N.W.2d 784 (1977); *State v. Shepard,* 208 Neb. 188, 302 N.W.2d 703 (1981).

The defendant's contention that excessive sentence issues may be litigated again if there are some allegations of constitutional grounds has been answered adversely to the defendant in *State v. Leadinghorse,* 192 Neb. 485, 222 N.W.2d 573 (1974).

A motion for post conviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. *State v. Peery,* 208 Neb. 639, 305 N.W.2d 354 (1981).

AFFIRMED.

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IN RE INTEREST OF SEAN DAVID DITTER AND TISHA LYNNE DITTER, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DAVID D. DITTER, APPELLANT.

322 N.W.2d 642

Filed July 23, 1982. No. 81-875.

1. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile case to the Supreme Court is heard de novo upon the record.
2. **Parental Rights.** Although a parent's parental rights should not be terminated for the sole reason of conviction of crime and incarceration, the fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated.
3. _____. A parent's inability to perform his parental obligations because of imprisonment and the nature of the crime committed, as well as the person against whom the criminal act was perpetrated, are all relevant to the issue of parental fitness and child welfare, as is the parent's conduct prior to imprisonment and during the period of incarceration.
4. _____. The right of a parent to maintain the custody of his or her child is a natural right, but it is not an inalienable right, and the public has a paramount interest in the protection of the rights of a child.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Affirmed.

Steven A. Goeden, for appellant.

Paul Schumacher, Platte County Attorney, and Eugene Schumacher, for appellee.

Charles H. Rogers, guardian ad litem.

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

PER CURIAM.

The appellant, David D. Ditter (Ditter), appeals from an order originally entered by the county court of Platte County, Nebraska, sitting as the juvenile court for Platte County, Nebraska, and thereafter affirmed by the District Court for Platte County, Nebraska, terminating Ditter's parental rights to his two minor children. We affirm.

The record in this case relates a story which can only be described as tragic and pathetic. On the evening of January 23, 1979, Ditter, then separated from his wife who was seeking to have their marriage dissolved, broke into his wife's apartment by smashing a plate glass patio door. Ditter announced to his wife and a girl friend who was then in the apartment that he intended to kill his wife, and ordered the girl friend to take the parties' two minor children from the apartment. At that time, one of the children was scantily clad and the other, still wet from a bath, was unclothed. Ditter then took his wife into the bedroom of the apartment, stripped her of her clothes, and, in the presence of two police officers who had just arrived on the scene, premeditatedly, maliciously, and intentionally murdered his wife by shooting her four times with a .357-magnum revolver while she pleaded with him for her life. The children, then ages 3½ and 2, were taken into custody by a social worker who had arrived on the scene shortly after the killing and Ditter's arrest.

The record discloses that this was not the first time Ditter had committed an act of violence upon

his wife. The records amply support the conclusion that Ditter had frequently mistreated his wife during their 8-year marriage. Ditter was shown to be an habitual and chronic user of drugs and alcohol and had, on December 12, 1978, been charged with first degree sexual assault and assault and battery arising by reason of Ditter having attempted to rape his wife after they had separated.

On January 24, 1979, the county court of Platte County, Nebraska, sitting as a juvenile court, exercised its emergency powers and placed the two minor children with the Multi-County Social Service Unit No. 143, ordering that the children be kept with the maternal grandparents, where they have resided ever since. Ditter made no effort to object and, in fact, did not enter his appearance in the juvenile proceedings until January 3, 1980, nearly 1 year after the proceedings were filed. On October 29, 1979, Ditter pled guilty to the crime of murder in the first degree, and on November 15, 1979, was sentenced by the court to imprisonment in the Nebraska Penal and Correctional Complex for and during his lifetime, where he now remains. Ditter was brought from the penitentiary and allowed to be present at every stage of the juvenile proceeding following the entry of his appearance in the case, and participated both personally and through his court-appointed counsel.

Following a trial, the juvenile court, on October 27, 1980, found that it had jurisdiction over the minor children under the provisions of Neb. Rev. Stat. § 43-202(2)(b) (Reissue 1978), which provides in part that the juvenile court shall have jurisdiction as to any child under the age of 18 years "who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian." The juvenile court further found that it was in the best interests of the minor children that David Ditter's parental rights be terminated, and so entered an order to that effect.

Ditter assigns three basic errors. The first two may be quickly disposed of. His first two assignments are to the effect that the court denied him due process of law because it denied his motion for discovery, and the trial court abused its discretion when it allowed into evidence highly prejudicial hearsay statements purportedly made by the children's mother during her lifetime. As we have indicated, the record in this case makes it clear that these two assignments are wholly frivolous and may be quickly denied. To begin with, an appeal of a juvenile case to the Supreme Court is heard de novo upon the record. *In re Interest of J.L.L.,* 209 Neb. 76, 306 N.W.2d 175 (1981); *In re Interest of Hill,* 207 Neb. 233, 298 N.W.2d 143 (1980); *In re Interest of Morford,* 207 Neb. 627, 300 N.W.2d 795 (1981). Therefore, even if the trial court had considered evidence which was not admissible, our review of this record is de novo and we are therefore able to disregard any evidence which should have been excluded. However, a reading of the juvenile court's order makes it clear that the findings upon which the juvenile court based its order of termination did not give any weight to the statements purportedly made by the mother during her lifetime, except as they were otherwise supported by the evidence. Ditter's claim that he is therefore entitled to a new trial in this matter, based upon a claim that inadmissible hearsay evidence was considered by the court, may be disregarded and overruled.

Likewise, Ditter's claim that he was denied due process of law because his motion for discovery was denied by the trial court is without merit. On July 24, 1980, Ditter filed a "shotgun" motion for discovery and inspection, asking the Platte County attorney to produce "any written statements, physical evidence, scientific reports, summaries of statements, the names and addresses of possible prosecution witnesses, and any other evidence that may be

prejudicial to the State's case and may assist the parent including the names and addresses of any person whose testimony would not support the prosecuting attorney's case and would assist the father, any written statements of any person that would be helpful to the father, and any other evidence of which the prosecuting attorney or the police have knowledge." How the State could have determined what documents to produce, had the trial court sustained the motion, is difficult to imagine. Nevertheless, the trial court found that since the issues in the termination case required evidence which was discoverable in a companion murder case filed contemporaneously with this case and that in fact extensive discovery had been accomplished by attorneys for the parent, David Ditter, in the companion case, the motion should be denied. Furthermore, the record establishes that the trial began on September 3, 1980, during which time the State presented its entire case. The case was then continued until September 22, 1980, on which date trial was completed. Ditter therefore had 19 days to adequately prepare, after having seen and heard all of the State's case, and, if additional time was required, could have made a showing at that time or requested a continuance, neither of which he did. During oral argument before this court, Ditter's counsel was specifically asked what evidence he was unable to discover and what evidence came as a surprise. He was unable to offer the court any response to either question. It is clear from the record that Ditter was not surprised or unable to prepare for trial and was not denied either due process of law or the effective assistance of counsel, and the trial court did not abuse its discretion in denying Ditter's motion to produce. That assignment of error can likewise be overruled.

Having disposed of Ditter's first two assignments of error, that leaves us, then, with what is essen-

tially the sole and only issue in this appeal, to wit, whether the parental rights of David Ditter to his two minor children, under the circumstances and facts in this case, should be terminated.

If § 43-202(2)(b) was ever intended to have application when granting to the juvenile court jurisdiction over a child under the age of 18 who lacks proper parental care by reason of the fault or habits of his parent, it was intended to apply in this case. David Ditter voluntarily entered a plea of guilty to the first degree murder of the children's mother. While the trial court found the murder was not so heinous as to justify the imposition of the death penalty, it comes as close to being heinous as any murder can and still fall short. Ditter's two minor children have been deprived of the love and affection of both their mother and father, if, indeed, there was any love and affection by the father prior to the time he murdered their mother, solely by reason of his intentional, vicious act—an act for which he must now spend the remainder of his natural life incarcerated, or at least until a time after these children have passed through their formative years and reached their majority. By reason of his long incarceration, he is unable to do anything of any significance in helping to raise these two children and has likewise deprived them of their mother's assistance in raising them. We have said before, "Although a parent's parental rights should not be terminated for the sole reason of conviction of crime and incarceration, the fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated." *In re Interest of Wagner and Russell,* 209 Neb. 33, 36-37, 305 N.W.2d 900, 902 (1981). This is a view which has frequently been adopted by other courts and has resulted, in similar cases, in the parental rights of the surviving parent who committed the murder being terminated. See, *In re Welfare of Scott,* 309 Minn.

458, 244 N.W.2d 669 (1976); *Matter of B.A.M.,* 290 N.W.2d 498 (S.D. 1980); *George v. Anderson,* 135 Ga. App. 273, 217 S.E.2d 609 (1975). In the case of *In re Sego,* 82 Wash. 2d 736, 513 P.2d 831 (1973), noted by us in the *Wagner and Russell* case, *supra,* the Washington court said at 740, 513 P.2d at 833: "As noted initially, courts attempt to protect the rights of both parents and children, giving primary consideration to the welfare of children. It is necessary to consider each case on its own facts. *In re Palmer, supra.* For example, a parent's misconduct, even if criminal in nature, does not automatically support permanent child deprivation. By the same token, imprisonment, alone, does not necessarily justify an order of permanent deprivation. *In re Staat,* 287 Minn. 501, 178 N.W.2d 709 (1970). On the other hand, a parent's inability to perform his parental obligations because of imprisonment, the nature of the crime committed, as well as the person against whom the criminal act was perpetrated are all relevant to the issue of parental fitness and child welfare, as are the parent's conduct prior to imprisonment and during the period of incarceration." See, also, *In re Adoption of Kurth,* 16 Wash. App. 579, 557 P.2d 349 (1976); *In re Guardianship of Davidson,* 259 So. 2d 762 (Fla. App. 1972); *Matter of Troy,* 27 Or. App. 185, 555 P.2d 933 (1976).

The facts in this case, considered by the juvenile court initially, and now considered by this court reviewing the order of termination de novo, establish that not only did Ditter commit the murder but he did so in such a manner that it must have a lasting effect on the children. Ditter now asks this court, as well as his children, to put out of mind the fact that after ordering the mother to remove all of her clothing, thereby subjecting her to the utmost humiliation, and while she begged for her life in the presence of two law enforcement officers who could not stop him, he fired four bullets into her for no reason

other than to show her who was boss. Ditter argues to us that he is now rehabilitated and has found a new way of life. If that is true, we are delighted and commend him for his efforts, but we are unable to turn the clock back. What was done is indelible and cannot be so quickly set aside. We also have testimony to the effect that if not restrained by incarceration, Ditter might once again revert to his previous lifestyle of violence and destruction.

While we have frequently held that the right of the parent to maintain the custody of his or her children is a natural right, we have likewise held that it is not an inalienable right and the public has a paramount interest in the protection of the rights of a child. *In re Interest of J.L.L.,* 209 Neb. 76, 306 N.W.2d 175 (1981); *State v. A.H.,* 198 Neb. 444, 253 N.W.2d 283 (1977); *State v. Logan,* 204 Neb. 204, 281 N.W.2d 753 (1979). Not only are we confronted with a situation where these children arrived at their difficult situation by reason of their father's vicious acts, but we further have the fact that this father is not able to provide these children with any parental support, either physically, emotionally, or financially, during their minority. When asked at oral argument how Ditter could provide any parental care for the children, counsel for Ditter indicated that he could talk to them during visiting hours at the penitentiary. Moreover, he asserted that Ditter should be afforded the right to keep his parental rights so that he could arrange for the termination himself at his choice and select the family to adopt his children. At least he was realistic to recognize that adoption for these children is the only way in which they may yet have any semblance of a family unit and receive any family love and affection from a set of parents. That being the case, Ditter is not entitled to make that decision under the circumstances in this case. The record establishes by clear and convincing evidence that the best interests of these minor children in this

case demand that Ditter's parental rights be terminated now so that a full and future life for these minor children can yet be provided. The judgment of the District Court affirming the action of the juvenile court terminating the parental rights of David Ditter to his two minor children is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

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STATE OF NEBRASKA, APPELLEE, V. RANDY S. GORE, APPELLANT.

322 N.W.2d 438

Filed July 23, 1982. No. 81-910.

1. **Evidence: Appeal and Error.** This court will not entertain objection to the admission of evidence when no objection thereto has been made in a proper and timely fashion at the trial level.
2. **Convictions: Appeal and Error.** This court will not set aside a conviction unless the defendant meets his burden of showing that the error claimed created not merely a possibility of prejudice but, rather, that it worked to his actual prejudice.

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

James P. Miller and Owen A. Giles, for appellant.

Paul L. Douglas, Attorney General, and Shanler D. Cronk, for appellee.

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

CAPORALE, J.

This criminal appeal originates from defendant-appellant's conviction by the District Court of Nebraska, Second Judicial District, in and for Sarpy County, pursuant to a jury verdict on charges of attempted first degree assault and burglary.

Defendant, Randy S. Gore, urges that the trial

court abused its discretion by (1) receiving evidence of an "excessive" number of defendant's prior misdemeanor convictions, and (2) allowing defendant to be cross-examined on convictions which did not involve dishonesty or false information.

The record is such that the jury could find the defendant, recently released from jail, visited his ex-wife Patricia Gore's apartment in the afternoon of July 10, 1981, at which time one Mike Raven was present. At that time defendant expressed displeasure at Raven's presence; he left and later reappeared at the apartment with his brother-in-law. On this occasion defendant and Raven argued and defendant again left. Raven spent the night at the apartment with Mrs. Gore. At about 1 a.m. she discovered defendant, who had pried open the patio door to gain entrance, inside the apartment. Mrs. Gore sprayed defendant with Mace in an unsuccessful attempt to get him to leave the apartment. Raven secluded himself in a bedroom and asked Mrs. Gore to call the police. She ran next door to the home of Gary and Linda Millsap to comply. Defendant, after attempting to kick down the bedroom door at Mrs. Gore's apartment, went outside. At that point Raven ran downstairs and out the front door, whereupon he was attacked by defendant with a tire iron. Raven proceeded to the Millsap house and was followed by defendant, who then attacked the front door of the neighbor's apartment. At this point defendant kicked at the neighbor's front door while at the same time yelling obscenities and threats to kill Raven. There is evidence that Raven had a knife. Defendant was accompanied during this time by a friend, Kenneth Woods, who was and had been outside the apartment. The police subsequently arrived; Mr. Millsap and Raven went outside, at which time defendant again attacked Raven. Woods also attacked Raven and defendant then

again attacked Raven while continuing to make threats on Raven's life.

During defendant's direct examination he testified that as a result of the divorce action filed by his ex-wife in 1981, he did some "stupid things"; that he had been arrested and convicted of six or seven misdemeanor crimes for "[d]isorderly conduct, false information to a police officer, assault, assault, assault," and that the assaults involved his ex-wife and sister. During cross-examination of defendant the court received, without objection, an Omaha Municipal Court register of misdemeanor actions concerning a March 13, 1981, assault and battery upon Patricia Gore by defendant. The court also received in evidence, without objection, three other misdemeanor registers of action. These concerned a disorderly conduct charge, an assault and battery charge, and a damage to property charge, all arising from an April 29, 1981, incident between defendant and his sister. In addition the court received, over defendant's objection, three other misdemeanor registers of action. These dealt with charges against defendant for resisting arrest and giving false information concerning a September 2, 1981, incident and a false information charge concerning a May 9, 1981, incident.

Defendant argues that the misdemeanor convictions which do not involve dishonesty or false statements were inadmissible under the provisions of Neb. Rev. Stat. § 27-609(1) (Reissue 1979), which provides: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment."

The problem with that argument is that this court will not entertain objection to the admission of evidence when no objection thereto has been made in a proper and timely fashion at the trial level. *Lindgren v. City of Gering,* 206 Neb. 360, 292 N.W.2d 921 (1980); *Scudder v. Haug,* 201 Neb. 107, 266 N.W.2d 232 (1978); *Erving v. State,* 174 Neb. 90, 116 N.W.2d 7 (1962), *cert. denied* 375 U.S. 876, 84 S. Ct. 151, 11 L. Ed. 2d 121 (1963); *Dutcher v. State,* 16 Neb. 30, 19 N.W. 612 (1884).

It may well be that in view of defendant's prior testimony the registers themselves were cumulative evidence. In this regard we note that defendant objected, without stating as a ground that this evidence was cumulative, to only three of the ten documents regarding prior misdemeanor convictions received in evidence. He had already told the jury about the events covered in two of those documents; he had not testified about resisting arrest. In view of the totality of the record it cannot be said that the one item which was not previously disclosed by defendant on direct examination prejudiced him.

This court will not set aside a conviction unless the defendant meets his burden of showing that the error claimed created not merely a possibility of prejudice but, rather, that it worked to his actual prejudice. *State v. Smith,* 187 Neb. 152, 187 N.W.2d 753 (1971); *State v. Stroh,* 181 Neb. 24, 146 N.W.2d 756 (1966); *United States v. Frady,* 456 U.S. 152, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982).

We find the defendant had a fair trial and affirm the judgment of the trial court.

AFFIRMED.

MCCOWN, J., dissenting.

The critical issue in this case involves the admissibility of evidence that the defendant has been convicted of a crime, when the evidence is offered for the purpose of attacking the credibility of the de-

fendant witness under the provisions of Neb. Rev. Stat. § 27-609 (Reissue 1979).

The relevant portion of that statute provides: "(1) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment." The remaining portions of the section make evidence of a conviction, even though otherwise within the terms of the rule, inadmissible under certain circumstances not relevant here.

Section 27-609 replaces previous Neb. Rev. Stat. § 25-1214 (Reissue 1964). That section provided: "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof." It will be noted that the only essential change in the language of the two statutes redefines a "felony" in terms of the length of imprisonment, and broadens the statute to include evidence of a conviction of a crime other than a felony, but only if the crime involved dishonesty or false statement. See *State v. Lang,* 197 Neb. 47, 246 N.W.2d 608 (1976). Under the former statute, evidence of conviction of any misdemeanor was wholly inadmissible.

Under the former statute this court held that if a defendant in a criminal prosecution admits that he has previously been convicted of a felony, it was error for the court to permit the prosecution to inquire as to the character of the offense or to permit the record of the conviction to be introduced. See, *Vanderpool v. State,* 115 Neb. 94, 211 N.W. 605 (1926); *Bosteder v. Duling,* 115 Neb. 557, 213 N.W. 809 (1927). That rule has been consistently followed.

In *State v. Kallos,* 193 Neb. 113, 225 N.W.2d 553 (1975), this court held that where a witness on cross-examination admits previous conviction of a felony, it was error to allow further inquiry of the witness on the subject other than as to the number of his prior felony convictions. This court said: "We have previously held that the above statute proscribes and limits the scope of any inquiry initiated by the State that may be made on cross-examination of a defendant, or any witness, in a criminal case. It permits inquiry of the defendant, or any witness, when he is a witness, if he was previously convicted of a felony. If the answer is in the affirmative, he may be asked the number of such convictions, and if the answer is correctly given, the inquiry must end there. The purpose of the restricted inquiry permitted by the statute is for whatever effect the facts of a previous conviction may have on the credibility of the defendant, or witness, as a witness and not for the purpose of tending to show he is prone to engage in criminal actions. . . . 'The inquiry made by authority of this statute . . . should be confined to a question or questions in proper form, and the witness should be required to answer specifically and directly. Neither the cross-examiner nor the witness should be allowed to wander or explain, but should be confined to the narrow limits fixed by the statute.' " *Id.* at 120-21, 225 N.W.2d at 557.

In *State v. Boss,* 195 Neb. 467, 238 N.W.2d 639 (1976), this court held that when a defendant testifies on his own behalf, the prosecuting attorney may question him as to his previous convictions for felony and the number thereof, but no details as to the nature of the charges or other details may be elicited or received.

This court noted in *State v. Lingle,* 209 Neb. 492, 308 N.W.2d 531 (1981), that the new statute neither directly adopts nor rejects the holding in *State v. Kallos, supra.* There is no apparent reason to alter

our previous holdings simply because misdemeanors involving dishonesty or false statements have now been included with felonies.

In the case at bar the prosecutor's cross-examination of the defendant began by asking the defendant whether or not there were 64 entries on the defendant's misdemeanor record. Defendant's counsel objected. The defendant answered: "Yeah, right, if you want to count - -." The court told the defendant to let his attorney speak first and the defendant's counsel then objected again and asked permission to approach the bench. Following the conference, the court did not rule on the objection or advise the jury to disregard the question or the answer. The prosecutor simply began on another subject. Later the prosecutor asked the defendant if he had been convicted of assault and battery on Patricia Gore, and the defendant answered that he believed he had pleaded guilty to it. The record of that conviction was offered and objected to on the ground of no sufficient and proper foundation. After counsel had approached the bench and after some discussion apparently involving two exhibits, the exhibit was reoffered and the defendant's counsel stated no objection. The exhibit received included not only the record of the conviction for assault and battery but included a record of the sentencing, a copy of the complaint, and even the affidavit of the complaining witness. Thereafter, the prosecutor cross-examined the defendant with respect to various other misdemeanors involving various offenses, including resisting arrest, false information, disorderly conduct, assault and battery, damage to property, and similar incidents. The prosecution offered exhibits 16 through 24 to establish the convictions on these offenses, in most instances after the defendant had admitted his conviction. The defendant's counsel objected to 6 of the 9 exhibits of convictions on the ground that they were incompetent, irrelevant, and

immaterial to the issue at bar, but stated that he had no objection to 3 of them. The court sustained the objection as to 3 disorderly conduct convictions and admitted all the others. Each of these exhibits also included the complaint and sentencing information, although they did not include the affidavits of the complaining witnesses.

The basic intent of § 27-609 is to preserve the defendant's right to a fair trial and to assure that the defendant should not be found guilty of the crime with which he is charged simply because he has previously been convicted of other crimes and not because of his specific guilt of the offense with which he is charged. 1 Jones on Evidence § 162 (5th ed. 1958). See, also, 2 Wigmore on Evidence § 302 (3d ed. 1940).

As this court stated in *State v. Casados,* 188 Neb. 91, 96-97, 195 N.W.2d 210, 214 (1972): "The rule excluding such evidence of other independent crimes is one of the distinguishing features of our common law jurisprudence and it rests on fundamental demands for justice and fairness which nourish the roots of our whole system of justice. . . .

. . . .

"It is a fundamental concept of our criminal law that an accused, whether guilty or innocent, is entitled to a fair trial. It is not only the duty of the trial court but of the prosecutor as well to see that he gets one."

In the case at bar it is apparent that the prosecutor set out to establish that the defendant had been convicted of independent misdemeanor crimes, most of which were clearly inadmissible under the statute in any event. The only excuse for going into such issues apparently is that the defendant, on direct examination, admitted convictions for misdemeanors which are not even within the scope of the statute and presumably may have misstated the total number of his misdemeanor convictions. Such

reasoning assumes that a defendant who testifies on direct examination in a criminal case that he has previously been convicted of one or more specific independent misdemeanors thereby waives the benefit of § 27-609 unless he continuously objects when evidence or testimony is tendered which is inadmissible under the statute. It seems obvious that a defendant witness in a criminal case who testifies on direct examination that he has been convicted of a specific independent crime does not thereby waive his rights under § 27-609, or his right to a fair trial.

The majority opinion tacitly approves the blatant violation of a defendant's rights to a fair trial upon the ground that the defendant's counsel did not object at every possible opportunity, and that the violations properly objected to were only a few and therefore not actually prejudicial. A prosecutor's deliberate and repeated disregard of long-established statutory and decisional requirements which attempt to protect a defendant's right to a fair trial ought not to be excused because defendant's counsel did not object often enough. On at least four occasions inadmissible evidence was admitted over timely objections. The fact that 10 or 20 other additional objections could have been made but were not does not alter the question of whether the defendant had a fair trial. The right to a fair trial ought not to depend upon a perfect performance by defendant's counsel. The conviction in this case should be reversed and the cause remanded for a retrial.

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STATE OF NEBRASKA, APPELLEE, V. LARRY PITTS, APPELLANT.

322 N.W.2d 443

Filed July 23, 1982. No. 82-021.

1. **Criminal Law: Witnesses: Testimony.** When a defendant in a

criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination.

2. **Witnesses: Testimony: Appeal and Error.** When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded.

James P. Miller and Owen A. Giles, for appellant.

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

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

CAPORALE, J.

Defendant-appellant, Larry Pitts, was tried by a jury in the District Court of Nebraska, Second Judicial District, in and for Sarpy County, on a charge of first degree sexual assault. We reverse and remand for a new trial.

In view of the following analysis and disposition, we discuss only the assignment of error that the trial court abused its discretion in allowing appellant to be cross-examined with respect to certain misdemeanor convictions.

In response to direct examination questions, defendant testified that he had "misdemeanor crimes" while a resident of Knox, Indiana. He came to Bellevue, Nebraska, in late 1979 or early 1980. While a resident of Bellevue he was charged with resisting arrest, assault, and failure to obey a police officer.

The trial court permitted cross-examination, over objection of defendant's attorney, that in connection with the Bellevue incident he was not admitted to a

pretrial diversion program; he was sentenced and received probation; the terms of said probation required that he refrain from drug and alcohol use and attend a drug and alcohol school; and in reports to the probation office he had stated he was abstaining from the use of alcohol and drugs when in truth and fact he was not so abstaining.

He was further cross-examined, over the objections of his attorney, with respect to the Knox, Indiana, crimes. He testified he was arrested for public intoxication and disorderly conduct in 1979, and in 1980 for "probable cause for theft." A warrant was issued for failure to appear in connection with one of those charges. He further testified he was not convicted of theft. He was also arrested for criminal conversion and fined $29, costs, and restitution for stealing some gasoline, which fine and costs he failed to pay.

Defendant argues that inasmuch as the misdemeanor convictions do not involve dishonesty or false statements, they were inadmissible under the provisions of Neb. Rev. Stat. § 27-609(1) (Reissue 1979), which provides: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment."

We have held that when a defendant in a criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination. We have also held that when the object of the cross-examination is to collaterally ascertain the accuracy

or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error. *Erving v. State,* 174 Neb. 90, 116 N.W.2d 7 (1962), *cert. denied* 375 U.S. 876, 84 S. Ct. 151, 11 L. Ed. 2d 121 (1963), in part quoting the case of *Grandsinger v. State,* 161 Neb. 419, 73 N.W.2d 632 (1955). See, also, *Shepperd v. State,* 168 Neb. 464, 96 N.W.2d 261 (1959), to the same effect, in part quoting *Garcia v. State,* 159 Neb. 571, 68 N.W.2d 151 (1955), and citing *Grandsinger, supra.*

The question thus becomes whether the trial court abused its discretion by permitting the wide-ranging cross-examination of the defendant, over his attorney's objection, as to misdemeanors touched upon in direct examination. We find it did abuse its discretion.

Obviously, the proper limits of cross-examination would have been clearer to the trial court had defendant's direct examination been more skillful and artful. Defense counsel's strategy of taking the "sting" out of any anticipated cross-examination by the State as to defendant's prior record (keeping in mind the time limit imposed by § 27-609(2)) would have been better served by merely asking defendant whether he had been convicted of a crime which involved dishonesty or false statement. If the truthful response were negative, such a response should end the matter. Indeed, the State should not inquire at all. If the response was affirmative and truthful statements were then elicited as to the number of such convictions, that should ordinarily end the matter. It is inappropriate in such circumstances to elicit or receive any other details. See, *State v. Lingle,* 209 Neb. 492, 308 N.W.2d 531 (1981); *State v. Boss,* 195 Neb. 467, 238 N.W.2d 639 (1976); *State v. Kallos,* 193 Neb. 113, 225 N.W.2d 553 (1975); *State v. Craig,* 192 Neb. 347, 220 N.W.2d 241 (1974).

However, notwithstanding the inartful nature of defense counsel's direct examination, the cross-examination permitted was far too broad.

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

REVERSED AND REMANDED.

McCOWN, J., concurs in the result.

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STATE OF NEBRASKA, APPELLEE, V. NICHOLAS R. PEIFFER, APPELLANT.

322 N.W.2d 445

Filed July 23, 1982. No. 82-184.

1. **Criminal Law: Statutes: Sentences.** When an amendment which mitigates the punishment for a crime is enacted after commission of the crime but before final judgment, the punishment shall be that contained in the amendatory act unless the Legislature specifically indicates otherwise.
2. **Words and Phrases.** The phrase "before final judgment" includes cases on appeal.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed in part as modified, and in part reversed.

Dennis R. Keefe, Lancaster County Public Defender, and Jerry Soucie, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, McCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The defendant-appellant, Nicholas R. Peiffer, pled guilty to a charge of driving while intoxicated, third offense, in the Third Judicial District Court in and for Lancaster County, Nebraska. At the time of sen-

tencing this was a Class IV felony and carried a maximum punishment of 5 years' imprisonment, a $10,000 fine, or both. He was placed on 3 years' probation, one of the conditions of which was that he spend a total of six weekends in jail. Subsequently, an information was filed, to which defendant pled guilty, seeking revocation of probation. Violations included failure to report to the jail and failure to report to the probation officer. On February 16, 1982, defendant was sentenced to an indeterminate term of not less than 1 nor more than 2 years, and his license was suspended for a period of 1 year from and after discharge from confinement. He received credit for 37 days of prior incarceration time.

In this direct appeal defendant claims that his sentence is excessive and should be reduced in light of the recent passage of L.B. 568 by the Nebraska Legislature, which became effective July 17, 1982. This statute changes the offense to a Class W misdemeanor and modifies the maximum period of confinement to imprisonment. This statute also requires that the driving privileges of a person convicted of third-offense drunk driving be permanently revoked as a part of the judgment of conviction, as follows: "If such person (i) has had two or more convictions under this subsection since the effective date of this act, (ii) has been convicted two or more times under the subsection as it existed prior to the effective date of this act, (iii) has been convicted two or more times under a city or village ordinance enacted pursuant to this subsection as authorized by section 39-669.07 either prior or subsequent to the effective date of this act, or (iv) has been convicted as described in subdivisions (c)(i) to (c)(iii) of this subsection a total of two or more times, such person shall be guilty of a Class W misdemeanor and the court shall, as part of the judgment of conviction, order such person to never again drive any motor vehicle in the State of Nebraska for any purpose from

the date of his or her conviction and shall order that the operator's license of such person be permanently revoked."

Neb. Rev. Stat. § 29-2204.01 (Reissue 1979) provides: "In any criminal proceeding in which a sentence of confinement has been imposed and the particular law under which such sentence was pronounced is thereafter amended to decrease the maximum period of confinement which may be imposed, then any person sentenced under the former law shall be entitled to his discharge from custody when he has served the maximum period of confinement authorized by the new law, notwithstanding the fact that the court may have ordered a longer period of confinement under the authority of the former law." Appellant contends that statute requires that his sentence be reduced. We need not, and do not, decide this case under the terms of that statute. Rather, the applicable common law principle declared in *State v. Randolph,* 186 Neb. 297, 183 N.W.2d 225 (1971), *cert. denied* 403 U.S. 909, 91 S. Ct. 2217, 29 L. Ed. 2d 686, that when an amendment which mitigates the punishment for a crime is enacted after commission of the crime but before final judgment, the punishment shall be that contained in the amendatory act unless the Legislature specifically indicates otherwise, controls the disposition of this case. As observed in *Randolph,* in the absence of anything indicating a contrary legislative intent: " 'It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. . . .' " *Id.* at 302, 183 N.W.2d at 228. We find no evidence of a contrary legislative intent in the

instant matter. See, also, *State v. Rubek,* 189 Neb. 141, 201 N.W.2d 255 (1972). The phrase "before final judgment" includes cases on appeal. *State v. Waldrop,* 191 Neb. 434, 215 N.W.2d 633 (1974); *State v. Rubek, supra.* Therefore, it becomes clear that we must reduce defendant's sentence of confinement to the newly created maximum of 6 months' imprisonment.

However, there remains the issue as to whether, as contended by the appellee State, we are to permanently revoke appellant's driving privileges. Appellant argues that to do so would amount to an ex post facto application of a more onerous provision of the amended statute, and thus violate U.S. Const. art. I, § 9, which prohibits ex post facto legislation. We wish to hear oral argument on that issue, and consequently reserve it for later determination. Accordingly, we schedule that issue for oral argument at 9 a.m. on August 30, 1982. Each party is directed to file supplemental typewritten briefs on or before August 25, 1982, fully addressing the constitutional questions presented.

Since one's liberty ought not await our schedule, appellant is ordered released from custody when he has served a period of 6 months' imprisonment, with credit for 37 days spent in jail awaiting sentencing; if he has already served such time, he is to be discharged from custody forthwith.

AFFIRMED IN PART AS MODIFIED,
AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLEE, V. ALFRED K. PHILLIPS, APPELLANT.

322 N.W.2d 447

Filed July 23, 1982. No. 82-065.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed in part as modified, and in part reversed.

Ronald S. Depue of McDermott, Depue, McDermott & McDermott, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This case is controlled by our opinion in *State v. Peiffer, ante* p. 299, 322 N.W.2d 445 (1982). Defendant-appellant is ordered released from custody when he has served a period of 6 months' imprisonment; if he has already served such time, he is to be discharged from custody forthwith.

The question as to whether his driving privileges are to be permanently revoked is reserved for later determination.

The parties are directed to file supplemental typewritten briefs on or before August 25, 1982, concerning the constitutional questions presented by the issue as to whether defendant-appellant's driving privileges are to be permanently revoked.

AFFIRMED IN PART AS MODIFIED, AND IN PART REVERSED.

# STATE OF NEBRASKA, APPELLEE, V. EUGENE L. HUNT, ALSO KNOWN AS EARL CAMPBELL, APPELLANT.

322 N.W.2d 624

Filed July 30, 1982. No. 43885.

1. **Prior Convictions: Judicial Notice.** The Nebraska Supreme Court may examine and take judicial notice of its own proceedings and judgment where certain aspects of the controversy have been previously considered and determined, in cases which are interwoven and interdependent.
2. **Witnesses: Testimony.** As a general rule, identification testimony by one who has actually observed a crime is admissible and it is for the trier of fact to determine whether the testimony is worthy of credence.
3. _____: _____. A witness may testify to facts and circumstances on which the identification is based as a foundation for that identification.
4. **Effectiveness of Counsel.** The party challenging the adequacy of criminal trial representation has the burden of proving incompetence and of showing that such incompetence prejudiced the defense.
5. _____. The standard for deciding whether criminal defense counsel provided adequate representation is whether he performed at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and whether he conscientiously protected the interests of his client.
6. **Confessions.** In order for a confession to be admissible, it must have been freely and voluntarily given and must not have been obtained by threat or promise.
7. **Confessions: Appeal and Error.** The admission into evidence of the confession constitutes an independent determination by the trial court that the confession was voluntarily made. Such determination will not be set aside on appeal unless clearly erroneous.
8. **Identification Procedures.** The determination as to whether identification procedures were unnecessarily suggestive and conducive to a substantial likelihood of an irreparably mistaken identification is to be made by a consideration of the totality of the circumstances surrounding the procedures used.
9. _____. An in-court identification may be received when it is independent of and untainted by impermissible pretrial identification procedures.

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

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

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

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

CAPORALE, J.

This opinion involves two separate appeals from the Nebraska Fourth Judicial District Court, in and for Douglas County, arising from two separate trials of the same defendant-appellant, Eugene L. Hunt, also known as Earl Campbell, resulting from two separate occurrences. These matters, by some mysterious procedure not recognized by our rules, are presented to us in a single brief which also deals with still another trial involving the same defendant-appellant for a third occurrence. See case No. 43955. To further confuse the presentation, the crimes with which we deal in this opinion were charged in separate counts in a single complaint, tried separately, and reported in a single bill of exceptions. If it was counsel's thought that by treating all three appeals in a single brief we would consider evidence in any one case as evidence in one or both of the other cases, he was mistaken. It is true, although it is not argued, that in *State v. Losieau,* 180 Neb. 671, 144 N.W.2d 406 (1966), we took notice in a second post conviction case of facts recited in our own earlier post conviction opinion concerning a different conviction and sentence for the same appellant. However, the *Losieau* rule that we may examine and take judicial notice of our own proceedings and judgment where certain aspects of the controversy have been previously considered and determined, in cases which are interwoven and interdependent, has no applicability here. We are not here dealing with our own records; we are dealing with facts developed

and determined by others, which we then review pursuant to prescribed rules of law. Secondly, these prosecutions were not interwoven and interdependent; they resulted from three separate and distinct assaults, albeit from one arrest. In this instance we, as in case No. 43955, entertain the appeals presented; however, we do not approve of the methods employed herein. Our review of these cases is not to be construed as an indication that we will entertain future appeals presented to us in the same fashion.

We direct our attention first to the appeal resulting from the trial which commenced September 9, 1980. Therein the defendant was found guilty by a jury of first degree sexual assault. Judgment was imposed in accordance with that verdict. The defendant assigns as error the claims (1) that he was denied the effective assistance of counsel in that his attorney failed to move for the suppression of the in-court identification of the defendant, and (2) that the trial court erred in receiving defendant's confession in evidence. We find the assignments of error to be totally without merit and affirm the judgment of the trial court.

The victim in this case, at about 4 p.m. on May 1, 1980, was, while walking home from school, dragged to a secluded area, threatened with death, and forcibly sexually penetrated, as defined in Neb. Rev. Stat. §§ 28-318(5) and 28-319 (Reissue 1979), by the perpetrator.

The record clearly establishes that the victim had ample opportunity to identify her assailant during the course of the crime and that she pointed him out in open court during the course of the trial. The record is silent as to any pretrial identifications. As a general rule, identification testimony by one who has actually observed a crime is admissible and it is for the trier of fact to determine whether the testimony is worthy of credence. *Sanchell v. Parratt,*

530 F.2d 286 (8th Cir. 1976). A witness may testify to facts and circumstances on which the identification is based as a foundation for that identification. *Peery v. State,* 165 Neb. 752, 87 N.W.2d 378 (1958). See, also, *Wilshusen v. State,* 149 Neb. 594, 31 N.W.2d 544 (1948).

As we have stated many times in the past, the party challenging the adequacy of criminal trial representation has the burden of proving incompetence and of showing that such incompetence prejudiced his defense. *State v. Hunt, ante* p. 214, 322 N.W.2d 621 (1982); *State v. Journey,* 207 Neb. 717, 301 N.W.2d 82 (1981); *State v. Auger & Uitts,* 200 Neb. 53, 262 N.W.2d 187 (1978); *State v. Lang,* 202 Neb. 9, 272 N.W.2d 775 (1978). See, also, *Ford v. Parratt,* 638 F.2d 1115 (8th Cir. 1981).

The standard for deciding whether defense counsel provided adequate representation is whether he performed at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and whether he conscientiously protected the interests of his client. *State v. Hunt, supra; State v. Rust,* 208 Neb. 320, 303 N.W.2d 490 (1981). There is nothing in this record which even remotely suggests that any impermissibly suggestive method of identification was employed. No incompetence or prejudice can be implied by trial counsel's failure to do that which ought not be done.

Defendant is not on any sounder ground with respect to his second assignment of error. In order for a confession to be admissible, it must have been freely and voluntarily given and must not have been obtained by threat or promise. *State v. Hunt, supra; State v. Hunsberger,* 211 Neb. 667, 319 N.W.2d 757 (1982); *State v. McDonald,* 195 Neb. 625, 240 N.W.2d 8 (1976). The admission into evidence of the confession constitutes an independent determination by the trial court that the confession was voluntarily made. Such determination will not be set aside on

appeal unless "clearly erroneous." *State v. Hunt, supra; State v. Hunsberger, supra; State v. Williams,* 205 Neb. 56, 287 N.W.2d 18 (1979). Although there is evidence that there was an altercation at the time of defendant's arrest at between 7 and 8 p.m. on May 6, 1980, the evidence shows a dispute as to the extent and nature of defendant's injuries and the handling of defendant by the police at the scene. There is evidence that defendant required no medical attention, made no complaint about being thirsty, sleepy, or hungry, was given timely *Miranda* warnings, and confessed at about 2 a.m. without coercion or duress. In view of the conflict in the evidence it cannot be said the trial court's determination that defendant's confession in this case was freely, voluntarily, and knowingly given is clearly erroneous.

The judgment of the trial court in connection with the trial which commenced September 9, 1980, is affirmed.

We now review the appeal arising from the trial which began November 3, 1980. The trial court imposed judgment in accordance with the jury's verdict finding defendant guilty of first degree sexual assault and of the use of a firearm to commit a felony. Defendant again urges that he was denied effective assistance of counsel in that his attorney did not move to suppress pretrial and in-court eyewitness identification of him, and that the admission into evidence of his confession was erroneous. We find these assignments of error to be without merit and affirm the judgment of the trial court.

On April 6, 1980, at approximately 10:30 or 11 p.m., the perpetrator accosted the victim while she was walking home from her brother's house to her own, threatened her with a gun, took her to a garage, and sexually penetrated her with force within the meaning of §§ 28-318(5) and 28-319.

The identification of the defendant began with a composite drawing made by the police based upon

the victim's description. Subsequently the victim was shown two sets of photographs which led to no identifications. Later she was shown a set of seven photographs in which the defendant was portrayed twice. Her testimony indicates that on this occasion she unhesitatingly identified the photographs of the defendant as those of the perpetrator. Detective Farmer testified she identified him even before encountering his photograph for the second time. Further, she identified the perpetrator in the courtroom. In addition, another victim also identified the defendant in this trial as the perpetrator of a sexual assault upon her. That victim also testified that she had identified the defendant from the same set of seven photographs as did the victim in this case.

The rules relating to the standard of competency required in criminal representation and the burden of proof in regard thereto have been discussed in the earlier part of his opinion. The determination as to whether identification procedures were unnecessarily suggestive and conducive to a substantial likelihood of an irreparably mistaken identification is to be made by a consideration of the totality of the circumstances surrounding the procedures used. *State v. Hunt, supra; State v. Harris,* 205 Neb. 844, 290 N.W.2d 645 (1980). See, also, *State v. Joseph,* 202 Neb. 268, 274 N.W.2d 880 (1979); *Simmons v. United States,* 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). We cannot conclude from the record that there were employed during pretrial any impermissibly suggestive methods conducive to a substantial likelihood of an irreparably mistaken identification. Failure to file a motion which should not have been successful cannot be said to constitute incompetence. Moreover, it appears that the victim in this case had ample opportunity to observe her assailant and she identified him in the courtroom from that recollection of his features. Even if there had been, and there were not, impermissible pretrial sugges-

tions as to the perpetrator's identity, an in-court identification may be received when it is independent of and untainted by impermissible pretrial identification procedures. *State v. Auger & Uitts,* 200 Neb. 53, 262 N.W.2d 187 (1978). Thus, no prejudice could be shown to have occurred in any event.

As to the second assignment, the rules relating to determining the voluntariness of confessions have been discussed in the earlier portion of this opinion. Defendant waived his *Miranda* rights and the recorded confession in this case was given shortly after 2 a.m. the day following the arrest, which took place on May 6, 1980. Again, there is a conflict in the evidence as to the substantiality of the injuries sustained by the defendant in the struggle surrounding the arrest, his physical and mental condition at the time of the confession, and whether he asked for medical assistance. Those conflicts were resolved against the defendant by the triers of fact and it cannot be said the trial court's determination that the confession was freely, voluntarily, and knowingly given is clearly erroneous.

The judgment of the trial court concerning the trial which commenced November 3, 1980, is affirmed.

AFFIRMED.

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NUCOR STEEL, A DIVISION OF NUCOR CORPORATION, A DELAWARE CORPORATION, APPELLEE, V. FRED A. HERRINGTON, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.

322 N.W.2d 647

Filed July 30, 1982. No. 44240.

**Taxation: Sales.** Where graphite electrodes are used in the manufacture of steel for the dual purpose of providing essential carbon for the steel manufacturing process and for the conduction of elec-

tricity which provides heat for the process, and where a substantial part of the graphite electrodes enters into and becomes an essential ingredient or component part of the finished steel and the remainder is consumed in the manufacturing and refining process, the use of such graphite electrodes in the manufacturing and processing of steel for ultimate sale at retail is not subject to taxation under the provisions of Neb. Rev. Stat. §§ 77-2702 and 77-2703 (Reissue 1981).

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

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

Murray Ogborn of Nelson & Harding, for appellee.

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

MCCOWN, J.

The plaintiff, Nucor Steel, filed a claim with the Tax Commissioner of the State of Nebraska for refund of state and local use taxes paid on its purchase and use of graphite electrodes in connection with the manufacture of steel. The Tax Commissioner denied the claim and Nucor appealed to the District Court for Lancaster County. On appeal the District Court reversed the order of the Tax Commissioner and granted the claim for refund. The Tax Commissioner has appealed.

Nucor Steel is a division of a Delaware corporation. Nucor is engaged in the business of making and selling steel and steel products, and its primary place of business is in Norfolk, Nebraska. The personal property upon which the taxes in this case were imposed consists of graphite electrodes used by Nucor in the steel-making process. The electrodes are cylindrical, approximately 16 inches in diameter and 72 inches long. Each electrode weighs approximately 875 pounds and is composed solely of graphite. The electrodes cost $726 each.

Nucor manufactures steel in electric arc furnaces.

Scrap metal is deposited in the arc furnaces in the meltdown phase of the process and three electrodes are lowered into the furnace and electricity is run through them to form an arc between the electrodes and scrap metal, creating tremendous heat which melts the scrap. When the scrap metal is completely melted, the electrodes are swung away and another load of scrap deposited into the furnace and melted. Four loads or "charges" are melted in one "heat," totaling approximately 50 tons.

The second stage of the process is the refining stage. During this stage of the process the electrodes are immersed in the liquid slag, which forms a cap on the molten metal underneath, and the electric arc continues to discharge, raising the temperature of the molten metal and adding carbon. Sufficient carbon must be present to create a "carbon boil" which agitates the molten metal so that impurities rise to the surface and become part of the slag. During this phase critical components of the steel are added and the metal is tested several times to insure they are present in the proper proportions. Carbon is the most important of the critical ingredients in steel. The graphite electrodes are virtually pure carbon.

At this stage of the process if it is determined that the carbon content is low, carbon is added by one of three methods. If the deficiency is small, crushed electrode material from broken electrodes which has been previously salvaged is directly added. Carbon coke is used if crushed electrode material is not available. If the deficiency is substantial, the electrodes are lowered into the molten bath and allowed to dissolve. If carbon in excess of specifications is present at this point in the refining stage, oxygen is introduced into the furnace to remove the excess carbon by the formation of carbon dioxide.

At the end of the refining process the slag is poured off and the molten steel continuously cast

into water-cooled molds where it hardens in the form of steel billets. Approximately 80 percent of the steel Nucor produces is cast to customer's specifications as to the content of carbon, manganese, phosphorus, and sulphur. The carbon content is the most important ingredient of the four and is the main strengthening agent in steel.

Nucor's finished steel product contains from .08 percent to 1 percent carbon, depending upon the customer's specifications. The average Nucor steel product contains approximately .25 percent carbon. Nucor's Norfolk plant produces an average of 23,000 tons of steel per month. Based on the electrodes used and the amount of steel produced in the year of the hearing, Nucor's electrodes are used at the rate of 10 pounds per ton of steel cast. The electrodes are used in a continuous-feed process. During the steel-making process carbon is added in several ways and an undetermined amount of carbon is present in the scrap metal, which may vary from .08 percent to 1 or 2 percent carbon. Carbon from the electrodes oxidizes during the meltdown stage, most of which escapes as gas. During the meltdown stage, pieces of the electrodes break off and fall into the furnace. Small pieces are allowed to remain in the molten bath and dissolve. Larger pieces are removed, crushed, and used as a carbon source in the refining stage. Through a chemical reaction during the refining stage carbon passes directly from the electrodes into the molten steel.

It is undisputed that the graphite electrodes are not a fuel and that part of the electrodes becomes a component of the finished steel product. The electrodes both conduct electricity and supply carbon to the product. One of the expert witnesses for Nucor testified that 54.5 percent of the carbon from the electrodes enters the steel during the manufacturing process. That percentage does not reflect the oxidation of the electrodes that occurs during the melt-

down process and escapes as gas, which cannot be measured. The 54.5 percent figure reflects the total amount of carbon from the electrodes which enters the steel during the process, although the part remaining in the finished product may be less if carbon content has to be reduced at the end of the refining stage.

An expert for the Tax Commissioner doubted the accuracy of those figures and expressed the view that a larger amount of carbon is oxidized during the carbon boil and released as carbon dioxide. He conceded, however, that there was no way to determine the exact amount of gases which escape.

Graphite electrodes are the common type of electrode used in electric arc furnaces. Various metals are all better conductors than graphite, but graphite electrodes are used by Nucor because they are the most economical, contribute carbon to the steel, and are the most readily available. If metal electrodes were used or if the electrodes did not introduce carbon into the steel, it would be necessary to add carbon from another source.

On September 22, 1978, Nucor filed its claim for refund of state and local use taxes paid on its purchase and use of graphite electrodes in its manufacturing process. At the formal hearing before the Tax Commissioner the claim was amended to cover the period from September 1, 1975, through July 31, 1978, in the amount of $141,795.46. On December 21, 1978, the Tax Commissioner denied the claim. He found that under Neb. Rev. Stat. § 77-2702 (Reissue 1981), a taxable use had been made of the electrodes because of "the complete use of them in the steel-making process as conductors in the electric arc furnace." He found that the question of whether the electrodes entered into or became an ingredient or component part of the steel was immaterial because it would not change the taxable nature of the use of them as part of the furnace in the production of steel. The

commissioner also found that some percentage of the carbon from the electrodes did enter into and remain a part of the finished steel product. This percentage, he found, was not shown with any accuracy but might vary from a de minimis amount to over 50 percent.

On appeal the District Court found that the graphite electrodes were used so that carbon therefrom did enter into and become an ingredient and component part of the finished steel product. The District Court also found that it was not necessary that the sole or only purpose for use of the electrodes was incorporation in the end product and that the electrodes used by Nucor were used for two purposes or functions, both of which were significant and not merely incidental. The District Court reversed the decision of the Tax Commissioner and entered judgment for the plaintiff for the refund sought. The Tax Commissioner has appealed.

Neb. Rev. Stat. § 77-2703(1) (Reissue 1981) imposes a tax "upon the gross receipts from all sales of tangible personal property sold at retail in this state . . . ." Section 77-2703(2) imposes a use tax on the "storage, use, or other consumption in this state of tangible personal property purchased, leased, or rented from any retailer . . . for storage, use, or other consumption in this state . . . ."

The statutory definitions of "sale at retail," "storage," and "use" specifically do not include "tangible personal property which will enter into or become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail." See § 77-2702(11)(a), (17), and (20).

The Tax Commissioner maintains that the primary function of the graphite electrodes is to generate heat to melt metal and that they are a part of manufacturing equipment. He contends that although at least a part of the electrodes enters into

and becomes an essential ingredient and component part of the processed steel, and meets the express term of the statute, that fact is immaterial because the purpose of providing carbon is only incidental.

Both parties rely on *American Stores Packing Co. v. Peters,* 203 Neb. 76, 277 N.W.2d 544 (1979). In that case this court held that the cellulose casings used in the manufacture of skinless frankfurters did not become an ingredient or component part of the finished product. This court found that the casings served the indispensable function of a mold and the fact that some portion of glycerin was transferred into the finished product, which already contained glycerin, was incidental. This court specifically upheld the Tax Commissioner's determination that the cellulose casings in that case did not enter into or become an ingredient or component part of the meat products involved. We distinguished steel processing cases in which the property involved was an essential component that entered into the chemical process of making steel.

In many cases differences in the statutory definitions make comparisons difficult. However, *Boswell v. Abex Corporation,* 55 Ala. App. 477, 317 So. 2d 314 (1975), *cert. denied* 294 Ala. 334, 317 So. 2d 317, involved the identical steel manufacturing process and issues which are involved in the case at bar. The Alabama use tax statute was almost identical to the Nebraska statute. It excepted tangible personal property or products "which enter into and become part of" the finished product. The Alabama court held that purchases of graphite electrodes were not subject to the tax because the graphite became an ingredient or component part of the manufactured product, regardless of whether the providing of graphite was the dominant purpose of the purchase of such property or not. The Alabama court held that "the crucial test is whether a part of the carbon electrode becomes an ingredient or component part

of the manufactured product, and clearly and without dispute it does." *Id.* at 480, 317 So. 2d at 317.

In *Robertson & Associates (Ala.), Inc. v. Boswell,* 361 So. 2d 1070 (Ala. 1978), the Alabama Supreme Court restated the test on the basis of whether the manufacturer used the material with the intent and purpose of making it an ingredient or component part of the finished product or whether its presence in the finished product was merely incidental to its primary function. The Alabama court did not directly pass upon the issue of whether or not a primary purpose of the use of graphite electrodes was to supply carbon, but rested its decision on the fact that the graphite electrodes were intended to become an ingredient or component part of the finished product and were within the specific language of the statute, regardless of the proportionate amount of carbon which remained in the finished product.

Texas, with a similar statutory provision, has also followed the Alabama court in its determination. See *Bullock v. Lone Star Industries, Inc.,* 584 S.W.2d 386 (Tex. Civ. App. 1979).

The cases cited by the Tax Commissioner are distinguishable because the taxed substance was only incidentally added to the final product rather than being an essential ingredient or component part of the finished product. In the case at bar the testimony is undisputed that carbon is an essential ingredient of steel and that the graphite electrodes involved here conduct electricity and supply carbon to the finished product, and were used for both purposes. There is also testimony that 54.5 percent of the graphite electrodes enters the steel during the manufacturing process. It is equally clear that the entire substance of the graphite electrodes involved here either enters into and becomes an ingredient or component part of the finished steel or is consumed in the process of manufacturing.

Some state statutes except not only property which enters into and becomes a component part of the finished product but also except property used or consumed in the manufacturing process, thus creating a form of dual primary purposes. See, *Shoe Corp. v. Kosydar,* 41 Ohio St. 2d 68, 322 N.E.2d 668 (1975); *Emery Indus. v. Kosydar,* 43 Ohio St. 2d 34, 330 N.E.2d 686 (1975).

On the facts in the present record the trial court correctly determined that the graphite electrodes were used in this case for two primary purposes and functions and that a substantial amount of the graphite electrodes entered into and remained an ingredient and component part of the finished steel product. The electrodes involved here were within the specific terms of the statute and we see no reason to read into the statute a requirement that a majority of the substance used must remain in the finished product in order to make the purpose of its use primary. There is no justification for holding that the purpose of using a substance which is an essential and critical ingredient of the finished product is not a primary and important purpose simply because there is also another reason for using the substance which is also important. It is tacitly conceded that if the graphite involved here was used in a form other than an electrode, it would not be subject to tax. The fact that the same substance can serve an additional purpose in the manufacturing process if it is in the form of an electrode does not change the factual reality or the terms of the tax statute.

Where graphite electrodes are used in the manufacture of steel for the dual purpose of providing essential carbon for the steel manufacturing process and for the conduction of electricity which provides heat for the process, and where a substantial part of the graphite electrodes enters into and becomes an essential ingredient or component part of the fin-

ished steel and the remainder is consumed in the manufacturing and refining process, the use of such graphite electrodes in the manufacturing and processing of steel for ultimate sale at retail is not subject to taxation under the provisions of §§ 77-2702 and 77-2703.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

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"L" INVESTMENTS, LTD., A PARTNERSHIP, APPELLANT, V. ELEANOR LYNCH, APPELLEE.

322 N.W.2d 651

Filed July 30, 1982. No. 44256.

1. **Damages: Property.** 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.
2. _____: _____. Except as otherwise hereinafter limited, where an improvement upon realty is damaged without damage to the realty itself and where the nature of the thing damaged is such that it is capable of being repaired or restored and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent damage is the reasonable cost of repairing or restoring the property in like kind and quality. This would be in addition to any other consequential damages which the injured party may establish by proper proof. If, in fact, the cost of repair or restoration exceeds the market value of the property just before the injury, then the proper measure of damages is the market value of the property just before the damages were incurred, less any salvage.
3. **Damages: Property: Proof.** The burden of establishing the cost of repair shall be upon the party seeking recovery. If the party against whom recovery is sought believes that the cost of repair exceeds the market value of the property just before damage, then the burden shall be upon such party to introduce evidence to establish that fact, and it will then be up to the trier of fact to determine which of the two measures of damages should be employed. Absent evidence that the cost of repair or restoration exceeds the market value of the property just before damage, it will be pre-

sumed that the cost of repair or restoration does not exceed the market value of the property just before damage.

4. **Case Overruled.** To the extent that *Hunt v. Chicago, B. & Q. R.R. Co.*, 180 Neb. 375, 143 N.W.2d 263 (1966), is to the contrary, it is overruled.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded with directions.

Marianne Clare Vainiunas of Marks, Clare, Hopkins, Rauth & Cuddigan, for appellant.

Eugene L. Hillman of McCormack, Cooney, Mooney & Hillman, P.C., for appellee.

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

KRIVOSHA, C.J.

This case presents to the court the question of what is the proper measure of damages when recovery is sought for the negligent damage to an improvement which is a part of the real estate, when the property can be repaired or restored. Initially, this case was tried in the municipal court of the city of Omaha, Nebraska, and resulted in a judgment in favor of the property owner. On appeal to the District Court for Douglas County, Nebraska, the trial court, relying upon what appears to be at least one of the rules of law in Nebraska at the present time, reversed the judgment and dismissed the action. In view of the fact that we believe the applicable rule should be otherwise, we reverse the action of the trial court.

The record discloses that on September 25, 1977, appellee Eleanor Lynch (Lynch), while operating a motor vehicle owned by John B. Sheffield, struck a building located at 1492 South 16th Street in the city of Omaha, Nebraska, and owned by the appellant, "L" Investments, Ltd. ("L" Investments).

"L" Investments filed a petition in the municipal

court of the city of Omaha, Nebraska, alleging that "L" Investments was the owner of the property which was struck by Lynch on September 25, 1977, when the automobile she was driving collided with the south side of the building. The petition further alleged that the building was damaged by the collision and that such damage was proximately caused by the negligence of Lynch. The acts of negligence were specifically set out in the petition. The petition further alleged that as a direct and proximate result of the negligence of Lynch, "L" Investments was damaged in the amount of $3,200. Although Sheffield and Lynch filed an answer denying generally all of the allegations of the petition, just before trial commenced Lynch admitted liability but denied that her negligence caused the damages claimed by "L" Investments. During the course of the trial in the municipal court, testimony was adduced to establish that as a result of the accident a portion of one of the outer walls measuring 8 feet by 4 feet was pushed in and damage was done to both the wall itself and several windows located in the wall. Testimony further established that the building itself was approximately 100 feet by 100 feet. Further testimony was adduced by "L" Investments which established in great detail how the repairs would be made to the property and what the cost would be. A complete breakdown of how the cost of repairs in the amount of $2,640 was arrived at was testified to by an expert called by "L" Investments. Following the trial, the trial court entered judgment for "L" Investments and against Lynch in the sum of $2,640. Sheffield was dismissed from the lawsuit by "L" Investments before judgment and may be disregarded for purposes of this appeal.

Lynch then appealed to the District Court for Douglas County, Nebraska, and a hearing de novo on the record was held on February 19, 1981. The trial court, relying upon what it correctly understood

to be the rule in Nebraska, as announced in *Hunt v. Chicago, B. & Q. R.R. Co.*, 180 Neb. 375, 143 N.W.2d 263 (1966), found that the injury sustained by "L" Investments as a result of Lynch's negligence was temporary in character and that therefore the proper measure of damages for recovery was the cost of restoration, if less than the diminution in value measured by the difference in value of the premises immediately before the accident and immediately after the accident. The District Court further found that the record was wholly lacking as to any evidence concerning the diminution in value to the real estate caused by the accident. Therefore, the court concluded that "L" Investments had failed to establish the fact that the cost of the repairs was less than the diminution in value to the property, and could not recover. The judgment of the municipal court was reversed and the case was dismissed.

As we indicated at the outset, this case presents to the court an opportunity to clarify what should be the rule of law regarding the proper measure of damages to be awarded where injury is caused to an improvement located upon the real estate and the injury can be repaired or the improvement restored. One might anticipate that the answer to that question would be relatively simple. However, an examination of the cases, both within this jurisdiction and elsewhere, discloses that there is some confusion regarding the proper measure of damages.

Dobbs, in his Handbook on the Law of Remedies, observes: "Most courts follow the rule that repair costs, when used as a measure, may not exceed the diminution in value of the property. Several courts have varied this formula by allowing repair or restoration cost to exceed the diminution in the value of the property but limiting such cost to the total pre-tort value of the property. . . . A few courts have allowed recovery for cost of restoration that exceeds the diminished value of the property, or have at

least stated that cost of restoration is the measure without any ceiling." § 5.1 at 317-18 (1973).

An examination of just some of the cases reported discloses that there may in fact be as many as four or five different rules. See, *Hunt v. Chicago, B. & Q. R.R. Co., supra; Jack L. Baker Cos. v. Pasley Mfg. & Distrib. Co.,* 413 S.W.2d 268 (Mo. 1967); *System Fuels, Inc. v. Barnes,* 363 So. 2d 747 (Miss. 1978); *Andersen v. Edwards,* 625 P.2d 282 (Alaska 1981); *Heninger v. Dunn,* 101 Cal. App. 3d 858, 162 Cal. Rptr. 104 (1980); *Huber v. Serpico,* 71 N.J. Super. 329, 176 A.2d 805 (1962); *Samson Co. v. Brusowankin,* 218 Md. 458, 147 A.2d 430 (1958); *Thatcher v. Const. Co.,* 21 Ohio App. 2d 41, 254 N.E.2d 703 (1970); *Assn. v. Auerbach,* 64 Ohio App. 2d 40, 410 N.E.2d 782 (1979); *Pitts v. Pine Meadow Ranch, Inc.,* 589 P.2d 767 (Utah 1978); *The Rector etc. of St. Christopher's v. C. S. McCrossan, Inc.,* 306 Minn. 143, 235 N.W.2d 609 (1975); *Zwick v. Simpson,* 193 Colo. 36, 572 P.2d 133 (1977); *A.I.D. Insurance Services v. Riley,* 25 Ariz. App. 132, 541 P.2d 595 (1976); *Myers v. Arnold,* 83 Ill. App. 3d 1, 403 N.E.2d 316 (1980); *Lobozzo v. Adam Eidemiller, Aplnt.,* 437 Pa. 360, 263 A.2d 432 (1970); *Conkin v. Ruth,* 581 P.2d 923 (Okla. App. 1976); *Colella v. King County,* 72 Wash. 2d 386, 433 P.2d 154 (1967); *Butler v. Anderson,* 71 Wash. 2d 60, 426 P.2d 467 (1967); *Bd. of Ed. v. Commonwealth, Dept. of Hwys.,* 528 S.W.2d 657 (Ky. 1975); *United States Steel Corp. v. Benefield,* 352 So. 2d 892 (Fla. App. 1977); *General Outdoor Adv. v. LaSalle Rlty.,* 141 Ind. App. 247, 218 N.E.2d 141 (1966); *Moser v. Thorp Sales Corp.,* 312 N.W.2d 881 (Iowa 1981); *Bluemlein v. Szepanski,* 101 Mich. App. 184, 300 N.W.2d 493 (1980).

In 22 Am. Jur. 2d *Damages* § 138 (1965), the author notes: "The underlying theory governing the recovery of damages in those cases in which a building or other structure is injured through the fault of the defendant is the same as that which applies to injuries to real property generally. The basic goal of the

court is compensation—that is, to award such an amount of money as will restore the injured party to the same property status which he occupied immediately prior to the injury. It is not possible, however, to state a single rule of damages which applies invariably to cases of this type. The facts vary from case to case. The building may be unused, it may be a large factory from which profits are derived, it may be located on land belonging to the plaintiff, the building may be owned by the plaintiff but situated on land leased from a third party, or the building may even be separated from the land at the time of the injury. Further, the destruction may be total or it may be easily reparable. A rule of damages which produces compensation in one case may be overcompensation (or undercompensation) in another case. Therefore, several rules of damages have been adopted for injuries to buildings or structures."

Further, in 22 Am. Jur. 2d *Damages* § 135 (1965), the author observes: "It is difficult to state a general rule of damages for tortious injuries to realty when those injuries do not cause permanent damage. This difficulty is caused, in large part, by the variety of temporary injuries which occur. Some injuries can be corrected almost immediately with little resultant loss to the plaintiff. Others can be corrected only with a substantial expenditure of funds and only after a lengthy period of time. Opinions are written for the individual case presented, and the language of the court, although seeking a specific rule of damages, reflects the facts involved and the theories of recovery presented in the particular case. Thus, it is not surprising that opinions state seemingly contradictory rules."

An examination of our own cases discloses that the confusion which has occurred elsewhere may also be found in Nebraska. In *Hunt v. Chicago, B. & Q. R.R. Co.*, 180 Neb. 375, 377, 143 N.W.2d 263, 265 (1966),

relied upon by the District Court, we said: "The general rule as to the measure of damages for injuries to real property is stated in 25 C.J.S., Damages, § 84, p. 920: 'The measure of damages for a permanent injury to real property is usually the (difference between the) fair value of the property immediately before and immediately after the injury. The recovery for a temporary injury to real property is measured by the loss sustained by the owner, and may include the cost of restoration if less than the difference in value, and the diminution in the value of the use and enjoyment or rental value of the property during the time the injury exists.' "

The *Hunt* case relied upon our earlier decisions in *Koyen v. Citizens Nat. Bank,* 107 Neb. 274, 185 N.W. 413 (1921), and *Cattin v. City of Omaha,* 149 Neb. 434, 31 N.W.2d 300 (1948).

In *Koyen, supra* at 275-76, 185 N.W. at 414, we specifically said: "Property such as fences, parts of buildings, and machinery, and furnaces, is capable of being replaced, and the proper measure of damages for the destruction thereof is the cost of restoring or replacing such property. 8 R.C.L. 484, sec. 46. If the property destroyed has no value separate and apart from the realty, the measure of damages for property destroyed is the difference between the value of the real estate before the injury and after the injury. But as to the destruction of property which is a part of the real estate, whose destruction does the realty itself no damage and is capable of being repaired or replaced, the measure is the cost of repairing or restoring the same." It should be noted that there was no mention in *Koyen* regarding diminution in value as a limitation on damages where the property has a separate value and is reparable.

And in *Cattin v. City of Omaha, supra* at 447-49, 31 N.W.2d at 307-08, we said: " 'The measure of damages for injury to, or destruction of, buildings or

other structures is the amount of the loss, which may be the difference in the value of the premises before and after the injury, the value of the building or structure, or, where practicable, the cost of restoration.'

. . . .

" 'Where property, a part of the realty to which it is attached, is destroyed without damage to the realty itself, and where the nature of the thing destroyed is such that it is capable of being replaced at once, and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent destruction is the reasonable cost of replacing the property in like kind and quality.' " Again, no mention was made as to diminution in value as a limitation, although the instruction given by the trial court and approved by us advised the jury that they were to take into account depreciation.

We now believe that regardless of what may have been said by us in the past, we should now attempt to announce a rule which, to the extent possible, removes any confusion in this area. We see little benefit in attempting to fashion a new rule for every specific case as suggested by the author of the American Jurisprudence article. See 22 Am. Jur. 2d *Damages* § 135 (1965). In attempting to choose which of the various rules should be adopted by this court, we must keep in mind the purpose of recovery in tort. In Restatement (Second) of Torts § 901 (1979) the authors explain the general principle embodied in the concept of recovery in tort by saying: "The rules for determining the measure of damages in tort are based upon the purposes for which actions of tort are maintainable. These purposes are: (a) to give compensation, indemnity or restitution for harms; (b) to determine rights; . . . ." Furthermore, in *Davenport v. Intermountain R. L. & P. Co.*, 108 Neb. 387, 393, 187 N.W. 905, 907 (1922), 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."

In the case of *Schiltz v. Cullen-Schiltz & Assoc., Inc.,* 228 N.W.2d 10, 20-21 (Iowa 1975), the Iowa Supreme Court observed: "[T]he principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he would have been had there been no injury or breach of duty, that is, to compensate him for the injury actually sustained . . . .

. . . .

"Where the injury is such that the premises may be restored to as good condition as it was before, the measure of recovery is the fair and reasonable cost and expense of such restoration."

Limiting the cost of repairs to the diminution in value of the property appears to fly in the face of such pronouncements. The diminution in value may be slight because the injury is slight as compared to the total value of the property, as evidenced by this case. Undoubtedly, the breaking of some bricks and the bending of several windows may not result in reducing the overall value of an old warehouse, still capable of fulfilling its intended function even with broken bricks. Yet, should we therefore excuse the tort-feasor from any liability? Is the owner not entitled to have his building without the broken bricks and windows even though the total value remains unchanged? We think so.

We, therefore, believe that the rule reflected by this court in *Koyen* is indeed the preferable rule and the one which should be followed by this court. We therefore now declare that the proper measure of damages for injury to an improvement upon real estate which can be repaired is as follows: Except as otherwise hereinafter limited, where an improve-

ment upon realty is damaged without damage to the realty itself and where the nature of the thing damaged is such that it is capable of being repaired or restored and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent damage is the reasonable cost of repairing or restoring the property in like kind and quality. This would be in addition to any other consequential damages which the injured party may establish by proper proof.

While certain of the writers, including Dobbs, and perhaps some courts, argue that right of recovery should be without limitation (see Dobbs, Handbook on the Law of Remedies, § 5.1 (1973)), we believe the award for such damage should not exceed the market value of the property immediately preceding the damage to the property. It seems that one ought not to be able to recover a greater amount for partial destruction than one could recover for total destruction. To the extent that our previous decisions on this matter, including *Hunt v. Chicago, B. & Q. R.R. Co.*, 180 Neb. 375, 143 N.W.2d 263 (1966), are to the contrary, they are overruled. If, in fact, the cost of repair or restoration exceeds the market value of the property just before the injury, then the proper measure of damages is the market value of the property just before the damages were incurred, less any salvage.

The burden of establishing the cost of repair shall be upon the party seeking recovery. If the party against whom recovery is sought believes that the cost of repair exceeds the market value of the property just before damage, then the burden shall be upon such party to introduce evidence to establish that fact, and it will then be up to the trier of fact to determine which of the two measures of damages should be employed. Absent evidence that the cost of repair or restoration exceeds the market value of the property just before damage, it will be presumed

that the cost of repair or restoration does not exceed the market value of the property just before damage.

Under the rule now adopted by the court, the record in this case discloses that the evidence adduced was sufficient to entitle "L" Investments to recover for its damages, and the decision of the District Court should be reversed. This is not a reflection on the trial judge who could not have anticipated our action in this case.

Lynch also argues that "L" Investments failed to prove that the cost of repairs were either causally connected to the accident which occurred on September 25, 1977, or were reasonable in amount. We believe that such claims are without merit in light of the record. Both the trial court and the reviewing District Court were apparently of the same opinion.

The judgment of the District Court is reversed and remanded. Appellee is given 20 days in which to request leave to introduce evidence that the cost of the repairs in the amount of $2,640 exceeds the pretort value of the entire improvement. Should appellee desire not to offer such evidence, or upon failing to do so within said 20 days, the District Court is directed to reinstate the judgment of the municipal court.

REVERSED AND REMANDED WITH DIRECTIONS.

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P. R. HALLIGAN POST 163, AMERICAN LEGION, APPELLANT, V. MILFORD SCHULTZ ET AL., APPELLEES.

322 N.W.2d 657

Filed July 30, 1982. No. 44263.

**Final Orders: Appeal and Error.** An order dismissing one cause of action while a second cause of action arising out of the same factual circumstances and involving the same parties but asserting a different legal theory of recovery remains pending for trial does not constitute a final appealable order.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Appeal dismissed.

Sodoro, Daly & Sodoro, for appellant.

Kelley, Wallace, Scritsmier, Moore, Romatzke & Byrne, P.C., and Schneider and Nisley, P.C., for appellees.

Ray C. Simmons, P.C., for amicus curiae.

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

MCCOWN, J.

This is an action against the parents of a 13-year-old boy to recover damages to a building and its contents allegedly caused when the minor willfully and intentionally set fire to the building.

The second amended petition alleges two causes of action. The first cause of action alleges that the parents are liable for the willful and intentional acts of their son under the provisions of Neb. Rev. Stat. § 43-801 (Reissue 1978). The second cause of action alleges that the parents were negligent in the supervision of their minor son in specified particulars. The defendants filed a demurrer to the amended petition of the plaintiff. The District Court sustained the demurrer as to the first cause of action on the basis that § 43-801 was unconstitutional. The court overruled the demurrer as to the second cause of action and that cause of action remains pending in the District Court. The plaintiff has appealed the dismissal of the first cause of action.

Neb. Rev. Stat. § 25-1911 (Reissue 1979) provides for an appeal from "[a] judgment rendered or final order made by the district court . . . ." Neb. Rev. Stat. § 25-1902 (Reissue 1979) defines a final order as "[a]n order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment . . . ."

In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority or jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed. *Knoell Constr. Co., Inc. v. Hanson,* 208 Neb. 373, 303 N.W.2d 314 (1981).

When the substantial rights of the parties in the action remain undetermined and the cause is retained for further action, the order is not final. *Martin v. Zweygardt,* 199 Neb. 770, 261 N.W.2d 379 (1978).

This court has not passed on the issue of whether the dismissal of one cause of action leaving another cause of action arising out of the same facts but asserting a different legal theory of recovery constitutes a final order for purposes of appeal. The majority of cases which have considered the precise issue under appeal provisions similar to those of Nebraska have held that the dismissal of one cause of action while another cause of action arising out of the same facts remains pending is not a final appealable order.

In *Weir v. Brune,* 364 Mo. 415, 262 S.W.2d 597 (1953), a suit was brought against the owners and lessors of a tenement for damages resulting when minor children were bitten by a rat. The petition alleged three causes of action, one based on violation of a city ordinance, one based on common-law negligence, and one based on breach of the rental contract. The trial court granted defendants' motion to dismiss as to the first cause of action only. The Supreme Court of Missouri held that there had been no final judgment, and that the dismissal was not appealable. The Missouri court said: "The judicial unit for an appeal is the final determination of the issues arising from a set of facts involved in the same transaction or occurrence, and not the determination of an individual issue not disposing of the action. An order dismissing some of several alternative

counts, each stating only one legal theory to recover damages for the same wrong, is not considered an appealable judgment while the other counts remain pending because the counts are concerned with a single fact situation. . . . It is the differing transactions or occurrences giving rise to a claim that forms the basis of separate units of judicial action and not the differing legal theories or issues presented for recovery. Neither the statutes nor our rules authorize litigants to bring one legal theory of recovery in a case to an appellate court while other legal theories of recovery on the same claim stand for trial. It is the final judgment on a claim, not the ruling on a pleaded issue, that is appealable." *Id.* at 419, 262 S.W.2d at 600. See, also, *Shoemaker v. City of Muscatine,* 275 N.W.2d 206 (Iowa 1979); *Stephens v. United Trust Life Insurance Company,* 118 Ga. App. 514, 164 S.E.2d 335 (1968); *Middlesex Mutual Assurance Co. v. Massare,* 32 Conn. Supp. 508, 338 A.2d 505 (1975).

In *North Indialantic Homeowners Ass'n v. Bogue,* 390 So. 2d 74, 75 (Fla. App. 1980), the Florida court said: "Piecemeal appeals are not permitted where claims are interrelated and involve the same transaction and the same parties remain in the suit. [Citation omitted.] An order dismissing one of several counts all arising out of the same factual circumstances is not an appealable final order. . . . Although the count dismissed here is based on a different legal theory than is the count which remains, it is based on the same factual background, and as such is not the type of appealable final order within the principles of *Mendez,* supra. The issues involved in both counts are clearly interrelated, they involve the same basic factual situation and the parties are the same. Under these circumstances, the order dismissing one count is not a final order and is not appealable."

In the present case the order dismissing plaintiff's

first cause of action while plaintiff's second cause of action arising out of the same factual circumstances and involving the same parties but asserting a different legal theory of recovery remains pending for trial does not constitute a final appealable order. The appeal is dismissed as premature.

APPEAL DISMISSED.

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RICHARD S. KLEAGER, APPELLEE, V. WALTER SCHANEMAN, APPELLANT, AND MARY SCHANEMAN, APPELLEE.

322 N.W.2d 659

Filed July 30, 1982. No. 44273.

1. **Attorneys' Liens.** The proper method for enforcing an attorney's charging lien is by resort to equity, because such a lien is equitable in nature.
2. **Equity: Appeal and Error.** Equity actions on appeal to this court are triable de novo on the record and we are required to reach an independent conclusion without reference to the findings of the District Court, subject to the condition that when the evidence on material questions of fact is in irreconcilable conflict, we 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.
3. **Attorneys' Liens.** An attorney has a lien for a general balance of compensation upon money in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party.
4. _____. Although an attorney's lien upon money in the hands of an adverse party is not perfected until notice has been given to the party in possession of the fund, the notice need not be in writing or in any specific form. Any notice of the existence of the claim against a fund, and that it will be asserted, is sufficient.
5. _____. A charging lien for attorney fees may arise out of an agreement between a client and his attorney that he is to receive a portion of the judgment recovered or of the proceeds thereof, provided it appears to be the intention of the parties that such judgment or proceeds will be looked to for security.
6. _____. An attorney's charging lien is confined to fees and costs

due for services rendered in the particular action in which the judgment or settlement proceeds were obtained. However, payment of a sum of money in a proceeding which exceeds the amount due and owing therein, which immediately gives rise to a dismissal of another action between the same parties, may be considered as to the excess proceeds arising out of the second case.

Appeal from the District Court for Scotts Bluff County: PAUL D. EMPSON, Judge. Affirmed as modified.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

James R. Hancock of Hancock Law Offices, for appellee Kleager.

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

HASTINGS, J.

This was an action brought by the plaintiff, Richard Kleager, to recover an attorney fee, said action being in the nature of, and tried as, a suit to foreclose an attorney's lien. After trial to the court without a jury, a judgment was entered in favor of the plaintiff and against the defendant Walter Schaneman in the sum of $5,633.33. The defendant has appealed to this court, assigning as errors the following: (1) That the trial court erred in finding this action to be one to foreclose a lien and thereby improperly denied the defendant Walter Schaneman a jury trial; and (2) That the court erred in finding that the plaintiff had a lien on the money paid into the divorce case because (a) there was inadequate notice to the defendant that the plaintiff claimed a lien, and (b) an attorney's lien would not attach to money paid into court in any action other than the action in which the legal services were rendered and which formed the basis for the lien.

Mary Schaneman, the other defendant in this action and who did not appear and against whom no

judgment was entered, had secured a decree of divorce from Walter Schaneman in March of 1966. As a part of the decree she was awarded a judgment for child support in the amount of $200 per month. About 6 months later, Mary and Walter resumed living together. This arrangement lasted, off and on, until sometime in 1978. In October of 1978 Mary filed an action in the District Court for Scotts Bluff County, seeking an accounting of the properties accumulated while the parties were living together during the period 1966 to 1978, and for distribution of her rightful share of that property. The plaintiff was the attorney who filed that action for Mary, and at all times pertinent herein was a party to a fee contract executed by Mary whereby she agreed to pay him for his services in the accounting action an amount equal to one-third of all moneys recovered from that cause of action.

According to the plaintiff's testimony in the instant case, he and his client appeared for trial of the accounting action on March 6, 1980. However, Walter had discharged his attorney prior to that date, and the court refused to proceed until he had had an opportunity to obtain another attorney. He further testified that the court rescheduled the trial and then suggested that the parties could use the courtroom to discuss a settlement. The plaintiff also testified that he suggested to Walter that they discuss a possible settlement, but that Walter responded by saying he had no offer to make. In addition, the plaintiff stated that at the time of this discussion Walter was aware of the fee arrangement whereby the plaintiff was to receive one-third of any settlement or judgment in the case, but that Walter informed the plaintiff that he, Walter, would find some way to compensate or pay Mary so that her attorneys would never receive anything by way of fees.

The defendant, by his testimony, agreed that the parties appeared in court on March 6, and that he

was granted a continuance by the court to obtain a lawyer. He also admitted that the court suggested that the parties discuss settlement. Furthermore, he agreed that the plaintiff asked him if he wanted to settle the case, and he said no and started to leave. However, he denied that anything was said about the contingent fee contract at that session, but did admit that he had learned from Mary just before they went to court on March 6 that such a contract did exist. The defendant further testified that he had never heard anything about an attorney's lien until the present case was started.

On cross-examination, the following questions and the answers given by the defendant are somewhat informative: "Q Tell us about that, please? What did you mean? A I was trying to settle the case. Q Now, that was during the hearing? A Yes. Q Why were you trying to settle the case? A I don't like law suits, I wanted to settle it and get out of it. Q And by settling it, what did you intend to do? A I don't know. Q Would you have paid some type of sum to settle that case? A Not one red cent on the Marvin v. Marvin-type case. Q Well, then what was the purpose of your making the statement to the Court that you might settle the case? A I not only might settle it, I did settle it. Q So, you agree that you did settle the case? A Yes. Q Okay. A It's dismissed, it's settled. Q And how did you achieve that settlement? A She called me up one day and told me she wanted to get out of here. Q That is — A She wanted to leave this law suit because this law suit was dragging on forever and she wanted to go. She had been living here for six months in a dump in town waiting for this law suit to get over with and nothing was happening."

The defendant went on to testify that on March 11, 1980, he and Mary went to the clerk of the District Court's office where Walter gave the clerk a cashier's check for $16,900. This amount was credited

toward the judgment for child support, and Mary receipted for and was paid that amount. Thereafter, Mary filed a written dismissal of the accounting action. The judgment docket in the clerk's office revealed a satisfaction and release of all support payments accrued through December 1969, so that at the time of the payment of the $16,900 on March 11, 1980, the amount of unpaid child support which had actually accrued was approximately $8,430. Furthermore, we note that since March 11, 1980, through December 3, 1980, Walter has made child support payments totaling $1,450.

The plaintiff learned of the dismissal of the accounting action from someone in the office of the clerk of the District Court, and on May 28, 1980, he filed the present action. After reciting the pertinent facts set forth above, the petition went on to allege the existence of a valid attorney's lien under the provisions of Neb. Rev. Stat. § 7-108 (Reissue 1977), and prayed for judgment in the amount of $5,633.33, representing one-third of the amount paid by the defendant to Mary on March 11. The petition also prayed for an accounting and determination of the fees which had accrued, and for "such other and further relief as may be just and equitable."

Defendant's claimed error in having been denied a jury trial is without merit. Under Nebraska law, the proper method for enforcing an attorney's charging lien is by resort to equity, because such a lien is equitable in nature. *Neighbors & Danielson v. West Nebraska Methodist Hospital,* 162 Neb. 816, 77 N.W.2d 667 (1956). The pleadings in the present action joined issue on the question of whether the plaintiff possessed a legitimate attorney's lien upon which he could "foreclose." Therefore, it was an equitable action in which the defendant was not entitled to a jury trial. The remaining problem is to ascertain whether the evidence supports a finding that such a lien in fact existed and was enforceable.

Equity actions on appeal to this court are triable de novo on the record and we are required to reach an independent conclusion without reference to the findings of the District Court, subject to the condition that when the evidence on material questions of fact is in irreconcilable conflict, we 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. *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 313 N.W.2d 667 (1981).

"An attorney has a lien for a general balance of compensation . . . upon money . . . in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party." § 7-108. One of the earlier Nebraska cases construing this statute, and upon which the defendant places great reliance, is *Elliott v. Atkins,* 26 Neb. 403, 42 N.W. 403 (1889). In that case this court stated: "An attorney, therefore, who desires to enforce a claim for his services, must file a lien to that effect; otherwise he cannot enforce a claim against the adverse party. This claim for a lien may be filed with the papers in the case, and the adverse party will be chargeable with notice of its existence. The existence of a contract between a client and his attorney, where there is no claim for a lien, would not be notice to the adverse party that he intended to assert the claim against him, as it might be presumed that such attorney intended to rely on the responsibility of his own client. In the case at bar there is no lien claimed or filed on behalf of the plaintiffs, and nothing to apprise the defendants that claims would be asserted against them." *Id.* at 409, 42 N.W. at 404-05.

However, it would appear that in later decisions, commencing with *Cones v. Brooks,* 60 Neb. 698, 84

N.W. 85 (1900), this court has taken a somewhat more liberal attitude as to notice requirements. In *Cones* we said: "The statutory and common law lien upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed is a charging or specific lien, and is not perfected until notice has been given to the party in possession of the fund. Such notice is necessary to prevent a *bona fide settlement of the controversy by the litigants and payment by the debtor to the creditor in ignorance of the attorney's rights.* . . . The notice need not be in writing or placed among the files of the case. Any notice of the existence of the claim, and that it will be asserted, is sufficient. . . . The statute does not require that the notice shall be in any specific form, or that it shall be given in any particular way; and we have no right to add anything to the law by construction. These views are not in conflict with any of the past adjudications of this court; but it may be that they are not in accord with some intimations and *dicta* found in the earlier cases. *Lavender v. Atkins,* 20 Nebr., 206, *Elliott v. Atkins,* 26 Nebr., 403, and *Sheedy v. McMurtry,* 44 Nebr., 499, upon which counsel for defendant rely, are cases in which there was no money in the hands of the adverse party to which an attorney's lien could attach. The question of notice was not so involved as to make any of these cases a precedent for this." *Id.* at 700, 84 N.W. at 86. (Emphasis supplied.)

More recently, in *Tuttle v. Wyman,* 149 Neb. 769, 32 N.W.2d 742 (1948), we stated: " 'Moreover, a charging lien may arise out of an agreement between a client and his attorney that he is to receive a portion of the judgment recovered or of the proceeds thereof, provided it appears to be the intention of the parties that such judgment or proceeds is to be looked to for security.' 7 C.J.S., Attorney and Client, § 211, p. 1146. . . . Plaintiff had no money or

property save and except the land and the rents and profits therefrom, which intervener [attorney], under his contract, recovered for her. She could pay him nothing for his services save and except therefrom. It was distinctly understood and agreed by plaintiff at all times that intervener was to have a portion of such recovery as compensation for his services. It was understood and agreed that the written contract between the parties so provided. The record admittedly and conclusively establishes that any recovery was to be security for the payment of intervener's compensation and that he was to have an interest in the funds and property recovered for the satisfaction of plaintiff's claims." *Id.* at 781, 32 N.W.2d at 749-50.

Finally, in *Barber v. Barber,* 207 Neb. 101, 296 N.W.2d 463 (1980), we quoted with approval from *Tuttle* most of the language set out above. We concluded by observing that "The record is quite clear that Charles had knowledge of Cunningham's claim for recovery of attorney fees at least as early as the entry of the original decree . . . . That being so, it would seem clear that Cunningham had both an attorney's lien under the Nebraska attorney's lien statute and also a charging lien on any judgment recovered, by virtue of her agreement with Dorothy, and that Cunningham had the right to enforce such lien . . . ." *Id.* at 113, 296 N.W.2d at 471.

Defendant's argument that plaintiff's claim should fail because no actual lien was ever filed, nor did the plaintiff specifically think about a lien until after the settlement had been made, falls upon deaf ears. Paraphrasing the language of *Tuttle,* it was distinctly understood by Mary, as well as by the defendant, that the plaintiff was to have a portion of any recovery or settlement as compensation for his services. The record conclusively establishes that any recovery was to be security for the payment of plaintiff's services. That the defendant bragged

that he would find a way to pay Mary whereby the lawyers would get nothing by way of fees, and then immediately took positive action to carry out this threat, only served to strengthen the notion that the defendant knew that if he made the settlement direct and aboveboard the plaintiff's fee would be taken out of such fund. Under the circumstances, the plaintiff, by operation of law, was entitled to such lien whether defendant was specifically aware of it or not.

Nevertheless, the defendant argues an attorney has a lien on money in the hands of the adverse party only in the action or proceeding in which the attorney was employed. He cites *Reynolds v. Warner,* 128 Neb. 304, 258 N.W. 462 (1935), and *Nicholson v. Albers,* 144 Neb. 253, 13 N.W.2d 145 (1944), in support of this proposition. The language and holdings of those cases clearly substantiate that claim. "The statute does not give an attorney a lien for services rendered in other cases or for any fees not connected with the case." *Reynolds v. Warner, supra* at 308, 258 N.W. at 464. "The statute does not give an attorney a lien for services rendered in other cases, or for any fees not connected with the case. A charging lien is confined to the fees and costs due for services rendered in the particular action in which the judgment was obtained." *Nicholson v. Albers, supra* at 255, 13 N.W.2d at 146.

However, it would be the height of naivete for this court to believe that a payment by the defendant of $16,900 on an accrued judgment of $8,430 in a divorce case whereby another pending, disputed case is dismissed is not a "package settlement" of both cases. This is especially true when one considers that the defendant continued to make future periodic payments on the divorce case almost as they became due.

Although we believe that the payment in full of the accrued support payments was induced by a desire

to settle the accounting action, there was a legitimate judgment in the former case of $8,430 which the defendant was not only entitled to pay but was obligated to pay. However, as to the excess payment of $8,470, the only logical conclusion is that it was intended as additional consideration for a settlement of the accounting action, and, to that extent, was subject to the lien of plaintiff's attorney. One-third of that sum amounts to $2,823, which was a fee rightfully belonging to the plaintiff.

The defendant, by making payment directly to Mary, did so in violation of the plaintiff's rights under his lien. The plaintiff is entitled to a judgment against the defendant in the amount of $2,823. The judgment of the District Court is affirmed as modified.

AFFIRMED AS MODIFIED.

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FARMLAND ENTERPRISES, INC., APPELLEE, V. GERALD SCHUEMAN AND DONNA RAE SCHUEMAN, APPELLANTS.

322 N.W.2d 665

Filed July 30, 1982. No. 44337.

1. **Usury: Statutes: Actions: Penalties.** All pending actions and proceedings to recover a penalty which have not been prosecuted to a final judgment are defeated by the repeal of the statute. Therefore, the repeal of a statute which imposes a penalty will prevent any prosecution, trial, or judgment for penalties accruing while such statute was in force, unless the contrary is provided in the repealing statute or some other existing statute.
2. **Usury: Actions.** The benefits afforded a borrower under the usury laws of the State of Nebraska do not constitute an independent cause of action but only a defense to a cause of action.
3. **Usury: Statutes: Actions: Penalties.** A mere penalty never vests, but remains executory; the repeal of a statute before a penalty is enforced is not a deprivation of vested rights. The unqualified repeal of a statute imposing a penalty operates the same way as the repeal of a strictly criminal statute. It abrogates all rights of action which have not been reduced to judgments.

4. **Usury: Loans: Forbearance.** The distinction between a loan and a forbearance is that a loan is a contemporaneous transaction evidencing the creation of a debt to be repaid, while a forbearance is a subsequent agreement entered into between a debtor and creditor to secure the repayment of a debt previously created and matured.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

N. Michael D'Angelo of Hogzett & D'Angelo, and Thomas C. Emery, for appellants.

John E. North, Jr., of Fromkin, Herzog, Jabenis & North, and James P. Linn of Linn, Helms, Kirk & Burkett, for appellee.

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

KRIVOSHA, C.J.

This appeal involves the question of whether the appellee, Farmland Enterprises, Inc. (Farmland), contracted for, received, or reserved a rate of interest on a contract entered into by and between Farmland and the appellants, Gerald Schueman and Donna Rae Schueman (Schueman), in excess of the rate provided by Neb. Rev. Stat. § 45-101.03 (Reissue 1978), thereby limiting Farmland's recovery on its contract with Schueman to the principal only. See Neb. Rev. Stat. § 45-105 (Reissue 1978). The trial court held that Farmland did not contract for, receive, or reserve usurious interest, and found in favor of Farmland. Our examination of the record reveals that the trial court was correct in its ultimate conclusion. We therefore affirm.

On February 15, 1971, Farmland and Schueman entered into an agreement whereby Farmland sold and Schueman purchased what is described as transportation interests. The total purchase price was in the amount of $653,333, of which $195,000 was paid on June 1, 1971, and the balance was to be paid in four unequal yearly installments of principal and

accumulated interest. The contract provided that the balance in the amount of $458,333 was to bear interest from January 1, 1971, at the rate of 6 percent per annum or "the prime rate in effect at Northwestern National Bank at Omaha, Nebraska [Bank], whichever is greater."

Schueman defaulted on one of the installment payments and suit was commenced by Farmland against Schueman on December 21, 1979. Schueman raised as a defense that Farmland had contracted for usurious interest, in violation of § 45-101.03, and therefore Schueman was entitled to the benefits of § 45-105.

During all of the times relevant to this action, § 45-105 provided: "If a greater rate of interest than is allowed in section 45-101.03 shall be contracted for or received or reserved, the contract shall not on that account be void, but if in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall recover only the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid . . . ."

On August 24, 1975, Neb. Rev. Stat. § 45-101.04 became effective and provided in part as follows: "The limitation on the rate of interest provided in section 45-101.03 shall not apply to: . . . (4) Loans made when the principal amount of the indebtedness is one hundred thousand dollars or more."

The trial court found that the transaction between Farmland and Schueman was not subject to the penalty provisions of § 45-105 because the record established that Farmland did not "intend" to contract for usurious interest. In reaching its conclusion, the trial court relied upon our decision in *Loucks v. Smith,* 154 Neb. 597, 599, 48 N.W.2d 722, 724 (1951), wherein we said: " '* * * in order to constitute

usury, there must be (1) a loan, express or implied; (2) an understanding between the parties that the money lent shall or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) a corrupt intent to take more than the legal rate for the use of the money loaned.' "

Schueman argues that the trial court erred in this finding because intent may be presumed merely by reason of the fact that a contract which was entered into by the parties might permit the collection of a usurious rate of interest. The contract in question provided that Schueman would pay to Farmland a rate of interest of 6 percent per annum or the "prime rate in effect at Northwestern National Bank at Omaha, Nebraska, whichever is greater." On the day on which the contract was entered into, to wit, February 15, 1971, neither the 6 percent rate called for in the contract nor the prime rate at the Bank was usurious. A contract is not usurious on its face merely by reason of the fact that circumstances may arise in the future which could result in the contract thereby becoming usurious. Schueman argues that because the contract provided that the interest rate was to be determined by a bank over which the parties had no control, the interest rate might become usurious and therefore the contract provided for usurious interest on its face. Schueman, however, cites no authority for that position, nor are we able to find any. Obviously, the Legislature could continue to amend the interest statute during the entire period of the contract so that the statutory maximum would always be in excess of the prime rate at the Bank. The simple fact of the matter is that the contract, on its face, was not usurious, nor did it "contract" for a greater rate of interest than that allowed by law.

That, however, does not resolve the issue, because § 45-101.04 not only makes it illegal to "contract" for

usurious interest but also makes it illegal to "receive" usurious interest. There is some evidence in the record to support a claim that during some portions of the contract Farmland received interest in excess of that authorized by law, although this also depends upon how the interest is computed during the term of the contract. Therefore, unless the transaction is otherwise exempted from the provisions of § 45-105, Schueman's claim for relief under § 45-105 must be examined. We need not make that examination because we believe that the enactment of § 45-101.04 prior to the time that suit was brought by either party precludes Schueman from raising the defense of usury in this action.

As we have previously noted, as of August 24, 1975, the Legislature of the State of Nebraska exempted transactions of this type from the provisions of § 45-101.03. Schueman argues that because the contract was entered into prior to the effective date of the statute, the enactment of the statute cannot be taken advantage of by Farmland. We have held to the contrary. In *Davis v. General Motors Acceptance Corp.*, 176 Neb. 865, 127 N.W.2d 907 (1964), we made a detailed and complete analysis of the effect of a statute similar to § 45-101.04. In holding that the Legislature could exempt transactions in existence prior to the effective date of the act, we said at 873-74, 127 N.W.2d at 913: "A forfeiture such as is prescribed in the Installment Loan Act is generally considered to be penal in nature. Because usury statutes are generally held to be penal in nature, they are subject to amendment or repeal by retroactive legislation. The rule is stated in 16 C.J.S., Constitutional Law, § 254, p. 1246, as follows: 'There is no vested right in the usury laws, which, therefore, may be repealed or changed so as to affect causes of action and defenses even in pending suits.'

. . . .

" '. . . All pending actions and proceedings to re-

cover a penalty which have not been prosecuted to a final judgment are defeated by the repeal. Therefore, the repeal of a statute which imposes a penalty will prevent any prosecution, trial, or judgment for penalties accruing while such statute was in force, unless the contrary is provided in the repealing statute or some other existing statute.' "

In *Davis* we specifically quoted from *Ewell v. Daggs,* 108 U.S. 143, 2 S. Ct. 408, 27 L. Ed. 682 (1883), saying at 875-76, 127 N.W.2d at 914: " 'Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. . . .' "

We concluded in *Davis, supra* at 876, 127 N.W.2d at 914, by saying: "The foregoing authorities establish that there is no vested right in a usury statute."

Section 45-101.04 did not save any transactions from the effect of its provisions, and Neb. Rev. Stat. § 49-301 (Reissue 1978) makes it clear that the instant transaction was not saved. Section 49-301 provides: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be

provided in such repealing statute." When enacting § 45-101.04, the Legislature specifically repealed § 45-105 and reenacted it in the new law, 1975 Neb. Laws, L.B. 349.

The right to claim usury possessed by Schueman prior to the enactment of § 45-101.04 was neither a "pending action" nor a "cause of action not in suit."

We have made it clear by our previous holdings that the benefits afforded a borrower under the usury laws of the State of Nebraska do not constitute an independent cause of action but only a defense to a cause of action. In *Seldin v. Northland Mortgage Co.,* 189 Neb. 175, 177, 202 N.W.2d 174, 177 (1972), we said: "It is well established in this State that usury is a defense rather than a cause of action, and that after usurious interest has been paid an action will not lie to recover it."

In *Davis, supra* at 874, 127 N.W.2d at 913, we further noted: " 'Upon the theory that the privilege of pleading usury as a defense pertains only to the remedy and is not an element in the rights inhering in the contract, many courts have held that the legislature by the amendment or repeal of the usury statutes abridge or take away the right to assert usury as a defense as to contracts previously entered into. It is generally considered that parties to usurious contracts hold any right they may have to penalties given by law, subject to a modification or repeal by the legislature, and that the repeal of a statutory prohibition against usury releases any penalties imposed, and thus validates the contract.'

". . . 'A mere penalty never vests, but remains executory; the repeal of a statute before a penalty is enforced is not a deprivation of vested rights. The unqualified repeal of a statute imposing a penalty operates the same way as the repeal of a strictly criminal statute. It abrogates all rights of action which have not been reduced to judgments. . . .' "

We believe that the enactment of § 45-101.04 some

4 years prior to the bringing of a suit in this case exempted this transaction from the provisions of § 45-105 and the limitations imposed by § 45-101.03. To the same effect see *Orden v. Crawshaw Mtg. & Inv. Co., Inc.,* 109 Cal. App. 3d 141, 167 Cal. Rptr. 62 (1980); *United Realty Trust v. Property Dev., etc.,* 269 N.W.2d 737 (Minn. 1978); *American Sav. Life Ins. Co. v. Financial Aff. Man. Co., Inc.,* 20 Ariz. App. 479, 513 P.2d 1362 (1973); *Deposit Guar. Bk. & Tr. Co. v. Williams,* 193 Miss. 432, 9 So. 2d 638 (1942).

Schueman argues, nevertheless, that even if § 45-101.04 is applicable generally, it does not apply in this case because the transaction is not a loan covered by § 45-101.04 but, rather, a forbearance. We believe, as the trial court found, that the assertion is without merit. A forbearance of money occurs when a debt is already due and owing and the creditor agrees to forbear collection of it. This was clearly pointed out in the case of *Carper v. Kanawha Bk. & Trust Co.,* 157 W. Va. 477, 493, 207 S.E.2d 897, 909 (1974), wherein the court said: "[T]he distinction between a loan and a forbearance [is] that a loan is a contemporaneous transaction evidencing the creation of a debt to be repaid, while a forbearance is a subsequent agreement entered into between a debtor and creditor to secure the repayment of a debt previously created and matured." See, also, Forbearance, Black's Law Dictionary 773 (4th ed. 1957). Here the debt was not yet due and therefore could not be a forbearance.

Such a holding would be consistent with our view expressed in *Lloyd v. Gutgsell,* 175 Neb. 775, 124 N.W.2d 198 (1963), where we held that if a car dealer in selling a car actually agrees with the buyer that he will finance the balance of the cash purchase price agreed upon, even though he has not loaned any money in the first instance, the transaction is a loan to finance the balance of the cash purchase

price. We believe that the analogy is applicable in this case.

The judgment of the trial court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. HERMAN THUNDER HAWK, APPELLANT.

322 N.W.2d 669

Filed July 30, 1982. No. 81-697.

1. **Miranda Rights: Self-Incrimination.** The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.
2. **Miranda Rights.** By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
3. _____. The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.
4. **Trial: Evidence.** The admission of testimony wrongfully received in a case tried to a jury is prejudicial error where it may have influenced the verdict.

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

James T. Hansen, Scotts Bluff County Public Defender, and Jonathan Pratter, for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren, for appellee.

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

WHITE, J.

This is an appeal from a judgment of conviction upon a jury verdict finding the defendant, Herman

Thunder Hawk, guilty of theft of movable property. The defendant assigns as error the admission of certain statements he made to a Nebraska state trooper while in custody.

On April 21, 1981, at approximately 6:14 a.m., Officer Donald Keiper of the Nebraska State Patrol was summoned to the scene of an accident 8.2 miles south of Chadron, Nebraska, on Highway 385. When he arrived, a number of people were present, including the defendant, his brother, the driver of the other vehicle involved in the accident, the Chadron rescue unit, and several other volunteers. Officer Keiper testified that upon his arrival the defendant was seated in the driver's seat of a van which was involved in the accident. Officer Keiper asked the defendant if he was the driver of the van and the defendant failed to reply. Keiper also testified: "There was a strong odor of alcohol about his person. He appeared to me to be intoxicated. He was having trouble holding his head up and was not coherent, almost as if he was trying — about to pass out."

Officer Keiper also testified that a witness to the accident told him the defendant's brother, Joseph Thunder Hawk, was attempting to pull the defendant from behind the wheel of the van when the witness arrived on the scene. With this information Officer Keiper went over to Mr. Thunder Hawk, who was on a stretcher, and advised him that he was under arrest for driving a motor vehicle while under the influence of alcohol.

The defendant was taken by the Chadron rescue unit to the Chadron hospital. While the defendant was en route to the hospital, Officer Keiper radioed the Chadron Police Department to send someone to the hospital to secure a blood or urine specimen from the defendant. After filling out his accident report and completing his investigation at the accident scene, Officer Keiper went to the Chadron hospital.

When he arrived at the hospital, Officer Souchek of the Chadron Police Department was just in the process of getting a urine specimen from the defendant. After the specimen was taken, Officer Keiper questioned the defendant in the reception room at the hospital.

Prior to questioning the defendant, the officer did not read to the defendant the *Miranda* warnings. Officer Keiper testified that he asked the defendant his name, birth date, and to produce his driver's license. In response the defendant gave his name, birth date, address, and stated that he did not have a driver's license. Keiper then asked the defendant what happened at the scene of the accident. The defendant responded that the "damn truck ran us off the road." Officer Keiper then told the defendant that he was headed south and had crossed the centerline and struck a truck. The defendant told the officer that he was headed for Porcupine, South Dakota.

The officer also testified that at the time of questioning the defendant he had the registration to the van which was registered to a Ronald Sylvester. Officer Keiper asked the defendant who owned the van, and the defendant said he did not know. The officer also asked if the defendant was driving, and he replied that he was the driver. When asked what the purpose of this line of questioning was, the officer replied that his motive in questioning defendant was solely to complete his accident report. However, he further testified in response to the question: "At any time during the questioning at the hospital were you attempting to obtain information to use in a drunk drive case? A. No, I was not, other than ascertain the fact that it was to support the fact that he was driving. I had information from other sources that he was driving. But he was alert, was talking to me, and I needed to know, or I wanted to know from him if he was driving, if he was."

After the defendant was asked if he knew who owned the van and he replied that he did not, Officer Keiper transported the defendant to the Dawes County jail. Upon arrival at the jail, the defendant was read his rights for the first time. The defendant did not waive his *Miranda* rights and he refused to talk to the officer further.

Subsequently the defendant was tried for theft of movable property, a violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1979), a Class III felony. At trial, all statements the defendant made at the hospital were introduced into evidence over the defendant's objections. The jury returned a verdict of guilty for the offense charged. The defendant was sentenced to imprisonment for a period of from 2 to 4 years in the Nebraska Penal and Correctional Complex. This appeal ensued. We reverse.

The defendant argues that the prosecution may not use any statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless the State demonstrates the use of procedural safeguards effective to secure the privilege against compelled self-incrimination. More specifically, prior to any questioning, a person in custody must be given *Miranda* warnings. See *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The State, on the other hand, argues that *Miranda* warnings and the requirements of the *Miranda* case do not apply to traffic offenses such as driving while intoxicated. Further, the State argues that the admission of the statements made by the defendant was at most harmless error.

In *Wiseman v. Sullivan,* 190 Neb. 724, 211 N.W.2d 906 (1973), we held: "The right to a Miranda type warning applies only to in-custody interrogation and has no application to a proper request to a motor vehicle driver to give a specimen under the implied consent statute." (Syllabus of the court.)

The court in *Wiseman* stated at 730, 211 N.W.2d at

911: "What is said in this opinion should not be taken to suggest that the police may in any way interfere with a suspect's right to counsel in connection with any charge of crime which may be related to the driving while intoxicated investigation as, for example, to drunk driving itself or motor vehicle homicide. As to these, of course, the ordinary rules pertaining to right to counsel apply. We simply say such right does not apply to the taking of samples under the implied consent statute."

We feel this case turns on whether or not the defendant was, in fact, in custody. The U.S. Supreme Court in *Miranda v. Arizona, supra* at 444, held: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." This court defined custodial interrogation in *In re Interest of Durand,* 206 Neb. 415, 293 N.W.2d 383 (1980). In that case, this court relied on *Rhode Island v. Innis,* 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), and stated at 420, 293 N.W.2d at 386: " '[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. . . .' " In this case, there is no doubt that the defendant was in custody at the time the statements were elicited. On both direct and cross-examination during the suppression hearing and on direct examination at the trial, the officer stated that the defendant was arrested at the scene of the traffic accident prior to being transported to the hospital. At the suppression hearing, Officer Keiper was asked on cross-examination: "Q. Was Mr. Thunder Hawk placed

under arrest at the scene of the accident? A. Yes. Q. So he was in custody while he was being transported to the hospital. A. Yes. Q. He was also in custody at the hospital? A. Yes, sir. Q. He would not have been permitted to leave the hospital? A. No. Q. What was Mr. Thunder Hawk placed under arrest for? A. Driving while under the influence of alcohol." Officer Keiper also testified that the reception room at the hospital was approximately 12 feet by 12 feet and that he and the defendant were the only persons present at the time of the questioning.

The officer testified that the statements given by the defendant were responses to express questions asked by the officer. At the time the incriminating statements were made, the investigation had reached the accusatory stage and had clearly focused on the defendant. The interrogation was aimed at soliciting incriminating statements from the defendant upon whom the investigation focused. At the time the officer asked the defendant who owned the vehicle, he already knew the answer, since he (the officer) had the vehicle registration. The *Miranda* safeguards were not intended to create a constitutional straitjacket. Volunteered and general on-the-scene questioning is not prohibited by its holding.

The officer should have given the *Miranda* warnings prior to any questions he asked at the hospital. His failure to do so was a violation of the defendant's rights against self-incrimination. We are not at this time stating whether or not the *Miranda* requirements apply to traffic offenses. What we are saying is that where a defendant is arrested and taken into custody, *Miranda* warnings must be given before he is interrogated.

The State argues that even if the *Miranda* warnings should have been given to the defendant prior to questioning him at the hospital, the admission of his statements at his trial was harmless error. We do

not agree. In *State v. Lee,* 196 Neb. 344, 347, 243 N.W.2d 53, 54 (1976), this court said: " 'The admission of testimony wrongfully received in a case tried to a jury is prejudicial error where it may have influenced the verdict.' "

The crime that the defendant was charged with requires the State to prove that he took the van or exercised control over it, and that he had the intent to deprive the owner thereof. The statements wrongfully admitted into evidence make up a large portion of the State's case against the defendant. Absent this evidence, the State must still prove that the defendant took the van or exercised control over it, and had the requisite intent to deprive the owner thereof. Viewing the other evidence in the record, reasonable minds could draw different conclusions. We cannot say beyond a reasonable doubt that the admission of this testimony did not influence the verdict and therefore we cannot hold the admission of these statements as harmless error.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

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STATE OF NEBRASKA, APPELLEE, V. CLAUDE D. LOVELACE, APPELLANT.

322 N.W.2d 673

Filed July 30, 1982. No. 81-783.

1. **Lesser-Included Offenses.** To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
2. _____. To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case.
3. **Assault: Lesser-Included Offenses.** First degree assault is not a lesser-included offense of attempted murder in the second degree.

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

Dennis R. Keefe, Lancaster County Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

KRIVOSHA, C.J.

The appellant, Claude D. Lovelace (Lovelace), appeals from a jury verdict finding him guilty of first degree assault. Lovelace maintains, on appeal, that the trial court erred in instructing the jury that first degree assault was a lesser-included offense of attempted murder in the second degree. We agree with Lovelace, and for that reason we reverse the conviction.

Lovelace was tried on an amended information. Count I of the amended information charged Lovelace with the crime of attempted second degree murder in violation of Neb. Rev. Stat. § 28-304(1) (Reissue 1979). Count II charged Lovelace with using a firearm to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1979). The facts in the instant case are not important for our disposition of the legal question presented to us. Suffice it to say that the evidence was sufficient to establish the fact that Lovelace did indeed shoot and wound one Raynold Jurgens during the course of an argument.

At the conclusion of all the evidence, the trial court submitted the case to the jury. The trial court advised the jury that "Under the information in Count I of this case, depending on the evidence, you may find the defendant: a. Guilty of attempted second degree murder. b. Guilty of assault in the

first degree. c. Not guilty. . . ." The court apparently included the instruction regarding assault in the first degree at the request of the State, on the theory that the crime of assault in the first degree is a lesser-included offense of *attempted* second degree murder and therefore may properly be submitted to the jury. There is, of course, the question of whether the State may, under any circumstance, request an instruction of a lesser-included offense. While we recognize that the question is raised in this case, because of the manner in which we dispose of the case, we do not, at this time, address that issue, but, rather, address only the legal question of whether assault in the first degree is a lesser-included offense of attempted murder in the second degree.

We emphasize that the analysis we make here is between assault in the first degree and *attempted* murder in the second degree, and not assault in the first degree and murder in the second degree. The offense of attempted murder in the second degree is defined by Neb. Rev. Stat. §§ 28-201 and 28-304 (Reissue 1979). Section 28-304(1) defines murder in the second degree as occurring when "A person . . . causes the death of a person intentionally, but without premeditation." Attempted murder in the second degree occurs, under the provisions of § 28-201(1), when "A person . . . (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in the course of conduct intended to culminate in his commission of the crime." To therefore be guilty of attempted murder in the second degree, the evidence must establish beyond a reasonable doubt that the accused, in effect, took a substantial step in a course of conduct intended to cause the death of another with malice and intent. The fact that *no* injury befalls the vic-

tim is of no consequence. One may attempt to murder another by shooting at him. Should he, however, miss his victim, striking a nearby tree, he may nevertheless be guilty of attempted murder in the second degree. Assault in the first degree, on the other hand, is committed when one "intentionally or knowingly *causes* serious bodily injury to another." (Emphasis supplied.) Neb. Rev. Stat. § 28-308 (Reissue 1979). The crime of assault in the first degree requires that a serious bodily injury *in fact* occurred. That one attempts to injure another and fails to cause a serious bodily injury is not sufficient to constitute assault in the first degree, as it is in the case of *attempted* second degree murder. It is therefore clear that while the elements of first degree assault *may* be present in a case of attempted second degree murder, it is likewise clear that one may nevertheless be guilty of attempted second degree murder without having committed first degree assault. It is this distinction which precludes assault in the first degree from being a lesser-included offense of attempted murder in the second degree. In *State v. Colgrove,* 197 Neb. 375, 376-77, 248 N.W.2d 780, 781 (1977), we defined a lesser-included offense by saying: "A lesser included offense is one which is necessarily established by proof of the greater offense. Fuller v. United States, 407 F.2d 1199. To be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Certain v. State, 261 Ind. 101, 300 N.E.2d 345. In sum the lesser included offense is one all the elements of which are necessarily included in the greater. See, State v. Jones, 186 Neb. 303, 183 N.W.2d 235; State v. McClarity, 180 Neb. 246, 142 N.W.2d 152." See, also, *State v. White,* 209 Neb. 218, 306 N.W.2d 906 (1981). As we have observed, the test which is imposed before an offense may be defined as a lesser-included offense cannot be met in

the situation involving attempted second degree murder and assault in the first degree. The fact that under a given set of circumstances such may be the case is not sufficient to constitute assault in the first degree as a lesser-included offense of attempted murder in the second degree as a matter of law. To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case. In *State v. Smith,* 55 Wis. 2d 304, 310, 198 N.W.2d 630, 633 (1972), the Wisconsin Supreme Court observed that when determining whether one crime is a lesser-included offense of another, the court should be concerned only with the elements of the crime and not with the particular facts established in the case at hand, saying: "[T]he test for a lesser included offense is not the peculiar nature of a single defendant's crime, rather it is whether the lesser offense is statutorily within the greater."

In view of what we have previously said about the *elements* of the lesser-included offense being such that the greater offense cannot be committed without at the same time committing the lesser, we believe the Wisconsin court's observation, noted above, is valid. See *State v. Colgrove, supra.* The trial court was in error in giving such an instruction. For that reason, the case must be reversed.

In doing so, we do not imply that we excuse the act of the defendant in this case. Our function, however, is to apply the law, even though it may produce a result contrary to our own best wishes. That is what a legal system based upon due process is really all about. In reversing this case, we note, however, that having found that assault in the first degree is not a lesser-included offense of attempted murder in the second degree, the rule set out in *State v. Aby,* 205 Neb. 267, 287 N.W.2d 68 (1980), to the effect that a conviction or acquittal of the principal offense bars any prosecution or punishment for a

lesser-included offense does not apply. As we noted in *State v. Dinverno,* 205 Neb. 775, 778, 290 N.W.2d 203, 205 (1980): "Even where one and the same act constitutes two separate and distinct crimes, neither an acquittal nor a conviction of one bars a prosecution for the other as placing the defendant in double jeopardy." See, also, *State v. Carter,* 205 Neb. 407, 288 N.W.2d 35 (1980).

The judgment and conviction are reversed and dismissed.

REVERSED AND DISMISSED.

BOSLAUGH, J., dissenting.

As the Attorney General's brief in this case stated, it is difficult to conceive how one could commit murder in the second degree or attempt to commit murder in the second degree by shooting the victim in the stomach and not attempt to cause serious bodily harm. "Cessation of life may be fairly characterized as the most serious of bodily injuries." (Brief for Appellee at 8.)

Unfortunately, the majority opinion abandons the rule which has been followed in this state for many years and adopts a rule from another state which vacates the conviction and forces the State to retry the defendant for a crime of which he is guilty and has already been convicted.

The majority opinion relies on the following quotation from *State v. Colgrove,* 197 Neb. 375, 376-77, 248 N.W.2d 780, 781 (1977): "A lesser included offense is one which is necessarily established by *proof* of the greater offense. Fuller v. United States, 407 F.2d 1199. To be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Certain v. State, 261 Ind. 101, 300 N.E.2d 345. In sum the lesser included offense is one all the elements of which are necessarily included in the greater. See, State v. Jones, 186 Neb. 303, 183 N.W.2d 235; State v. McClarity, 180

Neb. 246, 142 N.W.2d 152." (Emphasis supplied.) The statement of the rule is correct. The difficulty is that the rule is misunderstood and is incorrectly applied in this case.

The correct interpretation of the rule is demonstrated by the following quotation from *Alyea v. State,* 62 Neb. 143, 86 N.W. 1066 (1901), in which the defendant was charged with assault with intent to inflict great bodily injury. We said: "It is next urged that the crime of assault and battery, of which the defendant was convicted, is not embraced or included in the offense charged in the information. This, we think, is true. The information alleges an assault, but not a battery. If the latter had been averred in the information, the charge would have been sufficiently broad to have sustained a conviction for an assault and battery. *Mulloy v. State,* 58 Nebr., 204. But as the information contains no averment of a battery, the conviction can not stand. *Turner v. Muskegon,* 50 N.W. Rep. (Mich.), 310." *Id.* at 144, 86 N.W. at 1067.

The *Alyea* case demonstrates that it is the *allegations* in the information and the *proof* offered in support of the information which determines whether the lesser offense is included in the greater. It is the particular *offense committed by the defendant* that is controlling.

In *State v. McClarity,* 180 Neb. 246, 142 N.W.2d 152 (1966), one of the cases relied on in *State v. Colgrove, supra,* we held that assault with intent to commit robbery was a lesser-included offense within a charge of robbery because the *proof* showed that the offense had been committed by force and violence. We said: "When some of the elements of the crime charged in the information, without the addition of any element irrelevant to the original crime charged, may constitute another crime or crimes, such other crime or crimes are included within the crime charged. This court has held that the offense

of larceny from the person is included within a charge of robbery, Bunge v. State, 87 Neb. 557, 127 N.W. 899, Brown v. State, 33 Neb. 354, 50 N.W. 154, on rehearing, 34 Neb. 448, 51 N.W. 1028; that assault and battery is included within a charge of shooting with intent to wound, Moore v. State, 147 Neb. 390, 23 N.W.2d 552; and that assault and battery is included within a charge of assault with intent to commit rape, McConnell v. State, 77 Neb. 773, 110 N.W. 666. In McConnell v. State, *supra,* it was stated: ' "* * * we are satisfied, that the general rule is, that, where a higher and more atrocious crime fully embraces all the ingredients of a lesser offense, and when the evidence requires it, the jury may convict of the latter." ' The refusal to instruct upon a lesser included offense after request by the defense has been held to constitute reversible error. Moore v. State, *supra.* In this case, both the crimes of assault with intent to commit robbery and assault and battery include only elements contained within the crime of robbery; such elements find support in the evidence; and the trial court acted correctly in submitting both included offenses upon request." *Id.* at 249, 142 N.W.2d at 154.

In *State v. Jacobs,* 192 Neb. 246, 219 N.W.2d 768 (1974), we reversed a conviction for robbery "forcibly and by violence" because the trial court had refused a request to submit assault and battery as a lesser-included offense. We specifically rejected the argument of the State, which is the substance of the majority opinion in this case. We said: "*Unless this court elects to overrule it, this case is controlled by the case of State v. McClarity, 180 Neb. 246, 142 N.W.2d 152.* That case specifically held that the crimes of assault with intent to commit robbery and assault and battery are included within a charge of robbery. We also held that when the defendant requests the trial court to submit a lesser included offense in the instructions, the trial court must submit

all included offenses as to which the evidence is sufficient to support a verdict. *Here the evidence of the defendant established the assault and battery, and the State's evidence, if believed by the jury, was clearly sufficient to convict for the crime charged as well as the lesser included offenses.* The refusal to instruct upon a lesser included offense, after request by the defense, is reversible error. [Emphasis supplied.]

"The State contends that although typically all necessary elements of assault and battery are embraced within an information for robbery, all the *potential* elements are not embraced within the information against the defendant. The argument has been rejected by this court and by the federal courts. See, Joyner v. United States, 320 F.2d 798 (D.C. Cir.); Crosby v. United States, 339 F.2d 743 (D.C. Cir.); 4 Wharton, Criminal Law and Procedure, § 1888, p. 754. The fact that the information specifically charged that the robbery was committed 'forcibly and by violence' destroys the State's argument that robbery may potentially also be committed by 'putting in fear.' " *Id.* at 248, 219 N.W.2d at 770.

Another case which discusses and applies the rule correctly is *State v. Knaff,* 204 Neb. 712, 285 N.W.2d 115 (1979). There we held the trial court was not required to submit larceny from the person in a robbery case because the proof did not require it. We said: "During the early morning hours of August 19, 1978, Stephen Fiero was sleeping in his bedroom while still fully clothed. He felt someone touching him, but thought it was a friend telling him he was there. He then felt someone trying to get into his back pocket. He raised up and saw two black males, one standing in the doorway and the other at the foot of his bed. The one near the bed had what looked like a large dowel stick or metal rod about 3 feet in length in his hand, and the other appeared to

be grasping a revolver or pistol in both of his hands, pointing at the victim. Immediately realizing they were attempting to take his billfold, and believing if he resisted he would be shot or clubbed, he lay back down and pretended to be asleep. He felt his billfold being taken from his pocket by one of the men and, upon hearing them leave, got up and called the police. Mr. Fiero was unable to recognize either of the men, and the identity of the defendant and his presence at the scene were established by fingerprints and other evidence. The defense offered no evidence and no one else testified concerning the facts of the actual taking.

"It is on the basis of the foregoing evidence that defendant insists he was entitled to an instruction on the lesser-included crime of larceny from the person. The elements of robbery are the *forcible* taking of property from the person of another *by violence or putting in fear,* section 28-414, R.R.S. 1943, whereas larceny from the person requires the taking of property from another *without putting such person in fear by threats or the use of force and violence,* section 28-505, R.R.S. 1943. There is no question, of course, but that larceny from the person is a lesser-included offense of robbery, as the former crime 'is one which is fully embraced in the higher offense.' State v. Tamburano, 201 Neb. 703, 271 N.W.2d 472 (1978).

"The only evidence presented to the jury was that the victim was awake, saw a club and what he believed to be a gun, and permitted his property to be taken because he was afraid of injury to his person. It is only in those cases where, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater, but not the lesser, offense that the lesser-included offense instruction must be given. Where the evidence is uncontroverted on an essen-

tial element of the crime, mere speculation that the jury may disbelieve it does not entitle the defendant to such an instruction. State v. Tamburano, *supra*. The undisputed facts established in this case did not require the submission of a lesser-included offense instruction." *Id.* at 713-14, 285 N.W.2d at 117.

In *State v. Aby,* 205 Neb. 267, 287 N.W.2d 68 (1980), the defendant was convicted of both first degree sexual assault and felony debauching of a minor. We reversed the conviction of the second offense charged because it was a lesser offense included within the greater offense, the sexual assault charge. We said: "A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Comer, 199 Neb. 762, 261 N.W.2d 374. The evidence of the State which proved the first degree sexual assault in this case also proved felony debauching of a minor although the element of penetration was not an element of the debauching offense. Thus, under the evidence in this case, debauching of a minor was a lesser-included offense of the sexual charge.

"The State was not required to elect between the counts because a crime and a lesser-included offense may be charged in separate counts of the same information. See, Stapleman v. State, 150 Neb. 460, 34 N.W.2d 907; Longsine v. State, 105 Neb. 428, 181 N.W. 175.

"However, a defendant cannot be convicted of two degrees of the same offense or a crime and a lesser-included offense based upon the same act or transaction. In re Resler, 115 Neb. 335, 212 N.W. 765. A conviction or acquittal of the principal offense bars any prosecution or punishment for a lesser-included offense.

"For that reason the judgment on count II must be

reversed and that count dismissed." *Id.* at 269-70, 287 N.W.2d at 70.

Further citation of recent authority is unnecessary.

HASTINGS, J., joins in this dissent.

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ISABELLE EVANS BROMMER, APPELLEE, V. CITY OF HASTINGS, NEBRASKA, APPELLANT.

322 N.W.2d 787

Filed August 6, 1982. No. 43846.

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 reference to the findings of the trial court.
2. **Res Judicata.** The scope of the res judicata bar encompasses not only issues actually litigated in the first suit but also those issues which could have been raised in that suit.
3. _____. 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 Adams County: FRED R. IRONS, Judge. Reversed and dismissed.

Michael E. Sullivan, for appellant.

Arthur E. Langvardt, for appellee.

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

PER CURIAM.

This is an equity case commenced by Isabelle Evans Brommer, plaintiff and appellee, a landowner in Adams County, Nebraska, seeking a permanent injunction restraining the City of Hastings, Ne-

braska (City), a municipal corporation, defendant and appellant, from discharging water upon her land to the extent that it causes flooding and erosion of the same. In addition, Isabelle Brommer is seeking money damages for injury to her real estate resulting from this flooding.

The trial court entered a decree permanently enjoining the defendant from allowing drainage water to escape from the existing channel crossing the plaintiff's property onto the plaintiff's land to the north of said channel; permanently enjoining the defendant from allowing or causing any further erosion of the northerly bank of said channel; awarding the plaintiff $45,000 as total and permanent damages to the plaintiff's land south of said channel; and granting title to the defendant to that portion of plaintiff's land lying south of said channel, limiting defendant's use thereof to drainage or water control purposes. The defendant appeals.

The defendant asserts, in substance, that the trial court erred: (1) In failing to find that the plaintiff's action was barred by the doctrine of res judicata; (2) In finding that any conduct of the defendant was the cause of the various injuries sustained by the plaintiff due to flooding upon her real estate or to erosion of the channel upon her real estate; (3) In awarding money damages to the plaintiff as total and permanent damages to plaintiff's land south of the channel which crosses plaintiff's land; and (4) In restricting the use defendant can make of the property awarded to the defendant.

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 reference to the findings of the trial court. *Daugherty v. Ashton Feed and Grain Co., Inc.*, 208 Neb. 159, 303 N.W.2d 64 (1981); *Probert v. Grint*, 148 Neb. 666, 28 N.W.2d 548 (1947).

Plaintiff owns a parcel of agricultural real estate of approximately 25 acres located on the east side of

Highway 281 north of Hastings, Nebraska. In approximately 1958 the City constructed the present Lake Hastings dam. The dam was built across and blocked off what has historically been a draw or low area west of Highway 281. Prior to the construction of the dam, rainwater following heavy rains would flow through a depression or dry creek across plaintiff's land. Following the construction of the dam the water followed the same general course through plaintiff's land, with the owners being able to farm all of the land until recent years.

The principal source of water supply for Lake Hastings is the discharge of cooling water into the lake by the Hastings Utilities Department and natural surface waters, i.e., rainfall runoff. Surface waters are derived from an area approximately 8 miles square, known as the Lake Hastings Watershed. Three and one-half of those square miles are the urbanized portion of the City; the remaining 4½ square miles are comprised of farmland.

The dam is designed so that Lake Hastings is full almost all of the time and, therefore, has no reserve capacity. The result is that as the Hastings Utilities Department discharges water into the lake, or any rainfall runoff flows into the lake, equal amounts of water flow over the spillway and eventually cross the plaintiff's land, thus creating a constant flowing stream.

In 1961, following a flooding of her land, the plaintiff sued the City and recovered a judgment in the amount of $1,000.

In recent years there has been steadily increasing residential development around the lake. The defendant has made no effort to control runoff from the developed areas and merely allows it to flow into the lake. The runoff from the developed land comes into the lake at a much faster rate, with the result that there is a greater problem each year as steadily increasing volumes of water come across the plain-

tiff's land, especially during rainfalls. In addition, the constant flow in the channel has caused drastic erosion, with the result that the channel now flows larger and deeper each year.

Water flows in a southeasterly direction across plaintiff's land, then exits south under an east-west road, then sharply left under railroad tracks, then sharply north back under the east-west road. The resulting horseshoe-shaped turn in the channel impedes the flow of water and, in times of rainfall, it banks it up on the plaintiff's land. This has made farming of the land north of the channel difficult at best and has made the planting of new crops useless. The now constantly flowing channel has also totally cut off access to the land south of the channel. These 3½ acres have been rendered totally useless to the plaintiff due to this lack of access and because they have now developed sinkholes.

The defendant has argued that this action is controlled by the doctrine of res judicata because of the 1961 lawsuit between the parties. The prior court file introduced in evidence consists of the pleadings and a judgment. In the second amended petition filed in the 1961 lawsuit, the plaintiff alleged construction of the dam, establishment of the Hastings Utilities Department well field and its drainage into the watershed, continuous flow of water across the plaintiff's land, and permanent damage to the land. The action was tried on the second amended petition and the answer thereto. The earlier petition alleged only crop damage, costs of maintenance of the banks, and access costs to the isolated acreage. The petition in the instant case repeats all those allegations and adds another, i.e., that development in the watershed increases the volume of water received by the plaintiff's land. No allegation is made that water from outside the watershed is introduced into the watershed by the City. The prayer asks for monetary dam-

ages for permanent damage to the land, and an injunction.

Without discussion, we note the rather novel theory of the plaintiff that a city is liable to downstream proprietors for a presumed loss of soil absorption by reason of developments in a watershed. We believe this case is controlled by the doctrine of res judicata.

The scope of the res judicata bar encompasses not only issues actually litigated in the first suit but also those issues which could have been raised in that suit. *Industrial Credit Company v. Berg,* 388 F.2d 835 (8th Cir. 1968).

" ' " '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.' " ' " *Vantage Enterprises, Inc. v. Caldwell,* 196 Neb. 671, 674, 244 N.W.2d 678, 680 (1976).

The causes of action in both the 1961 lawsuit and this one are the same. The plaintiff had the opportunity to sue for an injunction in the first action but decided against it. This was evidenced by the change in the prayers in the amended petitions filed in the 1961 lawsuit. The plaintiff successfully maintained a cause against the City for permanent damage in 1961. The controversy has been litigated and permanent damage has been recovered once. The doctrine of res judicata prevents recovery a second time.

The judgment of the District Court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

CLINTON, J., participating on briefs.

SANDRA SUSAN O'NEIL, APPELLANT, V. JEFFREY BEHRENDT, APPELLEE.

322 N.W.2d 790

Filed August 6, 1982. No. 44247.

1. **Damages: Verdicts.** Where the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.
2. **Jury Instructions.** If instructions given the jury, considered and construed together, are not sufficiently specific in some respects and counsel offers a requested instruction that is a proper statement of the law and which will supply the omission, it is reversible error for the trial court to refuse to give such instruction.
3. **Damages: Appeal and Error: New Trial.** Where error in a trial exists only as to the issue of damages and the judgment is in other respects free from error, and it is clear that no injustice will result from doing so, this court may, when remanding a cause for a new trial, limit the new trial to such issue.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Reversed and remanded for a new trial.

Kennedy, Holland, DeLacy & Svoboda, for appellant.

Norman H. Wright of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellee.

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

HASTINGS, J.

The plaintiff, Sandra Susan O'Neil, who was a passenger in a motor vehicle which was involved in an accident, has appealed from a jury verdict and judgment entered in her favor in the amount of $1,000, and from the subsequent order of the District Court which overruled her motion for a new trial. She assigns as error the inadequacy of the verdict and the failure of the trial court to instruct the jury on nonimputation of negligence to the plaintiff.

Mrs. O'Neil is a 34-year-old housewife and the mother of two children, ages 11 and 7 years. She is

also a registered nurse, but with the exception of 2 years of part-time employment beginning in 1970, she has not practiced her profession since the birth of her first child in 1969.

On December 6, 1976, the plaintiff was a guest passenger in a motor vehicle being driven by a friend, Mrs. Constance Vawter. They were on their way to their church for a meeting of the Brownie troop of which the plaintiff was the leader. They drove west on Elm Street in the city of Omaha to 60th Street, which is a median-divided street, then turned north on 60th to Bancroft where a break in the median permitted them to turn back south on 60th by the use of a "U-turn." However, Mrs. Vawter was not able to complete the turn because her right front wheel struck the west curbing of 60th Street, causing her to stop headed in a southwesterly direction. Shortly thereafter, and before they were able to move, the motor vehicle in which the two women were riding was struck from the rear by one being operated in a southerly direction on 60th Street by the defendant, Jeffrey Behrendt.

Soon after the accident the plaintiff testified that she did not feel very good and started having double vision. She was then taken to Bergan-Mercy Hospital where she was seen in the emergency room by a physician, X-rayed, given some medication, and sent home to contact her own physician. She stated that she stayed in bed for a couple of days, and after getting up to attempt to carry on her normal activities, she began having some discomfort. After several weeks, she said, she realized she was not getting any better, she was having a lot of stiffness and pain, and so she made arrangements for an examination by Dr. Gerald Ries. According to the medical records this would have been on February 9, 1977. Dr. Ries took a series of X-rays, did an examination in the office, and prescribed medications for pain and relaxation. Mrs. O'Neil further testified

that she saw Dr. Ries on a regular basis and took physical therapy under his direction for a period of 2 weeks. She continued to have pain in her neck and down into her shoulders, arms, and hands, and finally, in June of 1977, at the urging of Dr. Ries, she was admitted into Bergan-Mercy Hospital for a little over a week for additional therapy and traction.

On July 4, 1977, Mrs. O'Neil was in another automobile accident in which the car in which she was riding was struck in the rear by another automobile. It happened that the plaintiff had an appointment to see Dr. Ries on July 5, so she told him about the latest episode. However, she contends that the July 4 impact "really wasn't too bad," and that she did not have any more problems than those she was already experiencing. The plaintiff continued to see Dr. Ries every 6 to 8 weeks for some period of time, and was then told by him to just come in when needed. In July of 1979 Dr. Ries recommended a myelogram and anterior cervical fusion. However, because of the uncertainties involved, she said that she has never agreed to undergo those procedures. She has not had further medical care since that time. It should be stated at this point that Mrs. O'Neil also testified as to an automobile accident in which she was involved in 1968. Although she saw a physician as a result of that accident, she claimed that all symptoms disappeared within 1 month.

The plaintiff, in describing her activities since the 1976 accident, claims that there are many things around the house that she is unable to do, such as lifting, running the vacuum cleaner, and helping with the yard work. The plaintiff's description of the pain that she has suffered and the restriction on her activities was corroborated by the testimony of her husband.

Dr. Ries, a board-certified orthopedic surgeon, described the course of treatment given Mrs. O'Neil, which in substance is that as described by her. Of

particular importance for our consideration is his description of the findings made during a December 21, 1977, examination of the plaintiff. He stated that she had pretty much discontinued use of a foam cervical collar which he had given her following the July 4 accident. According to him, she was still having some pain on the left side of her neck, which complaint had originated following the December 1976 accident. He made no mention of any right side pain which had been the area of her specific complaint due to the July 4 accident. He gave as his opinion that, as of the date of that examination, "I thought that she was pretty well over the symptoms and the findings that we had had from the July 4th accident, and told her that I felt that her problems in December were related to the problems that she was having prior to this [July 1977] accident."

It was Doctor Ries' opinion, based upon a reasonable degree of medical certainty, that as of the date of his last examination, July 25, 1979, the pain which she was then suffering was caused by the accident of December 6, 1976; that the symptoms would continue; and that as a result of that accident she would have approximately a 20 percent permanent impairment of her cervical spine. He also testified that the plaintiff would require future medical attention, and that he recommended a myelogram and the probability of a surgical anterior cervical fusion. He gave as his opinion that such surgery, including his fee, hospital care, and medicines, would amount to approximately $3,700.

As to the matter of medical costs actually incurred to the date of the trial, the parties stipulated that "if the proper person were called, he or she would testify that hospital, physician and medical expenses and services in the amount of $1,641.18 were incurred by Mrs. O'Neil *as a result of the accident of December 6, 1976,* and that the charges for the same are fair and reasonable." (Emphasis supplied.)

The defendant made no objections to any of the instructions proposed and given by the court to the jury. The plaintiff objected only to the court's failure to give her requested instruction, based on NJI 7.21, to the effect that if the jury found that Constance Vawter, the driver of the motor vehicle, was in any way negligent, such negligence could not be charged to the plaintiff. This request was refused. The court's instructions did allow the jury to find in favor of the plaintiff if it concluded that the defendant was negligent and that such negligence, "concurring or combining" with the negligence of plaintiff's host, was a proximate cause of the accident. More specifically, instruction No. 8 provided in part that before the plaintiff could recover, she must prove "2. That such negligence, if any, of the defendant was the proximate cause of the collision; or that the negligence of the defendant concurring or combining in any degree with the negligence, if any, of the driver of the vehicle in which plaintiff was riding as a passenger, was a proximate cause of the collision." In instruction No. 15, concurrent negligence was defined as "Where the independent acts or omissions to act of two or more persons combine to proximately cause an injury indivisible in its nature, each such act or omission to act is itself a proximate or concurrent cause, and any one or more of such persons may be held responsible for the entire injury. This is true even though one may have been more negligent than the other."

These instructions fully define the affirmative aspects of concurrent negligence as it relates to proximate cause, and the trial court followed the generally accepted rule of instructing in a positive, rather than a negative, manner. However, it requires no citation of authority to establish the proposition that, under the circumstances of this case, any negligence on the part of the plaintiff's host driver could not be imputed to the plaintiff. This is a concept of the law

which is difficult for laymen to grasp. It is for this reason, we believe, that the Nebraska Supreme Court Committee on Pattern Jury Instructions proposed, and this court adopted, NJI 7.21, and we believe that plaintiff's tendered instruction should have been given. It remains to be seen whether the court's failure to do so constituted prejudicial error.

Although not particularly definitive, the rule in this state has long been that where the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict. *Webster v. Halbridge,* 185 Neb. 409, 176 N.W.2d 8 (1970). In that case the jury returned a verdict of $1,600 in the face of special damages of approximately $2,000, plus evidence of pain and permanent scarring. *Bohn v. Kruger,* 185 Neb. 407, 176 N.W.2d 14 (1970), involved stipulated medical expense of $3,194.99 and a verdict in the same amount, which seemingly ignored additional uncontested damages for hired labor and obvious injuries requiring a period of hospitalization. In *Gross v. Johnson,* 174 Neb. 273, 117 N.W.2d 534 (1962), we reversed the action of the trial court in refusing to set aside a verdict in the amount of $1,998.62. This was equal to the undisputed total sum of the special damages, ignoring any damages for injuries, disability, pain, and loss of income.

The defendant argues that the stipulation as to damages was no more binding on the jury than if the witnesses had actually been called, qualified as experts, and testified in person. With this statement we agree. However, the fact remains that the testimony was undisputed, and that fact may be considered in determining whether or not the verdict was inadequate. *Gross v. Johnson, supra.*

In attempting to explain the rather meager verdict returned in this case, the defendant argues that perhaps the jury determined that a portion of the plaintiff's medical expenses was attributable to the

accident of July 4, 1977, or that the jury concluded that some of the expense was incurred by the plaintiff purposefully in anticipation of making a claim. Of course, either one of these theories is not beyond the realm of possibility. If that were the only issue in this case, one might be hard pressed to justify a reversal on that basis.

However, rather than a demonstration of sympathy for the plaintiff, as suggested in the defendant's brief, it is the more likely conclusion that, in returning the verdict that it did, the jury felt sorry for the defendant in view of the facts of the accident which perhaps indicated a higher degree of negligence on the part of the plaintiff's host. In other words, the verdict smacks of a compromise effected by the unwarranted placing of some of the burden for the host's negligence on the plaintiff. It is to prevent such a misapplication of the law, as we have suggested earlier, that NJI 7.21 was promulgated, fully supported by case law of long standing, and which formed the basis for plaintiff's requested instruction on that subject. As stated by this court in *Stahlhut v. County of Saline,* 176 Neb. 189, 203, 125 N.W.2d 520, 529 (1964): " 'Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. And, unless this is done, the judgment will not ordinarily be reversed for such defects.' " The corollary of that rule, of course, would be that if the instructions, considered and construed together, are not sufficiently specific in some respects and counsel offers a requested instruction that is a proper statement of the law and which will supply the omission, but which is refused by the trial court, the judgment will be reversed upon a showing of prejudice.

Considering the undisputed evidence in the case, we conclude that the failure of the District Court to

give the plaintiff's tendered instruction worked to the plaintiff's prejudice, resulting in what we believe to be a wholly inadequate verdict under the circumstances, and its order overruling the motion for a new trial is reversed.

When error exists as to only the issue of damages and the judgment is in other respects free from error, and it is clear that no injustice will result from doing so, a reviewing court may, when remanding a cause for a new trial, limit the new trial to such issue. *Caster v. Moeller,* 176 Neb. 446, 126 N.W.2d 485 (1964). Accordingly, the cause is remanded for a new trial on the issue of the amount of the damages only.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., concurs in the result.

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STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DONALD E. LEONARD, RESPONDENT.

322 N.W.2d 794

Filed August 6, 1982. No. 44253.

1. **Disciplinary Proceedings.** Generally, a judgment of conviction of a felony or misdemeanor involving moral turpitude rendered upon a plea of nolo contendere is conclusive upon a respondent lawyer in a disciplinary proceeding, and is sufficient to authorize the court to impose discipline.
2. _____. It is the conviction of a crime involving moral turpitude, and not the plea to the charged offense, that warrants disciplinary action.
3. _____. An attorney may be subjected to disciplinary action for conduct outside the practice of law for which no criminal prosecution has been instituted or conviction had.
4. _____. Although only those matters which are specifically charged in the complaint in a disbarment proceeding can be considered, a disciplinary proceeding is not a lawsuit with formalities of pleading, nor can technicalities be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong.

Original action. Judgment of suspension.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for relator.

Edward F. Carter, Jr., and Barney, Carter & Johnson, P.C., for respondent.

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

PER CURIAM.

This is a disciplinary proceeding against Donald E. Leonard, who was admitted to practice in this state on June 24, 1960. The charges relate to conduct other than the practice of law.

Formal charges against the respondent Leonard were filed in this court on April 23, 1981, by the Committee on Inquiry of the Third Judicial District. The formal charges allege that on August 23, 1979, the respondent pleaded guilty to an information filed in the U.S. District Court for the District of Colorado, charging a violation of Title 20, U.S. Code § 1087-4(c) (1976), "in that DONALD E. LEONARD failed to disclose to Union Bank and Trust Company that Labor Finance Industrial Bank had induced proprietary schools, i.e., Continental Commercial College, Educational Career Systems, Elba Systems Corporation, Wyoming Technical Institute, Arizona Automotive Institute, and persons connected therewith, not named as defendants herein, to make unlawful payments as a precondition to fund Federally Insured Student Loans, utilized by the students of said proprietary schools"; that on September 21, 1979, the respondent was permitted to withdraw his plea of guilty and enter a plea of nolo contendere and was thereupon sentenced to 60 days' incarceration and fined $1,000 and costs; and that the actions of the respondent constitute a violation of his oath of office as an attorney and violated Canon I, DR 1-102(A)(1),

(3), (4), and (6) of the Code of Professional Responsibility.

Canon I of the Code of Professional Responsibility provides: "A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession." DR 1-102(A)(1), (3), (4), and (6) provides: "A lawyer shall not: 1. Violate a Disciplinary Rule. . . . 3. Engage in illegal conduct involving moral turpitude. 4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. . . . 6. Engage in any other conduct that adversely reflects on his fitness to practice law."

The respondent's answer admitted only that he had been admitted to practice on June 24, 1960, and that an information against him had been filed in the U.S. District Court for the District of Colorado.

Pursuant to the rules of this court, a referee was appointed and an evidentiary hearing held on October 29, 1981. The referee found that § 1087-4(c) of the U.S. Code did not become effective until October 1, 1976, and could not have been violated by the respondent during the period May 14 to October 1, 1976, as alleged in the information filed in the federal court; that the information charged a violation of an ex post facto law; and that respondent's plea was a nullity and of no legal consequence. The referee recommended that the formal charges be remanded to the Committee on Inquiry for reconsideration.

Both the relator and the respondent filed exceptions to the report of the referee. The matter was then set for argument and has been submitted to the court.

Generally, a judgment of conviction of a felony or misdemeanor involving moral turpitude rendered upon a plea of nolo contendere is conclusive upon a respondent lawyer in a disciplinary proceeding, and is sufficient to authorize the court to impose discipline. *State ex rel. Nebraska State Bar Assn. v.*

*Tibbels,* 167 Neb. 247, 92 N.W.2d 546 (1958). It is the conviction of a crime involving moral turpitude, and not the plea to the charged offense, that warrants disciplinary action.

There can be no doubt that the respondent violated Canon I and Disciplinary Rule 1-102 if there was a factual basis for the charges against him.

The evidence before the referee shows that the prosecution in federal court arose out of the respondent's operation of a corporation known as "Medsa," which was owned by the respondent. Medsa owned or controlled an industrial bank in Colorado known as Labor Finance Industrial Bank (LFIB) which made loans to students under the Federally Insured Student Loan program. Medsa also owned or controlled several other corporations such as Systech of Colorado, Inc., Educational Methods, Incorporated, and K-Sette Corp., which were engaged in providing services to educational institutions. It was the contention of the government that loans were made available to students of educational institutions in accordance with an arrangement whereby the educational institutions would purchase services from the other corporations, and that such an arrangement violated a regulation prohibiting the payment of "points, premiums or additional interest of any kind" as an inducement to make student loans.

In 1976 LFIB sold its portfolio of student loans to Union Bank and Trust Company. The information filed in federal court alleged that the respondent had failed to disclose to Union Bank that LFIB had induced certain schools to make unlawful payments as a precondition to the funding of student loans. Union Bank makes no contention that the respondent failed to disclose material facts in regard to the transaction.

On the same day that the respondent entered his plea of guilty to the information filed against him, he, as chairman of the board of LFIB and president

of Medsa, entered pleas of guilty on behalf of Medsa and LFIB to an information charging that the corporations, operated by the respondent, had fraudulently required certain educational institutions "to pay kickbacks" as a precondition to the funding of student loans.

The fact that the federal statute, which the respondent was charged with having violated, was an ex post facto law is not controlling in this proceeding for several reasons. It is the respondent's conduct or "actions" which is in issue rather than whether he was technically guilty of the crime charged. An attorney may be subjected to disciplinary action for conduct outside the practice of law for which no criminal prosecution has been instituted or conviction had. *State ex rel. Nebraska State Bar Assn. v. Bremers,* 200 Neb. 481, 264 N.W.2d 194 (1978).

A federal regulation which was in effect during the time in question provided as follows: "No points, premiums or additional interest of any kind may be paid to any eligible lender in order to secure funds for making loans or to induce such a lender to make loans to the students of a particular institution or any particular category of students and, except in circumstances approved by the Commissioner, notes (or any interest in notes) evidencing loans made by educational institutions shall not be sold or otherwise transferred at discount." 45 C.F.R. § 177.6(e) (1970). The evidence before the referee shows that the respondent was familiar with this regulation, and in 1971 or 1972 sought legal advice as to whether the regulation was enforceable.

Although only those matters which are specifically charged in the complaint in a disbarment proceeding can be considered, a disciplinary proceeding is not a lawsuit with formalities of pleading, nor can technicalities be invoked to defeat the charges where undisputed facts show conduct which is ethi-

cally wrong. *State ex rel. Nebraska State Bar Assn. v. Jensen,* 171 Neb. 1, 105 N.W.2d 459 (1960).

The fact that § 1087-4(c) was not effective until October 1, 1976, was well known to the respondent, the U.S. attorney, and the federal court at the time the respondent entered his plea on August 23, 1979. The evidence before the referee establishes that a federal grand jury had been conducting an investigation into the practices of LFIB in regard to student loans, and the respondent agreed to a plea of guilty to the misdemeanor charge in return for an agreement by the U.S. attorney to not present to the grand jury a "RICO" indictment against the respondent which contained 22 counts and alleged "racketeer influenced and corrupt organizations" charges.

While the record before us is not as complete as it might be, we conclude that it is sufficient for the purpose of the charges made against the respondent and establishes by a clear preponderance of the evidence that he was guilty of violating Canon I, DR 1-102(A)(1), (3), (4), and (6) of the Code of Professional Responsibility.

There are mitigating circumstances shown in the record which should be considered in determining what discipline should be imposed. As previously mentioned, Union Bank makes no contention that the respondent withheld any material information from it. The record further discloses that, except for the pleas to the information filed in the federal court, the respondent has at all times maintained that none of the transactions involved were illegal.

We conclude that the respondent should be suspended from the practice of law for a period of 1 year. All costs are taxed to the respondent.

JUDGMENT OF SUSPENSION.

CLINTON, J., participating on briefs.

RIHA FARMS, INC., A NEBRASKA CORPORATION, APPELLANT, V. COUNTY OF SARPY, APPELLEE.

322 N.W.2d 797

Filed August 6, 1982. No. 44538.

1. **Taxation: Actions.** Generally, a suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover taxes alleged to have been illegally assessed, but each taxpayer must bring action on his own behalf.
2. **Taxation.** For purposes of taxation the terms actual value, market value, and fair market value mean exactly the same thing.
3. **Taxation: Appeal and Error.** In an appeal from property valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.
4. **Taxation: Valuation.** Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the question is whether the method used ultimately attains a reasonable degree of uniformity in value.
5. _____: _____. An approximation of value and uniformity of taxation is all that can be accomplished, and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the Constitution is all that is required.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

Warren S. Zweiback, Patricia A. Lamberty and Richard A. DeWitt of Zweiback, Kasher, Flaherty & DeWitt, P.C., for appellant.

Patrick Kelly, Sarpy County Attorney, for appellee.

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

MCCOWN, J.

This is a direct appeal by the owner of certain agricultural land situated in Sarpy County, Nebraska, from the action of the Sarpy County Board of Equalization fixing the valuation of plaintiff's agri-

cultural land for tax purposes for 1980. Plaintiff sought a reduction of valuation of its property and, on behalf of itself and all other owners of agricultural land in Sarpy County, sought to reduce the valuations of agricultural land to the valuations previously established for 1979, or, in the alternative, to increase the valuations of all other classifications of real property correspondingly. The District Court affirmed the action of the board of equalization as to plaintiff's property and denied class action relief.

Plaintiff is the owner of agricultural land in Sarpy County, specifically described in its petition. Neb. Rev. Stat. § 77-1330 (Reissue 1981) requires the Tax Commissioner to prepare and annually revise guides for county assessors and requires that all appraisals or reappraisals of real property for tax purposes are to be in compliance with such manuals and guides. The Tax Commissioner duly promulgated the Nebraska Agricultural Land Valuation Manual 1979. A countywide revaluation and reassessment of all agricultural land in Sarpy County was conducted in 1979 based on the land valuation manual and placed in effect for the 1980 tax year. Other classifications of real property were not similarly revalued and their assessments continued to be based upon a countywide reappraisal made in 1977, which took effect January 1, 1978.

In March 1980 the Sarpy County assessor mailed notice of valuation increases to the owners of agricultural land in Sarpy County, the increase to be effective as of January 1, 1980. Based on the assessor's figures, irrigated land values were increased by approximately 31.9 percent, dryland by 36 percent, and pastureland by 20 percent over the valuations for the previous tax year of 1979.

On April 1, 1980, the plaintiff and other property owners presented a resolution to the Sarpy County Board of Equalization requesting that the 1979 valuation of agricultural lands within the county be

maintained in effect until it was shown that a change of circumstances warranted a revaluation and reassessment of agricultural lands. The board denied the resolution. Thereafter plaintiff filed a protest with the Sarpy County Board of Equalization requesting that the valuation of its agricultural land be reduced from $29,370 to $16,800, which was apparently its 1979 valuation. Plaintiff's protest was denied by the county board of equalization and the plaintiff appealed to the District Court.

Plaintiff's petition alleged that the valuation of its agricultural land and of all other agricultural land in Sarpy County has not been equalized with other classifications of real property and that agricultural land in Sarpy County, including plaintiff's land, is presently assessed for tax purposes at greater values than other classifications of real property in the county. There is no evidence in the record as to the actual value of agricultural lands or as to what percentage of actual value is reflected in the assessed value. Neither is there evidence of the relationship of actual value to assessed value of any other classification of real property in Sarpy County. Neither is there any evidence in the record from which to determine whether agricultural property was assessed at a greater percentage of actual value than any other classification of real property. The plaintiff relies upon the evidence that only agricultural land valuations and assessments were increased for 1980, based upon the use of the agricultural land valuation manual, while other classifications of real property retained the 1979 valuation and assessment levels, which were based upon the 1977 countywide reappraisal. Plaintiff contends that a reappraisal of a single class of real property is inherently nonuniform and disproportionate, and that only the 1977 countywide reappraisal was uniform and valid.

The District Court denied class action status and found that the action of the Sarpy County Board of

Equalization was not unreasonable or arbitrary. The court also found that plaintiff had not met its burden of proving that the valuation of plaintiff's property, when compared with valuations placed on other similar property, was grossly excessive or the result of a systematic exercise of intentional will or failure of a plain duty. The District Court therefore specifically found that the finding and decision of the Sarpy County Board of Equalization as to the valuation placed on plaintiff's agricultural land for 1980 was correct, and affirmed the action of the county board.

Plaintiff asserts first that this case is an appropriate one for a class action suit under the provisions of Neb. Rev. Stat. § 25-319 (Reissue 1979). A party having an interest adverse to the interests of the parties sought to be represented may not sue as a representative of a class under the provisions of that section. Potentially conflicting interests within the class are incompatible with the maintenance of a true class action. *Blankenship v. Omaha P. P. Dist.,* 195 Neb. 170, 237 N.W.2d 86 (1976). Generally, a suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover taxes alleged to have been illegally assessed, but each taxpayer must bring action on his own behalf. See *Hansen v. County of Lincoln,* 188 Neb. 461, 197 N.W.2d 651 (1972).

In determining whether a class action is properly brought, broad discretion is vested in the trial court, and that rule applies to an appeal from the county board of equalization to the District Court. See *Berkshire & Andersen v. Douglas County Board of Equalization,* 200 Neb. 113, 262 N.W.2d 449 (1978). Potentially conflicting interests within the class are apparent in the present case. The denial of class action in the present case was proper.

Under Neb. Rev. Stat. § 77-201 (Reissue 1981), all tangible and real property subject to taxation is re-

quired to be valued at its actual value. For purposes of taxation the terms actual value, market value, and fair market value mean exactly the same thing. *Gradoville v. Board of Equalization,* 207 Neb. 615, 301 N.W.2d 62 (1981).

In an appeal from property valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. *Lexington Building Co., Inc. v. Board of Equalization,* 186 Neb. 821, 187 N.W.2d 94 (1971).

Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value. Approximation of value and uniformity of taxation is all that can be accomplished, and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the Constitution is all that is required. *Lincoln Tel. & Tel. Co. v. County Board of Equalization,* 209 Neb. 465, 308 N.W.2d 515 (1981).

In the case at bar the plaintiff makes no contention that its agricultural lands have been valued at more than their actual value. The plaintiff contends, however, that the value of its agricultural lands has not been fairly and proportionately equalized with all other property. To support that contention the plaintiff relies on the fact that only agricultural lands were reappraised for 1980, and that because of such reappraisal the valuations of agricultural lands for 1980 were proportionately higher than the valuations of other classifications of real property.

There is no evidence as to the actual value of any

classification of real property in either 1979 or 1980. Plaintiff argues that because there is a presumption that the 1979 assessment was proper and valid and reflected actual values of all classes of property, any increase in the value of agricultural lands is inherently nonuniform and disproportionate, and discriminatory in violation of constitutional requirements. The same presumption exists as to 1980, however. The record reflects the opinion of the Tax Commissioner that agricultural lands were substantially undervalued in comparison with values of other classifications of real property in the 1979 assessments, and that one of the basic reasons the Nebraska Agricultural Land Valuation Manual was used in the 1980 reappraisal of agricultural lands was to equalize the disparity in values between agricultural land and other classifications of real property.

If plaintiff's position were correct, no reappraisal of a single class of real property which resulted in a larger valuation and assessment for that class of property could be valid or uniform in any case. Taxing authorities are not limited to just one method of determining value. Neither should they be required to reassess all classes of property at the same time. Substantial compliance with the requirement of equalization and uniformity of taxation is all that can be required, and the taxpayer has the burden of proving that its property was unlawfully assessed.

The plaintiff failed to carry its burden of establishing that the value of its property was not fairly and proportionately equalized with all other property, or that the reassessment of agricultural lands in 1979 resulted in a discriminatory, unjust, and unfair assessment. Plaintiff also failed to prove that its agricultural land or other agricultural lands were valued at a higher proportion of actual value than other classifications of property in Sarpy County.

The District Court found that the action taken by the Sarpy County Board of Equalization was not arbitrary or unreasonable and that plaintiff failed to meet its burden of proving that the valuations placed upon its property were disproportionate or grossly excessive. The District Court specifically found that the valuation placed on plaintiff's agricultural land for 1980 was correct. That determination was correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in the result.

I concur in the result reached by the majority in that I agree that the evidence offered by the landowner was insufficient to establish the claims made by the landowner. I would have limited the decision to that point alone at this time.

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RIHA FARMS, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. ALBIN DVORAK, ASSESSOR, SARPY COUNTY, NEBRASKA, ET AL., APPELLEES.

322 N.W.2d 801

Filed August 6, 1982. No. 44298.

1. **Taxation: Collateral Attack.** The claim that property is assessed too high for taxation purposes cannot be made in the first instance by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization.
2. _____: _____. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void.

Appeal from the District Court for Sarpy County: SAMUEL VAN PELT, Judge. Affirmed.

Warren S. Zweiback, Patricia A. Lamberty and Richard A. DeWitt of Zweiback, Kasher, Flaherty & DeWitt, P.C., for appellants.

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

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

MCCOWN, J.

Riha Farms, Inc., and other Sarpy County landowners brought this action against various Sarpy County officials and the Nebraska Tax Commissioner seeking to have a 1980 reappraisal of agricultural real estate in Sarpy County declared void and unenforceable, and to enjoin the defendants from assessing or collecting 1980 real property taxes based upon valuations in excess of the 1979 valuations. The District Court found that the assessments of agricultural lands in Sarpy County for the year 1980 were not void, that the plaintiffs had an adequate and exclusive remedy at law which they had not exhausted, and that a collateral attack could not be maintained. The court dismissed the plaintiffs' petition and plaintiffs have appealed.

This is a companion case to *Riha Farms, Inc. v. County of Sarpy, ante* p. 385, 322 N.W.2d 797 (1982). The same basic factual situation is involved in both cases and the land of Riha Farms, Inc., is the same. The basic factual background in both cases is that in 1979 Sarpy County conducted a revaluation and reassessment of all agricultural land in the county, based upon the Nebraska Agricultural Land Valuation Manual 1979. Agricultural land was revalued and reassessed for 1980 tax purposes while other classifications of real property were not similarly revalued, but continued to be based upon valuations obtained on a countywide reappraisal of all real property made in 1977. The Sarpy County case is a direct appeal by landowners from the action of the Sarpy County Board of Equalization, while the present case constitutes a collateral attack upon the assessment and collection of all increases in taxes attributable to the reappraisal and revaluation of agricultural lands effective for the tax year 1980.

This court has consistently held that relief from the overassessment of property for tax purposes is by appeal to the District Court from the order of the county board of equalization fixing the assessed value of the property, and that the remedy thus given is full, adequate, and exclusive. The claim that property is assessed too high for taxation purposes cannot be made in the first instance by direct application to any other body or by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void. See, *Jones v. Valley County Board of Equalization,* 208 Neb. 559, 304 N.W.2d 396 (1981); *Scudder v. County of Buffalo,* 170 Neb. 293, 102 N.W.2d 447 (1960); *Gamboni v. County of Otoe,* 159 Neb. 417, 67 N.W.2d 489 (1954).

In the case at bar the record establishes that the plaintiffs, or some of them, pursued the full, adequate, and exclusive remedy of a direct appeal to the District Court from the order of the county board of equalization. The Sarpy County case determined that appeal, and also establishes that the revaluation and reassessment involved here was not void. The District Court's determination in the present case that the assessments of plaintiffs' properties for 1980 were not void and that a collateral attack could not be maintained was correct. The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF SCOTT E. WANEK ET AL., MINOR CHILDREN.
STATE OF NEBRASKA, APPELLEE, V. LINDA L. WANEK, APPELLANT.
322 N.W.2d 803

Filed August 6, 1982. No. 81-728.

1. **Parental Rights: Appeal and Error.** An appeal from an order terminating parental rights requires a de novo review.
2. **Parental Rights.** An order terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be based on clear and convincing evidence.
3. _____. There is no requirement that the court must implement a rehabilitation plan for the parent of a child found to be dependent and neglected.
4. _____. The right of a parent to custody and control of his or her children is not an inalienable right.
5. _____. The public has a paramount interest in the protection of children from abuse and neglect.
6. _____. Where a parent is unable to discharge parental responsibilities because of mental deficiency, and where there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated when such action is found to be in the best interests of the child or children.

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

Philip M. Martin, Jr., of Higgins & Martin, for appellant.

Gary L. Schacht, Hall County Deputy Attorney, for appellee.

William A. Francis, guardian ad litem.

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

WHITE, J.

Linda L. Wanek appeals from an order entered by the District Court for Hall County, Nebraska, affirming an order of the Hall County Court terminating her parental rights to Scott E. Wanek and Robin L.

Wanek. The natural father, Lonnie E. Wanek, does not appeal from that order. We affirm.

An appeal from an order terminating parental rights requires a de novo review. *In re Interest of Stoppkotte,* 210 Neb. 1, 312 N.W.2d 454 (1981). An order terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be based on clear and convincing evidence. *In re Interest of Brungardt,* 211 Neb. 519, 319 N.W.2d 109 (1982). With these rules of law in mind, we will set forth the facts.

On March 23, 1979, Officer Darryl Watson of the Grand Island Police Department was summoned to the Roundtable Lounge. Upon arrival he found the appellant, Linda L. Wanek, shouting and screaming profanities at the patrons of the bar. She was apparently upset over the loss of $5. The minor children, Scott, born January 10, 1975, and Robin, born December 31, 1977, were with her at the time. Officer Watson removed Linda and the children to the police department where she continued to scream and shout profanities at the officers. Eventually the police were successful in removing the younger child from Linda's arms. The younger child, Robin, was attended to by a secretary at the station. Robin was completely soaked through her diaper with urine and was suffering from severe diaper rash, with open and running sores. Margaret McClaren, a Child Protective Services worker for the Hall County Department of Public Welfare, was called to the police station to remove the children. She testified that when she arrived both children's clothes were completely soaked with urine, including their pants, socks, and shirts. She also testified that besides being wet and cold, both children were hungry and scared. The children were taken to St. Francis Hospital and then to Children's Village. Questioning Linda was not possible so, after consulting the

county attorney's office, Linda was transported to the Hastings Regional Center.

Dianna Olesen, a barmaid at the Roundtable Lounge, testified at the adjudication hearing that Linda and the children were already at the bar when she came to work at 4:30 p.m. Olesen said that she refused to serve Linda after 8 p.m. and suggested to Linda that she take the kids and leave. Olesen also testified that Linda had consumed eight or nine beers during the time she was working. Linda also allowed the children to run around the bar unattended. Later, between 10:30 and 11 p.m., Linda returned to the bar and began screaming at the patrons about $5 she was missing and believed to have been stolen. The police were summoned at that time.

On April 24, 1979, the children were adjudicated neglected and dependent as described by Neb. Rev. Stat. § 43-202(2)(c) (Reissue 1978). The court ordered the children to be placed with the Hall County Department of Public Welfare until further disposition.

Prior to the dispositional hearing, Linda and Scott underwent psychological examinations. Linda was determined to be functionally illiterate and mildly mentally retarded, with a severe alcoholism problem. Scott was determined to be borderline mentally retarded and suffered from a speech impediment.

At the time of the incident which gave rise to these proceedings, Lonnie, the natural father, and Linda were separated. Lonnie was unemployed and was living with his mother in St. Edward, Nebraska. A psychological examination on Lonnie also suggested that he too was mentally deficient.

A dispositional hearing was held on May 22, 1979. After testimony, the county court granted physical custody to the maternal grandparents, Mr. and Mrs. Lyle Lockard. Legal custody was to remain in the Hall County Department of Public Welfare. Linda and the children lived with her parents until Septem-

ber 1979. Due to increasing tensions between Linda and her mother, and her mother's drinking problem, Linda and the children moved into the home of Linda's sister and brother-in-law, Mr. and Mrs. Raymond Eirick. On October 5, 1979, the county court ordered physical custody to be transferred to Mr. and Mrs. Eirick.

On December 31, 1979, Linda entered the Hastings Regional Center drug and alcohol unit. On January 10, 1980, the Hall County attorney filed a motion to terminate parental rights.

All the evidence shows that Linda is unable, without daily supervision, to adequately care for the needs of the children. Throughout the proceedings, the trial court made heroic efforts to place the children in homes of various relatives of Linda Wanek. They were placed first with her parents and then with her sister Sandra. There was also an attempted placement with another sister, Mrs. Chohon. It is sufficient to say from the record that grave personal difficulties arose in each of those homes sufficient enough to convince the county court and the District Court, as well as this court on our review de novo, that the homes were not suitable for the children.

The evidence shows that, by reason of environmental circumstances, Scott is borderline retarded. Robin appears to be functioning normally.

The evidence clearly shows that the circumstances have not changed since the original petition was filed. Linda's behavior has remained unchanged also. Her prognosis for overcoming her alcohol problem is poor.

Linda argues that she should be given more time to rehabilitate herself. In the case of *In re Interest of Wood and Linden,* 209 Neb. 18, 24, 306 N.W.2d 151, 154-55 (1981), we said: " 'There is no requirement that the court must implement a rehabilitation plan

for the parent of a child found to be dependent and neglected . . . .' "

The right of a parent to custody and control of his or her children is not an inalienable right. The public has a paramount interest in the protection of the children from neglect. *In re Interest of Wood and Linden, supra; In re Interest of Stoppkotte,* 210 Neb. 1, 312 N.W.2d 454 (1981).

We are concerned here with the best interests of the children, and when the natural parent cannot rehabilitate herself in a reasonable time after the adjudication hearing and the prognosis is poor not only for purposes of rehabilitation but also for correcting the conditions of neglect and dependency, the best interests of the children require that a final disposition be made without delay.

Here, the best interests of the children require a stable and stimulating environment. The court was presented with overwhelming evidence that, unsupervised, neither parent could ever be responsible for the care of the children by reason of his or her mental and psychological deficiencies. A supervised attempt to place the children, along with their mother Linda, in the homes of family members proved near tragically unsuccessful. The welfare department worker testified that there is no agency whereby the children could remain with either of the parents and be under constant supervision of more responsible persons. We have held before that where a parent is unable to discharge parental responsibilities because of mental deficiency, and where there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, the parental rights may be terminated when such action is found to be in the best interests of the child or children. See *In re Interest of Farmer,* 210 Neb. 500, 315 N.W.2d 454 (1982).

It is our determination that the best interests of the children require that the parental rights of

Lonnie and Linda Wanek be terminated and that custody of the children be placed with the Department of Public Welfare for placement in a permanent and stable environment. The judgment of the District Court is affirmed.

AFFIRMED.

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IN RE INTEREST OF ROD LEE MCKINZIE, A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. DEBORAH JO BRUNER, APPELLANT.
323 N.W.2d 78

Filed August 6, 1982. No. 81-770.

1. **Parental Rights.** The right of a parent to maintain custody of his or her child is a natural but not an inalienable right; the public has a paramount interest in the protection of the rights of a child.
2. _____. Courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
3. _____. An order of the juvenile court terminating parental rights must be based on clear and convincing evidence.
4. **Juvenile Courts: Appeal and Error.** The Nebraska Supreme Court is required to review the record of the separate juvenile court de novo.

Appeal from the Separate Juvenile Court of Lancaster County. Affirmed in part, and in part reversed.

Paul M. Conley and Leroy P. Shuster, for appellant.

Michael G. Heavican, Lancaster County Attorney, and Richard J. Hautzinger, for appellee.

Mariclare Thomas, guardian ad litem.

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

CAPORALE, J.

Appellant, Deborah Jo Bruner, appeals to this court from an order of the separate juvenile court of Lancaster County, Nebraska, dated September 14, 1981, which terminated her parental rights to Rod Lee McKinzie, a minor born September 22, 1970. That order also terminated the parental rights of the natural father, Herbert Rodney McKinzie, Sr., but that portion of the order has not been appealed.

The two issues are (1) whether the order of the juvenile court terminating the parental rights of the appellant is supported by the evidence, and (2) whether the decision to terminate appellant's parental rights is in the best interests of the minor. We reverse.

Neb. Rev. Stat. § 43-202 (Reissue 1978) provides in pertinent part as follows: "The juvenile court in each county . . . shall have . . .

"(1) Exclusive original jurisdiction as to any child under the age of eighteen years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian;

"(2) Exclusive original jurisdiction as to any child under the age of eighteen years . . . (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian; (c) whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child; (d) whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the child . . . ."

This matter was first brought to the attention of the juvenile court by a petition filed April 22, 1977, alleging the child to be without proper support through no fault of his parents. A supplemental petition was filed on June 24, 1981, alleging that the child was without proper care and supervision due to

the faults and habits of his parents, and sought termination of the rights of the parents.

As we have stated in the past, the right of a parent to maintain custody of his or her child is a natural but not an inalienable right; the public has a paramount interest in the protection of the rights of a child. *In re Interest of Shepherd,* 211 Neb. 313, 318 N.W.2d 288 (1982); *In re Interest of J.L.L.,* 209 Neb. 76, 306 N.W.2d 175 (1981). However, courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. *In re Interest of Shepherd, supra; In re Interest of D.,* 209 Neb. 529, 308 N.W.2d 729 (1981). Furthermore, an order of the juvenile court terminating parental rights must be based on clear and convincing evidence. *In re Interest of Shepherd, supra; In re Interest of Farmer,* 210 Neb. 500, 315 N.W.2d 454 (1982); *In re Interest of Hiatt,* 209 Neb. 195, 307 N.W.2d 108 (1981); *Santosky v. Kramer,* 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

With those rules in mind we review the record of the separate juvenile court de novo, as we are required to do. *In re Interest of Shepherd, supra; In re Interest of Spradlin,* 210 Neb. 734, 317 N.W.2d 59 (1982); *In re Interest of Farmer, supra.*

The record clearly and convincingly establishes that the minor child suffers from a mild brain dysfunction and from an attention deficit with hyperactivity. He manifests behavioral and physiological problems. The mother voluntarily placed the child with the Lancaster County Division of Public Welfare for foster care in October of 1976. On May 4, 1977, the minor was adjudged a dependent child as defined in § 43-202(1). He was thereupon committed to the temporary legal custody of the Lancaster County Division of Public Welfare with continued placement in a foster home. A series of hearings

and placements followed, including a trial placement with the appellant. It became obvious during this period of time that this child simply required more care and attention than the mother, well intentioned as she may have been, was capable of providing. The mother recognizes this fact, although she, understandably, appears unable to accept it fully. In December of 1980 the appellant stated that she planned to relinquish the child for adoption and discussed that plan both with the separate juvenile court and with a social agency. Appellant, however, changed her mind in that regard. When the child became aware that such a plan was being considered he became even more depressed and exhibited even more behavioral problems. In May of 1981 the court changed the custody of the child from the Lancaster County Division of Public Welfare to the Department of Public Welfare, State of Nebraska.

The record clearly and convincingly establishes that the minor child is in need of a consistent and stable home environment which will provide him with a sense of belonging. The record also establishes that the mother has been unable to provide such an environment and sense of belonging. What the record does not show is that such an environment cannot be provided without terminating the mother's rights or that it is in the best interests of the child that those rights be terminated. Indeed, the record demonstrates that he has an attachment both to his mother and to his younger sister who is living with the mother. The record contains little evidence as to the likelihood of finding adoptive parents with the requisite skills and resources to provide this now almost 12-year-old boy with the environment and emotional support which he so clearly needs. Nor is there any showing he cannot be provided that environment and emotional support by continuing his custody in the Department of Public

Welfare of the State of Nebraska, with his mother having rights of visitation.

That portion of the order of the separate juvenile court of Lancaster County, Nebraska, dated September 14, 1981, which terminates appellant's parental rights in the minor child is reversed. That portion of the order continuing custody of the child in the Department of Public Welfare is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

CLINTON, J., participating on briefs.

BOSLAUGH, J., dissenting.

The majority opinion finds that the child in question requires more care and attention than the mother can (or is willing to) provide. It concludes that the solution is not to terminate the mother's rights, but to institutionalize the child so that the mother's right of visitation may be preserved. I find this an unacceptable solution and not one in the best interests of the child.

As long as the child remains in a proper foster care setting, and gets the necessary medication and psychosocial discipline and attention, his disorders may be controllable to some degree. However, the witnesses testifying as to the child's condition stressed that the most important factor in this child's future is that he be placed in a stable situation.

There is considerable testimony in the record that, in spite of the medication and proper techniques in dealing with his hyperactivity, his worst behavioral episodes occurred during times when he viewed his future as unstable. Although he does have an attachment to his mother, as the majority states, the record is clear that this child has a tremendous desire and need for a stable homelife where he can be loved and raised like other children, and that he believes he will never be returned to his mother. The last thing this child needs is to be continued in foster care with the accompanying ambivalence of a dim

hope that he may someday return home, yet the belief that he will never be able to.

I believe the record shows, by clear and convincing evidence, that a stable environment for this child cannot be obtained without terminating the appellant's parental rights. During the trial placement of the child with his mother in 1979-80, there were numerous weekends when she placed both the child in interest and his sister in Cedars Home for Children in Lincoln because of "problems" she was having, either financial or personal. At the time of the disposition hearing the mother had finally obtained a full-time job, and her personal problems centered around her second husband (not the child's father). When the child in interest went back into foster care, the trial court ordered that the second husband not be present during visitations between the child and mother, but the mother admitted that he was often there during visitations. The mother has moved numerous times during the pendency of this action, with each move being into a different school area. At the final disposition hearing she stated that she had separated from her second husband and had moved back to Lincoln from Eagle, but was not sure whether or not she would divorce the husband. There is nothing in the evidence to show that the mother intends to or is capable of providing even geographic stability for the child.

During the child's second stay in foster care, commencing in October 1980, the mother's efforts to visit the child became much less frequent. Pam Hughes, the child's foster mother from March 25, 1981, to June 4, 1981, testified there were only two visits between the mother and child during this time, both of them being initiated by the child himself. During the time the child was at the Nebraska Psychiatric Institute, the mother at first refused to visit him there because she did not agree with the welfare worker that the visits should be supervised. During

the disposition hearing, which extended over a period of 2 or 3 weeks, she did visit him once, but only after earlier testimony that she had not visited him since he had been there.

The testimony shows that this sporadic visitation by the mother was extremely hard on the child. There is nothing in the record to demonstrate that the mother's visitation attitude will change. It is difficult to understand why this child should be left in a situation identical to that which drove him from "normal" foster care in a home setting to an inpatient setting at NPI.

While this child may not be as adoptable as children without his behavior disorders, the evidence does not show that adoption is not a viable alternative. There is evidence that when the mother was considering voluntarily relinquishing the child for adoption, the counselor from Lutheran Family and Social Services found a family willing to adopt him.

Our cases hold, generally, that it is in a child's best interests "that a final disposition be made without delay." *In re Interest of McKee,* 208 Neb. 623, 304 N.W.2d 918 (1981). See, also, *In re Interest of Holley,* 209 Neb. 437, 308 N.W.2d 341 (1981); *In re Interest of Levey,* 211 Neb. 66, 317 N.W.2d 760 (1982); *In re Interest of Hastings,* 211 Neb. 209, 318 N.W.2d 80 (1982). " '[W]e will not gamble with the child's future; [he] cannot be made to await uncertain parental maturity.' " *State v. Souza-Spittler,* 204 Neb. 503, 511, 283 N.W.2d 48, 52 (1979). The majority opinion appears to ignore these cases, and disregards clear evidence that a stable situation is required for this child's best interests. It is the appellant herself who provides the lion's share of the instability in this child's life.

I would affirm the judgment of the juvenile court.

HASTINGS, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. STEVEN HACK AND JOHN CALLANS, APPELLANTS.

322 N.W.2d 806

Filed August 6, 1982. No. 81-771.

1. **Arrests: Probable Cause.** Probable cause for an arrest exists if the officer has reasonable cause to believe that the person arrested has committed a felony.
2. _____: _____. Probable cause does not require that the officer see the commission of a felony and does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.
3. _____: _____. If the facts available to the officer at the time of the arrest would warrant a man of reasonable caution in the belief the action was appropriate, then probable cause exists.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

John P. Murphy, Lincoln County Public Defender, for appellants.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

BOSLAUGH, J.

After a trial to a jury, the defendants, Steven Hack and John Callans, were convicted of manufacturing marijuana and possession of marijuana weighing more than 1 pound. They were sentenced to terms of 6 months each in the county jail. They have appealed and contend the trial court erred in overruling their pretrial motion to suppress.

The record shows that Box Elder Canyon, located south of Maxwell, Nebraska, is well known as a place where marijuana may be harvested.

On September 26, 1980, after receiving information from a private citizen, Douglas W. Ochsner, a deputy sheriff of Lincoln County, Nebraska, went to the vicinity of Box Elder Canyon. Ochsner arranged for

two other officers, Mitch Strasburg, the night supervisor sergeant of the sheriff's office, and Deputy McLeish, to meet him at a point near Box Elder Canyon.

At about 10:30 p.m. the officers proceeded to Box Elder Canyon where they found a white Ford van with Colorado license plates parked at the side of the road. Since there was no one in the van, the officers stationed themselves along the road so that they could observe the van. At about 11 p.m. Mark E. Larson, a state patrolman, joined the group of officers. While the officers had the van under observation, from time to time they could see a flashlight or lantern moving around in the general area of a marijuana field to the west of the road.

Between 1:30 and 2 a.m. three men, later identified as the defendants and Jesse Adkins, came out of the field to the west of the road and entered the van. After the men entered the van, the lights on the van were turned on for 5 or 10 seconds and then turned off. This happened twice. At about 2:50 a.m. the officers decided to approach the van. The men were ordered out of the van and handcuffed. They were "pat-searched" and each one was found to have a knife. The officers walked into the field west of the road approximately 100 yards and discovered five bags of freshly cut marijuana weighing approximately 100 pounds.

The defendants and Adkins were then taken to the sheriff's office at North Platte, Nebraska. The van was towed to North Platte where an inventory search was made.

The defendants' principal contention is that the arrest without a warrant was illegal because there was no probable cause for the arrest. Probable cause for an arrest exists if the officer has reasonable cause to believe that the person arrested has committed a felony. Probable cause does not require that the officer see the commission of a felony.

" 'Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction,'. . . ." *State v. Brewer,* 190 Neb. 667, 674-75, 212 N.W.2d 90, 94 (1973).

If the facts available to the officer at the time of the arrest would warrant a man of reasonable caution in the belief the action was appropriate, then probable cause exists. *State v. Dillwood,* 183 Neb. 360, 160 N.W.2d 195 (1968).

In *State v. Nowicki,* 209 Neb. 640, 645-46, 309 N.W.2d 89, 93 (1981), we said: "This court has held that a police officer is authorized to arrest a person without a warrant if he has reasonable cause to believe that such person has committed a crime. . . . ' "[T]he test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." ' In this regard, we have also held that probable cause is to be evaluated by the collective information of the police engaged in a common investigation." In *State v. Dussault,* 193 Neb. 122, 126, 225 N.W.2d 558, 561 (1975), we said: " 'In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . .' " *State v. Atwater,* 193 Neb. 669, 671, 228 N.W.2d 876, 878 (1975), notes: " ' " * * * there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." ' The ultimate test is whether the action of the officers was reasonable."

The evidence in this case is that a van with foreign license plates was found parked at night on a county

road near a marijuana field where harvesting was known to take place. Surveillance was established and a flashlight or lantern was seen from time to time moving about in the general area of the marijuana field. After a surveillance of more than 3 hours, three men were seen returning to the van from the general direction of the marijuana field. The reasonable inference to be drawn from these facts was that the three men had been in the marijuana field harvesting marijuana. Shortly after they were apprehended, five bags of harvested marijuana were found a short distance from the road.

After the van was taken to North Platte, an inventory search was made and an Argus camera with film, empty plastic bags and twine, an Eveready lantern and battery, and a Ray-O-Vac light were seized. The defendants complain that the officers had no right to seize these items because they had no connection to the crime.

The plastic bags and twine were of the type used to contain the harvested marijuana found near the scene of the arrest. A flashlight or lantern had been observed in the general area of the marijuana field while the van was under surveillance. The film in the camera, when developed, included photographs of two of the men in a marijuana field.

The defendants concede that an inventory search was authorized. See *Michigan v. Thomas,* ____ U.S. ____, 102 S. Ct. 3079, 73 L. Ed. 2d 750 (1982). The search of the van was authorized also as incident to the arrest. See, *State v. Watts,* 209 Neb. 371, 307 N.W.2d 816 (1981); *State v. Franklin,* 194 Neb. 630, 234 N.W.2d 610 (1975); *State v. Booth,* 202 Neb. 692, 276 N.W.2d 673 (1979). The items seized during the search were connected to the crime and the seizure was not unreasonable.

The ruling on the motion to suppress was correct. The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in the result.

I concur in the result reached by the majority in this court. I write separately, however, to express my belief that the development of the film in the camera was not proper and was not a part of the authorized search of the van. I believe, however, that the evidence obtained by reason of developing the film, in light of all the other evidence in this case, was without prejudice and therefore does not justify granting to the appellants a new trial. See *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

CAPORALE, J., joins in this concurrence.

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STATE OF NEBRASKA, APPELLEE, V. KENNETH D. MEINTS, APPELLANT.

322 N.W.2d 809

Filed August 6, 1982. No. 81-828.

1. **Homicide.** In a homicide case the State is required to prove that an act of the defendant caused the death of the victim.
2. **Homicide: Proximate Cause.** The act of the accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of the accused, as where the direct cause is a disease or infection resulting from the injury inflicted by the accused.
3. _____: _____. It is not a defense that improper treatment on the part of physicians, nurses, or the victim may also have contributed thereto. But where death results solely from erroneous treatment by another, the one who inflicted the injury is not responsible for homicide.
4. **Homicide: Proof of Death.** For purposes of the law of homicide, proof of the death of the victim may be established by proof of the irreversible cessation of the victim's total brain functions.
5. **Homicide: Brain Death: Proximate Cause.** Where a homicide victim has suffered brain death, removal of life support systems is not an efficient intervening cause of death.

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

Douglas McArthur, for appellant.

Paul L. Douglas, Attorney General, and Lynne Rae Fritz, for appellee.

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

BOSLAUGH, J.

After a trial to a jury the defendant, Kenneth D. Meints, was convicted of motor vehicle homicide and sentenced to imprisonment for 18 months to 3 years.

The prosecution arose out of an automobile accident in which Jodi Southard, an 8-year-old child, was fatally injured. At the time of the accident the victim was a passenger in an automobile operated by her father. There was evidence from which the jury could find beyond a reasonable doubt that an automobile operated by the defendant struck the rear of the Southard automobile, forcing it across the centerline of the highway and causing a front-end collision between it and a pickup truck proceeding in the opposite direction. The jury could also find beyond a reasonable doubt that the defendant was under the influence of alcoholic liquor at the time of the accident.

The principal issue upon the appeal relates to the cause of death of the victim. The evidence is that the victim was in a comatose condition when she was removed from the Southard automobile immediately after the collision. She was taken to the Beatrice Community Hospital by ambulance and examined there by Dr. John W. Porter. Dr. Porter testified that the victim was suffering from severe respiratory distress, to the point that he was afraid she might die in the emergency room. Dr. Porter diagnosed her injury as a severe head injury and made arrangements to have her taken to Lincoln, Nebraska, at once.

The victim arrived at the Bryan Memorial Hospital in Lincoln shortly after midnight on July 5, 1981, and was examined by Dr. Louis J. Gogela, a neurosurgeon. Dr. Gogela found the victim was totally stuporous and totally unresponsive. He concluded that she had sustained a very serious injury to the brain stem. Because of the nature of the injury he requested Dr. George J. Wolcott, a specialist in neurology and pediatric neurology, to assist in the treatment of the victim.

Both Dr. Gogela and Dr. Wolcott testified at length concerning the procedures which they followed in examining the victim. Their examinations disclosed that the victim was in complete areflexia, without reflexes, and with fully dilated and fixed pupils. There was an absence of spontaneous movements or breathing, and no response to normally painful stimuli. An encephalogram test performed on July 6, 1981, showed there was no brain activity, and Dr. Wolcott concluded cerebral death had occurred.

Since the time that the victim had been placed in the ambulance at the scene of the accident in Beatrice, Nebraska, at approximately 10:30 p.m. on July 4, 1981, she had been receiving assistance to enable her to breathe. At the hospital in Lincoln she was placed on a respirator and a drug was administered to assist in maintaining her blood pressure. Dr. Wolcott testified that over a period of 30 hours she was removed from the respirator 5 or 6 times and that on each occasion she did not begin to breathe.

Dr. Gogela testified that in his experience no person with an injury such as that sustained by the victim has ever recovered. In his opinion, a person with such an injury who is maintained on a respirator will die within 48 to 72 hours despite all life support that can be provided.

Dr. Wolcott testified that he has never known of a

patient with the type of injury which the victim sustained who survived. If such a patient is continued on life support systems, death usually occurs within a matter of days from pneumonia, kidney failure, heart failure, or other complications.

On the afternoon of July 6, 1981, after consultation with the family, Dr. Wolcott pronounced Jodi Southard dead and removed her from the respirator. Her heart continued to beat for a short time after she had been removed from the respirator.

An autopsy was performed upon the body of the victim by Dr. Harlan L. Papenfuss. Dr. Papenfuss testified that his examination disclosed the victim "had an early acute pneumonia developing." He further testified that in his opinion, within reasonable medical certainty, the cause of death was damage to the brain stem consisting of the upper portion of the cervical cord and the medullary portion of the brain stem.

The trial court instructed the jury that the State was required to prove beyond a reasonable doubt that the defendant caused the death of Jodi Southard by operating his motor vehicle while under the influence of alcoholic liquor and that the unlawful operation of his motor vehicle was the proximate cause of her death. The instructions contained a definition of both proximate cause and efficient intervening cause.

Instruction No. 10 was as follows: "If you find beyond a reasonable doubt that defendant unlawfully operated a motor vehicle as defined in these Instructions, and such unlawful operation proximately caused injuries to Jodi Southard, which:

"1. Caused her brain to irreversibly cease functioning so that there was an unresponsiveness to normal painful stimuli, an absence of spontaneous movements or breathing, and an absence of reflexes, and

"2. Her breathing and heart beat could be main-

tained only by medical support systems which condition was also irreversible,

"Then the subsequent withdrawal of such support systems before her breathing and heart beat finally stopped would not be an efficient intervening cause of her death, and defendant's unlawful operation of a motor vehicle would be the proximate cause of such death."

Instruction No. 10, which was objected to by the defendant, defined "brain death" and advised the jury that if it found beyond a reasonable doubt that brain death had in fact occurred, then withdrawal of life support systems from the victim would not be an efficient intervening cause of her death. The defendant contends that instruction No. 10 was erroneous; that the trial court should have defined death in terms of cessation of respiration, heartbeat, and circulation; and that withdrawal of the life support systems from the victim was an efficient intervening cause and the proximate cause of her death. For the purpose of this opinion, we consider brain death only as it may be involved in homicide cases. See *Commonwealth v. Golston,* 373 Mass. 249, 366 N.E.2d 744 (1977).

In a homicide case the State is required to prove that an act of the defendant caused the death of the victim. *Reyes v. State,* 151 Neb. 636, 38 N.W.2d 539 (1949). The fact that some other agency combined with the act of the defendant to cause the death is not a defense unless the other agency is an efficient intervening cause.

In *State v. Harris,* 194 Neb. 74, 230 N.W.2d 203 (1975), the victim sustained a fractured hip during an attempted robbery. The victim later died as a result of the injury, treatment of the injury, and complications that developed during the treatment. We held that the act of the accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause re-

sulted naturally from the act of the accused, as where the direct cause is a disease or infection resulting from the injury inflicted by the accused. It is not a defense that improper treatment on the part of physicians, nurses, or the victim may also have contributed thereto. But where death results solely from erroneous treatment by another, the one who inflicted the injury is not responsible for homicide.

There is no evidence of improper or erroneous treatment in this case. The uncontradicted evidence is that the injury to the brain stem was a fatal injury for which there could be no treatment and from which there could be no recovery. By the use of life support systems the victim could be made to continue to breathe for a matter of days, but the nature of the injury was such that this function would cease within a short time even if the life support systems were continued.

The concept of "brain death" developed, of necessity, as a result of advancements in medical science and techniques which permit the artificial maintenance of certain body functions by external means. As stated by the Supreme Court of New Jersey in *In Re Quinlan,* 70 N.J. 10, 26-28, 355 A.2d 647, 656 (1976): "The determination of the fact and time of death in past years of medical science was keyed to the action of the heart and blood circulation, in turn dependent upon pulmonary activity, and hence cessation of these functions spelled out the reality of death.

"Developments in medical technology have obfuscated the use of the traditional definition of death. Efforts have been made to define irreversible coma as a new criterion for death, such as by the 1968 report of the Ad Hoc Committee of the Harvard Medical School (the Committee comprising ten physicians, an historian, a lawyer and a theologian), which asserted that:

" 'From ancient times down to the recent past it

was clear that, when the respiration and heart stopped, the brain would die in a few minutes; so the obvious criterion of no heart beat as synonymous with death was sufficiently accurate. In those times the heart was considered to be the central organ of the body; it is not surprising that its failure marked the onset of death. This is no longer valid when modern resuscitative and supportive measures are used. These improved activities can now restore "life" as judged by the ancient standards of persistent respiration and continuing heart beat. This can be the case even when there is not the remotest possibility of an individual recovering consciousness following massive brain damage. ["A Definition of Irreversible Coma," 205 *J.A.M.A.* 337, 339 (1968)].'

"The Ad Hoc standards, carefully delineated, included absence of response to pain or other stimuli, pupilary reflexes, corneal, pharyngeal and other reflexes, blood pressure, spontaneous respiration, as well as 'flat' or isoelectric electroencephalograms and the like, with all tests repeated 'at least 24 hours later with no change.' In such circumstances, where all of such criteria have been met as showing 'brain death,' the Committee recommends with regard to the respirator:

" 'The patient's condition can be determined only by a physician. When the patient is hopelessly damaged as defined above, the family and all colleagues who have participated in major decisions concerning the patient, and all nurses involved, should be so informed. Death is to be declared and *then* the respirator turned off. The decision to do this and the responsibility for it are to be taken by the physician-in-charge, in consultation with one or more physicians who have been directly involved in the case. It is unsound and undesirable to force the family to make the decision. [205 *J.A.M.A.*, *supra* at 338 (emphasis in original)].' "

In *In re Bowman,* 94 Wash. 2d 407, 617 P.2d 731

(1980), the Supreme Court of Washington noted that with the recent advancement of medical science, the traditional common-law "heart and lungs" definition is no longer adequate. The court stated: "Until recently, the definition of death was both medically and legally a relatively simple matter. When the heart stopped beating and the lungs stopped breathing, the individual was dead according to physicians and according to the law. The traditional definition did not include the criterion of lack of brain activity because no method existed for diagnosing brain death. Moreover, until recently, no mechanical means have been available to maintain heart and lung action; and respiration, heart action, and brain function are so closely related that without artificial support, the cessation of any one of them will bring the other two to a halt within a very few minutes. Wasmuth, *The Concept of Death,* 30 Ohio St. L.J. 32, 38 (1969). . . .

"With the recent advancement of medical science, the traditional common law 'heart and lungs' definition is no longer adequate. . . .

. . . .

". . . It is the law's determination that brain death is the legal equivalent of death because—under current medical science—the capacity for life is irretrievably lost when the entire brain, including the brain stem, has ceased functioning." *Id.* at 412-16, 617 P.2d at 734-36.

More than one-half of the states now recognize brain death as a definition of death. In a number of homicide cases proof of brain death has been held to satisfy the requirement of the victim's death as an element of the crime.

In *Commonwealth v. Golston,* 373 Mass. 249, 366 N.E.2d 744 (1977), in affirming a conviction for murder in the first degree, the Supreme Judicial Court of Massachusetts approved an instruction which stated as a matter of law that brain death satisfied

the element of the death of the victim. The court also noted that the references to respiration and pulsation in the traditional definition of death "must be taken to refer to spontaneous rather than artificially supported functions." *Id.* at 254, 366 N.W.2d at 748.

In *Swafford v. State,* ___ Ind. ___, 421 N.E.2d 596 (1981), a conviction for murder was affirmed. The Supreme Court of Indiana held that "for purposes of the law of homicide proof of the death of the victim may be established by proof of the irreversible cessation of the victim's total brain functions." *Id.* at ___, 421 N.E.2d at 602.

In *State v. Johnson,* 60 Ohio App. 2d 45, 395 N.E.2d 368 (1977), a conviction for aggravated murder was affirmed. The court said: "Historically, the concept of clinical death embraced by the medical and legal professions has not included any criteria relating to brain activity. Death was regarded as the irreversible cessation of all vital functions, primarily respiration, circulation and heart beat, and its occurrence was marked by an instant or moment in time. Advances in medicine during the past several decades have rendered suspect these traditional criteria of death. Today the medical profession almost universally regards death as a continuing process which progresses through several distinct steps. Modern medicine has made it possible for physicians not only to diagnose brain death but also, paradoxically, to keep a patient, who has no chance of ever again functioning as a rational being with a human spirit and soul, 'alive' through artificial means.

. . . .

". . . From the premise that one is not dead under Ohio law until 'clinically dead,' appellant concludes that Otto Baum was legally 'alive' on November 6, 1975, even though his brain was dead, and therefore the *cause* of death was Dr. Walus' removal of the supplemental oxygen supply. The obvious flaw in

this argument is that Baum did not reach the point where Dr. Walus stopped administering oxygen by accident. He reached it because of defendant's act. A result may have more than one 'cause.' On the evidence, the most that can be said is that a jury question was presented as to the cause of Baum's death. . . .

"Was there evidence from which the jury could conclude beyond a reasonable doubt that appellant did, in fact, cause the death of Otto Baum? The answer must be yes. Every lay witness who observed Baum shortly after the attack testified that he was critically injured even before he arrived at General Hospital. Once there, his condition deteriorated rapidly to the point where surgery was necessary if he were to have any chance for survival. Although the operation was successful in removing the immediate danger posed by the blood clot, it failed to reverse the gradual collapse of Baum's central nervous system caused by the injuries to his brain." *Id.* at 48-51, 395 N.E.2d at 371-73.

In *State v. Fierro,* 124 Ariz. 182, 603 P.2d 74 (1979), in affirming a conviction for first degree murder where the victim had suffered brain death as a result of gunshot wounds, the court noted: "[T]he removal of life support systems did not change nor alter the natural progression of the victim's physical condition from the gunshot wounds in the head to his resulting death." *Id.* at 185, 603 P.2d at 77.

In *State v. Johnson,* 56 Ohio St. 2d 35, 381 N.E.2d 637 (1978), a conviction for aggravated murder was affirmed. The court held the jury could find that the defendant had caused the victim's death where the victim suffered brain death as a result of severe head trauma and supplemental oxygen was discontinued after 4 days of testing.

The cases which have been cited all support a rule that proof of brain death is sufficient as proof of the victim's death in a homicide case, and removal of

life support systems is not an efficient intervening cause of death in such cases. We conclude that the defendant's assignments of error are without merit.

The defendant makes two other arguments which require mention. The defendant complains that instruction No. 10 did not require the jury to find that the fact of brain death had been established in accordance with "reasonable medical standards." There are several reasons why that contention is without merit in this case.

The definitions used in instruction No. 10 followed, in substance, the standards which are now generally accepted for use in determining whether brain death has occurred. As the Colorado Supreme Court stated in *Lovato v. Dist. Ct.*, 198 Colo. 419, 601 P.2d 1072 (1979), in referring to the 1968 report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death: "These criteria constitute the basis of accepted medical standards for determination of brain death." *Id.* at 426, 601 P.2d at 1076.

It appears from the record that there was no issue in the District Court concerning this matter. The objection to instruction No. 10 was on a different ground. The testimony of Dr. Gogela and Dr. Wolcott showed that they had followed accepted procedure in determining that brain death had occurred.

The defendant also calls attention to several legislative proposals. A bill was introduced in the Legislature in 1977 concerning the right of a terminally ill patient to direct that artificial life support systems be withheld. The bill, L.B. 400, was indefinitely postponed in committee. In 1982 a bill was introduced in the Legislature to adopt the Uniform Determination of Death Act. The bill, L.B. 691, was also indefinitely postponed in committee. We find nothing in regard to these matters which is controlling in this case.

There being no error, the judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurring in the result.

I concur in the result. Most of the discussion about brain death is wholly unnecessary. The time of death of the victim is not an issue in this case. The proof was that the victim was dead by any standard when the charge was filed. The only issue other than defendant's criminal culpability was whether her death was caused by the act of the defendant or by withdrawal of the support system. The ordinary instruction on intervening cause would have sufficed. The undisputed testimony is that defendant's acts and not the withdrawal of the support system were the cause of death. The giving of instruction No. 10 was harmless error. The discussion in *State v. Harris,* 194 Neb. 74, 230 N.W.2d 203 (1975), and *State v. Johnson,* 60 Ohio App. 2d 45, 395 N.E.2d 368 (1977), cited in the court's opinion, adequately disposes of the defendant's arguments. There is no need, in cases of this type, to be concerned with the issue of brain death unless the State begins to prosecute for homicide while the victim is still on the life support system.

WHITE, J., joins in this concurrence.

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KEVIN BUTLER, APPELLANT, V. MIDWEST SUPPLY COMPANY, APPELLEE.

322 N.W.2d 815

Filed August 6, 1982. No. 81-837.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workmen's Compensation Court following rehearing have the same force and effect as a jury verdict in a civil case, and will not be set aside unless the evidence is insufficient to warrant the making of the award or the findings of fact do not support the award.

2. **Workmen's Compensation: Evidence: Proof.** In a workmen's compensation case the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that he is suffering from a disability and that such disability is the result of an accident arising out of his employment.
3. **Workmen's Compensation: Expert Witnesses.** Where medical evidence is relied upon in a workmen's compensation case to show the nature and extent of the disability and that there is a causal connection between the alleged injury, the employment, and the disability, the triers of fact are not required to take the opinions of such experts as binding upon them.
4. **Workmen's Compensation: Attorney Fees.** Where, upon rehearing in a workmen's compensation case, an employer has obtained a termination of a previous running award for temporary total disability, it cannot be said that the employer has failed to obtain any reduction in the amount of such award so as to be liable for statutory attorney fees.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Michael G. Goodman and Martin A. Cannon of Matthews, Cannon & Riedmann, for appellant.

Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

HASTINGS, J.

The plaintiff, Kevin Butler, has appealed from an award of the Nebraska Workmen's Compensation Court which on rehearing terminated a running award for temporary total disability.

Following the initial hearing the plaintiff was awarded certain benefits because of an industrial accident suffered by him on December 28, 1978, while employed by the defendant, Midwest Supply Company. In addition to an award of benefits for medical expenses and temporary partial and total disability to November 25, 1980, the date of the hearing, the plaintiff was awarded continuing temporary total disability benefits "for so long in the future as

the plaintiff shall remain totally disabled as a result of the said accident . . . ." The defendant requested a rehearing before a three-judge court, which resulted in an award substantially in accord with the original award, except that it declared that "Plaintiff has failed to prove by a preponderance of the evidence that he suffers or has suffered any disability after June 16, 1981, as a result of said accident and injury." On appeal to this court the plaintiff's assignments of error are that the court failed to find that plaintiff was suffering from a continuing disability and failed to award him statutory attorney fees.

In December of 1978 the plaintiff was employed by the defendant in Omaha, Nebraska, as a shag driver. This required that he load and unload trucks and drive them to different locations around the defendant's premises. On December 28 he was closing a door on a trailer when the latch slipped out and struck him on the mouth. He was taken to the emergency room of a local hospital where he was examined, advised to take aspirin and use hotpacks, and was then released to go home.

During the months following the accident the plaintiff was treated by a number of dental and medical doctors. He had no fractures, but did have some torn ligaments, and claims to have developed an infection around the gums. In order to relieve the pain which he claims to have, the plaintiff has taken a great number of aspirins and uses alcohol to excess, and as a consequence has developed a stomach problem of some nature. It is the plaintiff's position that his chief complaint is the severe pain in his mouth, which is activated by movement. He stated that he had not been released to return to work by his present physician, Dr. Voightlander.

In considering this matter on appeal we are governed by the rule that the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury

verdict in a civil case, and will not be set aside unless the evidence is insufficient to warrant the making of the award or the findings of fact do not support the award. *Union Packing Co. v. Klauschie,* 210 Neb. 331, 314 N.W.2d 25 (1982). Therefore, a review of the medical evidence is necessary.

Dr. James M. Steier, the plaintiff's family physician and the first to treat the plaintiff after the accident, testified that Mr. Butler did not complain of any injury to his teeth, and that he had no way to evaluate whether or not the trauma as related to him by the plaintiff was the cause of his pain and disability.

The next professional to see Mr. Butler was Dr. Doyle D. Gustafson, a dental surgeon, who last talked to the plaintiff on May 13, 1980. When asked if he had an opinion as to whether or not the pain which the plaintiff was suffering was such that it would substantially affect his ability to be gainfully employed, he replied that he felt incompetent to pass on that kind of a question. He did say that the plaintiff had a disturbance, but whether it came from an injury or from a psychological problem, he really could not sort out.

An oral maxillofacial surgeon, Dr. James G. Morgan, who is licensed to practice both medicine and dentistry, next saw the plaintiff. In his testimony given on April 27, 1981, referring to examinations made of the plaintiff in March of 1980, he stated that he could find nothing specific to relate the plaintiff's pain to, nothing to account for the pain, and that he had no way of telling whether the plaintiff's complaints of pain were related to his accident of December 28, 1978. He was unable to diagnose any dental problem that would explain the complaint of pain.

On March 21, 1980, the plaintiff was seen by Dr. William Shiffermiller, a physician specializing in internal medicine. He gave as his opinion that the

abdominal pain and discomfort were not the result of the accidental injury of December 28. He did assume that any pain in plaintiff's jaw was secondary to the trauma in 1978.

Dr. George Voightlander, a physician who was just completing his residency in family practice, saw the plaintiff for the first time on July 29, 1980, approximately 1½ years after the accident. Based upon the history given him by the plaintiff as to the accident and the subsequent pain in the jaw and abdomen, and the fact of his consumption of large amounts of alcohol, Dr. Voightlander gave as his opinion, in a deposition dated April 30, 1981, that "the pain began after this accident he suffered when he was struck in the jaw" and that at this time he was unable to engage in industrial work. The witness further ventured to say that plaintiff's disability would continue in the future for some period of time in excess of 1 year.

In a workmen's compensation case the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that he is suffering from a disability and that such disability is the result of an accident arising out of his employment. *Davis v. Western Electric,* 210 Neb. 771, 317 N.W.2d 68 (1982). Where, as in this case, medical testimony is relied upon to show the nature and extent of the disability and that there is a causal connection between the alleged injury, the employment, and the disability, the triers of fact are not required to take the opinions of experts as binding upon them. *Davis v. Western Electric, supra.*

It is apparent from the record that a genuine issue of fact existed as to the nature and extent of the disability and whether or not plaintiff suffered any disability as of June 16, 1981, which arose out of his accident of December 28. This question was decided adversely to the plaintiff by the compensation court and, under the rule previously expressed here, we

will not set aside those findings on appeal.

The Nebraska Workmen's Compensation Court was correct in denying an attorney fee to the plaintiff on rehearing. Where an employer has obtained a termination of a previous running award for temporary total disability, it cannot be said that such employer has failed to obtain "any reduction in the amount of such award" so as to be liable for attorney fees within the meaning of Neb. Rev. Stat. § 48-125 (Reissue 1978).

The judgment is affirmed.

AFFIRMED.

WHITE, J., concurs in the result.

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STATE OF NEBRASKA, APPELLEE, V. ANDRE HOLLOWAY, APPELLANT.

322 N.W.2d 818

Filed August 6, 1982. No. 81-865.

**Criminal Law: Penalties.** Where a fine has been imposed as part of the penalty for conviction of a crime, the court may not, under the provisions of Neb. Rev. Stat. §§ 29-2206(1) and 29-2412 (Reissue 1979), peremptorily direct that the fine be satisfied by crediting jail time against the fine. The defendant must be afforded an opportunity to pay the fine in the manner provided by these statutes or to make proof of indigency.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed in part and remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, and Dorothy A. Walker, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

CLINTON, J.

The defendant Holloway was found guilty after entering a plea of no contest to a charge of theft by unlawful taking of property of the value of $300 or more and less than $1,000. The offense is a Class IV felony and the authorized penalty is incarceration for not more than 5 years or a fine of not more than $10,000, or both. Neb. Rev. Stat. § 28-105 (Reissue 1979). Prior to sentencing the defendant had been confined in jail for a period of 393 days, not having posted the $25,000 cash bond fixed by order of the court. The record does not disclose the reason for the lapse of time between incarceration and plea and sentencing, but the briefs indicate that the time was consumed in connection with a motion or motions to suppress. The District Court imposed a sentence of 20 months' to 5 years' imprisonment and a fine of $7,500. The sentencing judgment also provided the defendant be given a credit of 93 days on the sentence of imprisonment and that the $7,500 fine be satisfied by being given credit for 300 days' jail time.

On this appeal the defendant argues (1) that the sentence is excessive, and (2) that the portion of the sentence satisfying the fine by crediting 300 days of jail time confinement while awaiting trial is unconstitutional because it could result in the defendant being incarcerated for a period of time longer than the maximum authorized imprisonment of 5 years. The defendant asks that the entire 393 days be credited on his sentence of imprisonment.

Defendant relies upon the holdings of the U.S. Supreme Court in *Williams v. Illinois,* 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970), and *Tate v. Short,* 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971). In *Williams* the facts were that an indigent defendant had been sentenced to the maximum period of imprisonment and also given a fine of $500, plus $5 costs, and the judgment provided that if at the end

of his incarceration he had not satisfied the fine, then he should remain in jail to work off the fine at the statutory rate of $5 a day. The Supreme Court held that though a state has considerable latitude in fixing the punishment for state crimes and may impose alternative sanctions, it may not under the equal protection clause subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency. In *Tate* the petitioner, an indigent, was convicted of traffic offenses and fined a total of $425. Texas law did not provide alternative penalties of imprisonment. The Court held that it is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it.

The defendant's first assignment may be disposed of summarily. We have carefully examined the record, including the presentence investigation. The sentence is not excessive.

As to the second assignment, we determine that the matter is controlled by the Nebraska statutes and we affirm the sentence but modify its implementation as hereinafter set forth. We point out in passing that the briefs of both parties are inadequate in their discussion of the governing statutes. Each quotes only that portion of the pertinent statutes that suits his partisan purpose and thus has not been helpful to the court.

The relevant Nebraska statutes provide as follows: Neb. Rev. Stat. § 29-2206(1) (Reissue 1979) authorizes the court to imprison a convicted defendant until a fine which has been imposed has been paid. Subsection (2) of that statute, insofar as is relevant here, reads as follows: "Notwithstanding the provisions of subsection (1) of this section, when any offender demonstrates to the court or magistrate that he or she is unable to pay such fine in one

lump sum the court or magistrate shall make arrangements suitable to the court or magistrate and to the offender whereby the offender may pay the fine in installments. The court or magistrate shall enter an order specifying the terms of such arrangements and the dates on which payments are to be made." Neb. Rev. Stat. § 29-2412 (Reissue 1979) provides: "Whenever it shall be made satisfactorily to appear to the district court, or to the county judge of the proper county, after all legal means have been exhausted, that any person who is subject to being or is confined in jail for any fine or costs of prosecution for any criminal offense has no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of such court or judge, on his or her own motion or upon the motion of the person so confined, to discharge such person from further imprisonment, for such fine and costs, which discharge shall operate as a complete release of such fine and costs; *Provided,* nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he or she may be sentenced to be imprisoned, as part of his or her punishment, or when such person shall default on a payment due pursuant to an installment agreement arranged by the court. Any person held in custody for nonpayment of a fine or for default on an installment shall be entitled to a credit on the fine or installment of twenty-five dollars for each day so held. In no case shall a person held in custody for nonpayment of a fine be held in such custody for more days than the maximum number to which he or she could have been sentenced if the penalty set by law includes the possibility of confinement."

We have held that where the term of a sentence pronounced is the statutory maximum for the offense, credit must be given for jail time. *State v. Rathbun,* 205 Neb. 329, 287 N.W.2d 445 (1980); *State v. Blazek,* 199 Neb. 466, 259 N.W.2d 914 (1977). Credit

for jail time need not, however, be given when the maximum sentence is not imposed. *Eutzy v. State,* 199 Neb. 384, 258 N.W.2d 829 (1977).

It seems clear from the statutes we have cited that a defendant, upon whom a fine has been imposed and who has the ability to pay a fine, must be given the opportunity to do so, and that a defendant who can pay but not in one lump sum must be given an opportunity to pay in installments. The following language of § 29-2412, "Whenever it shall be made satisfactorily to appear to the district court, or to the county judge of the proper county, after all legal means have been exhausted, that any person who is subject to being or is confined in jail for any fine or costs of prosecution for any criminal offense has no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of such court or judge, on his or her own motion or upon the motion of the person so confined, to discharge such person from further imprisonment, for such fine and costs, which discharge shall operate as a complete release of such fine and costs," clearly indicates that indigents cannot be required to satisfy fines by imprisonment. Further, the last sentence of § 29-2412 indicates that no defendant shall be held in prison in satisfaction of a fine for a period beyond the maximum number of days for which he could have been imprisoned for the offense of which convicted.

The proviso of § 29-2412 was enacted in 1979. 1979 Neb. Laws, L.B. 111. It is probable that this amendment was adopted in recognition of the holdings of the U.S. Supreme Court in the two cases we have cited. As we read those two cases, even an indigent may, in a case where both fine and imprisonment are authorized, be required to satisfy the fine by imprisonment provided the total time served does not exceed the maximum prison term which could have been imposed as punishment. Our statutes, however, appear to be more generous and provide that

an indigent may not be required to satisfy a fine by imprisonment.

It seems clear to us that the statutes cited do not authorize the procedure which the court here used, i.e., requiring the fine to be satisfied by applying the jail time served without giving an opportunity to pay in the manner provided by statute, and without affording an opportunity to show indigency.

The record does not clearly show that the defendant is an indigent unless that is to be inferred solely from the fact that he could not post a $25,000 cash bond. The inference that the defendant was indigent does not necessarily follow.

We affirm the sentence of imprisonment and the fine. We modify that portion of the judgment which requires the satisfaction of the fine by credit for 300 days' jail time. We direct that 2 months before the defendant shall have completed his 20-month to 5-year sentence he be given an opportunity of making a showing of indigency. If he shall make such proof, then the fine shall be discharged. If he shall fail to make such proof, then there shall be such further proceedings as satisfy the provisions of the statutes as we have interpreted them.

It is salutary at this time to point out the provisions of Neb. Rev. Stat. § 29-2407 (Reissue 1979) in order that they may not be overlooked. That statute grants the State a lien upon the defendant's property within the county for satisfaction of the fine. It then provides: "No property of any convict shall be exempt from execution issued upon any such judgment as aforesaid, against such convict, except in cases where the convict shall be sentenced to the Nebraska Penal and Correctional Complex for a period of more than two years, or to suffer death, in which cases there shall be the same exemptions as at the time may be provided by law for civil cases."

AFFIRMED IN PART AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., concurs in the result.

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STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DONALD R. HAYS, RESPONDENT.

322 N.W.2d 822

Filed August 6, 1982. No. 82-235.

**Disciplinary Proceedings.** The restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct.

Original action. Judgment of disbarment.

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

PER CURIAM.

This is a disciplinary proceeding against the respondent, Donald R. Hays, who was admitted to practice law in this state on June 24, 1966.

Formal charges were filed against the respondent on March 31, 1982. The charges, inter alia, allege that respondent violated DR 1-102 in that he engaged in misrepresentation, fraud, dishonesty, and conduct prejudicial to the administration of justice; violated DR 7-101 by intentionally failing to carry out a contract of employment for professional services; and violated DR 9-102 by failing to segregate his client's funds from his own, and by failing to promptly pay to the client funds to which the client was entitled. Notice of the filing of charges sent by certified mail to respondent's last-known address was returned as unclaimed. Five subsequent efforts by the sheriff of Lancaster County to serve the charges proved unsuccessful. Thereafter, service was had by publication. Answer day was June 1, 1982. No answer has been filed.

The Code of Professional Responsibility provides in pertinent part:

"DR 1-102. Misconduct. A. A lawyer shall not: 1. Violate a Disciplinary Rule. . . . 4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. 5. Engage in conduct that is prejudicial to the administration of justice."

"DR 7-101. Representing a Client Zealously. A. A lawyer shall not intentionally: . . . 2. Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under . . . ."

"DR 9-102. Preserving Identity of Funds and Property of a Client. A. All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows: 1. Funds reasonably sufficient to pay bank charges may be deposited therein. 2. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved. B. A lawyer shall: 1. Promptly notify a client of the receipt of his funds, securities, or other properties. 2. Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable. 3. Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them. 4. Promptly pay or deliver to the client as request-

ed by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive."

The record made before the First Judicial Committee on Inquiry reveals that on or about May 30, 1980, Ilene Kreinbrook retained the respondent to handle the dissolution of her marriage. During the course of that action she discovered $12,000 in cash in her basement which, at respondent's request, she brought to him. He was to deposit the funds in a bank for Mrs. Kreinbrook. The Kreinbrooks' marriage was dissolved on or about December 18, 1980, at which time Mrs. Kreinbrook was awarded $6,139.08 of the funds; one-half of the $12,000 plus the purported accrued interest. At respondent's suggestion she allowed him to retain her funds in order that they might "get together and invest it in stocks and bonds and stuff." It was Mrs. Kreinbrook's understanding that respondent would hold the money in trust for her. As she began to ask for distributions she experienced difficulty both in contacting respondent and in getting money from him. Payments, when made, were by checks drawn on a regular account of the respondent, not on a trust account. Upon receiving an insufficient fund check Mrs. Kreinbrook called Counsel for Discipline and, at his suggestion, wrote to the respondent, discharging him as her attorney and asking for an accounting of and return of her funds. After retaining another attorney she did receive $3,600 which, she testified, when combined with the other distributions to her approximated but did not quite equal the $6,139.08. However, her attorney wrote the Nebraska State Bar Association that full restitution had been made to his client.

The record further reveals that on or about April 3, 1981, John Jeffres was sentenced to jail for a period of 4 months for failing to pay court-ordered child support. While serving that sentence, Jeffres

contacted his mother. He asked her to send $500 to respondent on the basis that respondent had told him that he, respondent, had talked with a judge other than the one who had sentenced Jeffres and thought that by paying an additional $500 on the child support arrearage there was a good chance Jeffres would be released in 2 months instead of having to serve the full 4-month sentence. Jeffres' mother paid $500 to respondent for the purpose of applying it on Jeffres' child support arrearages. The $500 was not applied by respondent to the child support arrearages. Jeffres served his full 4-month sentence. After a number of requests, during which time respondent stated variously that the check had been sent or would be sent to Mrs. Jeffres, the money was ultimately returned to her by respondent's attorney.

There can be no doubt that respondent violated DR 1-102 and DR 9-102. In the Kreinbrook matter he clearly failed to segregate his client's money from his own; in both the Kreinbrook and Jeffres matters he failed to promptly pay or deliver, as requested, funds belonging to the clients. Further, the neglect of respondent to pay over money given to him to apply on past-due child support violated DR 1-102 by engaging in dishonest conduct as to his client and in conduct prejudicial to the administration of justice. Moreover, he failed to carry out a contract of employment in that regard and thus violated DR 7-101. See, *State ex rel. Nebraska State Bar Assn. v. Bremers,* 200 Neb. 481, 264 N.W.2d 194 (1978); *State ex rel. Nebraska State Bar Assn. v. Blanchard,* 179 Neb. 452, 138 N.W.2d 804 (1965).

Respondent's conduct warrants disbarment under the doctrines announced in the cited cases. Nor is the restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, an exoneration of his professional misconduct. *State ex rel. Nebraska State Bar Assn. v. Ledwith,* 197 Neb. 572, 250 N.W.2d 230 (1977).

The respondent is disbarred.

JUDGMENT OF DISBARMENT.

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JOHN E. SARRATT, APPELLANT, V. LINCOLN BENEFIT LIFE COMPANY, A CORPORATION, APPELLEE.

323 N.W.2d 81

Filed August 13, 1982. No. 44135.

1. **Actions: Summary Judgment.** The right of a party to sue as representative of a class may be determined on motion for summary judgment.
2. **Actions: Parties.** A party having an interest adverse to the interests of the parties sought to be represented may not sue as representative of a class under the provisions of Neb. Rev. Stat. § 25-319 (Reissue 1979).
3. _____: _____. Potentially conflicting interests within the class are incompatible with the maintenance of a true class action.
4. **Actions: Parties: Summary Judgment.** Where the record demonstrates the potentiality of conflict, either within the class or between the person who seeks to represent the class and the class, it is appropriate to dispose of the class aspect of the case upon motion for summary judgment.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Patrick L. Cooney and Michael W. Pirtle of McCormack, Cooney, Mooney & Hillman, P.C., for appellant.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

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

MCCOWN, J.

This is a class action instituted by the plaintiff on behalf of himself and other similarly situated policyholders against the defendant insurance company for damages and a refund of premiums paid. The District Court granted the defendant's motion for partial summary judgment denying plaintiff the right to proceed as a representative of the class but

allowing him to proceed with his own individual action. The plaintiff has appealed.

Plaintiff alleges that on November 1, 1974, he purchased a disability insurance policy from the defendant insurance company which provided benefits in the event of the disability of the insured. The premium was $38.08 per month. A return of premium rider provided that if the insured made no claim against the policy for a 10-year period, 80 percent of the premiums paid during the 10-year period would be returned. If, during the 10-year period, the insured received benefits equaling 30 percent or less of the premiums paid during the period, the company would pay 80 percent of the premiums, less the total of all benefits received during the period. The policy form declares in boldface type: "COMPANY RESERVES THE RIGHT TO CHANGE TABLE OF PREMIUM RATES." The insurance policies were sold by licensed agents of the defendant insurance company by individual contacts with individual policyholders and were not sold as a group plan.

In 1978 the insurance company increased the premium rates to $48.08 per month, based upon the actuarial experience of the company at that time. On April 30, 1980, plaintiff was notified that the insurance company would increase premium rates to $81.69 per month, effective June 1, 1980. This increase was also based upon the actuarial experience of the company. The plaintiff paid all premiums through May 1980 and on June 16, 1980, instituted this action attempting to represent as a class all persons who purchased the particular disability insurance policy with return of premium rider.

Plaintiff alleged that in the sale of the insurance policy with return of premium rider the defendant used advertising material which was a sham and a fraud; employed devices, schemes, and artifices to defraud; made untrue statements of material facts; and engaged in acts, practices, and courses of busi-

ness which operated as a fraud and deceit upon the purchasers of the policies. He prayed for damages and 80 percent of all premiums paid by members of the class and such other relief as may be required.

The defendant filed a motion for partial summary judgment on the ground that plaintiff was not entitled to bring the action in any representative capacity for the class described in the petition because there was a potentiality of conflict of interest between the persons represented. The District Court, after hearing on the motion, found that there was a potentiality of conflict of interest within the purported class and dismissed the class action aspect of the case, but found that plaintiff was entitled to proceed with the prosecution of his own individual case. The plaintiff has appealed from the dismissal of the class action.

The maintenance of class action suits is governed by Neb. Rev. Stat. § 25-319 (Reissue 1979), which provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

The general rule is that a plaintiff in a class action must have an interest in the controversy common with those for whom he sues and there must be that unity of interest between them so that the action might be brought by them jointly. Persons having an interest adverse to those of parties purported to be represented cannot maintain a representative or class suit on behalf of the latter. *Evans v. Metropolitan Utilities Dist.,* 185 Neb. 464, 176 N.W.2d 679 (1970).

The case of *Blankenship v. Omaha P. P. Dist.,* 195 Neb. 170, 237 N.W.2d 86 (1976), is determinative of the issues in the present case. In that case we held that the right of a party to sue as representative of a class may be determined on motion for summary

judgment. The statutes of this state authorize a partial summary judgment. Whether a partial summary judgment is a final and appealable order depends upon its effect. A party having an interest adverse to the interests of the parties sought to be represented may not sue as representative of a class under the provisions of § 25-319. Potentially conflicting interests within the class are incompatible with the maintenance of a true class action. Where the record demonstrates the potentiality of conflict, either within the class or between the person who seeks to represent the class and the class, it is appropriate to dispose of the class aspect of the case upon motion for summary judgment.

In discussing § 25-319 in *Blankenship,* this court said: "All the court need determine in granting a motion for summary judgment denying the plaintiff the right to proceed in a class action is that the undisputed facts demonstrate the potentiality of conflict of interests between the represented, or some of them, and the interests which the plaintiff asserts." *Id.* at 177, 237 N.W.2d at 90.

In the case at bar it is clear that there are actual conflicts, as well as potential conflicts, between plaintiff's interests as a former policyholder who has terminated his policy and other members of the class he seeks to represent. The plaintiff has no interest in any cause of action or recovery by others and it may well be that other policyholders may desire to continue their coverage. Class action by the plaintiff deprives all other policyholders of their choice of remedies. Those insureds who have had a change of health condition or occupation could suffer from an unavailability of disability income protection, and the claims history of various members of the class obviously differs and their right to qualify for the premium refund or other plan benefits could well be adversely affected by the single result sought in the plaintiff's proposed class action.

Other states have fairly consistently denied a right to maintain class actions in cases involving similar individual insurance policies. See, *Fisher v. Health Insurance Plan of Gr. New York,* 67 Misc. 2d 674, 324 N.Y.S.2d 732 (1971); *Highsmith v. Allstate Ins. Co.,* 17 Ill. App. 3d 615, 308 N.E.2d 204 (1974); *Alessandro v. State Farm Mut. Auto. Ins. Co.,* 259 Pa. Super. Ct. 571, 393 A.2d 973 (1978); *Johnson v. Travelers Insurance Co.,* 89 Nev. 467, 515 P.2d 68 (1973). Due process problems are also obvious in the case at bar.

The action of the District Court was correct and is affirmed.

AFFIRMED.

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NEBRASKA ENGINEERING COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. AL GERSTNER, DOING BUSINESS AS 1ST AG MANUFACTURERS CORPORATION, APPELLANT.

323 N.W.2d 84

Filed August 13, 1982. No. 44264.

1. **Actions: Pleadings.** Both legal and equitable principles may be enforced in the same action according to the facts. The essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is one at law or in equity, unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief.
2. **Corporations.** In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice.
3. _____. Some of the factors which are relevant in determining whether to disregard the corporate entity are (1) grossly inadequate capitalization, (2) insolvency of the debtor corporation at the time the debt is incurred, (3) diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses, and (4) the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard for the corporate entity.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Owen A. Giles, for appellant.

Michael A. Nelsen of Schmid, Ford, Mooney & Frederick, for appellee.

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

WHITE, J.

Plaintiff, Nebraska Engineering Company (Nebraska Engineering), brought this action in the District Court for Douglas County, Nebraska, against the defendant, Al Gerstner, doing business as 1st Ag Manufacturers Corporation (1st Ag). In the first cause of action, the plaintiff alleged that the defendant purchased merchandise in the value of $14,621.42 and failed to pay for the same. The second cause of action alleged essentially the same facts but alleged fraud in the securing of the merchandise and the failure to pay the account due. The defendant by answer admitted that the goods were sold and delivered to 1st Ag, a Nebraska corporation, but denied that the goods were ordered, solicited, or promised to be paid for directly or indirectly by Al Gerstner, the president and one of two stockholders of 1st Ag, and prayed that the plaintiff's petition be dismissed. For reply, the plaintiff denied generally any new allegations of fact in the defendant's answer. The trial court found for plaintiff and entered judgment for $14,621.42.

The cause was pled as a law action; however, a jury was waived and at trial it became apparent that the plaintiff's basis for recovery was not on any direct solicitation or order by Al Gerstner but was tried on the following theory stated by the trial judge: "The theory upon which the case is being tried and defended is the issue of whether or not the corporate entity should be pierced and personal lia-

bility imposed; is that correct? MR. MILLER: [trial counsel for Gerstner] Yes, Your Honor." The characterization of the action as law or equity becomes important for the purposes of the standard of review applied by this court. "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and in their place there shall be hereafter but one form of action, which shall be called a civil action." Neb. Rev. Stat. § 25-101 (Reissue 1979).

We have said that both legal and equitable principles may be enforced in the same action according to the facts. *City of Beatrice v. Gage County,* 130 Neb. 850, 266 N.W. 777 (1936). The essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is one at law or in equity, unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief. *Mills v. Heckendorn,* 135 Neb. 294, 281 N.W. 49 (1938).

This cause of action is one essentially stated at law. However, the theory on which the case was tried differs from the cause of action pled by the petition and is essentially a doctrine that was first cognizable in equity, i.e., to prevent the use of the corporate form to accomplish fraud or injustice. In *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 135, 296 N.W.2d 474, 477 (1980), this court stated: "In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice."

For the purpose of this case, we shall treat the matter as one in equity according to the agreement of the parties and not one in law as pled. We shall, therefore, review the matter de novo on the record and come to an independent conclusion without ref-

erence to the findings of the District Court. *Daugherty v. Ashton Feed and Grain Co., Inc.,* 208 Neb. 159, 303 N.W.2d 64 (1981).

However, even though this is an equity action and upon appeal it is triable de novo, it is still subject "to the condition that when the evidence on material questions of fact is in irreconcilable conflict, the 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." *Tilden v. Beckmann,* 203 Neb. 293, 297-98, 278 N.W.2d 581, 584-85 (1979); *Rolfsmeyer v. Seward County,* 182 Neb. 348, 154 N.W.2d 752 (1967).

In April 1980 the office manager of 1st Ag placed a telephone order with the office manager of Nebraska Engineering for farm elevator equipment in the sum of $14,621.42. Due to a questionable credit record, Nebraska Engineering refused to sell the goods to 1st Ag on any terms other than a cash basis; however, in a conversation with the office manager and subsequently with the general manager of Nebraska Engineering, it was agreed that the goods could be picked up at Nebraska Engineering and delivered to Michigan where payment was expected immediately from the ultimate purchaser. 1st Ag was acting as a wholesaler of those goods. On that condition the goods were released. 1st Ag received payment from the ultimate purchaser in Michigan and ultimately deposited the money in 1st Ag's account. In spite of repeated demands and promises made and broken, no payment was ever made to Nebraska Engineering. Nebraska Engineering at trial produced the testimony of James Goodnight, a managing partner for Fox & Company, a national public accounting firm, who testified to a detailed analysis of the financial structure and history of 1st Ag. Based on his evaluation of the testimony and the evidence, the trial court found "that the capitalization of 1st Ag

Manufacturers Corporation was and remained grossly inadequate; that the corporation was insolvent at the time the debt, the subject of this action, was incurred; that the defendant [Al Gerstner] herein diverted corporate funds to his own use; and that the corporation was a mere facade for the personal dealings of the defendant and that the operations of the corporation were carried on by him in disregard of the corporate entity, and to the prejudice of plaintiff as a creditor." The court further found, as was admitted by the parties, that the value of the goods was as stated in the plaintiff's petition and that they (the goods) had not been paid for.

The record establishes that the capital stock of 1st Ag was issued on December 28, 1977, in the amount of $1,000 and remained in this amount throughout the period in question. Al Gerstner and his wife were the sole stockholders. The trial court's memorandum accurately summarizes the facts in the record as follows: "According to the federal tax returns for periods in 1977, 1978, and 1979 the corporation operated at a net loss for each of the periods, resulting in negative balances in the 'retained earnings' account, the only other 'equity.' The testimony and other evidence establish that the corporation was insolvent when the subject debt was incurred. In April, 1969, the premises in which the corporation was operating were purchased by defendant and his attorney. A mortgage was given back, but corporation funds were used in payment of the mortgage loan installments. Loans were made to defendant [Gerstner], a director, and his attorney, another director, and while no loss to the corporation of any principal amount of these loans is shown, the fact is material in the determination of whether operations were carried on in disregard of the corporate entity. The corporation was actually dissolved on August 2, 1979, and not revived by a certificate of revival until July 23, 1980, a few days before this action was filed.

During the time the corporation was in a state of dissolution the subject debt was incurred, and the Court finds that defendant had knowledge of the dissolution and ample opportunity to correct the matter. . . . The defendant testified that the years 1977 and 1978 were good years, and profitable, but the income tax returns show operations of the corporation at a loss for those periods. The conclusion is inescapable that the corporation's business was profitable to defendant but not to the corporation and that the corporation was merely an instrument of defendant's personal dealings. The defendant having ignored the corporate entity, this Court will do likewise."

Some of the factors which are relevant in determining whether to disregard the corporate entity are (1) grossly inadequate capitalization, (2) insolvency of the debtor corporation at the time the debt is incurred, (3) diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses, and (4) the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard for the corporate entity. *United States Nat. Bank of Omaha v. Rupe,* 207 Neb. 131, 296 N.W.2d 474 (1980).

As pointed out in the plaintiff's brief and by the trial court's excellent memorandum, the actions of the defendant, Al Gerstner, fulfilled not several but each and every one of the above conditions. We agree with the judgment of the trial court. The judgment is affirmed.

AFFIRMED.

TYRO FARMS, INC., APPELLANT, V. FRED A. HERRINGTON, TAX COMMISSIONER, STATE OF NEBRASKA, ET AL., APPELLEES.

323 N.W.2d 88

Filed August 13, 1982. No. 44307.

1. **Taxation: Collateral Attack.** A claim that property is assessed too high for taxation purposes cannot be made in the first instance by collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization.
2. _____: _____. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void.

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

Charles A. Nye of Garvey, Nye, Crawford, Kirchner & Moylan, and Edward F. Fogarty of Fogarty, Lund & Gross, for appellant.

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

Donald L. Knowles, Douglas County Attorney, and Rockford G. Meyer, for appellees Howell et al.

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

WHITE, J.

Tyro Farms, Inc., brought this action on behalf of itself and all other owners of agricultural real estate similarly situated in Douglas County, Nebraska, against the state Tax Commissioner, Douglas County treasurer, Douglas County assessor, and all Douglas County commissioners to have a 1980 reappraisal of agricultural real estate in Douglas County declared unlawful and void, and to enjoin the defendants from assessing or collecting 1980 real property taxes based on valuations in excess of the 1979 valuations. The District Court for Douglas County found that the assessments of agricultural lands in Doug-

las County for the year 1980 were not void, that the plaintiff had an adequate and exclusive remedy at law which it had not exhausted, and that a collateral attack could not be maintained. The trial court dismissed the plaintiff's petition and the plaintiff has appealed.

The facts are essentially as follows: In 1979 Douglas County conducted a revaluation and reassessment of all agricultural land in the county. It based its revaluation and reassessment upon the Nebraska Agricultural Land Valuation Manual 1979. The agricultural lands in Douglas County were revalued and reassessed for 1980 tax purposes while other classifications of real property were not similarly revalued.

This case, like *Riha Farms, Inc. v. Dvorak, ante* p. 391, 322 N.W.2d 801 (1982), is a collateral attack upon the assessment and collection of all increases in taxes attributable to the reappraisal and revaluation of agricultural lands effective for the tax year 1980. For the same reasons set forth in *Riha Farms, Inc. v. Dvorak, supra,* we conclude here as well that a claim that property is assessed too high for taxation purposes cannot be made in the first instance by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void. See, *Riha Farms, Inc. v. Dvorak, supra; Jones v. Valley County Board of Equalization,* 208 Neb. 559, 304 N.W.2d 396 (1981); *Scudder v. County of Buffalo,* 170 Neb. 293, 102 N.W.2d 447 (1960); *Gamboni v. County of Otoe,* 159 Neb. 417, 67 N.W.2d 489 (1954).

The District Court's determination in the present case that the assessments of plaintiff's properties for 1980 were not void and that a collateral attack could not be maintained was correct. The judgment is affirmed.

AFFIRMED.

# BOARD OF EDUCATION OF KEYA PAHA COUNTY HIGH SCHOOL DISTRICT, A CLASS VI DISTRICT, APPELLANT, V. STATE BOARD OF EDUCATION ET AL., APPELLEES.

323 N.W.2d 89

Filed August 13, 1982. No. 44317.

1. **Appeal and Error: Jurisdiction.** An appellate court cannot acquire jurisdiction of a cause if the court from which the appeal was taken had no jurisdiction of the subject matter.
2. _____: _____. The parties cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent.
3. **Schools and School Districts: Jurisdiction: Appeal and Error.** Proceedings for review under the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-917 et seq. (Reissue 1981), shall be instituted by filing a petition in the District Court of the county where the action is taken. In a proceeding authorized by Neb. Rev. Stat. § 79-1103.05 (Reissue 1981), the action is taken in the county where the State Board of Education conducts its hearing.
4. **Appeal and Error: Jurisdiction.** The right of appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action.

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

William B. Cassel of Cassel & Cassel, for appellant.

Edward E. Hannon of Cronin, Hannon & Symonds, for appellees Richardson et al.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee State Board.

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

HASTINGS, J.

This is an appeal by the petitioner, Board of Education of Keya Paha County High School District, from the judgment of the District Court for Keya Paha County affirming the order of the respondent

State Board of Education dated August 25, 1980. This latter order had declared that the children of respondents Elmer Richardson, Havor Heyden, and Curtis Hitchcock might attend the public high school in Burke, South Dakota, and that the petitioner shall pay the sum of $1,968.40 for each of such children who attend said high school during the 1980-81 school year. The original proceedings before the State Board of Education were authorized by Neb. Rev. Stat. § 79-1103.05 (Reissue 1976).

The petitioner assigns as error: (1) The trial court erred in failing to hold said statute to be special or class legislation in violation of the Constitution of the State of Nebraska; (2) The court erred in failing to hold that said statute was violative of the equal protection clause of the Constitution of the United States; and (3) The court erred in holding that the State Board of Education had authority to order payment of tuition for students of the petitioner school district while attending the Burke, South Dakota, high school.

The petitioner is a Class VI school district within the meaning of Neb. Rev. Stat. §§ 79-1101 et seq. (Reissue 1981), and operates a public high school. The respondent State Board of Education was created by Neb. Rev. Stat. §§ 79-321 et seq. (Reissue 1981), and is an administrative agency within the meaning of Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981). The individual respondents named above are residents of the petitioner district and are the parents of children of high school age residing with them within such district. A related case and a forerunner of this litigation, *Richardson v. Board of Education,* is reported at 206 Neb. 18, 290 N.W.2d 803 (1980).

In effect at the time pertinent to this litigation was § 79-1103.05 (Reissue 1976), which provided: "(1) When application is made in writing by the parent or guardian of a pupil subject to the provisions of this section, the board of education of any school district

of the sixth class maintaining an accredited high school may pay the regular high school tuition for any pupil residing in such school district and attending an accredited or approved high school in this state outside 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 school 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.

"(2) Any parent or guardian of such student who is aggrieved by a decision of the board of education 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."

The individual respondents qualify as such "parents" inasmuch as they live approximately 20 miles closer to Burke, South Dakota, than they do to the high school operated by the petitioner in Springview, Nebraska. Accordingly, application was made to the petitioner for such tuition benefits, but their application was denied. An appeal to the State Board of Education followed. Following that appeal, an order was entered finding that the individual respondents had children who qualified for public high school education; that the public school at Burke was at least 10 miles closer to their residence than the school at Springview; and that because of the climate, road conditions, bus service, and distance, it would be in the best interests of said children if they were permitted to attend the public high school in Burke. Accordingly, the petitioner was ordered to pay $1,968.40 for each of said children who attend the Burke high school during the 1980-81 school year. It is this order which the petitioner appealed to the

District Court. Following that appeal, the District Court affirmed the order of the State Board of Education, and the Board of Education of Keya Paha County High School District perfected its appeal to this court.

Before addressing the issues raised by the petitioner in its assignments of error, it is necessary that we consider the matter of jurisdiction. The issue concerns the choice of forum made by the petitioner, in that it filed its appeal under the provisions of Neb. Rev. Stat. § 84-917 (Reissue 1981) in the District Court for Keya Paha County rather than in the District Court for Lancaster County. This issue was raised for the first time by the individual respondents in their brief in this court. However, the petitioner concedes in its reply brief that such delay in raising the question does not preclude our considering it at this time. It correctly cites *Lane v. Burt County Rural Public Power Dist.,* 163 Neb. 1, 77 N.W.2d 773 (1956), which stands for the proposition that an appellate court cannot acquire jurisdiction of a cause if the court from which the appeal was taken had no jurisdiction of the subject matter. Nor can the parties confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent. *Woodsmall v. Marijo, Inc.,* 206 Neb. 405, 293 N.W.2d 378 (1980).

Section 84-917 requires that "Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken . . . ." The individual respondents argue that the "action taken" was the order of the State Board of Education requiring the petitioner to pay for the tuition expense of the various children, that the hearing was had before the State Board of Education in Lancaster County, and, therefore, the action was taken there. They cite *The Flamingo, Inc. v. Nebraska Liquor Control Commission,* 185 Neb. 22, 173 N.W.2d 369 (1969), in support of their position.

That case involved the *suspension* of a liquor license as a result of a hearing held before the Nebraska Liquor Control Commission at its office in Lancaster County. The appellant licensee filed its appeal in the District Court for Dakota County, contending that Neb. Rev. Stat. § 53-1,116 (Reissue 1968), then in effect, provided that any decision of the commission *revoking* a license may be reversed by the District Court of the county in which the licensee resides. We disagreed, pointing out that the words "suspension" and "revocation" are not synonymous, and since we were dealing with a suspension, § 53-1,116 did not apply. We pointed out that the commission was an administrative agency and therefore was governed by the rules of administrative agencies. "Section 84-917, R.R.S. 1943, is controlling in this case. It provides: '. . . Proceedings for review shall be instituted by filing a petition *in the district court of the county where the action is taken* * * *.' (Emphasis supplied.) . . . The 'action (was) taken' in Lancaster County, and thus the petition should have been filed in the district court for Lancaster County. 'The right to appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action.' " 185 Neb. at 24-25, 173 N.W.2d at 371-72.

The petitioner argues that the individual respondents have relied upon a misinterpretation of *Flamingo* in that there the proceedings originated with the Nebraska Liquor Control Commission in Lancaster County, whereas in this instance the "action on appeal is the denial of tuition payments for the children of the individual appellees, which it is undisputed was taken in Keya Paha County." It then goes on to cite *Downer v. Ihms,* 192 Neb. 594, 223 N.W.2d 148 (1974), for the proposition that *Flamingo* cannot be taken as holding that venue for review of all appeals under the Administrative Procedures Act

must be in Lancaster County. That is a correct statement of what we said. However, *Downer* involved an appeal from an order of the director of the Department of Public Welfare upholding the action of the county board of public welfare which had rejected the applicant's claim for public assistance. We pointed out in the body of the opinion that pursuant to the mandate contained in Neb. Rev. Stat. § 68-1001.01 (Reissue 1976), now § 68-1001.01 (Reissue 1981), the Department of Public Welfare adopted certain regulations to implement the statutory right to a fair hearing and administrative appeal. Those regulations, we said, required that the department furnish appeal forms which may be filed with the county division of the applicant's residence and that the place of hearing before the director shall be in the county in which the applicant resides. In holding that the "action was taken" in the county of the applicant's residence, we said: "The administrative appeal from that action (review of the action of the county board) is then taken by filing notice either with the county board or with the director. The appeal hearing itself is held in the county of the plaintiff's residence. . . . The sole event that may occur in other than the county of the residence of the affected person is the consideration by the director of his decision. Even that is not mandated by statute for if the hearing is held before the director, as the statute authorizes, then presumably he might also make his decision in the county of the residence of the affected party." 192 Neb. at 600, 223 N.W.2d at 151. We are confronted with no similar statutory or regulatory requirements in this instance.

This court in *Downer* did not find it appropriate in ascertaining the "county where the action is taken" to conclude that the action taken was the denial of benefits which was accomplished initially by the county board located in the applicant's county of residence. Rather, our decision was based upon the

action taken by the Department of Public Welfare as the first agency to make a decision in a disputed case, which action was required by regulations to be taken in the county of applicant's residence. In the present case, we are of the opinion that the "action" was "taken" in Lancaster County, the site of the first adjudicated hearing of a disputed claim, and petitioner's petition should have been filed in the District Court for that county. " 'The right to appeal is statutory and the requirements of the statute are manda ry and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action.' " *The Flamingo, Inc. v. Nebraska Liquor Control Commission,* 185 Neb. 22, 25, 173 N.W.2d 369, 371-72 (1969).

Because the District Court for Keya Paha County acquired no jurisdiction of the subject matter of the action, this court also possesses no jurisdiction. Therefore, it is unnecessary for us to consider the petitioner's assignments of error, and the appeal is ordered dismissed.

APPEAL DISMISSED.

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WOLFE GITSCHEL AND DIANN L. GITSCHEL, APPELLANTS, V. JANICE E. SAUER, APPELLEE.

323 N.W.2d 93

Filed August 13, 1982. No. 44333.

1. **Summary Judgment.** Before a summary judgment may be granted, the moving party must establish that there exists no genuine issue as to any material fact in the case, and that under the facts he is entitled to a judgment as a matter of law.
2. _____. The burden is upon the party moving for the summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled.
3. _____. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists.

4. _____. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom.
5. _____. A motion for a summary judgment is not a substitute for a demurrer or a motion for a directed verdict.
6. **Contracts: Fraud.** A party who has been induced to enter a contract by fraud has, upon its discovery, an election of remedies, and he may either affirm the contract and sue for damages or disaffirm it and be reinstated to the position he was in before it was consummated.
7. _____: _____. A provision in a contract for the purchase of real estate, to the effect that vendee agrees that he has made personal inspection of the property covered by the contract and is buying it solely on his own investigation and not on any representations made by anyone else as to any material matter affecting such property or his purchase thereof, will not relieve the vendor or his agent from responsibility for fraudulent representations made concerning the subject matter of the contract.
8. _____: _____. The material elements of a cause of action for fraudulent representation are that the representation was made, that the representation was false, that when the representation was made it was known to be false or made recklessly without knowledge of its truth and as a positive assertion, that it was made with the intention that the plaintiff would rely upon it, that the plaintiff did rely upon it, and that he suffered damage as a result.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Dennis L. Arfmann and Robert M. Brenner Law Office, for appellants.

Holtorf, Kovarik, Nuttleman & Ellison, P.C., for appellee.

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

CLINTON, J.

This is an action for damages alleged to have been caused by the fraudulent representations made by the defendant seller inducing plaintiffs purchasers to buy a residential property located in Scotts Bluff

County, Nebraska. The seller filed a motion for summary judgment. Received in evidence in support of and in opposition to the motion were the purchase agreement; the deposition of each of the purchasers; the deposition of the defendant, Jan Sauer; the deposition of George Ruff, the real estate agent who represented the seller; and the answers by defendant to interrogatories by the plaintiffs. The trial court granted the summary judgment. The purchasers appealed. We affirm in part, and in part reverse and remand for trial on the merits.

Before a summary judgment may be granted, the moving party must establish that there exists no genuine issue as to any material fact in the case, and that under the facts he is entitled to a judgment as a matter of law. *Green v. Village of Terrytown,* 189 Neb. 615, 204 N.W.2d 152 (1973). The burden is upon the party moving for the summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom. A motion for a summary judgment is not a substitute for a demurrer or a motion for a directed verdict. *Green v. Village of Terrytown, supra.*

A party who has been induced to enter a contract by fraud has, upon its discovery, an election of remedies, and he may either affirm the contract and sue for damages or disaffirm it and be reinstated to the position he was in before it was consummated. *Russo v. Williams,* 160 Neb. 564, 71 N.W.2d 131 (1955).

The petition of the plaintiffs set forth four alleged

causes of action. The operative substance of these various causes is essentially the same, viz, in the negotiations leading up to the execution of the contract, the seller represented to the buyers, knowingly or recklessly with disregard of truth or falsity, that there existed on the premises a new and adequate well and a new and adequate septic tank and drainage system; that the buyers relied upon said representations in entering into the contract and were justified in so doing because the systems were not open to inspection; that the representations were not true; that the septic system and well did not, in fact, function properly; and that the plaintiffs were damaged by the false representations and were required to spend money to replace the systems to make the residence habitable.

The contract of purchase contained the following provision: "This offer is based upon my (our) personal inspection or investigations of the premises herein described and not upon any representation or warranties of conditions made by the seller or his agent." The seller contends that this provision entitles her to judgment as a matter of law. With respect to such a provision we have said, quoting from the earlier case of *Menking v. Larson,* 112 Neb. 479, 199 N.W. 823 (1924): " 'A provision in a contract for the purchase of real estate, to the effect that vendee agrees that he has made personal inspection of the property covered by the contract and is buying it solely on his own investigation and not on any representations made by any one else as to any material matter affecting such property or his purchase thereof, will not relieve the vendor, or his agent, from responsibility for fraudulent representations, made by vendor's agent, concerning the subject-matter of the contract . . . .' " *Wolford v. Freeman,* 150 Neb. 537, 546, 35 N.W.2d 98, 103 (1948). The contention of the seller with reference to the contractual provision is not well founded.

We now turn to the deposition testimony. We summarize or quote the pertinent material portions. Negotiations between the parties took place in early May 1978. The contract was signed on May 26, 1978. The purchasers took possession of the property early in October 1978.

There were two meetings between the parties before the contract was signed. On the first occasion there was an inspection of the house and apparently no conversation relevant to the issue before us. The plaintiff Wolfe Gitschel stated that at the second meeting he, his wife, the defendant, and the real estate agent were present. With respect thereto we quote from his deposition: "Q. Well, was the water system discussed? A. Pardon? Q. Was the water system discussed? A. I asked about plumbing. Q. Do you recall what you asked? A. Well, in the entire discussion I just asked if there was any plumbing problems. Q. Okay. Is that, to the best of your recollection, the way you said it? A. Yes. Q. And what, if anything, was said, and by whom? A. Well, Jan Sauer mentioned the fact that she had just installed a pressure system in the well and that she had put in a new drain field. . . . Q. Was anything else said about the plumbing, for the moment disregarding the sewer? A. No. Q. Now, with respect to the sewer system, which I think you already indicated was discussed, tell me what was said by who and what everybody said about it. A. Well, I asked if there was any problem with the plumbing, meaning the sewer system. And she said, 'No'—Jan. And then she went on to say she put in a new drain field. Q. Was there any further discussion about it? A. No."

Defendant testified that when asked about the plumbing she told the plaintiffs that they had had no problems, that they had put in a new holding tank (referring to the water system) and a new drain field (referring to the septic system). Her husband

had put in the new drain field mostly himself. They had no problems with the plumbing except on two occasions when a farmer cut the pipe. All the plumbing in the house drained properly. There was no discussion about a septic tank.

The plaintiffs testified that beginning a day or two after they took possession, the bathtub took hours to drain and the stool had to be flushed more than once. They used a plunger on the bathtub. They then began to use Drano and other chemicals and finally a sewer auger which they used many times. Plumbing drainage problems just grew worse. The first time they used the auger the system worked all right for a day or two and then began backing up again. Gitschel called the defendant to find out where the septic tank and the drain field were located and she told him the location, but it could not be located. Finally they found the drain field in the pasture. They had plumbers dig it up. It consisted of about 50 feet of perforated pipe placed in gravel or rock. They dug up the sewer line from the drain field to the house. There was no septic tank anywhere along the line. Later they found the septic tank adjacent to the foundation of the house. It had collapsed. It was connected to the house plumbing by a separate line from the drain field line. Gitschel, in response to a question asking him to describe this other line, answered: "A. The other line came out, like I say, from a Y shape from another part of the house. And it went into the septic tank. Q. So I understand you clearly, were there two sewer lines coming out of the house or one line that branched off two directions? A. Like I say, I'm no plumber. But I was told, and like I say, I didn't get down there and look because that thing was complete [sic] filled with sewage, you know. But they said there was a branch line." There was no drain field "going off" from the septic tank. The Gitschels had a new septic

tank put in and connected it to a new drain field. That solved the problem.

Ruff testified: "Q Now, calling your attention to the sewer system, was there a discussion about anything to do with the sewer system? A Yes. Wolfe asked about the sewer system. We were standing in the living room at the time. And I turned to Jan and said, 'Jan, tell us about the sewer system.' And she said there had been partial or some new drain field put in. And I asked her what she meant by a new drain field or part new drain field and then she explained the fact they had been running the raw sewage into a ditch south of them. And I asked her about the septic tank and she said, 'It's south of the house. I don't have any idea where it is.' And that's basically about the only thing that was said. Q. When you said, 'I don't have any idea where it is,' were you quoting her? A. Yes. She said, 'I don't know where it is, but it's south of the house.' . . . Q. Were there any questions asked about whether the sewer system ever over flowed or backed up, or anything? A. Not that I know of. Q. Was there any questions asked about the condition of other pipes and plumbing in the house or outside of the house? A. None that I know of."

The evidence further shows that the defendant had lived in the house for about 8 years. During that time she had no occasion, in her words, to "unplug" the septic tank. As previously indicated, she was unaware of its location. This would tend to indicate that it had not been emptied for about 8 years.

Except as above indicated, there was no evidence with reference to the water system. No reasonable inference can be drawn from the testimony that a false representation was made with reference thereto or that the plaintiffs suffered any damages with reference to that system. The judgment of the District Court, insofar as it pertains to the water system, is affirmed.

We have, however, a different evidentiary situation as it relates to the plumbing or septic system. It seems clear that the defendant has not demonstrated that there is no genuine issue of material fact with reference thereto.

The material elements of a cause of action for fraudulent representation are the following: (1) That a representation was made; (2) That the representation was false; (3) That when the representation was made it was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) That it was made with the intention that the plaintiff should rely upon it; (5) That the plaintiff did rely upon it; and (6) That he suffered damage as a result. *Ames Bank v. Hahn,* 205 Neb. 353, 287 N.W.2d 687 (1980).

The evidence shows a representation was made that the seller had had no problems with the plumbing and that in the context of the discussion that term included the septic system. Two issues of disputed material fact are whether an inference may be drawn from the evidence that (1) the representation was false when made, and (2) the defendant knew that it was false or made it recklessly and without knowledge of its truth or falsity.

A considerable amount of time, approximately 4 or 5 months, elapsed from the making of the representation until the plaintiffs took possession of the property. Immediately after taking possession the problems described occurred. If the problem developed after the representations had been made, then the defendant can hardly be charged with knowledge of their falsity. If the problems had manifested themselves previously, then clearly an inference of falsity and knowledge thereof can be drawn.

As previously indicated, the collapsed septic tank had never been emptied or "unplugged," as defendant put it. The Sauers had lived in the house since

at least 1970. Until January 1978, when the drainage field was put in, the sewer pipe had emptied into an open ditch. This fact, plus defendant's knowledge that the septic tank had not been opened for at least 8 years, would permit the inference that she knew that they were not functioning. The evidence that the septic tank had not been functioning is evidenced by the testimony that it was not connected to a drain field. This evidence and the undisputed fact that the alleged new drain field had no septic tank in front of it and that before its construction the sewer contents were being emptied into an open ditch would permit the finder of fact to conclude that there was no effective functioning septic system and the defendant either knew it or made the statement recklessly without knowledge of its truth or falsity. One need not be an engineering genius to know that a drain field of the type here described without a septic tank to catch the solid material would quickly clog. The construction of a new drain field in January 1978 and the sale of the property in May would tend to lead to the conclusion that the drain field was a temporary expedient to facilitate the sale.

The judgment is reversed and the cause remanded for trial on the merits on the issue of false representation and damage with reference to the septic system.

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

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JAMES ENGLAND, APPELLEE, V. ROBERT A. LEITHOFF, APPELLANT.

323 N.W.2d 98

Filed August 13, 1982. No. 44350.

1. **Judgments: Appeal and Error.** In a law action tried to the court without a jury, the findings of the court have the effect of a jury

verdict and will not be disturbed on appeal unless clearly wrong.

2. _____: _____. It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court will review the judgment rendered, will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed on appeal unless clearly wrong.
3. **Sales: Warranty.** It is the general rule of law that a warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the agreement of sale, upon which it is intended that the buyer shall rely in making the purchase.
4. **Livestock: Sales: Warranty.** Oral representations of the origin of livestock made in the course of the sale of livestock are express warranties relating to the livestock.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

John S. Mingus of Mingus & Mingus, for appellant.

John Wightman of Wightman and Fallesen, for appellee.

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

WHITE, J.

This is an appeal in a law action from the judgment of the District Court for Buffalo County, Nebraska, in favor of the plaintiff-appellee for $1,789.03 and costs of $427.06. The District Court affirmed the judgment of the Buffalo County Court. The errors assigned are essentially that the decision is contrary to the law and is not supported by the evidence.

In considering the errors alleged on appeal, we are mindful of our standard of review: "In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong." *McDowell Road Associates v. Barnes,* 198 Neb. 207, 210-11, 252 N.W.2d 151, 153 (1977). " 'It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court will review the judg-

ment rendered, will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly wrong. . . .' " *Buttner v. Omaha P. P. Dist.*, 193 Neb. 515, 517-18, 227 N.W.2d 862, 864 (1975).

The suit arose out of the purchase by the plaintiff, James England, of eight bred gilts (female pigs). The sale took place on April 21, 1979. The seller of the gilts was the defendant, Robert A. Leithoff. England purchased the gilts in response to an advertisement Leithoff ran in the Grand Island Independent newspaper. England contacted Leithoff and the price was fixed at $1,760 for all eight, or $220 each. England testified that Leithoff informed him "that he had got them from a friend auctioneer of his and I said if these come off of the salebarn or out of the salebarn, I don't want them and upon his answer, they had not come from a salebarn." England testified that if he had known the gilts had been sold at a sale barn, he would not have purchased them. The gilts had, in fact, been purchased by Leithoff at a sale barn in Sargent, Nebraska, on April 13, 1979. The gilts appeared to be healthy on delivery on April 21, 1979, and were placed on clean ground at England's farm. The first gilt delivered on April 24, 1979, within 3 days of the purchase, and all nine pigs were dead at birth. Four more gilts delivered within 24 hours and all pigs were born dead. Eleven pigs were ultimately delivered alive from the eight gilts.

Shortly after the delivery of the first gilt, England contacted Robert Hinke, a livestock equipment dealer from Axtell, Nebraska. Hinke testified that he was born and raised on a farm and had raised hogs practically all his life. Further, he had been a partner with a veterinarian and had worked as a veterinarian's assistant, assisting in diagnosis and treatment of diseases of hogs. Hinke testified that he had attended seminars run by veterinarians from

Iowa State University and Purdue University relating to animal care, and has read extensively on the subject. Hinke drove to the England farm and observed the gilts that had just given birth to the dead pigs. He observed excessive saliva at the mouth and heavy mucous drainage of the vagina, and the piglets were premature, gaunt, and their hair was shorter than normal. Over objection, he was allowed to testify that the gilts were suffering from a swine disease called leptospirosis. Hinke took two of the dead piglets to Dr. Glen Nickelson of the Holdrege Veterinary Clinic. Dr. Nickelson examined the pigs internally and externally, and observed that the lungs were flat, indicating that the pigs were born dead. Hinke related his observations of the gilts. Dr. Nickelson testified that in his opinion the gilts suffered from leptospirosis, a disease that destroys the value of gilts as breeding stock and results in either aborted dead pigs or stunted pigs that fail to gain weight or reach market weight as do pigs born of healthy gilts. He further testified that leptospirosis has an incubation period of from 5 to 21 days, and that the gilts suffered from the disease at the time they were delivered to the England farm.

Hinke further testified that hog producers would not purchase gilts from a sale barn because "Where they run so many hogs through salebarns, it is inevitable that you can . . . that you can take hogs that are well and run them through a salebarn and they will pick up a disease from the manure if nothing else in the pens and the alleys and therefore farmers who buy breeding stock . . . there are very few that I know of that would even take the risk of buying from a salebarn for brood stock in hogs." Hinke further testified that he would never recommend to a customer to buy gilts from a sale barn, and that, in view of the risk, his opinion of the value of a bred sow from a sale barn was that "they would have to pay me to take a bred sow out of a salebarn."

England introduced a regulation of the state Department of Agriculture adopted April 14, 1975, pursuant to Neb. Rev. Stat. §§ 54-1157 to 54-1186, 54-1701 to 54-1711, and 54-2001 to 54-2019 (Reissue 1978), which provides at (3)(c)(i)(E): "Swine released from a market or concentration point shall be confined on the premises of the purchaser for thirty (30) days separate from all other swine . . . ." Although plaintiff urges that a private cause of action is created by the regulation in favor of purchasers from buyers who violate this regulation, in view of our decision here we need not pass on the point, and do not do so. Neb. U.C.C. § 2-313 (Reissue 1980) provides: "(1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."

In discussing actions on warranties arising under Neb. U.C.C. §§ 2-313, 2-314, and 2-315 (Reissue 1980), White & Summers, Uniform Commercial Code § 9-1 at 326 (2d ed. 1980), observes that a lawyer with a warranty case "First . . . must prove that the defendant made a warranty, express or implied, under 2-313, 2-314, or 2-315. Second, he must prove that the goods did not comply with the warranty, that is, that they were defective at the time of the sale. Third, he must prove that his injury was caused, 'proximately' and in fact, by the defective nature of the goods . . . . Fourth, he must prove his damages."

England brought suit on the theory of breach of an express warranty, and not fraud. The trial court found and the evidence supports the finding that Leithoff warranted that the gilts did not come from a sale barn. However, it is not sufficient that a statement is made in connection with a contract for the sale of goods; the statement, in order to constitute an express warranty, must be "related to the

goods." Subsection (1)(b) of § 2-313 provides: "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." *Larutan Corp. v. Magnolia Homes Manuf. Co.,* 190 Neb. 425, 209 N.W.2d 177 (1973).

Is a representation that farm animals came from a private source and not from a public market related to the goods? We are persuaded by the reasoning of the Kansas Supreme Court in *Young & Cooper, Inc. v. Vestring,* 214 Kan. 311, 521 P.2d 281 (1974). In that case the seller brought suit to recover the purchase price of cattle. The jury returned a verdict for the seller and the buyers appealed, urging that the trial court erred in refusing to instruct the jury on its claim that the seller made express warranties concerning the cattle, which were not true. Among the representations made at trial, according to the testimony of the buyers, were "That the cows were a choice quality Angus breeding herd; it was their second calf crop; they were *all one brand of cattle* . . . they originated from San Angelo, Texas, (which according to the [buyers] indicated good quality cattle) . . . ." *Id.* at 315, 521 P.2d at 285. The cattle had a disappointing calving season, and, after testing, a number of them were discovered to have brucellosis. While testing the cows, the veterinarian discovered that 43 of the 450 cows bore Louisiana ear tags. The area in San Angelo, Texas, was shown to be a modified brucellosis-free zone.

In reversing the trial court and remanding for a new trial, the Kansas Supreme Court observed: "There was evidence from which the jury could find that this herd of cows was not as expressly warranted. There was abundant evidence that the herd in question was not a stable, or one brand herd. Forty-three head of animals in this herd tested by the veterinarians were found to have originated in

Louisiana, and they were traced to be transient heifers in Louisiana. There was also evidence of fresh brands on these cows in the pasture at the time they were tested, indicating that cows had been recently added to the herd prior to purchase by the Vestrings.

. . . .

"Oral representations that a herd of cows possesses these qualities are representations of fact which constitute express warranties." *Id.* at 326-27, 521 P.2d at 292-93.

Although the facts indicate other and more sweeping representations than present in this case, nevertheless, the clear holding of the Kansas Supreme Court is that representations of origin of livestock made in the course of the sale of livestock are express warranties relating to the livestock. "One of the primary tests of whether a given representation is a warranty or a mere expression of opinion is whether the seller assumed to assert a fact of which the buyer was ignorant or whether the seller merely expressed a judgment about a matter as to which each party could be expected to have an opinion." Annot., 94 A.L.R.3d 729, 730 (1979).

" 'It is the general rule of law that a warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the agreement of sale, upon which it is intended that the buyer shall rely in making the purchase.' " *Naaf v. Griffitts,* 201 Kan. 64, 66, 439 P.2d 83, 85 (1968).

Here, both parties testified that Leithoff led England to believe that the gilts were not from a sale barn. England also testified that he would not have purchased the gilts if he knew they came from a sale barn because "I didn't want anything that was bought through a salebarn."

We believe, as did the trial court, that Leithoff led England to believe he was buying gilts that had not come from a sale barn and that this constitutes

an affirmation of fact with respect to the gilts which was part of the basis of the bargain. England relied on Leithoff's representations when he purchased the gilts.

The evidence supports the decision of the trial court. The proximate cause of the damages was adequately shown. Relying on Leithoff's representations, England purchased bred gilts that were suffering from leptospirosis. The incubation period coincides with the time Leithoff purchased the gilts from the sale barn. There was also testimony that the risk of contracting the disease is increased by exposure to a public market.

The defendant does not assign the amount of damages as error. We can find no error in the trial court's decision; therefore we affirm.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. MICHAEL D. BRIDGEMAN, APPELLANT.

323 N.W.2d 102

Filed August 13, 1982. No. 81-699.

1. **Miranda Rights.** 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.
2. _____. The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.

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

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

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

MCCOWN, J.

The defendant was tried, found guilty of burglary, and sentenced to imprisonment for not less than 1½ nor more than 2 years. The issue on appeal involves the admissibility of a confession of the defendant.

On June 29, 1981, at approximately 11:30 p.m., the sheriff's office received a report of a burglary in progress at a service station in Omaha. A deputy responded to the call. When he arrived at the scene a black male walking through the parking lot of the service station saw the officer, dropped the car battery he was carrying, and fled. The deputy chased the man on foot, but lost him.

At approximately 1:30 a.m. Sergeant Whitmore of the sheriff's department picked up the defendant in an industrial area of west Omaha. The defendant fit the description of the man the deputy had seen at the service station. Sergeant Whitmore did not place the defendant under arrest at that time but took him to the sheriff's headquarters so the defendant could use the telephone to arrange a ride home. When they arrived at headquarters Sergeant Whitmore checked a reproduction of a footprint taken at the scene of the service station burglary and noted that it matched the defendant's shoes. He also noted that the defendant's pants and shoes were wet and grass stained and he had a hole in his jeans which might have been due to battery acid. The deputy who had investigated the burglary thought the defendant was the person he had chased from the service station area.

The defendant was then placed in an interrogation room and notified that he was under arrest for the service station burglary. At approximately 2 a.m. Sergeant Whitmore read the *Miranda* rights advisory form to the defendant. When the sixth and

final question of the advisory was read, "Knowing your rights in this matter, are you willing to make a statement to me now?" the defendant answered "No." Sergeant Whitmore then told the defendant that he thought he still had sufficient evidence to arrest the defendant for the burglary and outlined that evidence in detail. Sergeant Whitmore asked how the defendant's pants had become grass stained, how he had become so wet, and what the white marks on his pants were. The defendant said little, but claimed that he had done nothing and asked why he was being arrested. Thereafter, the defendant asked Sergeant Whitmore if things would be easier on him if he cooperated. The sergeant stated that was up to the county attorney, but the sergeant could make no promises. The defendant then agreed to make a statement. Sergeant Whitmore then changed the last answer on the rights advisory form from a "No" to a "Yes" and the defendant initialed the change.

There was no evidence of any break in the conversation between defendant's initial refusal to give a statement and the discussion of the evidence against him. Approximately 5 or 6 minutes passed between the time the defendant refused to make a statement and his agreement to do so. Since the defendant could not write, Sergeant Whitmore wrote the defendant's statement, read it back to him, and the defendant then signed the statement.

The defendant filed a motion to suppress the statement and an evidentiary hearing was held which developed the evidence outlined above. The motion to suppress was overruled and the statement was admitted at trial, along with the stipulated police reports.

*Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires that 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. Any statement taken after a defendant invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. The *Miranda* rules were extended to the functional equivalent of interrogation in *Rhode Island v. Innis,* 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). See, also, *Michigan v. Mosley,* 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

The case of *In re Interest of Durand,* 206 Neb. 415, 293 N.W.2d 383 (1980), is determinative of the issues involved here. In that case a 23-minute interval between the initial negative answer to a question of whether the defendant was willing to make a statement and a subsequent consent to make a statement was occupied by showing the defendant police reports of other crimes of which defendant was accused. This court held that 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. The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.

In the case at bar, when the defendant refused to make a statement the officer not only did not cease all interrogation but, instead, continued to discuss the evidence, even to the extent of asking for explanations of the evidence. To permit the continuation of custodial interrogation or its functional equivalent after only a momentary cessation clearly violates the requirements of *Miranda v. Arizona, supra.* The District Court erred in refusing to grant the defendant's motion to suppress his statement. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

CAROL BRUNER, APPELLANT, V. JAMES S. BRUNER, APPELLEE.

323 N.W.2d 104

Filed August 13, 1982. No. 81-700.

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

Owen A. Giles, for appellant.

L. J. Koenig of Koenig & Murray, and Eugene D. O'Sullivan, for appellee.

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

MCCOWN, J.

This is a dissolution of marriage case. The District Court dissolved the marriage and granted custody of the 1-year-old minor son to the father, with reasonable rights of visitation to the mother, and divided the property of the parties. The mother has appealed and the sole issue on appeal is the custody of the minor child.

The parties were married November 25, 1979, and their son, Christopher, was born May 13, 1980. The dissolution action was filed by the mother March 13, 1981, and the decree of dissolution was entered on August 12, 1981.

The minor son, Christopher, suffers from several medical problems, including asthma, a heart murmur, and various allergies. His condition is aggravated by exposure to cigarette smoke and animals. Both parents were 30 years old at the time of trial. Both were regularly employed and both are recovering alcoholics.

At a hearing on April 1, 1981, temporary custody was granted to the father. Following trial on July 30 and 31, 1981, the father was specifically found to be a fit and proper person to have custody, and the temporary custody was made permanent by the decree.

The record establishes that the father lives with his parents who are willing to, and do, assist in the care of Christopher. The father testified that he intends to make the home his residence for the foreseeable future. No one in the household smokes cigarettes. The grandmother is a registered nurse who has had extensive nursing experience. The evidence establishes that the home is more than adequate, Christopher is well taken care of, and is a normal, happy child.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court.

The judgment is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

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SAM BATTIATO, APPELLANT, V. FALSTAFF BREWING CORPORATION, APPELLEE.

323 N.W.2d 105

Filed August 13, 1982. No. 81-787.

1. **Workmen's Compensation: Appeal and Error.** Notice of appeal from a decision on rehearing in the Nebraska Workmen's Compensation Court must be filed within 1 month of the judgment or within 1 month of the order denying the motion for a new trial.
2. **Judgments: Appeal and Error.** A party's motion to withdraw a rest for the purpose of offering additional evidence is not a motion for a new trial and does not extend the time for appeal from a final judgment.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Richard J. Schicker of Schicker & Leahy, for appellant.

Richard L. Walentine of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellee.

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

CLINTON, J.

This is an appeal from the Workmen's Compensation Court on rehearing. On the original hearing before one judge of the Workmen's Compensation Court an award was made. On rehearing, the court found that the plaintiff failed to prove a causal connection between the accident and injury and the alleged permanent disability. The plaintiff appeals and argues that under the provisions of Neb. Rev. Stat. § 48-163 (Reissue 1978) the court, on its own motion, should have required the production of evidence to remedy the deficiency in proof, if any. *Steward v. Deuel County,* 137 Neb. 516, 289 N.W. 877 (1940). In this connection, see *Coco v. Austin Co., ante* p. 95, 321 N.W.2d 448 (1982).

The defendant argues, among other things, that this court does not have jurisdiction because the notice of appeal was not timely filed.

We find the jurisdictional issue is dispositive of this case and therefore we need not consider other issues raised. Notice of appeal from a decision on rehearing in the Workmen's Compensation Court must be filed within 1 month of the judgment, Neb. Rev. Stat. §§ 48-182 to 48-185 (Reissue 1978) and *Giangrasso v. Eagle Distributing Co.,* 185 Neb. 406, 176 N.W.2d 16 (1970), or within 1 month of the order denying the motion for a new trial, *Meester v. Schultz,* 151 Neb. 614, 38 N.W.2d 739 (1949), and *Hansen v. Paxton & Vierling Iron Works,* 135 Neb. 867, 284 N.W. 352 (1939).

The judgment of the court on rehearing was entered on September 11, 1981. It left no issue undisposed of. The notice of appeal was not filed until October 29, 1981. Clearly, it was out of time.

We, on our own motion, take note of one further matter. On September 15, 1981, the plaintiff filed

in the Workmen's Compensation Court a motion for leave to withdraw his rest "for the purpose of presenting medical evidence as to the issue of causation of the injury and permanent disability," citing the case of *Mead v. Missouri Valley Grain, Inc.*, 178 Neb. 553, 134 N.W.2d 243 (1965). The Workmen's Compensation Court denied the motion. The question arises as to whether the filing of the motion to reopen or withdraw the rest should be treated as a motion for new trial, thus extending the time of appeal and making timely the filing of the notice of appeal. A motion to reopen the case for the purpose of presenting additional evidence to remedy a defect in proof serves a different function than a motion for new trial. See 88 C.J.S. *Trial* §§ 104 to 112 (1955). A motion for new trial may be granted on certain specified grounds listed in the statute. Neb. Rev. Stat. § 25-1142 (Reissue 1979). None of those grounds, with the exception of newly discovered evidence, include remedying defect of proof. The purpose of the motion for new trial is not to inject new matter into an adjudicated case, but is to complain of that which has already been done. It affords the trial court an opportunity to correct its own errors. 66 C.J.S. *New Trial* § 1 (1950). After final judgment has been rendered, the filing of a motion to withdraw a party's rest does not extend the time for appeal.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. MERVIN D. EVANS, APPELLANT.
323 N.W.2d 106

Filed August 13, 1982. No. 81-807.

1. **Sexual Assault: Witnesses.** Testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for sexual assault.

2. _____: _____. In a prosecution for sexual assault, the prosecutrix may testify in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details, and others may likewise testify in chief to such fact and nature of the complaint, but not as to its details.
3. _____: _____. One to whom the complaining witness has complained may testify to the fact and nature of the complaint, if the complaint was made voluntarily and without unreasonable or inconsistent delay.
4. _____: _____. Although such complaint must be timely made, the effect of a delay in making such complaint may be alleviated by proof of a sufficient reason for the delay, such as intimidation or threats, or lack of opportunity.
5. **Criminal Law: Prior Acts.** As a general proposition, in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible.
6. **Sexual Assault: Intent: Prior Acts.** However, where intent is an element of the crime charged, it is permissible to admit evidence of the defendant's prior crimes, wrongs, or acts in order to prove that the defendant possessed the requisite intent to be convicted on a charge of attempted first degree sexual assault.
7. **Criminal Law: Appeal and Error.** The only errors which require reversal of a cause are those prejudicial to the right of the accused, or which constitute the denial of a substantial legal right.
8. **Criminal Law: Prior Acquittal.** Although generally a verdict of acquittal in a former trial is not to be considered as determining the collateral question of the presence of a general plan or scheme or necessary intent for the purpose of a subsequent trial for a distinct offense, when so much of the evidence of the former trial is placed before the jury in the subsequent trial, justice requires that the evidence of the former verdict should be allowed in evidence.
9. **Witnesses.** In order to offer in evidence the testimony of a witness at a former trial, the proponent of such evidence must show that the declarant is now unavailable as a witness.

Appeal from the District Court for Valley County: MARK J. FUHRMAN, Judge. Reversed and remanded for a new trial.

Paul E. Watts of Paul E. Watts & Associates, for appellant.

Paul L. Douglas, Attorney General, and Shanler D. Cronk, for appellee.

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

HASTINGS, J.

The defendant, Mervin D. Evans, was charged by information with attempted first degree sexual assault. Following the defendant's waiver of a jury trial, a trial was had to the court which resulted in a verdict of guilty. Defendant was sentenced to a term of not less than 3 nor more than 6 years' imprisonment. Defendant has appealed from that conviction and sentence, contending that the trial court erred in admitting certain corroborative testimony into evidence; that the trial court erred in refusing to admit into evidence the fact that defendant had been acquitted of a similar charge in a prior proceeding; and that the trial court erred in refusing to admit into evidence testimony regarding defendant's alleged sterility. We reverse.

The incident which gave rise to the information in this instance was the alleged attempted assault by the defendant of his adopted 14-year-old daughter on or about November 18, 1979. While it is not necessary to recount the details surrounding the attack, we must note that immediately following the alleged assault it was claimed that the defendant warned the prosecutrix not to tell her mother or she, the daughter, would "be in a lot of trouble." In any event, the prosecutrix did not report the incident to her mother until May 4, 1980, which was shortly after the defendant supposedly had threatened to assault her a second time. When asked why she had not reported the November 1979 incident earlier, the prosecutrix responded by saying that she was afraid that her father "would beat the heck out of me." Upon being told of the incident, the defendant's wife, the adoptive mother of prosecutrix, reported the assault to the police and defendant was taken into custody.

At the ensuing trial, the prosecutrix took the stand during the State's case-in-chief and described the alleged assault in detail. She also was allowed, over objection of defense counsel, to describe prior sexual contact between her father and herself which dated back to the time she was 6 years of age and which had culminated in sexual intercourse by the time the prosecutrix was 10 years old. Finally, also over counsel's objection, the prosecutrix was allowed to describe the events surrounding her decision to inform her mother on May 4, 1980, of the November 18, 1979, assault. These events included a threat of further sexual assaults on her by the defendant, and conversation which the prosecutrix had had with her twin sister who had also been adopted by the defendant and his wife. This conversation related to the fact that her sister had also been subjected to the defendant's sexual advances and indeed feared that she may have been made pregnant by the defendant at that time.

In what was purported to be an attempt to corroborate the testimony of prosecutrix, the prosecutor called her mother and sister to the stand. The mother confirmed the fact that the prosecutrix had reported the assault to her on the evening of May 4, 1980, and that she had in turn reported the incident to the police. The sister, however, was allowed to testify in greater detail. She reiterated the fact that she had told the prosecutrix on May 4, 1980, that the defendant had also had sexual contact with her and, in response to a direct question from the prosecutor, that she had told the prosecutrix she thought she was pregnant and that the defendant was the baby's father. Furthermore, the sister of prosecutrix was allowed, over the objections of the defense counsel, to testify to the fact that the defendant had made initial sexual advances toward her when she was around 10 years old and had engaged in sexual intercourse with her when she was 11 or 12 years of age.

Such activities would occur two to three times monthly, both inside and outside of the home. Finally, the sister testified during direct examination that she had indeed had a child and that she had not engaged in intercourse with anyone other than the defendant prior to the birth of the child.

It was revealed for the first time during this action, in the course of the cross-examination of the sister of prosecutrix, that the defendant had been charged and tried on an earlier occasion on an allegation similar to the present charge. This earlier trial resulted from an incident allegedly involving the defendant and the sister of prosecutrix. Defense counsel was prohibited by the court, however, from introducing any direct evidence of the verdict in that earlier action, either through the testimony of the prosecutrix's sister or through the introduction of the journal entry of the verdict. An inadvertent comment about the verdict was made by the defendant's wife during her testimony for the defense, although an objection to the response was sustained. However, there was no motion to strike the response, so that the response regarding the defendant's acquittal remains in the record before this court.

Finally, we must note that the defense counsel was also stymied in his attempt to introduce evidence concerning the defendant's sterility in order to impeach the testimony of the prosecutrix's sister regarding her belief that the defendant had fathered her child. The trial court rejected any such evidence, which was offered in the form of transcripts of the testimony of several witnesses taken from the earlier trial, on the basis that such evidence was irrelevant, hearsay, and that there was not sufficient foundation to support its admittance.

The defendant's initial assignment of error is a broad attack on the corroborative evidence offered by the prosecution in support of the testimony of the

prosecutrix. "The rule is that the testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for sexual assault. [Citation omitted.]" *State v. Aby,* 205 Neb. 267, 269, 287 N.W.2d 68, 70 (1980). In this instance, there can be no doubt that corroborative evidence does exist. However, we must determine whether it was properly admitted in the several forms in which it was offered.

The initial form of corroborative evidence of the testimony of the prosecutrix offered by the prosecution was the testimony of her mother and her sister regarding the details of the prosecutrix's May 4, 1980, complaint of the alleged assault. "The rule is well established in this state that in a prosecution for sexual assault, *the prosecutrix may testify* in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, *to the fact and nature of the complaint, but not as to its details;* and that *others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. State v. Chaney,* 184 Neb. 734, 171 N.W.2d 787 (1969); *Sherrick v. State,* 157 Neb. 623, 61 N.W.2d 358 (1953).

"This court has also stated that *one to whom the complaining witness has complained may testify to the fact and nature of the complaint* if the complaint was made voluntarily and without unreasonable or inconsistent delay. See, *State v. Deardurff,* 186 Neb. 92, 180 N.W.2d 890 (1970); *Texter v. State,* 170 Neb. 426, 102 N.W.2d 655 (1960)." (Emphasis supplied.) *State v. Watkins,* 207 Neb. 859, 863, 301 N.W.2d 338, 341 (1981).

Initially, we note that this rule requires that a timely complaint be made by the prosecutrix. However, the effect of a delay may be alleviated by proof of a sufficient reason for the delay, "such as intimidation or threats, or lack of opportunity . . . ."

*Sherrick v. State,* 157 Neb. 623, 630, 61 N.W.2d 358, 365 (1953). We have recently noted that fear of the attacker, shame, and the threat of placement in a foster home were all sufficient mitigating factors to alleviate the delay between the attack and the complaint. *State v. Watkins, supra; State v. Aby, supra.* In the present action, we need only point to the threats made by the defendant against the prosecutrix, and to the fact that the prosecutrix feared that the defendant would "beat the heck" out of her if she made a complaint, to find sufficient reason for the delay between the November 18, 1979, attack and the complaint made on May 4, 1980. However, the mere fact that the complaint was timely made does not rectify the manner in which the evidence of the complaint was introduced.

It is quite clear that the rule cited above permits a witness to testify as to the fact and nature of the complaint. However, it is equally clear that the same rule provides that "the details of such complaint may not be given." *State v. Gero,* 184 Neb. 107, 111, 165 N.W.2d 371, 373 (1969). The trial court failed to restrain the testimony of both the prosecutrix and her sister regarding the details of the complaint made in this instance. This failure permitted the prosecution to divulge the fact that the prosecutrix's sister had also engaged in sexual intercourse with the defendant, and, further, that she believed the defendant had impregnated her. Such testimony regarding the details of the complaint is clearly in violation of the aforementioned rule, and it was error to permit its admission. However, the prejudicial nature of such error has yet to be determined, and such a determination can only be made in conjunction with the remaining assignments of error.

The second form of corroborative evidence offered by the prosecution was the accounts of prior sexual contacts given by the prosecutrix and her sister. A review of the cases addressing this issue leaves one

with some uncertainty as to when evidence of prior criminal actions may be admitted. As a general proposition, "in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible." *State v. Franklin,* 194 Neb. 630, 642, 234 N.W.2d 610, 617 (1975). Through the years several exceptions to this general proposition have been developed, some of which have tended to lend some confusion as to when evidence of prior acts may be admitted. One such exception was noted in the syllabus of *State v. Erich,* 198 Neb. 1, 251 N.W.2d 381 (1977), wherein we noted: "One exception to this general rule is that in prosecutions for sexual assault, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value." Unquestionably, such a rule would permit the admission of the prosecutrix's testimony in this instance. However, it leaves the question of the propriety of the testimony of the prosecutrix's sister unanswered.

The State points the court to the broad general statement we made in *State v. Hitt,* 207 Neb. 746, 749, 301 N.W.2d 96, 99 (1981), wherein we noted: "Sexual crimes have consistently been classified as those in which evidence of other similar sexual conduct has been recognized as having independent relevancy, and courts generally hold that evidence of other sex offenses by the defendant may be admissible, whether the other offense involves the complaining witness or third parties. [Citations omitted.]" However, we need not go so far as to adopt this broad statement as the rule for this case.

As noted at the outset, the defendant was charged with attempted first degree sexual assault. By statute, an essential element of all criminal attempt charges requires evidence to show that the defendant "intentionally" engaged in conduct which would have constituted the crime attempted if the

circumstances had been as the defendant had believed them to be, or if the conduct constituted a "substantial step in a course of conduct *intended* to culminate in his commission of the crime." (Emphasis supplied.) Neb. Rev. Stat. § 28-201(1)(b) (Reissue 1979). It has long been accepted that in instances where intent is an element of the crime charged, it is permissible to admit evidence of the defendant's prior crimes, wrongs, or acts in order to prove that the defendant possessed the requisite intent to commit the act. *Henry v. State,* 136 Neb. 454, 286 N.W. 338 (1939); Neb. Rev. Stat. § 27-404(2) (Reissue 1979). See, also, *State v. Hitt, supra.*

Consequently, the evidence of the defendant's prior sexual relationships with the prosecutrix and her sister was properly admitted to prove that the defendant possessed the requisite intent to be convicted on a charge of attempted first degree sexual assault. We need not address the question of whether it was proper to admit the testimony of the prosecutrix's sister under the guise of corroborative evidence.

The fact that the prosecution was entitled to offer proof concerning the alleged prior sexual contacts between the defendant and his daughters also tends to remove any prejudicial effect imposed upon the defendant by the admission of the details of the prosecutrix's complaint to her sister. The potentially prejudicial content of such testimony lies in the statements regarding the beliefs of the sister of the prosecutrix that the defendant had impregnated her. No prejudice can arise from such a revelation in light of the fact that the same evidence is admissible as proof of prior sexual contact between the defendant and his daughters to show that the defendant possessed the requisite intent to commit an attempted sexual assault. Consequently, while the court erred in admitting the details of the prosecutrix's complaint to her sister, the defendant was not

prejudiced thereby. " 'The only errors which require reversal of a cause are those prejudicial to the right of the accused, or which constitute the denial of a substantial legal right.' " *State v. Brehmer,* 211 Neb. 29, 44, 317 N.W.2d 885, 894 (1982). The trial court's erroneous admission of the details of the prosecutrix's complaint does not support the defendant's request for reversal of his conviction.

The admissibility of the testimony regarding the defendant's prior sexual relationships with his daughters relates directly to the defendant's second assignment of error concerning the admissibility of the fact that he had been acquitted of a similar charge on a prior occasion. In *Koenigstein v. State,* 101 Neb. 229, 162 N.W. 879 (1917), the prosecution attempted to convict the defendant of receiving bribes from the owners of disorderly houses by showing a general plan and scheme to collect bribes from all such houses. To do so, they offered evidence of payments accepted from one McDonald, which payments had been the subject matter of an earlier prosecution of the same defendant. The trial court rejected the defendant's offer of the verdict of acquittal from the earlier prosecution. We noted on appeal that "While the verdict of acquittal in the former trial is not to be considered as determining that collateral question [the presence of a general plan or scheme] for the purpose of the subsequent trial for a distinct offense, we think that, when so much of the evidence of the former trial was before the jury in the case at bar, justice required that the former verdict should also have been allowed in evidence." *Id.* at 239, 162 N.W. at 883. This rule was reiterated in *Williams v. State,* 118 Neb. 281, 224 N.W. 286 (1929). See, also, *People v. Griffin,* 66 Cal. 2d 459, 426 P.2d 507, 58 Cal. Rptr. 107 (1967); Annot., 86 A.L.R.2d 1132 (1962); 83-87 A.L.R.2d Later Case Service 1132-1147 § 4 at 416 (1979).

In the present action, much like in *Koenigstein,*

the prosecution, through the testimony of the prosecutrix's sister, presented a great deal of the crucial evidence from the defendant's earlier trial. Although there is no direct reference to the facts which gave rise to the earlier charge being brought against the defendant, we can infer from the defendant's desire to prove his sterility in that action that the charges arose out of the alleged incestuous attack which gave rise to the pregnancy of prosecutrix's sister. In this respect, the prosecution went to great lengths during the direct examination of the prosecutrix's sister to introduce much of the same testimony that would have been offered in the earlier action. In response to the prosecutor's questions, the sister of prosecutrix acknowledged that she had had sexual intercourse with the defendant; that she had become pregnant; that she had told the prosecutrix that she believed the defendant was the father of her child; and, finally, that she had not had sexual intercourse with any other person other than the defendant prior to the birth of her child on December 25, 1980. Although, as we noted above, it was not error to offer such evidence in order to prove that the defendant possessed the requisite intent to commit the attempted assault, by presenting such evidence through the use of substantially the same testimony as would have been presented in the defendant's earlier trial, the prosecution has brought this case squarely within the rule set forth in *Koenigstein.* Consequently, it was error for the trial court to reject the evidence of the defendant's acquittal following an earlier trial which arose from similar charges filed by the prosecutrix's sister.

We should note that although the defendant's wife did allude to the verdict in the earlier trial at one point during her testimony for the defense, it is readily apparent that the trial court deemed admission of the verdict improper and refused to consider it in its decision. This fact is made apparent by the

court's sustaining an objection to the wife's testimony at the point the verdict was alluded to, and further by the court's ruling allowing the defendant to testify as to what he had testified to at the earlier trial but "not as to the result of the trial." Therefore, regardless of the fact that the trial court may have in fact been aware of the verdict, it was prejudicial to the defendant's interests to prohibit the admission of direct evidence to establish with certainty that the defendant had been acquitted of the earlier charge.

The defendant's final assignment of error challenges the propriety of prohibiting him from introducing evidence regarding his sterility in an attempt to impeach the testimony of the prosecutrix's sister. This evidence was attempted to be introduced by way of an offer of the transcribed excerpts of the testimony of three doctors who had testified at the defendant's earlier trial. An objection to the offer on the basis that the evidence in the form of testimony from a different trial than the one involved here was hearsay as to this case was sustained.

Testimony given by a witness at a prior trial is not to be considered hearsay "if the declarant is unavailable as a witness." Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1979). Counsel for the defense failed to offer any evidence to show that the three doctors were "unavailable," as that term is defined in § 27-804(1), to testify at the present trial. In opposition to the prosecution's objection, the defense contends that the evidence was offered for impeachment purposes and consequently could not be considered hearsay. However, any impeachment value inherent in the testimony of the doctors apparently would arise from the fact that they had concluded that the defendant was sterile. Only if one were convinced that the defendant was sterile would the testimony of the prosecutrix's sister be effectively impeached. Therefore, logic would dictate that this testimony was of-

fered "to prove the truth of the matter asserted" (Neb. Rev. Stat. § 27-801(3) (Reissue 1979)), namely, that the defendant was sterile and that it was physically improbable, if not impossible, for him to be the father of his daugher's child. In this respect, the testimony does fall within the statutory definition of "hearsay," and its admissibility depended upon a showing that the doctors were "unavailable" to testify at the defendant's second trial. The defendant's failure to do so made the court's denial of the evidence appropriate.

Although as a general rule the determination of the admissibility of evidence rests within the sound discretion of the trial court, we cannot say that this discretion was not abused in this instance. *State v. Martin,* 198 Neb. 811, 225 N.W.2d 844 (1977). In the present action, the trial court erred in failing to permit the defendant to present evidence of his earlier acquittal on charges brought by the current prosecutrix's sister. In light of the amount of testimony presented by the prosecution concerning the facts upon which this earlier charge was based, the evidence of the defendant's acquittal on the charge, although not conclusive on the question of whether the defendant had actually assaulted the prosecutrix's sister, would serve to rebut this testimony and therefore should have been admitted. *Koenigstein v. State,* 101 Neb. 229, 162 N.W. 879 (1917). The defendant was thereby prejudiced in the presentation of his defense, and his conviction must be reversed.

REVERSED AND REMANDED
FOR A NEW TRIAL.

KRIVOSHA, C.J., CLINTON, and WHITE, JJ., concur in the result.