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REPORTS OF CASES

DECIDED BETWEEN

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IN THE

Supreme Court of Nebraska

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DONALD C. PATTON

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By Donald C. Patton, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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Second	Sarpy, Cass, and Otoe	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George A. Thompson	Papillion
Third	Lancaster	Robert R. Camp	Lincoln
		William D. Blue	Lincoln
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		John E. Clark	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
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		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Thurston, Dodge, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Saline, Thayer, and Nuckolls	Orville L. Coady	Hebron

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Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster	Bernard Sprague William G. Cambridge	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin William H. Riley	Grand Island Grand Island
Twelfth	Sherman and Buffalo	DeWayne Wolf	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Grant, Hooker, and Thomas	Hugh Stuart John P. Murphy	North Platte North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy	Jack H. Hendrix	McCook
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No. 82-765: **Ker-Ash-Ton v. Kenner.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-735: **In re Estate of Klawonn.** Stipulation allowed; judgment affirmed as modified.

Nos. 84-957, 84-958: **Chmelka v. Continental Western Ins.** Stipulation allowed; appeal dismissed.

No. 85-159: **State v. Bethea.** Motion of appellee for summary affirmance sustained. Judgment affirmed; see Rule 7B(2).

No. 85-198: **Weiss v. Weiss.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

Nos. 85-212, 85-213: **State v. Winters.** Judgment affirmed; see Rule 7A.

No. 85-233: **First National Bank of Ainsworth v. Davis.** Motion of appellee to dismiss appeal sustained.

No. 85-266: **Painter v. City of Gering.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 85-286: **Oak Creek Ranch Ltd. v. Shrout.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-288: **Radke v. Pfizer Genetics, Inc.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-315: **School District of Alliance v. State Board of Education.** Stipulation allowed; appeal dismissed.

No. 85-335: **State v. Shook.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 85-344: **South Omaha Production Credit Assn. v. Keller.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-347: **County of Antelope v. Childs.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-360: **Penrod v. Director of Motor Vehicles.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 85-395: **State v. Elliott.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-399: **State v. John Kroger, Jr.** Judgment affirmed; see Rule 7A.

No. 85-400: **State v. John C. Kroger.** Judgment affirmed; see Rule 7A.

No. 85-403: **State v. Roose.** Judgment affirmed; see Rule 7A.

No. 85-406: **State v. Schreck.** Judgment affirmed; see Rule 7A.

No. 85-426: **State v. O'Connor.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-428: **Harding v. Harding.** Stipulation allowed; appeal dismissed.

No. 85-430: **State v. Radford.** Judgment affirmed; see Rule 7A.

No. 85-434: **State v. Lame.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-445: **State v. Jackson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-447: **State v. Lyons.** Judgment affirmed; see Rule 7A.

No. 85-448: **Waldron v. Peterson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-451: **Reeg v. Litz.** Stipulation allowed; appeal dismissed with prejudice.

No. 85-452: **State v. Valerio.** Judgment affirmed; see Rule 7A.

No. 85-458: **State v. Johnson.** Motion of appellee for summary afffirmance sustained; judgment affirmed; see Rule

7B(2).

No. 85-460: **State v. Grimes.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-469: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-477: **State v. Johnson.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-479: **State v. Thomas.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-482: **Sukstorf v. Sukstorf.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-484: **State v. Green.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

Nos. 85-491, 85-508: **State v. Lockhart.** Judgment affirmed; see Rule 7A.

No. 85-499: **State v. Dughman.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-500: **State v. Salstrom.** Judgment affirmed; see Rule 7A.

No. 85-504: **State v. Brock.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-509: **State v. White.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-510: **State v. Williams.** Judgment affirmed; see Rule 7A.

No. 85-511: **Bank of Midlands v. Bianco.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-513: **Autenrieth v. Muffly.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-514: **Stanczyk v. Jefferson.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-518: **Rerucha v. Carlin.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 85-520: **State v. Blankenfeld.** Judgment affirmed; see Rule 7A.

No. 85-522: **State v. Milk.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-524: **Siefken v. Siefken.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 85-525: **Satterlee v. Satterlee.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-534: **McBride v. State of Nebraska.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-538: **State v. Eggli.** Judgment affirmed; see Rule 7A.

No. 85-539: **State v. McGregor.** Judgment affirmed; see Rule 7A.

No. 85-540: **State v. Drum.** Judgment affirmed; see Rule 7A.

No. 85-542: **State v. Dickey.** Judgment affirmed; see Rule 7A.

No. 85-549: **State v. Herrick.** Judgment affirmed; see Rule 7A.

No. 85-550: **State v. Hall.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-551: **State v. Cech.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-560: **Jensen v. Gless.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-561: **First National Bank of Omaha v. Hagebush.** Motion of appellee for summary dismissal sustained; see Rule

7B(1).

Nos. 85-564, 85-565: **State v. Turner.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-566: **State v. Gray.** Judgment affirmed; see Rule 7A.

No. 85-572: **State v. McClellen.** Judgment affirmed; see Rule 7A.

No. 85-576: **Schaffer v. Jensen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-579: **Tyler v. Lincoln Regional Center.** On court's own motion, appeal is dismissed.

No. 85-581: **Manewal v. Manewal.** Stipulation allowed; appeal dismissed.

No. 85-588: **State v. Kincaid.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-590: **Schaben v. Schaben.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-594: **Occidental Savings & Loan v. Bell Federal Credit Union.** By order of the court, appeal dismissed for lack of jurisdiction.

No. 85-596: **State v. Lamotte.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-602: **Aero Mayflower Transit v. Allen's of Hastings.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-606: **Lutheran Benevolent Ins. Exchange v. McGuire.** Stipulation allowed; appeal dismissed.

No. 85-611: **Lindsay Credit Corp. v. Schleusner.** Stipulation allowed; appeal dismissed.

No. 85-612: **In re Kulba.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. 85-614: **State v. Petty.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 85-615: **State v. Brown.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-616: **Storm v. Farmers Union Cooperative Assn.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-617: **State v. Taylor.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-620: **State v. Jones.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-622: **Home Federal Savings & Loan v. South Ridge Development Co.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 85-630: **State v. Markovic.** Judgment affirmed; see Rule 7A.

No. 85-636: **Wambold v. Wambold.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-637: **Rec Room Shoppe of Omaha v. Tinerella.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-643: **Saunders County, Nebraska v. Employers Mutual Casualty Co.** Stipulation allowed; appeal dismissed.

No. 85-650: **Bik v. Reifenrath.** Stipulation allowed; appeal dismissed.

No. 85-652: **State v. Lueck.** Stipulation allowed; appeal dismissed.

No. 85-653: **Hardeman v. Bolte.** Stipulation allowed; appeal dismissed.

No. 85-654: **State v. Carrier.** Judgment affirmed; see Rule 7A.

No. 85-658: **Folcrum v. Nebraska Liquor Control Comm.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-659: **State v. Cardenas.** Upon confession of error, judgment vacated and cause remanded to the district court for

further proceedings.

No. 85-663: **State v. Packett.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-666: **State v. Rosekrans.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-672: **State v. Beck.** Judgment affirmed; see Rule 7A.

No. 85-674: **Loftin v. Masters Electric Co.** Stipulation allowed; appeal dismissed.

No. 85-680: **State v. Saltness.** By order of the court, appeal is dismissed for lack of final order.

No. 85-681: **Simons v. Monfort of Colorado.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-683: **State v. Pacey.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 85-688: **Flobert Industries, Inc. v. Luettel.** Stipulation allowed; appeal dismissed.

No. 85-689: **State v. Perry.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-693: **Wilson v. J.J. Parks Trucking Co.** Stipulation allowed; appeal dismissed.

No. 85-694: **Vasa v. Buckler.** Stipulation allowed; appeal dismissed.

No. 85-695: **State v. Sapp.** Judgment affirmed; see Rule 7A.

No. 85-697: **Brenneise v. Wheels of Lincoln.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-698: **Jones v. Jones.** Affirmed as modified by order of the court.

No. 85-700: **Tyler v. Terry.** Cause not being shown as to why appeal should not be dismissed as moot, appeal dismissed as moot.

No. 85-701: **Howard v. Yellow Freight System, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-702: **Cook v. Haller.** Stipulation allowed; appeal dismissed.

No. 85-704: **State v. Hingst.** Motion of appellant to dismiss

appeal sustained; appeal dismissed.

No. 85-705: **State v. Hayden.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-706: **Rice v. Rice.** Stipulation of settlement allowed; appeal dismissed.

No. 85-710: **State v. Kudron.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-715: **State v. Bazis.** Stipulation allowed; appeal dismissed.

No. 85-716: **State v. Garcia.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-717: **Burlington Northern Railroad v. Nebco, Inc.** Stipulation allowed; appeal dismissed.

No. 85-722: **State v. Mahlberg.** Judgment affirmed; see Rule 7A.

No. 85-723: **State v. Bryant.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-725: **Stanczyk v. McHargue.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 85-730: **Huffman v. Huffman.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 85-740: **Santiago v. Nebraska Dept. of Labor.** Stipulation allowed; appeal dismissed.

No. 85-742: **O'Neill v. Keyser.** Stipulation allowed; appeal dismissed.

No. 85-745: **Emsco, Inc. v. Dunrite Corp.** Stipulation allowed; appeal dismissed.

No. 85-747: **Metropolitan Life Ins. Co. v. Two-Bar-M, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-748: **Rolling v. Rolling.** By order of the court, appeal dismissed for lack of jurisdiction.

No. 85-750: **Wagner v. Warren.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-753: **State v. Wegner.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 85-758: **Gough v. Prudential-Bache Securities, Inc.** Stipulation allowed; appeal dismissed.

No. 85-759: **West v. United Catholic Social Services.** Stipulation allowed; appeal dismissed; cause remanded to Douglas County District Court for rehearing pursuant to § 43-104.06.

No. 85-760: **Mangan v. Stibbs.** Stipulation allowed; appeal dismissed.

Nos. 85-781, 85-782: **State v. Green.** Judgment affirmed; see Rule 7A.

No. 85-784: **State v. Stradley.** By order of the court, appeal dismissed; see Rule 7A.

No. 85-792: **State v. Winnett.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-801: **State v. Webster.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-806: **State v. Widman.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-807: **State v. Lunsford.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-812: **Myers v. Herman Bros. Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-813: **Zipursky v. Sky Harbor Air Service, Inc.** Stipulation allowed; appeal dismissed.

No. 85-815: **Cruise v. Dept. of Motor Vehicles.** Stipulation allowed; appeal dismissed.

No. 85-816: **State v. Cruise.** Stipulation allowed; appeal dismissed.

No. 85-821: **Howerter v. Nebraska Plastics.** Stipulation allowed; appeal dismissed.

No. 85-827: **State v. Haarmann.** Stipulation allowed; appeal dismissed.

No. 85-829: **Micek v. First National Bank & Trust Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 85-839: **Robison v. Robison.** Stipulation allowed; appeal dismissed.

No. 85-842: **Martin v. Champion International Corp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-843: **Nebraska State Bank & Trust Co. v. Koubek.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-844: **Jochim v. Jochim.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. 85-846: **Groetzinger v. Groetzinger.** Affirmed as modified by order of the court.

No. 85-849: **Farmland Service Coop, Inc. v. Stewart.** Stipulation allowed; appeal dismissed without prejudice.

Nos. 85-854, 85-856: **State v. Lewis.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-855: **State v. Stumbaugh.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-860: **State v. Brigham.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-861: **Kalinger v. Meints.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 85-870: **Brent v. Fincham.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-873: **Carter v. Carter.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-889: **State v. Dowson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-891: **Mattson v. Jensen.** Stipulation allowed; appeal dismissed.

No. 85-901: **State v. Monie.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to

withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-907: **Wolf v. Sites.** Stipulation allowed; appeal dismissed with prejudice.

No. 85-911: **Gilbert v. Archbishop Bergan Mercy Hospital.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-927: **Outlaw v. BCI, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 85-938, 85-939: **State v. Bean.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-940: **Ruben v. Fireman's Fund Ins. Co.** Stipulation allowed; appeal dismissed with prejudice.

No. 85-976: **State v. Mosier.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-012: **In re Interest of Peterson.** Stipulation allowed; appeal dismissed.

No. 86-021: **Gilliam v. Gaughan.** Stipulation approved; case remanded with directions.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

LLOYD C. OLDENBURG, APPELLANT AND CROSS-APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE AND CROSS-APPELLANT.

374 N.W.2d 341

Filed October 4, 1985. No. 84-097.

1. **Tort Claims Act: Negligence.** In actions under Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), the State Tort Claims Act, all questions of negligence and contributory negligence shall be determined initially by the trial court.
2. **Tort Claims Act: Appeal and Error.** On an appeal to this court of an action under Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), the findings of the trial court will not be disturbed unless clearly wrong.
3. **Highways: Motor Vehicles: Negligence.** It is the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of the shoulders of a paved or hard-surfaced highway to keep them reasonably safe for ordinary and reasonably anticipated use by a traveler using the highway while in the exercise of due care.
4. **Motor Vehicles: Presumptions: Negligence: Evidence.** The presumption that a party lacking memory of an accident exercised reasonable care for his own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced.

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

John J. Higgins of Higgins & Okun, and George H. Moyer, Jr., of Moyer & Moyer, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and GRANT, JJ., and MORAN, D.J.

GRANT, J.

This is an appeal from a decision of the district court dismissing an action brought by the plaintiff, Lloyd C. Oldenburg (hereinafter Oldenburg), against the State of Nebraska Department of Roads (hereinafter State), under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981). Oldenburg has appealed.

At approximately 10 p.m., October 19, 1979, Oldenburg was traveling east in the eastbound lane, or south half, of U.S. Highway 275, approximately 1 1/2 miles west of Norfolk, Nebraska. Highway 275 is a paved, two-lane, undivided highway with unpaved shoulders. At or about milepost 72.40 Oldenburg's car left the hard-surfaced portion of Highway 275 and went onto the south shoulder of the highway. Upon leaving the highway the right front and right rear wheels of Oldenburg's automobile dropped into a rut that was immediately adjacent to the paved portion of the highway. The rut was approximately 75 to 100 feet long, tapered at both ends, and at its deepest point was 6 to 8 inches deep. Because it had rained the previous day, there was some water in it.

In returning to the paved surface of the roadway, Oldenburg quickly turned the wheels of his car sharply to his left, returned to the paved surface, and lost control of his vehicle. As it came off the shoulder, the car traveled in a northeasterly direction across the highway and into the westbound lane of Highway 275, where it struck an oncoming pickup truck almost head on. The area where the collision occurred is open farm country, with no lights.

This collision caused Oldenburg severe and permanent injuries, including a brain concussion and cerebral contusion which resulted in an accumulation of fluid on the brain. He suffered retrograde and posttraumatic amnesia and has no recollection of the events which transpired immediately prior to or at the actual time of the accident.

Oldenburg timely filed a claim with the State Claims Board, which was rejected by the board on March 9, 1982. He then instituted this action in Madison County District Court for injuries sustained as a result of this two-vehicle collision. Trial was had to the district court sitting without a jury, as required

by § 81-8,214, and resulted in a verdict for the State.

The trial court concluded that the State was negligent in the maintenance of the shoulder area immediately adjacent to the paved area of the highway upon which Oldenburg was traveling and that this negligence was a proximate contributing cause of the collision of Oldenburg's automobile with the pickup. The court further concluded that Oldenburg was contributorily negligent in entering into a defective shoulder area that was open and visible, in leaving the paved surface, and in failing to slow his vehicle to such a speed that would allow him to safely return his vehicle to the paved portion of the highway. The court held that Oldenburg's contributory negligence was more than slight and was a proximate contributing cause of the collision of Oldenburg's automobile with the pickup truck. The court further found that by comparison Oldenburg's negligence was more than slight and the State's negligence was less than gross, and by reason thereof the trial court entered judgment for the State. When such findings are made by the trial court in an action under § 81-8,214, those findings of fact have the effect of jury findings under Neb. Rev. Stat. § 25-1151 (Reissue 1979).

In this court Oldenburg sets out several assignments of error, all of which may be consolidated into one. Oldenburg contends the trial court erred by concluding he was guilty of contributory negligence which was more than slight under the circumstances when compared with the negligence of the State. This determination is essentially a question of fact. This court has held on several occasions that the findings of the trial court in an action under the State Tort Claims Act will not be disturbed on appeal unless clearly wrong. *Wakenight v. State*, 212 Neb. 798, 326 N.W.2d 52 (1982); *Shepard v. State of Nebraska*, 214 Neb. 744, 336 N.W.2d 85 (1983). With this in mind we review the record in order to decide if the trial court was clearly wrong in its findings.

There is no question that the State has a duty to maintain its highways and areas adjacent to the highways in a reasonably safe condition. *King v. Douglas County*, 114 Neb. 477, 208 N.W. 120 (1926); *Clouse v. County of Dawson*, 161 Neb. 544, 74 N.W.2d 67 (1955). More specifically, in *Richardson &*

Gillispie v. State, 200 Neb. 225, 231, 263 N.W.2d 442, 446 (1978), *supp. op.* 200 Neb. 781, 265 N.W.2d 457, this court stated:

> It is the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of the shoulders of a paved or hard-surfaced state highway to keep them reasonably safe for ordinary reasonably anticipated use by a traveler using the highway while in the exercise of due care. The duty to keep highway shoulders safe for ordinary use does not require the State to protect against unusual or extraordinary occurrences.

Once the existence of the State's legal duty to maintain its highway shoulders is established, the question becomes whether the State failed to live up to its duty in this case.

The trial court found that the State knew or should have known of the long rut adjacent to the highway. State Patrol Officer Donald Matejka arrived at the accident scene at 10:30 p.m. At that time it was not raining, nor had it rained the day of October 19, 1979. Other evidence shows that it had rained on October 18 between 2 and 6 p.m. Matejka saw water in the rut, which meant the rain of October 18 had accumulated in the rut, and thus the rut had existed since before the rain of October 18. The evidence supports the trial court's finding that the State knew or should have known of the existence of the rut. Testimony by Thomas McCoy, a maintenance superintendent for the Department of Roads assigned to the Norfolk area, indicated that he was aware of the particular problem associated with the shoulder around milepost 72.40. McCoy acknowledged that Highway 275 curves slightly around milepost 72.40 and that traffic tends to get off the traveled portion of the road, wearing down the south shoulder.

There also was testimony from Robert Holsinger, a registered engineer who has had extensive experience in traffic engineering research. He testified that a rut or dropoff of 75 to 100 feet in length, immediately adjacent to the pavement and extending 6 to 8 inches in depth, would not be in compliance with the maintenance standards promulgated by the Board of Public Roads Classifications and Standards. (The trial court took judicial notice of Neb. Rev. Stat. § 39-2101 (Reissue

1984), which established the Board of Public Roads Classifications and Standards.) He further testified that such a defect would not be in compliance with the maintenance standards of the Department of Roads. Such a condition would create a special hazard to a traveling motorist because if the right side of the vehicle is diverted to the shoulder for whatever reason, the driver, in an attempt to return to the pavement, finds that his wheels form a scrubbing action along the edge of the pavement. A motorist is then confronted with cornering forces which occur because of the steering angle which is made to get the vehicle back on the pavement. The forces of rotation develop so fast that when the rear tire finally comes onto the pavement, the driver cannot react back to the right and would enter the oncoming lane of traffic.

The record indicates, and this court agrees, that the trial court was not clearly wrong in determining that the State had a duty to maintain and repair the shoulder with suitable material to withstand ordinary use, that the State breached its duty, that the State knew or should have known of this condition, that the rut was a proximate and legal cause of Oldenburg's accident, and that as a result of the State's negligence Oldenburg suffered actual injury. This finding, however, only answers half of the question in this case.

The trial court also found that Oldenburg was guilty of contributory negligence and that that negligence was also a proximate cause of the accident. The court found that Oldenburg's negligence was "in entering into a defective area [the shoulder] that was open and visible and in failing to slow his vehicle to such a speed that would allow him to safely return his vehicle to the paved portion of the highway." The trial court does not set out the factual details supporting its determination that Oldenburg was contributorily negligent in driving onto the shoulder. Nor do we find any evidence to support the court's finding in this regard. The determinative fact, however, in finding Oldenburg contributorily negligent is that after his car left the pavement it went upon a dirt shoulder softened by rain and containing a rut which this court found was open and visible. When faced with this problem and the problem of a pickup truck coming toward Oldenburg on its proper side of the

road, Oldenburg immediately turned his car to his left. The dispositive determination is whether this negligence of Oldenburg was more than slight and the State's negligence less than gross so as to bar any recovery by the appellant against the appellee.

The testimony of Officer Matejka in this case indicated that Oldenburg attempted to immediately turn back onto the highway after going onto the shoulder. He further testified that this attempt, made by Oldenburg without first reducing the vehicle's speed, was not good driving practice and was a contributing cause of the accident. Officer Matejka testified the proper approach for reentry onto the pavement would have been to not turn the steering wheel, get a good tight grip, reduce speed, regain control of the car, and slowly come onto the pavement.

Oldenburg argues that he should be insulated by the presumption of due care because neither party involved in the accident is available to testify concerning the accident and because the State has not produced enough evidence to rebut the presumption of due care. In his brief Oldenburg cites *Merritt v. Reed*, 186 Neb. 561, 185 N.W.2d 261 (1971). This case involved a claim by the estate of a deceased pedestrian who was struck by the defendant's automobile. The pedestrian never regained consciousness and died, while the defendant remembered nothing about the accident. In *Merritt*, the court stated at 563, 185 N.W.2d at 263, "Where both parties are deceased, are disabled, or lack memory, creating offsetting presumptions of due care, the resolution must rest upon the proper inferences to be drawn from whatever circumstantial evidence is available to the trier of fact."

The trial court held in effect that the State did present enough evidence to rebut any presumption that Oldenburg exercised due care. There were no eyewitnesses to the accident, but Officer Matejka, testifying as an expert, presented evidence showing that Oldenburg was contributorily negligent. Matejka observed the scuff marks on the vehicle's tires, the mud inside the wheel wells, the glass and metal debris on the highway, and the location of the two vehicles after the collision. From all this he concluded that Oldenburg immediately attempted to swerve

back onto the pavement, lost control of his vehicle, and collided with an oncoming pickup truck. Officer Matejka further testified on redirect examination:

> Q. Did you find any possibility of any evidence that the accident occurred in another manner different than you have testified to in court?
>
> A. No.
>
> Q. Was everything that you observed about the impact and matter you have narrated concerning the events that took place there, was that based on the physical evidence at the scene and your training and experience?
>
> A. That's correct. Yes.
>
> Q. You found no evidence to warrant inferences of the accident happening in some other manner different than what you testified?
>
> . . . .
>
> A. No, I didn't find any other indication.

In *Gerhardt v. McChesney*, 210 Neb. 351, 357, 314 N.W.2d 258, 263 (1982), the Nebraska Supreme Court held:

> "[T]he presumption in an action for wrongful death that a decedent exercised reasonable care for his own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced."

A similar result applies in cases, such as this case, when a party has a lack of memory resulting from the accident.

We conclude that the State did produce sufficient evidence at trial to rebut the presumption of due care set out in *Gerhardt* and that the trial court was not clearly wrong by finding that, by comparison, Oldenburg's negligence in sharply turning from a shoulder while a car was approaching was more than slight and the State's negligence was less than gross. By reason thereof the district court was correct in dismissing the appellant's petition.

In its cross-appeal the State contends that the trial court erred in finding the State negligent. We have disposed of that contention by determining that the evidence supported the trial court's finding that the State was negligent.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. L. WILLIAM KELLY III, RESPONDENT.

374 N.W.2d 833

Filed October 4, 1985. No. 84-482.

1. **Disciplinary Proceedings: Appeal and Error.** In a disciplinary proceeding the determination as to whether discipline should be imposed and what discipline is appropriate is made upon a de novo review of the record.
2. **Disciplinary Proceedings.** In a disciplinary proceeding the charges must be established by a clear preponderance of the evidence.
3. _____. Implicit in the oath of an attorney and in the license to practice law are the requirements of proper demeanor and restraint from practices which serve to discredit the legal system.
4. _____. Conduct which brings reproach upon the legal profession constitutes grounds for discipline.
5. _____. The nature and extent of discipline to be imposed is determined by a consideration of the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.

Original action. Judgment of suspension.

Alison L. Larson, Assistant Counsel for Discipline, for relator.

John R. Doyle and Timothy J. Doyle, for respondent.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is a disciplinary proceeding in which the respondent, L. William Kelly III, was charged with violating his oath of office as a lawyer and the Code of Professional Responsibility.

The respondent was admitted to the practice of law in this state on July 2, 1976.

On September 1, 1983, William Micek and Grover Robinson sought to retain the respondent's grandfather, Lloyd W. Kelly, Sr., to defend them on charges which were to be filed in Hall County, Nebraska. After briefly discussing the case with them, the senior Kelly called the respondent into his office to assist in the matter. A fee arrangement was discussed at this time, and a retainer of $1,000 to $1,500 was requested from each of the two

men. After further discussion it was arranged that the two men could leave their bond receipts with the Kellys in lieu of a cash retainer.

No express agreement was reached regarding the assignment of the cash bonds to the Kellys. Both Micek and Robinson claim that they expressly refused to assign the bond receipts and that the respondent was present at the time of this refusal. Respondent has no recollection of Micek's refusal to assign his bond receipt.

Micek and Robinson also claim that they offered to put up cash retainers but that Lloyd Kelly, Sr., responded that the cash retainers would be unnecessary so long as the bond receipts were left as security. The unassigned bond receipts were then left with the respondent on September 1, 1983.

According to Robinson, the respondent was told that the bond money was "all his" if he was able to get the charges dismissed. Lloyd Kelly, Sr., testified that such a statement was made at the end of the meeting in his office on September 1, 1983, when Micek and Robinson handed their bond receipts to the respondent. Robinson testified that he returned to the Kelly office later that same day and told the respondent that he could keep Robinson's $1,500 if the charges against him were dropped.

Following the September 1, 1983, meeting in the Kelly offices, the respondent engaged in several discussions with the Hall County attorney regarding Micek's and Robinson's cases. On September 14, 1983, the county attorney declined to prosecute Micek. On that same afternoon, the respondent wrote an assignment to Kelly & Kelly on the back of Micek's bond receipt and had another local attorney write Micek's signature below the assignment. The receipt was then presented to the clerk of the Hall County Court, and the $1,500 was paid over to the respondent. The respondent testified that he believed he had Micek's permission to cash the bond and that he thought he was doing Micek a service by saving him an extra trip from Lincoln to endorse the bond receipt. The proceeds of the bond received by the respondent were deposited in the Kelly office account, not a segregated trust account. The respondent testified that the funds were not segregated because he thought

he was entitled to the entire fee.

Later in the evening on September 14, 1983, Micek called the respondent at his home. Micek claims that the respondent told him, "I think I've got your charges dropped. But call me next week and I'll find out." The respondent claims that he stated, "They're not going to press charges against you. Why don't you come in, in a week or the first part of next week, or whatever, and we'll get, you know, we'll get the fee squared away." Micek was not informed in this conversation of the fact that his bond receipt had been endorsed in his name and cashed. The respondent stated that he did not tell Micek that the bond had been cashed because, at the time, he did not think it was important. Apparently, this was due to Robinson's statement regarding retention of the bond money if the charges were dismissed.

Micek and Robinson testified that they went to Grand Island the next day, September 15, 1983, because Robinson was confused about the sequence of procedural events taking place in his case. They also testified that they stopped at the Kelly offices, but the respondent was not there. It was on this date that Micek says he first learned from the clerk of the Hall County Court that the prosecution against him had definitely been declined and that his bond had been cashed. The respondent testified that his office records do not indicate that either Micek or Robinson was in the Kelly office on September 15, 1983, and that he had told Micek during the telephone conversation on the evening of September 14, 1983, that he (Kelly) would be out of town.

On September 19, 1983, Micek and Robinson made another trip to Grand Island to see the respondent. Micek said that he asked the respondent if his bill had been computed so that he might get everything squared away to save another trip to Grand Island. Respondent is said to have replied that he would send Micek the remaining money when the fees were figured but that he had to first discuss the bill with his grandfather, who "was sick, or something like that." The respondent, in contrast, testified:

> Q. And did Mr. Micek at that time request the return of his money?

A. No.
Q. He didn't?
A. No. If he would have reques — no, it was not discussed. What was discussed was, I said, "As soon as I get an opportunity to visit with my grandfather with regards to the fee notwithstanding what we said would be a retainer, I don't think we're entitled to the entire amount and we'll reimburse it after I get a chance to see him." I also explained to him that, you know my grandfather and his attitudes and everything, that it would probably take a couple weeks and that we would work something out; that I felt we would be entitled to a fee somewhere in the amount of $500. That seemed agreeable with him at the time.

The respondent admitted that, on this date, Micek was concerned with the fact that the respondent had cashed the bond receipt.

Micek stated that he returned to Lincoln and waited to receive his refund. Despite telephone calls to remind the respondent, Micek did not receive a check. Finally, Micek sought the assistance of a Lincoln attorney, Richard Scott. Scott telephoned the respondent and was informed that the $1,000 would be sent to Micek.

On October 10, 1983, not having received a check from the respondent, Micek returned to Grand Island. The respondent first told Micek that a check had already been sent. Shortly thereafter, the respondent wrote a check for $1,000 to Micek. Micek attempted to cash the check at the drawee bank but was told that there were insufficient funds in the account to cover the check. Upon his return to the Kelly office, Micek was told that the receipts from the previous day had not been deposited but that he could cash the check in a half hour or so. Funds were then deposited, and Micek was able to cash the check. Neither Richard Scott nor Micek ever received a check in the mail from the respondent.

On October 13, 1983, the respondent received notice of the filing of a complaint with the Counsel for Discipline of the Nebraska State Bar Association and was informed that he had 15 days to file a written response. His response was not received

until November 21, 1983. The respondent had previously received an unrelated private reprimand from the Committee on Inquiry for the Fifth Disciplinary District on June 13, 1983. One of the specific recommendations in that reprimand was that "in the future, should any response be due the Counsel for Discipline by the Respondent, that it be done promptly as the rules provide . . . ." In response to questioning by the Committee on Inquiry in regard to his late filing in the present matter, the respondent stated: "Quite frankly, I misread it and missed it [the 15-day filing period]; that's all. I did not try — Lord knows, after the last one I did not try and not follow any rules, believe me."

On February 21, 1984, written charges against respondent were filed with the Committee on Inquiry for the Fifth Disciplinary District. A hearing before the committee was held on March 15, 1984. The committee found reasonable grounds for discipline and the filing of formal charges. The Disciplinary Review Board also found grounds for discipline, and formal charges were filed in this court on June 18, 1984.

There was a hearing before the referee on March 4, 1985. The referee found that the respondent was guilty of the violations charged and that many of the respondent's problems were the result of alcoholism. The referee thought that a lengthy period of probation would be appropriate, in light of the respondent's recent efforts to bring his alcoholism under control. Because there was no way to effectively supervise probation, the referee recommended that the respondent be suspended from the practice of law for a period of 6 months. The relator then filed exceptions to the referee's recommendation.

The basic issues in this case are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. Our determination of these issues is based on a de novo review of the record. *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 352 N.W.2d 875 (1984); *State ex rel. Nebraska State Bar Assn. v. McArthur*, 212 Neb. 815, 326 N.W.2d 173 (1982).

The relator's burden of proof is to "establish the allegations in the formal charges by a clear preponderance of the evidence, so the court is satisfied to a reasonable certainty that the

charges are true." *State ex rel. Nebraska State Bar Assn. v. Michaelis*, 210 Neb. 545, 548, 316 N.W.2d 46, 48 (1982). The presumption of innocence applies.

The respondent is alleged to have violated his oath to faithfully discharge his duties as an attorney to the best of his abilities. Neb. Rev. Stat. § 7-104 (Reissue 1983). He is also charged with violating the following disciplinary rules of the Code of Professional Responsibility:

DR 1-102 Misconduct

A. 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.

5. Engage in conduct that is prejudicial to the administration of justice.

6. Engage in any other conduct that adversely reflects on his fitness to practice law.

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 requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

The respondent admits that he secured a forged endorsement of Micek's bond receipt. While there is conflicting evidence as to the understanding that Micek and the respondent had about the receipt, it is clear that there was never an express written assignment by Micek. Even if the respondent was authorized to cash the bond, the method used was wholly improper. The respondent characterized the forgery as ministerial in nature and done as a service to his client. This court has previously held a similar act to constitute a moral delinquency justifying suspension or disbarment. *State ex rel. Nebraska State Bar Assn. v. Butterfield*, 169 Neb. 119, 98 N.W.2d 714 (1959).

In *Butterfield* the respondent was held to have violated the Canons of Professional Ethics by postdating an acknowledgment he had affixed to a deed in his function as a notary public. In *In re Conti*, 75 N.J. 114, 380 A.2d 691 (1977), an attorney prevailed upon his secretary to forge his clients' names to a deed. He then executed an acknowledgment on the same instrument, certifying that his clients had appeared personally before him to acknowledge and deliver the deed. The respondent had engaged in this conduct at the request of and as a service to his clients. Nevertheless, the court concluded that he had violated DR 1-102(A)(4), as the forgeries amounted to an endeavor to mislead, while the acknowledgment was an outright misrepresentation. The respondent's conduct in the

present case was equally misleading.

The respondent admitted that after cashing the bond receipt the proceeds were not placed in a trust account but were deposited in the Kelly & Kelly office account. Whatever the initial retainer agreement between the respondent and Micek, it is clear that a fee of $1,500 had not been set, despite what the respondent might have thought in view of the statements made by Robinson. Commingling of a client's funds has been characterized as an area of grave concern. *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 352 N.W.2d 875 (1984). The inherent danger in such a practice is the potential for the loss of client funds. Micek experienced an element of that danger when he could not immediately cash the $1,000 check written by the respondent.

The respondent failed to tell Micek that he had received the bond proceeds on September 14, 1983. The fact that the respondent failed to inform Micek of the bond transaction during their telephone conversation that evening lends support to the view that the respondent acted knowingly and without authority in cashing the bond receipt.

The fact that Micek did eventually receive a refund of $1,000 from the respondent is not controlling, given the context of this case. The refund was acquired only after Micek had waited nearly 4 weeks without a response, had retained another attorney to assist in the matter, and then drove to Grand Island to receive an insufficient funds check. "A restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct." *State ex rel. Nebraska State Bar Assn. v. Bremers*, 200 Neb. 481, 484, 264 N.W.2d 194, 197 (1978).

Implicit in the oath of an attorney and in the license to practice law are the requirements of proper demeanor and restraint from practices which serve to discredit the legal system. *Statmore, supra.* In this case it is evident that the respondent has committed the violations of his oath as an attorney and of the Code of Professional Responsibility as charged. His conduct was of the type which brings reproach upon the legal profession and, as such, constitutes grounds for discipline. *Bremers, supra.*

The standard applied in determining the nature and extent of the discipline to be imposed involves consideration of "the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law." *State ex rel. Nebraska State Bar Assn. v. McArthur*, 212 Neb. 815, 819, 326 N.W.2d 173, 176 (1982).

The evidence in this case shows that the respondent has taken positive steps to deal with his alcohol dependence. The unsolicited testimony and letters from fellow attorneys evidence the respondent's capacity to be a competent and capable attorney.

Evidence of good reputation does not mitigate the misconduct proved in this case. *State ex rel. Nebraska State Bar Assn. v. Butterfield*, 169 Neb. 119, 98 N.W.2d 714 (1959). The respondent engaged in deceit, misrepresentation, and the commingling of client funds. The balance in the account in which the funds were placed was allowed to drop below the amount of the client funds which had been deposited in it. These acts were destructive of the trust essential to the attorney-client relationship.

We believe disbarment is inappropriate in the absence of specifically delineated injuries to Micek as the result of the respondent's misconduct. *McArthur, supra.* On the other hand, we believe a period of probation, as urged by the respondent, would serve to protect neither the public nor the reputation of the bar in light of the respondent's previous misconduct and the nature of the present violations.

We conclude that the respondent should be suspended from the practice of law for a period of 1 year. The suspension shall commence 10 days after the date of the filing of this opinion.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PATRICK J. HEATON, JR., RESPONDENT.
374 N.W.2d 598

Filed September 27, 1985. No. 85-764.

Original action. Judgment of disbarment.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This matter was submitted upon the complaint against Patrick J. Heaton, Jr., made by the Committee on Inquiry of the Sixth Disciplinary District, and his voluntary surrender of license and consent to the entry of a disciplinary order against him.

Upon due consideration, 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 Patrick J. Heaton, Jr., be, and hereby is, disbarred effective September 27, 1985.

JUDGMENT OF DISBARMENT.

FUEL EXPLORATION, INC., A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. RICHARD M. NOVOTNY AND CAROLINE E. NOVOTNY, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES,
MMS ENERGY INVESTMENT GROUP I, INC., ET AL., INTERVENORS-APPELLEES AND CROSS-APPELLANTS.
374 N.W.2d 838

Filed October 11, 1985. No. 84-433.

1. **Directed Verdict.** On a motion for directed verdict the moving party is deemed to have admitted as true all the relevant evidence received which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can

reasonably be deduced from such evidence.

2. **Property: Appurtenances: Words and Phrases.** The term "fixture" refers to a chattel which is capable of existing separate and apart from realty, but which, by actual annexation and appropriation to the use or purpose of the realty with the intention of making it a permanent accession thereto, becomes a part of the realty.
3. **Property: Appurtenances.** Once a chattel becomes a fixture, it is treated as a part of the realty and may not be removed therefrom except by the owner of the realty.
4. _____: _____. A "trade fixture" is not considered part of the realty and may be removed therefrom by the trade fixture's owner, so long as the removal does not cause substantial damage to the realty.
5. _____: _____. Whether articles constructed upon realty owned by another become annexed to and part of the realty depends to a great extent upon the facts and circumstances of the particular case.
6. **Property: Appurtenances: Intent.** The intention of the party making the annexation is to be inferred from the nature of the articles affixed, the relation between the parties, the situation of the party making the annexation, the nature of the structure, the mode of annexation, and the purpose or use for which the annexation has been made.
7. **Property: Appurtenances.** Generally, in the absence of statute any permanent improvement placed upon land of another by one having no interest or title in the land, without the landowner's consent, prima facie becomes a part of the realty and belongs to the owner of the land, although it was placed thereon by mistake or with a view of enforcing an adverse right in the land, unless there is an express agreement which takes the case out of the rule, or unless the owner is estopped to claim such ownership.
8. **Replevin: Proof.** In a replevin action the burden is on the plaintiff to show the facts necessary to recover existed at the time the action was commenced; what takes place thereafter is immaterial in the consideration and determination of the merits of the case.
9. _____: _____. A plaintiff in replevin must prove the interest pled; proof of a special ownership interest does not support an allegation of a general ownership interest.
10. **Judgments: Appeal and Error.** Harmless error forms no basis for reversal of a judgment on the verdict of a jury.
11. **Appeal and Error.** A party cannot be heard to complain of error which he or she was instrumental in bringing about.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Affirmed in part, and in part reversed.

George P. Burke of Van Steenberg, Myers & Burke, for appellants.

Robert G. Simmons, Jr., of Wright, Simmons & Selzer, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The appellee corporation, Fuel Exploration, Inc., brought a replevin action against the appellants, Richard M. and Caroline E. Novotny, husband and wife, seeking possession of certain oilfield equipment which Fuel Exploration alleged it owned. The trial court entered a replevin order, after which Fuel Exploration took possession. Following an allegation in the Novotnys' amended answer that there were in existence others who had an interest in the equipment, a group of "working interest owners" intervened and alleged that they became owners of the equipment after the order of replevin was issued, and joined in Fuel Exploration's prayer that possession be given to it. At trial the court determined as a matter of law that Fuel Exploration did not own the equipment at the commencement of the action as it had alleged but had "at best" a security interest in it and that the Novotnys, therefore, had the right to possess the equipment as of that time. The trial court also determined as a matter of law that the equipment constituted trade fixtures and instructed the jury that it was to determine ultimate ownership and whether Fuel Exploration and the working interest owners had the right to remove the equipment from the Novotny land. The jury returned a general verdict in favor of Fuel Exploration and the working interest owners. The trial court then, pursuant to a waiver of the jury on the issue of damages, awarded the Novotnys $1 in nominal damages for their temporary loss of possession. The Novotnys have appealed and by their six assignments of error raise three issues: (1) Whether the Novotnys owned the equipment; (2) Whether they were entitled to more than nominal damages; and (3) Whether the working interest owners should have been permitted to intervene. In their cross-appeal Fuel Exploration and the working interest owners urge that the trial court erred in holding as a matter of law that they were not the owners of the equipment at the commencement of this action. We affirm in part and reverse in part.

To the extent the trial court resolved questions upon motions

for directed verdicts, we review the evidence in light of the rule that upon such a motion the moving party is deemed to have admitted as true all the relevant evidence received which is favorable to the party against whom the motion is directed and, further, that the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced from such evidence. *Quad-States, Inc. v. Vande Mheen*, 220 Neb. 161, 368 N.W.2d 795 (1985).

So reviewed, the evidence establishes that the Novotnys are the record title owners of the west half of a certain Section 7 in Kimball County. They also claim ownership, but are not the record title owners, of a portion of Section 18 adjoining the southern boundary of their half of Section 7.

Through a series of transactions which are not relevant to the present case, Fuel Exploration, as "operator," joined a number of others known as "working interest owners" or "nonoperators" in a project to complete the drilling of and to operate an oil well on the east half of Section 7, land owned by a Mrs. Spiker but farmed by the Novotnys along with their half of Section 7 and the aforesaid portion of Section 18.

An operating agreement was executed between the working interest owners and Fuel Exploration, obligating the latter to operate the well after its completion and to procure the necessary equipment for so doing. The agreement states: "[A]ll equipment and material acquired in operations on the Contract Area shall be owned by the parties as their interests are shown in Exhibit 'A'." Although we do not find an exhibit so designated in the record, the evidence establishes the identity and proportionate interests of the working interest owners. The agreement obligates the working interest owners to pay a proportionate share of the cost of the equipment within 15 days of billing by Fuel Exploration. The record establishes that at least some of the working interest owners had paid their proportionate share of the cost of the equipment. The agreement also provides:

> Each Non-Operator [working interest owner] grants to Operator [Fuel Exploration] a lien upon its oil and gas rights in the Contract Area [defined elsewhere in the agreement as being all of Section 7 and a portion of

> Section 8], and a security interest in its share of oil and/or gas when extracted and its interest in all equipment, to secure payment of its share of expense, together with interest thereon at the rate provided . . . .

Pursuant to the provisions of the operating agreement, Fuel Exploration procured the equipment in dispute, which consists of two oil storage tanks, a treater used to separate water from the oil, a pump, and various accessories and connecting flow lines.

In the mistaken belief it was placing the equipment on Mrs. Spiker's land, Fuel Exploration in fact placed all of the equipment on land owned or claimed by the Novotnys, some of it on the Novotnys' half of Section 7 and some of it on Section 18. The tanks were put on but not secured to a pair of pads consisting of several yards of gravel leveled and packed to provide drainage. The treater, which is approximately 10 feet in diameter and stands 20 feet tall, was bolted to a portable concrete block approximately 12 to 15 inches thick and 6 to 8 feet square. The tanks were connected to the well with underground lines buried 4 feet deep, and there were flow lines from the tanks to the treater, as well as a gasline from the well to the treater. A treater house approximately 12 by 15 feet was also set against the treater to protect some valves.

After the Novotnys discovered the error, Fuel Exploration attempted to buy the land on which the equipment sat. The Novotnys, however, did not wish to sell. Negotiations for Fuel Exploration to lease the land on which the equipment was placed fell through. Thereafter, knowing that the equipment was removable, Mr. Novotny erected a temporary fence around the equipment area, posted no trespassing signs, maintained a 24-hour guard on the property, and notified Fuel Exploration that it was not licensed to enter upon his land, warning it not to trespass nor to remove any of the equipment.

Fuel Exploration then filed this suit. Following the hearing required by Neb. Rev. Stat. § 25-1093.02 (Reissue 1979), the trial court found that Fuel Exploration was entitled to possession of the equipment and ordered its delivery to Fuel Exploration pursuant to Neb. Rev. Stat. § 25-1093.04 (Reissue 1979).

Fuel Exploration then took possession and removed the equipment to Mrs. Spiker's land. It took no more than 2 days to do that, as the equipment, save for the buried lines, was designed so it could be picked up by a medium-sized crane and hauled from site to site as wells go dry. After the equipment was removed the Novotny land was leveled and returned to an appearance closely resembling its original state. The underground lines, however, were left in place.

After Fuel Exploration obtained the replevin order, the Novotnys alleged that there were others interested in the equipment who were not parties to the action. As a consequence, the working interest owners were permitted to join Fuel Exploration's suit. Both the working interest owners and Fuel Exploration pled that no title interest passed to the working interest owners until the equipment had been placed on the Spiker land.

At the jury trial both sides moved for directed verdicts at the close of all the evidence, whereupon the trial court made the rulings stated in the first paragraph of this opinion.

The Novotnys contend, in connection with the first issue raised by their assignments of error, that they owned the equipment and that the trial court erred in not so ruling. They claim the equipment had become fixtures annexed to their land and could not be removed except by them.

The term "fixture" refers to a chattel which is capable of existing separate and apart from realty, *Frost v. Schinkel*, 121 Neb. 784, 238 N.W. 659 (1931), but which, by actual annexation and appropriation to the use or purpose of the realty with the intention of making it a permanent accession thereto, becomes a part of the realty. See, *T-V Transmission v. County Bd. of Equal.*, 215 Neb. 363, 338 N.W.2d 752 (1983); *Cook v. Beermann*, 201 Neb. 675, 271 N.W.2d 459 (1978), *modified on other grounds* 202 Neb. 447, 276 N.W.2d 84 (1979); *Bankers Life Ins. Co. v. Ohrt*, 131 Neb. 858, 270 N.W. 497 (1936); *Frost v. Schinkel, supra*. Once a chattel becomes a fixture, it is treated as a part of the realty and may not be removed therefrom except by the owner of the realty. See, *T-V Transmission v. County Bd. of Equal., supra*; *Bankers Life Ins. Co. v. Ohrt, supra*; 35 Am. Jur. 2d *Fixtures* § 2 (1967).

A "trade fixture," unlike a "fixture," however, is not considered part of the realty and may be removed from the realty by the trade fixture's owner, so long as the removal does not cause substantial damage to the realty. See, *Bishop Buffets, Inc. v. Westroads, Inc.*, 202 Neb 171, 274 N.W.2d 530 (1979); *Rothery v. Dohrse*, 122 Neb. 259, 240 N.W. 296 (1932); *Frost v. Schinkel, supra*; 35 Am. Jur. 2d *Fixtures* § 3 (1967).

Whether articles constructed upon realty owned by another become annexed to and part of the realty depends to a great extent upon the facts and circumstances of the particular case. *Waters v. Reuber*, 16 Neb. 99, 19 N.W. 687 (1884). The intention of the party making the annexation is to be inferred from the nature of the articles affixed, the relation between the parties, the situation of the party making the annexation, the nature of the structure, the mode of annexation, and the purpose or use for which the annexation has been made. See, *T-V Transmission v. County Bd. of Equal., supra*; *Cook v. Beermann, supra*.

Given the movable character of the equipment and the fact that it was placed where it was by mistake, we must conclude as a matter of law the equipment never lost its character as chattels and became neither fixtures nor trade fixtures. Since the placement of the equipment was not permanent in nature, the case falls outside the general rule that in the absence of statute any permanent improvement placed upon land of another by one having no interest or title in the land, without the landowner's consent, prima facie becomes a part of the realty and belongs to the owner of the land, although it was placed thereon by mistake or with a view of enforcing an adverse right in the land, unless there is an express agreement which takes the case out of the rule, or unless the owner is estopped to claim such ownership. See *In re Estate of Carlson*, 214 Neb. 453, 334 N.W.2d 437 (1983).

In view of the fact that the Novotnys have no proprietary interest in the equipment whatsoever, it seems appropriate at this point in this unnecessarily convoluted case that we turn our attention to the cross-appeal of Fuel Exploration and the working interest owners.

The record establishes that the working interest owners are

"the people that pay the bills" and who, according to the operating agreement referred to above, "own" the equipment and did so at the time of the commencement of this action by Fuel Exploration.

The Novotnys, however, in effect argue that the true ownership of the equipment avails Fuel Exploration and the working interest owners nothing. In doing so they rely on the rule that in a replevin action the burden is on the plaintiff to show the facts necessary to recover existed at the time the action was commenced; what takes place thereafter is immaterial in the consideration and determination of the merits of the case. *State Farm Mutual Auto. Ins. Co. v. Drawbaugh*, 159 Neb. 149, 65 N.W.2d 542 (1954), *overruled in part on other grounds, First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co.*, 196 Neb. 595, 244 N.W.2d 209 (1976); *Bank of Keystone v. Kayton*, 155 Neb. 79, 50 N.W.2d 511 (1951); *Alliance Loan & Investment Co. v. Morgan*, 154 Neb. 745, 49 N.W.2d 593 (1951); Neb. Rev. Stat. § 25-10,103 (Reissue 1979). Moreover, they correctly argue, citing *State Farm Mutual Auto. Ins. Co. v. Drawbaugh, supra*, that the plaintiff must prove title as he or she pleads it and that an allegation of general ownership is not supported by proof of special ownership.

It is to be noted, however, that *State Farm* applied that rule as between two claimants, each of whom had a colorable interest in the property at the time the replevin action was commenced; the plaintiff because it had paid for an insured loss, and the defendant because he had acquired a certificate of title. Here, the Novotnys, as we have seen, have no proprietary interest in the equipment at all. (The rule is also found in *Griffing v. Curtis*, 50 Neb. 334, 69 N.W. 968 (1897), and in *Robinson v. Kilpatrick-Koch Dry Goods Co.*, 50 Neb. 795, 70 N.W. 378 (1897). It appears, however, that in *Griffing* the action failed because insufficient facts to support the claim of special ownership were pled. In *Robinson*, as in *State Farm*, it appears each of the claimants had a colorable interest in the property.) The evidence in this case is sufficient to support the allegation of ownership made by Fuel Exploration and the working interest owners.

Therefore, the trial court should have determined as a matter

of law that Fuel Exploration and the working interest owners owned the equipment as of the date the action was commenced and were entitled to possession as of that date.

In view of the jury's verdict, however, the trial court's errors in those regards are not prejudicial and form no basis for reversal. *Wausau Ins. Co. v. Schake*, 220 Neb. 802, 373 N.W.2d 669 (1985); *Fleming Realty & Ins., Inc. v. Evans*, 199 Neb. 440, 259 N.W.2d 604 (1977).

The foregoing resolution disposes of the second issue raised by the Novotnys' assignments of error adversely to them; having no proprietary interest of any kind in the equipment, they are entitled to no damages. Accordingly, the $1 judgment in favor of the Novotnys must be and is reversed.

The third issue raised by the Novotnys' assignments of error must also be rejected. If there was error in permitting the working interest owners to intervene, a matter we do not decide, it was prompted by the Novotnys' own allegation that there were others interested in the equipment who were not parties to the action. A party cannot be heard to complain of error which he or she was instrumental in bringing about. *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985); *Kluender v. Mattea*, 214 Neb. 327, 334 N.W.2d 416 (1983).

AFFIRMED IN PART, AND IN PART REVERSED.

KRIVOSHA, C.J., concurs in the result.

CAPORALE, J., dissenting.

I agree that the Novotnys are in no position to complain of the working interest owners' intervention in this case. I also agree that the working interest owners are and were the owners of the equipment when Fuel Exploration commenced this replevin action and that Fuel Exploration was and is not. I further agree that the equipment never lost its character as chattels and that the Novotnys therefore never acquired therein any interest whatsoever.

Yet, I dissent because I consider the result reached, although perhaps "fair" in the sense that it allows the owners to recover possession from those who have absolutely no interest in the equipment, to be legally incorrect.

The majority opinion ignores a basic principle of the law of replevin, that the plaintiff must recover on the strength of its

own interest in the property involved and not on any weakness in the interest of the defendant. *Putnam Ranches, Inc. v. Corkle*, 189 Neb. 533, 203 N.W.2d 502 (1973); *Bank of Keystone v. Kayton*, 155 Neb. 79, 50 N.W.2d 511 (1951). When that rule is applied, together with those cited by the majority, that the right to recover is dependent upon the facts as they existed at the time the action was commenced, that the plaintiff must prove the interest pled, and that proof of a special ownership interest does not support an allegation of general ownership, the inescapably correct legal conclusion is that because Fuel Exploration pled a general ownership interest rather than the special one it proved to have at the commencement of the action, and because the working interest owners pled they had no ownership interest when in fact the evidence establishes they did have such an interest when the action was commenced, neither Fuel Exploration nor the working interest owners are legally entitled to recover possession of the equipment in this action.

The majority's effort to distinguish this case from *State Farm Mutual Auto. Ins. Co. v. Drawbaugh*, 159 Neb. 149, 65 N.W.2d 542 (1954), *overruled in part on other grounds, First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co.*, 196 Neb. 595, 244 N.W.2d 209 (1976), and *Robinson v. Kilpatrick-Koch Dry Goods Co.*, 50 Neb. 795, 70 N.W. 378 (1897), fails. The Novotnys' fallacious claim that they had become the owners of the equipment once it was attached to their land is no more colorable or less colorable than the plaintiff's incorrect claim in *State Farm* that it had acquired a paramount interest in the automobile by virtue of having paid for its loss by theft. In like fashion, the Novotnys' claim is no more colorable or less colorable than that of the defendant in error in *Robinson*, which erroneously asserted it had a general ownership by virtue of its rights under chattel mortgages. (I agree that *Griffing v. Curtis*, 50 Neb. 334, 69 N.W. 968 (1897), does not rest on the rule that proof of a special ownership interest does not support an allegation of general ownership.)

Accordingly, I would reverse the judgment of the district court returning possession of the equipment to Fuel Exploration and the working interest owners. Neb. Rev. Stat.

§ 25-10,103 (Reissue 1979). Since the Novotnys had no use for the equipment, I would affirm the award of $1 in nominal damages to them. Neb. Rev. Stat. § 25-10,104(1) (Reissue 1979).

It seems to me that the majority opinion is an aberration which does no more than demonstrate that hard facts make bad law.

STATE OF NEBRASKA, APPELLEE, V. DAVID E. BROOMHALL, APPELLANT.

374 N.W.2d 845

Filed October 11, 1985. No. 84-871.

1. **Motions for Continuance: Appeal and Error.** Motions for continuances are addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on such motions will not be disturbed on appeal.
2. _____: _____. In determining whether or not the trial court has abused its discretion in refusing to grant a continuance, it is proper to look to the entire record in the case.
3. _____: _____. Where due diligence by the moving party has not been shown, the ruling of the trial court overruling a motion for a continuance for the purpose of securing additional evidence will not be disturbed.
4. **Evidence: Appeal and Error.** The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prejudiced from having a fair trial.

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

S.J. Albracht of Lathrop, Albracht & Lathrop, for appellant.

Robert M. Spire, Attorney General, and Harold Mosher, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

The defendant, a 14-year-old boy whose motion to waive jurisdiction to the separate juvenile court was denied, was convicted of assault in the first degree and second degree sexual assault. He was sentenced to the Nebraska Penal and Correctional Complex for terms of 5 to 15 years and 3 to 5 years concurrently. On appeal to this court defendant assigns as error that the district court failed to grant defendant's motion for a continuance of the trial and that the court erroneously allowed certain opinion testimony into the record without proper foundation. We affirm.

On the evening of July 13, 1983, the victim, a 25-year-old nurse, was jogging alone in the city of Omaha. She was attacked, sexually assaulted, and brutally beaten about the head with a piece of firewood, causing brain tissue to protrude through the wound. According to the further testimony of the victim, she had an opportunity for a minute or a minute and a half to observe her assailant as he knelt on top of her.

Although she was contacted by the police the latter part of July, she was unable to talk to the authorities. The victim returned to the police station in August and related to Officer Marilou Lawson what had happened the night of her assault, and described the person who had attacked her. During the course of that interview, she was able to help with the drawing of a composite of her attacker.

The victim met with police officers a couple of days later and was handed a group of five photographs of young men and was able to identify one, the defendant, as her attacker. She also made an in-court identification of the defendant as her attacker at the trial in March of 1984, and at two preliminary hearings held in November and December of 1983.

Officer Lawson testified that the composite picture of the victim's attacker was printed in the local newspaper. The police received several calls following the circulation of that picture, naming the defendant as resembling the composite.

Defendant was arraigned on September 15, 1983, at which time trial was set for the next jury panel. His present counsel entered the case around November 1, 1983. According to the prosecution, the victim was available as a witness since August

of 1983. The record itself reveals conclusively that she was available as early as November 9, 1983, when she appeared at a hearing on a motion to transfer jurisdiction and testified in great detail about the attack. Defendant's counsel declined cross-examination. The victim appeared again on December 28, 1983, at a hearing to suppress identification, and testified to the attack in detail. Some 20 pages of the record are devoted to defense counsel's cross-examination regarding identity of the defendant.

This case went to trial on the first day of the jury term commencing March 5, 1984. Sometime preceding the prior jury term, which date is not apparent, counsel had requested that trial not commence then, and he was told by the court to be ready for the next panel. That was confirmed by a letter from the court dated February 15, 1984, which counsel stated he did not receive until February 27 because he had been out of town.

Hearing was had on Wednesday, February 29, 1984, on defendant's oral motion for a continuance, and on March 1 and 2, 1984, on his written motion. For the purpose of this appeal defense counsel's complaint was that he had been unable to interrogate the victim or to get a deposition from her attending physician, Dr. McKinney, so that he could obtain and talk to his own expert witness to delve into the matter of the victim's ability to recall the events of the attack. However, the victim had been available for deposition, it would seem, at least since November 9 when she appeared in court and testified. Although defense counsel stated that he still had not received authorization to take Dr. McKinney's deposition, there is no showing in the record that such authorization was needed or that he had asked for it and it had been denied to him.

The court was concerned about the welfare of the victim. Apparently, she was to have had an out-of-state evaluation preparatory to possible additional rehabilitation services. That appointment was canceled because of the trial, and, according to her physician, she could not get into that program until the trial was over. The court felt that she should not be further inconvenienced and delayed in possible rehabilitation efforts by a further continuance, and it denied the motions.

At the hearing on his motion for a new trial, the defendant

offered the testimony of Dr. Charles Golden, a neuropsychologist. He had reviewed Dr. McKinney's deposition regarding the nature and extent of the victim's injuries. Based on that information and his own training and experience, Dr. Golden gave as his opinion that the type of injuries suffered by the victim would have resulted in memory impairment, a memory loss, and interference from the date of the accident to the time of trial in March and that it was likely that the victim was not working—testifying—from a true memory but on the basis of things that had happened after the accident. He further testified that it would have been difficult, if not impossible, for her to recall observations made by her on the day of the attack as to a description of the attacker.

There was nothing in the testimony of Dr. Golden that indicated he was not available at the time of trial in March of 1984. He did state that defense counsel had talked to him about the case "some months ago," after the trial, and the date of his testimony was November 8, 1984. The only other reference to timing was made by defense counsel during argument, wherein he said that at the time the deposition of Dr. McKinney was typed up it was too late to get ahold of Dr. Golden.

There is no question but that Dr. Golden's testimony would have been relevant to defendant's defense. True, Dr. McKinney did testify on cross-examination that the victim could have suffered from amnesia. However, he also said that he, a neurosurgeon, was not qualified to give an opinion as to the victim's susceptibility to the power of suggestion. Therefore, it is necessary for us to determine whether it was error for the trial court to refuse a continuance so that, as an after-the-fact determination, Dr. Golden would have been permitted to testify.

Motions for continuances are addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on such motions will not be disturbed on appeal. *State v. Denbeck*, 219 Neb. 672, 365 N.W.2d 469 (1985).

" 'In determining whether or not the trial court has abused its discretion in refusing to grant a continuance it is proper to look to the entire record in the case.' See, also, § 25-1148 R.R.S.

1943." *Kennedy v. State*, 171 Neb. 160, 166, 105 N.W.2d 710, 716 (1960).

The evidence adduced shows that defense counsel was involved with this case 4 months prior to trial. Although counsel complains of never having received a medical release which would have enabled him to take the deposition of Dr. McKinney, the record does not show a request was made for one or was required. As noted by the appellee, " '[w]here due diligence by the moving party has not been shown, the ruling of the trial court overruling a motion for a continuance for the purpose of securing additional evidence will not be disturbed.' Frese v. Michalec, 148 Neb. 567, 568, 28 N.W.2d 197, 197 (1947)." Brief for Appellee at 8.

We do not believe the trial court abused its discretion in denying the continuance.

In dealing with defendant's other assignment of error, that the court erred in allowing a police technician to give an opinion as to what substances he located in the area where the victim was found, it is necessary to supply some additional facts.

Gerold Klein testified that at approximately 11:30 on the evening of this assault, his dog rushed madly to the vestibule and was barking. Klein went to the door and found a woman, dressed in jogging clothes and covered with blood, sitting on the doormat, looking in the side windows of the door. He observed vomit on the step and was able to smell some about her. He called the rescue squad and later talked to the police. As he found out, the woman was the victim in this case.

Neb. Rev. Stat. § 27-701 (Reissue 1979) states:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

As the witness was not qualified as an expert, the question is whether the subject was proper for a lay witness.

The relevant testimony is as follows:

> Q. And based on your experience as a person and as a police officer did the substances found at the scene next to

> the Klein house appear, at least in your opinion, to be that of human vomit, human feces?
>
> MR. ALBRACHT: To which I object for the reason there is no proper and sufficient foundation for this witness to testify. He's not competent to answer that, Your Honor.
>
> . . . .
>
> THE COURT: He may answer. He's qualified to give a lay opinion as to what he feels it is.
>
> A. In my opinion, the substance that appeared [in the pictures of the scene] to be vomit was vomit and the substances that appeared to be feces was feces.

The question, as presented by the prosecution, is whether the substances were *human* vomit and feces. The statute allows testimony rationally based on perception. There is nothing in the record that indicates that the witness could distinguish between human and nonhuman body waste. On this basis the question was objectionable. However, the technician's testimony was that the substances were "vomit" and "feces," without reference to their origin. Additionally, on cross-examination, the technician testified that he could *not* distinguish human waste from that of an animal, absent a chemical analysis. The result is that the witness gave an acceptable lay opinion to an unacceptable question.

In order to have reversible error the appellant must demonstrate that the error was prejudicial. "[T]he admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prejudiced from having a fair trial." *State v. Bromwich*, 213 Neb. 827, 832, 331 N.W.2d 537, 541 (1983).

In light of the victim's eyewitness identification of the defendant, even if the statement was inadmissible, the error was harmless.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF P.M.C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. V.C.T., APPELLEE.

374 N.W.2d 598

Filed October 11, 1985. No. 85-359.

Appeal from the District Court for Clay County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Ted S. Griess, Clay County Attorney, and Jay J. Sullivan, guardian ad litem, for appellant.

Dean N. Hansen, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an appeal from a judgment of the district court for Clay County, Nebraska, reversing the order of the county court terminating the parental rights to P.M.C., a minor child.

The district court remanded the matter to the county court with directions to continue court supervision and the development of a foster care plan if the court determined that foster care should be continued.

On review de novo we agree with the decision of the district court that the charges of willful neglect were not proven by clear and convincing evidence and that the best interests of P.M.C. do not require termination of parental rights.

AFFIRMED.

DANIEL N. LEAGUE, APPELLANT, V. KAER P. VANICE III, APPELLEE.

374 N.W.2d 849

Filed October 18, 1985. No. 84-399.

1. **Pleadings: Limitations of Actions.** If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.
2. **Words and Phrases.** *Conceal* means to hide, secrete, or withhold from the knowledge of others; to withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight; or to hide or withdraw from observation, cover or keep from sight, or prevent discovery of.
3. **Words and Phrases: Limitations of Actions.** *Discovery*, as used in reference to a statute of limitations, means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer.
4. **Notice: Limitations of Actions.** Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained.
5. **Trial: Pleadings: Limitations of Actions: Proof.** A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense.
6. **Pleadings: Causes of Action: Limitations of Actions.** Where the facts incorporated into a petition by way of amendment constitute a cause of action separate and independent from that stated in the original petition, the statute of limitations against the cause of action pleaded in the amendment runs until the filing of such amended petition.
7. **Trial: Pleadings: Causes of Action: Attorney and Client: Evidence.** A claimant is not permitted to thrust his lack of knowledge into litigation as a foundation or condition necessary to sustain a claim against another while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Terrance A. Poppe of Hecht, Sweet, Alesio & Morrow, P.C., for appellant.

Victor E. Covalt III of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

The district court for Lancaster County as an equity court held that six causes of action claimed by Daniel N. League against Kaer P. Vanice III, based on a corporate officer's duty owed a shareholder, were barred by the statute of limitations in Neb. Rev. Stat. § 25-207(4) (Reissue 1979) and also dismissed a seventh and remaining cause of action based on alleged breach of duty by Vanice as League's agent in the sale of the capital stock of Vanice Pontiac-Cadillac, Inc. (VPCI). We affirm in part and in part reverse and remand.

Initially, all capital stock of VPCI, an incorporated automobile dealership conducted in downtown Lincoln at 12th and Q Streets, was owned by Vanice and Motor Holdings Division of General Motors Corporation (Motor Holdings). In their written contract entered August 12, 1960, Vanice and League agreed that League would receive 20 percent of VPCI capital stock as soon as Vanice acquired all the stock owned by Motor Holdings. Vanice was president, a director, and chief executive officer of VPCI in 1960 and maintained such relationships to VPCI until early 1980. As president of VPCI, Vanice received a monthly salary of $3,000 and a bonus, 20 percent of VPCI's annual profits before taxes. Between 1960 and 1964, VPCI paid Vanice dividends of $59,292. This formula for Vanice's compensation never changed. In late 1963 or early 1964 League became a director of VPCI and received an annual director's "fee" of $3,600. On April 13, 1965, Vanice acquired Motor Holdings' stock in VPCI and transferred to League 143.4 shares (20 percent) of VPCI stock.

After 1965 Vanice in his individual or personal capacity acquired real estate and other automobile-related businesses in Lincoln. During 1967, Vanice individually purchased a tract of real estate at 70th and O Streets, a site then near the outskirts of Lincoln. In May 1968 Vanice purchased Mart DoRan and Son body shop and placed the assets in Atlas Acceptance Corporation (Atlas), which was wholly owned by Vanice and which was formed in 1966. VPCI was conducting body shop operations when the DoRan transaction occurred. In 1970 VPCI moved its operations to a part of the tract owned by Vanice at 70th and O Streets and leased the property from

Vanice until the sale of VPCI in 1980. Another part of Vanice's tract was leased to Goodyear Tire & Rubber Company in 1971, and still another part of the tract was sold to a third party in 1972. Also, in 1971 VPCI began to withdraw from the business of leasing automobiles and transferred such business to Atlas so that by 1975 all auto leasing previously conducted by VPCI was assimilated by Atlas. Finally, in 1978 Vanice personally purchased Royal Motors and its real estate.

In the spring of 1979 Vanice telephoned League and suggested a sale of VPCI's capital stock for a "net" price of more than $1 million after satisfying VPCI's corporate debts. In a letter to Vanice on May 29, 1979, League authorized Vanice to negotiate and consummate a sale of VPCI capital stock on condition that "the net purchase price for 100% of the stock in the corporation will be not less than one million dollars." Vanice negotiated a sale to Abram, Ben, Henry, and Julius Misle (Misles). On June 29 Misles, Vanice, and League signed an agreement for Misles' purchase of all VPCI capital stock at a price of $2,086,144, less corporate liabilities of VPCI. On January 4, 1980, Vanice, in his individual capacity and as a representative of VPCI, as well as agent for League, signed an addendum to the June 29, 1979, agreement with Misles, namely, specification of the net amount payable to Vanice and League for their sale of VPCI stock to Misles. From the sale proceeds paid by Misles on January 4, Vanice satisfied VPCI's corporate debts of $1,042,092 and sent League two checks—one for $218,739.95 (20 percent of the net sale price) and another for $8,822.51 as payment of League's proportionate share of accrued interest on the price paid by Misles. League did not dispute the amount of either check but, according to League, cashed both checks "as fast as I could."

League filed a petition on March 5, 1981, and alleged two causes of action against Vanice. One cause of action was based on a breach of Vanice's duty as League's agent in the sale to Misles. In the other cause of action, League alleged a breach of fiduciary duty owed by Vanice, as president of VPCI, to League, the minority shareholder of VPCI. The breach of fiduciary duty related to Vanice's transactions involving Atlas' auto leasing business and body shop, as well as Vanice's real

estate at 70th and O Streets.

Later, in his third amended petition, filed on April 22, 1983, League altered his first cause of action and complained that Vanice had improperly allowed deduction of certain VPCI debts in negotiating and determining the sale price paid by Misles for VPCI's stock. League's third amended petition also alleged six causes of action in addition to the question concerning the sale to Misles, that is, causes of action as follows: second—Vanice, as president of VPCI, violated a fiduciary duty owed League, as a minority shareholder of VPCI, in VPCI's relinquishment of its auto leasing business to Atlas in 1972; third—improper payments of dividends by VPCI to Vanice from 1960 to 1964; fourth—VPCI's payment of excessive compensation to Vanice in 1977, 1978, and 1979; fifth—Vanice's diversion of auto body work from VPCI to Atlas in 1969; sixth—Vanice's transactions involving the real estate at 70th and O Streets; and seventh—Vanice's 1978 acquisition of Royal Motors. League alleged his lack of knowledge regarding the transactions questioned in the second, third, fifth, and seventh causes of action. League again requested an accounting concerning the Misle sale.

Among the 20 affirmative defenses raised in his answer, Vanice responded that League's third amended petition failed to allege sufficient facts to constitute a cause of action and that all causes of action, except the first cause of action directed to the Misle sale, were barred by the statute of limitations.

As authorized by Neb. Rev. Stat. § 25-221 (Reissue 1979), the district court ordered a separate trial regarding causes of action which Vanice claimed were barred by the statute of limitations. At the bifurcated trial on the statute of limitations, League admitted he received and reviewed monthly "accounting statement forms" submitted by VPCI to General Motors. These forms or reports detailed VPCI's operations and financial condition. VPCI's withdrawal from leasing operations in 1972 and payment of dividends from 1960 to 1964 were reflected in the statements VPCI sent to General Motors.

League testified that shortly after Vanice's acquisition of the DoRan body shop—sometime "in the early '60's"—Vanice told him about the purchase of the body shop. League was not

concerned about Vanice's purchase of the body shop, because "[t]he impression I had, it wasn't doing very much volume . . . ." League also testified he knew in 1979 that Vanice had purchased Royal Motors. Concerning Vanice's compensation paid by VPCI, League testified that as early as 1970 he was concerned with Vanice's salary and bonuses. In his letter sent to Vanice on July 28, 1970, League threatened to sue Vanice for "excessive compensation" paid by VPCI. In his July 28 letter League also, in substance, acknowledged that he knew about Vanice's 1970 acquisition of the 16-acre tract at 70th and O Streets and subsequent sale to VPCI, when he stated:

> Based upon information concerning your activities in acquiring real estate and obtaining zoning thereon, I am concerned about the possibility that you may be planning to engage in a program of self-dealing between yourself, or other corporations controlled by you, and this Corporation concerning the acquisition, ownership, development, rental or other use of certain real estate which you have acquired within the corporate limits of the City of Lincoln . . . .
>
> Since you are a director, the chief operating officer, and the owner of a majority of the stock in the Corporation, I intend to scrutinize all transactions between yourself and the Corporation to the end that nothing is done to the detriment of myself and any other minority shareholder.

League also acknowledged that in 1979 he had found out "about Royal Motors" and Vanice. VPCI neglected to hold any annual meeting of directors or shareholders.

Over League's objection, Charles Wright, an attorney who represented League during 1970, testified he had informed League that Vanice "has embarked on a course of acquiring real estate which may hereafter be purchased with corporate funds or leased to the corporation [by Vanice]." Wright also testified that the real estate mentioned was Vanice's land at 70th and O Streets which had come to Wright's attention in the course of Vanice's efforts to obtain suitable zoning for use of the tract in an automobile dealership. Wright further testified that, on occasions in 1970, League considered filing suit on account of Vanice's apparent self-dealing with VPCI, but ultimately

withheld suit because "there wasn't a lot of gravy on the table to be litigated."

Upon conclusion of the trial on the issue of the statute of limitations, the trial court held that six causes of action, that is, all except the cause of action based on the Misle sale, were barred by the statute of limitations contained in § 25-207(4), which provides: "The following actions can only be brought within four years: . . . (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud . . . ."

At a subsequent hearing on League's first cause of action (Misle sale), Vanice testified he had explained to League that VPCI's debts would be satisfied from the purchase price paid by Misles and that Misles were not assuming any of VPCI's liabilities in connection with the sale of VPCI's capital stock.

On May 29, 1979, League met with Vanice and the Misles at League's home in Overland Park, Kansas. At this meeting Vanice explained and demonstrated to League, with the aid of notes on a "yellow sheet of paper," that there were certain debts to be paid from the gross proceeds of sale but that, after such deductions, the net purchase price for VPCI stock would be more than $1 million. League testified about that May 29 meeting:

> [Vanice] had a yellow sheet of paper similar to what you have there and he showed at the top of it two million something that he was to get for the stock and I actually thought at the time it included the land and buildings. That's how much I knew about what was going on, that the whole deal was a two million something dollar deal. Then he started deducting from that figure certain items and he came down finally with the figure that showed — I don't remember what it was now. I wasn't paying too much attention to it.

Abram Misle testified that Misles were not assuming any of VPCI's liabilities and that VPCI's debts had to be paid from the sale proceeds at the time of closing.

A contract for the sale of VPCI, which outlined the representations Vanice made to League at the May 29 meeting, was signed by the parties on June 29, 1979. An addendum dated

October 5, 1979, relating to payment and transfer of stock was agreed to by the parties. In a telephone conference with Vanice on January 3, 1980, League agreed to a second addendum to the June 29, 1979, agreement, that is, a provision for the deduction of certain corporate debts to be deducted and paid from the sale proceeds, including $186,000 as the "[f]ull and complete amount of any and all setoffs, claims, charge-backs, etc., by Buyer against Sellers . . . ." The parties stipulated that the following were VPCI's debts paid or deducted in determining the net amount payable to League and Vanice at the closing on January 4, 1980, namely $375,000 to Kaer P. Vanice; $396,008 to Atlas; $12,000 to National Bank of Commerce; and $259,084 to General Motors Acceptance Corporation. Additionally, the parties stipulated that VPCI paid premiums on policies of life insurance on Vanice's life and that such insurance policies had a net value of $24,090.37. (We are unable to reconcile the figures stipulated by the parties with the amounts distributed in conjunction with the sale of capital stock to Misles. However, mathematical reconciliation of figures used by the parties is not necessary to dispose of the questions on appeal.)

The district court found there was no damage to League, because there was no showing that Misles would have completed the sale if VPCI's debts were not satisfied. The district court denied League an accounting and dismissed League's petition.

For his assignments of error League contends the district court erred: (1) In ruling the six causes of action founded on Vanice's concealment of transactions were barred by the statute of limitations; (2) In admitting evidence of communications between League and his attorney, because admission of such evidence violates the lawyer-client privilege protected by Rule 503 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-503 (Reissue 1979)); (3) In dismissing the first cause of action based on the sale of VPCI stock to Misles, when League failed to show an agreed-to sale price which would have been paid by Misles without a deduction for VPCI's debts; and (4) In denying League an accounting.

Inasmuch as everyone—trial court and counsel—apparently

proceeded on the theory that six of the questioned transactions, causes of action two through seven, involved concealment of a breach of fiduciary duty owed by a corporate officer to a shareholder of the corporation, and, further, on appeal the parties have devoted a substantial part of their briefs and argument to the question whether League has avoided § 25-207(4), the statute of limitations concerning an action for fraud, we will dispose of League's appeal accordingly.

In our review of the district court's judgment on the issue of the statute of limitations, the finding and decision of the district court, unless clearly wrong, will not be set aside.

"If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute." *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 355, 343 N.W.2d 753, 754 (1984). Therefore, in order to avoid the fatal consequence of his knowledge of facts comprising a cause of action for fiduciary concealment or fraud, League pleaded his lack of knowledge about some of the transactions questioned in his lawsuit.

"*Conceal* means 'To hide, secrete, or withhold from the knowledge of others. To withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight. To hide or withdraw from observation, cover or keep from sight, or prevent discovery of.' " *Christopher v. Evans*, 219 Neb. 51, 55, 361 N.W.2d 193, 196 (1985).

> " 'An action for relief on the ground of fraud must be commenced within four years after the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery.' " [Citing and quoting from *Rucker v. Ward*, 131 Neb. 25, 267 N.W. 191 (1936).] . . . The requirement is that if more than 4 years have elapsed since the alleged fraud the victim of it must allege and prove facts as to the failure to discover it which entitles him to maintain an action by virtue of the fraud, notwithstanding the lapse of time, and he must allege and establish diligence in this regard.

Abels v. Bennett, 158 Neb. 699, 705-06, 64 N.W.2d 481, 485

(1954).

Discovery, as used in reference to a statute of limitations, means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer. See *Sacchi v. Blodig*, 215 Neb. 817, 341 N.W.2d 326 (1983).

> "Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. This, in effect, means that notice of facts which would lead an ordinarily prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts."

Baxter v. National Mtg. Loan Co., 128 Neb. 537, 558, 259 N.W. 630, 640 (1935).

A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense. See *Van Burg v. Van Engen*, 76 Neb. 816, 107 N.W. 1006 (1906).

The record is replete with facts negating concealment of Vanice's transactions questioned by League or demonstrating that League either had discovered those transactions or was placed on notice of facts relating to such events. For approximately 15 years League had the dual capacity of director and shareholder of VPCI. As director or shareholder, League was given or had access to information about the questioned transactions. Perhaps 11 years before he commenced the action against Vanice, League weighed filing suit against Vanice but decided to forego seeking any redress because "there wasn't a lot of gravy on the table." League's notion in 1970 that a lawsuit against Vanice would produce a pittance as a recovery is no excuse for League's deferment in filing until 1981. In his sixth cause of action, League failed to allege facts constituting an excuse tolling the statute of limitations as a bar to his claim. See *S.I.D. No. 145 v. Nye, supra*. Therefore, the district court was correct in ruling that the sixth cause of action was barred by the statute of limitations. Further, League has not shown that the district court is clearly wrong in its decision that Vanice had satisfied the burden of proof regarding the statute of limitations as a bar to the second,

third, fifth, and seventh causes of action.

Appellate surgery is required on League's fourth cause of action, which alleges VPCI paid excessive compensation to Vanice "in the years 1977, 1978 and 1979." We infer that Vanice received the subject compensation in each of the years mentioned. League's claim based on excessive compensation was not asserted until April 22, 1983, when League filed his third amended petition. The excessive compensation claim pertaining to 1977 and 1978 succumbs to the same infirm pleading suffered by the sixth cause of action—failure to allege facts constituting an excuse tolling operation and bar of the statute of limitations. See *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d 753 (1984). The district court correctly dismissed League's fourth cause of action insofar as related to 1977 and 1978.

We empathize with the district court in the blitzkrieg of exhibits (69, including several multipage documents) and experience a sensation of deja vu. In *Rosnick v. Marks*, 218 Neb. 499, 501, 357 N.W.2d 186, 188 (1984), another statute of limitations case, we expressed our puzzlement that "in framing the issues by pleadings, apparently neither party believed it necessary to include the date" on which the subject transaction occurred, and stated: "Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute."

Here, we again are puzzled at the same deficiency in the pleadings as existed in *Rosnick v. Marks, supra*. The record and 105 pages of briefs by the parties do not supply the precise date in 1979 when VPCI paid Vanice the alleged excessive compensation. As stated in *Streight v. First Trust Co.*, 133 Neb. 340, 354, 275 N.W. 278, 285 (1937): "[W]here the facts incorporated into a petition by way of amendment constitute a cause of action separate and independent from that stated in the original petition, the statute of limitations against the cause of action pleaded in the amendment runs until the filing of such amended petition." In view of the allegations in League's fourth cause of action, if the questioned payment occurred on April

21, 1979, or earlier, an action based on such payment is barred unless there is an excuse tolling the statute of limitations. On the other hand, if the questioned payment(s) occurred on or after April 22, 1979, League has filed his action within the time prescribed for commencement of the action as alleged. Therefore, the cause of action involving 1979 may or may not be barred by the statute of limitations. The decision of the district court in holding that the statute of limitations barred League's claim pertaining to 1979 is not supported by the record and is, therefore, clearly wrong. We remand the fourth cause of action, based on the 1979 payment(s) only, to the district court for further proceedings.

Next, we address League's contention that admitting evidence from his attorney violated the lawyer-client privilege contained in Rule 503 of the Nebraska Evidence Rules. Did League waive the lawyer-client privilege?

Fairness is an important and fundamental consideration in assessing the issue of whether there has been a waiver of the lawyer-client privilege. See *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926 (N.D. Cal. 1976). In determining whether there has been a waiver of the lawyer-client privilege, the court in *Connell v. Bernstein-Macaulay, Inc.*, 407 F. Supp. 420, 422-23 (S.D.N.Y. 1976), stated:

> "All of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party. The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. Thus, where these three conditions exist, a court should find that the party asserting a privilege has

impliedly waived it through his own affirmative conduct." (Citing and quoting from *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975).)

"The [lawyer-client] privilege exists only to aid in the administration of justice, and when it is shown that the interests of the administration of justice can only be frustrated by the exercise of the privilege, the trial judge may require that the communication be disclosed." *Cohen, et vir v. Jenkintown Cab Co., et al.*, 238 Pa. Super. 456, 464, 357 A.2d 689, 693-94 (1976).

Several of League's claims were ostensively barred by the statute of limitations which protected Vanice from stale claims. To avoid the protection given Vanice by the statute of limitations, League alleged Vanice's concealment of the questioned events or transactions. When he alleged concealment, League injected his knowledge, or lack of knowledge, into the litigation as a crucial issue relevant to disposition of the claims based on an alleged breach of fiduciary duty by Vanice as an officer of VPCI. League is not permitted to thrust his lack of knowledge into the litigation as a foundation or condition necessary to sustain his claim against Vanice while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted against Vanice. Such tactic or situation would repudiate the sword-shield maxim suggested in *Cerny v. Paxton & Gallagher Co.*, 83 Neb. 88, 92, 119 N.W. 14, 16 (1908), *overruled on other grounds, Caster v. Moeller*, 176 Neb. 446, 126 N.W.2d 485 (1964) ("Any other rule would enable the client to use as a sword the protection which is awarded him as a shield.").

Recently, in *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985), we held that a mother's petition requesting child custody as a result of a dissolution proceeding waives the physician-patient privilege conferred by Rule 504 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-504 (Reissue 1979)). As a logical analogy drawn from *Clark*, our conclusion is that League, by pleading facts necessary to sustain his causes of action against Vanice, waived the lawyer-client privilege

concerning those communications bearing upon League's knowledge of events or transactions relevant to his claims against Vanice. Any other holding would be a triumph of form over substance and would lead down a legal cul-de-sac during a quest for truth through judicial proceedings. We find no abuse of discretion by the trial court in admitting communications to League from his attorney. Cf. *Clark v. Clark, supra* (waiver of physician-patient privilege).

League contends Vanice violated an agent's fiduciary duty by deducting corporate liabilities in arriving at the amount to be paid to League and Vanice as a result of their sale to Misles. The record substantiates that Misles purchased VPCI's capital stock on the basis that VPCI was a debt-free corporation and that Misles would not have paid the same price for capital stock of VPCI burdened with debt.

"It is the duty of an agent of limited authority to adhere faithfully to the instructions of his principal, and if he exceeds, violates, or neglects them, and loss results to his principal as a natural and ordinary consequence, he is liable therefor." *Winchell v. National Bank of Commerce Trust & Sav. Assn.*, 181 Neb. 870, 872-73, 152 N.W.2d 2, 5 (1967).

Assuming Vanice's violation of League's instruction in the Misle sale, League failed to offer any evidence that Misles would have purchased VPCI capital stock at a price greater than the price actually paid to League and Vanice or that Misles would have paid the same price for the capital stock of an indebted VPCI. The district court was correct in its determination that no loss or damage had been sustained by League.

Finally, League contends he was entitled to an accounting regarding the sale of stock to Misles. In a simplified statement, the rule is: No cause of action proved, no accounting granted.

Except that part of the district court's judgment disposing of League's fourth cause of action pertaining to 1979, the judgment of the district court is affirmed. However, we reverse that part of the district court's judgment concerning League's fourth cause of action pertaining to 1979 and remand this matter to the district court for further proceedings.

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

JOHN LEE JAMES AND EDNA DELORIS JAMES, AS PARENTS AND NEXT FRIENDS OF GREGORY DUWAYNE JAMES, AND AS INDIVIDUALS, APPELLANTS, V. JOHN MILTON LIEB AND WATTS TRUCKING SERVICE, INC., APPELLEES.

375 N.W.2d 109

Filed October 25, 1985. No. 84-254.

1. **Mental Distress: Negligence: Liability.** In a case of bystander recovery for negligent infliction of emotional distress, recovery based on the reasonable foreseeability of the harm is a more logical and just method of determining liability than the "zone of danger" rule.
2. _____: _____: _____. The factors to be considered in determining liability for negligent infliction of emotional distress are not intended to be fixed guidelines but, rather, are factors to be taken into account by the court in assessing the degree of foreseeability of emotional injury to the plaintiff.
3. **Mental Distress: Negligence.** In an action for negligent infliction of emotional distress, negligence must be measured against the particular set of facts and circumstances present in each case.
4. _____: _____. In an action for negligent infliction of emotional distress, the relationship between the plaintiff and victim is the most crucial in determining foreseeability.
5. **Mental Distress: Negligence: Proof.** Relationship within a certain degree of consanguinity is not required to prove a sufficient relationship for recovery in an action for negligent infliction of emotional distress.
6. _____: _____: _____. A marital or intimate familial relationship will be required for recovery in an action for negligent infliction of emotional distress. Extended family members will usually have a heavy burden proving a sufficiently close bond to allow recovery.
7. _____: _____: _____. If a plaintiff in a negligent infliction of emotional distress case experiences actual sensory perception of the accident, the requirement of proximity will be satisfied.
8. **Mental Distress: Negligence: Liability.** The determination of liability sustained in a case of negligent infliction of emotional distress depends on a number of factors, including where, when, and how the injury to the victim entered into the consciousness of the plaintiff.
9. **Mental Distress: Negligence.** In a case of negligent infliction of emotional distress, the emotional trauma must result from either death or serious injury to the victim.
10. _____: _____. In order to recover in a case of negligent infliction of emotional distress, the plaintiff need not necessarily evidence some concurrent physical injury resulting from the emotional trauma. While concurrent physical injury is highly persuasive, it is not necessary given the current state of medical science and advances in psychology.

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

David J. Cullan of Cullan, Cullan & Morrison, for appellants.

Daniel P. Chesire and Stuart M. Paulson of Kennedy, Holland, DeLacy & Svoboda, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal in a negligence action from an order of the district court for Douglas County sustaining the defendants' demurrer to plaintiffs' petition for failure to state a cause of action.

The following facts were alleged in the petition. On August 10, 1983, plaintiffs' son, Gregory Duwayne James, and their daughter, Demetria, were riding their bicycles north on 50th Street in Omaha, Nebraska. A garbage truck owned by the defendant Watts Trucking Service, Inc., and driven by its employee, John Milton Lieb, was backing west on Spaulding Street. The truck backed into the intersection of 50th and Spaulding Streets, through a stop sign, and hit and ran over Demetria, killing her. Gregory helplessly watched the entire incident. As a result of witnessing his sister's peril, Gregory became physically ill and suffered, and will continue to suffer, mental anguish and emotional distress.

In ruling on a demurrer we are obligated to accept the plaintiffs' well-pleaded facts, as distinguished from conclusions, as true. *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984).

The defendants demurred, contending that since plaintiffs' petition failed to allege that Gregory was within the "zone of danger" or in fear for his own safety, no cause of action for emotional distress had been asserted under Nebraska law. Based upon our prior holding in *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981), the trial court dismissed the petition. To the extent that *Fournell* is in conflict

with this opinion, it is expressly overruled, and we therefore reverse and remand this cause for further proceedings in accordance with this opinion.

In *Fournell* a young woman and her husband brought suit against a pest control company, alleging negligence concerning a termite inspection of the couple's home. The evidence showed that she had suffered mental and emotional disturbances as a result of discovering termite infestation and damage to her home. The majority in that case held that, under Nebraska law, to state a claim for negligent infliction of emotional distress or trauma, a plaintiff must first show that some type of *physical* injury resulted from the emotional trauma and, secondly, that he or she was within the " 'zone of danger or actually put in fear for his [or her] own safety.' " *Fournell, supra* at 687, 305 N.W.2d at 607. See *Owens v. Childrens Memorial Hospital, Omaha, Nebraska*, 347 F. Supp. 663 (D. Neb. 1972). The majority found Mrs. Fournell's petition failing in both regards, claiming damages solely for mental and emotional distress, and affirmed the district court's order of summary judgment for the defendant. Two members of this court joined in dissent. In their opinion mental injury alone should have been compensable, but at the very least the facts of the case showed that plaintiff had suffered a bodily injury from the emotional disturbances as required by Restatement (Second) of Torts § 436 A (1965), adopted by the majority.

Fournell concerned potential recovery by an alleged "direct victim" of the defendant's negligence. The issue of first impression presented to us in this case is whether and under what circumstances a bystander may recover for negligent infliction of emotional distress. The term "bystander" throughout this opinion refers to those persons who are not immediately threatened with physical injury nor placed in fear for their own safety by the defendant's negligence.

Under the "zone of danger" rule followed by this court in *Fournell*, other jurisdictions have allowed bystanders to recover for emotional distress only if they (1) were within a physical "zone of danger," (2) feared for their own safety, and (3) suffered physically manifested mental or physical injuries as a result of this fear. See, *Tobin v. Grossman*, 24 N.Y.2d 609, 249

N.E.2d 419, 301 N.Y.S.2d 554 (1969); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935). However, other "zone of danger" jurisdictions have allowed bystanders to recover damages for "fear for the safety of another," so long as the plaintiff was also at personal risk. See, *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979); *Bowman v. Williams*, 164 Md. 397, 165 A. 182 (1933). The latter view is in accordance with Restatement (Second) of Torts § 436 (1965), which would allow recovery when a family member is within the zone of danger but his or her emotional distress arises from fear for another's safety.

The reasoning behind this exception to the general rule denying recovery for the emotional distress arising from the fear for another is that once the defendant is found to have breached an original duty owing to the plaintiff, he should not be relieved of liability for the resulting unexpected or unusual bodily harm to the plaintiff. The Restatement, *supra* § 436, comment *f.*; Prosser and Keeton on the Law of Torts, *Limited Duty* § 54 (5th ed. 1984).

The "zone of danger" rule in general has been defended as a more rational means of determining liability than the "impact" rule which it replaced and which was abandoned by this court in *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674 (1937). The "zone of danger" rule supposedly provided the internal consistency lacking in its precursor. The "impact" rule denied damages for emotional distress unless the plaintiff also suffered a contemporaneous physical impact: an event logically unrelated to interest sought to be protected—fear for one's own safety. See, generally, Annot., 64 A.L.R.2d 100 (1959).

Advocates of the "zone of danger" rule also argue that it provides workable, reasonable limits to the liability of a potential defendant. *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980). "Under the zone-of-danger rule the courts and juries can objectively determine whether plaintiffs were within the zone of danger. Furthermore, plaintiffs can be cross-examined regarding whether their fear was for themselves or for another." *Stadler, supra* at 554. The "zone of danger" rule is currently followed by several jurisdictions. See, generally, Winter, *A Tort in Transition: Negligent Infliction of Mental Distress*, 70 A.B.A. J. 62 (1984).

However, in 1968 the California Supreme Court became the first jurisdiction to abolish the "zone of danger" rule and allow a bystander to recover for negligently inflicted emotional distress in its now landmark decision of *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). Since that time, a growing number of jurisdictions have taken another look at this tort and have either adopted or modified the *Dillon* approach and allowed bystander recovery for negligent infliction of emotional distress. See, *Versland v. Caron Transport*, ____ Mont. ____, 671 P.2d 583 (1983); *Apache Ready Mix Co., Inc. v. Creed*, 653 S.W.2d 79 (Tex. App. 1983); *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433 (Me. 1982); *Entex, Inc. v. McGuire*, 414 So. 2d 437 (Miss. 1982); *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979); *Dziokonski v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978); *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975); *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974); *Toms v McConnell*, 45 Mich. App. 647, 207 N.W.2d 140 (1973); *D'Amicol v. Alvarez Shipping Co.*, 31 Conn. Supp. 164, 326 A.2d 129 (1973).

In *Dillon* the plaintiffs, a mother and daughter, both witnessed an accident in which another daughter was struck and killed by a negligent driver. Arguably, the sister of the victim was within the zone of danger; her mother was not. In the view of the California Supreme Court, the facts of *Dillon* illustrated the fallacy of the "zone of danger" rule, which would deny recovery to one plaintiff, the mother, and allow recovery to the daughter. In the court's view, relief for the trauma equally suffered by both plaintiffs upon the apprehension of the child's death should not be based on the happenstance of a few yards. *Dillon, supra.*

At the outset of its discussion the *Dillon* court recognized that any claim for bystander recovery must necessarily be based on the defendant's adjudicated liability and fault for the injury or death of the victim. Without such fault there is no

"foundation for the tortfeasor's duty of due care to third parties who, as a consequence of such negligence, sustain emotional trauma." *Dillon, supra* at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76.

In analyzing the issue the court noted that normally

> the simple facts of plaintiff's complaint would establish a cause of action: the complaint alleges that defendant drove his car (1) negligently, as a (2) proximate result of which plaintiff suffered (3) physical injury. Proof of these facts to a jury leads to recovery in damages; indeed, such a showing represents a classic example of the type of accident with which the law of negligence has been designed to deal.

Dillon, supra at 733-34, 441 P.2d at 916, 69 Cal. Rptr. at 76.

It has been similarly stated that

> [i]n Nebraska, a determination of "proximate cause" consists of three elements: (1) negligence without which injury would not have occurred, (2) injury which is the natural and probable consequence of the negligence and (3) the absence of an efficient, intervening cause breaking the causal connection between the injury and the acts or omissions of negligence.

Petznick v. United States, 575 F. Supp. 698, 709 (D. Neb. 1983).

Quoting from Prosser, the *Dillon* court continued, stating:

> The assertion that liability must nevertheless be denied because defendant bears no "duty" to plaintiff "begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . . It [duty] is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . But it should be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, Law of Torts, *supra*, at pp. 332-333.)

Dillon v. Legg, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968).

The interest worthy of legal protection presented by bystander cases such as the one before us was best described by

the New Jersey Supreme Court when it adopted *Dillon*:

> [T]he interest assertedly injured is more than a general interest in emotional tranquility. It is the profound and abiding sentiment of parental love. The knowledge that loved ones are safe and whole is the deepest wellspring of emotional welfare. Against that reassuring background, the flashes of anxiety and disappointment that mar our lives take on safer hues. No loss is greater than the loss of a loved one, and no tragedy is more wrenching than the helpless apprehension of the death or serious injury of one whose very existence is a precious treasure.

Portee v. Jaffee, 84 N.J. 88, 97, 417 A.2d 521, 526 (1980). We find the profound and abiding love for one's sibling to be no less significant.

In its analysis the *Dillon* court reversed its position on the concept of a limited duty precluding liability to a plaintiff outside the zone of physical danger. According to the court, "the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case." *Dillon, supra* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. The court acknowledged, though, that

> [i]n order to limit the otherwise potentially infinite liability which would follow every negligent act, the law of torts holds defendant amenable only for injuries to others which to defendant at the time were reasonably foreseeable.
>
> In the absence of "overriding policy considerations . . . foreseeability of risk [is] of . . . primary importance in establishing the element of duty."

Dillon, supra at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.

While recognizing that "no immutable rule" could establish the defendant's duty for every future case, the court suggested the following "guidelines" as aids in resolution of bystander claims:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and

> contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

Dillon, supra at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

We note that the facts of the instant case squarely fit within these guidelines. While these guidelines have also been called arbitrary, see Prosser and Keeton on the Law of Torts, *Limited Duty* § 54 (5th ed. 1984), we believe the *Dillon* approach based upon the reasonable foreseeability of the harm to be a more logical and just method of determining a defendant's liability than the artificial boundaries of recovery drawn by the "zone of danger" rule.

Subsequent California cases have applied these guidelines with varying degrees of strictness. See, *Krouse v. Graham*, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977) (court noted that direct emotional impact from sensory and contemporaneous observance did not require plaintiff to actually see the accident); *Archibald v. Braverman*, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969) (plaintiff mother allowed to recover when she *immediately* arrived on the scene *after* the injury); *Jansen v. Children's Hospital Medical Center*, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973) (interpreting *Archibald* as allowing recovery because mother heard explosion and experienced a contemporaneous sensory perception). But see, *Ebarb v. Woodbridge Park Ass'n, Inc.*, 164 Cal. App. 3d 781, 210 Cal. Rptr. 751 (1985); *Parsons v. Superior Court for Cty. of Monterey*, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978); *Arauz v. Gerhardt*, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977) (mother denied recovery for arriving at scene after the accident occurred).

Generally, commentators believe, based upon recent cases, that California courts will require strict adherence to and will mechanically apply the *Dillon* guidelines in bystander recovery cases. See, e.g., Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 Hastings L.J. 477 (1984); Comment, *Negligent Infliction of Emotional Distress: A Proposal for a*

Recognized Tort Action, 67 Marq. L. Rev. 557 (1984).

Our review of the *Dillon* line of cases leads us to the same conclusion the Ohio Supreme Court reached: "These factors were not intended to be fixed guidelines with which an aggrieved plaintiff-bystander was required to satisfy in order to recover; rather, the factors were to be taken into account by courts in assessing the degree of foreseeability of emotional injury to the plaintiff." *Paugh v. Hanks*, 6 Ohio St. 3d 72, 76, 451 N.E.2d 759, 764 (1983). In an action for negligent infliction of emotional distress, as in any negligence action, "[n]egligence must be measured against the particular set of facts and circumstances present in each case." *McGinn v. City of Omaha*, 217 Neb. 579, 585, 352 N.W.2d 545, 549 (1984). Accord *Haught v. Maceluch*, 681 F.2d 291 (5th Cir. 1982).

We adopt the foreseeability approach of *Dillon*, with the following comments and modifications.

First, of the three *Dillon* factors the relationship between the plaintiff and victim is the most valuable in determining foreseeability, and therefore the most crucial. *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980); *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975). As the Rhode Island Supreme Court stated, "Personal relationship may link people together more tightly, if less tangibly, than any mere physical and chronological proximity." *D'Ambra, supra* at 656-57, 338 A.2d at 531. Furthermore, medical authorities are generally in agreement that a mere bystander who has no significant relationship with the victim will not suffer the profound, systematic mental and emotional reaction likely to befall a close relative as a result of witnessing or learning of the victim's death. See, Diamond, *supra*; Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. Fam. L. 163 (1977).

To satisfy this factor we choose not to require a relationship within a certain degree of consanguinity, as the Iowa Supreme Court did. *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981). Rather, we will require that there be a marital or intimate familial relationship between the plaintiff and the victim.

This particular facet of *Dillon* was sharply criticized by the court in *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d

419, 422, 301 N.Y.S.2d 554, 558 (1969):

> But foreseeability, once recognized, is not so easily limited. Relatives, other than the mother, such as fathers or grandparents, or even other caretakers, equally sensitive and as easily harmed, may be just as foreseeably affected. Hence, foreseeability would, in short order, extend logically to caretakers other than the mother, and ultimately to affected bystanders.

We believe this fear is unfounded. For if we require, as Professor Leibson suggests, "evidence of a close relationship between the plaintiff and the victim, one in which there was a strong bond between the two, it will be apparent that, in most cases involving relatives other than immediate family members, the evidence will not be sufficient to establish such a relationship." Leibson, *supra* at 198. The explanation for this insufficiency, according to Leibson, lies in the nature of our modern families. Today the extended family often has limited involvement in day-to-day activities of other family members and relatives and, therefore, would not typically possess the strong bond necessary to meet the test.

Our holding would not eliminate aunts, uncles, and grandparents from the class of potential plaintiffs, but would place upon them a heavier burden of proving a significant attachment.

Second, we address the factor that plaintiff's shock result from a "sensory and contemporaneous observance of the accident." No other aspect of the *Dillon* decision has drawn more attention than this factor. We agree with the observation of the Montana Supreme Court that if a "plaintiff is required to experience actual sensory perception of the accident, the requirement of proximity is necessarily satisfied." *Versland v. Caron Transport*, ____ Mont. ____, ____, 671 P.2d 583, 586 (1983). It has been suggested that the requirements of physical proximity and "contemporaneous observation" impugn the integrity of the *Dillon* approach and that *Dillon* has merely replaced the arbitrary spatial boundary of the "zone of danger" rule with an arbitrary temporal boundary. See Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 Hastings

L.J. 477 (1984).

It is true in cases such as the one before us that the contemporaneous observation guideline would serve to assure the minds of a jury that the emotional injury is serious. However, if a sufficiently close relationship exists, the psychological reaction of the plaintiff in many cases could be the same or perhaps worse upon the hearing of the loss. See Leibson, *supra*.

Rather, this guideline is, in effect, a policy consideration concerning the extent of the defendant's liability. As one court has stated, "Without such perception, the threat of emotional injury is lessened and the justification for liability is fatally weakened. The law of negligence, while it redresses suffering wrongfully caused by others, must not itself inflict undue harm by imposing an unreasonably excessive measure of liability." *Portee v. Jaffee*, 84 N.J. 88, 99, 417 A.2d 521, 527 (1980).

We believe that the Massachusetts Supreme Court has a better perspective on this criterion. The determination of liability for the injury sustained "depends on a number of factors, such as where, when, and how the injury, to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship . . . ." *Dziokonski v. Babineau*, 375 Mass. 555, 568, 380 N.E.2d 1295, 1302 (1978).

> A plaintiff who rushes onto the accident scene and finds a loved one injured has no greater entitlement to compensation for that shock than a plaintiff who rushes instead to the hospital. So long as the shock follows closely on the heels of the accident, the two types of injury are equally foreseeable.

Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 518, 413 N.E.2d 690, 697 (1980).

In addition to proving a sufficiently close relationship, we hold that the emotional trauma, the foreseeable harm to be redressed, must result from either death or serious injury to the victim. While minor injuries to a loved one may trigger emotions of sorrow and anxiety, these emotions pale in comparison to the profound grief, fright, and shock experienced following an accidental death or serious injury.

See, *Portee v. Jaffee, supra*; *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983).

Before concluding, we must also address the further requirement of a cause of action for emotional distress in *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981), that plaintiff must evidence some concurrent physical injury resulting from the emotional trauma. Other courts adopting the *Dillon* approach, to a certain degree, have retained this feature of the "zone of danger" rule. See, e.g., *Ramirez v. Armstrong, supra*; *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979). We now reject this requirement for many of the reasons stated in the Chief Justice's dissent in *Fournell, supra* at 697, 305 N.W.2d at 611: "To . . . require that, before one who is mentally injured may recover, he must at least regurgitate once seems . . . to be imposing upon the law a requirement that makes little or no sense."

Ostensibly, the problem in this area is of proving to a jury that a reasonable person in the position of the bystander plaintiff has suffered a compensable injury. While physical manifestation of the psychological injury may be highly persuasive, such proof is not necessary given the current state of medical science and advances in psychology. There are primarily three problems with this requirement: (1) It is overinclusive, since it could possibly lead to recovery for trivial claims of mental distress accompanied by physical symptoms; (2) It is underinclusive, since serious distress is arbitrarily deemed not compensable if not accompanied by physical symptoms; and (3) It encourages extravagant pleadings and distorted testimony. See, *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433 (Me. 1982); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

In reaching our decision we are not unmindful of the several policy arguments advanced against the cause of action we have adopted. Typically, opponents of expanding liability in this area contend that (1) bystander recovery will inundate the courts with fictitious injuries and fraudulent claims; (2) courts will be

deluged with a flood of litigation; (3) bystander recovery will unduly burden defendants with undue liability; and (4) once recognized, liability cannot reasonably be restrained. Each of these arguments have been adequately reflected by other courts. See, *Sinn v. Burd, supra*; *Culbert v. Sampson's Supermarkets Inc., supra*. We add the following comments.

First, even courts opposed to recognizing this cause of action have acknowledged that the fear of fraudulent claims alone is an insufficient reason to deny all such claims. See *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). Furthermore, the "zone of danger" rule also carries with it the risk of fraudulent claims. "It is not hard to imagine plaintiffs and their attorneys falsely alleging that the claimant was in some small way injured by the defendant's negligence, or was within the zone of danger in order to present a valid cause of action." Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. Fam. L. 163, 174 (1977). Also, it is not unlikely that under a "zone of danger" rule plaintiffs would carefully draft pleadings so as to vaguely present a factual question that the plaintiff was also in peril. Leibson, *supra*.

Second, taking California as an example, experience shows that its courts have not been overwhelmed with litigation in this area. See *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983).

Third, the "dollars and cents" argument that society cannot afford the costs that will ensue from recognizing liability for the demonstrable injury of emotional distress naturally resulting from defendant's negligent act has been aptly dispelled. See *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975). The possibility of increased insurance costs alone should not deny recovery for an otherwise valid claim.

Finally, we are not delayed by the specter that recognizing a cause of action for bystander recovery will naturally entail liability to every acquaintance of the victim. As we have emphasized, the class of bystanders limited to those with a marital or intimate familial status will sufficiently circumscribe the defendant's liability.

In summary, we hold that a plaintiff bystander has a cause of

action for negligently inflicted foreseeable emotional distress upon a showing of marital or intimate familial relationship with a victim who was seriously injured or killed as a result of the proven negligence of a defendant. We thus find error in the district court's order sustaining the defendants' demurrer.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., concurring.

I am in complete agreement with the majority in this case. I write separately because I believe that our decision in the instant case has not only moved us from the "zone of danger" rule to a modified "foreseeability" rule in cases of this nature but also stands for the proposition that from this point forward one in Nebraska may recover for emotional distress proximately caused by the defendant's negligence even if no physical injury is sustained.

CAPORALE, J., dissenting.

I dissent. In the past, Nebraskans were required to bear the cost of compensating one's physically manifested fear for his or her own safety. *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981). Now, Nebraskans are required to bear the more onerous cost of compensating one's psychic pain over the injury of another.

Contrary to the view of the majority, the "dollars and cents" argument has not been dispelled, at least not for me. The harsh reality is that there are societal costs to compensating for accidents; the greater the number of elements of damage, the greater are those costs. See G. Calabresi, The Costs of Accidents, A Legal and Economic Analysis 22, 23, 26, 27, 215-25 (1977). I find nothing in the record before us, or the majority opinion, which deals with those arguments other than the bald assertion that they have been "aptly dispelled." The case to which the majority opinion cites as supporting that statement, *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975), does nothing of the sort. The *D'Ambra* opinion makes it quite clear that, in the judgment of that court, the economic policy issues were "no bar to an extension of potential liability." *Id.* at 654, 338 A.2d at 530. That approach, I respectfully suggest, dispels nothing; the costs are still there.

Of course, Nebraska's earlier "zone of danger" rule was arbitrary, but the "bystander recovery" rule is no less so. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477 (1982). The "zone of danger" rule at least had the virtue of being susceptible to more objective proof.

That observation leads to another concern. The dispersive nature of the majority opinion, and the Chief Justice's concurring opinion, leaves me with no clear notion of what the majority envisions the limits of the rule to be. I recognize that the opinion must be read in the context of the facts pled in this case, but I respectfully suggest that the matter would have been left in a less confusing state if the majority opinion had limited itself to a consideration of those facts.

I would have affirmed the district court's order of dismissal.

BOSLAUGH and HASTINGS, JJ., join in this dissent.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. BILLY BRUCE AND BETTY BRUCE, APPELLANTS.

375 N.W.2d 118

Filed October 25, 1985. No. 84-503.

1. **Rules of the Supreme Court: Appeal and Error.** Failure to comply with Neb. Ct. R. 16A (rev. 1983) requiring that a copy of the brief assigning the unconstitutionality of a statute be served upon the Attorney General in those cases in which he is not already a party is fatal to a consideration of the issue by the Nebraska Supreme Court.
2. **Ordinances: Presumptions: Constitutional Law.** An ordinance is presumed to be constitutional, and its unconstitutionality must be clearly established.
3. **Ordinances: Zoning: Presumptions.** In the absence of clear and satisfactory evidence to the contrary, a zoning ordinance is presumed to be valid.
4. **Ordinances: Zoning.** Zoning ordinances should be given a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.

5. _____: _____. Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.
6. **Statutes.** A legislative act will not be permitted to operate retroactively where it invalidates or impairs contractual obligations or interferes with vested rights.
7. **Ordinances: Zoning.** Generally, a zoning ordinance will not be applied immediately to a use which the ordinance renders nonconforming.
8. **Ordinances.** Ordinances which limit and plan for the elimination of nonconforming uses generally are enforceable.
9. **Courts: Municipal Corporations: Ordinances: Presumptions.** Courts are required to presume that a legislative body, in enacting ordinances, acted within its authority, and the burden rests on those who challenge their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to public safety, health, morals, or general welfare.

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

Dana M. London, for appellants.

John C. McQuinn, Assistant Lincoln City Attorney, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Defendants, Billy and Betty Bruce, husband and wife, appeal from a mandatory injunction requiring that they remove a mobile home from their property. The Bruces assert two assignments of error. Firstly, the district court erred in ruling that the subject section of the Lincoln Municipal Code does not deprive them of equal protection of the law under the federal and state Constitutions. The argument they actually make with respect to the claimed unconstitutionality of the municipal code, as contrasted to an enabling statute, however, is that the relevant code provision is vague and therefore deprives them of due process. Secondly, the district court erred in ruling that the use made of the mobile home is not an accessory one customarily incident to the permitted uses of the subject property. We find both assignments to be without merit and, accordingly, affirm the decree of the district court.

In the interest of completeness we note that this is the second time that the propriety of maintaining a mobile home on the Bruces' property is before this court. The first appearance, *State v. Bruce*, 213 Neb. 661, 330 N.W.2d 752 (1983), presented a related, but different, legal issue.

The City of Lincoln instituted this action to obtain a mandatory injunction commanding the Bruces to remove a mobile home from their property. The city alleges a violation, among others, of Lincoln Mun. Code § 27.07.050 (1979). That section of the code states: "Accessory uses permitted in the AG agriculture district are accessory buildings and uses customarily incident to any of the permitted uses in the district." Lincoln Mun. Code § 27.07.020 (1979) permits buildings for certain specified agricultural uses and further provides that a "building or premises" within the AG agriculture district "shall be permitted to be used for . . . [s]ingle-family dwellings."

The Bruces own the subject property which is zoned AG agriculture and is located in Lancaster County. Although this parcel of land, consisting of approximately 5 acres, is not located within the Lincoln city limits, it is within the city's 3-mile zoning jurisdiction granted by Neb. Rev. Stat. § 15-902 (Reissue 1983).

The Bruces bought their property in 1955, at which time a mobile home was situated on the premises. That or another mobile home was kept on the property periodically from the time of purchase through May of 1969. No mobile home was on the property thereafter until January of 1973, when a mobile home was again placed thereon. This mobile home has been occupied since 1979 by various parties other than the Bruces themselves. At the time of trial the Bruces' 26- or 27-year-old daughter resided in the mobile home, which is attached to utilities. The Bruces themselves live in a single-family home also located on the property.

After January 1, 1978, and prior to May 8, 1979, the property was located in an A-1 single-family zoning district, which permitted single-family dwellings and accessory uses incidental thereto. After May 8, 1979, and prior to March 29, 1982, the area within which the property is located was zoned as R-3 residential. That zoning permitted single- and two-family

dwellings.

Several witnesses testified that the Bruces' mobile home constituted a nonconforming use of the property and that it constituted a nuisance and presented a danger to the surrounding structures and inhabitants. Mrs. Bruce testified that she and her husband lease some land adjoining their property, and it, together with their own land, is used to pasture up to five calves and three horses. She also testified that some of the land is planted in corn and alfalfa. Other witnesses testified they saw neither animals nor fences on the property.

In connection with the first issue presented by their assignments of error, the Bruces appear to contend that § 15-902 unconstitutionally deprives them of equal protection of the laws under the fourteenth amendment to the U.S. Constitution and art. I, §§ 1 and 3, of the Nebraska Constitution. Their claim is based on the fact that as nonresidents of the city of Lincoln they do not have the right to vote for the officials making land use decisions on their property.

The short answer to that contention is that the Bruces have failed to comply with Neb. Ct. R. 16A (rev. 1983) requiring that a copy of the brief assigning the unconstitutionality of a statute is to be served upon the Attorney General in those cases in which he is not already a party. That failure is fatal to a consideration of the foregoing argument by this court. *Vanarsdale v. Lincoln County*, 212 Neb. 790, 326 N.W.2d 47 (1982).

We therefore move on to a consideration of the Bruces' attack on § 27.07.050 of the Lincoln Municipal Code. As noted earlier, although the assignment of error attacks the section on the basis it deprives them of "equal protection," the argument actually presented is that the section is vague and, thus, deprives the Bruces of due process. Specifically, the Bruces contend that the term "accessory use" is not defined so as to give them notice that their conduct is impermissible.

We begin with the concept that an ordinance is presumed to be constitutional and that its unconstitutionality must be clearly established. *State v. Davison*, 213 Neb. 173, 328 N.W.2d 206 (1982). More specifically, in the absence of clear and

satisfactory evidence to the contrary, a zoning ordinance is presumed to be valid. *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984).

To expect the City of Lincoln to list in detail each use which might be incidental to a primary use is unreasonable and absurd. *City of Beatrice v. Goodenkauf*, 219 Neb. 756, 366 N.W.2d 411 (1985), establishes that zoning laws should be given a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole. Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning. In that case we held that caring for a large number of dogs did not constitute "animal husbandry" and, thus, was not an accessory use which was defined in the pertinent ordinance as something " 'normally appurtenant to the permitted uses and structures.' " *Id.* at 759, 366 N.W.2d at 413.

We conclude that § 27.07.050 is sufficiently clear and certain as to inform the Bruces what types of uses are permitted and not permitted as accessory uses. Therefore, the Bruces' contention in connection with their first assignment of error, that the relevant code section is unconstitutionally vague, is meritless.

The Bruces further contend, in connection with their second assignment of error, that in any event they did not violate § 27.07.050 by permitting the mobile home to remain on their property. Their argument in this regard is twofold.

First, they argue that when they bought the property, they acquired the right to maintain a mobile home on the land. This is presumably so because a mobile home was situated on the property at the time they bought it.

Present Lincoln Mun. Code § 27.38.010, adopted November 24, 1969, provides that an existing nonconforming use may be continued. The record is silent as to whether a similar provision existed when the Bruces purchased the property. Be that as it may, however, there was no mobile home on the Bruces'

property for a period of 3 years and 8 months, from May 1969 through January 1973. During that period of time, Lincoln Mun. Code § 27.38.030, adopted November 2, 1953, provided that the discontinuance of a nonconforming use for a period of 2 years forfeited the right to reestablish such a nonconforming use thereafter. (A similar provision is now found in Lincoln Mun. Code § 27.61.030 (1979).)

The Bruces, however, argue that a legislative act will not be permitted to operate retroactively where it invalidates or impairs contractual obligations or interferes with vested rights, citing *Dell v. City of Lincoln*, 170 Neb. 176, 102 N.W.2d 62 (1960). The thesis of the Bruces' position seems to be that since the mobile home was once permitted on the land, it must always be permitted on the land, with or without interruption. *Dell* is simply not apposite; it dealt with the reversionary interest in title to a vacated street, not whether one may forfeit the right to reestablish a discontinued nonconforming use.

Moreover, the Bruces confuse the operation of ordinances designed to eliminate nonconforming uses with the retroactive application of new restrictions on use.

Generally, a zoning ordinance will not be applied immediately to a use which the ordinance renders nonconforming. This is so because the landowner is thought to have a vested right in the continuation of the use of that land. See 1 R. Anderson, American Law of Zoning § 6.06 (2d ed. 1976). However, ordinances which limit and plan for the elimination of nonconforming uses are generally considered a proper exercise of a municipality's power. "While the mainstream of judicial decisions moves firmly toward the protection of vested rights in the use of land, neither the courts nor the legislators have lost sight of the policy considerations which prompt the limitation of nonconforming uses, and generate plans for their elimination." 1 R. Anderson, *supra* § 6.07 at 371.

Section 27.38.030 and its successor, § 27.61.030, provide for the gradual elimination of what have become nonconforming uses. They do not retroactively deprive the Bruces of a vested right. We are required to presume that a legislative body, in enacting ordinances, acted within its authority, and the burden

rests on those who challenge their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to public safety, health, morals, or general welfare. *Copple v. City of Lincoln*, 202 Neb. 152, 274 N.W.2d 520 (1979). There is nothing in the record which suggests that eliminating a nonconforming use after an interruption of 2 years or more is arbitrary, unreasonable, and without substantial relation to the public safety, health, morals, or general welfare.

As to the second part of the argument, that the presence of the mobile home on their property does not violate § 27.07.050, the Bruces argue that the evidence establishes a permitted agricultural use of the mobile home. That, however, just is not the fact. Even if we were to resolve the evidentiary conflicts relative to the use made of the land in favor of the Bruces, as we are permitted to do in this equity case, there is no evidence which relates the use of the mobile home to the agricultural uses permitted by § 27.07.050. The uncontroverted evidence is that the mobile home is used as a residence by the Bruces' adult daughter, separate and apart from the dwelling occupied by the Bruces, and does not constitute an ancillary use.

The decree of the trial court granting the City of Lincoln a mandatory injunction being correct, it is affirmed.

AFFIRMED.

MARIE A. DOBROVOLNY, APPELLEE, V. GINA C. DUNNING, DIRECTOR, NEBRASKA DEPARTMENT OF SOCIAL SERVICES, AND NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANTS.

375 N.W.2d 123

Filed October 25, 1985. No. 84-552.

1. **Public Assistance: Proof.** One seeking public assistance has the burden of proving entitlement to the benefits.
2. **Administrative Law: Right to Counsel: Proof.** If one chooses to represent

himself or herself before a tribunal, one must accept the consequences of one's own failure to properly present sufficient evidence to sustain one's burden.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with directions.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellants.

Jerom E. Janulewicz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

Gina C. Dunning, director, Nebraska Department of Social Services, and the Nebraska Department of Social Services appeal from a judgment entered by the district court for Hall County, Nebraska, which reversed a decision of the Department of Social Services which had found Marie A. Dobrovolny financially ineligible for public assistance benefits pursuant to Neb. Rev. Stat. §§ 68-1001 et seq. (Reissue 1981 & Cum. Supp. 1984). The trial court remanded the matter to the Department of Social Services for further proceedings on the ground that the finding by the Department of Social Services that Dobrovolny was financially ineligible was not supported by competent, material, and substantial evidence. We believe that the trial court was in error, and for that reason we reverse and remand with directions to affirm the finding made by the Department of Social Services.

The Legislature of the State of Nebraska has adopted a series of statutes establishing a program known as assistance to the aged, blind, or disabled. See § 68-1001 (Cum. Supp. 1984). Under the provisions of § 68-1001.01 (Reissue 1981), the Director of Social Services is authorized to promulgate rules and regulations providing for services to such persons. No issue is raised here by anyone that the regulations so promulgated by the director are in any manner unlawful or an improper delegation of legislative authority. We therefore accept the regulations as valid for purposes of this appeal. The record, sketchy as it is, indicates that Dobrovolny's eligibility, if any, is by reason of her being disabled and not because of blindness or

age. The claim made by Dobrovolny was that the Department of Social Services had failed to establish her ineligibility by competent, material, and substantial evidence.

While, as we have already indicated, the record is somewhat sketchy, what we have before us appears to indicate that on July 7, 1983, Dobrovolny applied for public assistance benefits pursuant to the program of assistance to the aged, blind, or disabled. Her request was denied on July 21, 1983, and she appealed the decision to the director of the Department of Social Services pursuant to the provisions of § 68-1016 (Cum. Supp. 1984). A hearing was held before a hearing examiner designated by the director on August 31, 1983. Dobrovolny appeared pro se. At the hearing, evidence was presented to the hearing officer indicating that on April 22, 1983, Dobrovolny, as grantor, had conveyed a parcel of real estate located in Boyd County, Nebraska, to her sister, Josephine Mahlendorf, for life, and the remainder to Dobrovolny's daughter, Donna Rae Dobrovolny. The evidence disclosed that the property had an assessed value of at least $17,630. Dobrovolny maintained that the conveyance was made because of the fact that she owed her sister $4,000 for moneys previously borrowed by the sister for Dobrovolny. She also maintained that her daughter had expended moneys over the years for Dobrovolny's benefit. In neither case, however, was there any evidence presented of the debts or any documents requiring Dobrovolny to repay the moneys loaned or advanced.

The evidence further disclosed that Dobrovolny also held title to some additional real estate in Boyd County in her name and her sister's name. This property had a value of at least $41,830. Dobrovolny maintained that she had acquired this land by inheritance, that it was her sister who actually owned the property, and that she had no real interest in it. She maintained that the property was placed in her name only to permit her to dispose of the land in the event of her sister's death.

The hearing officer found, based upon the evidence presented, that Dobrovolny had conveyed the parcel of ground valued at approximately $17,000 for the purpose of depriving herself of resources in order to qualify for public assistance and

that, further, the property which she owned a one-half interest in had a value in excess of $1,500. For those reasons the hearing examiner determined that Dobrovolny was ineligible for benefits. The decision of the hearing officer was affirmed by the director on September 12, 1983, and it was from that order that Dobrovolny appealed to the district court.

The Nebraska Public Welfare Manual § IX-3422 (rev. July 1, 1982), then in effect, provided in part: "An applicant/client need not be entirely without resources to be eligible for assistance." The standard used in making that determination for a single individual is that the individual must not have available resources in excess of $1,500. If he or she is found to have more than $1,500 in available resources, the individual is rendered ineligible for benefits. Furthermore, Nebraska Public Welfare Manual § IX-3536 (rev. Apr. 1, 1981), then in effect, provided: "The potential sales value of all real property, other than the allowed exemption for the home, shall be determined and considered in computing the amount of the applicant's total available resources." And, finally, Nebraska Public Welfare Manual § IX-3320 (rev. Apr. 1, 1981), then in effect, provided in part: "An applicant or client of AABD who deprives himself/herself of resources for the purpose of qualifying for assistance thereby becomes ineligible."

The argument of Dobrovolny is to the effect that the trial court was correct in remanding the matter to the hearing officer for further proceedings due to the hearing officer's failure to fully and fairly develop the record and failure to apprise Dobrovolny of her possible need for legal counsel. Apparently, it is Dobrovolny's position that because she elected to appear pro se, the hearing officer not only had a duty to make a complete record for review but also had a duty to make an independent investigation of the case to see if, in some manner, it could not be determined that Dobrovolny was eligible, and because of the officer's failure to do so, the matter must be remanded for a further hearing, at which time Dobrovolny may hire a lawyer to try and make a case. We do not believe that that position can be sustained.

In the first instance, when Dobrovolny was notified of the hearing, she was advised: "You or your representative are

encouraged to submit pertinent information relating to your appeal. On the basis of the hearing record, the State Director of Public Welfare will make a prompt decision in writing, which will be sent to you." It was Dobrovolny who was appealing, and not the hearing officer. As the party appealing, the burden was upon Dobrovolny to show the director, or in this case the director's designee, why the decision denying her benefits was in error. The cases seem to be without conflict that one seeking public assistance has the burden of proving entitlement to the benefits. *Keating v. Secretary of Health, Ed. and Welf. of U.S.*, 468 F.2d 788 (10th Cir. 1972); *McCarthy v. Burkholder*, 448 F. Supp. 41 (D. Kan. 1978); *Cummins v. State Dept. of Public Health & Welfare*, 481 S.W.2d 639 (Mo. App. 1972); *Ind. Dept. Public Welfare v. Anderson*, 171 Ind. App. 375, 357 N.E.2d 267 (1976).

Dobrovolny does not seem to quarrel with the position that she had the burden to prove she was eligible for benefits. As we have noted, however, she seems to believe that the hearing officer had some duty to make an independent investigation in order to find facts to support her position. She cites no Nebraska authority to support that position, but cites us to authority from other jurisdictions to the effect that a hearing officer has the affirmative obligation to probe, inquire, and explore the relevant factors to attempt to draw out the potential strength of the applicant's contention. See, *Hicks v. Mathews*, 424 F. Supp. 8 (D. Md. 1976); *Little v. Department of Health, etc., Social Sec. Admin.*, 173 F. Supp. 276 (S.D. Miss. 1959); *Schlabach v. Secretary of Health, Ed. & Welfare*, 469 F. Supp. 304 (N.D. Ind. 1978). Drawing out relevant factors is not the same as looking for evidence not known to the applicant.

The difficulty with all of this is that, with regard to the property conveyed, there is nothing missing in this record. The evidence is clear that Dobrovolny conveyed property to her sister for life, remainder to her daughter, for, at the most, $4,000 which the sister had borrowed for her at an earlier time. No probing in the world could possibly change that fact. There was no evidence that Dobrovolny was obligated to repay other moneys given to her by either her sister or her daughter, if in fact such moneys were given.

We know of no rule of law which authorizes the district court to continue remanding a proceeding for further hearings until the hearing officer has sufficiently assisted an applicant in proving eligibility for benefits. When one examines the transcript made before the hearing officer, it is clear that the hearing officer gave Dobrovolny every opportunity to present any evidence in support of her position, even after the hearing was closed. If there was evidence available to support her position, she was made aware of the need to produce that evidence and failed to do so. If one chooses to represent himself or herself before a tribunal, one must accept the consequences of one's own failure to properly present sufficient evidence to sustain one's burden. See, *State v. Wyman*, 215 Neb. 537, 339 N.W.2d 756 (1983); *State v. Brashear*, 201 Neb. 582, 270 N.W.2d 924 (1978).

The finding of the Director of Social Services with regard to the property conveyed by Dobrovolny was correct and should have been affirmed by the district court. In view of the fact that such a finding would render Dobrovolny ineligible for benefits regardless of the facts connected with the property owned with her sister, we need not examine that matter at this time. For that reason the judgment of the district court is reversed and the cause remanded with instructions to affirm the finding made by the Director of Social Services.

REVERSED AND REMANDED WITH DIRECTIONS.

PETER T. SUZUKI AND CAROL J. SUZUKI, APPELLANTS, V. ROGER R. HOLTHAUS AND ROBERT H. PETERSEN, APPELLEES.

375 N.W.2d 126

Filed October 25, 1985. No. 84-644.

1. **Actions: Attorneys at Law: Limitations of Actions: Damages: Time.** Any action to recover damages based on alleged professional negligence shall be commenced within 2 years next after the alleged act or omission providing the basis for such action.
2. _____: _____: _____: _____: _____. A cause of action for damages for

professional negligence accrues at the time of the act or omission causing the injury.

3. **Limitations of Actions.** A statute of limitations may begin to run at some time before the full extent of damages is sustained.

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

Thomas A. Gleason of Dolan, Davis & Gleason, for appellants.

Michael J. Mooney of McCormack, Cooney, Mooney, Hillman & Pirtle, for appellee Petersen.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

This is an action for malpractice brought by the plaintiffs, Peter T. Suzuki and Carol J. Suzuki, against Roger R. Holthaus and Robert H. Petersen as defendants. The action was originally filed only against Holthaus. The second amended petition, filed December 18, 1981, added Petersen as a defendant. Petersen's amended answer, filed May 17, 1983, alleged that the action was barred by Neb. Rev. Stat. § 25-222 (Reissue 1979).

The defendants moved for a separate trial as to the issue of the statute of limitations, and, after a trial to the court, the trial court found that the action was barred as to Petersen but not as to Holthaus. The plaintiffs' motion for new trial was overruled and they have appealed. The only issue before the court on this appeal is whether the action was barred as to Petersen.

The action arises out of litigation concerning a real estate contract. In late 1977 the plaintiffs entered into a contract for the purchase of a home located in Elkhorn, Nebraska. The Suzukis were dissatisfied with the property and brought an action against the sellers and the realty company for breach of contract (the underlying action). Petersen agreed to represent the plaintiffs on February 3, 1978, and entered his appearance in the underlying suit on February 27, 1978.

Late in 1978 the Suzukis met another attorney, Roger Holthaus. On January 6, 1979, they retained Holthaus to act as

cocounsel with Petersen in the pending contract action. At that time the realty company, one of the defendants in the underlying action, had filed a motion for summary judgment which was set for hearing on February 27, 1979.

The plaintiffs claim that prior to the hearing on the motion for summary judgment, both attorneys continually reassured them that the motion was without merit, that it was merely a delaying tactic, and that it would be denied by the court. Holthaus attended the hearing on the summary judgment motion and notified the plaintiffs on February 28, 1979, that the court had granted summary judgment in favor of the realty company.

The plaintiffs claim that both attorneys then advised them that the court's decision on the motion for summary judgment was clearly wrong but that the only way to overturn the decision would be to file an appeal and that an appeal would take over a year to process. They authorized the appeal, and Holthaus filed a motion for a new trial on March 7, 1979. Soon thereafter, the plaintiffs decided to continue the appeal pro se and asked both attorneys to withdraw. Petersen was granted leave to withdraw on March 23, 1979. Holthaus was granted leave to withdraw on March 30, 1979.

The motion for a new trial was denied and an appeal was taken to this court. On December 29, 1980, the summary judgment was affirmed. *Suzuki v. Gateway Realty*, 207 Neb. 562, 299 N.W.2d 762 (1980).

On March 11, 1981, the suit against Holthaus alleging professional negligence was filed. On December 18, 1981, a second amended petition was filed, adding Petersen. Both defendants, in amended answers, alleged the action was barred by the statute of limitations. The statute of limitations issue was tried to the court separately on April 16, 1984. The trial court found that the plaintiffs' cause of action accrued on or before February 28, 1979, and was barred as to Petersen because he had not been joined as a defendant until December 1981. It is from the decision concerning Petersen and a denial of their motion for new trial that the plaintiffs have appealed.

Section 25-222 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 . . . .

Plaintiffs argue that an appeal defers commencement of the statute of limitations because "[u]p until that point any injury that might have occurred is, at best, speculative, and, at worst, capable of being undone or remedied by a successful appeal." Brief for Appellants at 18-19. Plaintiffs also argue that they could not have discovered their cause of action until final resolution of the underlying case on appeal. However, both of these contentions are contrary to our decision in *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984).

Although "the point at which a statute of limitations commences to run must be determined from the facts of each case," *Interholzinger v. Estate of Dent*, 214 Neb. 264, 270, 333 N.W.2d 895, 899 (1983), the principles set out in *Rosnick* govern the application of § 25-222 to the facts in this case and are controlling as to when the plaintiffs' cause of action against Petersen accrued.

In *Rosnick* we held that a professional negligence suit accrues, as the statute sets out, at the time of the act or omission causing injury. This is known as the "occurrence rule," in contrast to the "damage rule" under which a cause of action accrues upon actual or appreciable harm or damage. See *Rosnick v. Marks, supra*.

Nebraska's occurrence rule is tempered by the discovery provision found in § 25-222. Thus, if an act or omission which causes injury is not discovered within 2 years, a plaintiff has 1 year after discovery to file suit. This was the situation in *Rosnick*, but because the plaintiff failed to file the action within the 1-year postdiscovery time limit, the action was barred. The

facts of the present case command a similar result.

In the present case the Suzukis allege that Petersen failed to use reasonable care in the handling of the plaintiffs' claim against the realty company in the underlying action. When the summary judgment motion was granted and the plaintiffs' claim against the realty company was dismissed, any negligence by Petersen in the handling of that matter became actionable. The alleged injury to the plaintiffs had occurred, although it might be determined that their damages were the expense of reversing the judgment. Thus, all of the acts or omissions which could have caused injury occurred on or before February 28, 1979, and the plaintiffs' cause of action accrued on that date.

The plaintiffs cannot now claim that they did not discover or were unaware of the adverse judgment or Petersen's part in the handling of events leading up to that judgment. Furthermore, discovery, as set out in the statute, does not mean final resolution of the underlying case by an appellate court. Although the plaintiffs may not have "discovered" the full extent of their damages on February 28, 1979, "a statute of limitations can be triggered at some time before the full extent of damages is sustained." *Rosnick v. Marks, supra* at 505, 357 N.W.2d at 190. Non-"discovery" of all damages is not the equivalent of nondiscovery of a cause of action as set out in § 25-222.

For these reasons the judgment of the district court is affirmed.

AFFIRMED.

RICHARD SOMMERFELD AND LYNN SOMMERFELD, APPELLEES, V. CITY OF SEWARD, NEBRASKA, APPELLANT.

375 N.W.2d 129

Filed October 25, 1985. No. 84-657.

1. **Courts: Summary Judgment: Appeal and Error.** The Supreme Court is not bound by the ground purportedly used by the trial court as the basis for granting summary judgment.

2. **Courts: Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.
3. **Municipal Corporations: Ordinances: Words and Phrases.** *Ordinance* is generally used to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality.
4. _____: _____: _____. A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive matters; and does not rise to the dignity of an ordinance.
5. **Municipal Corporations: Ordinances.** Generally, an ordinance cannot be amended, repealed, or suspended by a resolution.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

Russell A. Souchek of Souchek & Kimble, for appellant.

Larry L. Brauer of Allan, Brauer & Mullally, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

The City of Seward appeals a declaratory judgment entered by the district court for Seward County in favor of Richard and Lynn Sommerfeld, namely, judgment that a resolution of the Seward City Council was unconstitutional. See Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1979). The district court also issued a mandatory injunction in favor of Sommerfelds requiring the city's issuance of a permit for a well within the city. We affirm.

Since 1981 the city has had ordinance No. 9-834, which, in pertinent part, provides:

> It shall be unlawful for any person or persons to dig, drill or construct a well within the corporate limits of the City without first having obtained a permit therefor from the City Council. The applications for private well permits shall be obtained from the office of the Building Inspector
>
> . . . .
>
> . . . .
>
> Such application shall be accompanied with an

application fee of fifty ($50.00) dollars which shall cover the inspections, no part of which is refunded if the application is denied.

The required contents of an application for a well permit are not material to our decision and, therefore, have been deleted in reference to ordinance No. 9-834.

During existence of ordinance No. 9-834, the Seward City Council on May 3, 1983, passed resolution No. 11-83 as follows:

> WHEREAS, the City of Seward, Nebraska has an inherent moral and legal responsibility to maintain a dependable and adequate municipal water system; and,
>
> WHEREAS, the City of Seward, Nebraska has had to incur $1,500,000 debt to implement improvements to the municipal water supply system; and,
>
> WHEREAS, the impact of said indebtedness has caused the City to increase water rates significantly, with future increases necessary to successfully maintain the system and finance the incurred indebtedness; and,
>
> WHEREAS, additional private wells could significantly impact the financial stability of the Municipal Water Department;
>
> NOW THEREFORE BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF SEWARD, NEBRASKA that the City of Seward, Nebraska will not allow additional private wells until such time as the Municipal Water Department's financial strength has stabilized.

On February 13, 1984, Sommerfelds, as owners of real estate within the city, filed a petition alleging the city, on the basis of resolution No. 11-83, had refused to file Sommerfelds' application for a well permit and, therefore, had denied a well permit. Sommerfelds also alleged that resolution No. 11-83 violated their constitutional rights concerning due process and equal protection and that the questioned resolution was an illegal exercise of the city's police powers. In the prayer of their petition Sommerfelds sought a declaration of the rights and duties of the parties consequent to ordinance No. 9-834 and resolution No. 11-83. Sommerfelds also sought judgment that

resolution No. 11-83 was "unconstitutional, invalid and void" and requested an injunction prohibiting the city from denying plaintiffs the well permit requested.

In its answer the city alleged that resolution No. 11-83 was "a proper, reasonable and lawful regulatory exercise of the authority granted to the defendant in the operation of its water system and water department as a utility business and as a proprietary enterprise operated by the defendant," as well as a measure "proper and necessary for the protection of the health and public safety and for the general interest and welfare of the inhabitants of the City . . . ."

Sommerfelds and the city moved for summary judgment.

An affidavit of the city administrator was presented at the hearing for summary judgment. That affidavit recited: As a result of a water shortage in 1980, the city had to construct and expand its water system to avoid future shortage. For such water project the city has incurred a current indebtedness of $1,500,000 and will require an additional $1,331,000 for bond service to pay future indebtedness regarding the water project. The affidavit continued:

> That after study and consideration, by the Mayor and City Council, it was determined that in order to better accomplish payment of current indebtedness and to stabilize anticipated receipts, secure a favorable bonding program to borrow funds required for additional expansion still needed and maintain the existing supply, distribution and storage system, it was deemed in the best interests of the City utility system not to continue the granting of further permits for private wells, for the reason that an increased number of private wells would further reduce water usage, and therefore, reduce revenue to the City of Seward Water Department . . . .

Holding that resolution No. 11-83 was unconstitutional, the district court granted summary judgment to Sommerfelds and ordered that, upon Sommerfelds' compliance with ordinance No. 9-834, the city shall issue a well permit to Sommerfelds.

The city does not complain about relief granted in the form of a mandatory injunction requiring issuance of a well permit to Sommerfelds but contends the judgment of the district court

is contrary to law and unsupported by evidence.

The record in these proceedings for summary judgment presents no genuine issue as to any material fact inasmuch as all relevant facts are undisputed. Therefore, the question is whether Sommerfelds are entitled to judgment as a matter of law. See Neb. Rev. Stat. § 25-1332 (Reissue 1979) (rendition of summary judgment). However, the Supreme Court is not bound by the ground purportedly used by the trial court as the basis for granting summary judgment. See, *Garrett v. Nissen Corporation*, 84 N.M. 16, 498 P.2d 1359 (1972); *C & H Const. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 597 P.2d 1190 (1979). Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm. See *Robeson v. State*, 285 Md. 498, 403 A.2d 1221 (1979).

It has long been a rule in Nebraska that a court, including the Supreme Court, will decline to pass upon constitutionality of legislation unless such determination of constitutionality is necessary for proper disposition of an action. See *State ex rel. Casselman v. Macken*, 194 Neb. 806, 235 N.W.2d 867 (1975). Under the circumstances of this case, we need not resolve a constitutional question for our disposition of the city's appeal.

At the crux of this case is the role or status of a municipal resolution as legislation, and, more precisely, the critical question is whether a resolution is a validly effective means to amend, suspend, or repeal an ordinance.

The term *ordinance* is generally used to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality. 5 E. McQuillin, The Law of Municipal Corporations § 15.01 (3d ed. 1981). A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive matters; and does not rise to the dignity of an ordinance. C. Rhyne, The Law of Local Government Operations § 8.1 (1980). In *Weilage v. City of Crete*, 110 Neb. 544, 548-49, 194 N.W. 437, 439 (1923), this

court stated:

> It has been several times held by this court, and is, we think, the universal doctrine, that where the statute definitely prescribes a method of action, that method must be followed. Where this is not done, if the action taken by the municipality amounts to prescribing a permanent rule of conduct which is thereafter to be observed by the inhabitants of the municipality, or by its officers in the transaction of corporate business, then the rule prescribed may be more properly expressed in the form of an ordinance; but it is entirely proper to act by resolution, if the action taken is merely declaratory of will of the corporation in a given matter, and is in the nature of a ministerial act.

In a legislative proportion, statutes are to a state as ordinances are to a municipality.

For passage of ordinances by a city of the first class, as the City of Seward, there must be compliance with specific statutory requirements; for example, a majority of all members elected to the city council must concur in passage or adoption of an ordinance; an ordinance of a general or permanent nature must be read by title on three different days unless such requirement is suspended by appropriate vote of the governing body; and "except as provided in section 19-915 [changes in zoning regulations], no ordinance or section thereof shall be revised or amended unless the new ordinance contains the entire ordinance or section as revised or amended, and the ordinance or section so amended shall be repealed . . . ." See Neb. Rev. Stat. § 16-404 (Reissue 1983). Further, all ordinances of a general nature must, within 15 days after passage, be published in a newspaper located in the city. See Neb. Rev. Stat. § 16-405 (Reissue 1983).

One desirable characteristic of local legislation, if not all legislation, should be easily accessible identification of ordinances governing conduct of those within a municipality. Cf. Neb. Rev. Stat. § 16-403 (Reissue 1983) (publication of ordinances in the form of a book or pamphlet). As expressed in *City of Tuscola v. D & B Refuse Service,* 131 Ill. App. 3d 168, 170, 475 N.E.2d 633, 634 (1985):

> It is elemental that an act of a unit of local government which purports to prescribe a rule or rules of conduct applicable to the general public must be embodied in an ordinance. It is also well established that a resolution is inadequate to accomplish that which must be done by means of an ordinance. [Citations omitted.] These doctrines are rooted in logic and human experience, for an individual seeking to determine the propriety of a contemplated course of conduct will usually look only to statutes, governmental agency administrative regulations and municipal ordinances for guidance. It would be patently absurd to expect a citizen to rummage through sheaves of resolutions or other statements of a municipal governing body in order to determine whether particular conduct is or is not condoned by that governing body.

As envisioned by §§ 16-404 and 16-405, public notice and opportunity for public participation in the local legislative process are important considerations in attributing superiority of an ordinance over a resolution. See *Inganamort v. Borough of Fort Lee*, 72 N.J. 412, 371 A.2d 34 (1977).

Thus, generally, an ordinance cannot be amended, repealed, or suspended by a resolution. C. Rhyne, *supra* § 8.7; 6 E. McQuillin, The Law of Municipal Corporations § 21.13 (3d ed. 1980). See, also, *Inganamort v. Borough of Fort Lee, supra*. As expressed in *J. D. Abrams, Inc. v. Sebastian*, 570 S.W.2d 81, 86 (Tex. Civ. App. 1978): "[I]t takes a law to repeal a law, and . . . an act which destroys should be of equal dignity with that which established the procedure . . . and . . . an ordinance may be repealed only by another ordinance and not by resolution . . . ." See, also, *Cross v. Soderbeck*, 94 Wis. 2d 331, 288 N.W.2d 779 (1980).

Although the district court found the city's legislative action to be unconstitutional, we find the pleadings sufficient to raise a question regarding the general validity of resolution No. 11-83 irrespective of any question concerning constitutionality. The record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court.

Consequently, we find that resolution No. 11-83 is not a valid

amendment, repeal, or suspension of ordinance No. 9-834 of the City of Seward. Because ordinance No. 9-834 was still in effect when Sommerfelds applied for their well permit and controlled issuance of a permit for a private well, resolution No. 11-83 does not bar issuance of a well permit.

Inasmuch as the city does not question the propriety or form of injunctive relief as a consequence of Sommerfelds' action and, further, because the issue of the relationship between an ordinance and resolution has been resolved, we affirm the judgment of the district court.

AFFIRMED.

KRIVOSHA, C.J., concurs in the result.

ORE THOMPSON, APPELLEE, V. MONFORT OF COLORADO, INC., APPELLANT.
375 N.W.2d 601

Filed October 25, 1985. No. 84-890.

1. **Workmen's Compensation: Witnesses.** As the "trier of fact," the Workmen's Compensation Court is the sole judge of the credibility of witnesses and the weight to be given to testimony. Entering into a resolution by the Workmen's Compensation Court regarding any conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses.
2. **Workmen's Compensation: Appeal and Error.** Factual determinations by the Workmen's Compensation Court will not be set aside on appeal unless such determinations are clearly wrong.
3. **Workmen's Compensation: Notice.** If an employer does not have actual notice or knowledge of an employee's injury, Neb. Rev. Stat. § 48-133 (Reissue 1984) requires written notice to the employer concerning the employee's injury to be compensated under the Workmen's Compensation Act.
4. _____: _____. Knowledge of an employee's injury, gained by the employee's foreman, supervisor, or superintendent in a representative capacity for an employer, is knowledge imputed to the employer and notice to an employer sufficient for the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 1984).
5. _____: _____. A company nurse's knowledge about an employee's injury is

imputed to the company-employer. Such imputation of knowledge to the employer equally results from a company's medical technician acquiring knowledge while providing on-the-job health service for an employee of the employer.

6. _____: _____. In place of indispensable written notice, Neb. Rev. Stat. § 48-133 (Reissue 1984) contemplates a situation where an employer has notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable and that, therefore, the employer should investigate the matter further.

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

Kenneth H. Elson, for appellant.

Scott A. Burcham of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Monfort of Colorado, Inc., appeals the award on rehearing rendered in favor of Ore Thompson by the Nebraska Workmen's Compensation Court. In addition to generally denying that Thompson had a compensable claim, Monfort specifically alleged absence of notice regarding Thompson's accident or injury. We affirm the award on rehearing.

In the fall of 1983 Thompson worked as a "head boner" for Monfort at its Grand Island plant. A head boner uses an electric knife to cut meat from the head of a slaughtered animal. Such job requires that Thompson and his coworkers stand at a boning table as animal heads pass before them and that workers sometimes carry boxes weighing up to 80 pounds. The floor beside the table was "wet or bloody and kind of greasy" and uneven, sloping toward a floor drain beneath the table. While he was hanging his boning knife on a hook shortly before lunchtime on Friday, September 16, 1983, Thompson slipped and fell to the floor near the boning table. From the other side of the table, a fellow worker saw Thompson fall from view and reappear as Thompson "pulled himself back up with the table." The coworker also observed Thompson getting up with a "painful look on his face" as he was "grabbing his back."

Before eating lunch Thompson told a plant supervisor, Gay Hansen, that "I slipped and fell and hurt myself." Hansen said he would inspect the accident site later in the day. After lunch Thompson told his immediate supervisor, the offal foreman—Cleo Dukes, about the "fall." Thompson experienced immediate pain in his lower back after the fall and during the remainder of Friday.

Thompson's back pain prevented his working Saturday, September 17, but Thompson left a message on the company's telephonic recorder ("answering machine") concerning his absence from work due to the injury. Thompson continued to experience pain on the weekend. On Monday, September 19, with Dukes' permission, Thompson saw a Grand Island physician, who wrote a note to Monfort that Thompson could not work on an "uneven surface." On September 20 Thompson delivered that note to the company "nurse" (a medical technician) at the plant. Thompson saw a second Grand Island physician and obtained another note about the uneven floor and Thompson's work. Thompson delivered this note to Monfort's general foreman, Harley Thomas. The records of neither Grand Island physician contained reference to Thompson's fall on September 16. The head of Monfort's slaughter division at Grand Island characterized Thompson as a "cry baby" and told Thompson not to return to Monfort until Thompson "got something done with [his] back and got it fixed."

Because his condition persisted, Thompson was referred to a neurosurgeon, Dr. R. Schuyler Gooding. After a November 8 myelogram of Thompson, Dr. Gooding diagnosed Thompson's condition as a disk problem and on November 10 performed surgery on Thompson, with a postoperative diagnosis of "herniated nucleus pulposus [sic] L4-5 with right sciatica." In a report rendered on December 19, Dr. Gooding stated that Thompson's back condition was "the result of a fall at Monforts [sic] of Colorado, a meat packing plant in Grand Island, which occurred while the patient was working as a 'beef cutter.' " During his testimony at the rehearing, Dr. Gooding expressed his opinion that Thompson's disk problem was "directly related to the fall" of September 16. Dr. Gooding then

testified that Thompson had sustained permanent disability at 15 percent to the body as a whole and recommended rehabilitation because Thompson should not return to "any form of employment that would require him to lift in excess of 50 pounds as a part of that employment." Thompson last saw Dr. Gooding on April 26, 1984.

At the rehearing various Monfort personnel, including the medical technician, foreman (Dukes), and general foreman (Thomas), testified that Thompson never mentioned that he had fallen on September 16, 1983. Monfort's records indicated that Thompson complained about pain attributed to standing on a sloping or uneven floor, not to pain resulting from injury in a fall on September 16. Before filing suit Thompson never gave Monfort written notice concerning his alleged fall on September 16.

In its award rendered on rehearing, the compensation court determined that Thompson had sustained personal injury as the result of the slip and fall accident on September 16, 1983, awarded compensation benefits regarding Thompson's permanent partial disability, and ordered a program of rehabilitation.

Monfort claims the Workmen's Compensation Court committed error (1) by finding that Thompson's injury was the result of a compensable accident on September 16, 1983, and (2) by not finding that Thompson failed to give written notice of injury as required by Neb. Rev. Stat. § 48-133 (Reissue 1984).

We again note that our reviewing an award of the Nebraska Workmen's Compensation Court is governed by Neb. Rev. Stat. § 48-185 (Reissue 1984), which in pertinent part 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." As the "trier of fact," the Workmen's Compensation Court is the sole judge of the credibility of witnesses and the weight to be given to testimony. Entering into a resolution by the Workmen's Compensation Court regarding any conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the

extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses. Cf. *Gregory v. Davis*, 214 Neb. 408, 334 N.W.2d 1 (1983). Factual determinations by the Workmen's Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. See, *Zaleski v. Farmland Foods*, 219 Neb. 157, 361 N.W.2d 523 (1985); *Paris v. J. A. Baldwin Mfg. Co.*, 216 Neb. 151, 342 N.W.2d 198 (1984). Regarding facts determined and findings made upon rehearing in the Workmen's Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workmen's Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workmen's Compensation Court. See *Thomas v. Kayser-Roth Corp.*, 211 Neb. 704, 320 N.W.2d 111 (1982). Moreover, in testing the sufficiency of evidence "every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can be drawn from the evidence." *Tranmer v. Mass Merchandisers*, 218 Neb. 151, 152, 352 N.W.2d 610, 611 (1984).

Monfort argues that its records and testimony from its employees conclusively negatived Thompson's evidence so that the claim has not been proved by a preponderance of evidence. To reach such conclusion the eyewitness account of Doggett and the medical opinion by Dr. Gooding would have to be disregarded entirely. Monfort has shown no plausible reason that Thompson's evidence about the accident must be completely rejected as a matter of law.

On the question of Thompson's notice regarding his accident, Monfort refers us to § 48-133, as follows:

> No proceedings for compensation for an injury under this act shall be maintained unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof . . . . The notice shall be in writing, and shall state in ordinary language the time, place, and cause of the injury. . . . A notice given under the provisions of this section shall not be held invalid or insufficient by reason of any inaccuracy in

> stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead, and the employer, or the insurance company carrying such risk, as the case may be, was in fact misled thereby. Want of such written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury.

Although the Workmen's Compensation Court neglected to express a specific finding regarding Monfort's notice of Thompson's injury of September 16, implicit in the award on rehearing is a finding that Monfort had notice of the injury in question. Monfort contends written notice only will satisfy the notice requirement of § 48-133.

If an employer does not have actual notice or knowledge of an employee's injury, § 48-133 requires written notice to the employer concerning the employee's injury to be compensated under the Workmen's Compensation Act. See, *Krajeski v. Beem*, 157 Neb. 586, 60 N.W.2d 651 (1953); *Seymour v. Journal-Star Printing Co.*, 174 Neb. 150, 116 N.W.2d 297 (1962).

Knowledge of an employee's injury, gained by the employee's foreman, supervisor, or superintendent in a representative capacity for an employer, is knowledge imputed to the employer and notice to an employer sufficient for the notice requirement of § 48-133. See, *Clary v. R. S. Proudfit Co.*, 124 Neb. 582, 247 N.W. 417 (1933); *Gilbert v. Metropolitan Utilities Dist.*, 156 Neb. 750, 57 N.W.2d 770 (1953). See, also, *O'Brien v. H & S Asphalt Co.*, 302 Minn. 295, 224 N.W.2d 510 (1974); *Jones v Douglas & Lomason*, 55 Mich. App. 323, 222 N.W.2d 229 (1974). A company nurse's knowledge about an employee's injury is, also, imputed to the company-employer. See, *Panchak v. Simmons Co.*, 15 N.J. 13, 103 A.2d 884 (1954); *Amer. Distilling Co. v. The Industrial Com.*, 40 Ill. 2d 350, 239 N.E.2d 848 (1968). Such imputation of knowledge to the employer equally results from a company's medical technician acquiring knowledge while providing on-the-job health service for an injured employee of the employer.

The last sentence of § 48-133 eliminates an absolute requirement of written notice to the employer, namely, "Want

of such written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury." In place of indispensable written notice, § 48-133 contemplates a situation where an employer has notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable and that, therefore, the employer should investigate the matter further. See 3 A. Larson, The Law of Workmen's Compensation § 78.31(a) (1983). See, also, *Skinner v. Dawson Metal Products*, 575 S.W.2d 935 (Mo. App. 1978).

In the case before us the record reflects that Monfort's personnel have denied any communication from Thompson about an accident or injury on September 16, while Thompson has testified that he told the company medical technician, his foreman (Dukes), and a plant supervisor (Hansen) about Thompson's fall and injury sustained on September 16. Consequently, the record presents a question of fact and substantiates the factual conclusion reached by the Workmen's Compensation Court—Monfort had notice or knowledge of Thompson's accident and injury as soon as practicable after occurrence. To require Thompson to give written notice to Monfort under the circumstances would require an employee with an injured back to carry coals to Newcastle. The knowledge acquired by Monfort's employees—medical technician, foreman, and supervisor—supplied Monfort with knowledge to satisfy the notice requirement of § 48-133.

Whatever Monfort suggests may be myth in Thompson's claim, the Workmen's Compensation Court has settled as fact. Monfort has not demonstrated that the Workmen's Compensation Court was clearly wrong in any factual determination affecting the award on rehearing. Therefore, the award on rehearing is affirmed in all respects. Further, Thompson is awarded an attorney fee of $1,000 for services of his attorney in this court.

AFFIRMED.

GERALD LEE WILSON, APPELLEE, V. CITY OF NORTH PLATTE, APPELLANT.

375 N.W.2d 134

Filed October 25, 1985. No. 84-919.

1. **Workmen's Compensation: Appeal and Error.** In reviewing workmen's compensation cases this court is not free to weigh the facts anew. Our standard of review accords to the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing the same force and effect as a jury verdict in a civil case, and they will not be reversed or set aside unless clearly wrong.
2. **Workmen's Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can reasonably be drawn from the evidence.

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

David W. Pederson and Frank E. Piccolo of Murphy, Pederson, Piccolo & Pederson, for appellant.

Richard A. Birch of Nielsen & Birch, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

This action was brought by appellee, Gerald Lee Wilson, to recover workmen's compensation benefits from the appellant, City of North Platte. Wilson alleged he was injured while working for the city on March 16, 1983, and filed a petition with the Nebraska Workmen's Compensation Court on July 1, 1983. An award was entered in his favor on January 25, 1984. Both Wilson and the city sought rehearing of the order of the single judge before a three-judge panel of the compensation court. Evidence adduced before the panel on rehearing showed the following.

Wilson was hired by the city in 1971. He initially worked at the city landfill, first as a cashier and later as a heavy equipment operator. He then worked on the back of a garbage truck for about a year, lifting garbage cans and dumping the contents into the truck. In early 1975 Wilson began driving a garbage truck, a

position he held for approximately 6 years. In 1979 Wilson was placed in charge of enforcing municipal safety and sanitation ordinances. He was later promoted to sanitation foreman, a position he held until fired on June 7, 1983.

On March 16, 1983, Wilson reported to work as usual. On that day it was raining, and the rain later turned into a heavy, wet snow. He inspected the sanitation trucks, prepared them for operation, and did some "paperwork." Wilson was then sent to a city park as the operator of a tractor fitted with an auger to dig postholes and place railroad ties in those holes. The auger broke, and on Wilson's return to the shop he was sent out by his supervisor to replace a man who became ill while working on a garbage truck.

At this time there was so much snow on the ground that the workers kept sliding. Around 10 a.m. that morning, Wilson picked up a 30-gallon garbage can which was about half full. As he picked up the can and turned to dump the contents into the truck, he heard a pop and felt a sharp pain in his back. His knees buckled and he dropped the can. A coworker had to come over and pick up the garbage can and dump it for him. Wilson continued to work the rest of the day, but the pain got progressively worse. The following morning Wilson claimed he had so much lower back pain that he was unable to get out of bed.

Wilson testified that as a result of his injury, he suffered from pain in his lower back and numbness in his legs and hands. He testified that the pain prevents him from being able to lift and has caused him difficulty in walking or sitting for any length of time. Wilson eventually returned to work on April 6, 1983. He was subsequently dismissed from his job on April 19, 1983, because of a medically imposed lifting restriction, and then went on leave without pay until June 7, 1983. On that date Wilson was discharged.

After rehearing, the three-judge panel affirmed the findings of the single judge that Wilson had sustained his burden of proving that on March 16, 1983, Wilson was in the employ of the city and while so employed, and on said date and while engaged in the duties of his employment, suffered injuries to his back as a result of an accident arising out of and in the course of

his employment. The three-judge panel also determined that Wilson had suffered a 10-percent permanent partial disability rating to the body as a whole and that he actually suffered a 50-percent loss of earning power, "based on the various factors set forth in Sidel vs. Travelers Insurance Co., 205 Neb. 541, 288 N.W.2d 482 (1980)." The court awarded Wilson benefits of $180 per week for 2 6/7 weeks for temporary total disability and $118.40 per week for 297 1/7 weeks based on a 50-percent loss of earning power. In addition, the city was directed to pay $350 in medical bills, $1,000 for attorney fees, and $555 in court reporter fees. The city has now appealed to this court, alleging in three assignments of error that the panel erred in failing to find that Wilson did not suffer any accident or injury arising out of and in the course of his employment; in failing to find that the physical disability of 10 percent suffered by Wilson is the result of a preexisting non-work-related trauma; and in failing to find that any disability beyond the 10-percent physical disability is the result of preexisting non-work-related psychological problems.

There is no dispute as to the law applicable in this case, but rather as to the weight to be given the evidence. The compensation court resolved the factual disputes in Wilson's favor. All of the assignments of error concern questions of fact. As such, we must keep in mind that the scope of review for a case such as this is limited. 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, further, in *Buck v. Iowa Beef Processors, Inc.*, 198 Neb. 125, 127-28, 251 N.W.2d 875, 877 (1977), we said:

> In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska 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.

With regard to the first assignment of error, the city contends the record does not contain evidence showing a specific incident of injury arising out of or in the course of employment by which Wilson suffered an injury. In support of its argument the city points out that there was conflicting testimony between Wilson and his coworkers as to what actually transpired on the day Wilson was injured.

Wilson testified that one of his coworkers, Timothy Hoban, had to help him pick up the garbage can after Wilson felt his back pop and his knees buckle. Hoban testified that he did not remember working with Wilson on March 16, 1983, that he "very seldom talk[s] to anyone while I am on a truck," and that he has no recollection of such an incident. Hoban also testified that he remembered Wilson was off work in March and April of 1983 but that he did not remember if he worked with Wilson on Wilson's last day. On cross-examination Hoban also admitted that he had worked with Wilson on a number of occasions and that he could not separate what happened on March 16, 1983, from any other day he had worked with Wilson.

There was also testimony by Fred German, Wilson's other coworker, who was driving the garbage truck on March 16, 1983. In May of 1983, approximately 2 months after Wilson's injury, German gave a statement that Wilson never said anything about hurting his back on March 16, 1983. At his deposition taken for the trial, German testified that Wilson told him on March 16 that he had hurt his back and complained that his back "was hurting him terrible."

Conflicting testimony such as this raises questions of credibility and recollection. "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." *Novotny v. Electric Hose & Rubber Co.*, 214 Neb. 216, 219, 333 N.W.2d 406, 409 (1983). We have reviewed the record, and we conclude that the Workmen's Compensation Court, sitting as the trier of fact, was not clearly wrong in believing Wilson's account as to what happened on March 16, 1983.

The city also argues that the doctors who treated Wilson for

his lower back pain were never informed by Wilson as to a specific injury causing such pain. The evidence, however, shows otherwise.

Dr. Richard Slovek, an orthopedic surgeon, testified that Wilson did not tell him of any specific injury or incident which triggered his back pain. Dr. Slovek testified Wilson only told him that his back was sore after work one day. Dr. Slovek also testified, however, that when Wilson came to see him for the first time, as part of standard medical procedure, a history was taken from Wilson. This history included a description of the lifting incident on March 16, 1983, and of the symptoms that followed.

Dr. Cleve Hartman, a general practitioner, testified he could not remember what Wilson had told him on March 17, 1983, when Wilson saw him for the first time. But Dr. Hartman testified he was aware that the back injury was work-related, both when he initially treated Wilson and on four other visits in March and April of 1983.

Having reviewed the entire testimony of Drs. Slovek and Hartman, we hold that there was sufficient evidence before the workmen's compensation panel for the panel to hold that both doctors were aware of the lifting incident on March 16, 1983. Both gave expert medical opinions as to the aggravation suffered to Wilson's back, couched in terms surrounding the March 16, 1983, lifting incident. The city's position that the doctors had no notice of this incident or that such an incident never took place is unfounded. There is sufficient evidence in the record to support the findings of the panel that on March 16, 1983, while in the performance of his duties for the city, Wilson picked up a garbage can and as a result suffered injury to his back.

In its second error the city contends that the physical disability of 10 percent suffered by Wilson is the result of preexisting non-work-related trauma. As such, the city argues that even if Wilson's injury is job related, there is no legal causal relationship between his injury and his employment and that the debilitating symptoms that Wilson suffers from are the result of a preexisting back disease which eventually would have caused Wilson's disability.

It is undisputed that prior to March 16, 1983, Wilson had a back condition known as degenerative disk disease. The city suggests that the trauma that initially caused this condition may have been an antitank mine exploding near Wilson while he was on active Army duty in Vietnam in 1967. Through the 11½ years that Wilson had worked for the city, however, he had not experienced any pain in his lower back while lifting, bending, or walking. There is nothing in the record to indicate it hindered his job performance in employment with the city. There was ample evidence before the panel to support its finding that Wilson on March 16, 1983, "while engaged in the duties of his employment . . . suffered injuries to his back as a result of an accident arising out of and in the course of his employment" with the city.

To say that the mine explosion in Vietnam was the only incident of trauma to Wilson's back prior to March 16, 1983, is simply unfounded. The types of jobs Wilson had with the city contributed to the wear and tear on his back. For nearly a year and a half, Wilson worked on the back of a garbage truck, picking up trash cans that would generally weigh between 50 and 150 pounds. He also had to scoop up and throw in the garbage truck bundles of trees, grass, and weeds. While driving the truck for nearly 5 years, he also was required to help throw garbage in the truck when his coworkers needed help, and up until 1976 had to help in lifting "ice boxes or hot water heaters" onto the truck. Even after Wilson was promoted to municipal code enforcement, he still worked on the back of a garbage truck on at least 14 occasions from 1982 through the date of his injury on March 16, 1983. The record also shows that early on the morning of March 16, 1983, prior to hurting his back, Wilson had been working in a city park placing 60- to 70-pound railroad ties. The many years of lifting while employed for the city certainly contributed to the weakening of Wilson's back.

There is no question that the presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. *Novotny v. Electric Hose & Rubber Co.*, 214 Neb. 216, 333 N.W.2d 406 (1983). This court, however, has never said what quantum of evidence is needed in addition to the usual

"preponderance of the evidence" standard which is used for claims brought under the Nebraska Workmen's Compensation Act. But in *Engel v. Nebraska Methodist Hospital*, 209 Neb. 878, 312 N.W.2d 281 (1981), this court stated in its syllabus:

> When a workmen's compensation claimant is alleged to have suffered a disability rising out of and in the course of his employment which consists of the aggravation of a preexisting condition, the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition.

The facts in *Engel* are strikingly similar to the ones in this case. Both Engel and Wilson were wounded by a bomb exploding near them while serving in Vietnam. Both suffered trauma to their backs as a result of the explosion. Both further aggravated the preexisting defect to their backs as a result of lifting incidents while in their employment. In holding for the plaintiff, Engel, the court said:

> The question simply is whether the plaintiff suffered an injury arising out of and in the course of his employment which aggravated the preexisting condition and resulted in the disability. The principle does not require the claimant to prove that the disease or condition will not sometime *in the future* through natural progression result in disability.

Id. at 883, 312 N.W.2d at 285. Wilson has carried his burden of proving that he has a compensable injury under the Nebraska Workmen's Compensation Act.

In its last assignment of error, the city alleges that any disability beyond 10 percent physical disability "is the result of preexisting non-work related psychological problems." We do not so read the panel's finding and order.

Dr. Slovek testified that the injury to Wilson resulted in a 10-percent permanent partial disability. The three-judge panel found that while Wilson had been given a 10-percent permanent partial disability rating, he had actually suffered a 50-percent loss of earning power. The city alleges that any disability beyond the 10-percent physical disability is the result of preexisting non-work-related psychological problems.

Wilson was diagnosed in 1982 as having a psychological disorder known as posttraumatic stress syndrome. This problem was linked to his experiences while in Vietnam. It is the city's contention that a significant portion of Wilson's disability, specifically his inability to obtain other work, is attributable to his psychological problems. The city argues that it should not compensate Wilson for a problem that he suffered while outside his employment with the city.

In its award the three-judge panel stated "that the plaintiff has actually suffered a substantial loss of earning power, based on the various factors set forth in Sidel vs. Travelers Insurance Co., 205 Neb. 541, 288 N.W.2d 482 (1980)." In determining the loss of earning power to the employee in *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 547, 288 N.W.2d 482, 485-86 (1980), this court stated:

> [T]he Workmen's Compensation Court was entitled to take into consideration not only the 10 percent loss of bodily function because of the lumbar laminectomy, but also the facts that the plaintiff was engaged in common labor and that that was his primary skill. His ability to lift was impaired and his employability was thus reduced.

In this case the Workmen's Compensation Court entered its award in favor of Wilson based on physical disability and other relevant factors, but not his psychological problems. Similar to the employee in *Sidel*, Wilson's educational background is very limited, as shown by the record. He has no formal education beyond high school, where he was in special education training. He has a little difficulty in reading and writing.

Additionally, Wilson's employment history consisted mostly of manual labor. As a result of the lifting incident on March 16, 1983, Wilson injured his back, impaired his ability to lift, and thus reduced his employability. Given the facts in this case, we cannot say, as a matter of law, that the compensation court was clearly wrong in finding Wilson suffered a 50-percent loss in earning power. The city's contention that the amount of the award is significantly based on Wilson's psychological problems is mere speculation. A finding of 50 percent loss in earning power was well within the discretion of the compensation court.

In view of the limitations imposed upon this court regarding the review of the decisions made by a three-judge panel of the Nebraska Workmen's Compensation Court, we believe the evidence was sufficient to support the award entered by the court on November 6, 1984. The judgment of the compensation court is affirmed, and Wilson is allowed the sum of $1,000 for the services of his attorney in this court.

AFFIRMED.

WILLIAM A. SCAGGS, APPELLEE, V. ROBERT D. MILLER, SHERIFF OF YORK COUNTY, APPELLANT.

375 N.W.2d 140

Filed October 25, 1985. No. 84-947.

Extradition and Detainer: Habeas Corpus. Once the Governor has granted extradition, a court considering release on habeas corpus can do no more than decide (1) whether the extradition documents on their face are in order; (2) whether the petitioner has been charged with a crime in the demanding state; (3) whether the petitioner is the person named in the request for extradition; and (4) whether the petitioner is a fugitive.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and remanded with direction.

Vincent Valentino, York County Attorney, and Charles W. Campbell, for appellant.

Toney J. Redman, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Robert D. Miller, as respondent and sheriff of York County, appeals the decision of the York County District Court granting petitioner, William A. Scaggs, a writ of habeas corpus and quashing a Governor's arrest and extradition warrant issued on June 25, 1984, and filed with the York County Court. We reverse and remand with direction.

On January 31, 1981, Scaggs was indicted by a grand jury in Ross County, Ohio, for the offense of aggravated arson. The indictment was filed and arrest warrant issued on March 13, 1981. In connection with the Ohio warrant, Scaggs was arrested on June 2, 1981, in Durham, North Carolina, but released on bond pending extradition proceedings. On July 28 the Governor of Ohio executed a request for interstate rendition. The Governor of North Carolina issued a Governor's warrant of arrest and extradition on September 11 and promptly informed Ohio concerning the North Carolina warrant. Ohio, without explanation, failed to respond, and, on February 8, 1982, a North Carolina district court dismissed the North Carolina warrant.

After dismissal of the North Carolina warrant, Scaggs left a forwarding address and moved under his own identity from North Carolina to Nebraska. On June 14, 1984, the Governor of Ohio executed a second request for interstate rendition based upon the January 31, 1981, indictment. On June 25 the Governor of the State of Nebraska issued a Governor's arrest and extradition warrant which was then filed in the York County Court. Scaggs filed an application for writ of habeas corpus on August 13.

At an evidentiary hearing on his application, Scaggs was allowed to testify concerning Ohio's failure to transport him from North Carolina pursuant to the arrest and extradition warrant issued in North Carolina. In addition, the district court admitted as evidence numerous papers identified by Scaggs' counsel as the record of the North Carolina proceedings. Miller objected to Scaggs' evidence on grounds of relevancy, but the district court overruled Miller's objections, finding that Scaggs' evidence was relevant to the issue of due process. In granting Scaggs' application and quashing the extradition warrant, the court stated that "[b]y its actions of dilatory, unexplained delay, the State of Ohio has breached the petitioner's Constitutional right of due process and fundamental fairness and has waived jurisdiction of the petitioner."

Miller contends that the district court erred in admitting Scaggs' testimony concerning Ohio's failure to transport him from North Carolina and in ruling that the State of Ohio had

waived jurisdiction over Scaggs. Miller maintains that the district court's order granting Scaggs' application for writ of habeas corpus violates the constitutional right of the State of Ohio to extradite Scaggs pursuant to article IV, § 2, of the U.S. Constitution.

The scope of a habeas corpus action challenging an extradition warrant issued under article IV, § 2, of the U.S. Constitution is controlled by the U.S. Supreme Court's holding in *Michigan v. Doran*, 439 U.S. 282, 289, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978):

> Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

We have consistently adhered to *Doran* in habeas corpus actions wherein the petitioner has claimed that the demanding state has violated his constitutional rights. In *West v. Janing*, 202 Neb. 141, 274 N.W.2d 161 (1979), we declined to consider a petitioner's claim that the state demanding extradition had violated the petitioner's right to a speedy trial, holding that *Doran* "makes it clear that the court of the asylum state has no authority under the Constitution of the United States to determine such issues." *Id.* at 143, 274 N.W.2d at 162. In *Singleton and Anthony v. Adams*, 207 Neb. 293, 298 N.W.2d 369 (1980), we rejected the petitioner's contention that the Governor's warrants and supporting documents did not establish probable cause, stating that "[g]enerally, a claim by a petitioner that the demanding state has violated his constitutional right is a matter to be determined by the courts of the demanding state." *Id.* at 295, 298 N.W.2d at 370. Prior to *Doran*, we held in *Wise v. State*, 197 Neb. 831, 834-35, 251 N.W.2d 373, 376 (1977), that "[e]xtradition proceedings and habeas corpus review thereof should not be used as a vehicle to challenge acts undertaken by a sister state to enforce its criminal laws."

It is unclear upon what authority the district court admitted

Scaggs' evidence regarding conduct of the North Carolina proceedings. Likewise, it is unclear on what basis the district court determined that Ohio's delay in extraditing Scaggs from North Carolina violated Scaggs' constitutional right of due process or effected a waiver of Ohio's jurisdiction over Scaggs as a result of the extradition proceedings in North Carolina.

In *State ex rel. Partin v. Jensen*, 203 Neb. 441, 447, 279 N.W.2d 120, 123 (1979), regarding conduct of an extradition proceeding, we stated that "[m]odern notions of due process and fundamental fairness demand that a citizen should not arbitrarily be denied bail solely because there is no statute specifically authorizing the granting of bail." In *State ex rel. Partin v. Jensen, supra*, we did not, however, mean to imply that some general notion of due process could be used by a petitioner as a defense in an extradition proceedings, but, in fact, referred to *Michigan v. Doran, supra*, and affirmed the district court's decision to quash the writ of habeas corpus.

It is true, as Scaggs maintains, that some courts have adopted a waiver of jurisdiction theory apparently applied by the district court in the case before us. See, *Shelton v. Ciccone*, 578 F.2d 1241 (8th Cir. 1978); *Shields v. Beto*, 370 F.2d 1003 (5th Cir. 1967). However, these cases involve situations wherein a state sought return of a defendant who had been previously convicted of a criminal offense, was sentenced to imprisonment in the demanding state, but had failed to serve the sentence authorized in the convicting state. Scaggs directs us to no authority applying the waiver of jurisdiction theory in the procedural context involved in the present case.

Scaggs attempts to avoid the clear import of *Michigan v. Doran, supra*, and our holdings in *Singleton and Anthony v. Adams, supra*, *State ex rel. Partin v. Jensen, supra*, and *West v. Janing, supra*, by arguing that the four-factor list created by the U.S. Supreme Court in *Doran* and adopted by this court in subsequent cases expresses only a general rule which, in a given case, can give way to the need to protect the petitioner's constitutional rights. Scaggs, however, offers no persuasive reason why we should ignore the well-established limitation on the scope of inquiry in habeas corpus review of extradition proceedings. Under the facts of this case, we refuse to adopt an

exception to the rule precluding the petitioner's raising constitutional claims during habeas corpus proceedings in the asylum state.

Accordingly, we reverse the judgment of the district court granting Scaggs' application for a writ of habeas corpus and quashing the Governor's arrest and extradition warrant. We remand these proceedings and direct the district court to dismiss Scaggs' application.

REVERSED AND REMANDED WITH DIRECTION.

IN RE INTEREST OF J.R., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. J.R., APPELLANT.
375 N.W.2d 142

Filed October 25, 1985. No. 84-963.

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

William J. Panec, for appellant.

No appearance for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

J.R., a child under 18 years of age, appeals from the district court's affirmance of the disposition order of the county court, sitting as a juvenile court, which committed him to the Youth Development Center-Kearney. J.R.'s sole assignment of error in this court is that such disposition is excessive. The error being without merit, we affirm.

J.R. was earlier adjudged to be a child within the provisions of Neb. Rev. Stat. § 43-247 (Reissue 1984), such as to give the juvenile court jurisdiction over him. Although the record does not tell us under what subdivision of § 43-247 such was done, it does tell us that upon being so adjudged J.R. was placed on

probation. The record also tells us that J.R. was subsequently adjudged to have violated the terms of his probation by taking a bicycle belonging to another. There is no assignment before us claiming that the adjudication he violated the terms of his probation is erroneous.

Neb. Rev. Stat. § 43-286(4) (Reissue 1984) specifically provides that one under the jurisdiction of the juvenile court may have his probation revoked.

Sparse as the record is, it does reveal that the county judge considered that J.R. was making no progress in his efforts to complete a study program and that the judge feared J.R. would get into more trouble if he kept "on this way."

There is nothing before us from which we can determine that the district court's affirmance of the county court's disposition order is other than correct. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TAMARA HANSEN, APPELLANT.
375 N.W.2d 605

Filed October 25, 1985. No. 84-978.

1. **Criminal Law: Police Officers and Sheriffs: Search and Seizure: Motor Vehicles: Evidence.** Three requirements must be satisfied to uphold a warrantless search and seizure from an automobile under the plain view doctrine. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," i.e., he may not know in advance the location of the evidence and intend to seize it without obtaining a warrant, relying on the plain view exception only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.
2. **Criminal Law: Police Officers and Sheriffs: Search and Seizure: Evidence: Probable Cause.** In order to establish probable cause to associate property with criminal activity, all that is required is that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.

A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.

3. **Criminal Law: Search and Seizure: Motor Vehicles: Evidence: Probable Cause.** If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

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

Hal W. Anderson of Berry, Anderson, Creager & Wittstruck, for appellant.

Robert M. Spire, Attorney General, and Timothy E. Divis, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

Tamara Hansen appeals from a judgment entered by the district court for Scotts Bluff County, Nebraska, which, after trial by jury, found Hansen guilty of possession of cocaine, in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1979). This is a Class IV felony punishable by up to 5 years' imprisonment or a fine of $10,000, or both such imprisonment and fine.

Hansen assigns two errors. The first is that the district court erred in failing to suppress physical evidence unlawfully seized from her vehicle. The second is that the district court erred in failing to find that the State had not adduced sufficient evidence to establish guilt beyond a reasonable doubt. We have reviewed the record and believe that both assignments must be overruled and the judgment of conviction affirmed.

The charges against Hansen arose out of an incident occurring on September 2, 1984. Police Officers Mayo and Rezac of the Scottsbluff Police Department were working the midnight shift. At approximately 2:30 a.m., while near Lacy Park, a city park located in the city of Scottsbluff, their attention was drawn to a pickup truck located in the park with its dome light on. The park is subject to an 11 p.m. curfew, and, therefore, the officers approached the vehicle in order to determine why the vehicle was violating the 11 p.m. curfew.

After driving into the park with the squad car's lights turned off, Officer Mayo parked his police car some 10 feet to the right side and slightly to the rear of the pickup. Both Officers Mayo and Rezac alighted from the police cruiser and approached the pickup. Mayo went toward the driver's side while Rezac approached the passenger's side.

Officer Mayo testified at trial that when he got to the truck, he noticed a male and a female inside. Both occupants had open containers of beer in their laps. The officers both testified that they reached the pickup and peered through the windows. Officer Mayo said that he saw that Hansen had a brown, shiny object but could not see what she was doing with it except holding it. Officer Rezac testified that he observed that Hansen had a flat, brown item in one hand and a razor blade in the other. "[S]he was holding both of them in her hand as if she were going to be in the process of using them in the future." Rezac also testified that the passenger had in his hand a plastic bag or a small item that he was playing with.

Evidently, both officers knocked simultaneously on the window they were nearest. Mayo testified that he knocked on the window and, either as he opened the door or just before he opened the door, saw Hansen throw a shiny, brown object to the floor. The object looked like a stone one-quarter to one-half inch in thickness and approximately 2 to 3 inches in diameter. At nearly the same time, Rezac had knocked on the passenger's window and identified himself. Mayo heard Rezac order the male passenger not to put an item in his mouth. Rezac then reached through the open window to try to prevent the passenger from swallowing the packet. At this time Mayo had the driver's door open and, in order to assist his partner, jumped over Hansen toward the passenger. Mayo testified that Hansen began to strike him with her elbows and hands and her beer bottle. Hansen denies that she struck the officer. The efforts of the police officers, however, were futile because the passenger did swallow the object, a plastic or cellophane bag containing a white substance.

As Mayo got out of the vehicle, he picked up Hansen's bottle of beer and seized the brown, shiny object, along with the razor blade which he discovered on the floorboard of the driver's side

of the truck. When Officer Mayo picked the brown object and razor blade off the floor, he made a statement to Officer Rezac that the occupants were "cutting coke." Mayo then asked Hansen for identification. Hansen said that it was in her purse, which was located on the floorboard on the driver's side of the truck. Mayo then picked up the purse and opened the center portion. As he was looking in the purse for identification, he noticed a small vial in a side pocket. The vial was yellowish-brown with a black top. It contained a white powder which appeared to be a controlled substance. Mayo testified he suspected it was cocaine. At about this time Mayo read Hansen her rights and placed her under arrest. The vial was later scientifically tested and found to contain cocaine.

The appellant, Hansen, the driver of the vehicle, testified that she had gotten off work at about 2 a.m. She worked at a bar and had offered to drive a patron home. After stopping briefly at a party, she felt she had to go to the toilet, and so she and her passenger stopped at the Lacy Park restroom building for that purpose. She testified that the passenger stayed in the truck while she used the toilet facilities, and when she returned to the truck, she saw a white, shiny object on the floorboard of the passenger's side of her truck. She testified that she picked it up and looked at it. Hansen maintained at trial that she had no idea that a razor blade was anywhere in the truck. She also testified that while at the party she had left her purse in her unlocked pickup and, disclaiming all knowledge of the vial of cocaine, testified that the vial had possibly been planted in her purse.

Hansen moved, at a suppression hearing, to suppress the shiny stone, the razor blade, and the vial of cocaine. The trial court overruled the motions, and the evidence was admitted at the trial on the merits.

With regard to Hansen's second assignment of error, that the evidence was insufficient, we note that while it is assigned as error it is not discussed in her brief. It has long been a rule in this state that errors assigned but not discussed will not be considered by this court on appeal. See *Johnson v. Johnson*, 209 Neb. 317, 307 N.W.2d 783 (1981). We note, however, in passing, that an examination of the record discloses more than

sufficient evidence from which a jury could find Hansen guilty of the crime charged, beyond a reasonable doubt.

We turn, then, to the first assignment, concerning the district court's failure to suppress the evidence seized from Hansen's vehicle. In doing so we must examine the items individually.

We turn first to the razor blade and the stone. Both of these items were in plain view. It is clearly established that under appropriate circumstances a police officer may seize evidence in plain view without a warrant. See, *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), *reh'g denied* 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d 120; *Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983).

In *State v. Haselhorst*, 218 Neb. 233, 236, 353 N.W.2d 7, 10 (1984), we stated:

> Three requirements must be satisfied to uphold a warrantless search and seizure from an automobile under the plain view doctrine. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," i.e., he may not know in advance the location of the evidence and intend to seize it without obtaining a warrant, relying on the plain view exception only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. *Texas v. Brown, supra.*

The initial intrusion in this case was based upon the fact that Hansen's pickup truck was parked in a city park more than 3 hours after the curfew. The officers certainly had a right to stop the vehicle and determine why the curfew law was being violated. The first requirement is therefore satisfied.

Likewise, the evidence establishes that the second requirement is also satisfied. There is no evidence that the officers approached the vehicle knowing that there was drug paraphernalia in plain view. The discovery of the razor blade and the stone was clearly inadvertent and as a result of the officers' attempting to investigate a curfew violation.

And, as to the final requirement, in *Texas v. Brown, supra* at 742, it was said that in order to establish probable cause to associate property with criminal activity, all that is required is that

> the facts available to the officer would "warrant a man of reasonable caution in the belief," [citation omitted] that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.

See, also, *State v. Haselhorst, supra.*

We believe the evidence satisfies that requirement. Officer Rezac saw the stone and razor blade being held by Hansen through the window. Officer Mayo saw the stone through the window and the razor blade when he dove into the pickup to assist his partner. Both officers had had some training and experience in drug and drug paraphernalia detection and were aware that it was not uncommon to "cut cocaine" with a razor blade and a stone. This, added to the fact that Hansen's passenger swallowed a small package containing white powder when asked not to do so by the officers, further supported the " 'practical, nontechnical' probability that incriminating evidence [was] involved." The court, therefore, did not commit error when it overruled Hansen's motion to suppress the razor blade and stone.

That, then, leaves us with the search of the purse and the subsequent finding of the vial of cocaine. The decision of the U.S. Supreme Court in *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), seems to answer this question and supports fully the action taken by the district court. In *Ross, supra* at 825, the U.S. Supreme Court said: "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." We have likewise adopted the *Ross* rule. In *State v. McGuire*, 218 Neb. 511, 514, 357 N.W.2d 192, 195 (1984), quoting from *Ross*, we said:

> When a legitimate search is under way, and when its

> purpose and its limits have been precisely defined, nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

See, also, *State v. Haselhorst, supra.*

Having determined that Hansen was in possession of paraphernalia commonly connected with cocaine and that her passenger had swallowed a small bag containing a white powder, Officer Mayo certainly had the requisite probable cause necessary to search Hansen's lawfully stopped vehicle. Since the object of his search was a controlled substance which could have been secreted in a small container, he was fully justified in examining the purse for drug contraband. Such a search under the facts as presented cannot be said to be unreasonable within the meaning of the fourth amendment to the U.S. Constitution. See, *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979); *United States v. McHugh*, 575 F. Supp. 111 (D.R.I. 1983); *United States v. Mendoza*, 722 F.2d 96 (5th Cir. 1983); *United States v. Steele*, 727 F.2d 580 (6th Cir. 1984); *United States v. Shepherd*, 714 F.2d 316 (4th Cir. 1983).

We believe that the district court was correct in determining that there was no fourth amendment violation of Hansen's rights and that the evidence was therefore properly admissible. On that basis the conviction must be affirmed.

AFFIRMED.

DEBRA ANN RIDDLE, APPELLEE, V. MICHAEL JOSEPH RIDDLE, APPELLANT.

375 N.W.2d 143

Filed October 25, 1985. No. 85-115.

1. **Child Custody: Modification of Decree.** In a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests of the children.
2. **Child Custody: Modification of Decree: Evidence.** In determining whether the

> custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. What we are interested in is the best interests of the child now and in the immediate future, and how the custodial parent is behaving now is therefore of greater significance than past behavior when attempting to determine the best interests of the child.

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

G. Peter Burger of Burger, Bennett & Green, P.C., for appellant.

Eric B. Eisenhart, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The marriage of the appellant, Michael Joseph Riddle (husband), and the appellee, Debra Ann Riddle (wife), was dissolved by order of the district court for Furnas County, Nebraska, on October 8, 1981. As part of its decree, the court granted the custody of the parties' minor child to the wife and granted to the husband rights of visitation.

On July 19, 1984, the husband filed a motion seeking an order changing custody of the parties' minor child from the wife to him. Trial on the matter was commenced on August 23, 1984, at which time the wife requested that the court approve the transfer of the minor child from Nebraska to Longmont, Colorado, where the wife and her current husband reside. At the close of the evidence, the court overruled the husband's motion to modify the decree and, further, sustained the wife's request to transfer the child to Longmont, Colorado. It is from this order which the husband now appeals. He assigns as error that the district court erred in (1) failing to grant him custody as requested, (2) permitting the minor child to be moved to the State of Colorado, and (3) conducting an in camera interview of the minor child outside the presence of the parties. For reasons more particularly set out herein, we affirm the judgment of the district court.

We may quickly dispose of the husband's third assignment,

regarding the in camera interview of the minor child. The bill of exceptions discloses that the interview was conducted in the presence of counsel for the parties, though the parties themselves were absent. Furthermore, all of the interview, including cross-examination by both attorneys through the use of questions submitted beforehand to the district judge, is on the record. However, we need not decide whether such an interview was proper, because in matters such as modification of a divorce decree, as in all other matters involving the dissolution of marriage, our review is de novo on the record, see, *Walton v. Walton*, 220 Neb. 625, 371 N.W.2d 292 (1985), *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985), and *Kelly v. Kelly*, 220 Neb. 441, 370 N.W.2d 161 (1985), and in this case we have simply elected to disregard the in camera interview in arriving at our conclusion. An examination of that portion of the record would disclose that, in any event, the questions asked of the 6-year-old child produced little, if any, information that would be of assistance to this court in arriving at its decision.

We turn, then, to the principal issue raised by the husband. That is, whether the trial court was in error when it refused to modify that portion of the decree which had granted custody of the minor child to the wife. In *Walton v. Walton, supra* at 626, 371 N.W.2d at 293, we recently repeated the oft-cited rule in cases of this type to the effect that " '[i]n a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests of the children.' "

In support of the husband's petition, he introduced considerable evidence, the details of which we need not here recite, concerning the behavior of the wife prior to June 9, 1983. Much of the evidence was presented by reason of a diary kept by the wife from January 1 until June 9, 1983, when the husband apparently acquired possession of the diary. Had that evidence been presented to the trial court at the time the marriage was dissolved and, in fact, had the wife's lifestyle been, at the time the decree was entered, identical with what the evidence disclosed it was between January 1 and June 9, 1983, the district court may well have been justified in granting custody of the parties' minor child to the husband. However,

the record also discloses that for more than a year before the hearing on the application to modify, the wife had substantially changed her lifestyle for the better. She had married and had, so far as the evidence disclosed, discontinued all of the activities upon which the husband relied in seeking to change the custody of their minor child.

Moreover, the record discloses that although all of this information apparently came to the husband's knowledge at the latest on or shortly after June 9, 1983, it was not until more than a year later, on July 19, 1984, that he filed his application to change custody. One is inclined to believe that the husband did not find such behavior so outrageous until it appeared to be beneficial to raise the issues, or, if he found such behavior detrimental to the child, one is hard pressed to understand why he remained silent for such a long time.

While there are no hard-and-fast rules which can be set down in cases of this nature, it appears to us that in determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. What we are interested in is the best interests of the child now and in the immediate future, and how the custodial parent is behaving now is therefore of greater significance than past behavior when attempting to determine the best interests of the child. We are not unwilling to accept the fact that people do mature and can, if motivated, change their ways.

Cases of this type are never easy to decide, and where, as here, both parents apparently love and care for their child, the decision is even more difficult. Yet, unless one is willing to submit the child to the sword of Solomon, only one of the parties can prevail. That should not, however, prevent the other from continuing to provide love and affection, free of stress and strife, to the child. In any event, we have only one of two choices—either affirm the action of the district court and leave the child with the wife or reverse the judgment of the district court and award the custody of the child to the husband. Either decision will produce some disappointment.

While we are required to make independent conclusions of

fact without reference to the conclusions reached by the trial court, we nevertheless recognize that the trial court had the opportunity to see and hear the witnesses. Furthermore, because such matters are initially entrusted to the sound discretion of the trial judge, in the absence of an abuse of the trial judge's discretion, on appeal to this court the judgment of the trial court should be affirmed. See *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). Our examination of the record de novo discloses that the district judge did not, in any manner, abuse his discretion when he refused to change the custody of the minor child.

We further believe that having once determined that the custody of the minor child should not be changed, the evidence readily supports the district judge's determination that the minor child should be permitted to reside with the wife and her present husband in Colorado, subject to her former husband's reasonable rights of visitation. No good reason exists for requiring the wife to reside in Nebraska, away from her present husband. The evidence does not disclose that this arrangement will deny to the husband reasonable rights of visitation, though, obviously, it will make them more difficult.

While the record discloses that there have been material changes of circumstances which entitled the district court to consider the best interests of the child, we conclude that the decision reached by the district judge in this regard was in all respects correct. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT J. TAYLOR, APPELLANT.

375 N.W.2d 610

Filed October 25, 1985. No. 85-166.

1. **Confessions: Miranda Rights.** An in-custody statement voluntarily made without the benefit of *Miranda* warnings is admissible if it is not the product of interrogation.
2. **Trial: Tape Recordings: Evidence: Corroboration.** Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid.
3. **Tape Recordings: Evidence.** A recording is admissible unless the unintelligible portions of the tape recording are so substantial as to render the recording as a whole untrustworthy.
4. **Corroboration.** Corroboration is sufficient if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue.
5. **Trial: Expert Witnesses.** A general foundational objection does not reach the qualifications of an expert witness.
6. **Criminal Law: Controlled Substances: Proof.** A party claiming that the sale of a controlled substance was exempt has the burden of proof that an exemption was applicable.

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

Charles W. Balsiger of Jewell, Gatz & Collins, for appellant.

Robert M. Spire, Attorney General, and Charles E. Lowe, for appellee.

KRIVOSHA, C.J., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Upon trial to a jury the defendant, Robert J. Taylor, was found guilty of delivering marijuana, sentenced to imprisonment for 3 to 5 years, and fined $2,000. He has appealed and contends the trial court erred in (1) the admission into evidence of certain incriminating statements; (2) the admission into evidence of a tape recording of the alleged drug transaction; (3) the failure to direct a verdict for the defendant on grounds that the evidence was insufficient to support a

guilty verdict; (4) the allowance of expert opinion testimony that the substance sold was marijuana; and (5) the instruction to the jury defining marijuana and the failure to instruct that the State had the burden to prove that Taylor's acts were not statutorily excepted acts.

The evidence was such that the jury could find that the defendant sold an ounce of marijuana to an undercover agent for $70 on February 24, 1984. At the time the transaction took place, the undercover agent was equipped with a radio transmitter. The conversations between the defendant and the agent were recorded by a policeman stationed near the scene.

The defendant was arrested on June 2, 1984. While being "booked" at the police station, the defendant asked a detective, Timothy Schmitz, who had "narked him off." Schmitz testified as follows concerning that conversation:

> A. Robert Taylor asked me who narked him off.
> Q. And what did you respond to that question?
> A. I said, "Robert, you know I can't tell you that."
> Q. Then what did he say?
> A. He said, "Maybe I'll find out and just waste somebody."
> Q. What did you say in response to that?
> A. I said, "That kind of talk will just get you in more trouble than you're already in."
> Q. What did he say?
> A. He said, "It can't get much worse than this."

The defendant contends that it was error to receive this testimony over objection, in the absence of proof that the defendant had been advised as to his constitutional rights. Although the defendant was in custody at the time the statements were made, he was not being questioned in regard to the crime. The booking procedure involved questioning Taylor about statistical information and physical characteristics from a form sheet but did not involve questions about the facts or circumstances of the case. It was the defendant who volunteered a question about the case.

Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), sets the constitutional requisites for the admissibility of in-custody statements:

> [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.

Miranda does not require that volunteered statements be suppressed in the absence of the warnings: "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U.S. at 478. The admissibility of an accused's statement depends upon a showing that the statement was freely and voluntarily made. *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985); *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985).

The trial court's findings on a motion to suppress will not be disturbed on appeal unless, given the totality of the circumstances, they are clearly wrong. *State v. McCarthy*, 218 Neb. 246, 353 N.W.2d 14 (1984).

Taylor was not induced or coerced into making the statements. He was not interrogated about the crime as he was being booked into jail. An in-custody statement voluntarily made without the benefit of *Miranda* warnings is admissible if it is not the product of interrogation. *State v. Parsons*, 213 Neb. 349, 328 N.W.2d 795 (1983). Detective Schmitz did not question Taylor about the crime either directly or indirectly in a manner reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). "[I]nterrogation occurs when the subject is placed under a compulsion to speak," and does not occur when a statement is made in response to a " 'neutral,' 'spontaneous' question, not designed to elicit a confession." *State v. Lamb*, 213 Neb. 498, 502, 330 N.W.2d 462, 466 (1983). The trial court did not err in admitting the statements into evidence.

Taylor's second assignment of error involves the admission of the recording of the conversation during the drug delivery. Taylor complains that the tape recording should have been

excluded due to insufficient foundation and the fact that substantial portions of the tape were inaudible.

We have held that "tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid." *State v. Loveless*, 209 Neb. 583, 589, 308 N.W.2d 842, 846 (1981).

At trial defense counsel objected on grounds that the tape was not shown to be valid or authentic and that the speakers on the tape were not properly identified. The undercover agent testified that the defendant was the person from whom he had purchased the marijuana and that the defendant was the only male spoken to during the course of the transaction. The jury heard the agent testify and also make the introduction to the tape. This would enable the jury to discern between the two male voices on the tape. The defendant's mother's voice was identifiable because of the conversation about hair dyeing. Other voices on the tape were merely incidental and did not relate to the drug transaction.

The trial court properly admitted the tape despite its less than perfect quality. Partial inaudibility or indistinctness does not require exclusion of a sound recording unless those portions are " 'so inaudible and indistinct that the jury must speculate as to what was said. . . .' " *State v. Loveless, supra* at 589, 308 N.W.2d at 846. Even then, exclusion is discretionary " 'unless the unintelligible portions of a tape recording are so substantial as to render the recording as a whole untrustworthy . . . .' " *Id.*

In *Loveless, supra* at 589, 308 N.W.2d at 846-47, the admission of a partially inaudible tape was upheld where "certain material parts were audible and were recorded by the court reporter on the playback of the tapes in the courtroom . . . ." In the present case the court reporter was able to record a substantial portion of the tape as it was played in court. Several of the statements recorded were material and corroborative in light of testimony by the cooperating individual. For example, there were statements corroborative of testimony that the defendant had only a half ounce of marijuana for sale but that he would attempt to get the other half at a place called "Papa Red's." It also contained statements corroborative of testimony

that the cooperating individual purchased the first half ounce for $35, by giving Taylor $40 with $5 change back, and that Taylor was given $35 prior to leaving the house to pick up another half ounce of marijuana. Similarly, the tape corroborates testimony that the two half ounces purchased from Taylor were combined upon his arrival back at the house. In view of the support which the recording gave to the agent's testimony, it cannot be said that the tape was so untrustworthy as to require exclusion. See *United States v. Jones*, 540 F.2d 465 (10th Cir. 1976), *cert. denied* 429 U.S. 1101, 97 S. Ct. 1125, 51 L. Ed. 2d 551 (1977). The trial court did not abuse its discretion in admitting the tape.

The defendant challenges the sufficiency of the evidence, claiming that, without the tape recording, there is only the uncorroborated testimony of the cooperating individual to prove the delivery of a controlled substance. Neb. Rev. Stat. § 28-1439.01 (Cum. Supp. 1984) provides that "[n]o conviction for an offense punishable under sections 28-401 to 28-438 shall be based solely upon the uncorroborated testimony of a cooperating individual."

Taylor was convicted under Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1979) for knowingly or intentionally delivering the controlled substance of marijuana. In addition to the undercover agent's testimony, a State Patrol investigator testified that before the agent approached Taylor he had no marijuana in his possession and that upon his return he possessed an ounce of the substance. While the investigators monitoring and surveying the scene did not visually observe the deliveries which took place inside Taylor's home, they were able to corroborate the agent's testimony about Taylor's and his own movements. There was additional support for his testimony in photographs taken by one of the investigators and in the defendant's statements to Detective Schmitz.

We have previously held that the statutory precursor identical to § 28-1439.01 "only requires that a conviction be based on something more than only a cooperating individual's testimony." *State v. Beckner*, 211 Neb. 442, 446, 318 N.W.2d 889, 892 (1982). In *Beckner* we expressly rejected an argument that then Neb. Rev. Stat. § 28-439 (Reissue 1979) required that

a cooperating individual be corroborated on every element of the crime. Instead, we held that "corroboration is sufficient if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue." *Beckner, supra* at 447, 318 N.W.2d at 893. The testimony and pictorial evidence supplied by the investigators, as well as the defendant's admissions, provided the necessary corroboration, with or without the admission of the sound recording.

A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law. *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984). Considering the undercover agent's testimony, the corroborating testimony of the three law enforcement officers who monitored and maintained surveillance of the agent and Taylor at the time of the transaction, the 26 photographs taken at or near the time of the transaction, the tape recording of the transaction, and the defendant's admissions, it cannot be said that the trial court erred in refusing to direct a verdict for the defendant.

Similarly, there is no merit to the defendant's contention that expert opinion testimony identifying the substance obtained from Taylor as marijuana was improperly admitted. A general foundational objection does not reach the qualifications of an expert witness. *State v. Bideaux*, 219 Neb. 718, 365 N.W.2d 830 (1985). In the present case, as in *Bideaux*, defense counsel made a general foundational objection at trial, and on appeal attempts to challenge the expert's qualifications as a witness. This court will not consider issues for the first time on appeal if not properly raised in the pleadings or litigated at trial. *Armstrong v. Hartford Life Ins. Co.*, 219 Neb. 128, 361 N.W.2d 511 (1985). As we stated in *Bideaux, supra* at 721, 365 N.W.2d at 832, the logic behind requiring a specific qualification objection at trial is that "both the court and opposing counsel are entitled to know that the objection goes to the qualifications of the witness as an expert rather than to the factual foundation for the opinion."

Even if the qualification issue had been properly preserved at trial, we would find no merit in the defendant's argument. The

expert who testified at trial was a forensic drug chemist. His training and background included: a bachelor of science degree in chemistry and microbiology; 8 years of experience as a forensic drug chemist, analyzing substances to determine the presence of controlled substances; 3 to 4 months of intensive training by other chemists in the State Patrol laboratory; the performance of 9,000 to 10,000 different substance analyses to test for controlled substances content; and the performance of 5,000 to 6,000 substance analyses to test for marijuana content. After presenting this background and detailed descriptions of the tests run on the substances, the witness was permitted to testify that the substance obtained from the defendant was marijuana. There was adequate foundation for the testimony.

The defendant's final assignment of error pertains to the trial court's jury instructions on the material elements of the crime and on the definition of marijuana. These claims are also without merit.

Section 28-416(1)(a) provides in part that "[e]xcept as authorized by this article, it shall be unlawful for any person knowingly or intentionally: (a) To . . . deliver . . . a controlled substance." The defendant argues that because the State has the burden to prove each essential element of the crime beyond a reasonable doubt, the jury should have been instructed that the State had to prove that his acts were not specifically excepted by the statute. The trial court correctly refused to so instruct the jury.

Neb. Rev. Stat. § 28-432(1) (Reissue 1979) of the Uniform Controlled Substances Act, Neb. Rev. Stat. §§ 28-401 et seq. (Reissue 1979 & Cum. Supp. 1984), provides:

> It shall not be necessary for the state to negate any exemption or exception set forth in this article in any complaint, information, indictment or other pleading or in any trial, hearing, or other proceeding under the provisions of this article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

In a similar situation we held that the State did not bear the burden of proof on the issue of exemptions to a charge of unlawful sales of unregistered securities. *State v. Fries*, 214

Neb. 874, 337 N.W.2d 398 (1983). The statutes applicable in *Fries* included a provision like § 28-432 which placed the burden of proving an exemption upon the person claiming it. Because there was no evidence in the record to suggest that the securities involved fell within the applicable exemptions, the trial court had properly refused to give the requested instruction.

Taylor argues that the record is devoid of evidence showing that he was not within a statutory exception. It is also devoid of any evidence to suggest that his acts *were* within an exception. The trial court correctly refused to instruct on the exceptions.

The defendant also requested that the jury be instructed as to the technical definition of marijuana found in § 28-401(14) (Cum. Supp. 1984). The court declined to do so and instead instructed that "[m]arijuana is a controlled substance under the laws of Nebraska at the time alleged in the Information." We addressed a comparable question in *State v. Ambrose*, 192 Neb. 285, 220 N.W.2d 18 (1974). In that case the defendant, convicted on controlled substances counts, complained that the court had failed to instruct that "cocaine does not include de-cocainized coca leaves or extractions which do not contain cocaine or ecogine [sic]." *Id.* at 289, 220 N.W.2d at 21. In affirming the trial court's refusal to give this instruction, we noted that the evidence at trial presented no factual issue as to whether the substances involved were anything but cocaine. We concluded that if the requested instruction had been given, the jury would have had to engage in speculation and conjecture in the absence of relevant evidence. A tendered instruction, otherwise appropriate, which either misstates the law or tends to confuse or mislead the jury should not be given by the trial court. *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980).

In the present case there was expert opinion testimony that the substance obtained was marijuana. Cross-examination of the expert did not refute the opinion, nor did the defendant present independent evidence tending to do so.

Reading the instructions as a whole, we conclude that the law was fairly presented and the jury was not misled. *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985). There was no prejudicial error.

The judgment is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

JOHN B. MAYFIELD, APPELLANT, V. KLAUS HARTMANN, M.D., SUPERINTENDENT, LINCOLN REGIONAL CENTER, APPELLEE.

375 N.W.2d 146

Filed October 25, 1985. No. 85-171.

1. **Judgments: Collateral Attack.** Where a judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is a "collateral attack."
2. _____: _____. Only a void judgment is subject to collateral attack.
3. **Jurisdiction: Judgments: Collateral Attack.** It is well settled that where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
4. **Habeas Corpus: Appeal and Error.** It has long been the rule in this jurisdiction that habeas corpus is a collateral proceeding and as such cannot be used as a substitute for an appeal or proceedings in error.
5. **Constitutional Law: Statutes: Presumptions: Judgments.** A statute is presumed to be constitutional, and a judgment entered on an unconstitutional statute is not absolutely void but is voidable only.
6. **Habeas Corpus: Appeal and Error.** The writ of habeas corpus is not a corrective remedy and is not a substitute for appeal or proceedings in error.

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

Duane L. Nelson, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

KRIVOSHA, C.J., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

John B. Mayfield filed a petition for a writ of habeas corpus in the district court for Lancaster County, Nebraska. He now appeals from an order entered by the district court sustaining a

motion to quash and dismiss filed by the State. In support of his appeal Mayfield has assigned nine alleged errors committed by the district court. For reasons more particularly set out herein, we believe that habeas corpus did not lie in this case and, for that reason, affirm the decision of the district court.

Mayfield's petition alleges that he is currently confined in the security unit at the Lincoln Regional Center and has been so confined since November 15, 1977, pursuant to orders entered by the Douglas County Board of Mental Health. He admits in his petition that prior to his present commitment, he had pled not guilty by reason of insanity to a charge of sexual assault in the first degree and was thereafter committed to the Lincoln Regional Center pursuant to the laws as they then existed. He further alleges that his detention is unlawful on a number of grounds: (1) That at the time of his initial trial for sexual assault, he was incompetent to stand trial; (2) That when he offered his plea of not guilty by reason of insanity, he did not realize and was not advised that such a defense could result in an indeterminate confinement in a mental institution; (3) That he was committed to the Lincoln Regional Center under the provisions of law which provided that future release decisions would be made by the Douglas County Board of Mental Health and not by a court, as now required by Neb. Rev. Stat. §§ 29-3703 et seq. (Cum. Supp. 1984); (4) That he is not receiving effective and adequate treatment for mental illness; and (5) That he is not now dangerously mentally ill.

We believe that we need not address the many issues raised by Mayfield, for the simple reason that even if all of the issues raised by Mayfield were valid, a matter we do not decide, he was still not entitled to relief in the form of habeas corpus. The function of a writ of habeas corpus in Nebraska is a somewhat limited matter and may not be used as a substitute for an appeal. In *Sileven v. Tesch*, 212 Neb. 880, 326 N.W.2d 850 (1982), we reviewed the function of a writ of habeas corpus. We there noted at 883, 326 N.W.2d at 852:

> "Where a judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is a 'collateral attack.' *County*

of Douglas v. Feenan, 146 Neb. 156, 18 N.W.2d 740 (1945); *State ex rel. Southeast Rural Fire P. Dist. v. Grossman*, 188 Neb. 424, 197 N.W.2d 398 (1972). Only a *void* judgment is subject to collateral attack. *Stanton v. Stanton*, 146 Neb. 71, 18 N.W.2d 654 (1945); *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276*, 204 Neb. 316, 282 N.W.2d 576 (1979)."

We went on further in *Sileven, supra* at 884, 326 N.W.2d at 852-53, to note:

> "It is well settled that where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *State ex rel. Southeast Rural Fire P. Dist., supra*. . . .
>
> "We have recognized the distinction between want of jurisdiction and error in the exercise of jurisdiction. ' "Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked." ' "

We then concluded in *Sileven, supra* at 884, 326 N.W.2d at 853, by saying: "It has long been the rule in this jurisdiction that habeas corpus is a collateral proceeding and as such cannot be used as a substitute for an appeal or proceedings in error." (Citations omitted.) To the same effect, see, *Piercy v. Parratt*, 202 Neb. 102, 273 N.W.2d 689 (1979); *Schleuter v. McCuiston*, 203 Neb. 101, 277 N.W.2d 667 (1979); *State ex rel. Casselman v. Macken*, 194 Neb. 806, 235 N.W.2d 867 (1975).

Mayfield makes no claim that the Douglas County Board of Mental Health, which initially caused him to be placed in the custody of the Lincoln Regional Center, or the district court for Douglas County, Nebraska, which has now acquired jurisdiction over his person pursuant to § 29-3703, is either now without jurisdiction or was without jurisdiction when the order was entered. He maintains that § 29-3703, as applied to him, violates his constitutional rights because the new law amended the statutory scheme regulating how and in what manner

people such as Mayfield could be released from custody. However, while he makes that claim, he has not in any manner sought to have the act declared unconstitutional, and until such action is taken the law is presumed to be constitutional.

We do not mean to imply that we are passing on the validity of § 29-3703 by anything we say here. Yet, even if it can be argued that the statute does violate some constitutional principle, it is still not subject to collateral attack. We have repeatedly held that to release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. See, *Sileven v. Tesch, supra*; *Piercy v. Parratt, supra*. As noted by this court in *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 107, 181 N.W.2d 119, 123 (1970), "A statute is presumed to be constitutional and a judgment entered on an unconstitutional statute is not absolutely void but is voidable only."

Mayfield argues that cases to that effect have all involved criminal matters and therefore have no application in a case such as the present one. While it is true that Mayfield is now being held pursuant to civil commitment growing out of a criminal action, it does not change the rules with regard to whether his confinement can be collaterally attacked by habeas corpus. We have not so limited habeas corpus and have uniformly applied the rules in both civil and criminal cases alike. In *State ex rel. Casselman v. Macken, supra*, plaintiffs sought a writ of habeas corpus to obtain the return of their son who had been placed in a foster home by order of a juvenile court, a situation not dissimilar to the instant case. In affirming the district court's denial of the writ, we said at 809, 235 N.W.2d at 869:

> A judgment or dispositive order of a juvenile court is supported by the usual presumptions of validity and regularity. The proceedings leading to a final judgment or order in the juvenile court cannot be inquired into on a collateral attack such as habeas corpus but are assailable only in a direct proceeding. A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral

attack because the judgment is only voidable and not void.

And again, in *Schleuter v. McCuiston*, 203 Neb. 101, 277 N.W.2d 667 (1979), we affirmed the action of the district court which denied a writ of habeas corpus filed when petitioner sought the release of her minor child allegedly being held unlawfully and forcibly by others. In so doing we noted at 106, 277 N.W.2d at 670: "[T]he writ of habeas corpus is not a corrective remedy and is not a substitute for appeal or proceedings in error." See, also, *Sedlacek v. Hann*, 156 Neb. 340, 56 N.W.2d 138 (1952).

Mayfield is not without remedy. There are, obviously, a host of avenues available to him to test the various matters which he now raises. It is, however, clear that habeas corpus is not one of those available remedies and therefore not an appropriate vehicle by which to raise the issues contained in his brief. For that reason alone the trial court was correct in sustaining the State's motion to quash and dismissing the petition seeking a writ of habeas corpus. The judgment of the district court is therefore affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

CHARLES M. ALDRICH, APPELLEE AND CROSS-APPELLANT, V. ASARCO, INCORPORATED, APPELLANT AND CROSS-APPELLEE.

375 N.W.2d 150

Filed October 25, 1985. No. 85-183.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the compensation court will not be set aside unless clearly wrong.
2. **Workmen's Compensation: Words and Phrases.** Earning power is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.
3. **Workmen's Compensation.** There is no numerical formula for determining earning power or the loss of earning power due to an injury.
4. _____. When a workman has reached his maximum recovery, the remaining

disability is permanent and he is no longer entitled to compensation for temporary disability.

5. _____. The compensation court may prescribe the procedure to be followed if an injured workman desires to obtain the benefit of rehabilitation services under the statute.

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

James L. Quinlan of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

Ronald L. Comes and Richard W. Ratz of McGrath, North, O'Malley & Kratz, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding under the Nebraska Workmen's Compensation Act.

The plaintiff, Charles M. Aldrich, slipped and fell, injuring his back, on February 26, 1982, while employed as a laborer by the defendant, ASARCO, Incorporated. There is no dispute that the plaintiff was injured as the result of an accident which arose out of and in the course of his employment.

After the hearing before a single judge of the compensation court, the plaintiff recovered an award for medical expenses and temporary total disability from April 3, 1984, to the date of hearing, and for so long thereafter as he remained totally disabled. Upon rehearing, the plaintiff recovered an award of compensation for temporary total disability from April 3 to November 5, 1984, and compensation for a 30-percent loss of earning power for not to exceed 269 weeks thereafter. The plaintiff was also awarded past and future medical expenses and attorney fees.

The defendant, ASARCO, Incorporated, has appealed and contends that the evidence is insufficient to support the court's award of compensation for a 30-percent loss of earning power. The plaintiff has cross-appealed and contends that the evidence was insufficient to support the finding that the plaintiff's temporary total disability had terminated.

The plaintiff had been employed by the defendant as a laborer for approximately 14 years but was terminated from employment after his injury and before any disability other than pain had occurred. At the time of the rehearing he was 39 years old, had not completed the eighth grade, could not fill out his own job application, and, in his words, could not read or write "that good."

In determining the sufficiency of the evidence to support a Workmen's Compensation Court award, the evidence must be considered in the light most favorable to the successful party. *Baumbach v. Standard Chem. Mfg. Co.*, 219 Neb. 324, 363 N.W.2d 170 (1985); *Novotny v. Electric Hose & Rubber Co.*, 214 Neb. 216, 333 N.W.2d 406 (1983). Findings of fact made by the compensation court will not be set aside unless the findings are clearly wrong, *Masters v. Iowa Beef Processors*, 220 Neb. 835, 374 N.W.2d 21 (1985); *Scott v. State*, 218 Neb. 195, 352 N.W.2d 890 (1984), or unless a contrary finding is compelled as a matter of law, *Baumbach v. Standard Chem. Mfg. Co., supra*; Neb. Rev. Stat. § 48-185 (Reissue 1984).

The defendant contends that the award of compensation for a 30-percent loss of earning power was clearly wrong because at the time of the rehearing the plaintiff's employment had been terminated. Although the record is not clear, it appears that the plaintiff was terminated for reasons other than his back injury. The defendant contends the plaintiff's earning power had been diminished by events other than his injury.

Earning power is not synonymous with wages, *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954), and the fact of termination or the reason for it is irrelevant if the plaintiff sustained a compensable injury. The fact that an employer has terminated the employment of an employee, whose ability to perform the work for which he is fitted has been restricted due to an injury arising out of and in the course of his employment, does not destroy the right of the employee to compensation for the injury. See, *Minshall v. Plains Mfg. Co.*, 215 Neb. 881, 341 N.W.2d 906 (1983); *Guerra v. Iowa Beef Processors, Inc.*, 211 Neb. 433, 318 N.W.2d 887 (1982).

Although the accident occurred on February 26, 1982, the plaintiff testified that he felt pain in his back immediately after

he fell down and that he reported the accident to Dr. Sasse, the company doctor, on the following Monday, which was his next workday after the day on which the accident happened. Dr. Sasse prescribed pain pills and muscle relaxants.

On March 6, 1982, the plaintiff consulted another physician, Dr. Margules. On April 12, 1982, he consulted Dr. Angel, his family physician, because the pain was getting worse. According to the plaintiff, Dr. Angel had some x rays made and "shot some needles" in his back.

The plaintiff continued to work, although the pain continued, being worse on some days than on other days.

On April 3, 1984, the plaintiff went to the hospital because the pain had become so bad he "couldn't hardly walk." A myelogram was performed on April 5, 1984. The plaintiff's employment was terminated on March 15, 1984.

On April 30, 1984, he was hospitalized and exploratory surgery performed. He was again hospitalized from June 24 through July 4. A laminectomy was performed on June 27. As of the date of the rehearing, Dr. Margules had not released the plaintiff to return to work and had restricted his lifting to not more than 20 pounds.

At the request of the defendant, the plaintiff was examined by Dr. O'Neil. According to Dr. O'Neil, the plaintiff had sustained a 15-percent permanent partial disability to the body as a whole as a result of the injury and operative procedures. Dr. O'Neil stated that the plaintiff could probably tolerate moderate periods of sitting and standing but should avoid work which would require stooping, lifting, bending, and other stressful activities which would further aggravate his back.

The compensation court, upon rehearing, determined the plaintiff's disability was a 30-percent loss of earning power based upon "the extent of plaintiff's physical impairment as set forth by Dr. O'Neil, the wages earned by the plaintiff at the time of injury, the work restrictions imposed on him by Dr. O'Neil, and plaintiff's limited educational background . . . ."

> "Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to

> perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.

Akins v. Happy Hour, Inc., 209 Neb. 236, 239, 306 N.W.2d 914, 916 (1981) (similarly applicable to the present statute, Neb. Rev. Stat. § 48-121(2) (Reissue 1984)). There is no numerical formula for determining earning power or the loss of earning power due to an injury.

As we view the record, it sustains the award on rehearing.

The cross-appeal centers on whether the finding that the plaintiff was no longer temporarily totally disabled was in error. The plaintiff contends (1) that there is insufficient evidence to support a finding that temporary disability has ended and he is now permanently partially disabled and (2) that he should receive compensation for total disability because he is undergoing rehabilitation.

Viewing the evidence in a light most favorable to the successful party, in this instance the defendant, the record supports the compensation award. The medical evidence supplied by Dr. O'Neil, which is the most recent, appears to be uncontradicted. According to Dr. O'Neil, "Mr. Aldrich is entitled to a fifteen percent *permanent* partial disability of the body as a whole as a result of his back injury and two subsequent operative procedures." (Emphasis supplied.) The fact that the plaintiff was not released by either Dr. O'Neil or his own physician to return to work does not compel a finding that the plaintiff has not reached his maximum recovery. When a workman has reached his maximum recovery, the remaining disability is permanent and he is no longer entitled to compensation for temporary disability. See, *Allen v. Department of Roads and Irrigation*, 149 Neb. 837, 32 N.W.2d 740 (1948); *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985).

The compensation court, on rehearing, found that the plaintiff was entitled to rehabilitation, that the plaintiff should cooperate in being tested and evaluated by his rehabilitation counselor or other expert, and that *a rehabilitation plan should be formulated.* The plan should be submitted to the defendant, and if the defendant fails to approve the plan, the plaintiff *may*

then apply to the compensation court for a further hearing limited to the issue of rehabilitation. The record now before us does not show that these requirements have been satisfied.

The compensation court may prescribe the procedure to be followed if an injured workman desires to obtain the benefit of rehabilitation services under the statute. *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976). Where such a procedure has been prescribed, the right to rehabilitation services, including the right to compensation for temporary total disability while undergoing rehabilitation, depends upon compliance with the procedure prescribed.

We conclude that the record supports the award of the Nebraska Workmen's Compensation Court on rehearing, and the judgment must be affirmed.

The plaintiff is allowed $1,000 for the services of his attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL BURKE, APPELLANT.
375 N.W.2d 153

Filed October 25, 1985. No. 85-185.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

John H. Sohl, for appellant.

Robert M. Spire, Attorney General, and Dale D. Brodkey, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Following a jury trial in the county court, defendant was convicted of a violation of Neb. Rev. Stat. § 28-806(1) (Reissue 1979), a Class II misdemeanor, and was sentenced to probation

for 2 years. His conviction was affirmed by the district court. He has appealed to this court, alleging essentially that the evidence was insufficient to sustain the judgment. We affirm.

Although the county court offered to appoint counsel to represent defendant, he refused to accept an attorney and insisted on representing himself. The court did appoint John H. Sohl as defendant's legal assistant, who attended all court proceedings. Mr. Sohl conscientiously discharged his duties as such assistant, and not only submitted a brief in this court on defendant's behalf but also appeared for argument.

We have examined the record in this case and it fully supports the findings and judgments of the county and district courts.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOANNE G. TURNER, APPELLANT.

375 N.W.2d 154

Filed October 25, 1985. No. 85-312.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded for further proceedings.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Joanne G. Turner entered her guilty plea to second degree forgery. See Neb. Rev. Stat. § 28-603 (Reissue 1979). The district court sentenced Turner to imprisonment for a term of 20 to 40 months. Turner appeals her conviction and sentence on the sole ground that the district court failed to advise Turner

that she had the right to remain silent and not testify at trial.

At Turner's arraignment on May 11, 1984, the district court failed to inform Turner that she had a constitutional right to remain silent and that a guilty plea constitutes a waiver of that right. The court, referring to a statement made by Turner while in custody of police, did inform Turner that by a guilty plea she gave up her right to "come in and try to get the judge to exclude that statement from the evidence."

The State first contends that we are precluded from reaching the merits of the appeal because Turner did not file a motion for new trial; rather, Turner timely filed her notice of appeal to this court. In *State v. Wright*, 220 Neb. 847, 374 N.W.2d 26 (1985), we confronted and rejected the same contention now presented by the State. See Neb. Rev. Stat. § 25-1912.01 (Cum. Supp. 1984) (motion for new trial unnecessary for appellate review of a trial court's ruling which appears in the record). For the reasons set forth in *State v. Wright, supra*, we proceed to consider the merits of Turner's appeal.

The State next argues that the district court, by reference to Turner's right to question admissibility of her in-custody statement, fulfilled the requirement of *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), namely, a defendant entering a guilty plea must have been informed by the court concerning the defendant's constitutional privilege against self-incrimination. Although the fifth amendment privilege against self-incrimination may, in part, provide a basis for excluding Turner's in-custody statement, a question not presented or decided in this appeal, the privilege against self-incrimination within the purview of *State v. Tweedy, supra*, is a defendant's right to remain silent and not testify at trial. See, *State v. Branch*, 220 Neb. 754, 371 N.W.2d 740 (1985); *State v. Wright, supra*. While the district court may have, as the State characterizes the situation, "broached" the subject of self-incrimination by the court's reference to possible suppression of Turner's custodial statement, mere broaching does not satisfy the mandatory and adequately explanatory admonition to be given by a trial court concerning a defendant's constitutional guarantee against self-incrimination. The record clearly shows that the district court did not inform Turner of

her right to remain silent and not testify at trial, a judicial admonition required by *State v. Wright, supra.* In the absence of a waiver of the privilege against self-incrimination, a distinct constitutional right, we cannot presume that Turner's plea was voluntarily, knowingly, and intelligently entered. See *State v. Branch, supra.*

Accordingly, the judgment is reversed, defendant's conviction and sentence are vacated, and the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JEANNE LOUISE YOUNKIN, APPELLEE, V. GARY MARTIN YOUNKIN, APPELLANT.

375 N.W.2d 894

Filed November 1, 1985. No. 84-049.

1. **Modification of Decree: Good Cause: Pretrial Motions.** Upon a motion containing an allegation of fact which, if true, constitutes good cause to set aside or modify a decree dissolving a marriage, a court must grant an evidentiary hearing on the motion to set aside or modify the dissolution decree.
2. **Divorce: Paternity: Evidence: Good Cause: Pretrial Motions.** For good cause shown, in proceedings to dissolve a marriage, where paternity of a child affected by the dissolution proceedings is an issue to be resolved, blood group testing and other information bearing upon paternity of the child are proper areas for discovery under the Nebraska Discovery Rules (rev. 1983).

Appeal from the District Court for Kearney County: BERNARD SPRAGUE, Judge. Affirmed in part, and in part reversed and remanded with direction.

Wesley C. Mues of Knapp, Mues & Beavers, for appellant.

Michael R. Snyder and Stephen G. Lowe, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

The district court for Kearney County refused to set aside or modify its decree dissolving the marriage of Jeanne and Gary Younkin. Gary appeals and contends the district court erred in refusing to set aside its decree and denying discovery directed toward determining paternity of an unborn child for whom the court ordered Gary's payment of child support. We affirm in part and in part reverse and remand with direction.

On July 4, 1980, Jeanne and Gary Younkin married. On June 14, 1982, Jeanne filed a petition for dissolution of marriage and alleged, among other things, existence of marital property and her anticipated delivery of Gary's unborn child expected in October. Trial occurred on August 19, 1982.

Jeanne testified about her employment as an accountant; her income and expenses, including probable cost of prenatal and maternity care; marital property and its value, as well as property possessed by the parties before marriage; debts; the expected birth of Gary's child on October 7; and the absence of any health and accident insurance supplying maternity coverage.

Gary did not supply any evidence pertaining to Jeanne's pregnancy or the paternity of Jeanne's unborn child. Gary's evidence, generally, related to the value of property, real and personal, affected by the dissolution proceedings and his compensation received from a farm partnership conducted with his father and brother.

Trial concluded without rendition of judgment on August 19. Nevertheless, on September 7 Jeanne and Gary separately filed a motion for new trial.

On February 4, 1983, the court signed a "Decree of Dissolution" prepared by Jeanne's attorney in reference to the hearing on August 19, 1982. The decree provided: Custody of the unborn child was granted to Jeanne; Gary was required to pay child support of $350 per month and medical expenses regarding Jeanne's pregnancy and birth of the child; and Jeanne was awarded alimony in the amount of $1,000 per month from August 19 until 2 months after the birth of the child, whereupon Gary was required to pay Jeanne "lump sum alimony" of $6,000 in monthly installments of $500.

Gary filed a motion for an order nunc pro tunc on February 28, whereby the date for rendition of the judgment would be corrected in the decree, inasmuch as the court's trial docket did not contain the date on which judgment had been rendered. On February 28 Gary also filed his first motion to vacate or modify the decree and claimed the court's property division was incorrect, the costs of Jeanne's obstetrical and maternity care were "exorbitant," and child support was excessive. Gary requested modification of the decree to award him some 144 items of personal property, described in a 7-page exhibit appended to his motion. Personal property sought by Gary ranged from firearms to fishing paraphernalia and included sundry items such as sheets of plywood, a box of hinges, two or three pints of varnish, one black dress shoe, quiche pans, two corkscrews (one wooden and one Italian metal), and a portable dog kennel.

On April 7 the court overruled "the Motion for New Trial." Presumably, that order related to the separate motions filed by Jeanne and Gary in September 1982, the only motions for new trial shown in the record to be pending at April 7.

Gary filed a second motion to vacate or modify the decree on April 19 and alleged that Jeanne had given birth to a child in September 1982; that after the child's birth, Gary had become "aware of factors which lead [Gary] to believe that he is not the father of said minor child"; and that the decree should be modified to exonerate Gary from payment of child support and medical expenses concerning Jeanne's pregnancy and the birth of her child. Also, on April 19 Gary filed a motion seeking a blood test and related tests of Jeanne and her child to determine whether Gary was the father of Jeanne's child. Pursuant to Rule 37(a)(2), Nebraska Discovery Rules (rev. 1983), on May 31 Gary filed a "Motion for Order Compelling Discovery," namely, production of Jeanne's medical records concerning her pregnancy and postnatal care, because Jeanne had failed to produce the requested documents after Gary had served a formal "Request for Production" on April 18. Jeanne had not sought a protective order authorized by Rule 26(c) of the Nebraska Discovery Rules. Gary alleged that the documents sought were relevant to the paternity issue raised in his second

motion to vacate.

At a hearing on September 1 the court sustained Gary's motion for an order nunc pro tunc and amended the decree of dissolution "to reflect the date of rendition thereof as February 4, 1983 rather than August 19, 1982." At this same hearing the court overruled Gary's motions (blood test and production of documents), and then made the following findings and order:

> [The court] shall not receive any evidence in support of respondent's Motion to Vacate or Modify Decree and respondent's Motion to Vacate and Modify, both filed herein within the six-month period from the date of rendition of this Court's Decree of February 4, 1983, *for the reason that it is the opinion of this Court that the taking of such evidence is discretionary with the Court* and that said Motions do not justify the receipt of any such evidence and should be overruled. The Court, however, upon stipulation of petitioner's counsel, hereby grants to respondent the option to submit to the Court, for the record, a general written offer of proof in support of said Motions with a copy of said offer to be served upon petitioner's attorney, provided that the evidence so offered shall not be received by the Court upon petitioner's objection to said offer, which objection petitioner hereby makes in advance, for the record, and which objection the Court hereby sustains.

(Emphasis supplied.)

After the order nunc pro tunc correcting the date judgment was rendered, Gary, in his motion filed September 12, sought a new trial on account of the court's actions in disposing of Gary's motion to vacate or modify the decree of dissolution.

On November 7, 1983, Gary filed a "Statement of Intended Proof in Support of Motion to Vacate or Modify Decree." In such statement Gary generally expressed displeasure with the court's division of property. Gary further alleged that the child was born on September 18, 1982, and that the medical expenses for Jeanne's maternity care had been estimated to be $1,350, whereas actual expenses were $6,500. Neither Gary's motion nor his statement indicates that Jeanne's pregnancy was less than full term or that any feature of the child's birth was other

than normal. Gary offered to prove that the child born on September 18, 1982, "is not his child"; that Jeanne had told Gary that the child would be born in the middle of October 1982, but the child was born earlier; and that Gary had "facts which supported his contention that [the child] may not be his child." According to the offer of proof, the parties had separated until "nearly the end of December, 1981," when the parties "cohabitated for a period of approximately one month."

When the district court overruled Gary's motion for new trial, Gary appealed and contends the trial court committed error: (1) In overruling the motion to vacate or modify the decree of dissolution; (2) In denying Gary the opportunity to offer evidence in support of his motion to vacate or modify the decree; and (3) In not sustaining Gary's motions for discovery (blood test and Jeanne's medical records).

> A decree dissolving a marriage shall not become final or operative until six months after the decree is rendered, except for the purpose of review by appeal, and for such purpose only the decree shall be treated as a final order as soon as rendered. . . . [T]he court may, at any time within such six months, vacate or modify its decree.

Neb. Rev. Stat. § 42-372 (Reissue 1984).

In *Willie v. Willie*, 167 Neb. 449, 462, 93 N.W.2d 501, 509 (1958), we stated:

> "[During the 6-month period] the control of such a decree is within the sound judicial discretion of the trial court, but *good reason* must be shown for setting it aside, and such action must not be permitted to produce an unconscionable result, thereby abusing or misusing the judicial process.
>
> "What constitutes *good reason* for setting aside such a decree or what constitutes an unconscionable result prohibiting it depends upon the facts and circumstances of each particular case."

(Emphasis supplied.) (Citing and relying upon *Carpenter v. Carpenter*, 146 Neb. 140, 18 N.W.2d 737 (1945).)

In *Miller v. Miller*, 190 Neb. 816, 212 N.W.2d 646 (1973), after trial, a divorce decree was rendered on July 27, 1972. The

wife, on January 24, 1973, within the statutory 6-month period, filed a motion to vacate the decree. At the hearing on the motion to vacate, evidence was adduced regarding the wife's employment at the time of trial, valuation of property affected by the proceedings, and the amount of alimony awarded to the wife. In refusing to set aside the divorce decree, this court stated at 817, 212 N.W.2d at 647:

> We are satisfied that the evidence presented in support of petitioner's motion to set aside the decree was readily available to her at the time of trial. A motion to vacate is not available to a party to supply deficiencies, if any, in the evidence adduced at the trial. Petitioner cannot be permitted to retry the issues after she has had her day in court. There must be an end to litigation.
>
> Section 42-372, . . . permitting the trial court to modify its decree within 6 months, impliedly requires a showing of good cause. The refusal of the trial court to set aside a decree of divorce within the 6-month period pending finality may not be reversed by the Supreme Court in the absence of an affirmative showing of an abuse of discretion. As we said in Zachry v. Zachry (1970), 185 Neb. 336, 175 N.W.2d 616: "The control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court."

In reviewing a trial court's ruling on a motion to vacate or modify a decree dissolving a marriage, this court examines the record to ascertain whether there has been an abuse of discretion by the trial court in disposing of such motion. See *Puetz v. Puetz*, 211 Neb. 674, 319 N.W.2d 761 (1982).

A characterization of the phrase "abuse of discretion" is found in the syllabus in *Pettegrew v. Pettegrew*, 128 Neb. 783, 260 N.W. 287 (1935):

> In the exercise of judicial discretion, there is an abuse of that power where the reasons and rulings of the court are clearly untenable and deprive a party of a substantial right clearly and fairly established and amount to a denial of justice.
>
> "Discretion," when invoked as a guide to judicial action, is a sound discretion exercised with regard to what

> is right and equitable under the circumstances and the law and directed by the reason and conscience of the judge to a just result.

As we expressed in *Guggenmos v. Guggenmos*, 218 Neb. 746, 748, 359 N.W.2d 87, 90 (1984): "Although an abuse of discretion does not imply an improper motive, willful purpose, or intentional wrong, it does require the reasons or rulings of the trial judge to be clearly untenable and to deprive a party of a substantial right such as to amount to a denial of justice."

Gary's motion to vacate the decree of dissolution is couched in terms of general dissatisfaction with the court's division of property and award of alimony. There is no allegation in Gary's motion to vacate or modify which indicates that information regarding property matters and alimony was not reasonably available to Gary through pretrial discovery procedures or examination of witnesses at trial. Gary's apparent theory that Jeanne's evidence was not an exhaustive description of property to be divided in the dissolution proceedings does not provide a valid basis to vacate or modify the division of property ordered by the district court. We find nothing in Gary's motion which can be construed as an allegation of "good reason" or good cause necessary to authorize setting aside or modifying the decree dissolving the Younkin marriage. The picture painted in Gary's motion is one of his own lack of diligence or efforts to supply information to the court at the trial on August 19, 1982. The tensile strength of judicial imagination prevents our characterizing Gary's deficient diligence as "good reason" required to set aside a decree. In short, Gary alleged no facts which would constitute "good reason" or good cause to vacate the decree of dissolution disposing of property and alimony. Upon a motion containing an allegation of fact which, if true, constitutes good cause to set aside or modify a decree dissolving a marriage, the court must grant an evidentiary hearing on the motion to set aside or modify the dissolution decree. Moreover, Gary seeks to use a motion to vacate or modify a decree as a substitute for a direct appeal to review the correctness of a property division and award of alimony. Although we do not agree with the district court that, given an appropriate allegation of fact, an evidentiary hearing to set aside or modify

a decree is discretionary, we conclude in the present case that the allegations regarding property division and alimony are insufficient to raise an issue of good cause to set aside or modify a decree. Hence, the district court did not abuse its discretion in denying a hearing to vacate or modify the dissolution decree insofar as it related to property division and alimony.

The district court's ruling on the motion to vacate that part of the decree involving the child's paternity presents quite a different problem. Confronting us is a case wherein a pregnant wife, having cohabited with her husband before commencement of dissolution proceedings, has represented that her husband is the father of her child to be born, apparently consistent with conception during such cohabitation. We are not advised of any in utero tests supplying reliable information helpful in determining an unborn child's paternity.

A district court has jurisdiction to determine whether the husband is the biological father of a child to be supported as a result of the dissolution proceedings. See *Farmer v. Farmer*, 200 Neb. 308, 263 N.W.2d 664 (1978). See, also, *Timmerman v. Timmerman*, 163 Neb. 704, 81 N.W.2d 135 (1957).

In *Perkins v. Perkins*, 198 Neb. 401, 404, 253 N.W.2d 42, 45 (1977), this court held: " 'Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock.' " (Citing and quoting from *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974).)

By enacting § 42-372 the Nebraska Legislature has authorized an action or proceeding within 6 months to vacate or modify a previous dissolution decree. Such motion as has been filed by Gary is an action brought to set aside or modify a dissolution decree.

In resolving the question raised by Gary regarding the availability of discovery procedures to determine the issue of paternity, we refer to the Nebraska Discovery Rules, which became effective on January 1, 1983.

Rule 26(b) in part provides:

> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The question then becomes whether the blood grouping test or other scientific tests for determining paternity are within the purview of discovery authorized by the Nebraska Discovery Rules.

In pertinent part, Rule 35, Physical and Mental Examination of Persons, states:

> (a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

The Supreme Court of Alabama, in *Leonard v. Leonard*, 360 So. 2d 710 (Ala. 1978), after noting relaxation of the common-law requirement restricting evidence to proof that a husband was incapable of procreating or was "absent beyond the realm," held: "Any evidence which is competent and which tends to show clearly and convincingly that the husband could

not be physically or biologically the father is now admissible." *Id.* at 713.

In *Brondum v. Cox*, 30 N.C. App. 35, 226 S.E.2d 193 (1976), a proceeding involving the Uniform Reciprocal Enforcement of Support Act as a civil proceeding in North Carolina, the court held that a defendant was entitled to a blood grouping test upon timely motion in which the question of paternity arises, regardless of any presumption which might arise when the child is born in wedlock.

Balfour v. Balfour, 413 So. 2d 1167 (Ala. Civ. App. 1982), presented a situation wherein a wife, 6 weeks after she married her husband, filed for divorce and alleged that she was pregnant with her husband's child. The husband responded by alleging that his wife had represented that he was the father of the unborn child, but the husband denied paternity. The trial court ordered that blood tests be conducted for determination of paternity. Interpreting Rule 35 of the Alabama Rules of Civil Procedure, which is virtually identical to Rule 35 of the Nebraska Discovery Rules, the court stated at 1169:

> Rule 35(a) is not limited to only personal injury actions but it is universal in its application to all civil actions. Under that rule, it is proper to order blood grouping to aid the court in a divorce action in determining whether a husband is the father of a child. 8 C. Wright & A. Miller, Federal Practice and Procedure § 2232 (1970).
>
> . . . If blood group testings are performed, after proper predicate has been laid on the trial of the issue, evidence of the results of such tests and of the medical or scientific meaning and effect of the results of the tests is admissible in aid of the trial court in determining whether or not the husband is the natural father of a particular child.

In his motion to vacate part of the dissolution decree, Gary has disclaimed paternity of Jeanne's child. A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support. Likewise, questions concerning consequential liability for payment of prenatal and postnatal medical care for the mother and child will turn upon the question of the child's paternity. Medical reports concerning Jeanne's pregnancy, as well as blood tests

supplying information on the issue of paternity, appear reasonably calculated to lead to the discovery of admissible evidence. It is true that Gary, in the trial on August 19, 1982, did not raise or contest the issue of his paternity of Jeanne's unborn child. In the absence of a husband's knowledge of circumstances contradicting an allegation of paternity and without any reasonable prenatal test to ascertain paternity of a child ostensibly conceived in the marriage to be dissolved, we hesitate to impose a procedural precept requiring public repudiation of paternity, lest such ill-advised requirement be the source of immeasurable and unnecessary hurt. Jeanne's representation concerning Gary's paternity of her child and the absence of reasonable tests to provide reliable information bearing upon the issue of the paternity of an unborn child constituted good cause for the discovery sought by Gary's motion.

Although the precise factual basis for Gary's denial of paternity is not stated in his motion, and such specificity was never requested, Gary's motion does sufficiently raise the question of paternity, an issue excluded from resolution during the trial of August 19, 1982. Gary is entitled to have an evidentiary hearing on the issue of paternity. Denial of discovery under the circumstances constituted an abuse of discretion on the part of the district court.

Therefore, we affirm that part of the district court's judgment denying Gary an evidentiary hearing on matters of property and alimony disposed by the dissolution decree, but we reverse the district court's judgment denying Gary an evidentiary hearing with appropriate discovery procedure. This cause is remanded to the district court for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. I do not disagree with the majority's conclusion to the effect that in a proper proceeding blood tests may be properly ordered under the provisions of Rule 26(b) of the Nebraska Discovery Rules (rev. 1983). I do not, however, believe that the trial court's order denying appellant an evidentiary hearing in

the instant case was an abuse of discretion.

Appellant's principal claim for a further evidentiary hearing is his "suspicion" that he is not the father of the child born to the appellee. The majority notes that "[a]lthough the precise factual basis for Gary's denial of paternity is not stated in his motion," that "such specificity was never requested." I am not aware of any rule of law which requires one against whom a motion to set aside a decree has been filed to file a motion to make more definite and certain. The burden is upon the party seeking to set aside the judgment to allege facts sufficient to justify relief. See *Smith v. Goodman*, 100 Neb. 284, 159 N.W. 418 (1916).

The apparent reason for appellant's failure to raise that issue earlier is his contention that the child was not born at the time the trial was held. While that may be so, the evidence is clear that there was sufficient time before the decree was entered to raise the issue, if, in fact, such an issue could have been raised. No allegations are made as to why appellant could not have moved to withdraw his rest and offer additional evidence after the child was born and before the decree was entered.

The evidence discloses that, while trial was held prior to the date the child was born on September 16, 1982, the decree was not entered until February 4, 1983, some 4½ months after the child was born. On February 28, 1983, appellant filed a motion nunc pro tunc to have the decree reflect that it was not entered until February 4, 1983. Yet he did not raise any issue about the paternity of the child. He filed a further motion on February 28, 1983, requesting a modification of the decree. That motion addressed itself to a host of minutiae involving personal property but did not seek release from responsibility for the support of the child because he was not the father. It was not until April 19, 1983, that he, for the first time, sought to be relieved of responsibility for the support of the minor child because "it is respondent's belief that he is not the father of the child." He had more than ample time to raise the issue, if indeed such an issue exists.

I believe that the allegation and the evidence are insufficient for us to say that the trial court abused its discretion in not granting appellant an evidentiary hearing based upon the

sketchy allegation made so late after the fact.

Appellant maintains that he was advised the child was to be born in October, when, in fact, it was born on September 16, 1982, and because he was not with the appellee until near the end of December 1981, there is the possibility that the child may not be his. I am unable to follow that argument. Assuming that he and the appellee did not have sexual relations until the last day of December 1981, the most that can be said is that the child was born perhaps 2 weeks early. And if by "nearly the end of December, 1981," it might be as early as the 23d or 24th of December, the child was born after a gestation period of 267 days. That, standing alone, appears to me to be hardly sufficient to justify saying the trial court abused its discretion in refusing to set aside the decree and granting appellant the right to engage in discovery. It may very well have been that when the case was heard by the court, appellant did not know the child was to be born on September 16, 1982, but his apparent disregard of what he now contends is such a significant factor for nearly 7 months after the child was born, coupled with his very sketchy allegations, does not, in my view, constitute an abuse of discretion by the trial court. I would have affirmed the decision of the trial court in all respects.

IN RE CONSERVATORSHIP OF THE ESTATE OF ELSIE LINDAUER, A PROTECTED PERSON.
GLENN A. RODEHORST, CONSERVATOR, APPELLANT, V. ESTATE OF ELSIE LINDAUER, APPELLEE.

376 N.W.2d 1

Filed November 1, 1985. No. 84-191.

1. **Guardians and Conservators: Notice.** An intermediate account of a conservator is an adjudication of the matters considered in connection therewith only if made upon hearing and notice to all interested parties.
2. **Guardians and Conservators: Limitations of Actions.** The duties of a conservator are of a continuing nature, and, as a general rule, the statute of limitations does not apply to his duty to account to the protected person and his right to compensation.

Appeal from the District Court for Nance County: JOHN C. WHITEHEAD, Judge. Reversed and remanded.

Glenn A. Rodehorst, pro se.

Stan A. Emerson of Luckey, Sipple, Hansen & Emerson, guardian ad litem for Elsie Lindauer.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The appellant, Glenn A. Rodehorst, was appointed conservator for the estate of Elsie Lindauer on June 9, 1975. He qualified and letters of conservatorship were issued to him on that date.

On March 5, 1976, the conservator filed a report and an accounting for the period June 1, 1975, to December 31, 1975, together with a petition for approval of the report. The report was approved by the county court on that date.

Subsequent reports for each calendar year from 1976 through 1980 were filed and orders approving all reports except the 1976 report were entered by the county court. In none of these reports did the conservator show any amount due him or received by him for compensation or expenses. No notice was given to any other interested party concerning these reports or the petitions for their approval.

On February 11, 1982, the conservator filed a report and accounting for the period January 1, 1981, through December 31, 1981. The petition for approval of the report alleged that there was $4,084.21 due the conservator for his services since the date of his appointment, plus $74.86 advanced by the conservator for expenses. The account showed $3,000 paid to the conservator on December 30, 1981. The petition prayed that notice of the petition and report be given to all heirs.

On February 22, 1982, the county court found that fees prior to 1978 were barred by the statute of limitations and approved the report except as to fees prior to 1978. Upon appeal the district court found that proper notice had not been given of the hearing in the county court and remanded the matter to the county court for further proceedings.

After notice to all interested parties, the county court, on August 24, 1983, affirmed its previous order. That order was affirmed by the district court on January 16, 1984. The conservator has appealed from that order to this court.

The issue upon the appeal is whether the statute of limitations runs as between a conservator and the protected person during the conservatorship.

The duties of a conservator are of a continuing nature, and, as a general rule, the statute of limitations does not apply to the duty to account and to a determination of the amount due the protected person from him. See, *In re Estate of Statz*, 144 Neb. 154, 12 N.W.2d 829 (1944); *Finn v. Whitten*, 172 Neb. 282, 109 N.W.2d 376 (1961).

The general rule has been that an interlocutory, ex parte accounting by a guardian is subject to reexamination so long as his accounts remain unsettled, but a final settlement made pursuant to notice to persons interested in the estate is in the nature of a judgment and is conclusive as to all matters included therein. *In re Estate of O'Brien*, 80 Neb. 125, 113 N.W. 1001 (1907).

Neb. Rev. Stat. § 30-2653(c)(20) (Reissue 1979) authorizes a conservator, "acting reasonably in efforts to accomplish the purpose for which he was appointed," without court authorization or confirmation, to pay the compensation of the conservator and other expenses incurred in the collection, care, administration, and protection of the estate. Such payments, however, are subject to rule No. 37 of the Probate, Guardianship, Conservatorship Rules (July 1, 1985) and the approval of the court upon an accounting.

Neb. Rev. Stat. § 30-2648 (Reissue 1979) provides:

> Every conservator must account to the court for his administration of the trust upon his resignation or removal, and at other times as the court may direct. On termination of the protected person's minority or disability, a conservator may account to the court, or he may account to the former protected person or his personal representative. Subject to appeal or vacation within the time permitted, an order, made upon notice and hearing, allowing an intermediate account of a

> conservator, adjudicates as to his liabilities concerning the matters considered in connection therewith; and an order, made upon notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or his successors relating to the conservatorship. In connection with any account, the court may require a conservator to submit to a physical check of the estate in his control, to be made in any manner the court may specify.

Under this statute an order allowing an intermediate account adjudicates as to the liabilities of the conservator only if made upon notice and hearing and then only "concerning the matters considered in connection therewith." Upon the record before us it is clear that there was no adjudication upon any of the reports and accountings prior to that filed on February 11, 1982, and no determination made as to the amount due the conservator for his compensation and expenses.

The judgment of the district court is reversed and the cause remanded for further proceedings.

The guardian ad litem is allowed $750 for his services in this court, to be taxed as costs against the estate of the protected person.

REVERSED AND REMANDED.

TIMOTHY W. ANDERSON, APPELLANT, V. WILLARD PETERSON ET AL., APPELLEES.

375 N.W.2d 901

Filed November 1, 1985. No. 84-243.

1. **Political Subdivisions: Contracts: Statutes: Words and Phrases.** Competitive bidding, after public advertising, is a fundamental, time-honored procedure that assures the prudent expenditure of public money. Competitive bid statutes exist to invite competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work or supplies at the lowest possible price.
2. **Political Subdivisions: Contracts: Statutes.** Generally, competitive bidding statutes are strictly construed against public authorities required to obtain a

public letting. However, statutes requiring competitive bidding, although strictly construed, should not be extended beyond their clear implication.

3. **Statutes: Legislature: Intent.** To determine legislative intent we generally consider the subject matter of the whole act, as well as the particular topic of a statute containing the questioned language. In judicial construction of a statute, the statutory language will be given its ordinary and popular meaning, and a statute is open to construction only if the statute is ambiguous.
4. **Property: Political Subdivisions: Contracts: Words and Phrases.** Neb. Rev. Stat. § 23-324.05 (Reissue 1983), requiring competitive bidding in a county's acquisition of "supplies, materials, [and] equipment," contemplates expenditures for tangible personal property to be used by or furnished to any county officer, office, department, institution, board, or other agency of county government, except election supplies, materials, and equipment. An expenditure for replacement of a courthouse's heating and air-conditioning system is in the nature of a capital expenditure for long-term or permanent betterment of a county's building and constitutes capital improvement of a county's real property.
5. **Legislature: Statutes: Intent.** Reasons underlying valid legislation are left first to the Legislature and ultimately to the electorate.
6. **Statutes: Appeal and Error.** With respect to questions about a statute, a court's role is limited to interpretation and application of statutes, irrespective of a court's personal agreement or disagreement with a particular legislative enactment, so long as a questioned statute does not violate a constitutional requirement. Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial task of construing or applying a statute.

Appeal from the District Court for Phelps County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Donald H. Bowman of Peterson, Bowman & Johanns, for appellant.

Larry E. Butler of Butler & Voigt, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Timothy W. Anderson, a resident-taxpayer of Phelps County, brought suit against Willard Peterson, Alfred Holthus, Earl Thorell, Marvin Dannehl, Clarence L. Larsen, Erwin Braner, and Melvin Sall as members of the county board of Phelps County. Anderson alleged that the board members, without competitive bidding required by Neb. Rev. Stat. § 23-324.05 (Reissue 1983), entered a contract on behalf of the

county to replace the existing heating and air-conditioning system of the Phelps County Courthouse for $200,213. The district court for Phelps County, on the board members' motion for summary judgment, held that the questioned contract was exempt from competitive bidding and dismissed Anderson's petition. We affirm.

For some time before 1982, as the Phelps County Courthouse's heating and air-conditioning system was deteriorating, the county board contemplated replacement of the old system. Various departments or agencies of Phelps County had office space within the courthouse. During 1981, the county board received an estimate from a Kearney engineering firm that the replacement cost for the courthouse's heating and air-conditioning system would be more than $300,000.

In 1982, as reflected in a local newspaper's account, the county board decided to review replacement of the waning system. Phelps County at the time had a population of 9,800. A committee of board members made general inquiry of businesses believed to be in a position to handle the replacement project. The county board did not solicit sealed bids for a replacement system by notice published in a newspaper, legal or otherwise. A local heating and air-conditioning business submitted a sealed bid for the replacement project. Another bid was submitted by Kansas-Nebraska Corporation at $200,213, which was more than $47,000 lower than the only other bid submitted for the project. K-N had recently installed a heating and air-conditioning system in a neighboring county's courthouse. The Phelps County board signed a written contract with K-N for installation and replacement of the courthouse heating and air-conditioning system and paid K-N according to that contract. The replacement system installed by K-N was generally available from various businesses dealing in heating and air-conditioning systems. As a result of inheritance tax collected, the county had sufficient funds to pay the K-N contract. See Neb. Rev. Stat. § 77-2032 (Cum. Supp. 1984).

Anderson filed suit and claimed that competitive bidding on the heating and air-conditioning system was required by § 23-324.05, which in pertinent part provides:

> All purchases of and contracts for supplies, materials, equipment and contractual services, and all sales of such personal property which have become obsolete and unusable shall be based, wherever feasible, on competitive bids. If the amount of expenditure or sale is estimated to exceed five thousand dollars, sealed bids shall, unless otherwise provided in this act, be solicited by public notice inserted at least one time in a legal newspaper of general circulation in the county at least five calendar days before final date of submitting bids. The county purchasing agent shall also solicit sealed bids by sending requests by mail to prospective suppliers and by posting notice on a public bulletin board in his office. Competitive bidding shall not be required in purchasing unique or noncompetitive articles or in contracting for professional services. . . .

Anderson, for benefit of the county, sought damages from the board members under the provisions of two statutes, namely, Neb. Rev. Stat. § 23-336 (Reissue 1983): "All contracts . . . in contravention of any statutory limitation . . . are hereby declared unlawful and shall be wholly void as an obligation against any such county," and Neb. Rev. Stat. § 23-337 (Reissue 1983): "Any public official . . . who shall audit, allow or pay out, or cause to be paid out, any funds of any county for any article, public improvement, material, service or labor, contrary to the provisions of section 23-336, shall be liable for the full amount so expended . . . ."

Upon motions for summary judgment filed by Anderson and the board members, the district court found that there was no genuine issue of any material fact and that the board members were entitled to judgment as a matter of law because § 23-324.05 did not apply to the county's contract for repair and improvement of the courthouse by replacement of the heating and air-conditioning system.

It is undisputed that the estimated cost of the replacement system exceeded $5,000, that such replacement system was not unique, and that the county did not solicit bids by notice in a legal newspaper. Phelps County is not required to employ a purchasing agent. See Neb. Rev. Stat. § 23-324.01 (Reissue

1983) (necessity of a purchasing agent in a county having a population more than 150,000). The question is whether the board members are entitled to judgment as a matter of law. See Neb. Rev. Stat. § 25-1332 (Reissue 1979) (rendition of summary judgment). See, also, *Sommerfeld v. City of Seward, ante* p. 76, 375 N.W.2d 129 (1985).

At the outset we acknowledge that competitive bidding, after public advertising, is a fundamental, time-honored procedure that assures the prudent expenditure of public money. H. Cohen, Public Construction Contracts and the Law 1.1 (1961). Competitive bid statutes exist to invite competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work or supplies at the lowest possible price. Such statutes are enacted for the benefit of taxpayers. See *Savage v. State*, 75 Wash. 2d 618, 453 P.2d 613 (1969). Generally, competitive bidding statutes are strictly construed against public authorities required to obtain a public letting. See *Cosentino v. City of Omaha*, 186 Neb. 407, 183 N.W.2d 475 (1971). However, statutes requiring competitive bidding, although strictly construed, should not be extended beyond their clear implication. See 20 C.J.S. *Counties* § 183 (1940). See, also, *Ariz. Sec. Center v. State*, 142 Ariz. 242, 689 P.2d 185 (1984).

Therefore, raised by the present appeal is the question: Is a contract for replacement of a courthouse's heating and air-conditioning system a contract for "supplies, materials, equipment and contractual services" within § 23-324.05? Our answer lies within definitions for several terms of the statute in question.

Neb. Rev. Stat. § 23-324.03 (Reissue 1983) in part provides some definition:

> The terms supplies, materials, and equipment, as used throughout this act shall be construed to mean any and all articles or things which shall be used by or furnished to any county officer, office, department, institution, board or other agency of the county government, except election supplies, materials and equipment. The term contractual services shall be construed to mean any and all telephone, telegraph, postal, electric light and power service and

other similar services . . . .

As a result of § 23-324.03, the replacement system for the Phelps County Courthouse cannot be characterized as "contractual services" requiring competitive bids. Our focus necessarily shifts to the words "supplies, materials, [and] equipment" used in § 23-324.05. Unfortunately, the attempted definition found in § 23-324.03 is inadequate to answer our inquiry: What is the legislative intent of § 23-324.05, as well as the meaning of the words "*supplies*, *materials*, [and] *equipment*" found in that statute?

To determine legislative intent we generally consider the subject matter of the whole act, as well as the particular topic of a statute containing the questioned language. See *State v. Jennings*, 195 Neb. 434, 238 N.W.2d 477 (1976). In judicial construction of a statute, the statutory language will be given its ordinary and popular meaning, and a statute is open to construction only if the statute is ambiguous. See *Video Consultants v. Douglas*, 219 Neb. 868, 367 N.W.2d 697 (1985).

There are acceptable, ordinary, and popular meanings for the words under examination in § 23-324.05, namely, *supplies*—"An amount available or sufficient for a given use; store; stock. . . . Materials or provisions stored and dispensed when needed." The American Heritage Dictionary of the English Language 1293 (1981); *materials*—"tools, implements, articles, etc. needed to make or do something; as, writing *materials*." Webster's New Universal Unabridged Dictionary 1110 (2d ed. 1983); and *equipment*—"something with which a person, organization, or thing is equipped; furnishings." The American Heritage Dictionary of the English Language 443 (1981). Therefore, the language of § 23-324.05, requiring competitive bidding in a county's acquisition of "supplies, materials, [and] equipment," contemplates expenditures for tangible personal property to be used by or furnished to any county officer, office, department, institution, board, or other agency of county government, except election supplies, materials, and equipment. See *Datatrol Inc. v. State Purchasing Agent*, 379 Mass. 679, 400 N.E.2d 1218 (1980). An expenditure for replacement of a courthouse's heating and air-conditioning system is in the nature of a capital expenditure

for long-term or permanent betterment of a county's building and constitutes capital improvement of a county's real property. Such reference to capital improvement contradistinguishes a capital expenditure from an expenditure for supplies, materials, and equipment.

In our review of Nebraska statutes pertaining to competitive bids required to be solicited by a county, we find a legislative panorama presenting conspicuous inconsistencies. Several statutes regarding expenditures of public funds contemplate contracts for construction, repair, or maintenance of a county's property without competitive bids and public letting; for example, county hospital improvements which cost less than 50 percent of the hospital's original cost in certain counties (Neb. Rev. Stat. § 23-343.03 (Reissue 1983)); purchase, construction, maintenance, or improvements to a county garbage disposal plant (Neb. Rev. Stat. § 23-379 (Reissue 1983)); and construction or maintenance of a horse racing facility, including grandstands, pavilions, exhibition halls, and barns (Neb. Rev. Stat. § 23-389 (Reissue 1983)). Also, without competitive bidding or public letting, a county with a population more than 30,000 may construct or repair extramunicipal sidewalks (see Neb. Rev. Stat. § 23-365 (Reissue 1983)), although the county board "*may* receive bids for constructing or repairing any or all such walks and may let contracts to the lowest responsible bidder for constructing or repairing the same." (Emphasis supplied.) Neb. Rev. Stat. § 23-366 (Reissue 1983). Additionally, in the area of public service, Neb. Rev. Stat. § 23-378 (Reissue 1983) authorizes a contract for ambulance service without the necessity of competitive bidding or public letting. On the other hand, the county board must solicit competitive bids for the following: construction of levees and dikes (Neb. Rev. Stat. § 23-315 (Reissue 1983)); construction of streets outside the corporate limits of municipalities with specified populations (Neb. Rev. Stat. § 23-342 (Reissue 1983)); repairs in the event of a courthouse's partial destruction "by fire, riot, mob, storm, or other casualty," Neb. Rev. Stat. § 23-344 (Reissue 1983)); and county officers' supplies which cost more than $200 annually unless contracted with a sheltered workshop (Neb. Rev. Stat. § 23-321 (Cum. Supp. 1984)). If

there is a clear-cut legislative intent compelling competitive bids and pervading statutes pertaining to a county's expenditure of public funds, including an expenditure for capital improvement of a courthouse, such legislative intent eludes us. Instead of a statutory scheme containing a blanket requirement for competitive bidding but allowing specific exceptions if required, Nebraska statutes covering county expenditures and competitive bidding comprise a crazy quilt of legislation. It is indeed incongruous that a county must obtain competitive bids for "books, blanks, and stationery" (§ 23-321) but is relieved from obtaining competitive bids for a courthouse capital improvement which costs more than $200,000. Speculation about motivation or a reason behind such legislative inconsistency is not a function of this court. "Reasons underlying valid legislation are left first to the Legislature and ultimately to the electorate." *Spence v. Terry*, 215 Neb. 810, 816, 340 N.W.2d 884, 887 (1983).

In order to bring the county's contract within the purview of § 23-324.05 and the requirement of competitive bids pursuant to that statute, we would have to disregard the ordinary and popular meaning of the words *supplies*, *materials*, and *equipment* or, contrary to our constitutional role in relation to legislation, insert the phrase "capital improvements" as one of the situations requiring competitive bids for compliance with the statute being construed. We decline to rewrite the statute. Competitive bids and public letting are unquestionably a matter of legislative prerogative. The Legislature is the appropriate forum for resolution of questions concerning Nebraska's policy on the legislative relationship between competitive bidding and expenditures of public funds. In *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985), we characterized a court's function in construing legislation and enunciated:

> With respect to questions about a statute, our role is limited to interpretation and application of statutes, irrespective of our personal agreement or disagreement with a particular legislative enactment, so long as a questioned statute does not violate a constitutional requirement. Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial

task of construing or applying a statute.

Id. at 883, 367 N.W.2d at 704-05. In the course of our research, however, we have observed other states with statutes requiring competitive bids for contracts to repair, maintain, or improve public buildings. See *Secrist v. Diedrich*, 6 Ariz. App. 102, 105, 430 P.2d 448, 451 (1967) (construing an Arizona statute requiring competitive bidding for contract work on a public structure—" 'any building, structure, addition or alteration not exceeding twenty-five hundred dollars in total cost may be constructed without advertising for bids' "). See, also, *Carpet City, Inc. v. Stillwater Municipal Hosp. Auth.*, 536 P.2d 335, 337 (Okla. 1975) ("all public construction contracts [exceeding $2,500 awarded by any public agency for purposes of making any public improvements or constructing any public building, or making repairs to the same] shall be let and awarded in accordance with the provisions of the Act"). Formulation of a statute requiring competitive bids for repair, maintenance, or capital improvement of a county's building, including a courthouse, would involve minimal effort with plain language—a task within the Legislature's province.

The district court was correct in its judgment that the contract in question did not require competitive bids. Because the county board did not violate § 23-324.05, there is no issue of personal liability on the part of the members of the county board concerning the contract questioned by Anderson.

AFFIRMED.

KRIVOSHA, C.J., concurs in the result.

SUSANNE E. STRATMAN, APPELLEE AND CROSS-APPELLANT, V. KENNETH J. HAGEN, APPELLANT AND CROSS-APPELLEE.

376 N.W.2d 3

Filed November 1, 1985. No. 84-328.

1. **Paternity: Visitation: Actions.** Visitation of a child born out of wedlock may be awarded to the alleged father of the child only if there is a court determination, in an appropriate action, that the person seeking visitation is the father of the

child.

2. **Estoppel.** Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.
3. **Attorney Fees.** Attorney fees may be assessed against a party whom the court determines is responsible for conduct during the course of litigation which is vexatious and unfounded to the extent it constitutes bad faith toward the other party to the litigation.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part, and in part reversed and remanded for further proceedings on the issue of fees.

Jerome J. Ortman, for appellant.

John H. Kellogg, Jr., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

On April 16, 1979, in this action, appellee, Susanne E. Stratman, filed a "Petition To Establish Paternity" alleging that appellant, Kenneth J. Hagen, was the father of her child born December 8, 1978. Hagen filed his answer specifically denying that he was the father of the minor child and specifically denying that he had sexual relations with Stratman during the time relevant to the pregnancy in question. In preparation for trial of the action, Stratman took Hagen's deposition. In that deposition Hagen specifically denied, under oath, that he was the father of the child in question, and specifically denied, with corroborating detail, that he had any sexual relations with Stratman at any time after June of 1974.

Hagen filed a motion asking for a jury trial, as he was authorized to do by the provisions of Neb. Rev. Stat. § 13-112 (Reissue 1983), which provides in part: "The method of trial shall be the same as that in other civil proceedings except that the trial shall be by the court without a jury unless a jury be requested by the alleged father." Section 13-112 further

provides in part:

> Should it be determined in this proceeding that the alleged father is actually the father of the child, a judgment shall be entered declaring such to be the case. In the event that such a judgment is entered, the court shall retain jurisdiction of the cause, and enter such order of support as may be proper under the procedure and in the manner specified in section 13-106.

No judgment was entered declaring Hagen, the alleged father, to be the actual father.

On November 12, 1979, before the case came on for trial, the parties entered into an "Agreement of Support," which recited that Hagen entered into the agreement "without admission of paternity, in order to settle a disputed matter . . . ." Pursuant to the agreement, Hagen was to pay to Stratman the sum of $10,000, in three payments over 2 years, in settlement. Stratman agreed to accept the sum "in full satisfaction and release of any claim of support for the minor child which she may have against Kenneth J. Hagen." On December 4, 1979, the district court entered its "Decree" finding that the settlement agreement was fair and reasonable, approving the settlement which was attached to the decree, and holding that the settlement "shall have full force and effect as a judgement of this Court."

On October 28, 1983, Hagen filed his "Application for Specific Visitation." In this application Hagen alleged that after he had executed the agreement of support in 1979, he had visited the minor child for a period in excess of 2 years but that beginning in January of 1982 Stratman had refused to allow Hagen to visit "his minor son." Hagen prayed that the court allow him specific visitation with "the minor child of the parties" and award Stratman a reasonable amount of child support, that the court order Hagen to provide dental care (Hagen was a practicing dentist) and to provide the child health insurance, and for an order requiring Stratman to keep Hagen informed as to the child's activities. Hagen's application did not specifically state that Hagen was the father of the child, nor did it pray for an order determining that Hagen was the child's father.

Appellee Stratman filed an amended answer to Hagen's request for visitation. In her amended answer Stratman set out her married name and stated that during 1982 and 1983, she was married to another party; stated that she had denied visitation to Hagen; denied that Hagen had ever regularly visited the child; alleged that the agreement for support was the "settlement of a disputed paternity claim" and that the court's order of December 4, 1979, was a judgment which had not been appealed from and was, therefore, res judicata; and alleged that Hagen was estopped from now taking the position that he was the father of the child because of the legal position he had taken in the 1979 phase of this case. Stratman then filed a motion for summary judgment asking that the court dismiss Hagen's application for specific visitation and award her an attorney fee.

The trial court found that there was no genuine issue as to any material fact; that an "application for specific visitation" is not a proper procedure to establish paternity; that Hagen did not request a finding that he was the father of the child, although he "for all practical purposes is asking this Court to now find that he is the father of the minor child because, if a finding of paternity is not made, respondent [Hagen] certainly has no right of visitation" (emphasis in original); and that Hagen's implied judicial admission of paternity in his 1983 application for visitation constituted an absolute contradiction of his prior claim that he was not the father and was in violation of this court's holding in *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981).

The trial court then sustained Stratman's motion for summary judgment and dismissed Hagen's application for specific visitation.

Hagen appeals and in this court sets out eight assignments of error, which may be consolidated into three. Five of these assign as error the granting of the motion for summary judgment because there were genuine issues of material fact; two allege that the court erred in holding that the earlier disposition of the paternity action was res judicata; and the other alleges that the court erred in failing to consider "the best interests of the minor child in determining visitation by a natural father." Stratman

cross-appeals, seeking an attorney fee because of the vexatious nature of Hagen's actions in continuing to pursue an action which had been concluded, particularly where he had to diametrically change the position he had taken in early stages of the same lawsuit to do so. Without determining the other issues presented by Hagen, we determine that Hagen is estopped, by his conduct, from attempting to prove in this case that he is the father of the minor child in question, and we affirm the ruling of the trial court with regard to granting Stratman's motion for summary judgment.

Hagen's conduct which resulted in estoppel consisted of his filing a formal pleading specifically denying paternity; in testifying, under oath in his deposition, that he was not the father of the child in question, and in further testifying to facts which indicated that he could not have been the father; and in executing a settlement "without admission of paternity," thus requesting the trial court to dispose of the paternity issue without making any determination of paternity. There is no dispute as to any of these facts.

The effect of such a settlement has long been recognized. In *State, ex rel. Rengstorf, v. Weber*, 102 Neb. 103, 106-07, 166 N.W. 120, 121 (1918), we stated:

> In 7 C.J. 969, the following rule is laid down: "Except when forbidden by statute, the mother of an illegitimate child may, by a fair settlement with the putative father, on a reasonable consideration, preclude herself * * * from the right to maintain a bastardy proceeding."
>
> Our statute cannot be construed as forbidding such settlements. On the contrary, it was evidently the intention of the legislature to encourage them. The primary object of the statute is to induce the father of the illegitimate child to make settlement which will insure the support of the child, and in section 357, Rev. St. 1913, the mother of the child is designated as the one to be satisfied with the agreement.
>
> It would be against public policy and a dangerous rule to announce that settlements made out of court are without merit and legal effect. . . . As the proceedings are civil, no reason can be shown why a compromise of

> settlement should not be made therein the same as in all other civil cases, and such a contract, when made, is not in violation of public policy or against sound morals, as a bastardy proceeding is not a bar against criminal prosecution. *State v. Veres*, 75 Ohio St. 138. Where the parents of an illegitimate child are of full legal age and competent, it is their legal right to enter into a contract of settlement in which they provide for the support of said child. By such a contract the mother excludes herself from instituting bastardy proceedings against the putative father, unless such contract is set aside for good cause in an action brought for that purpose in the proper court.

The overall conduct of Hagen, including his actions in the settlement, constitutes equitable estoppel in this case. Hagen's undisputed actions fit squarely within the general rule we have announced in *DeBoer v. Oakbrook Home Assn.*, 218 Neb. 813, 818, 359 N.W.2d 768, 772 (1984), where we quoted with approval from *Reed v. Williamson*, 164 Neb. 99, 82 N.W.2d 18 (1957):

> "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy."

Here, Hagen is precluded from now asserting his claim that he is the actual father of the minor child. It is clear that Stratman relied on Hagen's conduct and has placed herself in a position where she could not ask for additional support from Hagen even if she still had the same evidence in 1983 that apparently she had in 1979. Hagen was before the court in 1979 and could have established his paternity by simply admitting he was the father. He explicitly did not do so, and the court is not now required to adjudge his latest whim that he now claims to remember that he was the father. Stratman pressed her claim, settled the claim, and is now free to live her life without further

interference from Hagen.

Hagen, of course, is correct in his statement of law that the granting of summary judgment is appropriate only when there is no genuine issue as to any material fact or as to the inferences to be drawn therefrom and when the moving party is entitled to judgment as a matter of law. See *Mayer v. Howard*, 220 Neb. 328, 370 N.W.2d 93 (1985). Hagen alleges that his actions since the court's decree of December 4, 1979, show that he has judicially admitted he is the father of the minor child in question, as contemplated by Neb. Rev. Stat. § 13-109 (Reissue 1983). He has alleged in his application that he is not permitted to visit "his son," and alleges that his actions have resulted in an admission of paternity. Hagen chooses to ignore the obvious fact that nowhere has any court, in this case or any other case, determined that Hagen is the father of this child born December 8, 1978; and, more importantly, Hagen will not recognize that this case is concluded.

Hagen points to the fact that this court held in *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981), that in an action to establish paternity, the court has jurisdiction to award visitation rights to the father in an appropriate case. That case remains the law. Necessarily, however, the right to visitation of a minor child is premised on the determination of the relationship between the party seeking visitation and the child. If it need be said, we now say that in a paternity action the court may award visitation to the alleged father only if the court determines that the alleged father is indeed the father. If the court determines that paternity is not established, visitation may not be awarded.

In *Cox v. Hendricks, supra*, there was an admission of paternity, and the case proceeded on the issues of custody, support, and visitation. This case is entirely different. Here, in a lawsuit, Stratman alleged Hagen was the father of her minor child. Hagen denied that fact. This contested case was settled between these two disputing parties, and the settlement was approved by the court. We decide only that this case is over and that Hagen by his conduct is estopped from reopening it.

With regard to Stratman's cross-appeal seeking attorney fees in appellant's attempt to reopen a case settled without any

determination of paternity, we determine that appellee is not entitled to a fee under *State ex rel. Toledo v. Bockmann*, 218 Neb. 428, 355 N.W.2d 521 (1984), but is entitled to a fee under the theory of vexatious litigation discussed in *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983), and in *Graham v. Waggener*, 219 Neb. 907, 367 N.W.2d 707 (1985). See Neb. Rev. Stat. § 25-824 (Cum. Supp. 1984). We have held that attorney fees may be assessed against a party whom the court determines is responsible for conduct during the course of litigation which is vexatious and unfounded to the extent it constitutes bad faith toward the other party to the litigation. Hagen requested the court's 1979 action and protected himself against future claims of Stratman in this matter. His earlier position, on which the court acted, rested on a specific denial of paternity. He has now decided, for whatever reason, to press a claim that he is indeed the father of the child and to reopen this settled lawsuit. We determine that Hagen's actions are vexatious toward Stratman. This case was settled 6 years ago. Stratman, as any litigant, is entitled to be free of any other claims of Hagen in this settled matter, particularly when such claims are premised on alleged facts which are the exact opposite of previous facts sworn to by Hagen. Accordingly, we determine that Stratman's cross-appeal on the issue of attorney fees is meritorious. Stratman is awarded the sum of $750 to apply toward the services of her attorney in this court, and the cause is remanded to the district court to award an attorney fee to Stratman for attorney services rendered to her in the district court.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED FOR FURTHER
PROCEEDINGS ON THE ISSUE OF FEES.

KRIVOSHA, C.J., concurs in the result.

IN RE INTEREST OF S.P., N.P., AND L.P., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. C.P., APPELLANT.

375 N.W.2d 616

Filed November 1, 1985. No. 84-726.

Parental Rights. Failure of a parent to correct a situation injurious to the life and normal development of a child may support an order of termination of parental rights, even though such child has not as yet manifested permanent damage.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Robert C. McGowan, Jr., for appellant.

Donald L. Knowles, Douglas County Attorney, and Elizabeth G. Crnkovich, for appellee.

Steven M. Lathrop, guardian ad litem.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

This is an appeal from the decree of the separate juvenile court of Douglas County which terminated the parental rights of C.P. to her three female children, S., age 12, N., age 10, and L., age 4. We affirm.

The children are all born out of wedlock. The mother and her children first became involved with the juvenile court with the filing of a petition on October 23, 1981. By her admission, the mother admitted that the children lacked proper parental care by reason of the faults or habits of the mother in that the mother had failed to provide a permanent and stable residence for herself and said children. Neb. Rev. Stat. § 43-202(2)(b) (Reissue 1978).

Following a February 10, 1982, disposition hearing, at which C.P. and her attorney were present, S. was placed in the temporary custody of the Douglas County Social Services, and the other two children in the temporary custody of the State of Nebraska Department of Public Welfare. In addition, C.P. was ordered to comply with a plan of rehabilitation which included participation in a credit program, individual counseling,

maintenance of permanent and stable housing, participation in the Visiting Nurses Association program, and compliance with a regular schedule of visitation with her children. Later on in the year 1982, C.P. was ordered to enter treatment and obtain counseling for alcoholism.

Review hearings were held on seven different dates in 1982 and 1983. A motion for termination of parental rights was filed on March 30, 1984, pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1984), and following extended hearings covering 5 different days, an order sustaining the motion was entered by the juvenile court on August 1, 1984. On her appeal C.P. assigns a single error, that the court erred in finding the best interests of the children required termination of parental rights.

The record is long and frustrating. C.P. had lived at seven different addresses in a period of just over a year. She served eight jail terms from 1981 to July of 1984 for offenses including shoplifting, stealing, and solicitation of prostitution.

C.P.'s lack of success in the area of alcoholism treatment is no less dismaying. She apparently fabricated a story about having received inpatient treatment at the Hastings Regional Center. She was admitted for inpatient treatment at St. Gabriel's Center in January of 1983, but left against the advice of her counselors and without completing the program. Upon readmission in May she completed the program, but, contrary to the advice given her, she attended but a couple of Alcoholics Anonymous meetings and then apparently lost interest. She has continued to drink. There was an attempt to have her admitted to St. Gabriel's for a third time, but the administration insisted that "she had all the tools" they could give her.

The record would disclose that C.P. has made no real progress with her drinking problem, with establishing a stable home, with obtaining employment, or with sharpening her parenting skills. Each review hearing has been a succession of threats, admonitions, and entreaties on the part of the court, and promises made and not kept by C.P.

We do not agree with C.P.'s argument that the State must show some harm to the children before it can be said to be in the best interests of the children to terminate parental rights. The court need not await certain disaster to come into fruition

before taking protective steps in the interest of a minor child.

> A practical program of parental rehabilitation should not be viewed as our system's indulgent toleration of an otherwise intolerable situation. *A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of a child.* In cases such as this the past is an indication of the future. Failure of a parent's good faith effort toward rehabilitation to correct a situation injurious to the life and normal development of a child may cause a court to conclude that a parent's past offers no future for the child.
>
> . . . To now leave the child in foster care for an indefinite period would be patently unfair to him, and would only continue the emotional problems attendant to a "temporary" custody situation. A child cannot be left suspended in foster care, and should not be required to exist in a wholly inadequate home. Further, a child cannot be made to await uncertain parental maturity.

(Emphasis supplied.) *In re Interest of D.*, 218 Neb. 23, 28-29, 352 N.W.2d 566, 570 (1984).

Three years is long enough. From a de novo review of the record, we conclude that the time for further experimentation has ended. We agree with the juvenile court that the evidence is clear and convincing that it is in the best interests of the minor children that the parental rights of their mother be terminated. Its judgment is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret that I must respectfully dissent from the majority opinion in this case. While I acknowledge that this is a difficult and sad situation, I do not believe that it is established by clear and convincing evidence that the children lack proper parental care by reason of the faults or habits of the mother as required by Neb. Rev. Stat. § 43-202(2)(b) (Reissue 1978). I acknowledge that the appellant has not been able to comply with the plan of rehabilitation. I suggest, however, that the plan in this case was not realistic. The mother in this case is a poor, uneducated alcoholic. Persons who are as untrained as the

appellant have difficulty obtaining employment, particularly at a time when many Americans, better trained, are unemployed. And, if unemployed, she will likewise have difficulty obtaining permanent housing. Moreover, as an alcoholic, she cannot "cure" herself merely by wishing to do so. I simply do not believe that it is appropriate for courts to rearrange families on the basis that by terminating parental rights a child may thereby be adopted by a "better" family. I would have reversed.

L. DWIGHT MOELL, M.D., APPELLANT, V. MENNONITE DEACONESS HOME AND HOSPITAL, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

375 N.W.2d 618

Filed November 1, 1985. No. 84-782.

1. **Jurisdiction: Time: Appeal and Error.** In a proceeding in error the jurisdiction of the court does not attach until there is presented to it, within the 1-month limitation contained in Neb. Rev. Stat. § 25-1931 (Reissue 1979), a duly authenticated transcript containing the final order or judgment of which complaint is made.
2. **Appeal and Error.** The mere production of unauthenticated original papers does not constitute a transcript within the meaning of Neb. Rev. Stat. § 25-1905 (Reissue 1979).
3. **Jurisdiction: Appeal and Error.** 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.

Appeal from the District Court for Gage County: ORVILLE L. COADY, Judge. Appeal dismissed.

Jerald W. Kerl of Andersen & Kerl, for appellant.

James L. Nelson of Carlson & Nelson, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

L. Dwight Moell, M.D., assigns as error the dismissal of his petition following his refusal to amend same after the

sustainment of the demurrers of Mennonite Deaconess Home and Hospital, Inc., and the individual members of its board of directors. The demurrers were based on the grounds that the district court lacked subject matter jurisdiction and that the petition failed to state a cause of action. We dismiss the appeal for lack of jurisdiction.

Neb. Rev. Stat. § 25-806 (Reissue 1979) permits a defendant to question the jurisdiction of a court over the subject matter of a proceeding as revealed by the face of a petition and the instruments attached thereto. *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977); *Clyde v. Buchfinck*, 198 Neb. 586, 254 N.W.2d 393 (1977).

The facts, as distinguished from the conclusions, alleged in Dr. Moell's petition are that he is a physician licensed by the State of Nebraska, who has practiced medicine at Beatrice in Gage County for 30 years; that Mennonite Deaconess Home and Hospital, which receives federal funds as well as charitable contributions, is a nonprofit, tax-exempt charitable corporation organized and existing under the laws of Nebraska, doing business as the only hospital in Gage County, under the name and style of Beatrice Community Hospital and Health Center; and that the hospital, by and through its board of directors, deprived Dr. Moell of membership on the hospital's medical staff, in violation of the hospital's bylaws. The petition concludes that, as a consequence of the foregoing, Dr. Moell has been deprived of due process of law and of his civil rights. In summary, the petition prays that the action of the hospital's board be reversed and that the hospital be prevented from denying staff membership to Dr. Moell.

Neb. Rev. Stat. § 25-1905 (Reissue 1979) requires that a plaintiff in error "file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified."

It has been held that in a proceeding in error the jurisdiction of the court does not attach until there is presented to it, within the 1-month limitation contained in Neb. Rev. Stat. § 25-1931 (Reissue 1979), a duly authenticated transcript containing the final order or judgment of which complaint is made. *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985); *Anania v. City of*

Omaha, 170 Neb. 160, 102 N.W.2d 49 (1960).

Although Dr. Moell's petition alleges that there is attached to it the "transcript of the proceedings . . . which includes the final action of the Defendant Board of Directors on February 8, 1984 . . .," such is not the fact.

Firstly, we do not find among the various and sundry documents appended to the petition any instrument which purports to constitute the February 8, 1984, action of the hospital's board. It has long been the rule that a transcript on appeal which does not contain a final order or judgment presents nothing for review. *Propeck v. Propeck*, 79 Neb. 218, 112 N.W. 302 (1907). Indeed, the final order or judgment complained of is the very essence of a transcript, for once a certified copy thereof is filed on time, other deficiencies may be supplied thereafter. *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976).

Secondly, the documents appended to Dr. Moell's petition are not authenticated in any way and therefore do not in any sense constitute a transcript. It has been held that the mere production of original papers without evidence as to their source does not constitute a transcript within the meaning of § 25-1905. *Adams v. City of Omaha*, 179 Neb. 684, 139 N.W.2d 885 (1966); *Anania v. City of Omaha, supra*. The proper procedure would have been to have the various documents before the hospital's board and the document evidencing the board's action certified by the president or other appropriate officer of the board as being true and correct copies of the documents which were before the board.

We must therefore conclude, without in any way determining whether a proceeding in error constitutes a proper vehicle to review the action of the hospital in any event, that the district court acquired no jurisdiction of the subject matter. Consequently, neither did this court. *Moyer v. Douglas & Lomason Co.*, 212 Neb. 680, 325 N.W.2d 648 (1982).

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. RONALD R. NAVARRETE, APPELLANT.

376 N.W.2d 8

Filed November 1, 1985. No. 84-936.

1. **Plea in Abatement: Preliminary Hearings: Evidence: Verdicts.** Error in the ruling on a plea in abatement challenging the sufficiency of the evidence at the preliminary hearing is cured by a verdict of guilty if the evidence at trial is sufficient to sustain a finding of guilt beyond a reasonable doubt.
2. **Juries: Evidence.** A jury may consider the physical appearance of the defendant together with other circumstances in determining his age.
3. **Venue: Appeal and Error.** A motion for a change of venue is addressed to the sound discretion of the trial court and will not be disturbed on appeal unless a clear abuse of discretion is shown.
4. **Juror Qualifications.** A juror need not be totally ignorant of the facts and issues involved. It is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.
5. **Criminal Law: Sexual Assault.** Consent or reasonable mistake as to the age of the victim is not a defense to first degree sexual assault upon a child.

Appeal from the District Court for Keith County: JOHN P. MURPHY, Judge. Affirmed.

Gregory J. Beal of Gregory J. Beal & Associates, P.C., for appellant.

Robert M. Spire, Attorney General, and L. Jay Bartel, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The defendant, Ronald R. Navarrete, has appealed from his conviction and sentence to imprisonment for 1½ to 4 years for first degree sexual assault on a child. Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979). First degree sexual assault on a child occurs when a person 19 years of age or older subjects a person less than 16 years of age to sexual penetration.

The defendant has assigned 11 errors in his brief. Our review, however, is limited to those errors which are argued and discussed in the brief. Neb. Ct. R. 9D(1)d (rev. 1983); *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983).

The defendant contends that the trial court should have

sustained his plea in abatement on the ground that the evidence at the preliminary hearing in county court was not sufficient to support the order binding him over for trial in the district court.

It is the rule in this state that any error in the ruling on a plea in abatement challenging the sufficiency of the evidence at the preliminary hearing is cured by a verdict of guilty if the evidence at trial is sufficient to sustain a finding of guilt beyond a reasonable doubt. *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975).

The record shows that the offense occurred on April 15, 1984. On the evening of the 14th the defendant, the victim, and a third person had been drinking and driving around Ogallala, Nebraska. The defendant, who was 22 years of age, purchased the beer which was consumed by the defendant, the victim, and the third person. The victim was only 15 years of age, although he was within approximately 6 weeks of his 16th birthday.

At about midnight the defendant and the victim were at the defendant's home. The third person had gone home. The victim was feeling the effect of the beer and went into the defendant's bedroom so that he could lie down on the bed. He awakened sometime later and found the defendant on the bed beside him. The defendant spoke with the victim for awhile and then placed his hand on the victim's penis. Later the defendant put his penis in the victim's mouth and then into the victim's anus. The victim again fell asleep. When he awakened he returned to his home but did not enter the house. The victim sat in his father's pickup truck for about an hour and then decided to report the incident to the police.

At the police station a statement by the victim was recorded. He was then taken to a medical clinic, where he was examined by a physician. A complaint was filed and the defendant was arrested on April 16, 1984.

Following his arrest, a police officer interviewed the defendant at the Keith County jail. Before advising the defendant of his rights, the officer asked the defendant his name and age. The officer was allowed to testify, over objection, that the defendant gave his name and stated his date of birth was April 22, 1961. The officer then advised the defendant of his rights but did not interrogate him further.

This, however, was not the only evidence before the jury as to the age of the defendant and was merely cumulative to the other evidence on this issue.

The victim testified that when he first met the defendant in June 1983, the defendant said that he was old enough to buy liquor and beer. The legal age to purchase alcoholic liquors at that time was 20. Neb. Rev. Stat. § 53-103(23) (Cum. Supp. 1982).

The jury observed the defendant throughout the trial, and there was testimony concerning the purchase of beer by the defendant on at least two occasions on the evening the offense was committed.

In *State v. Lauritsen*, 199 Neb. 816, 261 N.W.2d 755 (1978), we held that a jury may consider the physical appearance of the defendant if there is other evidence as to his age.

The testimony of the victim established the other elements of the crime. His testimony was corroborated by the testimony of the police officers and expert testimony concerning hair samples, blood tests, and saliva tests made upon the defendant. A semen stain found on the victim's underwear was consistent with other evidence that it came from the defendant. We conclude that the evidence was sufficient, if believed, to support a finding of guilt beyond a reasonable doubt.

The defendant contends that the trial court should have sustained his motion for a change of venue because extensive and prejudicial pretrial publicity concerning the offense deprived him of a fair and impartial trial in Keith County, Nebraska.

A motion for a change of venue is addressed to the sound discretion of the trial court and will not be disturbed on appeal unless a clear abuse of discretion is shown. *State v. Rife*, 215 Neb. 132, 337 N.W.2d 724 (1983).

The factors to be considered in determining whether a change in venue should have been granted due to pretrial publicity include:

> "[T]he nature of the publicity; the degree to which the publicity has circulated throughout the community; the degree to which the publicity circulated in areas to which venue could be changed; the length of time between the

> dissemination of the publicity complained of and the date of trial; the care exercised and ease encountered in selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn."

State v. Fallis, 205 Neb. 465, 469, 288 N.W.2d 281, 284 (1980), quoting *State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976).

The voir dire examination of the prospective jurors in the defendant's case does not support his contention that pretrial publicity deprived him of a fair and impartial trial. Of the 14 persons questioned in regard to exposure to pretrial publicity, 7 were retained to serve on the jury. The other 5 persons selected for the panel of 12 did not recall being exposed to any pretrial publicity in this case.

The trial court examined the venire in regard to exposure to publicity and as to whether they could set such information aside in determining the issues in the case. One juror, who thought it had affected his ability to remain impartial, was subsequently excused by the court. Another juror, who was also later excused, expressed doubts about his ability to act impartially, but on further questioning indicated that he could decide the issues on the evidence presented in court alone. None of the other jurors expressed any doubts as to their abilities in this regard.

Jurors need not "be totally ignorant of the facts and issues involved." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). The *Irvin* Court further elaborated that "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723. The jury selected in this case satisfied that requirement.

The defendant also contends that the statute under which he was prosecuted, § 28-319(1)(c), is unconstitutional because consent and reasonable mistake concerning the victim's age are not defenses. The statute in this respect is similar to ones on statutory rape in which consent is not a defense. *Stapleman v. State*, 150 Neb. 460, 34 N.W.2d 907 (1948); *State v. Vicars*, 186 Neb. 311, 183 N.W.2d 241 (1971). In the *Vicars* case we said at 314, 183 N.W.2d at 243: "[M]istake or lack of information as to

the victim's chastity is no defense to the crime of statutory rape." We have expressly rejected the "California Rule" stated in *People v. Hernandez*, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964), which the defendant relies on by analogy. *State v. Vicars, supra.*

The majority of the cases hold that a defense of reasonable mistake is not constitutionally required. See, e.g., *Nelson v. Moriarty*, 484 F.2d 1034 (1st Cir. 1973); *State v. Elton*, 657 P.2d 1261 (Utah 1982); *Goodrow v. Perrin*, 119 N.H. 483, 403 A.2d 864 (1979); *Com. v. Robinson*, 264 Pa. Super. 345, 399 A.2d 1084 (1979). In *State v. Vicars, supra*, we held at 313, 183 N.W.2d at 243:

> It is not violative of due process for the Legislature, in framing its criminal laws, to cast upon the public the duty of care or extreme caution. Nor is it unfair to require one who gets perilously close to an area of proscribed conduct to take the risk that he may cross over the line.

There being no error, the judgment is affirmed.

AFFIRMED.

KRIVOSHA, C.J., and WHITE, J., concur in the result.

CURTIS W. CEMER, APPELLEE, V. HUSKOMA CORPORATION AND ARGONAUT INSURANCE COMPANY, APPELLANTS.

375 N.W.2d 620

Filed November 1, 1985. No. 85-216.

1. **Workmen's Compensation: Limitations of Actions.** If an employee suffers an injury which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, the worker's failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.
2. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same effect as a jury verdict in a civil case, and an order disposing of a case, whether it be to enter an award or cause a dismissal of the claim, may not be set aside where the

findings are supported by the evidence. The facts are not reweighed on appeal.

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

Kevin Colleran of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

Robert R. Gibson of Gibson, Patrick & Wilson, and, on brief, Ronald Rosenberg of Rosenberg Law Offices, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

Huskoma Corporation and Argonaut Insurance Company (jointly referred to as Huskoma) appeal from an order entered by a three-judge panel of the Nebraska Workmen's Compensation Court, finding that the appellee, Curtis W. Cemer, had suffered a "latent and progressive injury that was not diagnosed until September, 1983." The three-judge panel reversed the order entered following a hearing before a single judge of the Nebraska Workmen's Compensation Court, who had found that Cemer's claim was barred by the statute of limitations. We affirm the decision of the three-judge panel.

On July 1, 1981, while employed by Huskoma, Cemer was injured when a pickup truck that he was working on rolled off of jack ramps and across his left shoulder, chest, left hip, and left leg. Cemer was taken to the emergency room at McCook Community Hospital, where he was examined by an attending physician. After a series of x rays were taken, it was determined that Cemer had suffered multiple contusions and a broken left foot. Although x rays were taken of Cemer's chest at that time, no chest injury was diagnosed.

Cemer chose to go home after having received an injection to relieve the pain. For approximately 5 days following the date of the injury, he returned to the hospital periodically to receive similar injections, and on July 3, 1981, in the attending physician's office, a cast was placed on his left foot.

Much of the evidence is in conflict, but only a minor portion

of the evidence in conflict is relevant to the issue presented by this appeal. Cemer maintains that he asked the attending physician to refer him to a specialist because he felt "there was something wrong" with his chest. The physician maintains, however, that neither he nor the radiologist detected any injuries to the sternum area and that he had no recollection that Cemer ever complained of chest pain. The physician placed Cemer in a physical therapy program for his shoulder, which began sometime in August. After completing the program, Cemer was released by the attending physician, who later testified that Cemer had still made no mention to him of any injury to the sternum.

Cemer received workmen's compensation benefits following the accident, in the form of temporary total disability payments as well as payments of medical expenses. The date of the last payment to Cemer was September 22, 1981. Between the time that he was released by the attending physician and September of 1983, Cemer worked for various employers, though he did not ever return to work for Huskoma.

While Cemer's testimony before the single judge and before the three-judge panel appears to be in conflict, it is undisputed that, in the summer of 1983, while carrying a bundle of shingles up a ladder, Cemer's chest "popped out of place." Shortly after that incident, Cemer consulted an orthopedic surgeon in Denver, Colorado. The orthopedic surgeon referred Cemer to a cardiovascular and thoracic surgeon, who ordered several special x rays called tomograms. After viewing the tomograms with a radiologist, the cardiovascular surgeon determined that Cemer "could have had a fracture in the past and that there was a very slight displacement at that time." He diagnosed Cemer's present problem as a "malunion of [a] partially healed fracture." He further testified that based upon the history as related to him by Cemer, the chest injury was caused by the July 1, 1981, accident.

Cemer filed his petition in the Nebraska Workmen's Compensation Court on December 22, 1983, more than 2 years after receipt of his last workmen's compensation claim but within the statute of limitations period if the injury to his chest, which occurred on July 1, 1981, is considered to have been

latent and progressive.

Neb. Rev. Stat. § 48-137 (Reissue 1984) provides in relevant part as follows:

> In case of personal injury, all claims for compensation shall be forever barred . . . unless, within two years after the accident, one of the parties shall have filed a petition . . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment.

The 2-year period began to run in this case on September 22, 1981, the date of the last payment. Thus, unless the case falls within some exception to the rule, the action is barred.

One of the exceptions to this rule may be found in *Thomas v. Kayser-Roth Corp.*, 211 Neb. 704, 707-08, 320 N.W.2d 111, 114 (1982), wherein we said that

> if an employee suffers an injury which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, the worker's failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.

In other words, if the injury is deemed to be, at the outset, latent and progressive, the statute of limitations does not begin to run until the employee discovers or should have discovered that he has a compensable disability. *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 371 N.W.2d 294 (1985).

Huskoma maintains that the instant case is like the case of *Ohnmacht v. Peter Kiewit Sons Co.*, 178 Neb. 741, 135 N.W.2d 237 (1965), where the plaintiff originally sprained an ankle. He continued to work as a carpenter but consistently had difficulty with his ankle and on one or two occasions left work because of pain. The plaintiff there did not consult a doctor for 33 months. The court found the injury not to be latent and progressive and thus the cause of action was barred by the statute of limitations.

Cemer, on the other hand, maintains that the instant case is controlled by *O'Connor v. Anderson Bros. Plumbing &*

Heating, 207 Neb. 641, 300 N.W.2d 188 (1981). There the plaintiff was injured in 1965 and continued to suffer pain for the next 12 years. However, throughout the whole time, he was examined or treated regularly by different physicians. In 1977 his arm suddenly went dead when he was operating a cigarette machine. At that time the full extent of his injuries was discovered, and it was held that the claim was not barred by the statute of limitations.

In the instant case the three-judge panel relied heavily on our decision in *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972). There, the employee was injured in 1965 when a beam fell on his leg. Several months after treatment the pain subsided. In 1970 Borowski was diagnosed as suffering a herniated disk. This court found that the herniated disk condition was latent and progressive and the injury not barred by the statute of limitations.

Although the instant case does not fall completely within any one of the three cases, upon examination of all of the evidence in this case and even disregarding the evidence of Cemer which is in conflict, we believe it cannot be said as a matter of law that the three-judge panel was clearly wrong. We have repeatedly held that

> findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same effect as a jury verdict in a civil case, and an order disposing of a case, whether it be to enter an award or cause a dismissal of the claim, may not be set aside where the findings are supported by the evidence. The facts are not reweighed on appeal.

Maxey v. Fremont Department of Utilities, supra at 631, 371 N.W.2d at 298.

In the instant case the evidence establishes that Cemer had an injury which was reported and for which he sought medical treatment. The compensation court could reasonably have found from the evidence that the injury to Cemer's chest was of such nature that it could not have been detected at the time the injury occurred. The attending physician maintains that he made no finding of an injury to the chest and gave no indication to Cemer that such an injury had occurred. On the other hand,

an automobile had rolled across his chest and down his body. He had, indeed, suffered an injury which caused a great deal of pain and which required physical therapy. That he therefore continued to suffer some pain following treatment, which he may have attributed to the diagnosed injury, is not so difficult to understand. We therefore agree with the three-judge panel that the chest injury, at its inception, was latent and progressive.

This means that the statute of limitations was tolled until it became reasonably apparent to Cemer, or should have become reasonably apparent, that a compensable disability was present. *Maxey, supra.* The three-judge panel found this to be in September of 1983 when Cemer's chest "popped out." The critical evidence which, if believed by the three-judge panel, was sufficient to support this finding is the testimony of the thoracic surgeon. Drawing from that testimony, it was reasonable for the three-judge panel to find, despite Cemer's bouts of pain, that until the chest "popped out" and tomograms of Cemer's chest were taken, the diagnosis could not have been reasonably made. An examining physician would need both the tomograms and Cemer's description of his chest "popping out" to make his diagnosis of the malunion of the sternum. This did not occur until September 1983. To reverse the decision of the three-judge panel, we would be required to reweigh the evidence, an act we are not permitted to perform. In view of the fact that there is evidence to support the decision of the three-judge panel, we affirm the decision.

AFFIRMED.

HARVEY L. SORENSEN AND MARGOT SORENSEN, APPELLANTS AND CROSS-APPELLEES, V. LOWER NIOBRARA NATURAL RESOURCES DISTRICT, APPELLEE AND CROSS-APPELLANT.

376 N.W.2d 539

Filed November 8, 1985. No. 84-224.

1. **Waters: Legislature.** By enacting the Municipal and Rural Domestic Ground Water Transfers Permit Act, Neb. Rev. Stat. §§ 46-638 to 46-650 (Reissue 1984),

as a part of Nebraska's policy, the Legislature has altered certain aspects of common law governing use of ground water, such as exoneration from the common-law prohibition against transfer of ground water and elimination of use on overlying land as a factor in determining reasonable and beneficial use of ground water.

2. **Constitutional Law: Waters: Appurtenances: Property.** The right of an owner of overlying land to use ground water is an appurtenance constituting property protected by Neb. Const. art. I, § 21.
3. **Words and Phrases.** Injury is an invasion of any legally protected interest of another, while damage is a loss, detriment, or harm sustained by reason of an injury.
4. **Causes of Action: Words and Phrases.** A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty.
5. **Eminent Domain: Damages.** All damages, present or prospective, which are caused by the exercise of eminent domain must be compensated and recovered in the original condemnation proceeding. A final award in a condemnation proceeding for the acquisition of a right-of-way is conclusive upon the parties thereto as to all matters necessarily within the issues joined, although not formally litigated.
6. _____: _____. Damages recoverable in a condemnation case are determined by the extent of the taking and a condemner's rights actually acquired, not by a condemner's use resulting from less than full exercise of a right acquired by eminent domain.
7. **Eminent Domain: Damages: Pleadings.** A promissory stipulation not contained in the condemner's petition cannot affect the extent of the taking or the amount of the damages to be awarded.
8. **Eminent Domain: Damages: Testimony.** Testimony offered by a condemner to diminish the taking stated in the condemnation petition or to describe anything less than full exercise of rights acquired by eminent domain is irrelevant to the question of damages caused by the condemner's appropriation.
9. **Eminent Domain: Presumptions.** It is a principle of law, or a "presumption," in eminent domain that a condemner will exercise all rights acquired and use the property appropriated to the full extent.
10. **Trial: Rules of Evidence: Expert Witnesses.** As a result of Rule 705, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-705 (Cum. Supp. 1984)), where cross-examination of an expert witness discloses there is no adequate factual basis for an expert's opinion, such opinion is irrelevant (Rule 401, Nebraska Evidence Rules, Neb. Rev. Stat. § 27-401 (Reissue 1979)), is inadmissible (Rule 402, Nebraska Evidence Rules, Neb. Rev. Stat. § 27-402 (Reissue 1979)), and should be stricken from consideration by a jury on proper motion of the party adversely affected by such irrelevant evidence.
11. **Rules of Evidence: Expert Witnesses.** An expert's opinion based on a misinterpretation or misconception of applicable law renders the opinion irrelevant.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Reversed and remanded for a new trial.

Donald J. Pepperl of Pepperl & Melcher, P.C., and Frank Roubicek, for appellants.

Steven G. Seglin and Leroy W. Orton of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

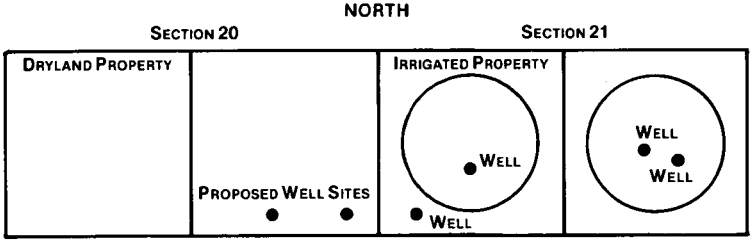
SHANAHAN, J.

Harvey L. and Margot Sorensen appeal the judgment entered in the district court for Knox County on a verdict in an eminent domain proceeding commenced by Lower Niobrara Natural Resources District (NRD). We reverse and remand for a new trial.

On February 4, 1981, NRD applied for a permit under the Municipal and Rural Domestic Ground Water Transfers Permit Act, Neb. Rev. Stat. §§ 46-638 to 46-650 (Reissue 1984) (the act), to install two wells on a quarter section owned by Sorensens and obtain statutory spacing protection. After a hearing on April 2 the Director of Water Resources (director) approved NRD's application and authorized NRD to pump ground water at a rate of 864,000 gallons per day (600 gallons per minute) and prohibited landowners and occupiers from placing within 1,000 feet of NRD's well sites any well with a capacity in excess of 100 gallons per minute. See Neb. Rev. Stat. § 46-651 (Reissue 1984).

NRD, in January 1982, filed its petition commencing eminent domain proceedings regarding a quarter section owned by Sorensens, the southeast quarter of Section 20, Township 29 North, Range 6 West of the 6th P.M., in Knox County. According to its petition, NRD sought fee simple title to two 1/2-acre tracts in Sorensens' quarter section, "for the purpose of supplying water for the beneficial use to the residents of the West Knox Rural Water District . . ." by "construction of well sites, water storage tank, water transmission lines, distribution pipelines and their appurtenances." Regarding the proposed wells, NRD's petition did not specify the number of wells, a rate for pumping ground water, or the quantity of water to be extracted.

NRD's proposed well sites were located in one of four quarter sections owned by Sorensens—two quarter sections of dry cropland with some pasture in the south half of Section 20 and two quarters irrigated by center pivot systems on the south half of Section 21, lying east of Section 20. Farming was the highest and best use of Sorensens' land. The plat, below, depicts the location of Sorensens' quarters and the two well sites sought by NRD.



Sorensens operated their quarters as a farm unit. Corn production on Sorensens' dryland was 75 bushels per acre, while the irrigated quarters produced 150 bushels per acre. Four wells, two for each center pivot system, supplied water for the irrigated cropland. Water pumped at the rate of 600 gallons per minute is necessary for operation of the existing center pivot irrigation systems on Sorensens' land.

Before proceeding, a glossary of hydrologic terms, or water words, may be helpful:

> Aquifer: A geological formation or layer of material that is porous or permeable to water, thus capable of containing or carrying ground water.
>
> Cone of depression: The funnel-shaped area around a well, where the water table has been lowered by the withdrawal of ground water through the well. The spout of the "funnel" is downward along the pump, while the upper part of the funnel, the radius of influence, extends laterally away from the pump.
>
> Drawdown: The amount by which the elevation of the surface of a body of water is or could be reduced by withdrawal or release of water.
>
> Recharge: Addition of water in an aquifer to replace that which has been withdrawn.

See 7 R. Clark, Waters and Water Rights (1976).

Sorensens' land and NRD's well sites are located over a common aquifer, that is, at the northern edge of the Ogallala aquifer, an alluvion outwash from the Rocky Mountains. Test holes on NRD's proposed sites disclosed a ground water yield of 300 to 350 gallons per minute. North of NRD's sites, near the center of the southeast quarter of Section 20, a test hole drilled by Sorensens indicated a yield from 150 to 200 gallons per minute.

Hydrologists testifying at trial did not materially disagree with each other's methodology but took issue with the different information used by opposing experts to formulate their opinions and feed their computers. The hydrologists described their use of a computer ground water model, a simulated aquifer to demonstrate behavior of the formation over a protracted period of water withdrawal. The model involves complicated computations vulnerable to "garbage in, garbage out," that is, computer computations were only as good as the validity of data supplied.

Testimony from expert witnesses was a sequence of point and counterpoint.

One of Sorensens' hydrologists testified the primary and most important characteristic of an aquifer is the formation's capability of providing economic withdrawal of subterranean water. In Sorensens' situation, however, there was no recharge of the aquifer supplying ground water for irrigation. Using a pumping rate of 300 gallons per minute on each of NRD's well sites and considering a well's expanding cone of depression, Sorensens' hydrologist concluded that NRD's extraction of water would lower the water table to a level where Sorensens' existing wells would become useless in 3 to 5 years. According to the hydrologist, with NRD's pumping ground water at a rate of 600 gallons per minute, Sorensens will "end up going dry." In the opinion of Sorensens' expert, as the cone of depression for NRD's wells expands, the ground water level will become so depleted that Sorensens' irrigation wells will "suck air."

Testimony of real estate appraisers called by Sorensens focused on the vulnerability of Sorensens' ground water supply as a result of NRD's project. According to Sorensens'

appraisers, on account of well spacing and impracticality of irrigation wells outside the area restricted to NRD's wells, any land development dependent on ground water north of NRD's well sites was curtailed, resulting in reduction of land value and price obtainable for Sorensens' dry land. Also, a factor bearing upon damages was Sorensens' diminishing supply and eventual loss of ground water for irrigation presently conducted, a loss caused by NRD's unlimited pumping pursuant to rights acquired in eminent domain.

NRD retained consulting engineers to design wells based on information supplied in a well-driller's report indicating sufficient ground water yield for two 300-gallon-per-minute wells. Sorensens objected, but the court allowed NRD's project engineer to testify about the number of people to be served by the project and further testify that, considering the proposed project, average daily pumping at a rate of 173 gallons per minute would meet the demands upon NRD until the year 2005.

Over Sorensens' objection, the court admitted exhibit 104, a copy of the director's order granting NRD's permit under the act, which exhibit in part contained the following:

> 5. Testimony at the hearing additionally indicated the purpose of [NRD's] project is to provide a more economic, reliable and better quality water supply for approximately 150 rural farmsteads and two small villages. . . .
>
> 6. . . . [NRD's] expert witness gave as his opinion that the well operation and consequent drawdown would have no appreciable effect on the ground water use activities of adjacent landowners. . . .
>
> IT IS THEREFORE FOUND that the construction of wells and withdrawal of ground water requested by the [NRD] is reasonable, is not contrary to the conservation and beneficial use of ground water, and is not otherwise detrimental to the public welfare, and that the application should be approved.

On the basis of NRD's pumping ground water at a rate of 175 gallons per minute from each well, NRD's hydrologist gave an opinion regarding Sorensens' supply of ground water, that is, in reference to Sorensens' wells, "[N]o appreciable interference in

yield and drawdown will be seen by the Sorensens."

NRD's real estate appraiser, relying on NRD's hydrologic information that pumping at 175 gallons per minute would not cause any significant loss in Sorensens' ground water supply, testified there was no damage to the Sorensen farm as a result of NRD's acquisition of the well sites. On cross-examination NRD's appraiser acknowledged that his opinion on the value of Sorensens' land after the taking and damages was based on the opinion of NRD's hydrologist, who in turn had formed his opinion (no loss of ground water for Sorensens) on the premise that NRD would pump 175 gallons per minute from each of its two wells. Sorensens moved to strike the appraiser's testimony on damage to their remaining tract because the expert had failed to take into account the full extent of NRD's rights acquired by eminent domain but, rather, had based his opinion on NRD's exercising less than its rights acquired by condemnation.

Toward the end of testimony adduced during the 4-day trial, one of the hydrologists attested that water runs downhill.

After a conference on instructions the court gave the following among its instructions:

> Your verdict for [Sorensens] should therefore represent the sum of money which justly compensates [Sorensens] both for the property taken and for any reduction in value to the remainder of [Sorensens'] property . . . . [Instruction No. 4.]
>
> [Y]ou may consider . . . every non-speculative element of inconvenience, annoyance and disadvantage which the taking has caused [Sorensens] and which would influence a purchaser's decision to buy the property or pay a certain amount for [the remainder]. [Instruction No. 5.]
>
> Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his, her, or its land, subject to the correlative or co-equal rights of other landowners to a reasonable proportion of the whole when the ground water supply is insufficient for all users. [Instruction No. 6.]

The Statutes of the State of Nebraska provide in

substance as follows:

. . . .

If the Director of Water Resources, after notice and hearing, finds that the withdrawal and transportation of ground water requested by the applicant is reasonable, is not contrary to the conservation and beneficial use of ground water, and is not otherwise detrimental to the public welfare, he shall grant a permit to the applicant to withdraw and transport water in the amount applied for or in a lesser amount; Provided, nothing in the granting of such permit shall be construed as limiting any right of an owner of an estate or interest in or concerning land to recover damage for any injury done to his or her land or to any water rights appurtenant thereto. You are instructed that Exhibit 104 is a permit granted to [NRD] under the provisions of the [act]. [Instruction No. 7.]

At the conference on instructions, Sorensens tendered, and the court rejected, an instruction supplementing the court's instruction No. 5 as follows:

[C]ompensation to the owners should be based upon the condemner's actual legal rights it is acquiring as described in [declaration of taking found in NRD's petition in eminent domain] and not the use the condemner may make of such rights.

That the condemner in this case may have no present intention of exercising all of the rights acquired or the probability that the use of the property may be limited, are not proper matters for consideration in fixing compensation, since damages are required to be paid for the rights appropriated, even though the full use may not be immediately contemplated or actually ever accomplished. The presumption is that the condemner will exercise its rights and use and enjoy the property taken to the fullest extent.

Sorensens also tendered, and the court refused, instruction No. 19: "The condemner has adduced evidence showing the purpose and nature of the taking and proposed project. The evidence was admitted for that purpose and cannot be used to reduce the extent of the taking or to obtain a mitigation of

damages."

Sorensens objected to instruction No. 7 and its incorporation of exhibit 104 (copy of the director's order).

Sorensens' 15 assignments of error are distilled into 6 complaints, that the district court erred in: (1) Giving instruction No. 6 regarding a landowner's right to use ground water; (2) Failing to give Sorensens' tendered instruction No. 5 supplementing instruction No. 5 given by the court; (3) Admitting testimony about NRD's projected or anticipated exercise of its right and use of property acquired by eminent domain and refusing to give Sorensens' tendered instruction No. 19; (4) Admitting a copy of the director's order (exhibit 104); (5) Giving instruction No. 7, incorporating exhibit 104; and (6) Refusing to strike the opinion testimony of NRD's appraiser regarding damages caused by NRD's taking.

NRD has cross-appealed and contests the district court's judgment awarding an attorney fee and expert witness fee for Sorensens. See Neb. Rev. Stat. § 76-720 (Reissue 1981).

The case before us raises questions involving the Nebraska Constitution, water law, eminent domain, damages, and causes of action.

NRD suggests a general, preliminary proposition: If Sorensens cannot own ground water, damages for injury to Sorensens' right to use ground water are not recoverable in eminent domain proceedings.

Rather than the English rule by which landowners have an absolute right to capture water found beneath their lands, as observed in *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933), Nebraska has developed a rule for ground water based on reasonable use and correlative rights, namely:

> [T]he owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole . . . .

Id. at 811, 248 N.W. at 308. See, also, *Luchsinger v. Loup River*

Public Power District, 140 Neb. 179, 299 N.W. 549 (1941); *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966); *Prather v. Eisenmann*, 200 Neb. 1, 261 N.W.2d 766 (1978); *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), *rev'd on other grounds* 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

Qualified by the requirement of reasonable, proportionate sharing during shortage of ground water, Nebraska's common law permits a landowner to use ground water extracted from beneath the owner's land, provided such landowner's extraction does not exceed a reasonable and beneficial use on the landowner's property. *Olson v. City of Wahoo, supra.*

Subject to constitutional limitations and the consent of Nebraska's citizens, the Legislature has the right and power to determine state policy on ground water. See, *Metropolitan Utilities Dist. v. Merritt Beach Co., supra*; *State ex rel. Douglas v. Sporhase, supra.*

In apparent concern for public water suppliers on account of the common law's restriction on transfer and transport of ground water off the surface overlying a source of ground water, the Legislature, in 1963, enacted the Municipal and Rural Domestic Ground Water Transfers Permit Act, by which the Director of Water Resources was authorized to grant a permit to public water suppliers "(a) To locate, develop, and maintain ground water supplies through wells or other means and to transport water into the area to be served and (b) to continue existing use of ground water and the transportation of ground water into the area served." § 46-638(1).

The director, after a hearing and upon a finding "that the withdrawal and transportation of ground water requested by the applicant is reasonable, is not contrary to the conservation and beneficial use of ground water," shall issue a permit under the act. § 46-642.

Additionally, the act provides:

> Nothing in sections 46-638 to 46-650 shall be construed as limiting any right of an owner of an estate or interest in or concerning land to recover damage for any injury done to his or her land or to any water rights appurtenant thereto; nor shall sections 46-638 to 46-650 limit rights of

> condemnation which public water suppliers have under the laws of the State of Nebraska.

§ 46-647.

In *State ex rel. Douglas v. Sporhase, supra* at 706-09, 305 N.W.2d at 617-18, after concluding that ground water in Nebraska is publicly owned, this court stated:

> Since the Nebraska common law of ground water permitted use of the water only on the overlying land, legislative action was necessary to allow for transfers off the overlying land, even for as pressing a need as supplying urban water users.
>
> . . . .
>
> . . . The public, through legislative action, may grant to private persons the right to the use of publicly owned waters for private purposes; but . . . the public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake. . . .
>
> . . . Ground water use is not an unlimited private property right in Nebraska law.

By enacting the Municipal and Rural Domestic Ground Water Transfers Permit Act as a part of Nebraska's policy, the Legislature altered certain aspects of common law governing use of ground water. Permittees under the act are exonerated from the common-law prohibition against transfer and transportation of ground water. See § 46-638(1)(b). Consequently, a public water supplier's use of ground water is not restrictively localized to the site of the water's extraction. Were NRD restricted to retention and use of 864,000 gallons on its tracts—the minimum daily yield extractable from the aquifer according to NRD's test results—each of the proposed 1/2-acre well sites would be transformed into a veritable Atlantis. In permitting transfer of ground water from the site of its extraction, the act has removed use on overlying land as an index for the "reasonable and beneficial use" required by common law. Whether overlying land remains a factor in formulating a "reasonable proportion" for sharing ground water during shortage is a question not required to be answered in the present case. Finally, to assure a public water supplier's

uninterrupted transfer and transportation of ground water, § 46-647 supplies a remedy of compensatory damages for a permittee's injury to another's land or water rights, in contrast with injunctive relief available under common law. Nevertheless, concerning landowners without a permit under the act, the common law still governs use of ground water inasmuch as such use is a limited private property right in Nebraska. See *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981).

What, then, is the nature of a landowner's right to use ground water? As already noted, the right to use ground water is a derivative right immediately dependent on ownership of the surface over a source of ground water. Thus, the right to use ground water does not float in a vacuum of abstraction but exists only in reference to and results from ownership of the overlying land. An appurtenance is "[t]hat which belongs to something else; an adjunct; an appendage. Something annexed to another thing more worthy as principal, and which passes as incident to it . . . ." Black's Law Dictionary 94 (5th ed. 1979). See, also, *Clearwater Elevator Co. v. Hales*, 167 Neb. 584, 94 N.W.2d 7 (1959). *Appurtenance* "signifies something pertaining to another thing as principal, and which passes as incident to the principal thing, which is different, but of a congruous nature." *City of Lincoln v. Lincoln St. R. Co.*, 67 Neb. 469, 487, 93 N.W. 766, 772 (1903). "A thing is deemed to be incidental or *appurtenant* to land when it is by right used with the land for its benefit, as in the case of a way, or water-course, or of a passage for light, air, or heat from or across the land of another." Black's Law Dictionary, *supra* at 94. Cf. *Neilson v. Leach*, 140 Neb. 764, 1 N.W.2d 822 (1942) (an easement, as an appropriate and useful adjunct of land, may be appurtenant to the real estate). Without embarkation on an ontological or metaphysical investigation, it is clear that the right to use ground water is an attribute of owning fee simple title to land overlying a source of ground water and is inseparable from the land to which it applies. We conclude that the right of an owner of overlying land to use ground water is an appurtenance constituting property protected by Neb. Const. art. I, § 21: "The property of no person shall be taken or

damaged for public use without just compensation therefor."

With that background regarding use of ground water, including the nature of Sorensens' right to use ground water, we can now proceed to dispose of Sorensens' several assignments of error.

Sorensens contend that the court, by giving instruction No. 6, informed the jury that NRD was an ordinary landowner subject to common law governing use of ground water. NRD suggests it is a generic landowner bound to observe common law in pumping water from its well sites. We need not dwell on this aspect of the case, because NRD, as a permittee under the act, is entitled to use ground water in a manner not otherwise accorded a landowner under common law and outside the purview and protection of the Municipal and Rural Domestic Ground Water Transfers Permit Act. As a result of the act, NRD has become a peculiar type of landowner granted very special status with statutory rights contravening common law. In substance and effect, instruction No. 6 informed the jury that Sorensens and NRD enjoyed equal rights in the use of ground water. Common law restricts Sorensens' use of ground water to a "reasonable and beneficial use" on their overlying land. The act authorizes NRD's transfer of ground water for use somewhere other than the site of extraction. Although § 46-642 does refer to a "reasonable . . . and beneficial use of ground water" on the part of NRD, such statutory characterization of use refers to the director's findings necessary for issuance of a permit under the act, not to the common-law duty imposed on an owner of land overlying ground water. Because instruction No. 6 indicated that rights to use ground water, Sorensens' and NRD's, were based on common law, the given instruction is incorrect and misleading regarding the parties' respective rights to use ground water.

Next, Sorensens argue that the court's instruction No. 5 is deficient because the given instruction allowed the jury to determine damages on the basis of NRD's prospective or contemplated use of property in exercising its rights acquired rather than damages based on rights actually acquired by eminent domain. NRD responds that § 46-647 obligates NRD to pay damages only when NRD's future use injures Sorensens'

ground water supply.

A pivotal question in this case involves the relationship between eminent domain and the Municipal and Rural Domestic Ground Water Transfers Permit Act. More specifically, our inquiry is whether depletion of a common source of ground water, as the result of water transfer off the overlying land acquired by a permittee's exercise of eminent domain, is an element of damage recoverable by a condemnee.

NRD fails to distinguish *injury* from *damage*, words not necessarily synonymous. Injury is an invasion of any legally protected interest of another, while damage is a loss, detriment, or harm sustained by reason of an injury. See *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984).

A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty. See, *City of Alliance v. Cover-Jones Motor Co.*, 154 Neb. 900, 50 N.W.2d 349 (1951); *Gaspar v. Flott*, 209 Neb. 260, 307 N.W.2d 500 (1981).

In *Little v. Loup River Public Power District*, 150 Neb. 864, 36 N.W.2d 261 (1949), this court held that Neb. Const. art. I, § 21, guarantees a condemnee the right to recover all damages caused by exercise of eminent domain and that a condemnee is "assured by the Constitution of the state recovery in one action of the whole amount of the damages . . . sustained because of the taking without the delay or expense of future lawsuits." *Id.* at 868, 36 N.W.2d at 264. Consequently, as a result of a government's exercise of eminent domain, a condemnee has a cause of action to recover just compensation for the condemnee's property taken by the government for a public purpose.

In a condemnation action there are two elements of damage: (1) market value of the land taken or appropriated; and (2) diminution in value of the land remaining, less special benefits. *Crawford v. Central Neb. Public Power & Irrigation Dist.*, 154 Neb. 832, 49 N.W.2d 682 (1951). All damages, present or prospective, which are caused by the exercise of eminent domain must be compensated and recovered in the original condemnation proceeding. *State v. County of Cheyenne*, 157

Neb. 533, 60 N.W.2d 593 (1953). In *Snyder v. Platte Valley Public Power and Irrigation District*, 140 Neb. 897, 901, 2 N.W.2d 327, 329 (1942), this court stated: "It is well settled by the decisions of this court that the final award in a condemnation proceeding for the acquisition of a right of way is conclusive upon the parties thereto as to all matters necessarily within the issues joined, although not formally litigated."

In a condemnation action a condemnee is entitled to recover compensation for all damages caused by the taking. Damages recoverable in a condemnation case are determined by the extent of the taking and a condemner's rights actually acquired, not by a condemner's use resulting from less than full exercise of a right acquired by eminent domain. See, *Richardson v. Big Indian Creek Watershed Conservancy Dist.*, 181 Neb. 776, 151 N.W.2d 283 (1967); *Little v. Loup River Public Power District, supra*. In considering just compensation and the amount of damages to be paid a condemnee, a jury may consider factors which would influence a well-informed buyer in determining a price payable for the property at the time of the government's taking. See, *Harmony Lanes v. State*, 193 Neb. 826, 229 N.W.2d 203 (1975); *Iske v. Omaha Public Power Dist.*, 185 Neb. 724, 178 N.W.2d 633 (1970).

In *Hunt v. Chicago, B. & Q. R.R. Co.*, 180 Neb. 375, 377, 143 N.W.2d 263, 265 (1966), this court stated a general rule for the measure of damages involving injury to real estate: " '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. . . .' " See, also, *"L" Investments, Ltd. v. Lynch*, 212 Neb. 319, 322 N.W.2d 651 (1982). Obviously, a landowner prosecuting a cause of action under § 46-647 will present evidence substantially the same, if not identical, as evidence presented by a landowner involved in an eminent domain proceeding. Bringing one action to recover damages for government's injury to a landowner's right to use ground water and yet another action for damages caused by the government's taking property—the character of which is determined by a water right—splits a cause of action. As expressed in *Lake Lorraine, Inc. v. American Telephone &*

Telegraph, 378 F. Supp. 13, 19 (E.D. Mo. 1974):

> The doctrine surrounding the rule against splitting a cause of action is in the nature of a rule of repose with the double purpose of protecting both the courts and the litigants from the harassment of repetitious litigation. . . . It is fundamental that causes of action should not be tried piecemeal . . . .

See, also, *Buder v. Fiske*, 174 F.2d 260 (8th Cir. 1949). Having already concluded that a landowner's right to use ground water is a proprietary appurtenance inseparable from the land benefited, and, therefore, a right protected by the Constitution, it would indeed be a legal paradox to require a condemnee to recover all condemnation damages in one action excluding consideration for interference of an attribute essential to the complete use and enjoyment of the property condemned. Even in the absence of eminent domain proceedings, a landowner has a cause of action for damage resulting from injury to the right to use ground water. See § 46-647. Such cause of action existing outside a condemnation case is little solace to a landowner who must recover all damages in eminent domain proceedings or who, on commencement of a subsequent action under § 46-647, will be confronted with a principle operating as a conclusive bar to a recovery of damages, namely, all compensation for injury to the condemnee's land had been recovered in the condemnation case. Section 46-647 in part provides that the act shall not "limit rights of condemnation which public water suppliers have under the laws of the State of Nebraska." If the act does not limit a condemner's rights in eminent domain, the act does not limit a condemner's duty to pay just compensation and a condemnee's right to receive all damages resulting from eminent domain. We therefore hold that when condemnation proceedings involve a public water supplier as a permittee under the Municipal and Rural Domestic Ground Water Transfers Permit Act, all damages caused by the taking must be recovered by the condemnee in the eminent domain proceedings, including damages to the remainder and water rights appurtenant to the remainder.

Having examined the relationship between an eminent domain proceeding and the cause of action existing under

§ 46-647, we now consider instruction No. 5 given by the court, Sorensens' requested instruction, and the likely effect of the given instruction on a jury in view of evidence about NRD's contemplated or projected use of the property and rights acquired.

For some time past, the rule in Nebraska has been, and continues to be, a promissory stipulation not contained in the condemner's petition cannot affect the extent of the taking or the amount of the damages to be awarded. See *Blobaum v. State*, 179 Neb. 304, 137 N.W.2d 855 (1965).

> In the absence of an agreement between the parties the condemner must take the rights he seeks to appropriate unconditionally and he must make full compensation for what he takes. An unaccepted promise to do something in the future cannot affect the character or the extent of the rights acquired or the amount of the damages to be recovered as just compensation. When property is taken by the power of eminent domain, the compensation of the owner is to be determined by the actual legal rights acquired by the condemner and not by the use he may make of the rights.

Little v. Loup River Public Power District, 150 Neb. 864, 866, 36 N.W.2d 261, 263-64 (1949). See, also, *Danish Vennerforning & Old Peoples Home v. State*, 191 Neb. 774, 217 N.W.2d 819 (1974).

NRD's declaration of taking, as contained in its condemnation petition, did not specify any restriction on NRD's use of the property acquired. NRD's petition alleged no basis for any inference that NRD will exercise less than its full rights or possess its property with less than complete use. NRD's pumping ground water is limited only by nature and the method of extracting water, not by the taking and acquisition of rights sought in NRD's condemnation petition. We note a requirement imposed by Neb. Rev. Stat. § 76-704.01(4) (Reissue 1981) concerning a condemnation petition, namely, such pleading shall include: "The quantity needed to fulfill the public purpose for which [the property is] taken." Beyond a metes-and-bounds description and the nature of title acquired, NRD's petition imposed no limitation on the use of property

appropriated from Sorensens. Instruction No. 5 was a prejudicially incomplete statement of law regarding damages "to be determined by the actual legal rights acquired by the condemner and not by the use he may make of the rights." *Little v. Loup River Public Power District, supra* at 866, 36 N.W.2d at 264. The deficiency of instruction No. 5 was magnified and intensified as the result of testimony from NRD's project engineer about a contemplated use into the 21st century, a use projected on less than full exercise of NRD's rights acquired in eminent domain. The engineer's testimony in essence reduced the extent of NRD's taking, that is, described NRD's project as something less than a full exercise of its rights acquired or less than complete use of the property appropriated. Any limitation of a right acquired and consequent use must be expressed in a condemnation petition, not implied in a condemner's evidence about prospective use. Evidence offered by a condemner to diminish the taking stated in the condemnation petition or to describe anything less than full exercise of rights acquired by eminent domain is irrelevant to the question of damages caused by the condemner's appropriation and, therefore, inadmissible. Rule 402, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-402 (Reissue 1979)). Cf. *Gable v. State*, 176 Neb. 789, 792, 127 N.W.2d 475, 478 (1964) (evidence of use is not admissible "for the purpose of reducing the extent of the taking or for obtaining a mitigation of damages"). See Rule 401 (relevant evidence, defined), Nebraska Evidence Rules (Neb. Rev. Stat. § 27-401 (Reissue 1979)). Admission of irrelevant evidence showing a diminution of the taking and, consequently, a reduction of damages prejudicially affected Sorensens' right to compensation required by the Nebraska Constitution. See Rule 103(1), Nebraska Evidence Rules (Neb. Rev. Stat. § 27-103(1) (Reissue 1979)). Sorensens' requested supplemental instruction No. 5 should have been given to complete an appropriate instruction on damages. Under the circumstances Sorensens' tendered instruction No. 19 should have been given as well.

Sorensens' complaint directed to instruction No. 7 and admission of exhibit 104 is valid. Existence of a permit under the act was relevant in reference to NRD's use of ground water as a public water supplier. However, admitting the contents of

exhibit 104, the copy of the director's order approving NRD's application, was prejudicial error. The exhibit informed the jury that during the proceedings before the director, an unidentified expert for NRD testified that NRD's well operations "would have no appreciable effect on the ground water use activities of adjacent landowners." Such opinion evidence, transmitted to the jury by admission of exhibit 104, was rank hearsay: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," Rule 801(3), Nebraska Evidence Rules (Neb. Rev. Stat. § 27-801(3) (Reissue 1979)). There lurked twofold prejudice to Sorensens' claim in the admission of exhibit 104. The mystery expert's opinion evidence, given at the hearing before the director and introduced in Sorensens' trial, was not subject to cross-examination during the condemnation trial. This circumstance placed the documentary hearsay opinion beyond a jury's considered evaluation. Moreover, such hearsay underscored and corroborated the opinion given by NRD's hydrologist at trial: "no appreciable interference in yield and drawdown will be seen by the Sorensens." The opinion given by NRD's hydrologist at trial was the keystone of a later opinion expressed by NRD's appraiser concerning damages resulting from the taking, another aspect of the trial treated subsequently in this opinion. Additionally, the director's findings that NRD's construction of its wells and use of ground water were "reasonable [and] not contrary to the conservation and beneficial use of ground water" and were not "detrimental to the public welfare" are irrelevant evidence on the question of damages caused by NRD's taking. With all the variables and undisclosed quantities entering the director's findings, any connection between departmental disposition of NRD's application and compensation due Sorensens as a result of NRD's taking is reduced to mere possibility, not the rational relationship based on likelihood required for relevant evidence. Cf. *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985) (a codefendant's conviction by a jury is irrelevant as evidence of a defendant's guilt). While NRD's reasonable use of ground water consistent with conservation is commendable, the

director's findings in that regard are irrelevant to the question of Sorensens' damages. The contents of exhibit 104 were inadmissible under the circumstances. Correspondingly, instruction No. 7's incorporating the contents of the director's order was erroneous and prejudicial to a jury's fair deliberation on the question of damages caused by NRD's taking. See Rule 103(1), Nebraska Evidence Rules.

Sorensens' next question relates to the jury's consideration of opinion evidence from NRD's appraiser on the matter of damages to Sorensens' remaining tract after the taking by NRD. As demonstrated on cross-examination, NRD's appraiser based his opinion on NRD's exercising less than the right acquired by eminent domain, that is, the expert based his opinion on NRD's extraction of ground water at 175 gallons per minute, whereas no such limitation appears in the taking described in NRD's condemnation petition. It is a principle of law, or a "presumption," in eminent domain that a condemner will exercise all rights acquired and use the property appropriated to the full extent. See *Little v. Loup River Public Power District*, 150 Neb. 864, 36 N.W.2d 261 (1949).

In *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979), this court recognized that the opinion of an expert witness lacks probative value if the assumption for such opinion is not true. As a result of Rule 705, Nebraska Evidence Rules, where cross-examination of an expert witness discloses there is no adequate factual basis for an expert's opinion, such opinion is irrelevant (Rule 401, Nebraska Evidence Rules), is inadmissible (Rule 402, Nebraska Evidence Rules), and should be stricken from consideration by a jury on proper motion of the party adversely affected by such irrelevant evidence. See, *Clearwater Corp. v. City of Lincoln, supra*; §§ 27-401 and 27-402; Neb. Rev. Stat. § 27-705 (Cum. Supp. 1984).

The premise utilized by the appraiser was not merely a factual weakness in the underpinnings of an opinion on damages—a circumstance affecting weight and credibility. The appraiser's opinion was formulated on a misinterpretation or misconception of Nebraska law regarding NRD's rights acquired in eminent domain and maximum exercise of such acquired rights. In substance, the appraiser based his opinion

on NRD's exercising rights legally different from and substantially less than rights actually acquired in eminent domain under Nebraska law. An expert's opinion based on a misinterpretation or misconception of applicable law renders the opinion irrelevant. See, *Riso v. Pottawattamie Bd. of Review*, 362 N.W.2d 513 (Iowa 1985); *Stubbs v. State, Department of Transportation*, 332 So. 2d 155 (Fla. App. 1976); *State Department of Transportation v. Byrd*, 254 So. 2d 836 (Fla. App. 1971). See, also, Rules 705, 401, and 402, Nebraska Evidence Rules. The district court should have sustained Sorensens' motion to strike the opinion given by NRD's appraiser regarding damages to Sorensens' tract remaining after NRD's taking.

The errors committed by the district court affected Sorensens' right to have a jury consider the question of damages based on proper evidence, and, therefore, we reverse the judgment of the district court and remand this cause to the district court for a new trial.

Because we have reversed the district court's judgment awarding compensation to Sorensens, there is no final judgment present in the eminent domain proceedings. Therefore, in reversing the district court's judgment on the verdict for damages, we necessarily set aside the award of fees dependent on a final judgment for damages recovered in Sorensens' condemnation case. For this reason we need not consider NRD's question about propriety of fees awarded by the district court pursuant to § 76-720.

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, J., participating on briefs.

JEROME J. FOLTZ, APPELLANT, V. NORTHWESTERN BELL TELEPHONE COMPANY, A CORPORATION, AND COEN CONSTRUCTION COMPANY, APPELLEES.

376 N.W.2d 301

Filed November 8, 1985. No. 84-306.

1. **Directed Verdict.** A party against whom a motion for directed verdict is aimed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. A court should not decide an issue as a matter of law unless the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom.
2. **Trial: Jury Instructions.** A trial court has a duty to properly analyze, summarize, and submit to the jury the substance of allegations of negligence in a tort petition.
3. **Master and Servant: Independent Contractor: Liability.** If an employer, accepting and resuming possession of work by an independent contractor, could have known from a reasonable inspection that there was a defect in the work, such employer may be liable for a third person's injury caused by that defective work.
4. **Master and Servant: Independent Contractor: Liability: Words and Phrases.** One employing an independent contractor may be liable for damages resulting from injury caused by the contractor's negligence, when, by rule of law or statute, the duty to guard against the risk is nondelegable. A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from delegated duties negligently performed.
5. **Master and Servant: Independent Contractor: Liability.** As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.
6. _____: _____: _____. One on whom a nondelegable duty is enjoined may not, by employing an independent contractor, escape vicarious responsibility and liability for proper performance of that nondelegable duty.
7. **Master and Servant: Independent Contractor: Liability: Negligence.** Exoneration of an independent contractor from a charge of negligence also exonerates the independent contractor's employer from vicarious liability dependent on that contractor's negligence.
8. **Pleadings: Appeal and Error.** An appeal is disposed on the basis of the theory presented by the pleadings on which a case has been tried.

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

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, and Thomas M. Monaghan of Monaghan, Tiedeman & Lynch, for appellant.

Joseph K. Meusey and Robert F. Rossiter, Jr., of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee Northwestern Bell.

Melvin C. Hansen of Hansen, Engles & Locher, P.C., for appellee Coen Construction.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

After judgment on a verdict in favor of Coen Construction Company (Coen) and Northwestern Bell Telephone Company (Bell), Jerome Foltz, as next friend of his son, Timothy, appeals from the district court for Platte County. We affirm.

For removal and salvage of the telephone lines and poles, Bell and Coen, on January 1, 1974, entered a written contract which, inter alia, included an indemnification agreement and provided:

> 4. . . . Remove poles and associated hardware, backfill pole hole and dispose of old poles and wire.
>
> . . . .
>
> 18. The Company's Representative will inspect all work and materials furnished by the Contractor and may condemn or reject any or all of such work or materials if in his opinion the same are not in accordance with this contract or with the specifications and changes . . . .
>
> . . . .
>
> 31. The Contractor assumes full responsibility for all injuries to, or death of, any person or persons or for damages to property, including property and services of the Company, and for all claims, losses or expenses which may in any way arise out of the performance of the work, whether caused by negligence or otherwise . . . .
>
> . . . .
>
> 37. The relationship of the Contractor with the Company hereunder shall be that of an independent contractor. The Contractor shall have full control and direction over the mode and manner of doing the work and of his personnel employed on or about the work.

As a record of its poles and their location, Bell maintained form "E297A" which contained dates of pole installations, length and class of poles, whether a pole was weatherproofed, and the year a pole was replaced or removed. The project contracted by Coen involved removal of at least 2,600 poles over a span of 150 miles, as well as salvage of wire and hardware from the pole line. If any pole was being used to support a farmer's fence, Coen severed such pole at a height suitable for continued use consistent with other posts in the fence. Poles outside fence lines were cut by Coen at a height not less than 4 feet above ground level and pulled from the ground. Bell's employees rolled all wire removed from poles. Coen kept the removed poles, hardware, and noncopper wire salvaged, while Bell retained all copper wire from the pole lines.

The pole line in question was located approximately 2 feet east of a fence on the Foltz farm. The line running from the pole line to the Foltz residence became useless after installation of underground service to Foltz. Bell generally kept itself informed about Coen's work, and whenever a telephone line crossed a major road, Bell's representatives made certain that traffic was not impaired. A Bell inspector periodically drove through the work area and occasionally stopped at random to check Coen's work. Also, the foreman of Bell's wire-winding crew kept track of Coen's progress. Coen and Bell's inspector had copies of form E297A to determine the number of poles per mile, and to have at hand other pertinent information about the pole lines.

Coen completed its work in April 1974. Before payment to Coen at conclusion of the work, a Bell representative accompanied Coen on an inspection of the area. This included a truck tour on the roads adjacent to the various pole lines, with an occasional spot check of the completed work. Bell was satisfied with Coen's work and accepted the completed project.

In July 1978 Timothy, 16 years of age, was operating a northbound tractor pulling a rotary mower to cut grass and weeds in the north-south ditch between Foltz' fence and the county road. This was the ditch where Coen, some 4 years earlier, had worked in removing Bell's pole line. Foltz was

required to mow the ditch twice annually. See Neb. Rev. Stat. § 39-1811(1) (Reissue 1984). During that mowing operation next to Foltz' fence line, the tractor driven by Timothy tilted slightly to the right due to the slope of the ditch bank. Brome grass in the ditch was approximately 3 feet tall. The left rear wheel of the tractor struck a stub of a telephone pole concealed by grass at a point approximately 2 feet east of Foltz' fence line. As a result of the tractor's impact with the pole, Timothy was thrown from the tractor and sustained serious bodily injury with consequential medical expenses.

Bell investigated the accident and, based on form E297A, concluded that Timothy's tractor had struck the stump of pole No. 4, originally a 16-foot class 10 eastern pine installed in 1933. In 1944 pole No. 4 was replaced with a 10-foot class 10 weatherproofed eastern pine.

Foltz, as next friend for Timothy, filed suit against Bell and Coen. In paragraph 4 of his second amended petition Foltz alleged:

> During 1974 Defendant Northwestern Bell Telephone Company installed the line from the southeast corner of the Foltz farm to the Foltz residence underground and contracted and agreed with the Defendant Coen Construction Company to remove and salvage the pole and wire line. . . . At all times material hereto the Defendant Coen Construction Company was subject to the direction and control, acted on behalf of, and was in the employ of the Defendant Northwestern Bell Telephone Company. *Defendants removed all of the poles save one, which defendants topped at a point approximately one and one-half feet above ground level. The portion of the pole remaining above ground level was weathered, gray and virtually invisible* when surrounded by grasses and foliage which were wont in nature to grow in the area between Foltz's east fence and the west edge of the main traveled portion of the county road bordering the east line of the Foltz farm.

(Emphasis supplied.)

Specifications of negligence on the part of Bell and Coen were alleged in paragraph 6 of Foltz' petition. (We have designated the grouping of such specifications as [A] and [B].)

Foltz alleged:

[A]

The collision between the tractor and the butt of the telephone pole was proximately caused by the negligence of the defendants in the following particulars:

(a) Defendants failed to remove the butt from an area which it knew or should have known would have to be traveled by anyone farming the adjacent land in order to destroy weeds growing thereon.

(b) Defendants cut the poles off at a height above the ground too high to permit mowing equipment to pass safely over it but not high enough to prevent it from being obscured by grass and weeds which defendant knew or in the exercise of reasonable care should have known were wont in nature to grow up around it.

(c) Defendants failed to place a suitable warning marker or flag upon said butt when it knew or in the exercise of reasonable care should have known that failure to do so would result in a collision.

(d) Defendants failed to remove all of the poles and backfill the holes as required by the terms of [the Bell-Coen contract].

Immediately following the foregoing allegations of negligence by Bell and Coen, Foltz alleged:

[B]

In addition to the foregoing acts of negligence, the defendant Northwestern Bell Telephone Company was, independently, guilty of negligence in the following particulars:

(a) It failed to adequately inspect the work of removing and salvaging the telephone line from the [southeast] corner of plaintiff's farm to the plaintiff's homestead.

(b) It failed to notify Defendant Coen Construction Company that the latter had failed to remove all the poles and backfill all the holes during the removal and salvaging of said telephone line.

(c) It failed to notify plaintiff that its contractor had

failed to remove all the poles from said line and backfill all the holes during the removal and salvaging of said telephone line.

(d) It failed to condemn Coen Construction Company's failure to remove all the poles and backfill all the holes during the removal and salvaging of said telephone line.

(e) It failed to remove the remaining poles and backfill the holes when it knew or in the exercise of reasonable care should have known that one of said poles had not been removed and the hole backfilled during the removal and salvaging of said telephone line.

In its answer Bell, after denying any negligence on its part, alleged Coen's status as an independent contractor.

During the trial, evidence indicated that none of the Foltz family had ever noticed the pole stub in the ditch. Testimony about the height of the pole butt ranged from approximately 10 inches to 2 feet. When the accident occurred, the area where Timothy had been mowing was not generally cut by Foltz. The color of the pole was such that, unless one were immediately above the pole and looking straight downward, the pole was indistinguishable from the tall, surrounding grass. As described by Jerome Foltz: "You couldn't see the stub until you were right over the top of it." Rose Foltz, Timothy's mother, testified: "You couldn't see [the pole stub] until you were right there on it, and that brome grass, it blended in with the pole and you couldn't see it." Timothy acknowledged that he had never seen "a pole sticking out of the ground," although he had walked and driven past the severed pole and worked around it numerous times. Coen's employees testified that poles in fence lines had been cut at a height not less than 2 feet above the ground, denied contact with the pole in question, and further testified that Coen had never cut any pole as short as the one involved in the accident. A representative of Bell testified that the presence of weatherproofing on the pole in question indicated the stub's height was 10 to 12 inches above ground level. Bell's witness concluded that the stub was the remnant of one of Bell's poles. One of Foltz' witnesses, who lived near

Bell's right-of-way, testified that, while snowmobiling in the right-of-way during the winter of 1982-83, he had come across stumps of poles with a height less than 2 feet. No one had informed Bell concerning any pole butts in its right-of-way, and Bell did not discover any such pole butts in the course of Coen's work or during its inspection of Coen's completed work.

At the end of Foltz' case in chief, Bell and Coen moved for a directed verdict on the issue of liability. The court overruled Coen's motion. Also, the court overruled Bell's motion directed to Foltz' claim based upon vicarious liability for Coen's negligence (paragraph 6[A] of the petition) but sustained Bell's motion regarding Foltz' claim that Bell was "independently guilty of negligence" as specified in paragraph 6[B] of the petition.

When all evidence had been concluded, Foltz requested reconsideration of the directed verdict in favor of Bell on the issue of independent negligence and asked to amend his petition, namely, an additional allegation that Bell, sometime before 1974, had severed the pole in question and negligently allowed the stump of the severed pole to remain in Bell's right-of-way. Foltz argued that Coen had acknowledged the fact that no pole in the project was cut at a height less than 2 feet above the ground, and, therefore, the jury could have found that the pole in question might have been severed by Bell at a time outside the project involving Coen. The district court denied Foltz' motion to amend his petition, noting that Foltz never asserted that Bell had severed any pole but, rather, had claimed that Coen had severed the pole as part of the contracted project, so that any liability on the part of Bell was vicarious.

Without request from any party, the court gave instruction No. 6 in part as follows:

> Before the plaintiff can recover against the defendant Richard Coen, doing business as Coen Construction Company, on his petition in this action, the burden is upon the plaintiff to prove by a preponderance of the evidence each and all of the following numbered propositions:
>
> 1. That said defendant, in the course of its contract with defendant Northwestern Bell Telephone Company, cut a certain telephone pole located adjacent to the farm

where plaintiff resides, and that in so doing, defendant Coen left the butt of said telephone pole standing, which butt of said pole is identified as Exhibit No. 18.

2. That defendant Coen was negligent in one or more of the following letters particulars:

(a) In failing to remove the butt of the telephone pole which he knew or in the exercise of reasonable care should have known would create an unreasonably dangerous condition.

(b) In failing to place a suitable warning on said butt of the telephone pole.

The jury returned a verdict for Coen and Bell.

Foltz assigns and argues 12 errors which can be reduced to the following errors claimed to have been committed by the district court: (1) In failing to direct a verdict against Coen; (2) In giving instruction No. 6, because that instruction is an improper statement of the bases for Coen's liability; (3) In directing a verdict for Bell on the issue of an owner's separate negligence concerning work done by an independent contractor; and (4) In not submitting to the jury the question whether Bell had failed to perform its nondelegable duty to obtain a negligence-free, unobstructed right-of-way as the result of Coen's work.

We begin by examining Foltz' claim that the court should have directed a verdict against Coen on the issue of negligence.

A party against whom a motion for directed verdict is aimed, here Coen, is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. See *Cullinane v. Interstate Iron & Metal*, 216 Neb. 245, 343 N.W.2d 725 (1984). A court should not decide an issue as a matter of law unless the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom. See *Edward Peterson Co. v. Ulysses S. Schlueter Constr. Co.*, 179 Neb. 883, 140 N.W.2d 830 (1966). In view of the evidence there is no doubt that the injurious pole butt remained after someone had severed one of Bell's poles. In paragraph 4 of his petition, Foltz described the pole in question as one which had been cut off "at a point approximately one and one-half feet above ground

level." Coen's employees negatived their contact with the pole in question and cutting any pole at a height commensurate with the pole butt involved in the Foltz accident. Consequently, there was a question of fact, whether the particular pole involved in the accident was the same pole identified as a part of the Bell-Coen project alleged in Foltz' petition. Identification of the pole as a part of the project was a question of fact for resolution by the jury. From the evidence the jury would be entitled to conclude, and may well have determined, that the pole in question was not the pole descriptively alleged in Foltz' petition. The court correctly overruled Foltz' motion for a directed verdict against Coen.

Next, Foltz argues that instruction No. 6 limited Coen's liability to negligence in failing to remove the pole in question after it had been severed by Coen. Such limitation, Foltz contends, eliminated jury consideration of an alternative basis for Coen's liability, namely, failure to remove a pole previously cut by Bell. A reasonable reading of Foltz' petition, paragraphs 4 and 6[A], is that Coen removed all severed poles except one which Coen had "topped," that is, severed the upper part of the pole, "at a point approximately one and one-half feet above the ground" and that the part of the pole remaining above ground, the pole butt, was indistinguishable from the surrounding terrain and vegetation or practically concealed. Foltz makes the valid observation that instruction No. 6 eliminated consideration of Coen's liability based on required removal of Bell's poles previously cut but unremoved at commencement of Coen's contracted work for Bell. Such consequence explains Foltz' attempt to amend his petition and include an additional allegation that the particular pole had been cut by Bell before 1974 so that the pole butt was located within Bell's right-of-way when Coen commenced work on the project. We note, however, that Foltz has not assigned as error the court's refusal to allow amendment of the petition. Under the circumstances, whether Coen had a duty to remove poles which may have been cut by Bell was a question excluded by Foltz' pleading on which the case was tried, not by instruction No. 6 given by the court. The court, by instruction No. 6, correctly summarized Foltz' allegations and specifications of negligence in accordance with

Nebraska law. See *Greenberg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 266 N.W.2d 902 (1978) (a trial court has a duty to properly analyze, summarize, and submit to the jury the substance of allegations of negligence in a tort petition). Foltz further complains that, as an instruction on Coen's negligence, the court should have informed the jury regarding standards imposed by Bell for performance of its agreement with Coen. Whatever the standards of performance of the Bell-Coen contract, the issue presented in this case is one of negligent infliction of damage, and the question in the lawsuit related to conduct falling below a standard established by law to protect others against unreasonable risk of harm. The court properly instructed the jury on the issue of Coen's negligence.

We conclude, therefore, there was no error entering the verdict returned by the jury in favor of Coen.

Concerning disposition of his claim against Bell, Foltz complains about the directed verdict in favor of Bell on the issue of Bell's separate or independent negligence alleged in paragraph 6[B] of the petition. In substance, Foltz contends that the court erred in not permitting the jury to consider Bell's conduct regarding inspection of Coen's completed work. Each of Foltz' specifications of Bell's negligence, set forth in paragraph 6[B], is premised upon omitted action which Foltz claims should have been taken as a consequence of Bell's inspection of work done by Coen.

The basis upon which Bell might be held liable in failing to properly inspect Coen's work is found in Restatement (Second) of Torts § 412 at 382 (1965):

> One who is under a duty to exercise reasonable care to maintain land or chattels in such condition as not to involve unreasonable risk of bodily harm to others and who entrusts the work of repair and maintenance to an independent contractor, is subject to liability for bodily harm caused to them by his failure to exercise such care as the circumstances may reasonably require him to exercise to ascertain whether the land or chattel is in reasonably safe condition after the contractor's work is completed.

Under § 412 of the Restatement, *supra*, comment *e.* at 384 contains the following:

> The rule stated in this Section subjects the employer of an independent contractor to liability only if, as a result of his failure to exercise such care as the circumstances require in inspecting the completed work done by his contractor, he fails to discover its bad condition and as a result bodily harm is caused to someone to whom he owes a duty of maintaining his land or chattels in reasonably safe condition.

See, also, Prosser and Keeton on the Law of Torts, *Imputed Negligence* § 71 (5th ed. 1984).

In determining whether the district court properly directed a verdict for Bell on the issue of separate or independent negligence regarding work done by Coen, we must first analyze the precise issue framed by Foltz' pleading. The issue raised by paragraph 6[B] of Foltz' petition is whether an inspection by Bell would have reasonably been expected to disclose the stub of the pole. See *Borden v. Phillips Petroleum Co.*, 541 S.W.2d 53 (Mo. App. 1976). Thus, Foltz cannot recover unless a reasonable inspection by Bell would have disclosed the pole butt within its right-of-way. For disposition of Foltz' appeal, we assume, but need not decide, that Bell had a duty to engage in a reasonable inspection consistent with § 412 of the Restatement, *supra*. Cf. *Lamb v. South Unit Jehovah's Witnesses*, 232 Minn. 259, 45 N.W.2d 403 (1950) (if an employer, accepting and resuming possession of work by an independent contractor, could have known from a reasonable inspection that there was a defect in the work, such employer may be liable for a third person's injury caused by that defective work). We again apply the standard for a directed verdict enunciated in *Cullinane v. Interstate Iron & Metal*, 216 Neb. 245, 343 N.W.2d 725 (1984), and *Edward Peterson Co. v. Ulysses S. Schlueter Constr. Co.*, 179 Neb. 883, 140 N.W.2d 830 (1966). Finally, we are cognizant of myriad factors which are involved in answering a question about the reasonableness of an employer's inspection of an independent contractor's completed work, as well as the difficulty of determining as a matter of law what constitutes a reasonable inspection. As stated in comment *c.* for § 412 of the Restatement, *supra* at 383:

> [I]t is impossible to state hard and fast rules which can be

> applied to determine automatically whether the employer has used such care as the circumstances of every particular case require. As in all cases in which the question involved is the amount of care which it is reasonable to require under the circumstances of the particular case, the general principle that the amount of care which must be used is proportionate to the danger involved in its absence and the burden which would be imposed by requiring it, is applicable . . . . The following factors are important: (1) the danger involved in the condition of the structure or chattel if the work is entrusted to the contractor is not carefully and skillfully done; (2) the character of the work—whether it is of the kind which a competent contractor is so likely to do properly that it is reasonable to rely entirely or to a certain extent upon his competence as a sufficient assurance that the work has been safely done; (3) the ability which the employer has or should have to appreciate the proper or improper character of the work done for him by the contractor; (4) the ease or difficulty of ascertaining the actual character of the completed work; and (5) the existence of a relation between the contractor's employer and those injured by the careless or incompetent work of the contractor which entitles them to expect that the employer will personally exercise care for their safety.

Foltz contends that Bell cannot avoid legal liability by wearing a blindfold to avoid uncovering any defect in Coen's work. The issue, however, is not whether Bell's inspection was reasonable but whether any reasonable inspection would have disclosed the pole butt. See, *Borden v. Phillips Petroleum Co., supra*; *Lamb v. South Unit Jehovah's Witnesses, supra*. In *McGinn v. City of Omaha*, 217 Neb. 579, 352 N.W.2d 545 (1984), this court held that it would be unreasonable to require a municipality to conduct lengthy, individual tree inspections of many thousands of trees on streets and in parks of the municipality charged with negligence in failure to inspect. By analogy to the unreasonable standard requiring inspection of the multithousand municipal trees presented in *McGinn*, we are not prepared to state that a reasonable inspection of Coen's work required a step-by-step pedestrian inspection, through a

work area of some 150 miles, to disclose a virtually invisible stump or remnant of Bell's severed pole. No realistic alternative is suggested by the evidence in this case. Under the circumstances, we agree with the district court that the evidence was insufficient, as a matter of law, to support a finding that Bell's alleged failure to properly inspect Coen's work caused Timothy's injuries. The district court correctly removed from the jury's consideration any issue regarding Bell's inspection of Coen's completed work.

For the first time, on appeal, Foltz raises various issues regarding a nondelegable duty imposed on Bell to obtain a negligence-free, unobstructed right-of-way as the result of Coen's work. As we held in *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984), one employing an independent contractor may be liable for damages resulting from injury caused by the contractor's negligence, when, by rule of law or statute, the duty to guard against the risk is "nondelegable." A nondelegable duty means that an employer of an independent contractor, such as Bell, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. See *Kelly v. Diesel Constr., Morse, Inc.*, 35 N.Y.2d 1, 315 N.E.2d 751, 358 N.Y.S.2d 685 (1974). As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another. See *Atlantic Coast Dev. v. Napoleon Steel*, 385 So. 2d 676 (Fla. App. 1980). One on whom a nondelegable duty is enjoined may not, by employing an independent contractor, escape vicarious responsibility and liability for proper performance of that nondelegable duty. See *Mortgage Guarantee Ins. Corp. v. Stewart*, 427 So. 2d 776 (Fla. App. 1983). See, also, Restatement (Second) of Torts, Introductory Note for §§ 416 to 429 (1965). While Coen's negligence may have been imputed to Bell under some aspect of vicarious liability resulting from the relationship between employer and independent contractor, the jury found in favor of Coen, that is, determined there was no negligence on the part of Coen. Because there is no error requiring retrial of Foltz' claim against Coen, Foltz cannot

recover against Bell on any theory of vicarious liability based on negligence asserted against Coen. Exoneration of an independent contractor from a charge of negligence also exonerates the independent contractor's employer from vicarious liability dependent on that contractor's negligence. See, *Stoutimore v. Santa Fe Ry. Co.*, 338 Mo. 463, 92 S.W.2d 658 (1936); *Borden v. Phillips Petroleum Co.*, 541 S.W.2d 53 (Mo. App. 1976). The error-free verdict exonerating Coen entitled Bell to be exonerated from vicarious liability, for out of nothing comes nothing. See *Lynch v. Hill*, 443 S.W.2d 812 (Mo. 1969). The foundation of Foltz' action against Bell is still negligence on the part of Coen. See Prosser and Keeton on the Law of Torts, *Imputed Negligence* § 69 (5th ed. 1984).

We dispose of Foltz' appeal on the basis of his theory presented by the pleadings on which the case was tried in the district court. See, *Ingerslew v. Bartholomew*, 216 Neb. 836, 346 N.W.2d 258 (1984); *Armstrong v. Hartford Life Ins. Co.*, 219 Neb. 128, 361 N.W.2d 511 (1985). Foltz tried his case on the theory that Coen had negligently performed work in the contracted project, namely, that Coen had cut Bell's pole but negligently failed to remove or warn about such severed pole, and that Bell was independently negligent in failing to properly inspect Coen's work. The court properly submitted Coen's negligence to the jury and properly removed consideration of any question concerning Bell's negligence regarding a failure to inspect.

AFFIRMED.

INOLA H. SMITH AND BENNETT G. HORNSTEIN, APPELLEES, V. BAKER'S LOCAL NO. 433 WELFARE FUND, APPELLANT.

375 N.W.2d 922

Filed November 8, 1985. No. 84-329.

1. **Actions: Equity.** An action to determine the interests of adverse parties in a fund held by a stakeholder is equitable in nature.
2. **Insurance: Workmen's Compensation: Subrogation.** A welfare fund which has made payments in the nature of health care benefits to a member on the assumption that the member was not entitled to workmen's compensation is not a subrogee and is not entitled to share in any part of a settlement of a claim made by the member against the employer under the Workmen's Compensation Act.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded with directions.

LeRoy J. Sturgeon of Smith & Smith, for appellant.

Bennett G. Hornstein of Taylor, Hornstein, Peters & Kluver, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an action in the nature of interpleader and for a declaratory judgment to determine the rights to $6,629.70 which was a part of the proceeds of the settlement of a claim under the Workmen's Compensation Act by Inola H. Smith against Continental Baking Division of International Telephone & Telegraph Corporation (Continental) and its insurance carrier.

The action is similar to *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961), in which United commenced an action against Hills and Allstate Insurance Company to determine the rights to a part of the proceeds from the settlement of a claim against a party insured by Allstate arising out of an automobile accident. In that case we said: "The present action is one of interpleader. . . . The right to interplead and have the interests of the adverse parties determined in a fund held by a stakeholder is an equitable proceeding and will be so treated on appeal." *Id.* at 132, 109 N.W.2d at 177.

Smith was injured in May and June 1982 while employed by Continental as a sanitation employee. Her claim against Continental for workmen's compensation benefits was denied. Smith then made claim against Baker's Local No. 433 Welfare Fund (Fund) under its plan for hospitalization and medical care benefits. The Fund paid Smith $6,629.70 on her claims for health care benefits.

On October 25, 1982, Smith consulted Bennett G. Hornstein, a lawyer practicing in Omaha, Nebraska, concerning her claim against Continental under the compensation law. Hornstein advised Smith that she had a legally arguable claim. She then entered into a contingent fee agreement with Hornstein in which Smith agreed to pay him 33 1/3 percent of any benefits recovered.

On October 27, 1982, Hornstein advised Bernard Clausen, the Fund's managing agent and trustee in Sioux City, Iowa, that a suit was being filed against Continental which would include the Fund's "equitable subrogation claim" for Smith's medical bills which had been paid by the Fund. The petition alleges that Clausen "acquiesced in this action" but made no effort to join or otherwise assist in the litigation.

On January 19, 1983, 2 days before the compensation suit was to go to trial, the parties entered into a settlement which the petition alleges included the Fund's "medical expense subrogation claim" in the full amount of $6,629.70. Hornstein demanded that the Fund pay one-third of that amount to him. The Fund refused and claimed that Smith had secured payment of her medical bills by the Fund "illegally" because she was entitled to workmen's compensation benefits.

On May 3, 1983, Hornstein received a check from Continental's insurance carrier in the amount of $6,629.70 payable to Hornstein, Smith, and the Fund. This action was commenced on November 10, 1983, by Smith and Hornstein against the Fund for a judgment declaring that Hornstein and Smith have no liability to the Fund except for two-thirds of the "subrogated amount" of $6,629.70 after Hornstein retains one-third of the amount as an attorney fee.

The defendant Fund filed an answer and counterclaim alleging that Smith was not entitled to the benefits she had

received from the Fund. The plan excludes payment of benefits for any injury or sickness for which a member is entitled to receive workmen's compensation benefits. The defendant further alleged that it had made demand upon Smith for repayment of the benefits she had received from the Fund but that she had refused to make repayment. The defendant denied that it had employed Hornstein or requested any professional service from him. The defendant prayed for judgment against Smith and Hornstein for the $6,629.70 or for judgment against Smith for any part of the $6,629.70 it did not recover from Hornstein.

On March 8, 1984, the plaintiffs filed a motion for summary judgment. The motion was heard on the pleadings and two affidavits filed by the plaintiffs. The plaintiffs' affidavits merely restated the facts alleged in the petition. The defendant filed no affidavits and made no countershowing. The trial court found that Hornstein was entitled to one-third of the $6,629.70, with interest and costs, and that the defendant was entitled to the remaining balance "as its net subrogation recovery." The defendant Fund has appealed.

A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law. *Beatrice Nat. Bank v. Mid-America Dairymen*, 220 Neb. 757, 372 N.W.2d 99 (1985).

The record presents no issues of fact at this time, but it does not sustain the judgment entered by the district court. The Fund was not subrogated to any of the proceeds of the settlement of Smith's compensation claim because it did not discharge any debt due Smith under the compensation law. The payments which the Fund made to Smith were in satisfaction of health care benefits it assumed Smith was entitled to as a member of the union. The Fund does not claim otherwise. In its brief the Fund characterizes itself as *a creditor of Smith for restitution of a payment made in error.*

The money which is the subject of this action is the result of the settlement of a disputed claim. It has never been adjudicated

whether Smith was entitled to recover anything from Continental under the compensation law. Also, it has not been adjudicated whether the Fund is entitled to recover any of the payments it made to Smith which it now alleges were made by mistake.

Upon the record now before us, Hornstein is entitled to one-third of the $6,629.70 pursuant to his contract with Smith. The balance of the proceeds of the settlement of the compensation claim belongs to Smith. The Fund has no interest in the proceeds from the settlement of Smith's claim under the compensation law.

The judgment is reversed and the cause remanded with directions to enter a judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., dissenting.

I regret that I must respectfully dissent from the majority opinion in this case. I do so not so much because I take issue with the result reached by the majority but because I believe that the route taken by the majority to reach that result is inappropriate and, if left alone, may lead others into believing the procedures set out in the majority opinion are appropriate or that the rules suggested are valid.

To begin with, the majority opinion recites:

> This is an action in the nature of *interpleader* and for a declaratory judgment to determine the rights to $6,629.70 which was a part of the proceeds of the settlement of a claim under the Workmen's Compensation Act by Inola H. Smith against Continental Baking Division of International Telephone & Telegraph Corporation (Continental) and its insurance carrier.

(Emphasis supplied.) While it is true that the plaintiffs alleged that this was an action for interpleader brought pursuant to the provisions of Neb. Rev. Stat. § 25-325 (Reissue 1979), in fact neither the statute nor the law of this jurisdiction would permit interpleader under the facts of this case. The plaintiffs were not only in error when they alleged that the moneys received from the Fund were "subrogated" funds but, as well, when they alleged this was an interpleader.

The majority notes that this action is similar to *United*

Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N.W.2d 174 (1961). While it is true that this is similar, there is a material and substantial difference. In the *Hills* case, *supra*, the interpleader was filed by the paying carrier, Allstate Insurance Company, which made no claim to any of the money. In the instant action the "interpleader" was filed by the plaintiffs, who claimed an interest in one-third of the money. Under Nebraska law a plaintiff who claims an interest in the money cannot file an interpleader. See § 25-325. In *Strasser v. Commercial Nat. Bank*, 157 Neb. 570, 572-73, 60 N.W.2d 672, 674 (1953), we said:

> [T]he four required elements of the right to interplead . . . [are]: "(1) The same thing, debt or duty, must be claimed by both or all of the parties against whom the relief is demanded. (2) All their adverse titles or claims must be dependent, or be derived from a common source. (3) The person asking the relief—the plaintiff—*must not have nor claim any interest in the subject-matter*. (4) He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder."

(Emphasis supplied.) Further, in *Strasser, supra* at 575, 60 N.W.2d at 675:

> Interpleader, although authorized by statute, is an equitable remedy whereby a disinterested stakeholder in possession of property claimed by two or more persons may require them to litigate the claims of each without embroiling him in the controversy. . . . It is a remedy for an innocent stakeholder who has no liability to any claimant of the property who is and has been perfectly indifferent and completely impartial between them.

See, also, *Provident Savings & Loan Ass'n v. Booth*, 138 Neb. 424, 293 N.W. 293 (1940).

Regardless of what the plaintiffs may have alleged, this was not an interpleader and was only an action for declaratory judgment. Neither Smith nor Hornstein was a disinterested stakeholder. Instead, they were persons in possession of a check which they could not endorse and in which they claimed an interest.

Recognizing, then, that this was an action for declaratory judgment and not interpleader, we have the strange situation in which the majority opinion in effect holds that because the plaintiffs did not seek all of the relief to which they were entitled, they are not entitled to retain the summary judgment which was granted. The majority maintains that while the record before us presents no issue of fact, it does not sustain the judgment entered by the district court. That conclusion apparently is based upon a notion that Smith was entitled to more relief than she asked for under her declaratory judgment.

In the petition filed by Smith and Hornstein, their prayer asks that the court declare that Hornstein and Smith have no legal liability to the defendant "except the 66-2/3% of the subrogated amount of $6,629.70 remaining after Hornstein retains 33-1/3% thereof as an attorney fee for his sole efforts in recovering defendant's subrogation claim." While Hornstein and Smith were probably wrong in alleging that any amount was due and owing as a "subrogated claim," they, nevertheless, pleaded the action in that manner and sought a declaration that they owed the Fund two-thirds of the amount recovered. Even if this money did not constitute a "subrogated claim," for the reasons noted by the majority, nevertheless the rule is well established that this court will not consider questions not presented to or passed on by the district court and upon appeal will dispose of the case upon the theory in which it was tried in the district court. See, *Ingerslew v. Bartholomew*, 216 Neb. 836, 346 N.W.2d 258 (1984); *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984).

Our judgment in this case exceeds any relief sought by the plaintiffs and is beyond the pleadings. Had the trial court entered a judgment similar to that which we now enter on appeal, I believe we would have been compelled to reverse the action of the trial court on the basis that the relief exceeded the prayer. It has generally been the rule in this jurisdiction that one may not obtain relief greater than that which is sought by the pleadings. See *Davis v. Hall*, 70 Neb. 678, 97 N.W. 1023 (1904).

> " 'It is also a general principle of law that a court cannot set itself in motion, nor has it power to decide questions except as presented by the parties in the pleadings.

> Anything that is decided beyond them is coram non judice and void. Therefore where a court enters a judgment or awards relief beyond the prayer of the complaint or the scope of its allegations the excessive relief is not merely irregular but is void for want of jurisdiction, and is open to collateral attack.' "

National Fire Ins. Co. v. Evertson, 153 Neb. 854, 856, 46 N.W.2d 489, 491 (1951). See, also, *Drieth v. Dormer*, 148 Neb. 422, 27 N.W.2d 843 (1947).

The majority further asserts that "it has not been adjudicated whether the Fund is entitled to recover any of the payments it made to Smith which it now alleges were made by mistake." My difficulty with that conclusion is the fact that the Fund filed a counterclaim seeking to recover the payments it made to Smith, which request the district court denied. While the Fund appealed from that judgment, it neither assigned as error the fact that the district court found against the Fund on its counterclaim nor did it argue that matter in its brief. Having failed to assign the error and argue it in the brief, this court should not consider the issue, see, *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 343 N.W.2d 735 (1984), and *Cockle v. Cockle*, 204 Neb. 88, 281 N.W.2d 392 (1979), and the judgment of the district court in dismissing the Fund's counterclaim should be considered as a final and binding judgment on the issue. As such, the judgment entered by the district court is res judicata to any other action which might be brought by the Fund in the future. As we noted in *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 106, 181 N.W.2d 119, 123 (1970):

> "The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein. The rule applies to every question relevant to and falling within the purview of the original action, in respect to matters of both claim or grounds of recovery, and defense, which

could have been presented by the exercise of diligence." See, also, *Caradori v. Hamilton*, 193 Neb. 500, 227 N.W.2d 850 (1975).

This is a difficult case, made more difficult by reason of the pleadings and what appear to be erroneous theories pleaded by the plaintiffs. I am afraid our judgment herein does little to relieve those problems. I would have affirmed the judgment of the district court.

ALFRED UTTECHT, APPELLANT, V. NORWEST BANK OF NORFOLK, N.A., APPELLEE.

376 N.W.2d 11

Filed November 8, 1985. No. 84-435.

1. **Banks and Banking: Joint Accounts.** A joint account is an account payable on request to one or more of two or more parties, whether or not mention is made of any right of survivorship.
2. _____: _____. A party to an account is one who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account.
3. **Banks and Banking: Joint Accounts: Debtors and Creditors.** Without qualifying any other statutory right to setoff or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to setoff against the account in which the party has a present right of withdrawal. The amount of the account subject to setoff is that proportion to which the debtor is beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.
4. **Banks and Banking: Joint Accounts.** Any multiple-party account may be paid, on request, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.
5. **Banks and Banking: Joint Accounts: Words and Phrases.** Net contribution is the sum of all deposits made by or for a party to a joint account as of a given time, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any dividends or interest included in the current balance.
6. **Statutes: Legislature.** In considering the meaning of a statute, this court will, if possible, discover the legislative intent from the language of the statute and give

it effect. We will not read a statute as if open to construction as a matter of course.

7. **Banks and Banking: Statutes: Contracts.** Absent allegations and proof of fraud, contractual arrangements between a bank and its depositors with respect to the bank's right of setoff may supersede statutory provisions.

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

David J. Warnemunde and George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

Dennis W. Collins and Max G. Dreier of Jewell, Gatz & Collins, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

Plaintiff, Alfred Uttecht, appeals from an order of the Madison County District Court sustaining the defendant's motion for summary judgment and dismissing the plaintiff's petition.

On March 2, 1982, and again on September 5, Alfred Uttecht purchased a total of five certificates of deposit from the Norwest Bank of Norfolk. Four of the certificates had a face value of $1,000, and one had a face value of $1,700. All of the certificates were issued in the names of "Alfred Uttecht or Rosalla Uttecht or Gary Uttecht or Stanley Uttecht or Susan [Uttecht] Ziegenbein." It is undisputed that Alfred alone provided all of the funds used to purchase the certificates.

Stanley Uttecht, Alfred's son and one of the named depositors, owed $23,041.46 plus interest to the bank. Stanley's debt to the bank was delinquent as of August 24, 1983, and thereafter the bank set off the balances of the certificates against the amount Stanley owed.

On October 7, 1983, Alfred Uttecht filed suit against the bank, claiming that the bank's setoff action was improper and demanding a return of the funds. Essentially, Alfred argued that Stanley was not entitled to any of the proceeds of the certificates because he had made no contribution to their purchase. Since Stanley had no rights in the accounts, the bank

could not reach these funds to satisfy Stanley's debt. The bank answered and subsequently filed a motion for summary judgment on March 21, 1984, which the district court sustained.

Alfred Uttecht appeals this judgment, claiming as error the trial court's determination that, as a matter of law, the bank had the right to set off the full amount of the certificates against Stanley's debt. The bank counters that its depositor's contract with Alfred, which gives the bank broad setoff powers with respect to multiple-party accounts, should control.

Our analysis of this issue turns on an examination of relevant Nebraska statutes. Neb. Rev. Stat. § 30-2701 (Reissue 1979) includes in its definition of "multiple-party account" a "joint account." A joint account is an "account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." § 30-2701(4). A "party" to an account is one "who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account." § 30-2701(7).

Neb. Rev. Stat. § 30-2713 (Reissue 1979), one of the so-called bank protection statutes, states:

> Without qualifying any other statutory right to setoff or lien *and subject to any contractual provision*, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to setoff against the account in which the party has . . . a present right of withdrawal. The amount of the account subject to setoff is that proportion to which the debtor is . . . beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.

(Emphasis supplied.)

Finally, Neb. Rev. Stat. § 30-2708 (Reissue 1979), another of the bank protection statutes, states:

> Any multiple-party account may be paid, on request, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum

withdrawn from an account, for purposes of establishing net contributions.

The bank argues that because § 30-2713 specifically provides for independent contractual arrangements between a bank and its depositors with respect to the bank's power of setoff, its depositor's contract with Alfred should control. The record indicates that the terms of the contract that Alfred signed when he purchased the certificates gave the bank a virtually unlimited right of setoff against the assets in Alfred's accounts for debts owed by him or any party to the multiple-party accounts:

> (c) Subject to rights accorded by law, Bank may, at any time and for any reason, charge to or offset against any amount then on deposit in any account (including a savings certificate), whether or not then due, any and all debts or liabilities (sole, several, joint, or joint and several, absolute or contingent, due or not due, liquidated or unliquidated, secured or unsecured) then owed to Bank by depositor *or, in the case of a multiple-party account, by any party to such multiple-party account,* and this agreement shall be construed to be the consent of depositor and any such party for the Bank to make such charge or offset if consent be required by any present or future law.

(Emphasis supplied.) It is obvious that if the terms of the contract control, the bank had the right to reach assets in Alfred's accounts for the purpose of satisfying Stanley's debt, notwithstanding the fact that Stanley contributed nothing to them.

Alfred contends that the terms of the contract should not control because of other language in the agreement which states that the bank's right of setoff is "[s]ubject to rights accorded by law" and that "[a]ll accounts and all deposits to and withdrawals from any account are subject to all applicable laws of . . . the state where the Bank is located . . . ." Those rights accorded by law, Alfred urges, are delineated by § 30-2713 and by Neb. Rev. Stat. § 30-2703 (Reissue 1979), the "net contributions" statute. Net contribution, as defined by § 30-2701(6), is the sum of all deposits made by or for a party to a joint account as of a given time, less all withdrawals made by

or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any dividends or interest included in the current balance.

In Alfred's view, these statutes limit the bank's right of setoff to those amounts actually contributed by Stanley; since Stanley contributed nothing to the purchase of the certificates, the bank had no right to set off the assets in these accounts for the purpose of satisfying Stanley's debt.

We need not decide whether Alfred's interpretation of the interplay among §§ 30-2701(6), 30-2703, and 30-2713 is correct, because we believe that the language of § 30-2713 speaks for itself.

In considering the meaning of a statute, this court will, if possible, discover the legislative intent from the language of the statute and give it effect. *Mitchell v. County of Douglas*, 213 Neb. 355, 329 N.W.2d 112 (1983). We will not read a statute as if open to construction as a matter of course. *County of Douglas v. Board of Regents*, 210 Neb. 573, 316 N.W.2d 62 (1982).

Whatever the limitations § 30-2713 may contain with respect to a bank's right of setoff, they are subject to agreements between a bank and its depositor. While it is true that the contract between Alfred and the bank stated that it was subject to the laws of the state where the bank is located, it is also true that those laws, as they currently read, provide that a bank may define by contract with its depositor the extent of its power of setoff. We conclude that, absent allegations and proof of fraud, contractual arrangements between a bank and its depositors with respect to the bank's right of setoff may supersede statutory provisions.

The order of the district court sustaining the bank's motion for summary judgment and dismissing the plaintiff's petition is affirmed.

AFFIRMED.

ESTHER H. MACKLEM, APPELLANT, V. VALLEY BANK OF UNION COUNTY, ELK POINT, SOUTH DAKOTA, A CORPORATION, AND NORBERT BREMER, APPELLEES.

375 N.W.2d 907

Filed November 8, 1985. No. 84-450.

Evidence: Trial. Any matter admitted under Rule 36 of the Nebraska Discovery Rules, promulgated by the Nebraska Supreme Court on January 1, 1983, is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

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

Norris G. Leamer of Leamer, Rager & Hohenstein, for appellant.

William J. Klimisch of Goetz, Hirsch & Klimisch, for appellee Valley Bank.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

Esther H. Macklem filed suit against the appellee Valley Bank of Union County to recover the sum of $22,050.77, together with interest, which Macklem maintained Valley Bank had received pursuant to a certain contract and which lawfully belonged to Macklem because of an assignment to her. After trial to the court, a jury having been waived, Macklem's petition was dismissed. It is from that order of dismissal which Macklem now appeals to this court. For reasons more particularly set out hereinafter, we affirm.

While certain of the evidence is in conflict, it does appear without conflict that on December 5, 1975, Macklem's son, Maurice F. Macklem, and his wife, Linda S. Macklem, sold certain farmland which they owned to Dale T. Wilson, Jean Wilson, and Norbert Bremer. The purchase price was $75,000, of which $20,000 was paid at the time the contract was signed. The balance in the amount of $55,000 was to be paid in annual installments of $3,000 to Ervin E. Nordstrom, as agent for the sellers. The contract further recited that there was a real estate mortgage to the federal land bank association which the sellers,

Maurice F. Macklem and Linda S. Macklem, were to pay. There are a number of other provisions to the contract which are not material to our decision and therefore need not be considered.

On December 11, 1975, after execution of the contract for sale, Maurice Macklem and his wife, Linda, executed an assignment to his father and mother, Lee Macklem and the appellant, Esther Macklem. The assignment set over to Esther Macklem and her husband $18,000 of the moneys to be received by Maurice Macklem from the sale of the farmland. The payments were to be made to Northwestern National Bank, Sioux City, Iowa, as representative of Lee and Esther Macklem. A second assignment, in favor of the appellee Valley Bank of Union County, was later executed by the sellers, Maurice and Linda Macklem, on April 12, 1979, and purported to assign to Valley Bank all of the Macklems' right, title, and interest in and to the contract of sale. Lee Macklem died on January 2, 1981, and the appellant, Esther Macklem, under the terms of the assignment, is the sole survivor of any rights under that assignment.

Macklem has assigned a number of reasons why the trial court was in error in not ordering Valley Bank to pay to Macklem moneys received by Valley Bank which Macklem claims belonged to her under her prior recorded assignment. We need not, however, consider any of the many assignments because the evidence presented at trial establishes conclusively that if Macklem was entitled to any money, she has been paid all of the money due her under the assignment and is not, therefore, entitled to any of the money subsequently paid by the buyers to Valley Bank.

Requests for admissions were served upon the appellant, Macklem. She was asked to admit to the following question:

> 5. Do you admit as a fact that on or about March 1, 1977, a total of $6,850.00 was paid by the Contract for Real Estate purchasers to *your representative* pursuant to said Contract referred to in Request for Admissions No. 1 and said assignment referred to in Request for Admissions No. 2?

(Emphasis supplied.) The answer to that question was "Yes." In similar fashion Macklem was asked to admit that on March 1, 1978, a similar payment in the amount of $3,154.41 was paid to

her representative and that on February 23, 1979, a payment in the amount of $4,965.85 was paid to *her representative*. To each of these questions she answered, unequivocally, "Yes." She likewise admitted in the request for admissions that on March 1, 1978, and February 23, 1979, a total of $3,004.34 was paid to *her representative* and the federal land bank for the payment of the mortgage to the federal land bank. This was the mortgage which was to be paid by her son and daughter-in-law. She, therefore, has admitted that her representative has received $17,974.60. Additionally, Macklem admitted that on September 23, 1977, a payment of $1,872 was paid directly to the federal land bank association in order to make a mortgage payment upon the property. This also was an obligation of her son and daughter-in-law.

Rule 36 of the Nebraska Discovery Rules, promulgated by the Nebraska Supreme Court on January 1, 1983, provides in part as follows: "(b) Effect of Admission. Any matter admitted under this rule is *conclusively* established unless the court on motion permits withdrawal or amendment of the admission." (Emphasis supplied.) Macklem never requested permission to either withdraw or amend the answers. Therefore, the answers stand conclusively and unequivocally established. The fact that the son testified that he and his mother had a different understanding or arrangement as to who should actually keep the money once received is of no significance. Certainly, Macklem had a right to make a gift to her son of any money she received. By making a gift or paying a debt, however, she is not entitled to receive additional payments, in light of her admission that her representative received payment on her behalf. Any effort by the parties to contradict or explain away the unequivocal admissions made by Macklem are of no avail.

In view of the fact that Macklem admitted that she had received all the payments due to her, we need not consider any of the other issues raised by the appellant or any of the other assignments of error made by her. The judgment of the district court is affirmed.

AFFIRMED.

WARDELL DUPUY AND JANICE DUPUY, APPELLEES, V. WESTERN STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT; R.J. PROPERTIES, INC., A NEBRASKA CORPORATION, AND R.J. HAMEL, ALSO KNOWN AS RODNEY J. HAMEL, APPELLEES.

375 N.W.2d 909

Filed November 8, 1985. No. 84-587.

1. **Property: Mortgages: Security Interests: Words and Phrases.** A mortgage is a special interest in real property consisting of a security for a debt or obligation.
2. **Property: Mortgages: Liens.** Absent stipulation to the contrary, title and right to possession remain in the mortgagor, and the mortgagee holds only a lien upon the property.
3. **Mortgages: Liens.** A lien and a mortgage are not synonymous; a lien is more comprehensive than a mortgage.
4. _____: _____. A mortgage instrument creates and evidences a lien securing a debt.
5. **Mortgages: Intent: Presumptions.** Absent an expression of intent, the court will presume that the mortgagee intended that which would prove most advantageous to it.
6. **Mortgages: Liens: Foreclosure: Pleadings.** A mortgagee's lien in a foreclosure action covers only the premises that were the subject of the foreclosure petition.
7. **Mortgages: Liens.** Multiple liens can be evidenced in one mortgage instrument.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for further proceedings.

Eric W. Kruger of Bradford & Coenen, for appellant.

Thomas Blount of Garber & Batt, for appellees Dupuy.

KRIVOSHA, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

Defendant Western State Bank appeals from a judgment of the Douglas County District Court ordering that the parcel of land known as Lot 19, Mossman & Wilson's Addition to the City of Omaha, Douglas County, Nebraska, be released from a mortgage encumbrance and further ordering that defendant R.J. Hamel, also known as Rodney J. Hamel (Hamel), pay Western State Bank the sum of $4,188.95 plus interest.

In March of 1978 Hamel obtained a loan from Western State Bank. As security for the loan, Hamel executed a mortgage which described three separate parcels of real estate: Lot 1,

Block 23, Village of Waterloo, Douglas County, Nebraska (Lot 1); Lot 19, Mossman & Wilson's Addition to the City of Omaha, Douglas County, Nebraska (Lot 19); and the north 50 feet of Lot 6, Block 11, Village of Waterloo, Douglas County, Nebraska.

In November of the same year, Hamel conveyed Lot 19 to R.J. Properties, Inc. Subsequently, in March of 1980 R.J. Properties sold Lot 19 by installment land contract to Wardell and Janice Dupuy, the plaintiffs in this action. Notice of the encumbrance on Lot 19 was contained on the face of the Dupuys' land contract.

Hamel defaulted on the loan, and subsequently Western State Bank filed a mortgage foreclosure action on January 30, 1981, describing in its petition only Lot 1 in Waterloo. Lot 19 was not described in the petition, and the Dupuys were not made a party to this action. On July 16, 1981, a decree of foreclosure was entered ordering the sale of Lot 1. On June 18, 1982, the property was sold. The district court entered an order confirming the sale. The clerk of the district court for Douglas County filed a certificate of satisfaction of mortgage with the Douglas County register of deeds. The certificate names only Lot 1 and is indexed only against this property.

The proceeds of the sale did not satisfy fully Hamel's debt to the bank. The bank made a demand on the Dupuys that they pay the amount in deficiency and threatened to institute a mortgage foreclosure action. The Dupuys brought a quiet title action in the Douglas County District Court naming the bank, R.J. Properties, Inc., and Hamel as defendants and contending that by virtue of the initial foreclosure action against Lot 1 the bank no longer had an enforceable security interest in the Omaha property. The bank counterclaimed against the Dupuys for foreclosure of the mortgage on the Omaha property and cross-claimed against R.J. Properties and Hamel for satisfaction of the deficiency amount. The bank now appeals the district court's order releasing Lot 19 from the mortgage encumbrance and ordering Hamel to pay the deficiency amount.

The bank asserts in its first assignment of error that the district court erred in finding that the initial foreclosure action

against Lot 1 operated in law as a release of the other parcels of real estate named in the mortgage instrument. Essentially, the bank argues that notwithstanding the fact that a single mortgage document describing three parcels of land was executed, in effect the mortgage agreement created three separate liens securing Hamel's debt. Because the bank did not exhaust its security interests when it foreclosed on only Lot 1, it is entitled to pursue by subsequent foreclosure on Lot 19 that portion of the debt yet unpaid.

The Dupuys counter that the bank's foreclosure of Lot 1 constituted an election by the bank to proceed against only one of the three secured parcels of land, whereupon the remaining property was released from the lien. To decide otherwise, the Dupuys argue, would constitute an impermissible splitting of a single cause of action and would violate the principle of res judicata.

At the outset, we recognize that in Nebraska, as in many jurisdictions today, a mortgage is a special interest in real property consisting of a security for a debt or obligation. *Barber v. Crowell*, 55 Neb. 571, 75 N.W. 1109 (1898). The mortgagee, therefore, holds only a lien upon the property, *Morrill v. Skinner*, 57 Neb. 164, 77 N.W. 375 (1898), and, absent stipulation to the contrary, title and right to possession remain in the mortgagor, Neb. Rev. Stat. § 76-276 (Reissue 1981). The mortgagee's lien entitles the mortgagee to compel foreclosure of the mortgagor's equity of redemption in the property should the mortgagor default on the debt. See, generally, G. Osborne, Handbook on the Law of Mortgages §§ 6, 12 (2d ed. 1970); *Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp.*, 192 Neb. 588, 223 N.W.2d 425 (1974).

The Dupuys' position appears to be premised on the belief that a mortgage document can evidence only one security interest or lien. Since only one document was executed by Hamel and the bank, only one lien arose on the three parcels of property. If the bank wished to foreclose against all the secured parcels of land, it was free to do so; however, its failure to proceed against all of the secured property in the initial action waived its right to foreclose later against any of the remaining named property if the debt was not fully satisfied.

We believe that the Dupuys' theory not only represents a triumph of form over substance but under these facts also conflicts with applicable statutes and case law in Nebraska.

A lien has been characterized in this jurisdiction as an "obligation, tie, duty, or claim annexed to or attaching upon property by the common law, equity, contract, or statute . . . ." *Landis Machine Co. v. Omaha Merchants Transfer Co.*, 142 Neb. 397, 403-04, 9 N.W.2d 198, 203 (1943); see *Matter of Himberger*, 9 Bankr. 278 (D. Neb. 1981). An encumbrance upon property as security for the payment of a debt, a lien is perhaps most accurately described as a right afforded by law to have an obligation satisfied out of particular property, *Olsen, et ux. v. Kidman*, 120 Utah 443, 235 P.2d 510 (1951), thereby providing a supplemental remedy for the collection of a debt. See *Associated Bean Growers v. Chester B. Brown Co.*, 198 Neb. 775, 255 N.W.2d 425 (1977).

Although often used synonymously, a mortgage and a lien are not exact equivalents:

> Liens, mortgages, and pledges, while differing in many respects, are somewhat analogous, and in everyday parlance the term "lien" includes a mortgage or pledge, as it does all similar obligations by which specific property may be subjected to the payment of a particular debt. *The word lien, however, is more comprehensive than either a mortgage or a pledge.*

(Emphasis supplied.) 51 Am. Jur. 2d *Liens* § 3 at 144-45 (1970).

In *Dysart v. State Dept. of Public Health & Welfare*, 361 S.W.2d 347 (Mo. App. 1962), the court distinguished a mortgage from a lien, concluding that the mortgage instrument "create[s] and evidence[s] a lien . . . to secure the debt." *Id.* at 353. Using a similar line of reasoning, the Court of Appeal for the State of California found in *Sanborn v. Sanborn*, 3 Cal. App. 2d 437, 39 P.2d 830 (1934), that the purported mortgage document upon which a foreclosure was based did not constitute a mortgage as opposed to a chattel lien because neither words of conveyance nor transfer were used to create the proprietary interest inherent in a lien. *Swanson v. Graham*, 27 Wash. 2d 590, 179 P.2d 288 (1947). In short, "Every lien is not a mortgage." *Sanborn, supra* at 440, 39 P.2d at 831.

Our conclusion is consistent with the applicable statute governing the construction of documents creating interests of any kind in real property. Neb. Rev. Stat. § 76-205 (Reissue 1981) directs the courts, when construing instruments creating interests in real estate, "to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." Neb. Rev. Stat. §§ 25-2137 through 25-2155 (Reissue 1979) consist of those statutes specifically applicable to mortgage foreclosure actions. Nowhere in these statutes do we find a reference to or definition of multiple liens, how they are created, or the nature of their longevity, although, as noted earlier, § 76-276 directs that legal title to mortgaged property remains in the mortgagor so that the mortgagee holds only a security interest enforceable upon default of the loan.

Turning to relevant case law, we find in *Overland-Wolf, Inc. v. Koory*, 183 Neb. 611, 162 N.W.2d 889 (1968), the declaration that the mortgagee's intent will control whether the lien has been preserved or extinguished. Additionally, absent an expression of intent, the court will presume that the mortgagee intended that which would prove most advantageous to it. *Id.*

Overland-Wolf addressed the related issue of when a lien is extinguished by merger of the fee and the mortgage. Despite the general rule that upon judgment of foreclosure and sale of the property, the mortgage merges with the fee, "[i]t is the intention of the mortgagee that is controlling. Before there can be merger the evidence must show that the [mortgagee] intended that there be a merger. In the absence of such evidence, the lien of the plaintiff's mortgage remains effective." *Id.* at 614, 162 N.W.2d at 891.

Similarly, language in an earlier case, *National Life Ins. Co. v. Fitzgerald*, 61 Neb. 692, 85 N.W. 948 (1901), foreshadowed the holding in *Overland-Wolf*. In *Fitzgerald* the mortgagee sought to foreclose after the death of the mortgagor and while his estate was being administered. Afterwards, but before the decree of foreclosure was rendered, evidence of the debt as described in the mortgage agreement was filed in the county court by the mortgagee as a claim against the debtor's estate. The estate posited that the filing of the claim was an assertion of

a general lien, which was inconsistent with the existence of the special lien on a part of the decedent's estate. The court specifically found that "[e]very mortgagee secures by his contract a special lien on some part of his debtor's property; and, speaking generally, a right to appropriate the whole of such property, if necessary to satisfy his claim." *Id.* at 693, 85 N.W. at 948.

Another related principle commented upon in *Fitzgerald*, that is, that "an action to foreclose a mortgage is not a suit for the recovery of money alone," was reinforced in two later cases, *Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp.*, 192 Neb. 588, 223 N.W.2d 425 (1974), and *Lincoln Joint Stock Land Bank v. Barnes*, 143 Neb. 58, 8 N.W.2d 545 (1943). In *Northwestern Mut.* the court explained the purpose and effect of a foreclosure action: "A foreclosure proceeding, however, is not brought to create a lien but to enforce one already in existence. *It affects no property except the property being foreclosed for the particular lien and affects it only by limiting the time for redemption and authorizing its sale if not redeemed.*" (Emphasis supplied.) 192 Neb. at 592, 223 N.W.2d at 428. The mortgagor in *Northwestern Mut.* argued that a deficiency after foreclosure eliminated all remaining liens, while the mortgagee claimed that its liens, executed in four separate mortgage instruments, were essentially a single lien which attached to all the premises involved in the four cases. Noting that "[t]he nature of [the mortgagee's] liens therefore becomes critical," *id.* at 591, 223 N.W.2d at 427, the court held that the documents had created four separate liens. It followed that the mortgagee's lien in each foreclosure covered "only the premises that were the subject of that foreclosure petition." *Id.* at 591, 223 N.W.2d at 428.

Furthermore, in *Lincoln Joint Stock Land Bank, supra*, the court distinguished a foreclosure from a quiet title action, stating that the former existed "for the purpose of determining the existence of a mortgage lien, to ascertain the amount thereof and its priority, and to obtain a decree directing the sale of the premises . . . ." *Id.* at 61, 8 N.W.2d at 550. See, also, *Wittwer v. Dorland*, 198 Neb. 361, 253 N.W.2d 26 (1977). Also significant was the court's acknowledgment that the

mortgagee's intent would control vis-a-vis the extinguishment of the lien. *Lincoln Joint Stock Land Bank, supra.*

With these statutes and decisions as background, we now consider the effect of the mortgage instrument at issue. We note that our review of equitable action is de novo on the record, leaving us free to reach independent conclusions irrespective of the decisions reached by the trial court. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985). The precise legal descriptions of the parcels in the mortgage agreement and the parties' subsequent actions make it apparent that Hamel and the bank intended to impose liens upon each parcel of land. Should Hamel default on the loan, it seems reasonable to conclude that by executing the document, both parties contemplated that any or all of the named property could be subject to foreclosure to satisfy completely Hamel's debt. That the parcels were intended by the parties to be individually encumbered is further evidenced by the terms in the Dupuys' land contract, terms which specifically refer to the bank's lien on Lot 19.

Given the parties' actions, as well as the face of the instrument, we conclude that the parties intended to secure Hamel's obligation by encumbering the individual parcels of real estate with liens enforceable to the extent of the debt. Applying the *Overland-Wolf* presumption that the mortgagee intends that which is most advantageous to it, we find that the fact that such intent was evidenced in one instrument as opposed to three does not alter this conclusion. We see no reason, in logic or in law, to limit the number of security interests, or liens, that a mortgage agreement can evidence. Of course this rule applies assuming a legally sufficient description of the properties in the mortgage instrument.

We are cognizant of the points raised in the dissent, but we find more persuasive and illustrative of our position the reasoning used by the Court of Appeals for the State of Michigan in *Michigan National Bank v. Martin*, 19 Mich. App. 458, 172 N.W.2d 920 (1969). After holding that while the mortgagor's indebtedness remained unsatisfied, the mortgagee's first foreclosure did not preclude subsequent foreclosures for the balance of the debt, the court explained the

considerations behind the rule:

> This is not to say that a mortgagee who holds several mortgages securing the same debt must foreclose each mortgage in separate actions. Cases may arise in which it would be convenient to join foreclosures upon separate mortgages in one action. Indeed, upon plaintiff's motion, the two suits brought in Kent county were consolidated for trial. However, there may also arise cases in which adoption of any rule of compulsory joinder would work serious hardship on both mortgagor and mortgagee. Where one of several mortgaged properties, if sold upon foreclosure, would yield funds sufficient to satisfy the principal debt, requiring foreclosure upon all properties would needlessly involve the additional properties in litigation. Also, where the mortgagor is in default on only one of several secured notes, all evidencing the some [sic] loan, a rule of compulsory joinder would force a mortgagee either to wait until the other notes are due before foreclosing upon all mortgaged properties or, in the alternative, to lose foreclosure rights upon the security for notes not yet due. [Citation omitted.] We cannot adopt a rule which compels such unfortunate results.

Id. at 463-64, 172 N.W.2d at 922.

The bank's foreclosure action against Lot 1 was an in rem action involving only the Waterloo property and determining by judicial process the amount of the debt and the right, absent the mortgagor's equity of redemption, to sell the property to satisfy Hamel's debt. The bank's action against Lot 1 does not deny it the right to enforce its multiple security interests in further actions involving different parties and different parcels of land.

Indeed, without speculating on the effect of individual statutes, suffice it to say that it would be difficult if not impossible and certainly impractical to require the mortgagee to bring one all-encompassing foreclosure action against separate parcels of encumbered property. Any attempt to join all interested parties and parcels in one action would be subject to rules of joinder of parties defendant and causes of action, Neb. Rev. Stat. §§ 25-317, 25-701, and 25-702 (Reissue 1979),

as well as to the specific joinder statute applicable in foreclosure actions, Neb. Rev. Stat. § 25-2141 (Reissue 1979), the rules controlling proper venue in foreclosure actions, Neb. Rev. Stat. §§ 25-401 and 25-402 (Reissue 1979), and the statute concerning real parties in interest, Neb. Rev. Stat. § 25-301 (Reissue 1979).

While we are aware that authority exists which would cast the Dupuys as necessary as opposed to proper parties, see, generally, G. Osborne, Handbook on the Law of Mortgages § 321 (2d ed. 1970), we nonetheless believe that the rule thwarts the sound policy considerations outlined in *Michigan National Bank, supra*. We also note that the rule is discretionary, depending upon the practicalities of joining all parties with an interest in the foreclosure action. G. Osborne, *supra*.

Because we have determined that a mortgage foreclosure such as this involves separate liens and separate parties and parcels of land, we find no merit in the Dupuys' contentions that successive foreclosures split a single cause of action and violate the principle of res judicata. We further note an abundance of authority validating consecutive foreclosures such as the one involved here. See, e.g., *Michigan National Bank v. Martin*, 19 Mich. App. 458, 172 N.W.2d 920 (1969); *Waken v. Bimstrom*, 172 Okla. 232, 45 P.2d 97 (1935); *Tacoma Sav. Bank & Trust Co. v. Safety Inv. Co.*, 123 Wash. 481, 212 P. 726 (1923).

The order of the district court releasing Lot 19 from the lien and directing Hamel to pay the deficiency amount is reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., dissenting.

I respectfully dissent from the majority opinion in this case. In my view the majority has reached a wrong conclusion because it has set its sights on the security and not upon the debt. In the instant case we have but a single transaction involving a *single* note secured by a *single* mortgage describing three parcels of ground. Western State Bank had but a single cause of action, and when it elected to sue on the note and

foreclose the mortgage, it in effect brought its only cause of action. To therefore permit Western State Bank to subsequently sue again on the very *same* note and seek to foreclose on the very *same* mortgage, I believe, constitutes a splitting of a cause of action and is not permitted. The matter is fully explained in 1 G. Glenn, Mortgages, Deeds of Trust, and Other Security Devices as to Land § 88 at 533 (1943), wherein the author notes:

> The mortgage presents the phenomenon of only one debt, with only one pledge to secure it. The debt may be split into bonds, or it may be payable in a series of notes, but in a broad sense it remains true that there is one debt, which arose out of one transaction. In like manner, there is only one pledge, although there may be many parcels of land, and many types of security. It follows that a foreclosure must be of the entire security; and, no matter how many parcels of land there may be, all should be included in the suit. To do otherwise is to "split an entire case," and that fault is penalized, in our jurisprudence, by refusal to hear the deferred portion in a later suit. It follows that a foreclosure upon one of two parcels will preclude a later foreclosure upon the other.

See, also, *Layden v. Layden*, 228 N.C. 5, 44 S.E.2d 340 (1947). That, likewise, has been the law in this jurisdiction since at least 1903. In the case of *Nebraska Loan & Trust Co. v. Domon*, 4 Neb. (Unoff.) 334, 93 N.W. 1022 (1903), it was said: "The foreclosure of a mortgage for the interest only on the principal debt secured thereby, where the whole debt, both principal and interest, is due and payable at the time of such foreclosure, ordinarily exhausts the lien of the mortgage, and is a bar to a second foreclosure suit." (Syllabus of the court.) It was further said in the *Nebraska Loan & Trust Co.* case, *supra* at 338, 93 N.W. at 1023: "In fact the general rule is, that where by the terms of a mortgage the whole amount of principal and interest is due, a foreclosure for a part thereof exhausts the lien of the mortgage."

And in *Johnson v. Payne*, 11 Neb. 269, 272, 9 N.W. 81, 82 (1881), we said that "whatever amount is due under the mortgage at the time of its foreclosure constitutes but a single and indivisible demand, and therefore cannot be separated and

collected by several actions." See, also, *Haines v. Flinn*, 26 Neb. 380, 42 N.W. 91 (1889).

In *Dooly v. Eastman*, 28 Wash. 564, 68 P. 1039 (1902), the Supreme Court of Washington, in a case very similar to the instant case, said:

> One having a mortgage on several pieces of land to secure the same debt cannot foreclose it by piecemeal, and if he attempt to do so he waives his lien upon the premises not included in the decree. As was well said by the supreme court of California in *Mascarel v. Raffour*, 51 Cal. 242, "by the foreclosure the mortgage is merged in the judgment, and a new action could not be maintained to foreclose the mortgage as to the omitted lot. A mortgage cannot be foreclosed by piecemeal in that way, and the legal effect of omitting from the decree a portion of the mortgaged premises is a waiver of the mortgage lien as to that portion. The mortgagor, therefore, cannot complain of the decree." . . . The loss of his lien may, and no doubt will, work a hardship upon appellant, but, as he shows that it was the result of his own voluntary act, he must abide the consequences.

Id. at 577-78, 68 P. at 1043-44.

The majority relies upon *Michigan National Bank v. Martin*, 19 Mich. App. 458, 172 N.W.2d 920 (1969), as illustrative of the majority's position and reasoning. It is interesting, however, to note that the court in *Michigan National Bank v. Martin, supra*, makes the very distinction which the dissent seeks to make. In *Michigan National Bank v. Martin, supra*, there were *two* notes and *three separate* mortgages on three separate parcels of ground. In affirming the trial court's decision to permit successive actions, the Court of Appeals for the State of Michigan said at 462-63, 172 N.W.2d at 921:

> Defendants have not cited any authority which would apply the rule against splitting to bar successive foreclosures upon separate mortgage instruments. *Dooly v. Eastman* (1902), 28 Wash 564 (68 P 1039), relied upon by defendants, is distinguishable, since there the mortgagee held but a single mortgage which covered several tracts of land. It was held that, where one holding a

> single mortgage upon two tracts of land foreclosed against one only, he thereby waived any right to later foreclose upon the other tract. In the instant case, plaintiff held not one, but three separate mortgages.

Obviously, the Michigan court did not believe that whether there was but a single note and a single mortgage versus multiple notes and multiple mortgages was putting form over substance as suggested by the majority herein.

Furthermore, the majority's concern about what would happen if property was in more than one county is not well founded. Neb. Rev. Stat. § 25-402 (Reissue 1979) specifically provides:

> If the real property, the subject of the action, be an entire tract, and situated in two or more counties, or if it consists of separate tracts situated in two or more counties, the action may be brought in any county in which any tract or part thereof is situated, unless it be an action to recover the possession thereof. . . .

Refusing to permit one who holds a mortgage to split a cause of action is not putting form over substance. I would have affirmed the judgment of the district court.

STEPHEN L. KLOCH, APPELLANT AND CROSS-APPELLEE, V. EDWARD G. RATCLIFFE, APPELLEE AND CROSS-APPELLANT.
375 N.W.2d 916

Filed November 8, 1985. No. 84-642.

1. **Libel and Slander.** Statements made at an investigation held pursuant to the grievance procedure under the Railway Labor Act, 45 U.S.C. §§ 151 et seq. (1982), and an operating agreement and relevant to the subject of the hearing are absolutely privileged.

2. **Libel and Slander: Proof.** Where a qualified privilege exists, there can be no recovery without proof of malice.
3. **Libel and Slander.** A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information.
4. **Libel and Slander: Proof.** In order to prove malice the plaintiff must show that the defendant knew that the statement was false or that the statement was made with a reckless disregard as to its truth or falsity.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Herbert M. Sampson III of Sampson, Forney & Dobrovolny, for appellant.

Walter R. Metz, Jr., of Metz & Metz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

This was an action for slander in which the jury returned a verdict for the plaintiff in the amount of $375,000. The defendant's motion for judgment notwithstanding the verdict was sustained and the petition dismissed. The plaintiff has appealed. By a cross-appeal the defendant submits additional reasons for affirming the judgment of the district court.

On April 18, 1982, the plaintiff, Stephen L. Kloch, was employed as a locomotive engineer by the Burlington Northern railroad. He was returning to Alliance, Nebraska, from Edgemont, South Dakota, as the engineer on a freight train which entered the Alliance yard at about 3 a.m. According to the yard office, the plaintiff's train arrived in the yard at 3:02 a.m.

At about the same time, the defendant, Edward G. Ratcliffe, a road foreman employed by the railroad, was returning to Alliance from Crawford, Nebraska, by automobile. One of the duties of a road foreman is to run "efficiency tests" on locomotive engineers employed by the railroad. The defendant had been performing efficiency tests on engineers in the Crawford area.

The defendant was driving on a highway that was alongside

the track on which the plaintiff's train was operating. When the defendant observed the train approaching Alliance, he decided to run an efficiency test known as a final terminal delay or "FTD" test on the engineer operating that train. After the train entered the yard, the defendant went to the yard office.

Under the provisions of the operating agreement between trainmen and the railroad, trainmen receive penalty pay (final terminal delay) if the time required to "tie up" after their train enters the yard exceeds 30 minutes. This pay is in addition to their regular pay for "trip miles" but is paid only if the 30-minute limit is exceeded.

The procedure to "tie up" consists of filling out a timecard and signing the register in the yard office. The railroad considers 5 minutes a reasonable time for this activity. The register is the official record of when a trainman's paid day ends and indicates that he has completed all of his duties and is off duty.

After entering the yard office the defendant went to the tower where he could observe the activity in the yard. He saw the plaintiff arrive at the yard office at 3:29 a.m. by "taxi," a conveyance provided by the railroad to bring crews to and from the yard office. According to the defendant, the plaintiff did not enter the yard office until 3:34 a.m. Before entering the yard office the plaintiff had walked over to his pickup and engaged in conversation with other trainmen in the area.

After the plaintiff had entered the yard office, the defendant went to the crew caller's office, which is adjacent to and separated from the register room by a window. After the plaintiff entered the register room, the defendant had one of the crew callers on duty, Joanne Husman, point out the plaintiff. The defendant then compared his watch with the standard clock which was located in the operator's room adjacent to the crew caller's office. The defendant's watch was within 30 seconds of the time shown by the standard clock, which is the permitted variance.

The defendant watched the plaintiff sign the register and then leave the register room. The defendant examined the register and found that the plaintiff had entered 4 a.m. in the register. After the plaintiff had left the building, the defendant

showed the register to Husman. It was then 3:55 a.m. The defendant noted all of the relevant times in a notebook which he kept for that purpose.

The defendant then attempted to locate the plaintiff outside the yard office, but the plaintiff had left the yard.

The conductor of the train and the other "head end" crew members had recorded 3:40 a.m. as their "tie up" time.

On the following day the defendant reported the results of the test to his superior. It was determined that there should be an "investigation," as provided for in the operating agreement. A hearing officer was appointed and notice of the hearing served on the plaintiff. The defendant testified at the hearing held on April 30, 1982, that he saw the plaintiff leave the railroad premises at 3:54 a.m., after he had signed out on the federal train register showing his tieup time to be 4 a.m. The defendant's testimony at the hearing is the basis for this action.

Following the hearing, the plaintiff was found to have violated the rules of the railroad and was discharged on May 28, 1982. The plaintiff appealed his discharge under the provisions of the Railway Labor Act, 45 U.S.C. §§ 151 et seq. (1982). The appeal was in the third stage of the appeal process on December 1, 1982, when the plaintiff was reinstated on a leniency basis without back pay.

This action was filed on January 3, 1983.

In sustaining the motion for judgment notwithstanding the verdict, the trial court found that the action was preempted by federal law, that the defendant's testimony was absolutely privileged, and that there was insufficient evidence of malice to sustain an action if the privilege was only a qualified privilege. The plaintiff's assignments of error all relate to these findings.

The plaintiff's claim rests solely upon the statements made by the defendant at the hearing, which was provided for in the operating agreement, and at which the defendant was required to testify. In deciding this case we consider only those matters relating to whether the defendant's statements were privileged, the extent of the privilege, and whether there was evidence of malice.

With respect to the matter of privilege, the trial court found that the statements made at the hearing were absolutely

privileged.

The alleged defamatory statements involved in this case consist of the defendant's answers to four questions asked him by the hearing officer at the April 30 hearing. The officer asked: (1) "Was he [Kloch] claiming then time for payment for which he was not entitled?" Ratcliffe responded, "Yes, sir." (2) "Would that be considered theft?" Ratcliffe responded, "Yes, sir." (3) "Is claiming time for pay which is unsubstantiated or unearned theft?" Ratcliffe responded, "Yes, sir." (4) "Did Mr. Kloch fail to give a factual report concerning his tie up time in the early morning hours of April 18th?" Ratcliffe responded, "Yes, sir." These statements were clearly relevant to the subject of the hearing.

The only persons present at the hearing were the hearing officer, a stenographer, the defendant, the plaintiff, and a union representative appearing on the plaintiff's behalf.

The rule of absolute privilege applies not only to judicial proceedings but to quasi-judicial proceedings as well. *Sinnett v. Albert*, 188 Neb. 176, 195 N.W.2d 506 (1972); *Shumway v. Warrick*, 108 Neb. 652, 189 N.W. 301 (1922). The hearing or investigation at which the alleged defamatory statements were made is an arbitration proceeding which is similar to a judicial or quasi-judicial proceeding.

In *Neece v. Kantu*, 84 N.M. 700, 705-07, 507 P.2d 447, 452-54 (1973), *cert. denied* 84 N.M. 696, 507 P.2d 443, the Court of Appeals of New Mexico observed:

> The doctrine of absolute immunity was extended in General Motors Corporation v. Mendicki, 367 F.2d 66 (10th Cir. 1966), to cover arbitration of employer-employee grievances pursuant to a collective bargaining agreement between the employer and the union.
>
> In *Mendicki*, supra, there were four steps to arrive at a decision. (1) The employee taking up the grievance with the foreman of the company for adjustment. (2) If unsuccessful, the employee is represented by the local union shop committee. (3) If unsuccessful, an appeal is taken from the plant management decision to higher levels of union and management. And (4) *A hearing before the*

impartial Umpire. Mendicki started a grievance under Step One. It was during Step Four that the claimed defamation occurred. The court said [p. 70]:

"It is our conclusion that statements made either by representatives of management or by representatives of an employee *at a conference and bargaining session having for its purpose the adjustment of a grievance of the employee or other peaceable disposition of such grievance* are unqualifiedly privileged. [Emphasis added]"

The reason given for absolute immunity was that statements clearly germane to the issues involved, if not accorded absolute immunity, would interfere with the national labor policy of the United States.

For comments on *Mendicki*, supra, see 15 Univ. of Kan.L.Rev. 553 (1967). Bostwick, the author, concluded [pp. 567, 568]:

"The court apparently applied state defamation law, finding that state law would grant an unqualified privilege to statements made during the course of a labor grievance proceeding. The court recognized that the national labor policy would be impaired if defamation remedies were awarded in the *Mendicki* case. Having arrived at this determination, the court held the statements to be 'unqualifiedly privileged.'

* * * * * *

"Considering the factual situation presented in *Mendicki*, the Tenth Circuit should have held that state defamation actions are absolutely barred as to statements made by participants during the course of a labor grievance proceedings. Only by such a decision could the court adequately have insured that the national labor policy, as defined by Congress, would be given the full play required by the Supreme Court."

Mendicki, supra, was followed by summary judgments granted in Corbin v. Washington Fire & Marine Insurance Co., 278 F.Supp. 393 (D.C.S.C.1968), aff. 398 F.2d 543 (4th Cir. 1968); Joftes v. Kaufman, 324 F.Supp. 660 (D.D.C.1971).

There is a conflict of authority. *Mendicki*, supra, was

not followed in Bird v. Meadow Gold Products Corp., 60 Misc.2d 212, 302 N.Y.S.2d 701 (1969). It held that defamatory statements were a qualified privilege, but granted defendant a summary judgment because the statements made were a sincerely held opinion of the defendant. Maryland and New Jersey also held that the type of privilege involved is a qualified privilege. Henthorn v. Western Md. R.R. Co., 226 Md. 499, 174 A.2d 175 (1961), and by opinion, Jorgensen v. Pennsylvania R.R. Co., 25 N.J. 541, 138 A.2d 24 (1958), 72 A.L.R.2d 1415.

Mock v. Chicago, Rock Island & Pacific Railroad Co., 454 F.2d 131 (8th Cir. 1972), held that statements made in proceedings before *The National Railroad Adjustment Board* were absolutely privileged because the board was a quasi-judicial agency.

Should New Mexico adopt the doctrine of absolute immunity from liability for defamation which takes place during the course of labor-grievance-arbitration proceedings? We believe it should. This is a matter of first impression in New Mexico.

Bostwick, supra, stated:

"The grievance proceeding under a collective bargaining agreement is quite similar to a judicial or quasi-judicial proceeding. The Supreme Court has stated that the grievance procedure is 'an effort to erect a system of industrial self-government' in which 'a new common law—the common law of a particular industry or of a particular plant' is fashioned and applied. The grievance procedure is merely an agreed upon substitute for legal action in a judicial forum and is actually quasi-judicial in nature."

The Furst letter of August 28, 1970, as a hearing officer, followed a hearing with both parties present and evidence heard. It was the Second Step in procedure for adjustment of grievances. It led ultimately to a hearing before the System Board of Adjustment. The Furst hearing can be placed in the category of a quasi-judicial proceeding. See, Chiordi v. Jernigan, 46 N.M. 396, 129 P.2d 640 (1942);

dissenting opinion, State v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957). Being a quasi-judicial hearing, Furst's letter was unqualifiedly privileged. *Mock*, supra; Stryker v. Barbers Super Markets, Inc., supra.

In *Mendicki*, supra, the defamation occurred during Step Four in a hearing before an impartial umpire. In *Mock*, supra, defamation occurred during a hearing under Step Four before the National Railroad Adjustment Board. Do the same rules apply during a hearing under Step Two before a company hearing officer? We believe they do.

As the hearing officer, Furst was bound to comply with the provisions of the Collective Bargaining Agreement. The Collective Bargaining Agreement ordered the decision to be presented in writing as a "peaceable disposition of such grievance." Furst's letter was "clearly germane to the issues involved." To fail in this respect would violate the agreement.

We conclude that Furst's defamatory statements were absolutely privileged.

Other cases which have reached a similar result are: *Sturdivant v. Seabord Service System, Ltd.*, 459 A.2d 1058 (D.C. App. 1983); *Rougeau v. Firestone Tire and Rubber Company*, 274 So. 2d 454 (La. App. 1973); *DeLuca v. Reader et al.*, 227 Pa. Super. 392, 323 A.2d 309 (1974); *Turner v. Gateway Transp. Co., Inc.*, 569 S.W.2d 358 (Mo. App. 1978).

The plaintiff concedes that at least a qualified privilege attached to the statements of the defendant. If only a qualified privilege existed, the plaintiff still could not recover because there was no evidence of malice. Where a qualified privilege exists, there can be no recovery without proof of malice. *Bartels v. Retail Credit Co.*, 185 Neb. 304, 175 N.W.2d 292 (1970).

A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information. *Hall v. Rice*, 117 Neb. 813, 223 N.W. 4 (1929) (citing *Wise v. Brotherhood of Locomotive F. and E.*, 252 F. 961 (8th Cir. 1918)); *Dangberg v. Sears, Roebuck & Co.*, 198 Neb. 234, 252

N.W.2d 168 (1977).

The existence of even a qualified privilege places the controversy within the rule stated in *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966).

In *Linn* the Court attempted to accommodate both the federal interest in uniform regulation of labor relations and the state's interest in protecting its citizens. The Court held that it was necessary to "limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." *Linn* at 64-65. The Court, by analogy, adopted the definition of malice stated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), under which a plaintiff is not allowed recovery absent a showing that the defamatory statements were published with knowledge of their falsity or with reckless disregard as to whether they were true or false.

The trial court relied upon this standard in granting defendant's motion for judgment notwithstanding the verdict. Although the plaintiff alleged that the defendant had "falsely and maliciously stated that the Plaintiff was a thief by attempting to steal from Burlington Northern, Inc.," the evidence does not support the allegation of malice.

It is the defendant's knowledge or a reckless disregard of the truth or falsity of his statements on which the plaintiff's case rests.

The plaintiff, in his brief, contends that the evidence shows certain facts which, when added together, support his allegation. The plaintiff relies upon the following facts: "The Defendant saw the caboose crew show up at the yard office at 3:30 A.M. The Defendant saw Steve Kloch show up at 3:35 A.M. The defendant did not watch the other crew members check out. The Defendant was only interested in checking the time of Steve Kloch." Brief for Appellant at 30. The plaintiff then concludes that "[t]he defendant published statements about Steve Kloch with knowledge of their falsity." *Id.* The reason the defendant was "waiting" for the plaintiff was because the plaintiff was the subject of the efficiency, or FTD, test.

The U.S. Supreme Court has held that "[i]nstructions which permit a jury to impose liability on the basis of the defendant's hatred, spite, ill will, or desire to injure are 'clearly impermissible.' [Citation omitted.] '[I]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard.' [Citations omitted.]" *Letter Carriers v. Austin*, 418 U.S. 264, 281, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974). The plaintiff cannot recover absent a showing of actual knowledge or reckless disregard of the falsity of the statements made.

There is no evidence that the defendant knew that his statements were false or that he made them with reckless disregard for their truth or falsity. The defendant took special precautions to ensure that his information was correct. He compared his watch with the standard clock and had an independent witness, Husman, observe the plaintiff and read the entry made by the plaintiff in the register. The only evidence which disputes the correctness of the defendant's statements is evidence to the effect that the plaintiff left the yard office at 4 a.m. This falls short of proof that the defendant *knew* his statements were false or that he made them with reckless disregard for their truth or falsity.

It is unnecessary to consider any of the issues raised in the cross-appeal.

The judgment of the district court is affirmed.

AFFIRMED.

GRANT, J., concurring.

I concur in the result reached in the opinion of the majority, but on the second ground discussed. I believe that defendant had a qualified, rather than an absolute, privilege in his actions which were undertaken in his employment as a road foreman with the Burlington Northern railroad. *Hall v. Rice*, 117 Neb. 813, 223 N.W. 4 (1929); *Dangberg v. Sears, Roebuck & Co.*, 198 Neb. 234, 252 N.W.2d 168 (1977). Since defendant had such a qualified privilege, but the evidence showed, as a matter of law, that defendant was not guilty of malice toward plaintiff, I would affirm on that ground.

IN RE INTEREST OF R.L.T., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. A.J.T., APPELLANT.

376 N.W.2d 310

Filed November 8, 1985. No. 85-244.

Parental Rights. It is not necessary for a court to await permanent injury to a child by reason of the activity of a parent in order to terminate parental rights.

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

James G. Sharp of Everson, Noble, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellant.

Jerry L. Shelton, Deputy Gage County Attorney, and Duane W. Smith of Dalke, Smith & Harris, guardian ad litem, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

This is an appeal from the judgment of the district court which affirmed the decree of the county court sitting as a juvenile court. The county court had terminated the parental rights of A.J.T. to her female child, R.L.T., age 3. We affirm.

The child was born out of wedlock. The mother and child became involved with the juvenile court system with the filing of a petition on June 3, 1982. The petition alleged that the child was one as described in Neb. Rev. Stat. § 43-202(2)(e) (Reissue 1978), in that said child was in a situation dangerous to life and limb or injurious to the health or morals of such child in that the mother, due to her emotional condition, was incapable of providing proper care for said child.

The mother admitted the allegations of the petition, and the child was placed in the temporary custody of the Gage County Division of Public Welfare. The mother was ordered to undergo a psychological examination and evaluation.

According to the testimony of Dr. Wayne R. Price, a clinical psychologist, A.J.T. suffers from a personality disorder, a long-term problem which is manifested by impulsivity, unstable personal relationships, inappropriate intense anger, affective

instability, difficulty in being alone, and physically self-damaging acts.

The testimony of police officer Alan Baldwin reveals that he was called to the scene of an apparent domestic disturbance in the city of Beatrice. He found A.J.T. to be highly upset and emotional and engaged in a rather violent argument with a man. Also present was A.J.T.'s daughter, R.L.T., who at that time was not quite 5 months of age. Further, as testified to by Officer Baldwin, she threatened to take her child and walk the streets until they both "froze to death."

There was testimony at the adjudication hearing from a Mrs. Johnson with whom A.J.T. and her child resided prior to June 3, 1982, that A.J.T. did not properly bathe and feed the child; that she would become upset with the child; that on one occasion she slapped the child; and that at another time she had given the child almost a full can of beer.

As part of a plan of rehabilitation, the county court, in addition to the psychological testing and counseling, ordered A.J.T. to establish a permanent residence, maintain contact with R.L.T. through visitation, attend parenting classes, and obtain employment. An order to this effect was entered on January 7, 1983.

During the intervening period from the entry of the order setting forth the plan of rehabilitation to the order terminating parental rights on October 31, 1984, A.J.T. left Beatrice to attend a Job Corps training program in Utah. She left without completing the program to follow a boyfriend to Boulder, Colorado. She returned to Beatrice, living with friends for short periods of time, and then she sought readmission to the Job Corps program. However, in the meantime, she obtained employment with a carnival, and left Nebraska in August. She went to Texas, took a position as a topless dancer in Corpus Christi, then left for California, where she was employed for a time as a seminude model. While living in California, A.J.T. was arrested for vandalism, and she eventually served 21 days in jail for battery of a police officer. She failed to keep Social Services adequately informed of her whereabouts as required by her plan of rehabilitation.

Not only did A.J.T. fail to comply with the requirements of

the rehabilitation plan as to psychological counseling but she failed to return to Beatrice for review hearings as requested. Upon her return to Beatrice for the termination hearing, she engaged in a fight in a local tavern.

A.J.T. was reevaluated by Dr. Price on October 13, 1984. He found that she still exhibited characteristics of a borderline personality disorder and will continue to do so, the duration and the intensity of which will be dependent upon her involvement in long-term therapy. Dr. Price testified that in his opinion there is a chance of impulsive, aggressive outlets of anger by A.J.T. He further said: "The angry outbursts can be inward towards herself or outwards towards a target that's there without intending any harm to the individual or the object, so I see that if the anger is not controlled, the child could be at risk."

Counsel for the mother argues that the evidence was not clear and convincing that the mental illness of A.J.T. would continue for a prolonged and indeterminate period. We do not agree. Dr. Price did concede that there had been some improvement in A.J.T.'s condition since his initial meetings with her, perhaps due in part to a delayed impact of earlier counseling sessions. However, he emphasized that continued improvement would require long-term, regular psychotherapy, and without that it would not be likely that there would be a significant change in her condition.

The record is rather clear and convincing that A.J.T. has not followed the recommendations of counseling spelled out in her rehabilitation plan, and her attitude, as expressed by her, holds out little hope that she will change in that regard. She still has no established home nor visible means of support.

It is not necessary that the court await the time that the child shows permanent scars of her mother's anger and impulsivity before acting to terminate this relationship. *In re Interest of S.P., N.P., and L.P., ante* p. 165, 375 N.W.2d 616 (1985).

From a de novo review of the record, we agree with the juvenile court that it has been established by clear and convincing evidence that A.J.T. now suffers from a personality disorder likely to last for an indefinite period, and which is likely to subject her child to either physical or emotional injury, and that it is in the best interests of said child that the parental

rights of A.J.T. be terminated.

The judgment of the district court in affirming the decree of the county court is correct and is affirmed.

AFFIRMED.

RICHARD L. CLEASBY, APPELLANT AND CROSS-APPELLEE, V. LEO A. DALY COMPANY, APPELLEE AND CROSS-APPELLANT.

376 N.W.2d 312

Filed November 15, 1985. No. 84-357.

1. **Contracts.** Three tests are appropriately applied to determine if a transaction has been completely integrated: (1) Was the written contract complete; did it include the whole or only a part of the transaction? (2) Does the evidence outside the writing vary or controvert the written terms? (3) Was the writing intended to cover the whole transaction, as shown by the conduct and language of the parties and the surrounding circumstances?
2. **Courts: Contracts.** The court, not the jury, decides as a preliminary matter the extent to which a transaction is embodied in the writing.
3. **Employer and Employee: Termination of Employment.** The refusal of an employer to allow an employee to perform the duties required of him by his employment amounts to his dismissal from such employment.
4. **Directed Verdict.** A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
5. _____. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than to submit it to a jury for determination.
6. **Employer and Employee: Contracts.** In a personal service contract there is an implied condition that the employee will be able to perform at the time stipulated for performance.
7. **Contracts.** Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

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

David J. Lanphier and Robert M. Gonderinger of McGill, Koley, Parsonage & Lanphier, P.C., for appellant.

Martin A. Cannon of Matthews & Cannon, P.C., for appellee.

KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and CHEUVRONT, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a damage suit for breach of a contract for overseas personal services brought by Richard L. Cleasby against his employer, Leo A. Daly Company (Daly). A jury awarded Cleasby $5,346; he appeals. Daly cross-appeals, claiming as error the denial of its motion for directed verdict.

Daly is an international architectural consulting firm based in Omaha, Nebraska. In 1981 the Saudi Arabian National Guard contracted with a French firm, Dumez, to design and build a new city for about 40,000 personnel and related families, costing $972 million. Saudi Consulting House (SCH), a governmental agency having an architectural license available only to citizens, contracted with the National Guard to supervise construction and design. SCH contracted with Daly, as an associate, to perform those duties, with Daly as the major performer; SCH and the National Guard reserved some controls, and, generally, their wishes were respected. Daly was required to provide for approval a list of all permanent personnel and their job assignments, which included Cleasby. Approval of replacements was also required. Except for vacation time, all assigned personnel were required to be working full time at the jobsite. Temporary absences were approved informally.

In April 1981 Daly solicited Cleasby's services as project manager—Cleasby had an established work background in the field of personnel management—he accepted the offer contained in a four-page letter dated May 15, 1981. The first page provides:

This letter is a confirmation of our understanding with

you in regard to your joining the staff of LEO A. DALY and being assigned to the National Guard Housing Project at Khashm-Al-An near Riyadh, Saudi Arabia. This specific assignment is for a two-year period, but it is hoped that by mutual agreement between you and our firm that your association with us will be extended either in Riyadh or in another location.

Our office in Riyadh is known as SAUDI CONSULTING HOUSE - LEO A. DALY (SCH/LAD), A PROFESSIONAL ASSOCIATION. This is an association between LEO A. DALY and SAUDI CONSULTING HOUSE, a consulting engineering organization owned by the Saudi Arabian government. For purposes of administration all of our personnel assigned to Saudi Arabia are accountable to the General Manager for Leo A. Daly affairs in Saudi Arabia, Mr. Roy L. Follmuth.

The position offered to you is for Project Manager. The work schedule will be 48 hours per week.

Salary

The compensation for this position is as follows:

Salary	US$ 54,000	per annum (effect. 29 Aug '81)
+ Completion Bonus of 15% of Total Salary	8,100	per annum (payable upon completion of 24 months employment)
Total	US$ 62,100	per annum

Following page 1 are general benefits and requirements including automatic banking of paychecks, free living accommodations, paid travel and shipment of personal property, paid stateside storage of household goods, insurance and medical benefits including evacuation to and treatment in

London for major illness, furnished auto, profit-sharing plan, income tax benefits (foreign), immigration procedures, and a physical examination requirement. Also included:

> Vacation and Rest and Recreation (R&R)
>
> Regarding vacation and recreation leave (R&R), after 12 months we provide four weeks leave, together with a round-trip economy air fare to the point of origin; R&R leave of one week together with round-trip air fare to London (or equivalent) following 6 and 18 months on the job. . . .
>
> Force Majeure
>
> We must, of necessity, reserve the right to interrupt or discontinue overseas assignments upon the occurrence of unforeseen or unexpected conditions such as termination of the Client's project, war, incurrection [sic], and the like.
>
> In directing its overseas promotional efforts, LEO A. DALY is careful to consider the implications of work performance in foreign locations. Conditions affecting admission, language, customs, accommodation, travel, food, health, and personal safety are among the factors regularly evaluated.

The 2-year term began August 29, 1981. It is noted that the written contract provided employment for Cleasby on the staff of Daly as well as a special assignment overseas, and the evidence shows that Daly honored the staff employment.

For technical reasons Cleasby signed the contract after arrival in Saudi Arabia, backdating it to May 16, 1981, as instructed. Prior to August 29 Cleasby acquainted himself with the project and his duties, including a trip to Saudi Arabia. Cleasby described his duties as the supervisor of all construction inspectors and technicians, on behalf of the National Guard, to ensure contract compliance. Daly had about 35 persons on the job. All parties agree that the project manager was a key position imposing much responsibility for the day-to-day operation and success of the entire project and Daly's performance of its agreement with SCH. The job required personal performance.

Cleasby performed his assigned duties without reported incident or complaint until April 9, 1982, when he took R and R

to Greece, where he suffered a gastrointestinal ailment. This was followed by treatment in London, England, until May 28, 1982, when he was returned to Omaha, Nebraska. His recovery was not completed until July 6, 1982, when Dr. Joseph Holthaus released him to return to his duties.

When Cleasby left on R and R, his duties were temporarily assumed by a Daly employee, Errol Dierks. Due to Cleasby's illness, Daly hurriedly dispatched an Omaha employee, Scott Rynearson, to temporarily assume the project manager duties. Since he was one of the original planners, he had a full understanding of the project. Upon the further-delayed recovery, Rynearson's satisfactory performance, and the need for an onsite manager, arrangements were made with SCH to approve Rynearson as the permanent project manager, which, after some delay, was finalized on August 16, 1982.

About June 28, 1982, Cleasby conferred with his immediate superior, Vice President Robert Ramsey, concerning his job status. Ramsey told him that he was discharged and that he would not be returning to Saudi Arabia, giving as reasons that he had been away a long time, everybody was extremely pleased with Rynearson's performance, and it would be inappropriate to replace Rynearson. On July 6, 1982, Cleasby conferred with John Free, senior vice president, who told him that he was not discharged but that he would not be returned to his job and that they would find a place for him in their organization. On July 16, 1982, there was a further discussion with both Ramsey and Free; he was again told that he would not be returned to Saudi Arabia, the previous reasons were again discussed, and, in addition, administrative and personnel problems and unsatisfactory job performance were suggested as other reasons. Particularly, Cleasby was told that his return required the approval and consent of Dr. Nassif, resident manager of SCH, who would not be available for consultation until about September 15, 1982. There was some evidence that a request had been made for a visa permitting Cleasby to return to Saudi Arabia.

There were no further business contacts with Daly. Cleasby's overseas salary was restored, but he was not required to perform any work. About September 20 Cleasby had his attorney contact Daly again, requesting reassignment as project

manager and suggesting that otherwise some legal action would be taken. Daly responded by letter of October 13, 1982, discharging Cleasby effective September 25, 1982. This suit followed.

Cleasby's main theory of recovery is that he performed a fully integrated contract, and since there were no express provisions for termination, Daly was without authority to do so. Cleasby claims the measure of damages is the amount of the unpaid salary for the balance of the contract term, including bonuses and special damages, citing *Sullivan v. David City Bank*, 181 Neb. 395, 148 N.W.2d 844 (1967). He assigns as error (1) the ruling of the trial court that the contract was not fully integrated and that there was an implied right of Daly to terminate the contract upon good cause shown, (2) the court's instructions on plaintiff's burden of proof and damages, and (3) the ruling of the court that the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 et seq. (Reissue 1984), was inapplicable. Cleasby's petition alleges the written contract, Daly's refusal to return him to Saudi Arabia on July 16, 1982, performance, wrongful discharge by Daly on September 25, 1982, and damages.

Daly's defenses are that Cleasby failed to meet his burden of proof; that there were implied provisions and conditions to the contract that were violated by Cleasby, including his required personal presence at the jobsite, except for annual leave, R and R, and temporary absences; that Daly had a right to terminate the contract because of Cleasby's extended absence from the jobsite; and that there was a right to terminate the contract because of business necessity.

There is confusion in the record concerning the date that Cleasby's 2-year employment contract was terminated. Cleasby claims September 25, 1982, and Daly claims July 16, 1982.

"The refusal of an employer to allow an employee to perform the duties required of him by his employment amounts to his dismissal from such employment." (Syllabus of the court.) *Schlueter v. School Dist. No. 42*, 168 Neb. 443, 96 N.W.2d 203 (1959).

Cleasby's petition alleges that Daly refused to return him to the jobsite on July 16, 1982, which is fully supported in the evidence. The written employment contract was terminated on

July 16, 1982, and the jury should have been so instructed.

Whether the contract between Daly and Cleasby was fully integrated is discussed first. The following three tests are appropriately applied to determine if a transaction has been completely integrated: (1) Was the contract complete; did it include the whole or only a part of the transaction? (2) Does the evidence outside the writing vary or controvert the written terms? (3) Was the writing intended to cover the whole transaction, as shown by the conduct and language of the parties and the surrounding circumstances? In answering these questions, sometimes the court will have to look no further than the instrument itself. The court, not the jury, decides as a preliminary matter the extent to which a transaction is embodied in the writing. *Traudt v. Nebraska P.P. Dist.*, 197 Neb. 765, 251 N.W.2d 148 (1977).

From a reading of the contract the greater part relates to employee benefits without reference to his duties, responsibilities, or required performance. There are no provisions for job description, level of performance and job review, discharge and termination rights of either party, rights of the parties in the event of unforeseen absences from the jobsite (an issue here), or inability to perform the contract except as provided in the force majeure provisions.

The lack of such important provisions in the writing indicates that the contract was not complete; it clearly described only a part of the agreement. From an examination of the contract alone, it is apparent that the transaction was not completely integrated. In addition, the evidence at trial did not vary the written terms. Finally, the conduct of the parties, specifically that of Cleasby in his performance of work on the jobsite in Saudi Arabia, indicates that the parties intended there to be more to the contract than was embodied in the writing.

None of the three *Traudt* tests are met. The trial court properly ruled early in the evidence that the contract was not fully integrated, and it was implied that each party had the right to terminate it for cause. See *McIntyre v. Plywood Company*, 24 Wash. App. 120, 600 P.2d 619 (1979).

> The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties . . . .

> [W]hatever may fairly be implied from the terms or nature of an instrument is, in the eyes of the law, contained in it.

17 Am. Jur. 2d *Contracts* § 255 at 649 (1964).

We next discuss Daly's cross-appeal and claim of error, the denial of its motion for directed verdict made at the close of the evidence based on (1) Cleasby's failure of proof and (2) justification for termination because of business necessity.

> A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Where, however, the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than to submit it to a jury for determination.

Hoefer v. Marinan, 195 Neb. 477, 480, 238 N.W.2d 900, 903 (1976).

Daly's answer denied Cleasby's petition and alleged the defense that

> plaintiff became ill in April of 1982 while on leave, and continued to be ill and allegedly unable to perform his contract for at least three months, and the substantial requirements of defendant's contracts in Saudi Arabia made it imperative that a project manager be placed permanently in plaintiff's former station soon after plaintiff suffered his illness, and plaintiff was therefore replaced for reasons of *business necessity*, and plaintiff's employment contract for service in Saudi Arabia was terminated.

(Emphasis supplied.)

The answer raises two separate proof issues: (1) Cleasby had the burden to prove his performance of the contract, Neb. Rev. Stat. § 25-836 (Reissue 1979), and *Timmerman v. Hertz*, 195 Neb. 237, 238 N.W.2d 220 (1976); and (2) Daly had the burden to prove justification because of business necessity.

The annotation in 21 A.L.R.2d 1247 at 1249 (1952) states:

> Whether or not the facts present a situation which justifies

> the discharge of the employee is usually a question for the jury.
>
> The courts have stated that among the factors to be considered are the duration and nature of the illness or incapacity, the term of the contract of employment, the type of services to be rendered, the necessities of the employer, and whether the services may be reasonably and substantially performed for a time by another.
>
> In a personal service contract there is an implied condition that the employee will be able to perform at the time stipulated for performance. And some courts have said generally that where a contract of employment is not absolute, the inability of the employee to perform services due to sickness or other disability discharges both parties from further performance.

See, also, 18 S. Williston, A Treatise on the Law of Contracts § 1942 (3d ed. 1978).

There is a conflict in the evidence as to whether Cleasby performed all of the contract terms as required, so that issue was properly a fact question for the jury.

Daly's affirmative defense of business necessity as justification for terminating Cleasby's 2-year employment in Saudi Arabia is discussed next. That defense is included in instruction No. 9, considered at the jury instruction conference. Daly filed 15 requested instructions that were refused by the court; however, they are not included in the record here.

Business necessity is sometimes called impossibility of performance, extreme impracticability, frustration of contract, or implied condition in the promise. That defense has as a foundation the supervening impossibility caused by the unforeseen illness and extended recovery time, absent fault, the employer's unusual necessities to replace, and compliance with foreign administrative rules. It is fully discussed in Annot., 84 A.L.R.2d 12 at 50 (1962): "The theory that under some circumstances the contract, although absolute in terms, should be read as if it contained an excusing condition relative to the contingency which developed has been rather widely adopted . . . ."

Daly presented evidence concerning the necessity of having

its employees who were to work in Saudi Arabia be approved by the Saudi Arabians and that Daly was not free to replace personnel at will. Evidence was also presented that the Saudi Arabians usually approved whomever Daly proposed. While the circumstances of Daly's not being entirely free to return Cleasby to Saudi Arabia may have been a factor in its decision to replace Cleasby with Rynearson, under the facts it does not rise to the level of impossibility due to foreign law that is an excuse for breach of contract. See 18 S. Williston, *supra* § 1938.

The Restatement (Second) of Contracts § 261 at 313 (1981), states:

> § 261. Discharge by Supervening Impracticability
>
> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Further, the Restatement, *supra* § 265 at 334-35, states:

> § 265. Discharge by Supervening Frustration
>
> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

The evidence concerning Cleasby's illness and absence strongly supports Daly's affirmative defense of business necessity. In addition, the evidence that performance was urgently required in Saudi Arabia, that there was a need for a manager currently informed of all developments and problems, and that there was an ongoing need to promote and maintain acceptable administrative relationships with SCH and the National Guard also supports the defense of business necessity. Lastly, there is the uncontroverted and convincing evidence that Daly was required to obtain approval of replacements, that Cleasby was barred from returning to Saudi Arabia without the express consent of a certain Dr. Nassif, and that his consent could not have been obtained before September 15.

A mere scintilla of evidence is not enough to require the submission of an issue to the jury. *Langemeier, Inc. v. Pendgraft*, 178 Neb. 250, 132 N.W.2d 880 (1965). The evidence on the issue of justification because of business necessity is undisputed and conclusive in favor of Daly, and reasonable minds could draw but one conclusion, that Daly was justified as a matter of law because of business necessity to terminate Cleasby's 2-year employment in Saudi Arabia on July 16, 1982.

Even so, Daly's motion for a directed verdict was properly denied, since the pleadings and the evidence present other issues for trial, including damages for unpaid compensation due before and after July 16, 1982, and for consequential damages.

The jury should have been instructed that Daly's termination of Cleasby's employment in Saudi Arabia was without fault and justified, whether or not such was requested by Daly. *Enyeart v. Swartz*, 213 Neb. 732, 331 N.W.2d 513 (1983). Failure to do so was prejudicial error. The judgment is set aside, and the cause is remanded for trial on all remaining issues.

It is not necessary to discuss the other assigned errors.

Since upon remand plaintiff may again present the issue of attorney fees under the Nebraska Wage Payment and Collection Act, §§ 48-1228 et seq., it is noted that this is a special statutory remedy for the recovery of unpaid wages. *Rudolf v. Tombstone Pizza Corp.*, 214 Neb. 276, 333 N.W.2d 673 (1983). The cause of action stated here is a suit to recover damages for breach of contract, so the provisions of the Nebraska Wage Payment and Collection Act do not apply.

REVERSED AND REMANDED WITH DIRECTIONS.

CHEUVRONT, D.J., dissenting.

I agree that the employment contract between Daly and Cleasby was not fully integrated; I further agree that the Nebraska Wage Payment and Collection Act does not apply.

I respectfully dissent from that portion of the majority opinion which states: "The evidence on the issue of justification because of business necessity is undisputed and conclusive in favor of Daly . . . ." In my opinion the record in this case does not support such a conclusion. Rather, a factual question did exist which was for the jury to decide. Even Daly's own employees gave conflicting reasons for the discharge. I would affirm.

DOLORES LONDON, APPELLANT, V. JUDITH A. STEWART, PERSONAL REPRESENTATIVE OF THE ESTATE OF JERRY W. STEWART, DECEASED, APPELLEE.

376 N.W.2d 553

Filed November 15, 1985. No. 84-434.

1. **Negligence: Proximate Cause.** An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury.
2. _____: _____. An intervening cause is one which comes into active operation in producing the result after the negligence of the defendant.
3. _____: _____. An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.
4. **Negligence: Proximate Cause: Liability.** If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.
5. **Jury Instructions.** It is the duty of the trial court to instruct the jury only on issues which are pleaded and which find support in the evidence.
6. **Negligence: Liability: Damages.** If the separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone could not have caused the result.
7. **Evidence: Juries.** Marginally relevant evidence which is outweighed by the danger of *unfair* prejudice, confusion, or misleading the jury should be excluded.
8. **Evidence: Negligence: Proximate Cause: Jury Instructions.** Where the evidence is conflicting as to the negligence of a party and the proximate cause of an accident, those issues must be submitted to the jury.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded for a new trial.

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

David A. Domina of Domina & Gerrard, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

Following a jury trial of a case involving an October 25, 1981, automobile accident, a verdict and judgment were

entered in favor of the defendant, Judith A. Stewart. Plaintiff, Dolores London, has appealed, alleging as errors the giving of certain instructions, the reception of evidence of a compromise settlement between plaintiff and a former defendant, Anthony G. Siecke, and the trial court's failure to direct a verdict for the plaintiff on the issue of liability. We reverse and remand for a new trial.

Plaintiff was a passenger in an automobile being driven at approximately 1:30 a.m. in a westerly direction by Jerry W. Stewart, defendant Judith Stewart's decedent. That automobile collided with one being driven in an easterly direction by Siecke. The road on which the accident occurred had an asphalt surface which was measured to be 23 feet 7 inches in width.

There was testimony that the Siecke automobile did not have its headlights on. Mrs. Siecke testified that the headlights were on at all times. She also said that her husband was operating their automobile in the right-hand lane of traffic and that the Stewart automobile headed right toward them and was being driven on the wrong side of the road. However, Mrs. Stewart testified that her husband was driving on his own side of the road. Both Stewart and Siecke had been drinking.

Identifiable gouge marks and skid marks would tend to indicate that both vehicles were pretty much in the south, or eastbound, lane of traffic. Immediately after the accident, the Siecke automobile was located in the south lane of traffic, headed east, and the Stewart vehicle was in the north lane, facing southeast.

Although plaintiff named both Siecke and Stewart, by his personal representative, as defendants, a settlement was made with Siecke and the case was dismissed as to him.

By instruction No. 11 the jury was told that Stewart had alleged that the negligence of Siecke intervened between any negligence of Stewart and the injury to plaintiff and that if the jury so found that Siecke was negligent and that such negligence was an intervening cause and was the proximate cause of plaintiff's injuries, then the jury must find for the defendant Stewart. Instruction No. 17, defining intervening cause, was also given by the court. Plaintiff objected to both instructions.

Instruction No. 17 was taken from NJI 3.43 and reads as follows:

> An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. A person is not legally responsible for an injury if it would not have resulted but for the interposition of an efficient intervening cause, which he should not have reasonably anticipated.
>
> If an action is of a character which, according to the usual experience of mankind, is liable to invite, induce, or set into operation the intervention of some subsequent cause, the subsequent cause is not an efficient intervening cause.

This court has frequently dealt with what constitutes "an efficient intervening cause." In *Shelton v. Board of Regents*, 211 Neb. 820, 825, 320 N.W.2d 748, 752 (1982), this court stated:

> An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. *Coyle v. Stopak, supra.* In *Coyle, supra* at 606-07, 86 N.W.2d at 768, we further said: " 'The causal connection is broken if between the defendant's negligent act and the plaintiff's injury "there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff." ' "

See, also, *Welsh v. Zuck*, 192 Neb. 1, 218 N.W.2d 236 (1974); *Lock v. Packard Flying Service, Inc.*, 185 Neb. 71, 173 N.W.2d 516 (1970).

It is the defendant's position that the alleged negligence of Stewart occurred first and merely created a condition upon which the negligence of the other driver, Siecke, caused the injury. Emphasis is given to the positions of the Restatement (Second) of Torts § 441(1) (1965) and Prosser and Keeton on the Law of Torts, *Proximate Cause* § 44 (5th ed. 1984). Both authorities indicate that an intervening cause occurs after the initial negligence of the actor. "An intervening cause is one which comes into active operation in producing the result *after* the negligence of the defendant. 'Intervening' is used in a time

sense; it refers to latter events." Prosser and Keeton, *supra* at 301. "An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." The Restatement, *supra* at 465.

These statements are correct as far as they go. However, both definitions suggest that the intervening force is one which actively operates to produce the harm *after* the negligent act of the defendant has been committed. If the negligence of the defendant is continuing in nature, actions of both parties constitute concurring negligence. The rule is stated in Restatement (Second) of Torts § 439 at 464 (1965):

> If the effects of the actor's negligent conduct *actively* and *continuously* operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.

(Emphasis supplied.)

Here, there was evidence which would support a conclusion that Stewart was on the wrong side of the road right up to the time of impact. If this was true, he was guilty of active and continuous negligence which was either the proximate or a proximately contributing cause of the accident.

The giving of an instruction on intervening cause was not appropriate in this instance. It is the duty of the trial court to instruct the jury only on issues which are pleaded and which find support in the evidence. *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985). That the giving of such instruction was prejudicial to the rights of the plaintiff is apparent.

If the separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone would not have caused the result. *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 205 N.W.2d 523 (1973).

As to the issue relating to evidence of a compromise settlement, the record discloses that on April 9, 1984, during the course of the trial, Mrs. Siecke, in testifying as a witness for the plaintiff, said that at the time of the accident the automobile being driven by her husband was on the right side of the road.

On cross-examination she admitted that in a deposition given on July 23, 1982, she had testified that she did not know which side of the road they were on. She also conceded that in a deposition given on March 12, 1984, she stated that they were more on the right side of the road than on the other side, although it was disclosed on further direct examination that she knew they were on the right side of the roadway.

It is quite apparent that the foregoing cross-examination was a proper exercise of the right to impeach the testimony of a witness. However, defendant's counsel was permitted, over objection and on recross-examination, to inquire of Mrs. Siecke if it was not true that at the time of her March 12 deposition her husband was also a defendant in this lawsuit. She, of course, admitted that such was the case. She also admitted that at the time of the earlier testimony she was suing the estate of Jerry Stewart. The attempt of plaintiff's counsel to show the result of that last litigation was denied by the trial court.

It seemed to be the position of defendant's counsel and of the trial court that the above testimony of the role of Mrs. Siecke's husband in the lawsuit was properly admitted under the provisions of Neb. Rev. Stat. § 27-408 (Reissue 1979), which provides in pertinent part as follows: "Evidence of . . . compromising . . . a claim which was disputed . . . is not admissible to prove liability . . . . This rule . . . does not require exclusion when . . . offered for another purpose, such as proving bias or prejudice of a witness . . . ."

Assuming that such evidence constitutes evidence of compromising a claim involving the witness, it is difficult to see that such testimony could be the result of bias arising out of such compromise. We agree with the plaintiff that the questions asked of Mrs. Siecke were clearly intended to suggest that her husband had paid Dolores London; therefore, it is assumed, the jury would not want to compensate plaintiff twice. However, there must be something about the settlement of the claim against the husband of the witness that might influence her to testify falsely.

It is conceivable that at a time when the suit against her husband was still active, Mrs. Siecke might want to testify favorably to him, i.e., that he was on his own side of the road at

all times. Contrariwise, once his liability was settled, other than the desire to tell the truth, she would have no reason to care on which side of the road he was, and an answer that she did not know would not be unexpected. In the present case the sequence was just the opposite.

We see no logical connection between the facts testified to by Mrs. Siecke and the status of her husband's lawsuit. We see no relevance to the testimony. At best, any possible relevance was outweighed by the danger of *unfair* prejudice, confusion, or misleading of the jury. Neb. Rev. Stat. § 27-403 (Reissue 1979). Plaintiff's objection should have been sustained.

From our review of the record, the evidence was conflicting as to the negligence of the defendant and the proximate cause of the accident. As such, that issue must be submitted to the jury. *Fangmeyer v. Reinwald*, 200 Neb. 120, 263 N.W.2d 428 (1978).

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

REVERSED AND REMANDED FOR A NEW TRIAL.

KRIVOSHA, C.J., concurring in the result.

I concur in the result reached by the majority in this case. I write separately, however, because I do not agree with the majority's conclusions concerning the evidence of the compromise settlement. In my view the evidence of a settlement in this case was properly admitted into evidence under the provisions of Neb. Rev. Stat. § 27-408 (Reissue 1979). The majority suggests that evidence of the settlement in this case could not show any bias on the part of the witness. The majority further suggests that once Mr. Siecke's liability was settled, Mrs. Siecke would have no desire to tell anything but the truth. Section 27-408, however, contemplates that there may be situations where parties settle on condition that the defendant with whom the settlement is made will render favorable testimony on behalf of the plaintiff. It may very well be that a plaintiff is willing to accept a lesser settlement if the defendant, once freed of liability, will agree to testify favorably for the plaintiff. Such a situation does constitute a bias which may be disclosed under § 27-408. In 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 408[05] at 408-27 (1985), the noted authors observe, "The other general exception to Rule 408's

exclusionary force is proof of bias or prejudice of a witness. Need for the evidence is most common when the witness has compromised his claims against a litigant in the suit being tried."

In the case of *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632 (3d Cir. 1977), a similar situation was presented. In May of 1969 John McShain, Inc., purchased from Wings, Inc., for $282,136 an aircraft manufactured by Cessna Aircraft Co. In December of 1969 the main landing gear of the plane collapsed as the plane alighted on the runway in Baltimore. After notifying Cessna, McShain had the aircraft repaired by Butler Aviation-Friendship, Inc. The plane was then returned to McShain. After 5 hours of further flight, the plane's landing gear once more gave way upon touchdown. McShain filed a suit against Cessna, and Cessna joined Butler as a third-party defendant. When a witness for McShain, who was an employee of Butler's sister corporation, testified, Cessna sought to introduce a release executed between McShain and Butler for the purpose of impeaching the witness' testimony. In upholding the trial court's ruling, the court of appeals said at 635:

> We believe that Judge McGlynn did not commit reversible error in admitting the agreement and in allowing comments upon it. The fact that a sister corporation of Harmon's employer had been released from liability in exchange for Harmon's testimony cast doubt upon Harmon's impartiality. Thus, as counsel for McShain appeared to contend at oral argument, McShain's claim is in reality that the potential prejudice from the admission of the agreement outweighed the agreement's probative value.

The situation in the instant case is even stronger. I believe that the district court was correct in permitting the evidence of the compromise to be presented to the jury for the jury's consideration under the provisions of § 27-408. While there is always prejudice resulting from such testimony, this is recognized as one of the exceptions. "In permitting cross-examination on such subjects, Rule 408 has determined, in effect, that the need to evaluate a witness's credibility normally outweighs the policy of encouraging compromises." 2

J. Weinstein & M. Berger, *supra* at 408-28. While I concur in the result reached by the majority in this case, I would not have found the evidence of the compromise to be error.

SANITARY AND IMPROVEMENT DISTRICT NO. 95 OF DOUGLAS COUNTY, NEBRASKA, A CORPORATION, ET AL., APPELLANTS, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

376 N.W.2d 767

Filed November 22, 1985. No. 83-775.

1. **Municipal Corporations: Ordinances: Annexation.** Neither Neb. Rev. Stat. § 14-373 nor § 19-3101 (Reissue 1983) applies where a city of the metropolitan class seeks to adopt an ordinance annexing land adjacent to the city's boundaries.
2. **Statutes.** Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning.
3. **Municipal Corporations: Annexation.** The act of annexation is a matter of statewide concern, and therefore the state statutes, and not the city charter provision, are controlling.
4. _____: _____. The determination of the City of Omaha, Nebraska, to annex or not to annex outlying property is a purely municipal concern, but this is not true of the annexation process which necessarily affects property outside the municipality and persons who are not inhabitants of the city. The protection of such persons and property is a matter of state concern, and in fulfillment of its duties in this respect, the state must fix the rules and regulations pertaining to annexation procedures.
5. _____: _____. A municipality cannot annex property for revenue purposes only.
6. **Municipal Corporations: Ordinances: Proof.** The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.
7. **Sanitary and Improvement Districts: Municipal Corporations: Legislature.** A sanitary and improvement district, like a municipal corporation, is a creation of the Legislature. The Legislature may prescribe how and in what manner this legal entity may be created, and, by the same token, as is true with municipal corporations, may determine how it can be discontinued.

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

Lyle E. Strom of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, and Robert J. Huck of Croker, Huck & McReynolds, for appellants.

Herbert M. Fitle, Omaha City Attorney, and Charles K. Bunger, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

Sanitary and Improvement District No. 95 of Douglas County, Nebraska, a sanitary and improvement district created pursuant to the laws of the State of Nebraska, and other persons who are electors, residents, and owners of real and personal property located within the boundaries of S.I.D. No. 95 (hereinafter collectively referred to as S.I.D. No. 95) appeal from an order entered by the district court for Douglas County, Nebraska, denying S.I.D. No. 95's request for a permanent injunction to enjoin the City of Omaha from enforcing annexation ordinance No. 29545. By this ordinance the City of Omaha annexed Mockingbird Hills West Subdivision, the area served by S.I.D. No. 95.

S.I.D. No. 95 maintains that the annexation was invalid and should have been enjoined because (1) the city failed to follow the provisions of Neb. Rev. Stat. §§ 19-3101 and 14-373 (Reissue 1983), which S.I.D. No. 95 maintains was mandatory; (2) the city annexed Mockingbird Hills West Subdivision solely for the purpose of generating revenues; (3) the city failed to refer the proposed annexation to the planning department for a determination as to whether the annexation conformed with the city's master plan as required by § 7.06 of Omaha's home rule charter of 1956; (4) the city failed to make a good faith study of its ability to provide essential services to the annexed area; and (5) Neb. Rev. Stat. § 14-117 (Reissue 1983) is unconstitutional and void in that it subjects S.I.D. No. 95 to taxation without representation and operates to deny S.I.D. No. 95 and those similarly situated due process of law and equal protection of the law in contravention of the fifth and fourteenth amendments of the Constitution of the United States and §§ 3 and 21 of article I of the Constitution of Nebraska. We believe the district court was correct in denying the injunction, and, accordingly, we affirm.

Mockingbird Hills West Subdivision is located in Douglas

County, Nebraska, and is generally bounded by 96th Street on the east, 108th Street on the west, L Street on the north, and Q Street on the south. The area contains 268 acres. Within the area there are 527 single-family homes, 14 duplexes, 46 apartments, 1 school, 1 park, 6.9 miles of improved streets, sanitary and storm sewers, 2 commercial areas, and 2,103 residents. On July 28, 1981, the Omaha City Council adopted ordinance No. 29545, which annexed Mockingbird Hills West Subdivision to the City of Omaha. The mayor signed the ordinance on July 29, 1981.

We turn first to the assignment of error concerning the city's failure to comply with either § 14-373 or § 19-3101. Section 14-373 provides:

> Each city of the metropolitan class is authorized and required to prepare a plan for its future physical development and growth. Such plan shall be prepared, and shall be carried out by an appropriate city board or official. The plan *may* include such lands outside the corporate limits of the city as may bear a relation to the development of the city. A planning board may be given such other powers and duties by statute or charter as may be appropriate.

(Emphasis supplied.)

Section 19-3101 provides as follows:

> The county board of any county in which there is a city of the metropolitan or primary class shall appoint an advisory committee comprised of persons residing outside of the city of the metropolitan or primary class, within three miles of the corporate limits thereof and outside of any city or village, and owning property within said three-mile zone. Such committee shall be composed of five members to be appointed for a two-year term and such committee shall advise the planning commission and city council of such metropolitan or primary city on all matters of planning and zoning relating to that area which is outside of the metropolitan or primary city, within three miles of the corporate limits of such city, and outside of any city or village.

While the record in this case would support the contention that the annexation ordinance was not submitted to a planning board pursuant to § 14-373 or to an advisory board pursuant to § 19-3101, the evidence does show that prior to the enactment of the ordinance by the Omaha City Council, public hearings were held before the Omaha Planning Commission. On July 8, 1981, the planning board recommended passage of the annexation by a vote of 7 to 0. More importantly, however, we believe that neither § 14-373 nor § 19-3101 applies where a city of the metropolitan class seeks to adopt an ordinance annexing land adjacent to the city's boundaries. Therefore, the fact that neither of these sections may have been complied with would not be of significance.

The authority for a city of the metropolitan class to annex land is specifically provided by § 14-117. That section provides:

> The corporate limits of any city of the metropolitan class shall be fixed and determined by the council of such city by ordinance. The city council of any metropolitan city may at any time extend the corporate limits of such city over any lands, lots, tracts, street or highway, such distance as may be deemed proper in any direction, and may include, annex, merge or consolidate with such metropolitan city, by such extension of its limits, any adjoining city of the first class having less than 10,000 population or any adjoining city of the second class or village . . . .

There is no contention made that § 14-117 was not complied with or that the manner in which the ordinance was adopted did not comply with the laws of the State of Nebraska.

An examination of both §§ 14-373 and 19-3101 discloses that neither section applies with regard to annexations. Section 14-373 requires each city to prepare a plan for its future *physical* development and growth. The section then further provides that "[t]he plan *may* include such lands outside the corporate limits of the city as may bear a relation to the development of the city." (Emphasis supplied.) The fact that the requirement imposed upon the city is limited only to land within the boundaries of the metropolitan city is, in our view, significant.

While the statute authorizes the city to include land outside the city if it desires to do so in order to effect orderly planning for physical development, the statute does not impose such a requirement. We have regularly held that the word "may" is permissive and not mandatory. See *Buhrmann v. Sellentin*, 218 Neb. 288, 352 N.W.2d 907 (1984). It would therefore be anomalous if, on the one hand, we were to hold that a city of the metropolitan class was not required to include within its plan lands outside the corporate limits of the city and, at the same time, hold that the failure to prepare a plan which included land outside the city prevented the city from annexing the land. We do not believe that such a meaning can be obtained from a reading of the statute. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning. See *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 175 N.W.2d 74 (1970).

Similarly, we believe that § 19-3101 has no application to the instant case. Section 19-3101 provides in part that the function of the committee shall be to advise the planning commission and city council "on all matters of planning and zoning relating to that area which is outside of the metropolitan or primary city, within three miles of the corporate limits of such city . . . ." It appears to us that the purpose of this section is to assist the city in regulating land which is not a part of the city but is within its zoning jurisdiction. See Neb. Rev. Stat. § 14-116 (Reissue 1983). The instant case is not dissimilar to the case of *City of Parkview v. City of Grand Island*, 188 Neb. 267, 196 N.W.2d 197 (1972). In that case the city of Parkview sought to have an annexation ordinance adopted by the city of Grand Island declared invalid. One of the grounds urged by the city of Parkview was Grand Island's failure to first obtain prior recommendation from the regional planning commission for Hall County, Nebraska, as required by Neb. Rev. Stat. § 18-1306 (Reissue 1970). In rejecting that contention we observed that the section did not require a recommendation in regard to annexation and the failure to do so did not invalidate the ordinance. We believe the same to be applicable in the instant case. Section 19-3101 simply affords persons residing

outside of the boundaries of a metropolitan city, but within the 3-mile zoning area, an opportunity to make recommendations as to how the land outside of the boundaries shall be regulated and how the land may be used. Once the land is to be annexed, however, the provisions of § 19-3101 have no application. Because neither § 14-373 nor § 19-3101 has any direct application to the act of annexation, the failure of the city to comply with either section is of no relevance.

We next turn to S.I.D. No. 95's claim that the city failed to comply with §§ 7.04 and 7.06 of Omaha's home rule charter. Section 7.06 of the city charter requires that certain matters be referred to the planning board for a determination as to whether the act being contemplated conforms with the city's master plan. The ordinance provides:

> No ordinance or resolution which deals with the acquisition, extension, widening, narrowing, removal, relocation, vacation, abandonment, sale, or change in the use of any public way, transportation route, ground, open space, building, or structure, the subject matter of which has not been previously reported on by the Planning Department in accordance with the provisions of section 7.05 of this charter, shall be adopted by the Council unless and until such ordinance or resolution shall first have been referred to the Planning Department and a report rendered thereon regarding conformity of the matter involved to the master plan. . . .

Section 7.04 prescribed what the master plan shall contain.

While it may reasonably be argued that the annexation of adjoining land does not fall within any of the categories set out in § 7.06 and, further, that the planning department did in fact render a report when it advised the planning commission before its action, we need not reach those issues. It is beyond question that the act of annexation is a matter of statewide concern, and therefore the state statutes, and not the city charter provision, are controlling. In *City of Millard v. City of Omaha*, 185 Neb. 617, 621, 177 N.W.2d 576, 579 (1970), we said:

> The determination of the city of Omaha to annex or not to annex outlying property is a purely municipal concern,

> but this is not true of the annexation process which necessarily affects property outside the municipality and persons who are not inhabitants of the city. The protection of such persons and property is a matter of state concern and in fulfillment of its duties in this respect, the state must fix the rules and regulations pertaining to annexation procedures.

See, also, *S.I.D. No. 95 v. City of Omaha*, 219 Neb. 564, 365 N.W.2d 398 (1985). Being, therefore, a matter of statewide concern, the provisions of § 14-117 are the applicable requirements for annexation, and not the City of Omaha's charter. As we have indicated, while we have doubt as to whether annexation is included within the provisions of charter § 7.06, we nevertheless need not reach that issue because the evidence conclusively establishes that the requirements of the state statute were, in all respects, met, and the annexation, therefore, on that basis, was valid.

That brings us, then, to S.I.D. No. 95's next claim, that the annexation was undertaken simply because the city desired to obtain revenue. While it is true that a municipality cannot annex property for revenue purposes only, see, *Witham v. City of Lincoln*, 125 Neb. 366, 250 N.W. 247 (1933), and *United States v. City of Bellevue, Nebraska*, 334 F. Supp. 881 (D. Neb. 1971), *aff'd* 474 F.2d 473 (8th Cir. 1973), it is likewise true that the evidence in this case does not support that claim. By annexing the S.I.D., the City of Omaha assumed the obligation for all of the S.I.D.'s liabilities. See Neb. Rev. Stat. § 14-118 (Reissue 1983). Therefore, to suggest that the city will acquire all of the funds of the S.I.D. without recognizing that it will also incur substantial obligations is to ignore the reality of the matter. Certainly, a city has a right to defer annexing an adjacent area until it determines that it can reasonably assume the obligations which will be imposed upon the city by reason of the annexation. The facts in the instant case do not support a claim that the city's only objective in annexing the land in question was to become the recipient of increased revenues, free of corresponding obligations. The city was acquiring a fully developed area, and therefore, in addition to paying off any

and all bond obligations of the area, it further assumed the responsibility of providing all necessary improvements and services. " 'The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity. . . .' " *Wagner v. City of Omaha*, 156 Neb. 163, 167, 55 N.W.2d 490, 493 (1952). The trial court was correct in concluding that the annexation was not solely for revenue purposes.

What has been said with regard to the revenue may likewise be said with regard to the claim that the city has not studied the feasibility of providing services to the annexed area. There is no evidence to support a claim that the city is not prepared to provide necessary services. No evidence has been introduced to support a claim that the City of Omaha will not maintain and repair the streets and sewers, or shovel the snow upon the streets, or provide police or fire protection. In the event that the city should fail to provide adequate services for the area, the citizens may have some claim. But the mere fact that a feasibility study was not conducted to determine whether the city would perform the duties which it is by law obligated to perform does not render the annexation invalid.

S.I.D. No. 95's final claim of error is that the district court erred in failing to find that constitutional rights were violated by the annexation. That matter has previously been disposed of by this court.

It is clear that a sanitary and improvement district, like a municipal corporation, is a creation of the Legislature. The Legislature may prescribe how and in what manner this legal entity may be created, and, by the same token, as is true with municipal corporations, may determine how it can be discontinued. As we said in *City of Millard v. City of Omaha*, 185 Neb. 617, 622-23, 177 N.W.2d 576, 580 (1970):

> " 'Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property.

> The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.' "

We know of no rule of law which would make this rule any different as applied to a sanitary and improvement district, which is another form of political subdivision. By inserting "sanitary and improvement districts" in place of "municipal corporations" in *City of Millard v. City of Omaha, supra*, we have a correct statement of the law which is dispositive of this issue. We are unable to find any basis to support the claim of S.I.D. No. 95 that the enactment of the ordinance violated the constitutional rights of either the district itself or any of its residents.

Having therefore considered and disposed of all of the errors assigned by S.I.D. No. 95, we affirm the judgment of the district court denying the injunction.

AFFIRMED.

CAPORALE, J., not participating.

THERESE ANN JOHNSON, APPELLANT AND CROSS-APPELLEE, V. ARNOLD ALBERT JOHNSON, APPELLEE AND CROSS-APPELLANT.
376 N.W.2d 558

Filed November 22, 1985. No. 84-198.

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

Thomas H. DeLay of Mueting, DeLay & Stoffer, for appellant.

Edward J. Keane and Alice S. Horneber of Margolin, Gildemeister & Willia, for appellee.

KRIVOSHA, C.J., WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

PER CURIAM.

This appeal involves a domestic relations matter in which appellant questions the division of property and alimony. Appellee has cross-appealed, claiming excessive alimony and child support. Upon de novo review we conclude that the record fails to show an abuse of discretion with respect to any of these issues. The judgment is therefore affirmed.

Appellee shall pay the costs including $1,000 to apply to appellant's attorney fee in this court.

AFFIRMED.

CONRAD JACOBS, APPELLANT, V. PAUL GOETOWSKI, M.D., APPELLEE.
376 N.W.2d 773

Filed November 22, 1985. No. 84-200.

1. **Physicians and Surgeons: Medical Malpractice: Limitations of Actions.** Under Neb. Rev. Stat. § 44-2844 (Reissue 1978), the running of the statute of limitations is interrupted during the medical review proceedings and recommences 90 days after the medical review panel issues its opinion.
2. **Pleadings: Causes of Action: Physicians and Surgeons: Medical Malpractice.** A plaintiff's right to amend the wording in his specimen petition filed under Neb. Rev. Stat. § 44-2840 (Reissue 1978) in his petition later filed in the district court is the same as a plaintiff's right to amend any other petition, so long as the matter submitted to the court is the same matter submitted to the medical review panel.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Martin A. Cannon of Matthews & Cannon, P.C., for appellant.

Kathleen A. Jaudzemis of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

This is an appeal from a district court order sustaining the motion for summary judgment filed by defendant, Paul Goetowski, M.D., in a medical malpractice action filed by plaintiff, Conrad Jacobs. On July 30, 1982, Jacobs filed a petition against Goetowski in the district court for Lancaster County. Both parties moved for summary judgment on the question of whether the statute of limitations had run on Jacobs' claim. The district court denied plaintiff's motion and sustained the motion of defendant. Jacobs timely appealed to this court. We sustain the denial of plaintiff's motion for summary judgment, reverse the granting of defendant's motion, and remand the cause.

The undisputed facts concerning the statute of limitations are the following.

Jacobs was hospitalized by Dr. J.R. Thompson for severe back pains on September 30, 1977. Goetowski first saw Jacobs a day or two after Jacobs was admitted to the hospital. Goetowski performed a myelogram on October 3, 1977, and performed a laminectomy on October 5, 1977, to remove a disk in Jacobs' back. At 11 a.m. Jacobs was returned to his hospital room following the myelogram, and an hour later his vital signs were stable and he had control of his lower extremities, but he was complaining of discomfort. At 1 p.m. the hospital nurses' records, as explained in the Goetowski deposition, showed that Jacobs had some stress incontinence in connection with his bladder function and numbness in his lower extremities. At 8:30 a.m. on October 4, 1977, Jacobs complained that "both

my legs and all my organs are dead" and thought he could not move his right foot. At this time Jacobs, in actuality, had good circulation to his right foot and could move his toes. Goetowski testified that he did not "disconnect" Jacobs' signs from the myelogram but that "it is something new and different, no question about it, but just what transpired and why was a puzzle."

After the two operations Jacobs remained in the hospital until the 25th of October, under the care of Goetowski. Jacobs was discharged from the hospital in a wheelchair and saw Goetowski for followup orthopedic consultation on November 22 and December 23, 1977, and April 4, 1979. On April 4, 1979, Jacobs told Goetowski that if Goetowski could not do anything for him, there was no sense in seeing him further.

On October 2, 1979, Jacobs filed notice with the Nebraska Director of Insurance of a claim against Goetowski. The claim included a proposed petition (hereinafter called the specimen petition) alleging injuries to Jacobs. The claim was filed pursuant to § 44-2840 of the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1978). Jacobs' specimen petition alleged that Jacobs was admitted to Lincoln General Hospital "for investigation of back pain, under the care of Dr. Paul Goetowski"; that on October 3, 1977, a myelogram was performed on Jacobs by Goetowski; that during the myelogram, Jacobs developed incontinence of the bladder and numbness of the lower extremities; that thereafter Jacobs "was subjected to a laminectomy operation" but that plaintiff's condition after this operation was similar incontinence and neurological loss; and that Jacobs' injuries were directly and proximately caused by the negligence and malpractice of Goetowski.

A medical review panel was selected pursuant to § 44-2841. Only Goetowski submitted evidence to the panel. On April 21, 1982, the review panel rendered a written report stating: "The members of the Medical Review Panel find from the evidence that the Defendant, Paul Goetowski, M.D., met the applicable standard of care required under the circumstances." No other findings or statements, except procedural matters, were in the opinion submitted by the panel.

Based on the undisputed facts before the trial court, the court, by its docket entry, made the following order: "Filing No. 7, Motion of Defendant for Summary Judgment; sustained. Filing No. 5, Motion of Plaintiff for Summary Judgment; overruled. Attorney Shaffer [Goetowski's attorney] directed to submit proposed order reflecting same."

Jacobs' appeal assigns as error the trial court's actions in sustaining Goetowski's motion for summary judgment; in finding that Jacobs' petition filed with the medical review panel pled negligence only in the myelogram procedure; in holding that the specimen petition could not be amended after Jacobs filed suit in the district court; and in holding that the statute of limitations began to run when the myelogram was performed and not when the course of treatment of Jacobs by Goetowski was completed. Jacobs further assigns as error the trial court's denial of Jacobs' motion for summary judgment.

The applicable statute of limitations is found in § 44-2828. This statute requires that an action to recover damages based on alleged malpractice be brought "within two years next after the alleged act or omission," except in actions which cannot be discovered in 2 years. Also applicable in this case is § 44-2844, which in part provides: "The filing of the request for review of a claim shall toll the applicable statute of limitations for a period of ninety days following the issuance of the opinion by the medical review panel." Jacobs filed his petition pursuant to § 44-2840 on October 2, 1979. As stated above, the medical review panel issued its opinion on April 21, 1982, which was approximately 2½ years after Jacobs' notice. Jacobs filed his petition against Goetowski in the district court on July 30, 1982, the 100th day after the medical review panel issued its opinion.

The initial step in determining whether Jacobs' cause of action is barred by the statute of limitations presents a procedural problem. The trial court determined that the word "toll" in § 44-2844 means to interrupt the running of the statute. The trial court found that the statute began to run on October 3, 1977, the date of the myelogram procedure, and ended on October 3, 1979. The interruption meant that the 2-year statute of limitations of § 44-2828 was suspended on October 2, 1979, when Jacobs initiated proceedings against

Goetowski before the Nebraska Director of Insurance and thus began the process resulting in consideration of his medical malpractice claim by a medical review panel. The trial court determined that Jacobs had 1 day left under the 2-year statute of limitations and that when the medical review panel issued its opinion on April 21, 1982, Jacobs had 91 days to file his petition against Goetowski. This 91 days, of course, consisted of the 90 days set out in § 44-2844 plus the 1 day left in the 2-year statute of § 44-2828. The trial court found that Jacobs had until July 21, 1982, to commence suit and that since he had not begun his district court action until July 30, 1982, the "extended" or "tolled" statute had run, and the court therefore dismissed Jacobs' suit.

Goetowski, of course, thought the decision that the statute had run was correct, but, as the trial court noted in its memorandum opinion, argued "that plaintiff had at most 90 days to file suit." Goetowski's position was that if the statute ran while the case was under review before the panel, the plaintiff had only 90 days after the panel opinion to file his court suit. Appellee Goetowski did not file a cross-appeal on this issue. Since appellant Jacobs agreed with the "interruption" meaning of tolling, he obviously did not assign the trial court's approach to the question of tolling as error.

The question as to the meaning of tolling must be answered, however, because if the trial court's determination is incorrect and the appellee's position is correct on this issue, then the trial court's determination constituted plain error because the statute of limitations would have run no matter when it began, since Jacobs' court action was filed more than 90 days after the panel opinion and the statute had run during the medical panel proceedings. In the circumstances of this case we must address the question. Jacobs can prevail in this case only if the trial court's position on tolling is correct and if the statute began to run at a time after the myelogram procedure of October 3, 1977.

To determine if Jacobs' cause of action is barred by the statute of limitations, we must define "toll" as used in § 44-2844 and determine how § 44-2828, requiring an action to be commenced within 2 years next "after the alleged act or omission," applies to Jacobs' cause of action.

Goetowski's position on the tolling question is summarized in his brief, where he states at 7:

> The tolling provision of section 44-2844 is susceptible to two interpretations - first, that the statute continues to run during the period under consideration by a medical review panel, and simply will not operate as a bar to action if the limitations period runs during the review and if suit is brought within the ninety-day period following issuance of the panel opinion; and second, that the statute is suspended or interrupted during the review proceedings and for ninety days thereafter and recommences after ninety days.

The first interpretation determines that the statute of limitations continues running while the panel reviews the claim. After the panel issues its order, the time within which to file in court is the longer of either the time remaining under the statute of limitations or the 90 days. The second interpretation suspends the running of the statute of limitations and the statute does not resume running until 90 days after the panel's decision. Goetowski believes the first of these interpretations is correct.

We find the second interpretation of the term "toll" most persuasive and hold that it is correct. Section 44-2802(2) notes: "Any legal word or term of art used in [the Nebraska Hospital-Medical Liability Act] and not otherwise defined shall have such meaning as is consistent with common law." We have used the term "toll" to mean an interruption of the running of special statutes of limitations. See *Farmers & Merchants Bank v. Merryman*, 126 Neb. 684, 254 N.W. 428 (1934). Further, we note that Black's Law Dictionary 1334 (5th ed. 1979) contains a definition of "toll" consistent with defendant's second interpretation: "To suspend or stop temporarily as the statute of limitations is tolled during the defendant's absence from the jurisdiction and during the plaintiff's minority."

Other courts have adopted this interpretation, both in the context of medical liability acts and in general. The Supreme Court of Virginia, in *Baker v. Zirkle*, 226 Va. 7, 307 S.E.2d 234 (1983), dealt with this issue in the context of a medical malpractice act. After quoting the definition of "toll" found in Black's Law Dictionary (as quoted above), the court stated that

"the running of the statute of limitations was interrupted." *Id.* at 13, 307 S.E.2d at 237. Interpreting Va. Code § 8.01-581.2 (repl. 1977), the court reversed the lower court interpretation which would have allowed the statute of limitations to run while the medical review panel reviewed the claim and during which time the plaintiff was prohibited from filing in a court of law. The Virginia court held that to interpret the tolling statute any other way than interrupting would be to give the word "toll" no meaning at all. See, also, *Dye v. Staley*, 226 Va. 15, 307 S.E.2d 237 (1983).

A Texas court of appeals dealt with the Texas medical liability act in *Phillips v. Sharpstown General Hosp.*, 664 S.W.2d 162 (Tex. App. 1983). The lower court had granted summary judgment in favor of the defendants, finding the plaintiffs' claim barred by the statute of limitations. The court stated that the opposing definitions were to merely extend or to suspend. The court posed the issue: "Simply stated, does § 4.01(c) [Tex. Rev. Civ. Stat. Ann. art. 4590i, § 401(c) (Vernon Cum. Supp. 1982-1983)] . . . extend only the *expiration date* of the limitation statute, otherwise allowing it to run, or does it suspend the *running* of the limitation statute?" (Emphasis in original.) *Id.* at 165. The court found that the proper interpretation was that of suspending the running of the statute of limitations, quoting Black's Law Dictionary (5th ed. 1979), 37 Tex. Jur. 2d *Limitation of Action* § 132 (1964), and 54 C.J.S. *Limitations of Actions* § 262 (1948). The court stated at 166: "We hold that the 75 days during which the statute was 'tolled' should not be calculated as part of the two-year limitation period; upon the expiration of the 75-day period, the 48 remaining days as of the October 28th notice date continued to run." See, also, *Johnson v. Macon County*, 447 So. 2d 157 (Ala. 1984).

The Supreme Court of Wisconsin, in *Tamminen v. Aetna Casualty & Surety Co.*, 109 Wis. 2d 536, 327 N.W.2d 55 (1982), interpreted Wisconsin's tolling statute, Wis. Stat. Ann. § 655.04(6) (West 1980), to suspend the statute of limitations. At 109 Wis. 2d 543, 327 N.W.2d at 58, the court stated:

> Sec. 655.04(6) provides that, when a claim or submission of controversy is filed with the administrator, the applicable statute of limitations ceases to run. Moreover, the statute of limitations is tolled or remains suspended

> until thirty days after the hearing panel issues its written decision. After the thirty-day period, the statute again commences to run.
>
> The effect of the statute is that the limitations period cannot run out while the controversy is before the panel, and a claimant is thereafter given a thirty-day grace period plus the time which remained on the period of limitations at the time of the filing.

To the same effect, see *Stappas v. Kagen*, 109 Wis. 2d 528, 326 N.W.2d 757 (1982), where the plaintiff filed with the panel 2 days prior to the running of the statute of limitations and the court held he had 32 days from the issuance of the panel decision to commence an action in court.

Under § 44-2844 the running of the statute of limitations is interrupted during the medical review proceedings and recommences 90 days after the medical review panel issues its opinion.

Interpreting "toll" in § 44-2844 to mean "interrupt," it is clear that Jacobs had whatever was left of the original 2-year limitations period under § 44-2828 plus the 90 days authorized by § 44-2844 within which to file his petition. Since Jacobs filed his petition 100 days after the decision of the panel, the determination as to when the statute of limitations period began to run is dispositive of his claim.

If Jacobs' malpractice claim is premised only on the alleged negligence of Goetowski in the administration of the myelogram procedure of October 3, 1977, it is clear that the statute of limitations has run. We have determined that the applicable 2-year statute was interrupted on October 2, 1979, which was the next to last day on which a malpractice action could have been filed by Jacobs based on alleged negligence of Goetowski on October 3, 1977. In this situation the "interruption" of the limitations period would have given Jacobs 1 more day after the 90-day tolling period to file his petition. Jacobs' petition was filed in the district court on July 30, 1982—100 days after the medical review panel opinion issued April 21, 1982. A cause of action predicated on an act of October 3, 1977, would be subject to dismissal because the 2-year statute had expired. An action based on a negligent act of October 5, 1977 (the date of Jacobs' laminectomy), would be

similarly time-barred.

We hold that under the provisions of § 44-2844, when a notice is filed under the provisions of § 44-2840, the running of the 2-year statute of limitations is interrupted during the medical review proceedings and that the statute resumes running 90 days after the medical panel issues its opinion.

With regard to the dispositive question as to when the statute of limitations began to run, we note that the order sustaining the defendant's motion for summary judgment set out the trial court's reasoning in paragraph 5, where the court stated in part:

> Neither the laminectomy nor [the lack of] reoperation need be considered by the Court. Plaintiff's allegations, raised in his amended and second amended petitions, respectively, after defendant alleged the statute of limitations defense in his Answer, were not raised or an opinion issued during Medical Review Panel proceedings.

The trial court determined that the statute of limitations began to run on October 3, 1977, the date of the myelogram procedure. The trial court further held that the plaintiff, in his court petition filed after the medical review panel opinion, could not amend the specimen petition filed with the panel.

An interpretation of § 44-2840 which rigidly locks a plaintiff into the exact words pled in his specimen petition as submitted to the medical review panel is incorrect. Such an analysis would give a document filed with the medical review panel final effect not given to a petition filed in a court of law and would negate Neb. Rev. Stat. §§ 25-846 to 25-856 (Reissue 1979), which authorize amendments to pleadings before answer, after demurrer, and even after judgment. Defendant would have us hold that it is legally impossible to later amend a plaintiff's petition submitted to a medical review panel. Such a result would destroy discovery and trial functions and, in effect, overrule a plethora of cases allowing liberal amendment of pleadings. In *Building Systems, Inc. v. Medical Center, Ltd.*, 213 Neb. 49, 52, 327 N.W.2d 95, 97 (1982), this court discussed § 25-852 and emphasized the words of that statute, that the court may allow the amendment of any pleading, either before or after judgment, " *'in furtherance of justice.'* " The court, in *Building Systems*, quoted from an earlier holding in *Kleinknecht v. McNulty*, 169 Neb. 470, 100 N.W.2d 77 (1959),

that the provision in the statute " 'in furtherance of justice' " was " 'the lodestar to guide it.' " *Building Systems, supra* at 52, 327 N.W.2d at 97. The *Kleinknecht* court, in its syllabus, stated: "The law of amendments should be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule, nor indicated any reason for discontinuing its judicial application."

Plaintiff's specimen petition filed pursuant to § 44-2840, when broadly construed, stated facts sufficient to outline generally a cause of action for medical malpractice against Goetowski, including a cause of action for negligent treatment. While the specimen petition specifically noted that a myelogram was performed by the defendant, it also stated facts which included that (1) the plaintiff was admitted to Lincoln General Hospital for investigation of back pain, under the treatment of the defendant; (2) the plaintiff developed incontinence of the bladder and numbness of the lower extremities, which have persisted to the present time; (3) the plaintiff was subjected to a laminectomy; and (4) the plaintiff's incontinence and neurological loss continued and were "directly and proximately caused by the negligence and malpractice of the defendant."

The trial court held that plaintiff's second amended petition more specifically alleging negligence, not only in the myelogram but in the treatment following this procedure, set out issues not raised by the plaintiff's specimen petition. We hold that, when broadly construed, Jacobs' specimen petition raised generally the negligence more specifically alleged in Jacobs' amended petitions in court. We hold that a plaintiff's right to amend the wording in his specimen petition filed under § 44-2840 in his petition later filed in the district court is the same as a plaintiff's right to amend any other petition, so long as the matter submitted to the court is the same matter submitted to the medical review panel.

We note the language of *Muenchau v. Swarts*, 170 Neb. 209, 215, 102 N.W.2d 129, 133 (1960):

> "[B]y the phrase 'cause of action,' as here used, is meant, not the formal statement of the facts set forth in the petition as a cause of action, but the subject matter upon which the plaintiff grounds his right of recovery." . . .

> . . . "So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed and others added in order to cure imperfections and mistakes in the manner of stating the plaintiff's case."

Plaintiff's specimen petition, although obviously subject to a motion to make more definite and certain, adequately stated a cause of action for malpractice, and plaintiff's later court petition preserved that cause of action. The record before the medical review panel included notes and records from plaintiff's entire stay at the hospital and outpatient treatment. To look back at plaintiff's specimen petition and limit him to proving negligence in the myelogram procedure, because that procedure is easy for a layman to identify and label in a petition, and deny him the right to prove negligence in medical work which he cannot identify at the time of the filing of the specimen petition would result in a travesty of justice. Plaintiff's injuries are alleged to have arisen from the exact overall situation he has identified generally in his petition—the investigation of his back pain under the treatment by defendant.

To hold a patient before a medical review panel to the intricacies of the code pleading in our courts would lead to injustice. The purpose of the specimen petition before the medical review panel is to give defendants general notice of what an allegedly injured patient is claiming. It is important to note that in the proceedings before the medical review panel, defendant knew generally about what Jacobs was complaining, beyond the fact that he had walked into the hospital and went home in a wheelchair. In his "Presentation to the Medical Review Panel by Defendant, Paul Goetowski, M.D.," defendant stated that "Mr. Jacobs alleges in his proposed petition that Dr. Goetowski was negligent in his care and treatment of Mr. Jacobs . . . ." Similarly, defendant later states in the same "Presentation" that "Mr. Jacobs alleges in his petition that Dr. Goetowski was generally negligent in his testing and treatment of Conrad Jacobs." It is clear that at this early point in such a protracted litigation, defendant was fully aware that Jacobs was claiming general negligence in his care and treatment. Since there is no procedure for a plaintiff to be alerted as to flaws in his specimen petition before the review

panel and to correct such flaws, the plaintiff's specimen petition must be construed most broadly or a plaintiff will be prevented from presenting actionable claims before a court by events before a nonjudicial body. Jacobs' specimen petition stated facts and conclusions and raised issues beyond the myelogram which occurred October 3, 1977. Jacobs was entitled to amend that petition in his subsequent legal proceeding, so long as he does not set out a new cause of action.

In this situation it is impossible to hold that there is no genuine issue as to when the statute of limitations began to run. If later evidence establishes, without any fact questions, that the myelogram procedure of October 3, 1977, was the sole cause of Jacobs' injury, one factual situation is present. If the evidence subsequently shows that some other, later incident caused the injury, another factual situation is presented. Necessarily, the motions for summary judgment filed by each party must be overruled.

In *Sacchi v. Blodig*, 215 Neb. 817, 818, 341 N.W.2d 326, 328 (1983), we noted:

> Upon a motion for summary judgment a court examines the evidence to discover if any real issue of fact exists, takes that view of the evidence most favorable to the party against whom the motion is directed, and gives to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence.

In *McHenry v. First Nat. Bank*, 216 Neb. 580, 583, 344 N.W.2d 652, 654 (1984), we stated that "one is entitled to summary judgment only when there is no genuine issue as to any material fact, the ultimate inferences to be drawn from the facts are clear, and he is entitled to judgment as a matter of law." Plaintiff has more specifically alleged facts in his second amended petition to raise issues which, if proved, state a cause of action not barred by the statute of limitations. Jacobs' specimen petition, as understood by defendant, under general theories of negligence, raised generally the efficacy of the treatment afforded Jacobs. Jacobs now specifically alleges that defendant's failure to reoperate and relieve pressure of the edema before that pressure became irreversible was negligence. In *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983), we discussed the concept of continuing treatment under *Williams*

v. Elias, 140 Neb. 656, 1 N.W.2d 121 (1941), and its effect of deferring the date that the cause accrues until the treatment for a specific illness ceases. Plaintiff is entitled to attempt to prove that he falls under the continuing treatment rule set out in *Williams* and *Smith, supra*.

In so holding, it is apparent that questions of fact exist with regard to plaintiff's claim and its commencement. Plaintiff's motion for summary judgment on the statute of limitations question was properly overruled and that action of the trial court is affirmed. The court was not correct in sustaining defendant's motion for summary judgment on the same issue, and that order is reversed.

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

HASTINGS, J., not participating.

KRIVOSHA, C.J., dissenting.

I specifically dissent because I believe that the majority has misinterpreted the provisions of Neb. Rev. Stat. § 44-2844 (Reissue 1978). The majority declares that under the provisions of § 44-2844 the *running* of the statute of limitations is interrupted during the time the claim is before the medical review panel and begins to run again 90 days after the medical review panel issues its opinion. In my view, the plain language of the statute does not support that conclusion. As noted by the majority, the statute provides that "[t]he filing of . . . a claim shall *toll* the . . . *statute of limitations* for a period of ninety days *following* the issuance of the opinion by the medical review panel." (Emphasis supplied.) The tolling referred to in § 44-2844 is not set in motion by the filing of the claim but, rather, by the issuance of the opinion by the medical review panel.

Furthermore, § 44-2844 does not provide that the "*running*" of the statute of limitations is tolled as in the cases cited by the majority, but only that the statute is tolled.

The majority seems to be of the opinion that if the running of the time to commence an action is completed so as to bar the filing of an action, the bar cannot thereafter be "tolled." I am not aware of any rule to that effect. "To toll the statute of limitations means to show facts which *remove* its bar of the action." (Emphasis supplied.) Black's Law Dictionary 1658 (4th

ed. 1957). The general rule, supported by the great preponderance of the authorities, is to the effect that the running of the time to bring an action merely bars the bringing of the action but does not extinguish the substantive right. See 51 Am. Jur. 2d *Limitation of Actions* § 22 (1970). In *Stock v. Meissner*, 217 Neb. 56, 59, 348 N.W.2d 426, 428 (1984), we observed: "Statutes of limitations are statutes of repose [citation omitted], and generally they do not impair existing substantive rights, but merely affect the procedure by which such rights may be enforced, *Cedars Corp. v. Swoboda*, 210 Neb. 180, 313 N.W.2d 276 (1981)." Therefore, even though the statute of limitations "bars" the bringing of the action, the cause of action continues to exist. As such, its bar to an action can be "removed" by providing that its effect may be "suspended" or "stopped temporarily" so as to allow the filing of an action.

Unlike the cases cited by the majority, nothing in § 44-2844 provides that the filing of the claim tolls the "running" of the statute of limitations. All of the cases cited by the majority for the proposition that the statute of limitations is tolled *during* the time the matter is being considered by the review panel involve statutes which specifically provide that the filing of the claim tolls the "running" of the statute from the time of filing.

Farmers & Merchants Bank v. Merryman, 126 Neb. 684, 254 N.W. 428 (1934), cited by the majority, involved a Nebraska statute (Comp. Stat. § 20-214 (1929)) which specifically tolled the "running" of the statute. The statute in question provided:

> If, when a cause of action accrues against a person, he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

That language is not at all similar to § 44-2844.

Likewise, in *Baker v. Zirkle*, 226 Va. 7, 307 S.E.2d 234 (1983), the Virginia statute (Va. Code § 8.01-581.9 (repl. 1977)) provided: "The giving of notice of a claim pursuant to

§ 8.01-581.2 shall toll the applicable statute of limitations for and including a period of one hundred twenty days *following the notice* . . . or sixty days following issuance of any opinion by the medical review panel, whichever is later." (Emphasis supplied.) And in *Phillips v. Sharpstown General Hosp.*, 664 S.W.2d 162 (Tex. App. 1983), the Texas Court of Appeals dealt with a statute (Tex. Rev. Civ. Stat. Ann. art. 4590i, § 401(c) (Vernon Cum. Supp. 1982-1983)) which specifically provided that the giving of the notice interrupted the running of the statute of limitations. The Texas statute read: "Notice given as provided in this Act shall toll the applicable statute of limitations to and including a period of 75 days *following the giving of the notice* . . . ." (Emphasis supplied.) And the Wisconsin statute (Wis. Stat. Ann. § 655.04(6) (West 1980)), cited in *Tamminen v. Aetna Casualty & Surety Co.*, 109 Wis. 2d 536, 327 N.W.2d 55 (1982), and *Stappas v. Kagen*, 109 Wis. 2d 528, 326 N.W.2d 757 (1982), likewise dealt with a statute which specifically provided that the filing of the claim interrupted the *running* of the statute of limitations. The Wisconsin statute provided: "The filing of the submission of controversy shall toll any applicable statute of limitations, and such statute of limitations shall remain tolled until 30 days after the hearing panel issues its written decision . . . ."

In my view, that is not the same as a statute which provides for the tolling of a statute of limitations for a period of 90 days following the issuance of the opinion by the medical review panel but makes no reference to tolling before the issuance of the opinion. The majority, in effect, reads the statute as though the word "running" and the word "and" are a part of the statute so that it would read: "The filing of the request for review of a claim shall toll the *running of the* applicable statute of limitations *and* for a period of ninety days following the issuance of the opinion by the medical review panel." While it is true that the Legislature could have so written the statute, the fact is that it did not.

Nor am I unmindful of the fact that this court in *Prendergast v. Nelson*, 199 Neb. 97, 106, 256 N.W.2d 657, 664 (1977), said: "The law *specifically* provides that the statute of limitations is tolled during the period the matter is subject to consideration by the medical review panel and for a period of 90 days following

its opinion." (Emphasis supplied.) That language is, at best, dicta to the case and is made without benefit of citation. The law, § 44-2844, does not specifically provide that the statute of limitations is tolled during the period the matter is subject to consideration.

In my view, it was not the intention of the Legislature to *extend* the statute of limitations by enacting § 44-2844 but, rather, to ensure that if one filed a claim with the medical review panel, the individual had a reasonable time thereafter to file suit even if the action was already barred by the statute of limitations. The majority, in effect, suggests that if a claim is filed with the medical review panel on the first day that it could be filed, the individual thereby has 2 years and 89 days after the review panel renders its decision in which to file suit. I see no legislative intent to that effect. Rather, I believe that the statute should be read to mean that in no event can an individual who files a claim with the medical review panel have less than 90 days following the issuance of the medical review panel's decision in which to file suit. I would have so held and therefore would have affirmed the decision of the district court.

BOSLAUGH, J., dissenting in part.

I agree with Chief Justice Krivosha's interpretation of the statute. I believe it was the intention of the Legislature to provide that the plaintiff should have not less than 90 days following the issuance of the opinion of the medical review panel in which to commence an action.

LOUIS KASH ET AL., APPELLANTS, V. McDERMOTT & MILLER, P.C., A NEBRASKA PROFESSIONAL CORPORATION, ET AL., APPELLEES.

376 N.W.2d 558

Filed November 22, 1985. No. 84-813.

1. **Demurrer: Pleadings: Causes of Action.** An objection that there is another case pending between the parties for the same cause may be raised by demurrer to a petition, but only when the pendency of the other action is shown on the face of the petition.
2. **Plea in Abatement: Causes of Action.** A defendant may file a plea in abatement when there is another action pending between the same parties, involving the same or substantially the same subject matter, cause of action, and relief.
3. **Plea in Abatement.** A plea in abatement is a dilatory and technical plea and is not, as a rule, favored by the courts.
4. **Demurrer: Plea in Abatement.** A demurrer and a plea in abatement are different with respect to the role of evidence in the proceedings.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for further proceedings.

Mary Cannon Veed of Matthews & Cannon, P.C., for appellants.

John F. Thomas of McGrath, North, O'Malley & Kratz, P.C., for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from an order of the Douglas County District Court sustaining the defendants-appellees' plea in abatement and dismissing without prejudice the plaintiffs-appellants' petition.

Plaintiffs, Louis Kash, Gerald Hruza, and Larry Schelm, were three stockholders in the Niobrara Investment Company, a holding company whose primary asset was the stock of the Bank of Niobrara (Bank), Niobrara, Nebraska. The defendants are certified public accountants who were retained to perform directors' examinations for the Bank and to provide general financial and accounting advice to the Bank.

In September 1982 the Department of Banking and Finance

conducted an examination of the Bank. As a result, numerous loans were reclassified, creating a capital shortage. The department concluded that the plaintiffs and other stockholders must either arrange for injection of money into the Bank to restore its capital position or close the Bank and liquidate its assets.

The defendants advised the plaintiffs in this matter, and eventually the plaintiffs and other stockholders injected an additional $750,000 into the Bank, $450,000 of which the plaintiffs supplied.

In the spring of 1983 the Department of Banking and Finance conducted another examination which resulted in additional loan reclassifications and, ultimately, the liquidation of the Bank's assets, a proceeding still in progress at the time briefs were filed and arguments heard in this case. Because the holding company stock is now essentially worthless, the plaintiffs have lost both their original and subsequent capital investments.

The plaintiffs sued the defendants on October 3, 1983, alleging negligence and/or fraud. In their original petition the plaintiffs joined derivative claims on behalf of the corporation with individual claims for individual damages. In response to the defendants' successful demurrer for misjoinder, the cases were severed and docketed separately. The derivative claims currently are pending in the Douglas County District Court. The case at issue is the appeal of the individual stockholders.

After the plaintiffs filed their second amended petition, the defendants filed a plea in abatement, claiming that the derivative suit was the same as the individual stockholders' suit. At the hearing on the defendants' plea, during which the district court allowed no evidence, arguments were made and the defendants' plea was sustained.

The appellants make several assignments of error, but because of the manner in which we decide this case, we consider only the first. The appellants claim that the district court erred when it sustained the defendants' plea in abatement without allowing the introduction of evidence and without establishing an evidentiary record. The crux of the appellants' argument is that when considering the appropriateness of a plea in abatement, unlike a demurrer, the trial court should allow the

parties to present evidence extraneous to the pleadings and should construct an evidentiary record for purposes of appellate review.

An objection that there is another case pending between the parties for the same cause may be raised by demurrer to a petition, but only when the pendency of the other action is shown on the face of the petition. Neb. Rev. Stat. § 25-806(3) (Reissue 1979); *Johnsen v. Parks*, 189 Neb. 712, 204 N.W.2d 804 (1973).

The same objection can be made by a common-law plea in abatement. A defendant may bring a plea in abatement when there is another action pending between the same parties, involving the same or substantially the same subject matter, cause of action, and relief. *National Bank of Commerce T. & S. Assn. v. Shull*, 195 Neb. 590, 239 N.W.2d 505 (1976). A plea in abatement is a dilatory and technical plea and is not, as a rule, favored by the courts. *National Bank of Commerce T. & S. Assn. v. Shull, supra*; *Richardson v. Opelt*, 60 Neb. 180, 82 N.W. 377 (1900). It generally will not be sustained unless the party interposing it can clearly show that he or she is within the reason for its enforcement. *Richardson v. Opelt, supra.*

We agree with the appellants that a demurrer and a plea in abatement are different with respect to the role of evidence in the proceedings. The purpose of a plea in abatement is "to bring to the attention of the court some fact or circumstance, *not disclosed on the face of the record*, which will defeat the particular action without absolutely and forever precluding or excluding right of recovery in the plaintiff." (Emphasis supplied.) 61A Am. Jur. 2d *Pleading* § 129 at 130 (1981); *Boyle v. Webb*, 54 Ariz. 188, 94 P.2d 642 (1939).

We do not read § 25-806(3) to incorporate completely the common-law plea in abatement so as to preclude the parties and court from introducing and considering evidence when determining the appropriateness of the plea. To interpret the statute in such a manner would make a plea in abatement and a demurrer under § 25-806(3) indistinguishable, something they are not. See, e.g., *Tyler v. Hand*, 48 U.S. 573 (7 How. 573), 12 L. Ed. 824 (1848); *Boyle v. Webb, supra.*

Here, although the defendants could have demurred under § 25-806(3), they chose to rely upon a plea in abatement. At the

hearing the district court should have allowed both parties to introduce evidence as to the appropriateness of the plea under the circumstances.

Accordingly, we reverse and remand to the district court for proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WASHINGTON COUNTY BANK, A NEBRASKA BANKING CORPORATION, APPELLEE, V. RED SOCKS STABLES, INC., ET AL., APPELLEES, REGENCY THOROUGHBRED FARMS, INC., INTERVENOR-APPELLANT.

376 N.W.2d 782

Filed November 22, 1985. No. 84-921.

Security Interests: Liens: Livestock. A Nebraska agister's lien for services and care rendered to livestock owned by a Nebraska resident is not superior to a perfected security interest filed before the agister's lien, unless the security interest holder agrees in writing to the contract for the feed and care of the livestock involved.

Appeal from the District Court for Washington County: MARK J. FUHRMAN, Judge. Affirmed.

Daniel J. Duffy and David A. Blagg of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Gregory P. Drew, for appellee Washington County Bank.

William B. Brandt and Robert J. Hallstrom of Brandt, Horan, Hallstrom & Sedlacek, for amicus curiae Nebraska Bankers Association.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

On December 29, 1982, Red Socks Stables, Inc. (hereinafter

Red Socks), executed a promissory note promising to repay to Washington County Bank (hereinafter Bank) the sum of $270,000. On the same date, Red Socks executed a security agreement and a supplemental security agreement granting the Bank a security interest in, inter alia, "All thoroughbred horses, including all thoroughbreds now owned or hereafter acquired by Red Socks Stables, Inc. . . . ." On or about December 30, 1982, the Bank perfected its security interest in the thoroughbreds by filing a financing statement with the Secretary of State and with the county clerk of Saunders County, where the chief executive office of Red Socks was located. On August 18, 1983, Judy C., Blue Maze, and Pal, among the horses specifically named in the supplemental security agreement, were delivered by Red Socks to Regency Thoroughbred Farm, Inc., which later became known as Regency Thoroughbred Farms, Inc. (hereinafter Regency), for care and feeding at Regency's operation in Sarpy County at an agreed price of $7 per day per horse. Regency cared for the thoroughbreds through September 15, 1984, at a total cost of $7,583.50.

Red Socks defaulted on its note. The Bank obtained a default judgment in the amount of $294,658.77 against Red Socks on August 13, 1984, in Washington County District Court. The Sarpy County sheriff took possession of the thoroughbreds pursuant to a writ of execution issued out of the Washington County District Court. When the sheriff took possession of the horses on September 15, 1984, Regency informed the sheriff that it had an agister's lien. On September 19, 1984, Regency filed an "Affidavit Concerning Agister's Lien" with the county clerk of Sarpy County.

Following the procedures set out in Neb. Rev. Stat. § 25-1521 (Reissue 1979), the matter of the priority of the Bank's security interest and Regency's lien was submitted to the district court for Washington County. In an order dated November 12, 1984, the lower court held that the Bank, by reason of its perfected security interest, had priority over Regency's agister's lien. Regency timely appealed from that decision. We affirm.

By stipulation the parties agreed to the facts as set out above. In addition, the parties stipulated that the matter came before the district court for Washington County pursuant to Neb. Rev. Stat. §§ 25-1521 through 25-1523 (Reissue 1979) and that the Bank had never agreed in writing to the care and feeding of Red Socks' thoroughbreds by Regency. There is no dispute that the Bank, Red Socks, and Regency are all Nebraska corporations.

Regency assigns a single error: "The court erred in ruling that the perfected security interest held by Washington County Bank was prior to the agister's lien held by Regency . . . ."

Neb. U.C.C. § 9-310 (Reissue 1980) provides:

> When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

Under this statute Regency's agister's lien would have priority over the Bank's perfected security interest unless the lien created by the agister's statute is statutory and "the statute expressly provides otherwise."

Neb. Rev. Stat. § 54-201 (Reissue 1984) creates the agister's lien. Such a lien is a "statutory lien" within the meaning of § 9-310 set out above. *Mousel v. Daringer*, 190 Neb. 77, 206 N.W.2d 579 (1973); *Becker v. Brown*, 65 Neb. 264, 91 N.W. 178 (1902). The remaining question is whether § 54-201 expressly provides "otherwise."

Subsection (1) of § 54-201 provides for agisters' liens where both contracting parties (the owner of the livestock and the agister) are Nebraska residents, as follows:

> When any person, firm, corporation, or partnership not provided for in subsection (2) of this section shall procure, contract with, or hire any other person to feed and take care of any kind of livestock, the person so procured, contracted with, or hired shall have a first, paramount, and prior lien upon such property for the feed and care bestowed by him or her upon the same for the contract price agreed upon . . . *as long as the holders of any prior liens shall have agreed in writing to the contract for the*

feed and care of the livestock involved. . . .
(Emphasis supplied.)

Subsection (2) of § 54-201 expressly provides for agisters' liens, where the agister furnishing services is a resident of Nebraska and the person or firm contracting for the services is a nonresident of Nebraska, as follows:

> When any person, firm, corporation, or partnership whose residence or principal place of business is located outside the State of Nebraska shall procure, contract with, or hire any other person, firm, corporation, or partnership within the State of Nebraska to feed and take care of any kind of livestock, the person so procured, contracted with, or hired shall have a first, paramount, and prior lien upon such property for the feed and care bestowed by him or her upon the same for the contract price agreed upon, and in case no price has been agreed upon, then for the reasonable value of such feed and care.
> . . .

Regency alleges that the language of § 54-201(1) and (2), stating that an agister shall have a "first, paramount, and prior lien," means that an agister's lien is a lien superior to other liens and not merely a prior lien if it is first in time. We do not so construe § 54-201. We hold that the priority referred to in both §§ 9-310 and 54-201 means priority in time of filing. Any other construction would not afford protection to liens or security interests filed first in time. The degree of protection afforded by a first lien often is the deciding factor in the determination of a security interest holder or a lienholder to render financial or other services to a property owner.

The different situations governed by § 54-201(1) and (2) are clearly delineated. Subsection (1) gives Nebraska agisters a first lien for services rendered to a Nebraska livestock owner *if* the holders of any prior liens on that livestock "shall have agreed in writing to the contract for the feed and care of the livestock involved." Subsection (2), on the other hand, gives Nebraska agisters a lien prior to any other liens, without any requirement that the holders of prior liens consent to the priority of the agister's lien, if the party contracting for the agister's services is a nonresident of Nebraska.

It is clear that the Legislature has set out a different priority

of liens based on whether the debtor who contracts with the agister is a resident or a nonresident of Nebraska. In this case the evidence is that Red Socks, the owner of the livestock, is a Nebraska corporation and that Regency, the agister, is also a resident of Nebraska. The evidence also establishes that the Bank's security interest in the livestock was perfected before Regency entered into its contract with Red Socks for the care and feeding of Judy C., Blue Maze, and Pal—the livestock in question. It is also a stipulated fact that the Bank did not agree in writing to Red Socks' contract with Regency.

We hold that a Nebraska agister's lien for services and care rendered to livestock owned by a Nebraska resident is not superior to a perfected security interest filed before the agister's lien, unless the security interest holder agrees in writing to the contract for the feed and care of the livestock involved.

The Bank's lien was prior to Regency's agister's lien. The ruling of the trial court establishing that priority was correct and is affirmed.

AFFIRMED.

ELTON H. GIBSON, APPELLANT, V. CITY OF LINCOLN, DOING BUSINESS AS LINCOLN TRANSPORTATION SYSTEM, APPELLEE.

376 N.W.2d 785

Filed November 22, 1985. No. 85-117.

1. **Rules of Evidence.** An underlying objective of the Nebraska Evidence Rules (Neb. Rev. Stat. §§ 27-101 et seq. (Reissue 1979 & Cum. Supp. 1984)) is inexpensive efficiency in presentation of relevant evidence. The Nebraska Evidence Rules are 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.
2. **Rules of Evidence: Expert Witnesses: Hearsay.** Rule 703, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-703 (Reissue 1979)), clearly contemplates admission of an expert's opinion based on hearsay supplying facts or data for that opinion, rather than a requirement of firsthand knowledge as the only source of information for an expert's opinion.

3. **Workmen's Compensation: Trial: Presumptions: Evidence: Appeal and Error.** In a bench trial, that is, all factual determinations made by a judge and not by a jury, we apply the principle or "presumption" that the trial court will consider only relevant and otherwise admissible evidence so that an erroneous admission of evidence during a bench trial will not result in a reversal, if there is relevant and admissible evidence to sustain the trial court's judgment. The foregoing principle, likewise, applies to a rehearing before the Nebraska Workmen's Compensation Court.
4. **Expert Witnesses.** Generally, an expert witness' firsthand knowledge is a factor which may affect such witness' credibility and weight given to the testimony from that expert, but presence or absence of firsthand knowledge does not, by itself, necessarily establish preference or priority in evidentiary value.
5. **Workmen's Compensation: Witnesses.** Entering into a resolution by the Nebraska Workmen's Compensation Court regarding any conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses.
6. **Workmen's Compensation: Appeal and Error.** Factual determinations by the Nebraska Workmen's Compensation Court will not be set aside on appeal unless such determinations are clearly wrong.
7. _____: _____. Regarding facts determined and findings made upon rehearing in the Nebraska Workmen's Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1984) precludes the Supreme Court's substitution of its view of facts for that of the Workmen's Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workmen's Compensation Court.

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

Walter E. Zink II of Baylor, Evnen, Curtiss, Grimit & Witt, and Friedman Law Offices, for appellant.

James D. Faimon, Assistant Lincoln City Attorney, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Elton H. Gibson appeals the dismissal of his petition on rehearing in the Nebraska Workmen's Compensation Court. We affirm.

During the year preceding the incident in question, Gibson, age 61, was employed as a Handi-van driver by the City of

Lincoln (Lincoln Transportation System). The Handi-van transports handicapped and elderly persons, and the van driver must assist patrons entering and leaving the van. Gibson was in good health at the time of the incident, had been smoking an average of one package of cigarettes daily, and, several years before the incident, had experienced chest pains while shoveling snow, an activity discontinued for some time past.

On February 15, 1983, while lifting a woman's wheelchair to a secure location within the Handi-van, Gibson experienced in his chest a "very sharp pain . . . about six inches below [the] neck." The combined weight of the wheelchair and woman was 200 pounds. Gibson's pain persisted throughout the remaining day. That afternoon, Gibson notified his supervisor of the chest pain, and on February 16 continued experiencing pain in his chest. On February 17 Gibson saw his physician, who ordered some tests, including an electrocardiogram (a graphic tracing of the electric current produced by contraction of the heart muscle) which recorded irregular function in Gibson's heart, prompting a suggested followup appointment which Gibson never scheduled.

During the evening of February 18, Gibson's chest pain recurred while he was attending a theater. En route to his home, Gibson stopped at Bryan Memorial Hospital for evaluation and was admitted to the hospital's coronary care unit after an electrocardiogram indicated irregularity in Gibson's heart. While confined in the coronary care unit at Bryan on February 19, Gibson suffered a heart attack. Gibson's physician, Dr. Paul W. Jewett, a cardiologist, made an initial diagnosis that Gibson suffered from angina pectoris (chest pain with a feeling of suffocation) and probably had been suffering from this condition for approximately 4 years. Later, Dr. Jewett obtained an arteriogram (a graphic tracing of the arterial pulse of the heart) of Gibson and concluded that Gibson had "three-vessel coronary artery obstructive disease" and also had "heart muscle damage." Subsequent diagnosis disclosed that obstruction of Gibson's coronary vessels was 100 percent in the right artery, 50 percent in the mid-left anterior descending artery, and 75 percent in the obtuse marginal artery. Gibson was dismissed from Bryan Memorial Hospital on March 3, and on March 17 Dr. Deepak M. Gangahar, a thoracic and

cardiovascular surgeon, performed coronary bypass surgery to repair Gibson's blocked blood vessels. In June 1983 Gibson unsuccessfully attempted to return to work, and has never been able to resume his duties as a Handi-van driver.

In the rehearing, the parties introduced medical evidence through depositions of doctors.

Gibson presented evidence from Dr. Jewett, who testified there are three classes of chest pain attributable to coronary blockage. One type of chest pain is angina, brief pain lasting perhaps 5 minutes. The second is a heart attack, pain lasting for hours at a time and associated with permanent heart muscle damage. Finally, interposed between angina and a heart attack is an "intermediate syndrome," pain lasting between 10 minutes and an hour but not associated with permanent damage—"a stunned heart, but not a permanently damaged heart." Intermediate syndrome is a warning of an impending heart attack. According to Dr. Jewett, Gibson's symptoms fit into the intermediate syndrome classification. Also, Dr. Jewett observed that Gibson had a "severe amount of coronary artery obstructive disease" but acknowledged that the wheelchair episode of February 15 "contributed in some material and substantial degree to cause [Gibson's heart attack]." Dr. Jewett expressed an opinion that Gibson is unable to return to work as a bus driver and is permanently and totally disabled as a result of the heart attack and recurrent symptoms which are precipitated by any sort of mild activity on his part. Dr. Jewett further testified that Gibson's

> exertion of lifting a wheelchair into position and locking it substantially increased the risk which had been created by his coronary artery disease and that this exertion precipitated or contributed in some material and substantial degree to cause the transmural myocardial infarction which he experienced. . . . [T]his exertion at work of lifting the wheelchair and locking it represented exertion greater than that of nonemployment life for Mr. Gibson or any other person.

Dr. Gangahar testified that he observed an atherosclerotic condition in Gibson and that Gibson had "critical blockage" of his coronary arteries which had been giving him chest pain or angina for the last 3 years or so prior to the surgery. The

objective of the surgical procedure performed by Dr. Gangahar was restoration of circulation "so the blood can go beyond the blockage, induced by cholesterol plaque . . . atherosclerotic plaqueing."

To counteract evidence from Dr. Jewett, the city had employed Dr. Ronald A. Draur, a cardiologist, who reviewed Dr. Jewett's deposition as well as medical and surgical reports compiled by Gibson's physicians, including the coronary arteriogram obtained by Dr. Jewett during Gibson's confinement in Bryan Memorial Hospital. After reviewing such medical data Dr. Draur formed an opinion that Gibson suffered from severe atherosclerotic coronary artery disease (blockage of the blood vessels of the heart) at the time of his heart attack and that such arterial blockage resulted in an insufficient blood supply to the interior wall of Gibson's heart, causing death of heart muscle cells—a condition medically known as a myocardial infarction and commonly called a heart attack. Dr. Draur did not dispute that Gibson was totally disabled from a heart attack. However, Dr. Draur expressed his opinion:

> The extent of risk imposed on Mr. Gibson by his heart disease . . . for the development of myocardial infarction can probably best be summarized by saying that the underlying substrate of coronary atherosclerosis is the cause of myocardial infarction, and that he was at risk for development of a heart attack . . . because of the presence of that disease . . . and that he was at risk for development of that in view of the extensive nature of the disease discovered at arteriography at any time. It could be at any time and it could be with or without any significant exertion.

For Dr. Draur the interval of 4 days between Gibson's angina and the heart attack was significant, because

> to consider that a specific activity caused a myocardial infarction, there should be a close temporal relationship between that physical activity and the onset of activity. When that close temporal relationship is lacking, then we speak of the precipitating episode, if you want to use that, or the event in question, as being angina rather than myocardial infarction. If there's no damage done at the

> time of the exertion, then the exertion has caused angina. If there is damage that has occurred at the time of the myocardial infarction — I mean, if there's damage that occurs at the time of that physical exertion, then there is a myocardial infarction.

Introduced during and included as a part of Dr. Draur's deposition was a copy of that doctor's report in a letter dated October 3, 1984, sent to the city attorney, which was, in substance, a synopsis of the testimony contained in the Draur deposition. At trial Gibson objected to admission of the written report from Dr. Draur.

The three-judge panel of the Nebraska Workmen's Compensation Court found that Gibson was suffering from a severe atherosclerotic coronary artery disease and stated:

> The plaintiff's myocardial infarction on February 19, 1983, was not caused by his exertion 4 days previously. That exertion had only caused an episode of angina. In this connection, the Court has afforded greater weight to the testimony of Dr. Drauer [sic] rather than that of Dr. Jewett. This episode of angina did not disable the plaintiff, did not cause the plaintiff to incur the hospital and medical expenses which are before the Court, and is not the condition which has today rendered the plaintiff totally disabled. The petition of the plaintiff should be dismissed.

Gibson assigned four errors entering into dismissal of his petition: (1) Admitting the opinion testimony of an unqualified witness, Dr. Draur, whose opinion was based on hearsay, namely, the deposition of Dr. Jewett and medical records for Gibson; (2) Admission in evidence of a copy of Dr. Draur's report dated October 3, 1984; (3) The compensation court's giving Dr. Draur's testimony greater weight than the testimony of Dr. Jewett, an attending physician; and (4) The compensation court's failing to enter an award for Gibson.

Regarding Dr. Draur's opinion, Gibson contends that, because Dr. Draur never examined him, the physician was not qualified to testify as an expert witness on Gibson's condition and injury. However, Gibson did not raise any question concerning Dr. Draur's professional qualifications as an expert by reason of "scientific, technical, or other specialized

knowledge" and does not suggest that a medical opinion in the present case would not "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." See Rule 702, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-702 (Reissue 1979)). Dr. Draur was an expert whose opinion was admissible on the question whether Gibson's claimed injury was compensable under the Nebraska Workmen's Compensation Act. See Neb. Rev. Stat. § 48-151(4) (Reissue 1984) (definition of *injury* for purposes of the act). Continuing his contention about an expert's opinion, Gibson argues that Dr. Draur's opinion, based on medical data and Gibson's medical records obtained from third parties, is inadmissible due to involvement of hearsay.

Gibson overlooks Rule 703, Nebraska Evidence Rules:

> The facts or data in the particular case on which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Neb. Rev. Stat. § 27-703 (Reissue 1979).

Rule 703, Nebraska Evidence Rules, is patterned on Rule 703 of the Federal Rules of Evidence. The advisory committee's note for federal Rule 703 contains:

> In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

Although a doctor employed to testify in opposition to an employee's claim for workmen's compensation is not cast in the role of a physician making a "life-and-death" decision about a patient, nevertheless an underlying objective of the Nebraska Evidence Rules is inexpensive efficiency in presentation of relevant evidence. That objective compels admission of Dr. Draur's opinion. Further, as expressed in Rule 102, Nebraska Evidence Rules: "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." Neb. Rev. Stat. § 27-102 (Reissue 1979).

Gibson does not argue that the facts or medical data used by Dr. Draur as the basis for his expert opinion were not the type reasonably relied upon by cardiologists in forming their professional opinions or inferences; for instance, Dr. Draur's reliance on the arteriogram used by Dr. Jewett in treating Gibson. Gibson's only complaint is directed to the nature of the data as hearsay. However, Rule 703, Nebraska Evidence Rules, clearly contemplates admission of an expert's opinion based on hearsay supplying facts or data for that opinion, rather than a requirement of firsthand knowledge as the only source of information for an expert's opinion. As a result of Rule 703, Nebraska Evidence Rules, Dr. Draur's opinion was properly admitted as evidence relative to Gibson's claim.

Dr. Draur's report contained in his letter to the city attorney was hearsay, see Rule 801, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-801 (Reissue 1979)), and, therefore, not admissible, see Rule 802, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-802 (Reissue 1979)). In a bench trial, that is, all factual determinations made by a judge and not by a jury, we apply the principle or "presumption" that the trial court will consider only relevant and otherwise admissible evidence so that an erroneous admission of evidence during a bench trial will not result in a reversal, if there is relevant and admissible evidence to sustain the trial court's judgment. See, *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980); *State v. Tomes*, 218 Neb. 148, 352 N.W.2d 608 (1984). The foregoing principle, likewise, applies to a rehearing before the Nebraska Workmen's

Compensation Court. Moreover, Dr. Draur's letter to the city attorney provided nothing materially different from the evidence properly admitted through Dr. Draur's deposition. In view of Dr. Draur's testimony, we find that no substantial right of Gibson has been prejudicially affected as a consequence of the doctor's report incorrectly admitted as evidence. See Rule 103(1), Nebraska Evidence Rules (Neb. Rev. Stat. § 27-103(1) (Reissue 1979)).

Gibson next argues that the testimony from Dr. Draur, who had not examined him, should not be given greater weight than the testimony from Dr. Jewett, Gibson's attending physician. As a corollary complaint, Gibson advocates a rule that an attending or examining physician's testimony should automatically be accorded more weight than testimony from a physician who has neither attended nor personally examined the person about whom an opinion is to be expressed. To support his contention Gibson relies on *Aeschleman v. Haschenburger Co.*, 127 Neb. 207, 254 N.W. 899 (1934), where this court acknowledged that a physician, as a plaintiff's witness with firsthand knowledge derived from an autopsy performed by the witness, was in "better position to know than the experts [physicians] for the defendant, who base their opinions solely upon what was told to them or what they heard." *Id.* at 217, 254 N.W. at 904. We note that none of the physicians testifying in *Aeschleman* was an attending physician. The court in *Aeschleman* did not require, as a rule of law governing evidence, that testimony from a doctor with firsthand knowledge be accorded greater weight than testimony from physicians who had not attended or personally examined the person about whom expert opinion is expressed. Rather, in *Aeschleman*, this court recognized that personal observations by a physician may be a factor affecting weight of testimony or credibility of a witness expressing an expert opinion. If we were to follow the path pointed by Gibson and adopt a principle that an attending or examining physician is conclusively more credible, and testimony from such a witness has greater weight than testimony from a physician who has not attended or personally examined an individual, we would soon find ourselves in an evidentiary dead end where a court must ultimately direct a jury to make factual determinations solely

on the basis of a witness' firsthand knowledge, notwithstanding a jury's disbelieving the witness or reasonably concluding that testimony from such witness was to be given little or no weight.

In the absence of discredit as a matter of law, the "trier of fact" remains the sole judge of a witness' credibility and the testimony's weight. Generally, an expert witness' firsthand knowledge is a factor which may affect such witness' credibility and weight given to the testimony from that expert, but presence or absence of firsthand knowledge does not, by itself, necessarily establish preference or priority in evidentiary value. In Gibson's case, credibility of the physicians and weight of their testimony were questions of fact to be resolved by the compensation court.

As his final assignment of error, Gibson asserts that he is entitled to an award on account of his heart attack. Although the testifying physicians, generally, agreed that Gibson suffered a myocardial infarction, or heart attack, resulting in permanent disability, the medical evidence is in conflict concerning the cause of Gibson's heart attack. Dr. Gangahar described Gibson's chronic arterial condition antedating myocardial infarction for as much as "three years or so." Dr. Jewett testified that Gibson's heart attack was work related, that is, caused by employment exertion greater than exertion during Gibson's "nonemployment life." Dr. Draur countered that, although Gibson's angina was work related, the heart attack, with consequential medical expenses and disability, was not caused by Gibson's employment. Rather, according to Dr. Draur, Gibson's heart attack was the result of a coronary atherosclerotic disease, so that a heart attack might occur "at any time and it could be with or without any significant exertion."

> In myocardial infarction cases the issue is whether the injury arises out of and in the course of employment and that issue must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. Reis v. Douglas County Hospital, 193 Neb. 542, 227 N.W.2d 879. In the "heart cases" the problem is causation, and whether the injury is the result of personal rather than employment risk. The presence of a preexisting disease or condition enhances the degree of

> proof required to establish that the injury arose out of and in the course of employment. Brokaw v. Robinson, 183 Neb. 760, 164 N.W.2d 461.

Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 583, 254 N.W.2d 92, 95 (1977). Further, as expressed by this court in *Doty v. Aetna Life & Casualty*, 217 Neb. 428, 435, 350 N.W.2d 7, 10 (1984): "Where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court."

> Entering into a resolution by the Workmen's Compensation Court regarding any conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses. [Citation omitted.] Factual determinations by the Workmen's Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. [Citations omitted.] Regarding facts determined and findings made upon rehearing in the Workmen's Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workmen's Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workmen's Compensation Court.

Thompson v. Monfort of Colorado, ante p. 83, 86-87, 375 N.W.2d 601, 603-04 (1985).

The record contains sufficient evidence to allow the Nebraska Workmen's Compensation Court to accept one physician's opinion over another's as an answer to the question concerning causation of Gibson's disabling heart attack. Factual determinations and findings made by the compensation court in this case are not clearly wrong. Therefore, the decision and judgment of the Nebraska Workmen's Compensation Court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ELMER L. LOSCHEN, APPELLANT.

376 N.W.2d 792

Filed November 22, 1985. Nos. 85-139, 85-141, 85-146, 85-182.

1. **Criminal Law: Prosecuting Attorneys.** Where a single act violates more than one statute, a prosecutor is free to prosecute under any statute he chooses, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.
2. **Pleas: Presentence Reports.** A factual basis for a plea of nolo contendere may be established by examination of the presentence report.
3. **Criminal Law: Constitutional Law: Sentences.** The factors to be considered in determining whether punishment is unconstitutionally cruel and unusual are (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.
4. _____: _____: _____. Regardless of its severity, a sentence of imprisonment which is within the limits of a valid statute ordinarily is not a cruel and unusual punishment in the constitutional sense.
5. **Sentences: Appeal and Error.** In the absence of an abuse of discretion, a sentence imposed within statutory limits, including the denial of probation, will not be disturbed on appeal.

Appeals from the District Courts for Kearney, Adams, Clay, and Franklin Counties: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Richard Scott, for appellant.

Robert M. Spire, Attorney General, and Dale D. Brodkey, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

These four consolidated cases arise from the nolo contendere pleas of defendant, Elmer L. Loschen, to four separate charges of theft by deception, each in a different county. He was thereupon adjudged guilty in each instance and thereafter sentenced to imprisonment for a term of not less than 20 months nor more than 5 years on each offense, the sentences to be served consecutively. The issues raised by defendant's assignments of error are (1) whether his prosecution for theft by deception was legal, claiming that another criminal statute

better fits his conduct; (2) whether there was a lack of a factual basis upon which to accept his nolo contendere pleas; and (3) whether his sentence is either (a) cruel and unusual or (b) excessive. We affirm.

Defendant had been a grain buyer for approximately 9 years, hauling the grain he purchased in his own trucks. He was bonded for $32,000. When defendant's bank, in January of 1984, refused to extend any further credit, defendant became unable to pay for the grain he had purchased from various farmers and then sold.

As a consequence, defendant was initially charged separately in Kearney, Adams, Clay, and Franklin Counties with one count of theft by deception, a Class III felony, since the value of the grain in each case was alleged to be greater than $1,000. As a Class III felony, each charge authorized imprisonment for a period of not less than 1 nor more than 20 years or a fine of not more than $25,000, or both a fine and imprisonment. In addition, defendant was also charged in Franklin County with a second count of theft by deception and with other counts of failure to license and bond vehicles and with nonpayment of grain purchases, as required of a grain buyer.

Pursuant to a plea bargain, defendant, on November 26, 1984, pled nolo contendere to a charge of theft by deception, reduced to a Class IV felony, in each of the four cases. As a Class IV felony, each charge authorized imprisonment for a period of 0 to 5 years or a fine of not more than $10,000, or both. All other charges against defendant were dismissed, as were two separate theft charges and a charge of aiding and abetting in the commission of a felony brought against defendant's wife.

The various presentence reports show that defendant's grain deals with Michael Thom furnished the basis for the Kearney County conviction (No. 85-139). Defendant purchased 20,000 bushels of corn from this victim in October 1983, but payment, which was due on March 1 and June 1, 1984, was never made, leaving Thom with a $71,000 loss. Defendant had also told Thom that he was bonded for $1 million and that he was able to pay more for the grain because he was shipping it directly to the west coast. Like the other victims, Thom's attempts to contact

defendant and receive payment failed.

The Adams County case (No. 85-141) arose from defendant's agreement to pay $64,000 by February 1, 1984, for 20,000 bushels of corn sold by Dick Burr in the middle of January 1984. No payment was ever made.

The Clay County case (No. 85-146) involved defendant's business dealings with Leroy Thom, in which defendant told Thom he was bonded for $1 million and that the reason he could offer a higher price was because he was dealing directly with grain buyers in Kansas City and Los Angeles. Local elevators were said to be used only for storage. Thom's loss is approximately $584,000.

As to the Franklin County case (No. 85-182), defendant approached his cousin, Dale Loschen, in January 1984 about selling him corn, which the cousin did on February 23. Defendant assured his cousin that he was bonded for $1 million but that it would take 3 months before he could make payment, since he was shipping the corn to the west coast to sell, this being the reason he could offer a higher price than the local elevators. In fact, defendant sold the corn to an area elevator, receiving payment the same day. The value of the corn the defendant took from his cousin is $72,724.31.

The record reveals that in addition to these four cases defendant did not pay for grain he acquired from various other persons. One such individual alone lost over $264,000, and the total amount lost by the various victims is estimated to be approximately $3 million.

Defendant first argues that Neb. Rev. Stat. § 88-513 (Supp. 1985) more accurately describes his conduct than does the statute under which he was charged, Neb. Rev. Stat. § 28-512 (Reissue 1979), and, thus, he could not be prosecuted under the latter statute.

At the relevant time, § 88-513 (Reissue 1981) provided:

> No officer or agent of any state-licensed grain warehouse shall issue a receipt for grain not actually received. If at any time there is less grain in a warehouse than outstanding receipts issued for such grain, there shall be a presumption that the officers of such warehouse have wrongfully removed or caused to be removed grain or

> issued receipts for grain not actually received and in violation of this section. Any officer or agent who shall violate the provisions of this section shall be guilty of a Class I misdemeanor.

As a Class I misdemeanor, this crime authorized imprisonment of 0 to 1 year or a $1,000 fine, or both a fine and imprisonment. (Effective June 5, 1985, violation of this statute constitutes a Class IV felony.)

The statute under which defendant was prosecuted, § 28-512, provided, as it does now:

> A person commits theft if he obtains property of another by deception. A person deceives if he intentionally:
>
> (1) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise; or
>
> (2) Prevents another from acquiring information which would affect his judgment of a transaction; or
>
> (3) Fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship; . . . .

We need not, however, concern ourselves with determining whether § 88-513 applies to defendant's conduct at all. For even if it does apply and, as argued by the defendant, does in fact better describe defendant's conduct than § 28-512, the county attorney was not limited to prosecuting under the former statute.

Where a single act violates more than one statute, a prosecutor is free to prosecute under any statute he chooses, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *State v. Miller*, 216 Neb. 72, 341 N.W.2d 915 (1983); *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981).

The first issue, then, must be resolved against defendant.

Defendant next urges that there was no factual basis for his nolo contendere pleas, as his intent to deceive was not shown.

A factual basis for a plea of nolo contendere may be established by examination of the presentence report. *State v. Richter*, 220 Neb. 551, 371 N.W.2d 125 (1985).

As noted earlier, the presentence reports dealing with the Kearney, Clay, and Franklin Counties cases clearly establish that defendant deliberately created in his victims a false impression by telling them he was bonded for substantially more than he actually was, and by telling them the grain was being shipped directly to buyers removed from the immediate area when in fact he was selling it locally.

The presentence report with respect to the Adams County case provides only the information that payment was not made when and as promised. Nonetheless, we cannot say that a factual basis for the plea does not exist because the bill of exceptions does not include the proceedings had at the hearing at which the plea was entered and accepted. As said in *State v. Richter, supra* at 552, 371 N.W.2d at 127:

> When an assertion is made that a plea of guilty was involuntarily made, one of the propositions that may be inherent in that claim is that some, if not all, of the defendant's constitutional rights were either not explained to or waived by the defendant. As the defendant chose not to include the entire proceedings, i.e., the initial arraignment, in the bill of exceptions, we do not consider any deficiency that may have existed in the court's explanation of the defendant's constitutional rights.

Similarly, absent a bill of exceptions of the relevant proceeding, we do not consider an assertion that a factual basis for the plea does not exist. "Any assignment of error which requires an examination of the evidence cannot prevail on appeal in the absence of a bill of exceptions." *State v. Behrens*, 204 Neb. 785, 788, 285 N.W.2d 513, 515 (1979); *State v. Harris*, 205 Neb. 844, 290 N.W.2d 645 (1980).

Thus, the second issue must also be resolved against defendant, bringing us to the third and final issue, whether the sentences are cruel and unusual or, in any event, excessive.

Defendant first claims the sentences are disproportionate to the crime and therefore cruel and unusual, in violation of the eighth amendment to the U.S. Constitution and article I, §§ 9 and 15, of the Nebraska Constitution.

The factors to be considered in making that assessment have recently been reiterated in *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985), as being (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions. Accord, *State v. Brand*, 219 Neb. 402, 363 N.W.2d 516 (1985); *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983).

As stated in *State v. Leadinghorse*, 192 Neb. 485, 487, 222 N.W.2d 573, 576 (1974), "[r]egardless of its severity, a sentence of imprisonment which is within the limits of a valid statute ordinarily is not a cruel and unusual punishment in the constitutional sense."

There is no claim that the range of penalties prescribed by § 28-512 are, in and of themselves, unconstitutional, only that the sentences imposed upon defendant within that range are such. Yet, the record contains no evidence from which such a conclusion can be reached. Neither has any case been cited, nor found by independent research, which holds that four consecutive prison terms of not less than 20 months nor more than 5 years for deceiving four persons out of a total of over $790,000 by misrepresenting one's grain-buying operations are unconstitutionally disproportionate to the crimes. The penalties are not cruel and unusual.

The second attack on the sentences is that they are, in any event, excessive.

In this connection it must be borne in mind that the prosecutor permitted the defendant to plead guilty to thefts involving values of not over $1,000 when the evidence clearly supported thefts involving values of over $1,000. The difference, as noted earlier, is that the former constitute Class IV felonies whereas the latter constitute Class III felonies, and thus reduce the maximum period of imprisonment by 15 years on each charge.

True, defendant is a 52-year-old married man with no prior criminal record other than numerous traffic offenses, but the fact still remains that defendant relieved his victims of the product of their labors by deceiving them. The record indicates that the trial court carefully considered the sentences it imposed and the factors operating against probation, including that defendant should have contemplated the effect upon his victims and that there were no substantial grounds tending to justify the crime. Neb. Rev. Stat. § 29-2260 (Cum. Supp. 1984).

It is a firmly established rule of this jurisdiction that in the absence of an abuse of discretion, a sentence imposed within statutory limits, including the denial of probation, will not be disturbed on appeal. *State v. Gregory*, 220 Neb. 778, 371 N.W.2d 754 (1985); *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985). See, also, *State v. Ellefson*, 214 Neb. 747, 336 N.W.2d 88 (1983) (holding that absent an abuse of discretion, consecutive sentences will not be disturbed).

The sentences imposed, though the maximum permitted, cannot be said to be legally excessive nor to constitute an abuse of discretion.

Since the record resolves the issues raised by defendant's assignments of error against him, the judgments and sentences are each affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DWIGHT E. REDDICK, APPELLANT.

376 N.W.2d 797

Filed November 22, 1985. No. 85-180.

1. **Mentally Disordered Sex Offender: Appeal and Error.** The Nebraska Supreme Court will not disturb a trial court's finding that one is a mentally disordered sex offender whose disorder is nontreatable unless it can be said that such declaration was an abuse of discretion.
2. **Constitutional Law: Mentally Disordered Sex Offender.** The failure of the State to treat a mentally disordered sex offender whose disorder is nontreatable does not constitute cruel and unusual punishment such as to violate either the eighth amendment to the federal Constitution or article I, § 9, of the Nebraska Constitution.
3. **Mentally Disordered Sex Offender: Words and Phrases.** A mentally disordered sex offender for whom a program of treatment will not lead to a cure is "nontreatable" within the meaning of Neb. Rev. Stat. § 29-2914 (Reissue 1979).

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Defendant, Dwight E. Reddick, pled no contest to a charge of attempted first degree sexual assault. He was adjudged guilty and, following evaluation, determined to be a mentally disordered sex offender whose disorder is nontreatable. He was thereafter sentenced to prison. In this appeal Reddick assigns as error the trial court's finding that his disorder is nontreatable and its holding that the portion of Neb. Rev. Stat. § 29-2914 (Reissue 1979) which provides for the imprisonment of nontreatable mentally disordered sex offenders is constitutional. We affirm.

On April 3, 1984, Reddick visited the residence of a female neighbor. While there, he picked up a knife, placed it against his neighbor's throat, and told her he was going to rape her. She

resisted, whereupon Reddick put down the knife and began to choke her. He then tore off some of her clothing and demanded that she engage him in a sex act. The neighbor continued to resist; her hysterical crying apparently startled Reddick and she was able to escape.

The evidence establishes that in 1966 Reddick was convicted of disturbing the peace for threatening the life of another female neighbor's son unless she posed nude in front of her window. Thereafter, he was committed for a period of several weeks to the Lincoln State Hospital. Reddick was further convicted of violent sexual crimes on two occasions prior to the present conviction, once in 1968 and once in 1973. Later in 1973 he was found to be a sexual sociopath and was committed to the Lincoln Regional Center until August of 1979. Reddick received psychiatric treatment as a result of these prior convictions and confinements to the state hospital and regional center.

Following the present conviction, Reddick was evaluated in accordance with the requirements of Neb. Rev. Stat. §§ 29-2912 and 29-2913 (Reissue 1979). Three of the four examiners are psychiatrists, and each concluded that Reddick is a mentally disordered sex offender whose disorder is nontreatable. One psychiatrist diagnosed Reddick as suffering from sadism and a schizoid personality and observed that past mental treatment has proved unsuccessful. Another of the three also noted that past treatment proved unsuccessful and expressed the opinion that about all Reddick had learned from his past experiences was that he would not be punished severely if he claimed a mental illness. This psychiatrist concluded Reddick felt no great need for change. The last psychiatrist eliminated any organic cause for Reddick's behavior and characterized him as one who "has been unable to learn from experience, psychotherapy or punishment," and who "tended to downplay his own responsibility and . . . will not hesitate to blame others for his problems." The fourth examiner, a psychologist, agreed Reddick was a mentally disordered sex offender, but was of the opinion that his disorder was treatable. Although he agreed that past treatment had not proved successful, he thought that the more structured treatment now available should at least be tried.

Section 29-2914 provides that a mentally disordered sex offender whose disorder is nontreatable shall be sentenced as provided by law on the offense for which he or she has been convicted.

This court will not disturb a trial court's finding that one is a mentally disordered sex offender whose disorder is nontreatable unless it can be said that such declaration was an abuse of discretion. *State v. Sell*, 213 Neb. 437, 329 N.W.2d 361 (1983).

As the foregoing recitation demonstrates, there is ample evidence to support the trial court's finding that Reddick is nontreatable; it therefore cannot be said that the trial court abused its discretion in so finding. Consequently, Reddick's first assignment of error fails.

In connection with his second assignment of error, Reddick in effect argues that it is somehow unconstitutional not to treat a mental condition which is not treatable.

Although Reddick does not specify what provision of which constitution he claims § 29-2914 violates by requiring that nontreatable mentally disordered sex offenders be punished as are nonmentally disordered sex offenders, his argument appears to proceed on the basis that the subject provision constitutes cruel and unusual punishment, in violation of the eighth amendment to the federal Constitution and of article I, § 9, of the Nebraska Constitution.

In so arguing Reddick misinterprets *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Therein, the U.S. Supreme Court stated at 104-05:

> We therefore conclude that deliberate indifference to serious medical *needs* of prisoners constitutes the "unnecessary and wanton infliction of pain," . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

(Emphasis supplied.)

Thus, it is the need either to alleviate pain or to effect a probable cure which triggers the State's duty to provide

treatment.

That such is so is further illustrated by cases decided after *Estelle* by various federal circuit courts. See, for example, *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981), which states the "essential test is one of medical necessity and not one simply of desirability." *Inmates of Allegheny Cty. Jail v. Pierce*, 612 F.2d 754, 763 (3d Cir. 1979), observes that "[t]he key factor in determining whether a system for psychological or psychiatric care in a jail or prison is constitutionally adequate is whether inmates with serious mental or emotional illnesses or disturbances are provided reasonable access to medical personnel qualified to diagnose and treat such illnesses or disturbances." *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977), ruled that the right to treatment is limited to that which can be provided upon "a reasonable cost and time basis," *id.* at 48, when it is established with reasonable medical certainty "(1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial," *id.* at 47.

Nebraska's view is and has been in accord with the federal view; the State has no obligation to treat that which is not treatable. *State v. Sell*, 202 Neb. 840, 277 N.W.2d 256 (1979), interpreted the phrase "benefited by treatment," found in former Neb. Rev. Stat. § 29-2903(3) (Reissue 1975), to mean a program leading to cure and not simply one which facilitates the defendant's ability to live with his condition.

We now hold that a mentally disordered sex offender for whom a program of treatment will not lead to a cure is "nontreatable" within the meaning of § 29-2914.

There is no evidence that Reddick's disorder causes him pain which can be alleviated. That circumstance, coupled with the evidence that treatment of his disorder will not lead to a cure, renders his second assignment of error meritless.

The judgment of the trial court being correct, it is affirmed.

AFFIRMED.

MELVIN H. HOEPPNER, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

376 N.W.2d 561

Filed November 22, 1985. No. 85-277.

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

Melvin H. Hoeppner, pro se.

Herbert M. Fitle, Omaha City Attorney, and George S. Selders, Jr., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Initially, the Nebraska Workmen's Compensation Court entered an award on May 18, 1977, for workmen's compensation benefits payable to Melvin H. Hoeppner on account of his disability, permanent and partial. Hoeppner obtained subsequent modifications of that award, but, in early 1983, the final payment of benefits for 300 weeks of disability was received by Hoeppner. See Neb. Rev. Stat. § 48-121(2) (Reissue 1984). Upon Hoeppner's application for modification of the award entered on May 18, 1977, the compensation court on rehearing found that the "medical reports offered by [Hoeppner] and received in evidence fail to set forth any basis for a finding that [Hoeppner] has suffered an increase of disability." Hoeppner maintains that the compensation court's judgment of March 15, 1985, is contrary to the evidence.

We have reviewed the record and find sufficient evidence to sustain the factual determinations and findings made by the Workmen's Compensation Court, which determinations are not clearly wrong. See *Zaleski v. Farmland Foods*, 219 Neb. 157, 361 N.W.2d 523 (1985). See, also, *Thomas v. Kayser-Roth Corp.*, 211 Neb. 704, 320 N.W.2d 111 (1982).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. REGINALD D. PORCHIA, APPELLANT.

376 N.W.2d 800

Filed November 22, 1985. No. 85-281.

Constitutional Law: Pleas: Waiver. A defendant who pleads guilty to a felony or misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights.

Appeal from the District Court for Douglas County: LAWRENCE CORRIGAN, Judge. Remanded for further proceedings.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

Robert M. Spire, Attorney General, and Mel Kammerlohr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The appellant, Reginald D. Porchia, was originally charged by information filed in the district court for Douglas County, Nebraska, with assault in the second degree and use of a knife to commit a felony. Subsequently, Porchia pled guilty to second degree assault and was thereafter sentenced to a term of 2 years' imprisonment.

The single issue presented to this court is whether Porchia's federal constitutional rights were violated in that his guilty plea was not voluntarily, knowingly, and intelligently entered. An examination of the record discloses that while the district court did inquire of Porchia with regard to a number of matters before accepting his plea of guilty, it did not ask Porchia whether Porchia understood that by entering a plea of guilty he was waiving his right to confront witnesses and to cross-examine them, as guaranteed to him by the sixth and fourteenth amendments to the U.S. Constitution. We believe that, in light of our previous holdings on these matters, the

district court's failure to especially inquire on the record whether Porchia understood that by entering a plea of guilty he was waiving his right to confront and cross-examine witnesses, the conviction and sentence must be set aside and the matter remanded to the district court for Douglas County, Nebraska, for further proceedings.

In *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), in syllabuses of the court, we held:

> A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily.
>
> A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, *the right to confront witnesses against him*, the right to a jury trial, and the privilege against self-incrimination, and the record must *affirmatively* show a voluntary and intelligent waiver of these rights.

(Emphasis supplied.)

In view of the fact that the record here is silent with regard to Porchia's knowingly and intelligently waiving his right to confront witnesses and cross-examine them, we have no other alternative but to vacate the conviction and sentence and to remand the matter to the district court for Douglas County, Nebraska, for further proceedings consistent with this opinion. See, *State v. Branch*, 220 Neb. 754, 371 N.W.2d 740 (1985); *State v. Fischer*, 218 Neb. 678, 357 N.W.2d 477 (1984); *State v. McMahon*, 213 Neb. 897, 331 N.W.2d 818 (1983).

REMANDED FOR FURTHER PROCEEDINGS.

IN RE ESTATE OF YULA E. STEPPUHN, DECEASED. EULA MAE HAWKINS, PERSONAL REPRESENTATIVE OF THE ESTATE OF YULA E. STEPPUHN, DECEASED, AND DONALD TWEEDY, APPELLEES, V. LORAYNE VANWYK, PERSONAL REPRESENTATIVE OF THE ESTATE OF HENRY A. STEPPUHN, DECEASED, APPELLANT.

377 N.W.2d 83

Filed December 6, 1985. No. 84-202.

1. **Decedents' Estates: Courts: Jurisdiction: Equity.** The county courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
2. **Statutes: Constitutional Law: Appeal and Error.** When a statute is constitutionally suspect, the Supreme Court will endeavor to interpret it in a manner consistent with the Constitution.
3. **Courts: Jurisdiction: Constitutional Law: Equity.** The common law and equity jurisdiction granted the district court by the Constitution cannot be legislatively limited or controlled.
4. **Decedents' Estates: Courts: Jurisdiction: Equity.** In common law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.
5. **Tenancy in Common: Joint Tenancy: Presumptions: Intent.** In matters involving joint ownership a tenancy in common is ordinarily presumed, and in order to find a joint tenancy the court must find a clear expression of an intent to create a joint tenancy.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed in part, and in part reversed.

Joseph C. Byam of Byam & Byam, for appellant.

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman, Thomsen & Holtorf, for appellee Hawkins.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from an order of the district court for Dodge County affirming the decision of the county court that it had subject matter jurisdiction of the case, that the title to the bearer bonds in question was held as tenants in common, and that the appellees' decedent's estate was entitled to one-half of the bearer bonds, or one-half of their value, plus one-half of any interest accrued from March 18, 1979, the date of Yula E.

Steppuhn's death.

The appellant in this case is the personal representative of Henry A. Steppuhn, deceased, and the appellees are the personal representative of Yula E. Steppuhn, deceased, and Donald Tweedy, the residuary devisee of Yula E. Steppuhn.

This is a dispute over ownership of bearer bonds owned by Henry Steppuhn and Yula Steppuhn, husband and wife. Henry and Yula were married for 25 years. Yula died on March 18, 1979, and Henry died on February 3, 1983.

Prior to their deaths, the parties maintained a joint account with the investment banking firm of Robert E. Schweser Company, Incorporated, in Omaha, Nebraska. When the account was opened, Yula made a specific request that it be a joint account under the names "Henry and/or Yula Steppuhn." All the invoices received by the Steppuhns when they purchased bonds that were from Robert E. Schweser Company in the Steppuhn account appeared as a joint account in the records of Robert E. Schweser Company, and if one of them had died, the company would have delivered any bonds in its possession to the survivor. The office orders and confirmations from the Robert E. Schweser Company show that the bearer bonds were sold to "Mr. Henry Steppuhn and/or Mrs. Yula Steppuhn."

The Steppuhns purchased bearer bonds from the Robert E. Schweser Company out of funds from their joint checking account at First National Bank and Trust Company of Fremont. The bonds were delivered to the Steppuhns, receipted for by either Henry or Yula, or in some cases both, and placed in a safe-deposit box at Equitable Federal Savings & Loan Assn. in Fremont, Nebraska. The safe-deposit box was leased jointly under the names "Henry Steppuhn and Yula Steppuhn," and both Henry and Yula had access to the safe-deposit box at all times.

The Steppuhns had been married for 25 years and were retired. The Steppuhns would go to the safe-deposit box, clip the coupons from the bonds when due, and deposit the funds in their joint checking account.

When Yula Steppuhn became ill and was in the hospital, she made sure, in the event anything happened to her, that LoRayne VanWyk knew about the bonds and could take Henry to the

safe-deposit box and help him clip the coupons and deposit the funds in the Steppuhns' joint checking account. In a letter to her sister-in-law before her death, Yula stated, "We have Municipal bonds in bank box 5991 Equitable Savings & Loan . . . . [T]hey are very prompt sending checks to Henry A. Steppuhn."

After Yula's death on March 18, 1979, the bonds remained in the possession of Henry Steppuhn. He continued to clip the coupons and deposit the proceeds in the same checking account. Yula Steppuhn's will does not identify the bonds, but paragraph 1 of her will states in part, "My husband and I have a considerable amount of jointly held property." In addition, a note in Yula Steppuhn's handwriting found in Henry's papers after his death states in part, "We have $25,000 in bank box in Municipal Bonds in Safety Deposit Box - Equitable - Fremont."

On February 3, 1983, Henry Steppuhn died, and on March 9, 1983, a short form inventory was filed in Henry Steppuhn's estate. This inventory included the bearer bonds.

First, we address the issue of subject matter jurisdiction. The county court has been given jurisdiction by the Legislature to handle probate matters. Neb. Rev. Stat. § 24-517 (Cum. Supp. 1984) states in part: "Each county court shall have the following jurisdiction: (1) Exclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof."

Neb. Rev. Stat. § 30-2211 (Reissue 1979) states:

> (a) To the full extent permitted by the Constitution of Nebraska, the court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; (2) protection of minors and incapacitated persons; and (3) trusts.
>
> (b) The court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

The comment to § 30-2211 states in part: "This section corresponds to section 24-517. . . . Under previous law, county courts have had incidental authority, including incidental

equity jurisdiction, to effectuate its jurisdiction as to probate, guardianship, and trust matters."

We have stated that county courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction. *In re Estate of Layton*, 207 Neb. 646, 300 N.W.2d 802 (1981).

In § 24-517 the Legislature's grant of exclusive original jurisdiction to the county courts in matters relating to decedents' estates is of suspect constitutionality insofar as it relates to matters that would involve either the chancery or common-law jurisdiction of the district courts. However, when a statute is constitutionally suspect, we endeavor to interpret it in a manner consistent with the Constitution. *State v. Kock*, 207 Neb. 731, 300 N.W.2d 824 (1981).

The Nebraska Constitution is clear in its grant of power to the district courts. Neb. Const. art. V, § 9, states, "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide . . . ." In *Village of Springfield v. Hevelone*, 195 Neb. 37, 236 N.W.2d 811 (1975), we stated that the jurisdiction granted the district court by the Constitution cannot be legislatively limited or controlled. The grant of jurisdiction to the district court, however, while original, is not exclusive. That each of two courts may possess the same original jurisdiction is clear, but that two separate courts may not exercise exclusive jurisdiction is also clear. Our previous opinions have not always addressed this point. In considering the difference between exclusive and original, the apparent conflict between the jurisdiction of the county court and the district court vanishes.

In the instant case the county court had subject matter jurisdiction. The claim by the personal representative of Yula's estate in property in the estate of her husband, Henry, is clearly an action relating to the decedent's estate.

Next, we address the issue of whether the bearer bonds were held as a tenancy in common or as a joint tenancy. Since bearer bonds do not indicate title on their face, one must look to other evidence to determine title and, as in this case, whether they are owned as tenants in common or as joint tenants with right of survivorship. In matters involving joint ownership a tenancy in

common is ordinarily presumed. *Whiteside v. Whiteside*, 159 Neb. 362, 67 N.W.2d 141 (1954). In order to create a joint tenancy in this state, the intention of the parties must be clearly expressed. If the question is whether a joint tenancy or a tenancy in common has been created, the ordinary rules apply: the presumption is in favor of a tenancy in common, and in order to find a joint tenancy the court must find a clear expression of an intent to create a joint tenancy. Volkmer, *Nebraska Law of Concurrent Ownership*, 13 Creighton L. Rev. 513 (1979).

In this case the testimony revealed that the parties intended to set up a "joint account" with the investment banking firm, and all of the bonds were purchased from this firm. All of the invoices were in both of their names, and their account was listed as "Mr. Henry Steppuhn and/or Mrs. Yula Steppuhn." It is clear from the last writings she made in the hospital before her death that Yula's intention was that the bonds would go to Henry upon her death. From the intentions of the parties it is clear that the bearer bonds were held as a joint tenancy.

This case is distinct from *White v. Ogier*, 175 Neb. 883, 125 N.W.2d 68 (1963), where the only evidence was that the money used to purchase the bearer bonds came from a joint account. With respect to the Steppuhns (from the time of purchase of the bonds until their death), the evidence is clear that the bonds were intended to be owned in joint tenancy.

AFFIRMED IN PART, AND IN PART REVERSED.

KRIVOSHA, C.J., concurs in the result.

DONALD R. VACEK, JR., APPELLANT AND CROSS-APPELLEE, V. G. RONALD AMES, APPELLEE AND CROSS-APPELLANT.

377 N.W.2d 86

Filed December 6, 1985. No. 84-361.

1. **Causes of Action: Criminal Conversation.** A cause of action for criminal conversation exists in Nebraska.
2. **Verdicts.** A party who has sustained the burden and expense of trial, and who has

succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict.

3. **Verdicts: Juries: Appeal and Error.** A jury verdict may not be set aside unless it is clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party.
4. **Alienation of Affections: Damages.** In an alienation of affections case, the plaintiff is entitled to the damages which are the natural, probable consequence of the act complained of.
5. _____: _____. There is no mathematical method or formula for determining appropriate compensation in an alienation of affections case.
6. **Alienation of Affections: Evidence: Proof.** In an alienation of affections case, evidence as to the defendant's income and financial condition may be admissible as proof as to how the alienation was accomplished.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded with directions.

Gordon R. Hauptman and Steven D. Wolf of Westergren, Hauptman & O'Brien, P.C., for appellant.

Edward D. Hotz of Hotz, Kizer & Jahn, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This was an action for alienation of affections and criminal conversation brought against G. Ronald Ames by Donald R. Vacek, Jr. A verdict was directed against the defendant on liability on the criminal conversation count. The jury returned a verdict for the plaintiff on both causes of action and fixed the damages at $100,000. The jury found that the damages on the criminal conversation count were $20,000, but that amount was included in the $100,000 awarded on the other cause of action.

The trial court found that the verdict for alienation of affections was excessive and granted a new trial on that cause of action as to damages only. The verdict on the criminal conversation count was set aside on the ground that actions for criminal conversation should be abolished.

The plaintiff has appealed and contends that the trial court erred: (1) In holding that criminal conversation was not a valid cause of action in this state; and (2) In finding that the verdict on the cause of action for alienation of affections was excessive

and granting a new trial on the issue of damages on that cause of action. The defendant has cross-appealed, claiming that the trial court erred in admitting evidence of the defendant's income.

The record shows that the plaintiff married Cherie Cernik on May 15, 1976. Their marriage was a relatively stable one during the first few years, with the couple planning for their future, making decisions together, planning for children, traveling together, and socializing with other couples. In 1980 Cherie became dissatisfied with her job at Mutual of Omaha. In mid-September of 1980 she was promoted to a secretarial position within Mutual. In her new position Cherie performed secretarial duties for three individuals, one of whom was the defendant, Ames. Ames was a second vice president in Mutual's data processing department at that time.

In 1981 the plaintiff began to notice changes in Cherie's behavior and her attitude toward their marriage. Most notable was the fact that she began to work longer hours.

The defendant testified that he first began to see Cherie alone socially in February of 1981. From that point on, the frequency of their dates for drinks or dinner after work increased from once every couple of weeks in late February to early April, to once every week in April and May, to sometimes twice a week in late May and June. The defendant admits that on these occasions he and Cherie went to various bars, restaurants, hotels, and motels. On Memorial Day weekend in 1981, they took a 2-day trip to Sioux City. She also accompanied him on a trip to Kearney, Nebraska, for the Fourth of July weekend. At the time of this latter trip, the defendant knew that Cherie had left the plaintiff and had taken up residence in a motel.

Cherie returned to the plaintiff during the week following the trip to Kearney. Four days later, she again left the plaintiff and moved into an apartment on the following weekend. The defendant left his family a few days later and moved in with Cherie. The defendant admits that he and Cherie engaged in sexual intercourse in late August 1981. Cherie filed for divorce in October of 1981. The decree was entered on April 16, 1982. Cherie married the defendant on February 14, 1983.

We have held, recently, that a cause of action for criminal

conversation exists in Nebraska. *Kremer v. Black*, 201 Neb. 467, 268 N.W.2d 582 (1978). See, also, *Creason v. Myers*, 217 Neb. 551, 350 N.W.2d 526 (1984). The trial court erred in setting aside the verdict on that cause of action on the ground that the cause of action should be abolished.

Criminal conversation is the violation of a spouse's right to the exclusive privilege of sexual intercourse. *Oliver v. Oliver*, 159 Neb. 218, 66 N.W.2d 420 (1954). In *Kremer, supra* at 470, 268 N.W.2d at 584, we acknowledged the common-law view that the sexual relation in a marriage "is one that must be maintained inviolate for the well-being of society."

With respect to the verdict on the cause of action for alienation of affections, we believe the record supports the verdict. Although the evidence was in conflict in some areas, the jury resolved those conflicts in favor of the plaintiff. A party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict. *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983).

> A jury verdict may not be set aside unless it is clearly wrong and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party and all conflicts in the evidence . . . and the credibility of the witnesses is [sic] for the jury and not for the court.

Kniesche v. Thos, 203 Neb. 852, 856, 280 N.W.2d 907, 910 (1979).

The plaintiff's evidence showed that the marriage had been a relatively stable one up until the time that Cherie became involved with the defendant. At that point Cherie's interest in the marriage and in sex with the plaintiff began to diminish. The plaintiff testified that he loved his wife and did not want the divorce. When Cherie left him, he was "totally devastated." His pain and suffering were evidenced by the decline in the quality of his job performance in the Postal Service and testimony as to his emotions through 1983. The plaintiff sought counseling from a priest and has experienced religious conflicts because of the divorce. He did not date for a year and a half after the divorce became final. As a result of the divorce, he has lost the

friendship and companionship of Cherie's parents.

In an alienation of affections case, the plaintiff is entitled to the damages which are the natural, probable consequence of the act complained of. *Breiner v. Olson*, 195 Neb. 120, 237 N.W.2d 118 (1975). The elements of the damages for which a plaintiff may recover include: lost comfort, society, love, and protection; pain; suffering; injury to health; degradation; and humiliation. *Creason, supra*; *Breiner v. Olson, supra*. Marital stability is a factor to be considered in the assessment of damages in an alienation of affections case. *Creason, supra*.

In previous alienation of affections cases, we have been reluctant to set aside the verdict. There is no mathematical method or formula for determining appropriate compensation. *Hansen v. Strohschein*, 178 Neb. 367, 133 N.W.2d 598 (1965); *Baltzly v. Gruenig*, 127 Neb. 520, 256 N.W. 4 (1934). A jury, with proper instruction, is qualified to determine such damages. *Creason, supra*.

In this case the jury was instructed not to allow sympathy or prejudice for or against either party to influence its verdict. The jury was further instructed to consider facts such as the marriage's previous stability, in mitigation of the plaintiff's damages, and to consider evidence of the defendant's financial status only as it may have been a cause of the alienation of Cherie's affections and *not* as it related to damages. The jury was instructed not to compensate the plaintiff excessively for any loss sustained, nor to allow damages by way of punishment or sympathy.

As we view the record, it sustains the verdict, and the trial court erred in finding the verdict was excessive.

On the cross-appeal the defendant claims error in the admission of evidence as to his financial condition. At the trial he testified to his income for 1981 through April of 1982, without objection.

The Vaceks' divorce became final on October 16, 1982. Over objection, the trial court permitted the plaintiff to examine the defendant as to his income after April 1982 and up to October 1982.

The defendant testified that his annual income in 1981 was $62,000, with an increase annualized at $68,000 in February

and March of 1982. On April 16, 1982, the defendant's income rose to $73,000. In June of 1982 it rose again to $83,000 per year, which was his income on October 16, 1982.

The defendant claims that evidence as to his income was irrelevant except as it related to his ability to pay a judgment, and was therefore inadmissible and prejudicial.

In *Baltzly, supra* at 526, 256 N.W. at 6-7, we held:

> As a general rule, testimony as to the financial condition of the defendant has no place in such a controversy, and should not be admitted in evidence. If, however, one who is accused of alienating a husband's affections held out to him her need of his assistance in handling her property, and continually consulted with him, and he was highly flattered and attracted thereby, and enjoyed sharing in such responsibilities, and if this was one of the blandishments by which defendant induced him to desert his wife, it might be material.

In the present case, evidence of the defendant's income was relevant to show how he accomplished the alienation of Cherie's affections. There was testimony that Cherie was impressed with the defendant's background and potential. There was also testimony that after the Vaceks separated, the defendant and Cherie took many out-of-town trips together and that the defendant gave her a dinner ring in April of 1982. The plaintiff alleged that his wife's affections were alienated at least in part by the defendant's provision of gifts, money, and trips. Evidence as to the defendant's income was relevant to show that the defendant was in fact in a position to entice the plaintiff's wife in the manner alleged by the plaintiff. The jury was instructed to consider this evidence only as it related to the cause of the alienation of Cherie's affections for the plaintiff. We conclude that the evidence as to the defendant's income was admissible under the circumstances in this case.

Although the Vacek marriage was dissolved on April 16, 1982, the decree was not final until 6 months later. Neb. Rev. Stat. § 42-372 (Reissue 1984). The marital relation continued during this period. *Choat v. Choat*, 218 Neb. 875, 359 N.W.2d 810 (1984). In the event of a reconciliation the decree could have been vacated. On that basis, evidence as to the defendant's

income during the 6-month period after the date of the decree was relevant and admissible.

The judgment is reversed and the cause remanded with directions to reinstate the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., dissenting.

For the reasons more particularly set out by McCown, J., in his dissent in *Kremer v. Black*, 201 Neb. 467, 268 N.W.2d 582 (1978), and my own dissent in *Creason v. Myers*, 217 Neb. 551, 350 N.W.2d 526 (1984), I must dissent from the majority opinion in this case. In my view, perpetuating either of these causes of action created by courts ignores the reality of today's lifestyle. I would abolish both causes of action. While we ought to strive to improve the sanctity of marriage, the fact that the relationship withers and dies, as it did in this case, should not be grounds for one to recover what are obviously punitive damages. If the majority opinion is strictly construed, one who engages in a social relationship with another who has obtained a decree of divorce, during the 6 months after the decree was obtained but before it becomes final, may be liable in a suit for alienation of affections because by engaging in this relationship the formerly married couple is prevented from reconciling. In my view, that is not appropriate.

BOSLAUGH, J., dissenting.

There was substantial evidence in this case that the Vacek marriage had deteriorated before Cherie became acquainted with the defendant. In my opinion the verdict on the cause of action for alienation of affections was excessive. The order of the trial court granting a new trial on that cause of action should have been affirmed.

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

While I agree with our holding in *Creason v. Myers*, 217 Neb. 551, 350 N.W.2d 526 (1984), reaffirming alienation of affections as a viable cause of action in this state, I do not agree that criminal conversation in its common-law form should be similarly retained.

In *Kremer v. Black*, 201 Neb. 467, 268 N.W.2d 582 (1978), a majority of this court held that common-law criminal

conversation should be retained as a cause of action in this jurisdiction. In his dissent Justice McCown enumerated legal and policy reasons why criminal conversation, in its traditional common-law form, had outlived its usefulness. I agreed with Justice McCown's reasoning then. However, I now believe the action should be abolished.

The action for criminal conversation is not only an anachronism in today's world, it is manifestly unjust and irrational in the hands of mercenary and vindictive spouses.

Law is not a fixed science. Principles of law change with the passing of time, through the gradual change of thought on the part of society and social institutions. When the reasons behind a traditional principle of law have ceased to exist, then, in the richest tradition of the common-law system, the rule of law should be altered to reflect those changes.

Common-law criminal conversation is a cause of action of judicial making. As Justice Cardozo once said, "A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience." This court's capacity for growth and change in the judicial development of the common law should reflect no less.

IN RE APPLICATION OF RED CARPET LIMOUSINE SERVICE, INC. RED CARPET LIMOUSINE SERVICE, INC., APPELLEE, V. YELLOW CAB COMPANY ET AL., APPELLANTS.

377 N.W.2d 91

Filed December 6, 1985. No. 84-486.

1. **Public Service Commission: Motor Carriers: Proof.** An applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the Public Service Commission.
2. **Public Service Commission: Motor Carriers.** In determining the issue of public

convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.

3. **Public Service Commission: Appeal and Error.** Upon an appeal from an order of the Public Service Commission granting a certificate, this court may decide only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
4. _____: _____. If there is evidence to sustain the finding of the Public Service Commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary.

Appeal from the Nebraska Public Service Commission. Reversed.

Marshall D. Becker, for appellants.

Arlyn L. Westergren and, on brief, Jeffrey B. Farnham and Casey J. Quinn, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

On May 22, 1984, the Nebraska Public Service Commission granted Red Carpet Limousine Service, Inc., the authority to operate as a common carrier in Nebraska intrastate commerce in the transportation of passengers by limousine between points within a 50-mile radius of Omaha, over irregular routes. A certificate of public convenience and necessity was issued in that order.

Protestants, Yellow Cab Company, Checker Cab Company, Airport Transportation Company, Handicab Company, and Hunt Transportation, Inc., doing business as Happy Cab, and intervenor in opposition, Old Market Limousine Service, Inc., appeal.

We have held that under Neb. Rev. Stat. § 75-311 (Reissue 1981), an applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion

and expertise of the Public Service Commission. *Gentry Real Estate Co. v. King's Limousine Service, Inc.*, 201 Neb. 761, 272 N.W.2d 359 (1978).

In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest. *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981); *Black Hills Stage Lines, Inc. v. Greyhound Corp.*, 174 Neb. 425, 118 N.W.2d 498 (1962).

The standard of review for this case is well established. Upon an appeal from an order of the commission granting a certificate, this court may decide only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made. *In re Application of Greyhound Lines, Inc., supra*; *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.*, 186 Neb. 261, 182 N.W.2d 648 (1971).

If there is evidence to sustain the finding of the commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary. *In re Application of Greyhound Lines, Inc., supra*; *Neylon v. Petersen & Petersen, Inc.*, 181 Neb. 143, 147 N.W.2d 488 (1966).

The appellants argue that this court may intervene in the present case because the Public Service Commission acted arbitrarily in granting the appellee, Red Carpet Limousine Service, Inc., the requested authority. We agree and reverse, finding that Red Carpet Limousine failed to demonstrate two of the three requirements for a certificate of public convenience and necessity: (1) That its proposed operation will serve a useful purpose responsive to a public demand or need; and (2) That this purpose cannot or will not be served as well by existing carriers. We make no finding as to the third requirement, that the purpose can be served by the applicant in a specified manner

without endangering or impairing the operations of existing carriers contrary to the public interest.

A review of the testimony before the Public Service Commission demonstrates the lack of evidence to sustain the issuance of the certificate of public convenience and necessity. Jay D. Bowman testified as the president and sole stockholder of the appellee, Red Carpet Limousine Service, Inc. He proposes to station the corporation's one limousine at Eppley Airfield and employ three drivers to provide 24-hour service. Bowman stated that he is most interested in gaining the business traveling in and out of Eppley Airfield and between the Millard Airport and Ak-Sar-Ben. However, Bowman cast doubt on the need for the service between the Millard Airport and Ak-Sar-Ben by testifying that that route is currently served by Limousines Limited and that the management of that company is considering abandoning the service. Further, the president of Old Market Limousine Service, Inc., testified that her company could respond to a call from its courtesy phone at Eppley Airfield within 10 minutes.

Bowman also testified that Red Carpet Limousine Service, Inc., would answer a particular public need in that it would charge a minimum 1-hour fee rather than the 2-hour minimum fee required by Old Market Limousine Service, Inc.

There are two problems with the appellee's emphasis on this feature of its proposed service as the basis for its claim to serve a public need. First, Red Carpet Limousine has not submitted a rate schedule for its proposed services. The 1-hour minimum fee is rendered meaningless for purposes of comparison without that evidence. Second, the appellee has not supplied evidence of a minimum fee charged by the three other Omaha and Millard limousine services. These companies may already provide the service which Red Carpet Limousine proposes.

Several of Bowman's personal friends testified that they would use Red Carpet Limousine's proposed service, but most of them admitted that they had never used or inquired about the existing limousine services. One such witness even admitted that the potential user of Red Carpet Limousine's service currently has access to free transportation with his own company messenger service.

Kay E. Neil, president of the Douglas County Chapter of Mothers Against Drunk Driving, testified to the organization's general promotion of alternative driving services to provide "safe rides." She did not testify, however, that Red Carpet Limousine could provide better "safe rides" than the taxicab companies are currently providing, nor that the public demands that service in luxury automobiles.

The appellee, Red Carpet Limousine Service, Inc., simply has not met the burden of proof required for an application under § 75-311. Exemplary cases demonstrating the required showing by an applicant for a certificate of public convenience and necessity are *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981); *Gentry Real Estate Co. v. King's Limousine Service, Inc.*, 201 Neb. 761, 272 N.W.2d 359 (1978); and *Robinson v. National Trailer Convoy, Inc.*, 188 Neb. 474, 197 N.W.2d 633 (1972).

Red Carpet Limousine's showing of public need simply does not rise to the level of need demonstrated in the above-cited cases. We find that the evidence is insufficient to sustain the finding of the Public Service Commission; that finding was arbitrary and unreasonable. Its order is reversed.

REVERSED.

WILLIAM L. ZIMMERMAN, APPELLEE AND CROSS-APPELLANT, V. DOUGLAS R. MARTINDALE, APPELLANT AND CROSS-APPELLEE.

377 N.W.2d 94

Filed December 6, 1985. No. 84-497.

1. **Contracts.** A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangements.
2. _____. When an agreement not covered by the Uniform Commercial Code stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.
3. _____. To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof. Further, in order that a binding contract may result from an offer and

acceptance, it is essential that the minds of the parties meet at every point and that nothing be left open for a future arrangement.

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

Richard A. Douglas of Winner, Nichols, Douglas and Kelly, for appellant.

Robert G. Simmons, Jr., of Wright, Simmons & Selzer, for appellee.

KRIVOSHA, C.J., HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired, and OTTE, D.J.

KRIVOSHA, C.J.

This action was originally instituted by the appellee, William L. Zimmerman, for the purpose of dissolving a partnership known as Midwest Blaze-King (Midwest), pursuant to Neb. Rev. Stat. § 67-337 (Reissue 1981). The record discloses that Midwest was formed and operated pursuant to an oral agreement entered into between William Zimmerman and Douglas R. Martindale without compliance with the provisions of Neb. Rev. Stat. § 67-101 (Reissue 1981). Under the provisions of this oral agreement, the parties were to split profits and expenses equally. The partnership operated pursuant to this agreement during the years 1979 to 1983, when it was dissolved.

Following trial to the district court for Scotts Bluff County, Nebraska, a decree was entered dissolving the partnership and distributing the assets of the partnership. In doing so the district court found that one of the assets owned by the partnership was a certain license agreement contributed by Zimmerman to the partnership. The district court found that Zimmerman should receive credit in his capital account for one-half of the license agreement, in the sum of $50,000. It is this $50,000 which is the principal dispute in this appeal. For reasons more particularly hereinafter set out, we believe that the district court was in error in its finding regarding the license agreement.

The basis upon which the district court found as it did with regard to the license agreement was apparently an agreement entered into earlier between Zimmerman and Martindale and

dated January 1, 1980 (exhibit 1). By the terms of that agreement Zimmerman represented that he was the owner of a certain license agreement with Woodcutter's Manufacturing, Inc., an Oregon corporation. The second paragraph of the agreement provided as follows: "ZIMMERMAN is *willing* to sell a 50% interest in such license agreement to MARTINDALE for the sum of $50,000.00 to be paid *under terms and conditions to be agreed upon at some future period of time.*" (Emphasis supplied.) The agreement then provided that the parties were to form a corporation, with each owning 50 percent of the stock, and that Martindale was to put $10,000 into a bank account as an act of good faith. The agreement concluded by providing:

> 5. Should ZIMMERMAN and MARTINDALE be unable to reach an agreement with regards to the Corporation then each party shall retain as follows:
>
> A. ZIMMERMAN shall retain the License Franchise Agreement of which MARTINDALE shall make no claim of interest to.
>
> B. MARTINDALE shall be returned all sums of money immediately so advanced to the future Corporation or to ZIMMERMAN himself.

The evidence is without dispute that no corporation was ever formed and none came into existence. Had nothing more occurred, a solution to this case would be relatively simple. Paragraph 5 of exhibit 1 clearly set out how the matter was to be resolved. Zimmerman would receive back the license, and Martindale would receive back his money. If this occurred, presumably each party would have gone his own way and that would have been the end of the matter. Unfortunately, however, although the parties did not form a corporation and fulfill the terms of exhibit 1, they did, nevertheless, form a partnership and proceed to conduct business as a partnership and not as a corporation.

The record further discloses that though exhibit 1 recited that Zimmerman was the owner of a certain license agreement, in fact when exhibit 1 was signed he was not. And it was not until after the partnership agreement had been formed that the partnership, and not Zimmerman, purchased the franchise agreement from Woodcutter's Manufacturing, Inc., for the

total sum of $20,000. Payment of this $20,000 was made by Martindale's contribution of an automobile having a value of $15,000 and Zimmerman's contribution of an automobile having a value of $5,000. Woodcutter's was willing to accept these automobiles as payment for the license.

Zimmerman argues that the decision of the district court was correct because Martindale agreed to purchase a one-half interest for $50,000, regardless of what its actual cost may have been. He urges us to recognize that the very essence of the American free enterprise system is "Buy low and sell high," and, in view of the fact that Martindale agreed to pay $50,000 for the license, he must abide by that agreement. If we were able to hold that exhibit 1 was an enforceable contract, then, perhaps, Zimmerman's contentions would be correct. We believe, however, that such is not the case. Rather, we believe that the most that can be said of exhibit 1 is that it was a contract to enter into a contract. The language does not provide that Zimmerman sells to Martindale a 50-percent interest for the sum of $50,000 or that Martindale buys the interest for $50,000, but only recites that Zimmerman "is willing to sell a 50% interest" for $50,000 "under terms and conditions to be agreed upon at some future period of time." Those future conditions were never agreed to. Nor were any of the other conditions of exhibit 1 regarding the formation of the corporation ever fulfilled. Nor does exhibit 1 recite that Martindale is willing to buy the interest.

We have previously held that a contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangements. See, *Rybin Investment Co., Inc. v. Wade*, 210 Neb. 707, 316 N.W.2d 744 (1982); *O'Brien v. Fricke*, 148 Neb. 369, 27 N.W.2d 403 (1947). When an agreement not covered by the Uniform Commercial Code stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement. In *Rybin Investment Co., Inc. v. Wade, supra* at 709-10, 316 N.W.2d at 746, we said:

> To establish an express contract, there must be shown what amounts to a definite proposal and an unconditional

> and absolute acceptance thereof. [Citations omitted.]
>
> Further, in order that a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for a future arrangement.

It is clear that had Zimmerman sought specific performance of the contract he would not have been successful under the terms of exhibit 1 and the facts as they existed at the time the agreement was signed. The most that can be said of exhibit 1 is that the parties elected not to form a corporation and proceeded under paragraph 5 of exhibit 1. After that the parties proceeded to enter into a new arrangement, to wit, a partnership agreement in which each party was to be an equal partner. The license, as the record clearly establishes, was purchased by the partnership for $20,000, of which Martindale contributed $15,000 and Zimmerman $5,000. Exhibit 1 was not binding on Martindale, and he was not obligated to pay Zimmerman $50,000 for a one-half interest in a license which had already been purchased by the partnership. The trial court therefore erred in adding $50,000 to Zimmerman's partnership capital account.

The appellee, Zimmerman, has filed a cross-appeal in which he maintains that the district court erred in not ordering Martindale to pay to the partnership interest on $67,043.50 from June 18 to December 16, 1983. The record discloses that after the sale of the partnership, Martindale obtained possession of a check in the amount of $67,043.50, representing part payment. These were moneys that properly belonged to the partnership and, if placed in the partnership account, could have earned interest. The evidence discloses that if the $67,043.50 had been in fact placed in an interest-bearing account, the interest on the amount would have been $2,756.31. This amount should be considered to be an asset of the partnership and Martindale should be required to pay that sum into the partnership for division in the appropriate dissolution of the partnership.

A second item adjusted by the court involves some alleged home improvements in the amount of $2,880.30. An examination of the record, however, discloses no evidence to

support that contention. As a matter of fact, during the course of the trial, the district court advised the parties that there was no evidence to support that adjustment and that, absent such evidence, the amount could not be considered. Apparently, in preparing the decree, however, the amount found its way into the accounting. It should have been disregarded.

The last item, amounting to $1,809.64, has to do with the withdrawal of two motor vehicles. There is no evidence to support any contention except that withdrawal of the vehicles was considered by each of the parties to be equal, and therefore the capital entries should be adjusted to show equal withdrawals by the parties for the motor vehicles.

For these reasons the judgment of the district court is affirmed as modified and the cause remanded to the district court for adjustments in accordance with this opinion.

AFFIRMED AS MODIFIED.

BILL AND STELLA LIS, HUSBAND AND WIFE, APPELLANTS, V. MOSER WELL DRILLING & SERVICE, INC., A NEBRASKA CORPORATION, APPELLEE.

377 N.W.2d 98

Filed December 6, 1985. No. 84-691.

1. **Actions: Contracts.** A suit on a contract presents an action at law.
2. **Judgments: Appeal and Error.** The findings and conclusions of the trial court in an action at law tried without a jury have the effect of a jury verdict and will not be set aside by the Nebraska Supreme Court unless they are clearly wrong.
3. **Contracts: Damages: Proof.** One seeking recovery in a contract action has the burden of proving damages with as much certainty as the case permits.
4. **Contracts: Damages.** If a construction contract is substantially performed, the damages which the owner suffers because of defective workmanship or the use of unsuitable materials are measured by the reasonable cost of remedying the defects, if remediable; if the defects are not remediable without reconstruction of or material injury to a substantial portion of the improvement, the damages are measured by the difference between the value of the improvement as constructed compared to what its value would have been if constructed according to the contract.
5. **Damages: Proof.** Proof of damages to a mathematical certainty is not required;

the proof is sufficient if the evidence is such as to allow the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed in part, and in part reversed and remanded with direction.

Richard D. Sievers, for appellants.

Rex R. Schultze of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellee.

KRIVOSHA, C.J., CAPORALE, and SHANAHAN, JJ., and GARDEN, D.J., and COLWELL, D.J., Retired.

CAPORALE, J.

Plaintiffs, Bill and Stella Lis, husband and wife, appeal from the dismissal of their suit for damages arising out of the breach of a contract by the defendant, Moser Well Drilling & Service, Inc., a Nebraska corporation. The Lises' dispositive assignment in this court is that the county and district courts erred in ruling that they failed to prove their damages. We affirm as to Stella Lis and reverse and remand with the direction that judgment be entered in favor of Bill Lis.

The Lises own real estate on which a water well was drilled when their house was built. Approximately 13 years later, on May 31, 1982, Bill Lis contracted to purchase a water supply and heat exchange system from Moser. The system was designed to provide water for household uses and to take water from the supply well, extract the thermal value therefrom, circulate air thus chilled or warmed through the house, and discharge the water used by the heat exchange portion of the system into a second, or return, well.

Moser elected to design the system so as to use the well already on the property as the return well. It became apparent as soon as the installation was completed, however, that this well would not accept all of the discharge water; it overflowed, thereby causing the discharge water to flood the Lises' property. Because of this malfunction, Bill Lis refused to pay the full contract price. As a consequence, Moser agreed to acidize the well, that is, wash it out with an acid solution. As part of that undertaking, Moser wrote that it did "not expressly

[sic] or imply any form of a warranty on the return well for any defects it might have in the future after we get it to accept water without running water over the top of the well." Moser thereafter acidized the well twice; later blew air into it; and finally deepened it. Following each of these procedures, the return well accepted all of the discharge water for short periods, but then began to overflow again. Bill Lis paid the remainder of the purchase price after the first short successful operation of the system.

A fair summary of the Lises' evidence is that a new return well would likely solve the overflow problem. Moser's evidence is that there is a 50-percent chance that a new return well would solve the problem and that additional acidization or other procedures might have as good a chance to solve the problem.

The uncontroverted evidence is that a new return well would cost $2,000.

The county court found that "a breach of contract" had been proved but that the Lises fell "short on their proof of damages."

This being a suit on a contract, it is an action at law. *Occidental S. & L. v. Bell Fed. Credit Union*, 218 Neb. 519, 357 N.W.2d 198 (1984). That being so, the findings and conclusions of the county court have the effect of a jury verdict and will not be set aside by this court unless they are clearly wrong. *Schmode's, Inc. v. Wilkinson*, 219 Neb. 209, 361 N.W.2d 557 (1985); *H & L Equip. v. Schardt*, 217 Neb. 653, 349 N.W.2d 924 (1984).

Moser contends that its undertaking was only to acidize the well, which it did. The county court in effect found that Moser's undertaking was to solve the overflow problem, as contended by the Lises. The record supports that finding. Moser's statement that it made no warranty once it got the return well "to accept water without running water over the top of the well" is certainly susceptible to the interpretation that Moser agreed not to get the return well to accept the discharge water for short, intermittent periods of time but, rather, to solve the overflow problem so the system would function as designed.

The question therefore becomes whether it can be said that the county court's finding that the Lises failed to prove damages is clearly wrong.

The finding is clearly correct with respect to Stella Lis. Her name appears on none of the contract documents. She simply was not a party to the transaction, and, thus, there is no basis upon which to include her as a party to this lawsuit.

As to Bill Lis, however, the matter requires further analysis.

We have said in construction contract cases that if the contract is substantially performed, the damages which the owner suffers because of defective workmanship or the use of unsuitable materials are measured by the reasonable cost of remedying the defects, if remediable; if the defects are not remediable without reconstruction of or material injury to a substantial portion of the building, the damages are measured by the difference between the value of the building as constructed compared to what its value would have been if constructed according to the contract. *Nekuda v. Vincent*, 213 Neb. 527, 330 N.W.2d 477 (1983); *Moss v. Speck*, 209 Neb. 46, 306 N.W.2d 156 (1981); *Fink v. Denbeck*, 206 Neb. 462, 293 N.W.2d 398 (1980). We applied the same rule in a case involving the improper preparation of a surface for grading and paving. *A R L Corp. v. Hroch*, 201 Neb. 422, 268 N.W.2d 101 (1978). We conclude the rule applies as well to an improvement such as is involved in this case.

In view of the uncontroverted evidence concerning the cost of a new well, implicit in the county court's conclusion that Bill Lis did not prove his damages is the finding that the overflow problem is not remediable.

The county court was certainly free to accept Moser's testimony that there was but a 50-percent chance that a new return well would solve the overflow problem. There is also, however, uncontroverted evidence that wells are by their nature unpredictable and that no one can accurately foretell the result of a particular remedial procedure in the circumstance presented by this case.

It is clear that as the party seeking recovery, Bill Lis has the burden of proving his damages with as much certainty as the case permits. *Nebraska Truck Serv. v. U.S. Fire Ins. Co.*, 213 Neb. 755, 331 N.W.2d 266 (1983); *Meisinger Earth Moving, Inc. v. State*, 212 Neb. 554, 324 N.W.2d 387 (1982); *LeRoy Weyant & Sons, Inc. v. Harvey and Classic Lanes*, 212 Neb. 65,

321 N.W.2d 429 (1982); *Settell's, Inc. v. Pitney Bowes, Inc.*, 209 Neb. 26, 305 N.W.2d 896 (1981). Proof to a mathematical certainty, however, is not required; the proof is sufficient if the evidence is such as to allow the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness. *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984); *LeRoy Weyant & Sons, Inc. v. Harvey and Classic Lanes, supra.*

In applying those rules to the present case, we must conclude that proving the cost of installing a new return well is sufficient as a matter of law to establish Bill Lis' actual damages with as much certainty as the case permits. We must therefore conclude the county court was clearly wrong in ruling that Bill Lis failed to prove his damages and that the district court erred in affirming the county court's judgment as to him.

Accordingly, the cause is remanded to the district court with the direction that it be remanded to the county court for the entry of judgment in the sum of $2,000 in favor of Bill Lis. The judgment of the district court dismissing Stella Lis' action is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

CHARLES D. RIDENOUR, APPELLEE, V. FARM BUREAU INSURANCE COMPANY OF NEBRASKA, A MUTUAL INSURANCE COMPANY, APPELLANT.

377 N.W.2d 101

Filed December 6, 1985. No. 84-730.

1. **Contracts: Reformation: Equity.** An action for reformation is equitable in nature.
2. **Equity: Appeal and Error.** The Nebraska Supreme Court reviews equitable matters de novo on the record, taking into consideration the fact that the trial court saw and heard the witnesses and accepted one version of the facts rather than another.
3. **Contracts: Reformation: Intent.** Reformation is decreed in order to effectuate the real agreement of the parties when a written instrument does not represent

their true intent.

4. **Contracts: Reformation: Fraud.** Reformation may be decreed where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party.
5. **Contracts: Reformation.** Reformation conforms an erroneous written agreement to the antecedent agreement of the parties; that is to say, to the agreement entered into prior to the execution of the erroneous written agreement.
6. **Reformation: Evidence.** To obtain reformation the evidence must be clear, convincing, and satisfactory.
7. **Evidence: Proof: Words and Phrases.** Clear, convincing, and satisfactory evidence is present when there has been produced in the trier of fact a firm belief or conviction that a fact to be proved exists.
8. **Contracts: Presumptions: Intent.** There is a strong presumption that a written instrument correctly expresses the intention of the parties to it.

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Reversed and remanded with direction to dismiss.

Arlen W. Langvardt of Jacobsen, Orr & Nelson, P.C., for appellant.

Charles J. Cuypers of Sherwood & Cuypers, and John E. Dier of Person, Dier & Person, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and WOLF, D.J., and COLWELL, D.J., Retired.

CAPORALE, J.

Defendant, Farm Bureau Insurance Company of Nebraska, a mutual insurance company, appeals from the reformation of a policy of insurance issued by it so as to provide coverage for losses occasioned by the collapse of plaintiff Charles D. Ridenour's hog confinement building. Farm Bureau's assignment that the trial court erred in reforming the policy is meritorious; we therefore, without considering its other assignments of error, reverse and remand the cause with the direction that it be dismissed.

An action for reformation being equitable in nature, *Farmers Coop. Assn. v. Klein*, 196 Neb. 180, 241 N.W.2d 686 (1976), we review this matter de novo on the record, taking into consideration the fact that the trial court saw and heard the witnesses and accepted one version of the facts rather than

another. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Hulse v. Schelkopf*, 220 Neb. 617, 371 N.W.2d 673 (1985).

A review of the evidence with that principle in mind reveals that in May of 1976 plaintiff had a hog confinement building erected on the farm he leased. In July of 1977 he purchased a "Country Squire" insurance policy issued by Farm Bureau. That policy was renewed from year to year and was in force and effect at the time the aforesaid hog confinement building collapsed on August 10, 1982.

The declarations pages for the year from July 25, 1982, to July 25, 1983, and the policy language do not provide coverage for losses resulting from a collapse of the hog confinement building, but do provide coverage for certain other direct losses of the structure up to a limit of $35,000, less a deductible amount of $50. While the policy does make protection available for loss resulting from the collapse of plaintiff's residence, plaintiff did not purchase such coverage.

The collapse resulted in destruction of the confinement building and in the death of some of the hogs within it. Farm Bureau denied liability for the resulting losses, and this suit followed.

Plaintiff testified that in the first part of February 1982, he, his wife, Thelma, and his son, Tom, met with Tim Moomey, an agent who sold and serviced policies for Farm Bureau, in the Ridenour kitchen. The record reflects that Moomey had graduated from Kearney State College in 1975 and immediately became an agent for Farm Bureau. He thereafter received specialized insurance business training at various seminars. According to plaintiff, the purpose of the meeting was "[t]o discuss the coverage of our hog confinement building." Plaintiff had become aware that his hog supplier had experienced some trouble with a building like his, and he became concerned about the soundness of his own building. He testified that he therefore wanted insurance to cover his losses should the building collapse. Plaintiff told the court he advised Moomey that "we wanted to be covered for the collapse of the building." Plaintiff stated Moomey told him that "under the blanket plan we had we was covered for the hogs; and in the Country Squire we was covered for the collapse." (It appears

that the subject policy was the only one in force. It contains, as coverage D, "Blanket Farm Personal Property," which provides protection for losses resulting from the death of hogs from certain designated causes but not from the collapse of a structure.) Plaintiff also recalled that at this meeting his wife, at Moomey's request, provided Moomey with the number of hogs then in confinement.

Thelma Ridenour testified that she called Moomey in February 1982 to ask him to meet with the Ridenours "to talk about our coverage on the hogs and to see if we were covered for specific things that we had been reading and hearing about." She explained that their hog supplier had talked to her husband and son about the floor slats collapsing and hogs drowning in the pit in connection with his confinement building. According to her, the Ridenours wanted to know if their insurance policy covered such occurrences. She testified further that at the February 1982 meeting her husband inquired whether there was coverage for asphyxiation and drowning of the hogs in case the slats would collapse. She recalled that Moomey said such coverage was provided by the blanket policy. She, in addition, remembered that her husband also asked to be covered for losses caused by a collapse of the building, and Moomey said such coverage was provided by the Country Squire policy. Thelma Ridenour confirmed that at this meeting she reported to Moomey the number of hogs then in the confinement building. She also reported their weight.

Tom Ridenour testified that he was present at the February 1982 meeting between his parents and Moomey. He recalled that his father told Moomey about the problems the hog supplier had with his confinement building and that his father asked Moomey if their insurance covered asphyxiation of the hogs, collapse of the slats, and collapse of the building. According to Tom Ridenour, Moomey said those events were covered.

Plaintiff further testified that he had a second meeting with Moomey in April 1982, at which time only the two of them were present. On this occasion Moomey filled out a checklist, which plaintiff signed. The list makes no reference to collapse losses on any structure and recites that items not shown on the

declarations pages are not insured. According to plaintiff, however, Moomey was in a hurry and the checklist was not discussed. Nonetheless, plaintiff admits that he did sign the checklist after the items listed were read off to him. As a result of this April meeting, the dollar amount of certain coverages on the hog confinement building, other than collapse, was increased from $25,000 to $35,000.

Plaintiff and his wife both testified they had not completely read the Country Squire policy. They did not understand the wording and relied instead on Moomey to interpret it for them.

On the other hand, Moomey, who had ended his relationship with Farm Bureau in November of 1982, testified that at no time prior to the collapse of the confinement building did the Ridenours request that the hogs and building be insured so as to cover losses resulting from its collapse. In fact, Moomey knew collapse coverage was not available from Farm Bureau for outbuildings such as the hog confinement structure. As of the time of trial, mid-1984, Moomey knew there were two or three companies which provided such coverage as of that time, but he did not know whether such insurance was available from those companies at the time of the collapse.

Moomey recalled meeting with plaintiff in April of 1982, at which time they did a "farm review." That is, Moomey went through an inventory of the farm and reviewed the declarations pages with plaintiff "line by line [to] make sure everything was the way they wanted it." Plaintiff and Moomey also reviewed the checklist discussed earlier. Moomey stated that his procedure was to go through the checklist and explain the coverage, then check off each type desired by the insured.

Plaintiff testified that on August 11, 1982, the day after the confinement building collapsed, Moomey went to the Ridenour farm and informed them he was sorry but the home office said there was no coverage.

Moomey testified that upon receiving a call from one of the Ridenours on the date of the collapse, he caused his secretary to prepare a notice of loss report for submission to Farm Bureau's home office describing the property lost, the cause of the loss, and the amount of insurance coverage claimed for each item. He also assigned an adjuster to inspect the property. Moomey

and the adjuster discussed the fact that there was no coverage for the loss.

The principle upon which plaintiff relies is that reformation is decreed in order to effectuate the real agreement of the parties when a written instrument does not represent their true intent. *Waite v. Salestrom*, 201 Neb. 224, 266 N.W.2d 908 (1978); 66 Am. Jur. 2d *Reformation of Instruments* § 1 (1973).

In this jurisdiction reformation may be decreed where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party. In such events the erroneous written agreement is conformed to the antecedent agreement of the parties; that is to say, to the agreement entered into prior to the execution of the erroneous written agreement. *Johnson v. Stover*, 218 Neb. 250, 354 N.W.2d 142 (1984); *Waite v. Salestrom, supra*; *Oft v. Dornacker*, 131 Neb. 644, 269 N.W. 418 (1936).

To obtain reformation the evidence must be clear, convincing, and satisfactory. *Johnson v. Stover, supra*. Such evidence is present when there has been produced in the trier of fact a firm belief or conviction that a fact to be proved exists. See *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985).

Moreover, there is a strong presumption that a written instrument correctly expresses the intention of the parties to it. *Johnson v. Stover, supra*; *Beideck v. National Fire Ins. Co.*, 139 Neb. 171, 296 N.W. 873 (1941).

The record does not produce in us a firm belief or conviction that there was a mutual mistake of fact. Moomey was a trained and experienced insurance agent who, after he had no relationship with Farm Bureau, testified he knew the coverage claimed by plaintiff was not available from Farm Bureau and who denied representing that such coverage existed under the policy. Plaintiff argues that Moomey's expression of sorrow over the fact that Farm Bureau's home office said there was no coverage, coupled with the facts that he caused a notice of loss report to be prepared and arranged for an adjuster to inspect the property, establishes that Moomey did think collapse coverage for the hog building existed. We conclude otherwise. Prudence dictated that plaintiff's claim be noted and

investigated. Investigation of this claim to determine the facts does not necessarily imply a thought that coverage exists. Neither does an expression of regret that the home office said coverage does not exist necessarily imply an earlier belief by Moomey that there was coverage. It may as easily imply regret at the confirmation of what Moomey already knew.

Any mistake which may have existed was therefore one made only by plaintiff. Under such a circumstance he must, in order to recover, clearly, convincingly, and satisfactorily establish that the mistake was either the result of fraud on the part of Farm Bureau or due to Farm Bureau's inequitable conduct.

Plaintiff concedes in his brief that there was no fraud (Brief for Appellee at 8), but argues that Farm Bureau engaged in inequitable conduct by not delivering the declarations pages until after the loss. The late delivery of the declarations pages is more than adequately explained, however, by the fact that plaintiff was tardy in paying his premium. Moreover, since plaintiff admits he did not read the policy, he cannot be heard to complain that not having the declarations pages deprived him of an opportunity to discover that he had no collapse coverage on his hog confinement building.

The nature of the conflict in the evidence in this case is not unlike that present in two earlier cases which resulted in a denial of reformation. In *Beideck v. National Fire Ins. Co., supra*, the insureds testified they told the agent that as they expected to make a temporary move to Wisconsin, they wanted fire insurance to cover their personal belongings wherever the property might be located. They also claimed that the agent agreed to provide such coverage and assured them when he delivered the policy that it contained the coverage they had requested. The agent, on the other hand, testified he did not tell the insureds that they had the coverage in question but, instead, told them that the type of coverage they wanted was not available. In denying reformation this court noted that there was no evidence of mutual mistake and that if the insureds were to recover, it must be on the basis of fraud. The court then concluded that the evidence, being in sharp and irreconcilable conflict, was insufficient to establish fraud. The insured in *Du Teau Co. v. New Hampshire Fire Ins. Co.*, 156 Neb. 690, 57

N.W.2d 663 (1953), sought to reform an automobile dealer's insurance policy so that it would cover a loss occasioned when it voluntarily parted with an automobile because of the fraud of a third party. The insured's manager, who had purchased the policy, testified that the insurance agent told him there would be coverage in the event of any loss, particularly of the type in question in the case. The insurance agent, on the other hand, testified that he made no such representations to the manager. We once again observed that the evidence was sharply and irreconcilably conflicting and, citing *Beideck v. National Fire Ins. Co.*, 139 Neb. 171, 296 N.W. 873 (1941), held that the evidence was insufficient to support a reformation of the contract.

The principal cases relied upon by plaintiff in which reformation was decreed are distinguishable from the case presently before us. *Heikes v. Farm Bureau Ins. Co.*, 181 Neb. 827, 151 N.W.2d 336 (1967), also involved a dispute concerning the Country Squire policy. Therein, the insureds' potatoes had been destroyed by fire, an excluded peril. The insureds had spoken with their insurance agent about fire coverage for their potato storehouse and some personal property. The agent, after inspecting the storehouse, informed them that their policy covered stored potatoes against fire and commented at the scene of the fire that coverage was ample under the coinsurance clause. Moreover, although the agent had sold 60 Country Squire policies, he did not know that root crops and vegetables were excepted from fire coverage. This court held that reformation was proper because there was clear and convincing proof that the insureds relied in good faith upon the agent's misrepresentations. Indeed, in *Heikes* there was no evidentiary conflict as to what the agent represented; consequently, the only conclusion which could have been reached was that there had been a mutual mistake. That was also the situation presented by *Corrigan v. Fireman's Fund Ins. Co.*, 180 Neb. 13, 141 N.W.2d 170 (1966), and *Robinson v. Union Automobile Ins. Co.*, 112 Neb. 32, 198 N.W. 166 (1924), in which the agents testified that they had misinformed the insureds about the coverages provided.

In the case presently before us, however, the evidence falls

short of overcoming the presumption that the policy as written correctly expresses the intention of the parties at the time it was renewed.

Accordingly, the decree of the trial court is reversed and the cause remanded for dismissal.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

CLARENCE POLSKI AND JERRY POLSKI, APPELLANTS, V. VAUGHN POWERS, APPELLEE.

377 N.W.2d 106

Filed December 6, 1985. No. 84-809.

1. **Insurance: Contracts.** It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued.
2. **Insurance: Contracts: Breach of Contract: Negligence.** Absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages.

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

Earl D. Ahlschwede of Ahlschwede, DeBacker & Truell, for appellants.

James D. Livingston of Cunningham, Blackburn, VonSeggern, Livingston & Francis, for appellee.

KRIVOSHA, C.J., CAPORALE, and SHANAHAN, JJ., and GARDEN, D.J., and COLWELL, D.J., Retired.

KRIVOSHA, C.J.

Clarence Polski and Jerry Polski, father and son (hereinafter jointly referred to as Polskis), appeal from a judgment entered by the district court for Howard County, Nebraska, granting summary judgment in favor of the appellee, Vaughn Powers. The Polskis commenced this action by filing a petition against

Powers which contained two causes of action. The first cause of action alleged that Powers breached an agreement he had had with the Polskis to provide them with insurance protecting them from death loss to certain pigs which they raised. The second cause of action alleged that Powers was negligent by failing to inform the Polskis that the policy which they had purchased through Powers excluded coverage to livestock dying because of suffocation. They further alleged that Powers was negligent by failing to inform them that the exclusion for suffocation could be eliminated from their insurance policy by payment of an additional premium, and further by failing to explain and discuss the policy provisions and exclusions with them. For reasons more particularly set out hereinafter, we affirm the decision of the district court granting summary judgment in favor of Powers.

The facts of the case are without dispute in all material aspects. The Polskis have a farming operation near Elba in Howard County, Nebraska. Powers is an insurance agent for Farm Bureau Insurance Company of Nebraska and has been selling insurance to the Polskis, including coverage for their livestock, since 1956. The policy on the livestock, which apparently had been sold to the Polskis for many years, insured them against certain types of death losses to their livestock but specifically excluded loss caused in whole or in part by smothering.

In 1979 the Polskis constructed a confinement nursery for hogs on their farm and, for the first time, began to conduct a confined hog operation. The confinement nursery had a series of fans on the exterior of the building used to circulate air. Those fans are powered by electricity. On the morning of August 23, 1983, the Polskis discovered that lightning had struck near their farm, causing the fans in the confinement nursery to stop. Their backup electric generator also stopped, resulting in the suffocation and death loss of 226 pigs owned by the Polskis. The carrier, Farm Bureau Insurance Company of Nebraska, denied liability on the basis of the exclusion in the policy.

The evidence is without dispute that the policy clearly provides that death to livestock caused by suffocation is

excluded. There is no contention made that the policy is in any manner ambiguous or that if anyone read the policy he or she would be misled. The Polskis concede that they never read the policy until after the loss occurred, but maintain that Powers should have told them about the exclusion. The evidence further clearly establishes that the Polskis never specifically asked Powers to provide them coverage for a hog confinement operation or to change the livestock coverage which they had for a number of years, or to give them any advice with regard to obtaining coverage for the livestock to be kept in the confinement building. The policy which was delivered to the Polskis by Powers was simply the same policy which had been purchased by the Polskis in previous years and before they started their hog confinement operation.

It is apparently the contention of the Polskis that Powers, upon seeing the construction of the confinement building, had a duty to advise the Polskis that their livestock coverage did not cover the hogs if they died of suffocation inside the confinement building. We do not believe that to be the law in this jurisdiction.

The instant case is somewhat similar to the situation presented to us in *Manzer v. Pentico*, 209 Neb. 364, 307 N.W.2d 812 (1981). In *Manzer* the plaintiff brought an action for damages against the defendant insurance agent for allegedly failing to obtain insurance to cover the plaintiff's custom farming operations. After the taking of depositions and filing of interrogatories, the district court sustained the insurance carrier's motion for summary judgment and dismissed the plaintiff's petition. In affirming the action of the district court, we said at 366, 307 N.W.2d at 813, that "it is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued." See, also, *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980); *Collegiate Mfg. Co. v. McDowell's Agency, Inc.*, 200 N.W.2d 854 (Iowa 1972).

While Powers may have been aware that the Polskis had built a new building and were keeping hogs in the building, he had no knowledge that they wished to change their insurance coverage or to obtain other or different coverage. While it may be good

business for an insurance agent to make such suggestions, absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages. See, *Fleming v. Torrey*, 273 N.W.2d 169 (S.D. 1978); *Johnson v. Tenuta & Co.*, 13 N.C. App. 375, 185 S.E.2d 732 (1972).

We believe it would be an unreasonable burden to impose upon insurance agents a duty to anticipate what coverage an individual should have, absent the insured's requesting coverage in at least a general way. Where the evidence, as here, discloses that this policy was the renewal of a policy which had been purchased by the Polskis for a number of years prior to the loss, and the Polskis never asked for coverage for death loss due to suffocation or even asked Powers for his advice regarding the new hog confinement operation, we believe that there was no genuine issue as to any material fact and Powers was entitled to judgment as a matter of law. See Neb. Rev. Stat. § 25-1332 (Reissue 1979). On that basis the decision of the district court in granting the summary judgment and dismissing Polskis' petition was correct. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FORREST W. HURLBURT, APPELLANT.

377 N.W.2d 108

Filed December 6, 1985. No. 85-074.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

Forrest W. Hurlburt, pro se.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Forrest W. Hurlburt appeals an order of the Cass County District Court dismissing Hurlburt's "Verified Motion to Vacate and Set Aside Conviction" made pursuant to the Nebraska Post Conviction Act. See Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1979). We affirm.

In 1983 Hurlburt was found guilty of manslaughter and sentenced to imprisonment for a term not less than 6 years and 8 months nor more than 20 years. Hurlburt appealed the conviction and sentence, arguing that the evidence was insufficient to support the conviction and that the sentence imposed by the district court was excessive. In *State v. Hurlburt*, 218 Neb. 121, 352 N.W.2d 602 (1984), this court affirmed the judgment of the district court.

On December 10, 1984, Hurlburt filed, pursuant to § 29-3001, a "Verified Motion to Vacate and Set Aside Conviction," contending, in substance, that various aspects of his jury trial denied constitutional guarantees under the Nebraska Constitution and the U.S. Constitution. Specifically, Hurlburt alleges that the district court committed error in (1) allowing misconduct on the part of a spectator; (2) allowing testimonial references to statements made by Hurlburt without warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); (3) allowing submission of an improper jury list; (4) allowing prosecutorial misconduct; (5) refusing to grant Hurlburt's motion for a change of venue; (6) improperly instructing the jury; and (7) refusing to dismiss a juror. Hurlburt also maintained that there was insufficient evidence to support his conviction.

On January 11, 1985, the district court, after reviewing the file and record in Hurlburt's case and without holding an evidentiary hearing, entered an order denying Hurlburt's motion, noting that the allegations contained in the motion did not raise questions involving "new evidence and that the post-conviction remedies cannot be used to secure further review of the issues already litigated." Hurlburt claims the

district court erred in denying his motion without holding an evidentiary hearing.

A motion for post conviction relief cannot be used to secure review of issues which either have already been litigated on a direct appeal, see, *State v. Boyer*, 220 Neb. 312, 369 N.W.2d 644 (1985), and *State v. Brown*, 220 Neb. 305, 369 N.W.2d 639 (1985), or which were known to defendant and counsel at time of trial, capable of being raised in a direct appeal, but not raised in defendant's direct appeal, see, *State v. Shepard*, 208 Neb. 188, 302 N.W.2d 703 (1981), *State v. Weiland*, 190 Neb. 111, 206 N.W.2d 336 (1973), and *State v. Lincoln*, 186 Neb. 783, 186 N.W.2d 490 (1971). In considering Hurlburt's direct appeal this court rejected Hurlburt's claim that the evidence was insufficient to support this conviction. Moreover, at the time of trial Hurlburt and his counsel had knowledge of the matters raised in the remaining allegations contained in Hurlburt's motion and could have raised such matters as part of Hurlburt's direct appeal. In this appeal Hurlburt suggests that he was denied effective assistance of counsel, but such issue was not raised by Hurlburt's verified motion and, therefore, was not presented to the district court as a question concerning post conviction relief. Hurlburt offers no explanation why the matters presented in his motion could not have been and were not raised as a part of his direct appeal.

Since the file and record in this case reveal that Hurlburt's motion to vacate and set aside his conviction does not raise matters entitling Hurlburt to relief under the Post Conviction Act, the district court properly denied Hurlburt an evidentiary hearing. See *State v. Williams*, 218 Neb. 618, 358 N.W.2d 195 (1984).

As this court stated in *State v. Weiland, supra* at 113, 206 N.W.2d at 338, "[t]here must be an end to litigation."

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HERBERT HOPKINS, JR., APPELLANT.

377 N.W.2d 110

Filed December 6, 1985. No. 85-121.

1. **Sexual Assault: Evidence.** Neb. Rev. Stat. § 28-321(2) (Cum. Supp. 1984) excludes evidence of a victim's past sexual behavior unless evidence offered by the defendant at an in camera hearing shows that (1) the victim's past sexual behavior with anyone other than the defendant has some bearing on the question whether the defendant is the source of physical evidence in the prosecution for sexual assault or (2) the victim's past sexual behavior with a defendant is related to the issue of the victim's consent to the sexual act involved in the prosecution of the defendant, provided that such evidence demonstrates some reasonably associative relationship between the victim's past sexual behavior and the sexual act for which the defendant is prosecuted and, further provided, that such evidence shows a victim's pattern of conduct or behavior which may be construed as consent to the sexual act charged against the defendant.
2. _____: _____. Admissibility of evidence concerning a victim's past sexual behavior with a defendant is controlled by Neb. Rev. Stat. § 28-321(2)(b) (Cum. Supp. 1984), which is a statutory species of relevant evidence and permits evidence of a victim's prior sexual relations with a defendant when such evidence is offered by the defendant on the issue of whether the victim consented.
3. _____: _____. For the purposes of Neb. Rev. Stat. § 28-321(2)(b) (Cum. Supp. 1984), in order that a victim's past consensual sexual behavior with a defendant be admitted as evidence relevant to a charge of sexual assault, the defendant must, by offer of proof at the in camera hearing, adduce some evidence tending to prove a defendant's claim that the victim consented to the sexual act which is the subject of the prosecuted charge against the defendant.
4. _____: _____. Although evidence of a victim's past sexual behavior may be admissible under Neb. Rev. Stat. § 28-321(2)(b) (Cum. Supp. 1984) on the issue of consent, the trial court, nevertheless, may apply the balance found in Rule 403 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-403 (Reissue 1979)), that is, exclusion if the probative value of the otherwise relevant evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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

Arthur C. Toogood, Adams County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Timothy E. Divis, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Herbert Hopkins, Jr., appeals his conviction and sentence for first degree forcible sexual assault, after a bench trial in the district court for Adams County. We affirm the judgment of the district court.

In her Hastings home the victim, age 22, was babysitting a neighbor's little girl on the night of August 17, 1984. After putting the neighbor's child and victim's two children to bed, the victim retired around 10 p.m., wearing pajamas and panties. The victim was later awakened by her neighbor knocking on the front door to pick up her child. After the neighbor and her child left, the victim returned to bed but was again awakened by a knock at the front door sometime during the early morning of August 18. Half-awake and believing that her neighbor was returning, the victim opened the door and found Herbert Hopkins, an acquaintance of the victim and her husband. Hopkins stepped into the living room, where the victim informed Hopkins that her husband was not home. The victim's Doberman pinscher, "a pretty friendly dog," jumped on Hopkins. When the dog had calmed down, Hopkins resumed conversation with the victim and suggested sexual relations. The victim asked Hopkins to leave, and Hopkins "smacked" the victim in the left corner of her mouth. As the victim, bleeding from a lacerated or split lip, started for the kitchen, Hopkins grabbed her from behind, placed the victim's neck in an arm-vise, and began choking or strangling the victim until she could not breathe. Hopkins demanded that the victim remove her panties, which she did, and slapped the victim on the right side of her face before sexually penetrating the victim.

As soon as Hopkins left the victim's house, the victim ran to the home of the neighbor for whom she had been babysitting. The time was approximately 3 a.m., according to the neighbor who was awakened by the victim's beating on the door and screaming "Help me. Help me." At the neighbor's, the victim—hysterical, crying, and blood-covered, with her lip "swollen up"—recounted that "Herb had hit her" and "Herb

had attacked her." Ten minutes later, the neighbor went to the victim's house to get the children of the victim and saw blood in the kitchen and living room. On August 18 the victim reported the assault to the Adams County sheriff and was examined at the emergency room of a local hospital. The examining physician found a "T-shaped laceration of the upper left lip with a lot of swelling in that same area," and also noted a laceration inside the victim's mouth at the "gum line" as well as a bruise with a "purplish-blue color like a fresh bruise would be" beneath the victim's left jaw. Authorities recovered not only a blood-soaked rag used to wipe blood from the floor of the victim's house but the victim's bloodstained panties and pajamas as well. Sheriff's personnel took photographs depicting the victim's physical injuries.

In the evening of August 18, Deputy Sheriff Gordon Sidlow went to Hopkins' home and transported him to the sheriff's office. After *Miranda* admonitions, Hopkins gave a tape-recorded, and later transcribed, statement to deputy sheriffs. Hopkins stated that he had been drinking on the night of August 17 but could not recall his whereabouts during the early morning of August 18. Hopkins answered "Yes," when asked if he might have struck the victim; "Possibly" and "Probably could have" to inquiries whether he had sexual relations with the victim; and "I don't know. Could be," when asked whether he had sexual relations with the victim against her will on August 18. While maintaining he could not recall his whereabouts during the morning of August 18, Hopkins did have a vague recollection of the victim's Doberman jumping on him. Hopkins was arrested on August 19.

On September 26, Hopkins was arraigned on the information charging him with first degree forcible sexual assault in violation of Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1979) and entered a plea of not guilty.

Pursuant to Neb. Rev. Stat. § 28-321(1) (Cum. Supp. 1984), Hopkins notified the county attorney concerning Hopkins' intention to offer evidence of the victim's past sexual behavior and then filed a "Motion to Allow Evidence of Past Sexual Behavior," seeking an in camera hearing to establish the admissibility of (1) the victim's past sexual relations with

Hopkins, claimed to be relevant to the issue of the victim's consent to the sexual act charged in the information, and (2) the victim's past sexual relations with persons other than Hopkins, claimed to be relevant to the question of identifying the source of the State's physical evidence to be used in establishing Hopkins' contact with the victim.

At the in camera hearing authorized by § 28-321(2), Hopkins offered proof consisting solely of the victim's testimony, that is, during the 2-month period from April to May 1984, the victim had sexual relations with Hopkins on five separate occasions in the presence of the victim's husband who joined Hopkins in sexual intercourse with the victim. No evidence was presented concerning Hopkins' presence in the victim's home during the early hours of August 18, except the victim's testimony about her violent contact with Hopkins. At conclusion of the hearing, the court determined that evidence of the five instances of the victim's prior sexual activity constituted a "pattern of behavior," was "relevant on the issue of consent," and, therefore, was admissible. The court overruled Hopkins' motion regarding admission of evidence concerning the victim's prior sexual relations with persons other than Hopkins.

The State filed a motion for rehearing regarding the court's decision to admit evidence about the five episodes of the victim's prior sexual acts with Hopkins. After hearing argument on the State's motion, the court set aside its previous order and ruled that Hopkins' offer of proof was insufficient to establish relevancy of the victim's past sexual behavior.

Hopkins waived a trial by jury. During the bench trial, the State's evidence consisted of testimony from the victim, who related the details of Hopkins' sexual assault on her; the victim's neighbor and another, who described the victim's condition upon arrival at the neighbor's residence early on August 18; the emergency room physician, who described the victim's condition, including injuries sustained; and Deputy Sidlow—all as previously set forth in this opinion. The State introduced physical evidence, including the victim's clothing and the blood-soaked rag, and also introduced the photographs depicting the victim's split lip and other bodily injury. Also received in evidence was Hopkins' statement given to sheriff's

personnel on August 18.

Responding to the State's case, Hopkins called Sipo Collins, who testified that Hopkins and he had been drinking in Grand Island on the evening of August 17, returned to Hastings in Hopkins' car around 1:30 a.m. on August 18, and went to a house in the locality of the victim's residence, where Hopkins parked his car in the driveway. While Collins remained in the car, Hopkins knocked at the door of the house, entered, and reappeared about 15 minutes later. According to Sipo Collins, there was nothing out of the ordinary, and they then drove around Hastings for a while. Hopkins testified about his drinking with Collins during the evening of August 17, leaving Grand Island around 1 a.m. on August 18, and not being able to remember anything about the early morning of August 18 except the victim's Doberman jumping on him.

Upon conclusion of all evidence, the court found Hopkins guilty of first degree forcible sexual assault and, after a presentence investigation and report, sentenced Hopkins to the Nebraska Penal and Correctional Complex for a term of 3 to 7 years.

Hopkins contends the district court erred in (1) refusing to admit evidence of the victim's past sexual activity with Hopkins; (2) refusing to sustain Hopkins' motion to dismiss the information as the result of insufficient evidence and lack of corroboration; and (3) refusing to place Hopkins on probation and imposing a sentence which was excessive and disproportionate to the severity of the offense.

Hopkins' first assignment of error requires that we, for the first time, examine § 28-321 pertaining to admissibility of evidence regarding a victim's past sexual behavior. Background for § 28-321 is noteworthy.

For years, in passing upon admissibility of evidence concerning a victim's past sexual activity, courts have considered a victim's past sexual behavior as relevant to the issue of consent to the sexual act for which a defendant was being prosecuted. See Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977). The "logical underpinnings" of that view, although shaky in the extreme, have been well documented, see Berger,

supra at 22-29, and were, perhaps, epitomized in a 1915 decision by the Tennessee Supreme Court: "[N]o impartial mind can resist the conclusion that a female who has been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure." *Lee v. State*, 132 Tenn. 655, 658, 179 S.W. 145 (1915). No less a distinguished scholar than Dean Wigmore maintained a victim's character for chastity should be admitted on the issue of a victim's overall "credibility." 1A J. Wigmore, Evidence in Trials at Common Law § 62 (Tillers rev. 1983).

In historical perspective, Nebraska was no exception and, generally, recognized admissibility of evidence regarding a rape victim's past consensual sexual behavior. For instance, in *Frank v. State*, 150 Neb. 745, 35 N.W.2d 816 (1949), this court, citing 3 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law §§ 924*a* and 979 (3d ed. 1940), held that it was

> prejudicial error to exclude any direct competent evidence not too remote in time, showing specific immoral or unchaste acts and conduct by [the victim] with others, not only for the purpose of being considered by the jury in deciding the weight and credibility of her testimony generally, but for the purpose of inferring the probability of consent and discrediting her testimony relating to force or violence used by defendant in accomplishing his purpose and her claimed resistance thereto.

150 Neb. at 753, 35 N.W.2d at 822. Likewise, in *State v. Hunt*, 178 Neb. 783, 135 N.W.2d 475 (1965), this court dealt with the admissibility of specific instances of a victim's consensual sexual activity, holding that evidence of a victim's previous sexual relations with others was admissible as a "circumstance on the issue of consent." *Id.* at 787, 135 N.W.2d at 478. Thus, a rape victim's past sexual behavior became substantive evidence from which to infer consent to the sexual act involving an alleged rapist.

Visions of detailed disclosure required by an evidentiary rule applied in a public courtroom may have been a deterrent to a victim's reporting rape. Well-founded or speculative prospects of an extensive inquiry into their sex lives prompted some rape

victims to forgo the additional trauma of a courtroom ordeal and refuse to assist prosecution and punishment of a brutal and barbaric act. As a result of admitting evidence about a victim's previous sexual behavior, a rape victim was frequently compelled to answer embarrassing and sometimes cynical or painful questions on cross-examination about her sexual activities occurring before the event for which an alleged rapist was prosecuted. Grueling and excruciating cross-examination of a rape victim often achieved only evidence having questionable relevance to the case being tried. No longer the accuser, the victim was forced to defend herself against accusations made on varying and nebulous notions of unchastity, impurity, and immorality. See Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977). See, also, Bohmer & Blumberg, *Twice Traumatized: the rape victim and the court*, 58 Judicature 391 (1975); Comment, *The Rape Victim: A Victim of Society and the Law*, 11 Willamette L.J. 36 (1974).

Often, legislative response to the problem in prosecuting rape cases was a "rape shield law" designed to limit courtroom inquiry into a victim's past sexual activities. At the forefront of these laws was Fed. R. Evid. 412, passed in 1978, in part, to govern the admissibility of a victim's prior sexual relations as evidence in rape prosecutions in federal courts, but also to serve as a model and impetus for needed changes in state laws. See 124 Cong. Rec. 36,256 (1978) (statement of Sen. Bayh). Federal Rule 412 precludes admission of reputation or opinion evidence regarding a victim's past sexual activities and restricts admissibility of specific instances of past sexual activity to situations involving a victim's (1) relations with third persons when offered by the accused on the issue of the source of semen or injury or (2) relations with the accused when offered by the accused on the issue of consent. The vast majority of states have adopted some variant rule of evidence substantially similar to federal Rule 412. See 1A J. Wigmore, Evidence in Trials at Common Law § 62 n.11 (Tillers rev. 1983).

In 1975 the Nebraska Legislature enacted Neb. Rev. Stat. §§ 28-408.01 et seq. (Reissue 1975) as an overall revision of sexual assault legislation designed to "protect the dignity of the

victim at all stages of the judicial process." § 28-408.01. That 1975 legislation authorized an in camera hearing to determine whether the victim's past sexual conduct was relevant to a pending prosecution. Section 28-408.05(3) contained an exclusionary provision that

> [s]pecific instances of prior sexual activity between the victim and any person other than the defendant shall not be admitted into evidence . . . unless consent by the victim is at issue, when . . . such activity shows a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

Although the Legislature in 1975 "adopted a stricter rule than was formerly the case regarding the admissibility of evidence of a sexual assault victim's past sexual conduct," *State v. Tiff*, 199 Neb. 519, 527, 260 N.W.2d 296, 301 (1977), § 28-408.05(3) did not address admissibility of a victim's past sexual activity with a defendant charged in a rape case and did not impose a specific bar to admitting evidence of a victim's previous sexual relations with anyone other than a defendant accused of rape. In 1977 the Eighty-fifth Legislature, First Session, passed L.B. 38 which recodified § 28-408.05 at Neb. Rev. Stat. §§ 28-321 through 28-323 (Cum. Supp. 1978).

Eventually, in 1984 the Eighty-eighth Legislature, Second Session, enacted L.B. 79, now codified as § 28-321 (Cum. Supp. 1984) as follows:

> (1) If the defendant intends to offer evidence of specific instances of the victim's past sexual behavior, notice of such intention shall be given to the prosecuting attorney and filed with the court not later than fifteen days before trial.
>
> (2) Upon motion to the court by either party in a prosecution in a case of sexual assault, an in camera hearing shall be conducted in the presence of the judge, under guidelines established by the judge, to determine the relevance of evidence of the victim's or the defendant's past sexual behavior. Evidence of a victim's past sexual behavior shall not be admissible unless such evidence is: (a) Evidence of past sexual behavior with persons other

> than the defendant, offered by the defendant upon the issue whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair; or (b) evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

Instead of providing an additional and separate rule in the Nebraska Evidence Rules (Neb. Rev. Stat. §§ 27-101 et seq. (Reissue 1979 & Cum. Supp. 1984)), the Legislature, in enacting § 28-321, still sought a parallel to federal Rule 412. See Introducer's Statement of Intent, L.B. 79, Judiciary Committee, 88th Leg., 2d Sess. (Jan. 26, 1983). An objective of § 28-321, as well as federal Rule 412, is a restriction on admissibility of a victim's past sexual behavior as evidence in sexual assault cases. Patterned on federal Rule 412, § 28-321(2) excludes evidence of a victim's past sexual behavior unless evidence "offered by the defendant" at an in camera hearing shows that (1) the victim's past sexual behavior with anyone other than the defendant has some bearing on the question whether the defendant is the source of physical evidence in the prosecution for sexual assault or (2) the victim's past sexual behavior with a defendant is related to the issue of the victim's consent to the sexual act involved in the prosecution of the defendant, provided that such evidence demonstrates some reasonably associative relationship between the victim's past sexual behavior and the sexual act for which the defendant is prosecuted and, further provided, that such evidence shows a victim's pattern of conduct or behavior which may be construed as consent to the sexual act charged against the defendant. See *People v Williams*, 416 Mich. 25, 330 N.W.2d 823 (1982) (necessity of "logical relevance" between the prior sexual acts and the issue of consent). Implicit in § 28-321(2)(b) is an evidentiary syllogism. Major: The victim's past sexual behavior

with the defendant was consensual. Minor: The victim's behavior in the present prosecution is the type of activity in which the victim participated with the defendant in the past. Conclusion: Therefore, the victim's behavior in the present prosecution was consensual.

Admissibility of evidence concerning a victim's past sexual behavior with a defendant is controlled by § 28-321(2)(b), which is a statutory species of relevant evidence and permits evidence of a victim's prior sexual relations with a defendant "when such evidence is offered by the defendant on the issue of whether the victim consented." This language found in § 28-321 is virtually identical with that in federal Rule 412. In reference to federal Rule 412, some authors have concluded that a victim's past sexual conduct is admissible "only when the defense, in effect, admits the defendant had intercourse with the victim but wishes to show that she was a willing participant in the act." 23 C. Wright & K. Graham, Federal Practice and Procedure § 5389 at 606-07 (1980). According to Wright and Graham, the court should determine whether consent is a contested issue by "examining the evidence [at the in camera] hearing." 23 C. Wright & K. Graham, *supra* § 5389 at 606. Nevertheless, the Nebraska Legislature has enacted § 28-321(2)(b) with the manifest intent to restrict admissibility of evidence concerning a victim's past sexual behavior with a defendant. In authorizing an in camera hearing for adduction of evidence establishing relevancy of a victim's prior sexual behavior, and by referring to evidence "offered by the defendant on the issue of whether the victim consented," the Legislature has imposed a condition for admissibility of evidence concerning a victim's past sexual behavior with a defendant, namely, relevance limited to those cases where a defendant at an in camera hearing has satisfied the requirement of a prima facie showing that the victim has consented to the sexual act charged against the defendant as a crime. Thus, for purposes of § 28-321(2)(b), we hold, in order that a victim's past consensual sexual behavior with a defendant be admitted as evidence relevant to a charge of sexual assault, the defendant must, by offer of proof at the in camera hearing, adduce some evidence tending to prove a defendant's claim that the victim

consented to the sexual act which is the subject of the prosecuted charge against the defendant. Our construction of § 28-321(2)(b) conforms with the view held by a majority of courts before the advent of rape shield laws, namely, the requirement that a defendant by appropriate evidence must raise the issue of a victim's consent before evidence of a victim's previous consensual sexual behavior toward the defendant is admissible. See, *State v. Cunningham*, 97 Idaho 650, 551 P.2d 605 (1976); *State v. Settle*, 111 Ariz. 394, 531 P.2d 151 (1975); *People v. Schafer*, 4 Cal. App. 3d 554, 84 Cal. Rptr. 464 (1970); *Shapard v. State*, 437 P.2d 565 (Okla. Crim. 1967); *People v. Gabler*, 111 Ill. App. 2d 121, 249 N.E.2d 340 (1969); *State v. Sims*, 30 Utah 2d 357, 517 P.2d 1315 (1974). See, also, *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (1978) (under New Mexico's "rape shield law," absent a showing sufficient to raise the issue of a victim's consent, past sexual conduct is inadmissible in the prosecution of a criminal assault case).

Hopkins contends the district court should have admitted evidence of the five prior incidents of sexual activity involving Hopkins, the victim, and the victim's husband. Hopkins argues that, under § 28-321(2)(b), previous sexual encounters with the victim were relevant to the issue of the victim's consent to the sexual relations on which the criminal prosecution was based. At the in camera hearing, however, the only evidence offered by Hopkins consisted of the victim's acknowledgment of her five previous incidents involving sexual relations with Hopkins. Hopkins produced no evidence indicating that the victim had consented to sexual relations with him on August 18. Consequently, at the in camera hearing there was no evidence of any express or inferential consent on the part of the victim. Hopkins has failed to present evidence supplying the minor premise in the evidentiary syllogism implicit in § 28-321(2)(b). The court properly excluded evidence of the victim's past sexual relations with Hopkins.

We in no manner imply that the State is relieved of its burden to prove by evidence beyond a reasonable doubt that sexual penetration was accomplished by a defendant through force. We do, however, acknowledge that admissibility of evidence concerning a victim's past sexual behavior involves evidentiary

and patent policy considerations independent of the Nebraska Evidence Rules. We also note that once a defendant has properly adduced evidence of a victim's consent to the act charged in a present criminal prosecution, the court must still determine whether a victim's past sexual behavior is, under § 28-321(2)(b), relevant to the issue of consent. The court must consider the question whether the victim's past sexual behavior "shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent." Further, although evidence of a victim's past sexual behavior may be admissible under § 28-321(2)(b) on the issue of consent, the trial court, nevertheless, may apply the balance found in Neb. Evid. R. 403, that is, exclusion if the probative value of the otherwise relevant evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In his second assignment of error, Hopkins contends that the victim's testimony was not sufficiently corroborated and that there is insufficient evidence to support his conviction. We dispatch that assignment of error by reaffirming the rule enunciated in several cases.

> The general rule is that testimony of the victim of a sexual assault must be corroborated as to material facts and circumstances which tend to support the victim's testimony and from which, together with the victim's testimony as to the principal fact, an inference of guilt may be drawn. Corroboration of the principal act constituting the offense is not required.

State v. Craig, 219 Neb. 70, 79, 361 N.W.2d 206, 214 (1985).

In the present case the record is replete with evidence sufficient to corroborate the victim's testimony and establish Hopkins' commission of the crime charged. The victim testified positively about sexual penetration by Hopkins. Evidence shows that the victim suffered bruises to her body and received a harsh blow to her mouth. The victim's neighbor testified that the hysterical victim—bruised, battered, and bloody—came to the neighbor's house in the early morning of August 18 and

complained that she had been struck and attacked by Hopkins. Hopkins virtually admitted his presence at the victim's home sometime during the early morning of August 18 when he testified about his recollection of the victim's jumping Doberman. Testimony of Sipo Collins, Hopkins' companion on August 17 and 18, provides some circumstantial evidence, as well. The victim's testimony is corroborated concerning material facts and circumstances from which an inference of guilt may be drawn. See *State v. Craig, supra*. Since the victim's testimony was sufficiently corroborated, there can be no question that the evidence was sufficient to sustain Hopkins' conviction.

Finally, Hopkins asserts that the sentence imposed by the district court, namely, imprisonment for a term of 3 to 7 years, is excessive. Forcible sexual assault is a Class II felony punishable by imprisonment for a term of 1 to 50 years. See Neb. Rev. Stat. §§ 28-319(2) and 28-105(1) (Reissue 1979).

The sentence imposed by the district court was well within the statutory limits as punishment for a Class II felony. Probation was an optional sentence available to the district court but was rejected as inappropriate under the circumstances. We are unable to conclude and state that the district court abused its discretion in sentencing a man convicted of first degree forcible sexual assault to imprisonment for a term of 3 to 7 years. Therefore, the sentence imposed is affirmed. See, *State v. Sims*, 213 Neb. 708, 331 N.W.2d 255 (1983); *State v. Schmidt*, 213 Neb. 126, 327 N.W.2d 624 (1982).

The judgment of the district court is correct in all respects and, therefore, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL T. MICHALSKI, APPELLANT.

377 N.W.2d 510

Filed December 6, 1985. No. 85-145.

1. **Constitutional Law: Equal Protection.** Equal protection guarantees that similar persons will be dealt with similarly by the government.
2. **Statutes: Constitutional Law: Equal Protection: Appeal and Error.** The standard of review used by courts when reviewing statutes challenged on equal protection grounds depends upon the nature of the classification and the rights affected.
3. **Statutes: Constitutional Law: Appeal and Error.** Under the strict scrutiny test, strict congruence must exist between the classification and the statute's purpose. The end the legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists.
4. _____: _____: _____. If the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end.
5. **Licenses and Permits: Motor Vehicles: Constitutional Law.** Driving is not a fundamental right, and drunk drivers are not a suspect class.
6. **Statutes: Constitutional Law: Presumptions.** Given a statute's presumption of validity and the legislature's inherent power to classify for legitimate purposes, a challenger bears a heavy burden in demonstrating that the classification is arbitrary and not rationally related to a legitimate governmental end.
7. **Statutes: Constitutional Law.** An overinclusive classification burdens a wider than necessary range of individuals, extending beyond those persons possessing the trait contributing to the mischief or evil the legislature seeks to eradicate.
8. _____: _____. An underinclusive classification exists when all persons in the class are indeed perpetrators of the mischief or evil the state wishes to eliminate, but others who possess the same undesirable trait remain outside the class.
9. **Statutes: Motor Vehicles: Constitutional Law.** The classification made in Neb. Rev. Stat. § 39-669.07 (Reissue 1984), that is, the line drawn between drivers who are drunk and drivers who are sober, is one rationally related to a legitimate governmental end.
10. **Licenses and Permits: Motor Vehicles: Constitutional Law: Due Process.** A driver's license is an "entitlement," the revocation or suspension of which requires procedural due process guaranteed by the fourteenth amendment.
11. **Statutes: Motor Vehicles: Constitutional Law: Due Process: Appeal and Error.** Because the right to travel has been characterized as fundamental, courts examine statutes impairing that right using the strict scrutiny standard of review.
12. **Statutes: Constitutional Law.** To be in a position to challenge the constitutionality of a statute, a party must be adversely affected by the provisions at issue.
13. **Criminal Law: Constitutional Law: Sentences.** The eighth amendment's

proscription of cruel and unusual punishment prohibits not only barbaric punishments but also sentences that are disproportionate to the crime committed.

14. **Criminal Law: Constitutional Law: Sentences: Appeal and Error.** When evaluating whether a sentence constitutes cruel and unusual punishment, courts consider (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals for like offenses in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.
15. **Criminal Law: Constitutional Law: Sentences.** Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.

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

Jeffrey M. Doerr of Kryger Law Office, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

KRIVOSHA, C.J., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and FAHRNBRUCH, D.J.

WHITE, J.

On July 17, 1982, the Nebraska Unicameral joined a growing number of state legislatures responding to citizens' demands for strict laws dealing with drunk drivers on the nation's public roads. On this date 1982 Neb. Laws, L.B. 568, which amended Nebraska's existing drunk driving laws, went into effect. Intended as a comprehensive program reflecting a "get-tough" attitude toward drunk drivers, the amendments affected a total of nine separate sections of the then-existing drunk driving statutes. See Floor Debate, L.B. 568, Judiciary Committee, 87th Leg., 2d Sess. 8626-27 (Mar. 10, 1982) (statement of Sen. Nichol); Comment, *L.B. 568: Nebraska's New Drunken Driving Law*, 16 Creighton L. Rev. 90 (1982). At issue in this case is the constitutionality of one of those statutes, Neb. Rev. Stat. § 39-669.07 (Reissue 1984).

Michael T. Michalski was driving his 1969 Chevrolet pickup on a public road in Antelope County at approximately 7:20 p.m. on August 26, 1984. Deputy Ralph Black of the Antelope County Sheriff's Department observed Michalski's vehicle to be

traveling at a high rate of speed and in an erratic manner. When Deputy Black stopped the vehicle, he discovered that Michalski was driving on a suspended driver's license and that an open can of beer was in the pickup. After administering various field sobriety tests, all of which Michalski failed, Deputy Black placed Michalski under arrest for drunk driving and transported him to the sheriff's office in Neligh, Antelope County, Nebraska. There, Deputy Black read the implied consent form to Michalski, after which he turned Michalski over to another officer for the purpose of administering a breath alcohol test. The result of the test showed that Michalski had a blood alcohol content of .215.

Michalski was charged with driving while under the influence of alcohol, third offense. On September 14, 1984, he filed a motion to quash, alleging that § 39-669.07 violated numerous state and federal constitutional provisions. The Antelope County Court overruled Michalski's motion and, proceeding on stipulated facts and exhibits, found the defendant guilty of driving while under the influence of alcohol, third offense. The court proceeded immediately to an enhancement hearing, after which, pursuant to § 39-669.07(3), it sentenced Michalski to 120 days in the county jail, a $500 fine plus costs, and permanent revocation of his driver's license. The Antelope County District Court affirmed the conviction and sentence.

Michalski appeals from this judgment, assigning as error the county and district courts' findings on the constitutionality of § 39-669.07. Specifically, Michalski argues that the statute deprives him of equal protection of the law, due process of law, and the right to travel. He further contends that the statute's provisions violate the principle of separation of powers and constitute cruel and unusual punishment. His constitutional challenges are directed primarily, though not exclusively, at the language in § 39-669.07(3) providing for permanent revocation of an operator's license upon the individual's third drunk driving conviction. In pertinent part § 39-669.07 reads:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or

when that person has ten-hundredths of one per cent or more by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine. Any person who shall operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or while having ten-hundredths of one per cent by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine shall be deemed guilty of a crime and, upon conviction thereof, shall be punished as follows:

. . . .

(3) If such person (a) has had two or more convictions under this section since July 17, 1982, (b) has been convicted two or more times under this section as it existed prior to July 17, 1982, (c) has been convicted two or more times under a city or village ordinance enacted pursuant to this section either prior or subsequent to July 17, 1982, or (d) has been convicted as described in subdivisions (3)(a) to (3)(c) of this section 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.

If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of one year, and such order of probation shall include as one of its conditions confinement in the city or county jail for seven days.

For each conviction under this section, the court shall as part of the judgment of conviction make a finding on the record as to the number of the defendant's prior convictions under this section prior or subsequent to July 17, 1982, and the defendant's prior convictions under a

> city or village ordinance enacted pursuant to this section either prior or subsequent to July 17, 1982. The defendant shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions.

We examine first Michalski's claim that § 39-669.07(3) deprives him of equal protection of the law.

The thrust of Michalski's argument is that the statute classifies unreasonably and arbitrarily because it provides for no exemption for those who require private motor vehicle transportation to, from, or during their employment. Permanent revocation of one's driver's license under these circumstances means the loss of livelihood for some thrice-convicted drunk drivers. On the other hand, those who are unemployed or who do not depend upon private motor vehicle transportation in their jobs feel the effects of the penalty far less severely. This dissimilar impact, Michalski argues, exemplifies a classification that is arbitrary, unreasonable, and violative of state and federal constitutional guarantees.

U.S. Const. amend. XIV, § 1, provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." See, also, Neb. Const. art. I, § 1. Equal protection guarantees that similar persons will be dealt with similarly by the government. See generally J. Nowak, R. Rotunda & J. Young, Constitutional Law, *Equal Protection* ch. 16, § IB (1983). It does not foreclose government from classifying persons or from differentiating one class from another when enacting legislation. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911). As one commentator has put it, "The equal protection of the laws is a 'pledge of the protection of equal laws.' But laws may classify. And 'the very idea of classification is that of inequality.' " Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 344 (1949) (quoting *Atchison, Topeka &c. Railroad v. Matthews*, 174 U.S. 96, 19 S. Ct. 609, 43 L. Ed. 909 (1899)).

The standard of review used by courts when reviewing

statutes challenged on equal protection grounds depends upon the nature of the classification and the rights affected. Although the U.S. Supreme Court has suggested a third standard appropriate when examining classifications based upon sex, *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), alienage, *Mathews v. Diaz*, 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976), and illegitimacy, *Trimble v. Gordon*, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977), two standards of review dominate equal protection analyses.

If the legislative classification involves either a suspect class, *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (race), or a fundamental right, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966) (voting), courts will analyze the statute with strict scrutiny. Under this test, strict congruence must exist between the classification and the statute's purpose. The end the legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists. On the other hand, if the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976). Upon a showing of a rational relationship between means and ends, courts will find such legislation constitutionally healthy.

Driving is not a fundamental right, and drunk drivers are not a suspect class. See, *Ruge v. Kovach*, 467 N.E.2d 673 (Ind. 1984); *Yeckley v. Com., Dept. of Transp.*, 81 Pa. Commw. 576, 474 A.2d 71 (1984); *Com., Dept. of Transp. v. Slater*, 75 Pa. Commw. 310, 462 A.2d 870 (1983). While the U.S. Supreme Court has blurred the distinction between "right" and "privilege" with respect to driving, the Court has not defined a driver's license as a "right" but, instead, has referred to it as an "entitlement" requiring some degree of due process in the revocation procedure. See *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). There also exists no

fundamental right to drive based upon a fundamental right of employment. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976); *Ruge v. Kovach, supra*. Finally, unlike the races, drunk drivers do not constitute a suspect class "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or regulated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

We therefore examine § 39-669.07 using the rational relation standard of review. As we have repeatedly held, state laws are accorded a presumption of constitutionality. *State v. Edmunds*, 211 Neb. 380, 318 N.W.2d 859 (1982). Further, the power of classification rests with the legislature, and we will not interfere with that power if real and substantial differences exist which afford a rational basis for classification. *State ex rel. Halloran v. Hawes*, 203 Neb. 405, 279 N.W.2d 96 (1979). Given a statute's presumption of validity and the legislature's inherent power to classify for legitimate purposes, a challenger bears a heavy burden in demonstrating that the classification is arbitrary and not rationally related to a legitimate governmental end.

Although courts afford legislatures considerable deference under the rational relation test, some restraints exist. As we have said, legislative classifications must be reasonable and not arbitrary. *Nebbia v. New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934); *Linenbrink v. Chicago & N. W. Ry. Co.*, 177 Neb. 838, 131 N.W.2d 417 (1964). Those challenging a statute's reasonableness traditionally rely upon the argument that its classification is either overinclusive or underinclusive. See, e.g., *Jimenez v. Weinberger*, 417 U.S. 628, 94 S. Ct. 2496, 41 L. Ed. 2d 363 (1974).

An overinclusive classification burdens a wider than necessary range of individuals, extending beyond those persons possessing the trait contributing to the mischief or evil the legislature seeks to eradicate. See generally Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 at 348-50 (1949). An underinclusive classification exists when all persons in the class are indeed perpetrators of the

mischief or evil the state wishes to eliminate, but others who possess the same undesirable trait remain outside the class. *Id.* Finally, some classifications are so constitutionally infirm that they can be challenged on both overinclusive and underinclusive grounds. See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943).

Michalski's equal protection argument does not follow either of these traditional lines of attack. He does not and cannot contend that the statute as written excludes or includes improperly. No thrice-convicted drunk driver is excluded from the class, and no lesser offender or nonoffender is swept into a net of permanent license revocation.

Instead, Michalski relies upon the impact of the statute's permanent revocation sanction as demonstrative of an arbitrary classification. He claims that permanent revocation burdens persons who are not similarly situated, that is, those who depend on their vehicles in their livelihood and those who do not.

In support, he relies on this court's decision in *Creigh v. Larsen*, 171 Neb. 317, 106 N.W.2d 187 (1960). *Creigh* involved a statute fixing taxes on intangible personal property and assessing penalties for failure to report the property on tax returns. The tax rates on the particular classes of intangible property were statewide and uniform in application. The penalties, however, differed because they were computed by multiplying the actual value of omitted intangible property by the applicable rate for tangible property as fixed by varying mill levies in the state's districts. Although the valuation assessment on intangible property was uniform, the penalty varied, depending upon where the taxpayer lived. In effect, taxpayers who had committed identical violations of the taxing statute were paying disparate penalties.

Finding the penalty scheme invalid on equal protection grounds, the court stated the general rule:

> " 'The legislature may make a reasonable classification of persons, corporations and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the

> subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated.' "

Creigh, supra at 321, 106 N.W.2d at 190, quoting *State ex rel. Ralston v. Turner*, 141 Neb. 556, 4 N.W.2d 302 (1942).

The *Creigh* court found the classification to be rationally related to the legitimate state interests of tax assessment and tax collection. However, the problem with the statute in *Creigh*, and the critical difference between it and § 39-669.07, was that the magnitude of the offense as measured by the amount paid in penalties was dependent upon the valuation of tangible property in various state districts. The statute's penalty was incomplete until one of many highly divergent mill levies was applied to the value of omitted intangible property. It was this application of the tangible rate to intangible property that the court found to be arbitrary:

> But the application of the tangible rate to intangible property has no reasonable relation to the magnitude of the offense where the intangible rate is uniform throughout the state. It discriminates between members of the established class in that it produces varying penalties for identical offenses among members of the class.

Creigh, supra at 323, 106 N.W.2d at 191.

We believe that Michalski's reliance on *Creigh* is misplaced. We further believe that the classification made in § 39-669.07, that is, the line drawn between drivers who are drunk and drivers who are sober, is one rationally related to a legitimate governmental end. See *Kellum v. Thorneycroft, etc.*, 133 Ariz. 115, 649 P.2d 994 (1982). The penalty of permanent license revocation must and does operate uniformly on all members of the class because the statute classifies not on the basis of employment conditions or transportation requirements but on blood alcohol content and repeat offenses.

As part of his equal protection argument, Michalski also contends that § 39-669.07 is unconstitutional in that it exempts from its coverage mopeds, self-propelled invalid chairs, and vehicles operated upon rails. These exclusions are not direct. Rather, mopeds, self-propelled invalid chairs, and vehicles operated upon rails are exempted from the definition of

"motor vehicle" in Neb. Rev. Stat. § 39-602(53) (Reissue 1984), so that statutes like § 39-669.07, which pertain only to operators of "motor vehicles," automatically exclude operators of these three types of vehicles.

We do not agree with Michalski's position. We have already stated the general rule that classifications appearing in social or economic legislation require only a rational relationship between the state's legitimate interest and the means selected to accomplish that end. The ends-means fit need not be perfect; it need only be rational.

Consistent with its purpose of protecting the public from drunk drivers, the Legislature exempted mopeds and self-propelled invalid chairs from the statute's coverage presumably because the threat of harm to citizens from intoxicated operators of these vehicles is not as great as is the threat posed by an intoxicated driver of a vehicle of unlimited weight and speed. Further, the exemption of vehicles operated on rails is rational in light of the fact that another statute deals with intoxicated operators of these vehicles. Neb. Rev. Stat. § 74-706 (Reissue 1981). In sum, we cannot say that the classifications in § 39-602(53) as applied in § 39-669.07 are arbitrary and without rational bases.

We next consider Michalski's claim that § 39-669.07 denies him due process of law insofar as it does not provide him with a hearing prior to license revocation. The importance of the hearing, in Michalski's view, is linked to significant property and liberty interests at stake. Citing cases which have classified a driver's license as both a property and liberty interest, *State v. Moseng*, 254 Minn. 263, 95 N.W.2d 6 (1959), and *Matter of Schutt v. Macduff*, 205 Misc. 43, 127 N.Y.S.2d 116 (1954), he urges us to conclude that because no meaningful hearing is provided in the procedures of § 39-669.07, the statute deprives him of a protected interest without due process of law.

For a number of reasons we do not accept Michalski's proposition. The U.S. Supreme Court addressed the issue of whether and how much process is due in driver's license suspension proceedings in *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). Rather than relying upon the "right-privilege" distinction, the Court labeled a driver's license

an "entitlement," the revocation or suspension of which requires procedural due process guaranteed by the fourteenth amendment.

The process that is due must be "meaningful," *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965), and "appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

The Court found the Georgia financial responsibility statute at issue in *Bell* to be constitutionally impaired because it did not provide a forum, prior to license suspension, for the determination of a driver's liability following an accident. Liability was presumed and the license suspended automatically without any kind of hearing.

A significant difference exists between the Georgia statute and § 39-669.07. Section 39-669.07 is a penal statute which provides for a trial on the issue of Michalski's guilt, an enhancement hearing on the issue of Michalski's prior convictions, and a sentencing hearing where Michalski was provided the opportunity "to review the record of his . . . prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions." § 39-669.07(3). At each stage of the proceedings, Michalski was represented by counsel, either selected by him or by the court. Furthermore, the statute is clear in its terms and " 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' " *Richardson v. City of Omaha*, 214 Neb. 97, 102-03, 333 N.W.2d 656, 660 (1983).

In *Stauffer v. Weedlun*, 188 Neb. 105, 195 N.W.2d 218 (1972), this court found constitutional the procedures afforded in the statute providing for revocation of a driver's license under the point system. The relevant statute provided for neither notice nor hearing prior to revocation by the Department of Motor Vehicles.

The *Stauffer* court distinguished its facts from those in *Bell v. Burson, supra*, where the driver's license was automatically suspended under the financial responsibility law:

> A revocation for traffic violations under the point system of our statutes involves a substantially different situation than revocation under the financial responsibility acts. . . .
>
> . . . .
>
> The financial responsibility statutes in effect create without any hearing a presumption of fault. This, if we understand the footing of Bell v. Burson, *supra*, is their constitutional deficiency. Such a situation does not exist in the case here involved.

Stauffer, supra at 109, 112, 195 N.W.2d at 222-23.

We, too, see a significant difference between automatic license suspension under financial responsibility laws and revocation under the provisions of a criminal drunk driving statute. The process involved in § 39-669.07 is neither automatic nor presumptive, except in favor of Michalski's innocence. If anything, he was provided with heightened due process under the terms and conditions of § 39-669.07. Accordingly, we find no merit in Michalski's argument that the statute deprives him of due process of law.

We next address Michalski's contention that § 39-669.07 deprives him of his constitutionally protected right to interstate travel. As a necessary part of his argument, Michalski asserts that the right to travel interstate perforce includes a right to travel intrastate.

Because the right to interstate travel has been characterized as fundamental, *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971), and *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), courts examine statutes impairing that right using the strict scrutiny standard of review. Under this strict standard, Michalski urges, the statute cannot withstand constitutional scrutiny because the State's interest, while significant, is not compelling to the degree it justifies impairing a fundamental right. Furthermore, Michalski claims, the ends-means fit is not sufficiently congruent because alternatives less restrictive than permanent license deprivation exist by which to accomplish the State's purposes.

We do not believe that § 39-669.07 impairs Michalski's right to travel as it has been defined by the U.S. Supreme Court and

lower courts. The basic flaw in Michalski's argument is that he equates the right to travel with the right to travel by way of a particular mode of transportation. While the revocation of Michalski's driver's license limits his options as to method of transportation, it does not impair his right to travel or his right to reach a given destination. He continues to be able to travel within and without the state wherever and whenever he chooses.

We agree with the reasoning of the Colorado Supreme Court in *Heninger v. Charnes*, 200 Colo. 194, 613 P. 2d 884 (1980), where the court found that the revocation of one's driver's license does not burden the constitutional right to travel:

> Any incidental disadvantage in appellant's travel options is directly attributable to his voluntary and repeated violations of the traffic laws. *More importantly, such incidental disadvantage is of no constitutional significance to his basic right to travel interstate.* The revocation of appellant's license to drive in no manner impairs his freedom to move from state to state. He has been neither locked into nor fenced out of the state of Colorado and is as free to come and go at will as he was before the revocation.

(Emphasis supplied.) *Id.* at 198, 613 P.2d at 887.

Therefore, we find no merit in Michalski's argument that § 39-669.07 impairs his right to travel.

We turn next to Michalski's contention that § 39-669.07 violates the separation of powers doctrine, in that the statute sets mandatory conditions of probation. While he does not argue that the Legislature has no power to decree probation as punishment for certain offenses, Michalski claims that § 39-669.07, which establishes mandatory terms and conditions of probation for this offense, is a legislative encroachment into the judicial arena, violative of article II, § 1, of the Nebraska Constitution.

In *State v. Havorka*, 218 Neb. 367, 355 N.W.2d 343 (1984), we specifically left open the question of the Legislature's power to restrict the trial court's authority to place an individual on probation under whatever conditions the court determines. Because this court is not in the habit of rendering advisory

opinions, we similarly decline to reach the issue today. *State v. Hochstetler*, 214 Neb. 482, 334 N.W.2d 455 (1983).

To be in a position to challenge the constitutionality of a statute, a party must be adversely affected by the provisions at issue. Absent a justiciable dispute, we have no power to pass summarily on the constitutionality of a legislative act. *State ex rel. Nebraska Nurses Assn. v. State Board of Nursing*, 205 Neb. 792, 290 N.W.2d 453 (1980).

As a result of his third drunk driving conviction, Michalski had his driver's license permanently revoked, was fined $500 plus costs, and was sentenced to 120 days in jail. He was not placed on probation; therefore, he cannot challenge the provisions of § 39-669.07 pertaining to probation and its conditions, and we offer no opinion as to their constitutionality.

Finally, Michalski argues that the permanent license revocation penalty of § 39-669.07(3) violates state and federal constitutional provisions prohibiting cruel and unusual punishment. See, U.S. Const. amends. VIII and XIV; Neb. Const. art. I, § 9. Although Michalski does not raise it in his argument, article I, § 15, of the Nebraska Constitution requires that all penalties be proportioned to the nature of the offense. The U.S. Supreme Court has repeatedly held that the eighth amendment's proscription of cruel and unusual punishment prohibits not only barbaric punishments but also sentences that are disproportionate to the crime committed. See, e.g., *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983); *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910).

Michalski believes that § 39-669.07(3) cannot withstand constitutional scrutiny under the test enunciated by the Supreme Court in *Solem v. Helm, supra*. Specifically, he claims that the harshness of the penalty of permanent license revocation is not proportionate to the gravity of the offense and that the penalty is unconstitutionally severe when compared to penalties for the same offense in other jurisdictions.

We do not agree. *Solem* set forth the factors an appellate court should consider when evaluating whether a sentence constitutes cruel and unusual punishment. These factors are (1) the gravity of the offense and the harshness of the penalty, (2)

the sentences imposed on other criminals for like offenses in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Solem v. Helm, supra*; *State v. Brand*, 219 Neb. 402, 363 N.W.2d 516 (1985).

Regarding the first prong of the analysis, the *Solem* court stated that the gravity of an offense can be determined in part by comparing with other offenses the "harm caused or threatened to the victim or society." 463 U.S. at 292. Few would question the seriousness of the harm caused or threatened to the victim and society at the hands of a repeatedly intoxicated driver. The potential for death or serious injury is tragically high among those unfortunate enough to encounter a drunk driver on the road. Although drunk driving is not a crime of violence by penal code standards, a motor vehicle in the hands of a drunk driver is a weapon as surely as is a knife, gun, or club in the hands of an assailant. We have no difficulty concluding, as did the Legislature, that drunk driving is a serious offense, particularly when the defendant has previously committed the same act. *State v. Brand, supra.*

The second prong of the *Solem* analysis is not applicable here because § 39-669.07 apparently involves the only Class W misdemeanor in the state.

The third prong of the *Solem* test directs us to compare the sentence imposed with those existing in other states for the same offense. Our review of other states' statutes indicates that while permanent license revocation is among the harsher penalties, it is by no means unheard of. For example, under varying circumstances a repeatedly convicted drunk driver currently may lose his or her driving privileges forever in Vermont, South Carolina, North Carolina, and Connecticut. Vt. Stat. Ann. tit. 23, § 1208(d) (Supp. 1985); S.C. Code Ann. § 56-5-2990 (Law. Co-op. Supp. 1984); N.C. Gen. Stat. § 20-19(e) (1983); Conn. Gen. Stat. Ann. § 14-227a(h) (West Supp. 1984). In Colorado, license revocation is "indefinite" after the third offense and in no case is it less than 2 years. Colo. Rev. Stat. § 42-2-122(1)(i) (repl. 1984). In West Virginia and Virginia, revocation upon the third conviction is for 10 years and indefinitely thereafter, with reissue in the discretion of the commissioner of motor vehicles

(West Virginia) and the circuit court (Virginia). W. Va. Code § 17C-5-2(c) (1984); Va. Code § 46.1-421 (Cum. Supp. 1985). In Ohio, revocation can be for a period up to 10 years, Ohio Rev. Code Ann. § 4507.16 (Page Supp. 1984), and in Florida revocation is for not less than 10 years, Fla. Stat. Ann. § 322.28(3) (West Supp. 1985).

Based upon the foregoing analysis, we conclude that § 39-669.07(3) is constitutionally valid and does not constitute cruel and unusual punishment under either the state or federal Constitution. In this regard we stated in *State v. Brand, supra*, that the provisions in the Nebraska Constitution do not require more than do those of the eighth amendment of the U.S. Constitution. The Nebraska constitutional prohibition against cruel and unusual punishment "does not abridge the Legislature's power to select such punishment as it deems most effective in the suppression of crime." *State v. Ruzicka*, 218 Neb. 594, 598, 357 N.W.2d 457, 461 (1984). Neither does the requirement that all penalties be proportioned to the nature of the offense do so. *State v. Brand, supra*.

Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Reviewing courts grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes. *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). The constitutional provision preventing cruel and unusual punishment was not intended to abridge this legislative authority, *State v. Tucker*, 183 Neb. 577, 162 N.W.2d 774 (1968), and in assessing a punishment selected by a democratically elected legislature against the constitutional measure, courts presume that the sanction is valid, *Gregg v. Georgia, supra*. We conclude that Michalski has not met the burden of demonstrating that the revocation penalty of § 39-669.07(3) is either cruel, unusual, or disproportionate.

For the foregoing reasons the order of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF M.L.B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. J.B.W., APPELLANT.

377 N.W.2d 521

Filed December 6, 1985. No. 85-148.

1. **Parental Rights: Appeal and Error.** An order terminating parental rights is reviewed de novo on the record, giving great weight, where the evidence is in conflict, to the fact that the trial court observed the parties and witnesses and judged their credibility.
2. **Parental Rights.** An order terminating parental rights must be based on clear and convincing evidence.
3. _____. The primary consideration in any case involving termination of parental rights is the best interests of the child.
4. _____. It is generally in a child's best interests that a final disposition be made without delay.
5. _____. The right of a parent to custody and control of his or her children is not an inalienable right.
6. _____. The public has a paramount interest in the protection of the children from neglect.
7. **Appeal and Error.** It is the general rule that a ground of error must be raised and passed on in the intermediate court before it may be reviewed in a higher court.
8. **Parental Rights.** The fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated.
9. _____. There is no requirement for a court to implement a rehabilitation plan for the parents of a child found to be dependent and neglected.
10. _____. It is not the law in Nebraska that parental rights may not be terminated unless a parent is given a reasonable opportunity for rehabilitation.
11. _____. The court may order a parent to make reasonable efforts to rehabilitate, and a parent's failure in such rehabilitative efforts is another independent reason justifying termination of parental rights.
12. **Juvenile Courts: Parental Rights.** While there is no requirement that a juvenile court must institute a plan for rehabilitation of a parent, where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be reasonable and must be conducted under the direction of the juvenile court.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

Roberta S. Stick, for appellant.

Vincent Valentino, York County Attorney, and Charles W. Campbell, for appellee.

George E. Brugh, guardian ad litem.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

J.B.W., the natural mother of M.L.B., born August 30, 1975, has appealed from the January 21, 1985, order of the district court for York County which affirmed the March 7, 1984, order of the York County Court terminating her parental rights to M.L.B. pursuant to Neb. Rev. Stat. § 43-292(2) and (6) (Reissue 1984). M.L.B. is the appellant's only child.

An order terminating parental rights is reviewed de novo on the record in this court, giving great weight, where the evidence is in conflict, to the fact that the trial court observed the parties and witnesses and judged their credibility. *In re Interest of M.S.*, 218 Neb. 889, 360 N.W.2d 478 (1984). An order terminating parental rights must be based on clear and convincing evidence. *In re Interest of Fant*, 214 Neb. 692, 335 N.W.2d 314 (1983).

The primary consideration in any case involving termination of parental rights is the best interests of the child. *In re Interest of D.*, 218 Neb. 23, 352 N.W.2d 566 (1984). 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). " '[W]e will not gamble with the child's future; she cannot be made to await uncertain parental maturity.' " *State v. Souza-Spittler*, 204 Neb. 503, 511, 283 N.W.2d 48, 52 (1979). 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 Wanek*, 212 Neb. 394, 322 N.W.2d 803 (1982).

Keeping in mind these interests, we now proceed to the circumstances of this case. Appellant makes eight assignments of error which can be summarized as follows: (1) There is insufficient evidence to terminate parental rights; (2) The court erred in admitting into evidence statements made to the caseworker by an anonymous caller; and (3) The court erred in finding that the supplemental petition alleged facts sufficient to state a cause of action.

The facts and proceedings of this case span nearly 10 years. J.B.W. is currently 32 years old, and the record indicates that she has spent most of her life since age 20 in prison. At the time of her daughter's birth, J.B.W. was incarcerated at the Nebraska Center for Women for the second time as a result of being sentenced to a term of 3 years for possession of a forged instrument. The daughter, M.L.B., was born in August of 1975. Shortly after M.L.B.'s birth, a petition was presented to the York County Court stating that M.L.B. appeared to be a child described in Neb. Rev. Stat. § 43-202(2) (Supp. 1975) because her mother was incarcerated, and therefore within the jurisdiction of the juvenile court. On September 5, 1975, the court issued an order finding that M.L.B. should be placed in the custody of the Lancaster County Welfare Department for the best interests of the child. The court found M.L.B. to be a juvenile child as defined by § 43-202(2) (Supp. 1975) and her care and custody were given to the Lancaster County Welfare Department. M.L.B. was represented by a guardian ad litem during the proceedings.

On November 18, 1975, J.B.W., following conviction for being an accessory after the fact, was sentenced to 1 year in the Nebraska Penal and Correctional Complex. Upon her mother's release from prison, M.L.B. was placed with her mother on a trial basis. This placement lasted from April of 1977 to July of 1977, when J.B.W. was arrested and again incarcerated. On February 10, 1978, J.B.W. was sentenced to concurrent terms of 2 to 4 years. She was convicted of possession of a forged instrument and burglary; a habitual criminal charge against her was dismissed. During J.B.W.'s incarceration, her daughter was taken to visit her on several occasions for five-night stays.

In early 1979 J.B.W. was transferred from the Nebraska Center for Women to the Work Release Center in Lincoln. When she was paroled in January of 1980, her caseworker told her that in order to regain physical custody of her daughter, it would be necessary for her to get a job, establish a permanent residence, and maintain consistent visitation with her daughter. This was followed by a contract between the caseworker and J.B.W., signed on September 15, 1980. The contract provided that in order to regain physical custody of her daughter, J.B.W.

would have to maintain contact with the caseworker and advise her of address changes, visit M.L.B. on a regular basis, obtain suitable housing, participate with vocational rehabilitation, secure employment, receive counseling, and become involved with parenting classes and homemaker services.

During an afternoon visit with her daughter in February of 1981, J.B.W. took M.L.B. to Colorado and severed all contact with her caseworker. J.B.W. remained in Colorado with her daughter until June of 1981 when J.B.W. was arrested. An anonymous caller telephoned Denver authorities about M.L.B. and delivered M.L.B. to a welfare office. In July of 1981 M.L.B. was flown to Lincoln and returned to the foster home she had lived in since July of 1977 and where she has lived ever since. J.B.W. was sentenced on October 1, 1981, to the custody of the executive director of the Colorado Department of Corrections for a term of 2 years plus 1 year of parole as a result of being convicted of criminal attempt second degree forgery. While in prison, J.B.W. maintained contact with her daughter through letters and phone calls. On October 29, 1981, it came to the attention of the York County Court that J.B.W. was incarcerated in Colorado, and on October 30 the court continued the care, custody, and control of M.L.B. with the Lancaster County Welfare Department.

On May 12, 1982, the York County Court ordered that no visitation take place between J.B.W. and her daughter prior to a review hearing that summer. J.B.W. was released from the Colorado facility, but a September 1 order of the court continued the care and custody of M.L.B. with the Lancaster County Welfare Department until J.B.W. could assure the court that her terms of probation would allow her to remain in Nebraska. Visitation was left to the discretion of the welfare department.

The York County attorney petitioned the court to terminate the rights of the parents of M.L.B. on November 29, 1982, alleging that M.L.B. fell within Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982) and that her parents neglected M.L.B. and refused to give her care and protection. On February 4, 1983, the court terminated the father's rights for lack of contact and lack of support for more than 6 months. On March 14 a hearing

was held on the State's petition to terminate J.B.W.'s parental rights. The court dismissed the motion to revoke parental rights because J.B.W. voluntarily relinquished her parental rights on that date. Four days later a motion to rescind the dismissal of the action was filed because J.B.W. executed a revocation of her relinquishment.

The State again filed petitions to terminate J.B.W.'s parental rights on July 14 and July 20, 1983. The petitions alleged that M.L.B. fell within the meaning of § 43-292(2) and (6) (Cum. Supp. 1982). The petitions were filed pursuant to § 43-247(6) (Cum. Supp. 1982). Section 43-292(2) and (6) provides:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection;
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

Section 43-247(3)(a) provides:

> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> . . . .
>
> (3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; or who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistance [sic], education, or other

> care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the juvenile; who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile; .
> . . .

J.B.W. filed a demurrer alleging the petition failed to state facts sufficient to constitute a cause of action. The demurrer was overruled.

Trial was held on October 5 and 6, November 3 and 8, and December 12, 1983. On November 8 the court overruled a motion to dismiss the motion to terminate parental rights. On March 7, 1984, the court found that under § 43-292(2) (Reissue 1984) it was in the best interests of M.L.B. to have J.B.W.'s parental rights terminated because J.B.W. was a parent who substantially, continuously, and repeatedly neglected her daughter and refused to give her necessary parental care and protection. The court further found that the matter fell under § 43-292(6) (Reissue 1984) and that J.B.W. had failed, after reasonable efforts under the direction of the court, to correct conditions leading to the determination made by the court. The court terminated J.B.W.'s parental rights.

J.B.W. appealed the order terminating parental rights to the district court for York County, under the provisions of Neb. Rev. Stat. § 24-541.01 (Cum. Supp. 1982). On January 21, 1985, the court affirmed the termination, finding no prejudicial error. J.B.W. filed notice of her intention to appeal the order of the district court on February 14, 1985.

During the periods when J.B.W. was not incarcerated since the birth of her daughter, the longest period of time she has lived in one apartment is the 4- to 5-month period prior to the termination hearing. She often lived with people who possessed criminal records and who have assaulted her. Throughout the 8 years prior to the termination hearing, she has had a pattern of refusing to work with the caseworkers and homemakers who have been assigned to her. She has not shown up for appointments, not answered her door even when she was home, and has generally shown a poor attitude toward working with

those assigned to her. She has never held a full-time job since her daughter was born and has never contributed to her support. On numerous occasions J.B.W. did not show up for scheduled visits with her daughter. Her daughter was aware of J.B.W.'s failure to appear for the visits because the foster mother always informed M.L.B. in advance of the visits. A psychological evaluation of J.B.W. resulted in testimony that she is a person of borderline intelligence.

On the positive side, J.B.W. has expressed her interest on several occasions in having her daughter returned to her. Throughout her daughter's life she has sent her small gifts, many of them handmade. She has kept in touch with her daughter, although this effort appears sporadic. Her crimes, although felonies, have been nonviolent. Her diligence in continuing to attempt to gain custody seems to indicate a sincere desire on her part to be a mother to her daughter. She has stated that she loves her daughter and desires to have her daughter live with her.

We will first dispose of the assignments of error dealing with the anonymous caller and the supplemental petition. It is the general rule that a ground of error must be raised and passed on in the intermediate court before it may be reviewed in a higher court. *In re Estate of Kothe*, 131 Neb. 780, 270 N.W. 117 (1936); 5B C.J.S. *Appeal & Error* § 1808 (1958). This is particularly true with questions relating to the sufficiency of pleadings and the admissibility of evidence. 5B C.J.S., *supra*. The question involving the admissibility of statements made by the anonymous caller was not presented to the district court for review. Likewise, the alleged error regarding the supplemental petition was not presented to the district court. Since there was no ruling by the court below, these assignments of error will not be considered.

Whether there is sufficient evidence for the district court to have terminated J.B.W.'s parental rights is considered next. As stated above, the court terminated J.B.W.'s rights on two grounds, essentially that she neglected her daughter and that she did not rehabilitate herself under the direction of the court. We find that the district court was correct on the first ground, but not on the second.

The evidence clearly and convincingly establishes that the mother has been unable to care for her daughter and that she has failed to take advantage of the resources offered to her through the Lancaster County Welfare Department. M.L.B. has lived with her mother for two short periods only. The first was from April to July of 1977. This placement ended when J.B.W. was arrested for burglary. M.L.B. was not yet 2 years old at this time. The second period was from February to July of 1981 when J.B.W. took M.L.B. to Colorado without permission of the court or the welfare department. This period of custody was also terminated upon J.B.W.'s arrest and incarceration. M.L.B. was 5 years old when this incident occurred.

There is evidence in the record that M.L.B. fears and distrusts her mother. A psychologist and two caseworkers testified that they felt it was in M.L.B.'s best interests that the parental rights of her mother be terminated so that M.L.B. can be given a chance to live in a permanent home.

J.B.W.'s many years of incarceration and the effect they have had on her daughter are also factors contributing to the evidence that it is in M.L.B.'s best interests that her mother's parental rights be terminated. We have said that the fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated. "Furthermore, we cannot disregard the appellant's conduct which resulted in his incarceration . . . ." *In re Interest of Reed*, 212 Neb. 208, 211, 322 N.W.2d 411, 413 (1982). J.B.W.'s repeated law violations and the resulting periods of incarceration have substantially contributed to her daughter's spending most of her life in foster care.

Turning now to the second ground on which the trial court based its decision to terminate parental rights, we find that the trial court improperly used this ground to support its decision. The court found that J.B.W. had failed, after reasonable efforts *under the direction of the court*, to correct conditions leading to the determination made by the court.

"We have held that there is no requirement for a court to implement a rehabilitation plan for the parents of a child found to be dependent and neglected." *In re Interest of V.B. and Z.B.*,

220 Neb. 369, 373, 370 N.W.2d 119, 122 (1985). Likewise, a court does not even have to order a parent to make reasonable efforts to rehabilitate herself. *In re Interest of Brungardt*, 211 Neb. 519, 319 N.W.2d 109 (1982). Further,

> it is not the law in Nebraska that parental rights may not be terminated unless a parent is given a reasonable opportunity for rehabilitation. The court may, within its discretion, order a parent to make reasonable efforts to rehabilitate, and a parent's failure in such rehabilitative efforts is another independent reason justifying termination of parental rights.

In re Interest of W., 217 Neb. 325, 329-30, 348 N.W.2d 861, 864-65 (1984).

Appellant argues that the plan for J.B.W. to make reasonable efforts to rehabilitate herself was not directed by the court and was not subject to court review. It is clear from the record that the plan was directed by the Lancaster County Welfare Department through the caseworker assigned to J.B.W. and her daughter and that it was not directed by the court. Whether or not the plan was *subject* to court review, it does not appear from the record that it ever was reviewed by the court.

The question of whether the natural mother had rehabilitated herself was central to the case in *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985). In that case the State's plan was both unreasonable in terms of visitation and support payments and was not put into effect under the direction of the juvenile court. It was drawn up by the welfare authorities and was not the subject of any court order or court review.

> While there is no requirement that a juvenile court must institute a plan for rehabilitation of a parent, where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be reasonable and must be conducted under the direction of the juvenile court.

Id. at 110, 368 N.W.2d at 480. "In transferring its authority, in blank, to the faceless forces comprising a state agency, the juvenile court abdicated its jurisdiction. Such a transfer of

jurisdiction is totally improper." *Id.* at 112, 368 N.W.2d at 481.

The plan drawn up by the caseworker for J.B.W. appears reasonable. It was not, however, conducted under the direction of the court. Therefore, the failure of J.B.W. to rehabilitate herself by following the plan is not a proper ground for termination of parental rights under § 43-292(6) (Reissue 1984).

Nevertheless, upon the record before us we conclude there is clear and convincing evidence that the best interests of the minor child require termination of the mother's parental rights. M.L.B. has spent most of her life in foster care because her mother has failed to rehabilitate herself sufficiently to be able to provide a home for her daughter. We are not hopeful that this situation will improve, and it is unfair to M.L.B. to subject her to years of continuing uncertainty about her status.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret, but I must respectfully dissent from the majority opinion in this case. As noted by the majority, an order terminating parental rights must be based on clear and convincing evidence. *In re Interest of Fant*, 214 Neb. 692, 335 N.W.2d 314 (1983). In my view the evidence in this case does not, by clear and convincing evidence, justify the termination. What we have is a mother who has spent a great deal of time in jail and, therefore of necessity, away from her minor child. While such action is not to be condoned, it is, nevertheless, to be considered when terminating parental rights because of lack of parental care. The reason for that is because we have previously said that incarceration should not be the sole reason for terminating parental rights. See, *In re Interest of Wagner and Russell*, 209 Neb. 33, 305 N.W.2d 900 (1981); *In re Interest of Ditter*, 212 Neb. 279, 322 N.W.2d 642 (1982).

The evidence in this case discloses that whenever the mother is not incarcerated she is with her child and does attempt, as best she can, to provide the child with love and affection. Furthermore, the record discloses that even when she is in prison she has made efforts to remain in contact with the child and to have the child with her whenever possible. While the record discloses that she has not been able to maintain a

full-time job nor fully understand the need to cooperate with the caseworkers, there is some explanation for all of that. As noted by the majority, a psychological evaluation resulted in a finding that she is a person of borderline intelligence. In evaluating her functions, therefore, we should not ignore that fact. We cannot limit motherhood to only those persons of average or above average intelligence. Parents come in all mental sizes, and absent a showing of injury to the child other than or different from that which any family of borderline intelligence which does not come within the grasps of the courts might create, we should not terminate parental rights.

It is not the function of courts to find "better homes," even though that may be in the best interests of the child, where the evidence does not clearly and convincingly justify termination. I would have reversed the decision of the juvenile court.

STATE OF NEBRASKA, APPELLEE, V. PERRY K. SMITH, APPELLANT.

377 N.W.2d 527

Filed December 6, 1985. No. 85-153.

1. **Trial: Evidence: Appeal and Error.** As a general rule, it is not prejudicial error to admit evidence which is simply cumulative of other competent evidence.
2. **Criminal Law: Evidence: Intent.** The intent with which an act is done is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
3. **Trial: Intent: Appeal and Error.** The question of whether defendant had the requisite intent to commit a wrongful act is one of fact which, if resolved against the defendant by the trial court based on evidence, will not be interfered with on appeal unless so lacking in probative force that we can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.
4. **Sentences: Appeal and Error.** When the punishment of an offense created by statute is left to the discretion of the trial court, to be exercised within certain prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless the record reveals an abuse of discretion.

Appeal from the District Court for Merrick County: JOHN M. BROWER, Judge. Affirmed.

Richard T. Vanderheiden of Phares, Torpin, Vanderheiden & Mesner, for appellant.

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

The defendant, Perry K. Smith, was charged in the county court for Merrick County with procuring liquor for a minor in violation of Neb. Rev. Stat. § 53-180 (Reissue 1984). After trial to the court the defendant was found guilty and sentenced to 30 days in the county jail. On appeal to the district court for Merrick County, the conviction and sentence were affirmed.

In this appeal defendant assigns as error: (1) The admission into evidence of two beer cans upon insufficient foundation; (2) The insufficiency of the evidence to support the conviction; and (3) The imposition of an excessive sentence.

Nebraska Liquor Control agents Nicholson and Fehrs were working undercover at Haven's Ballroom on April 13, 1984, when they noticed defendant with a group of three young-looking patrons. Agent Nicholson followed the defendant to the bar and saw him purchase two cans of beer and one mixed drink. When he returned to his table, the defendant placed the drinks on the table. The agents saw each of the four patrons consume some of the alcohol, and they informed other officers of their observations. While agent Nicholson was speaking with the other officers, the defendant returned to the bar and purchased more beverages.

Agents Fehr and Nicholson remained undercover while the other officers asked the four patrons for identification and discovered that the defendant's three companions were minors. All four were arrested, and two beer cans and the plastic cup containing the mixed drink were seized. Agent Nicholson later tagged the evidence when he returned to the Merrick County sheriff's office. The three companions were charged with being minors in possession, but the charge against the minor male was later dismissed.

The defendant's theory of his case at trial was that he had purchased the beer and mixed drink for his own consumption. Both of his minor female companions testified that they drank from his beer without the defendant's permission and that there had been no prior agreement that he would purchase alcohol for them.

Defendant first assigns as error the trial court's decision to admit as evidence the two partially emptied beer cans without testimony on the chain of custody. We need not address this claim because this error, if it was error at all, did not constitute reversible error. The admission of the beer cans was harmless because the evidence was cumulative; there is other competent evidence to support the conviction. While the State bore the burden of producing evidence that the beverage which the defendant purchased and which his companions consumed contained alcohol, the record is replete with statements and admissions that the defendant purchased beer and mixed drinks and that the female companions consumed some of that beer. In fact, the defendant never argued that the beverage was not beer. The beer cans are simply unnecessary to establish that element of proof. *State v. Thierstein*, 220 Neb. 766, 371 N.W.2d 746 (1985); *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984).

Regarding his second assignment of error, defendant argues that the State did not produce evidence that he intended to procure liquor for a minor, and therefore there is insufficient evidence to support a conviction. We also find this assignment of error unfounded. The intent with which an act is done is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186 (1983).

Whether the defendant had the requisite intent is a question of fact which was resolved against him by the trial court. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983).

Defendant argues, finally, that the 30-day jail sentence is

excessive. Neb. Rev. Stat. § 53-180.05(1) (Reissue 1984) states that the violation for which the appellant has been convicted is a Class III misdemeanor, which carries a maximum punishment of 3 months in jail, or a $500 fine, or both. When the punishment of an offense created by statute is left to the discretion of the trial court, to be exercised within certain prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless the record reveals an abuse of discretion. *State v. Davis*, 200 Neb. 557, 264 N.W.2d 198 (1978). We find no such abuse. The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF C.G., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES,
APPELLANT, V. C.G., APPELLEE.
IN RE INTEREST OF G.G.T., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES,
APPELLANT, V. G.G.T., APPELLEE.

377 N.W.2d 529

Filed December 6, 1985. Nos. 85-195, 85-196.

Juvenile Courts: Jurisdiction. A juvenile court has no statutory authority to place children adjudged under Neb. Rev. Stat. § 43-247(1) (Reissue 1984) with the Department of Social Services.

Appeal from the Separate Juvenile Court of Sarpy County. Reversed and remanded for further proceedings.

Robert M. Spire, Attorney General, Royce N. Harper, and J. Kirk Brown, for appellant.

D.L. Pelton and Robert B. O'Neal, for appellees.

Pat Kelly, Sarpy County Attorney, and Lawrence D. Gendler, for Sarpy County.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

These two cases were consolidated for review of orders of the separate juvenile court of Sarpy County, Nebraska, placing the two juveniles involved in the custody and care of the Nebraska Department of Social Services (hereinafter department) after the court had adjudged each of the juveniles to be within the definition of Neb. Rev. Stat. § 43-247(1) (Reissue 1984).

The facts are succinctly set forth in the department's brief and agreed to by the county attorney of Sarpy County (ostensibly representing the juveniles' parents, but in reality simply supporting the orders of the juvenile court) and by counsel for the juveniles. The department is the appellant in each case. Standing to present this appeal is vested in the department by Neb. Rev. Stat. § 43-285 (Reissue 1984), which provides: "When the [juvenile] court awards a juvenile to the care of the department [of social services] . . . then the department . . . shall have standing as a party to file any pleading or motion . . . and to be granted any review or relief requested . . . ." The facts, agreed to by all the parties, are set out in the department's brief as follows:

> The two minors involved in this consolidated appeal have both been adjudicated law violators within subsection (1) of Neb.Rev.Stat. §43-247 (Reissue 1984). By orders of the Separate Juvenile Court of Sarpy County, Nebraska, both minors were placed in the care and custody of the Nebraska Department of Social Services.
>
> The court specifically instructed in its order dated February 7, 1985, that [C.G.] (Case No. 85-195) be placed by the department in a suitable group home. In Case No. 85-196, the court specifically directed in its order dated January 18, 1985, that [G.G.T.] be placed with the department for screening and evaluation at the Eppley Chemical Dependency Unit, and further ordered the department to pay any costs not covered by the parents' insurance. The department filed a motion for rehearing, or in the alternative, to amend the order but said motion was overruled by the court on February 11, 1985. This consolidated appeal resulted.

Brief for Appellant at 3-4.

The department assigns as error:

> 1. The juvenile court erred in holding that the statutes grant it authority to place a child adjudged under §43-247(1) as a law violator in the care and custody of the Department of Social Services other than temporarily for evaluation at the Nebraska Center for Children and Youth.
>
> 2. The juvenile court erred in holding that it has authority to determine the course of treatment for a child subsequent to its placement by the court with the Department of Social Services.

Id. at 2.

For the reasons hereinafter set out we conclude that the juvenile court did err as set out in the first assignment of error. We therefore reverse the orders and remand the causes. In view of that holding we do not reach the second assignment of error.

The jurisdiction of the juvenile court is provided for in § 43-247, which provides:

> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> (1) Any juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor . . . ;
>
> (2) Any juvenile who has committed an act which would constitute a felony . . . ;
>
> (3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent . . . who is abandoned . . . or (b) who, by reason of being wayward or habitually disobedient, is uncontrolled by his or her parent . . . who deports himself or herself so as to injure or endanger seriously the morals or health of himself, herself, or others; or who is habitually truant from home or school;
>
> (4) Any juvenile who has committed an act which would constitute a traffic offense as defined in section 43-245;
>
> . . . .

Upon adjudicating a minor as falling within one of the subsections of § 43-247, the court may order a disposition in the case pursuant to Neb. Rev. Stat. §§ 43-283 to 43-2,101 (Reissue

1984). In particular, § 43-284 pertains to the disposition of juveniles adjudged to be those defined in § 43-247(3), while § 43-286 pertains to juveniles described in § 43-247(1), (2), (3)(b), or (4).

The department contends that the sections of the juvenile code outlining the array of dispositions available do not include "the Department of Social Services . . . as an alternative for . . . a minor adjudged a delinquent under §43-247(1)." Brief for Appellant at 5. The department acknowledges that the juvenile court may place in the department temporary custody of any juvenile for the purpose of evaluation at the Nebraska Center for Children and Youth "either pending adjudication (§43-258) or following adjudication but prior to final disposition (§43-281) . . . ." Brief for Appellant at 5-6. The department contends, however, that the department is not provided as an alternative for permanent placement of juveniles adjudicated under § 43-247(1), (2), or (4). The department contends that the only juveniles authorized to be placed permanently with the department are those falling under subsection (3), that is, juveniles commonly referred to as status offenders. See §§ 43-284 to 43-287.

In response to the position presented by the department, the Sarpy County attorney in his brief at 1 states: "The statutory classification outlined in Sections 43-286 and 43-287 . . . is a denial of the Equal Protection Clause because it creates an unreasonable irrebuttable presumption that law violators shall not receive necessary state services by virtue of their adjudication." The Sarpy County attorney further states that this classification is wrong because, "Thus, a child who runs away from home may seek state assistance, through Juvenile Court, but a child who shoplifts may not. What results is a uniform statewide program available to the runaway and not the shoplifter." Brief of Sarpy County Attorney at 4.

We do not agree, but hold instead that the State, through the Legislature, has made a valid classification between juveniles who are homeless or in physical, mental, or moral danger, not as a result of any act of theirs causing harm to any other person, but because of the situation in which such juveniles find themselves, and juveniles who cause harm or damage to others

by their own volitional acts in violation of the State's criminal law. Such a differentiation is reasonable and does not result in any failure to provide equal protection to all juveniles. There is a substantial difference in the two classifications. We held in *State v. Ruzicka*, 218 Neb. 594, 597, 357 N.W.2d 457, 461 (1984): " 'If the classification of persons singled out by the legislation is reasonable and not arbitrary, and is based on substantial differences having a reasonable relation to the persons dealt with and the public purpose to be achieved, it meets the constitutional test of equal protection.' "

We also note that there is a uniform statewide program available to juvenile criminal offenders in the Youth Development Center at Kearney or Geneva. Up to the point of the utilization of such programs, it is true that the juvenile courts have only their probation officers and the resources of the individual counties to turn to in solving the problems of the juvenile law violator.

It is at that point that what appears to be the real focus of the disagreement between the county attorney of Sarpy County and the Attorney General of the State of Nebraska, representing the department, emerges. The county attorney states that the department "further argues that the county and not the State ought to provide the necessary services for these minor children [juvenile law violators]." Brief of Sarpy County Attorney at 3.

The resolution of such differences is beyond the power of this court to settle in this case. As we have often said, it is not our place in our system of government to make any judgments on the efficacy of specific statutes, but only to determine if such statutes are constitutional. As stated in *State v. Ruzicka, supra* at 597, 357 N.W.2d at 461: "This court does not sit as a superlegislature to review the wisdom of legislative acts." See, also, *Bridgeford v. U-Haul Co.*, 195 Neb. 308, 238 N.W.2d 443 (1976). In this case we determine that §§ 43-283 to 43-2,101 do not violate the equal protection provisions of either the U.S. Constitution or the Constitution of the State of Nebraska.

Counsel for the juveniles do not raise the constitutional question but submit their brief in support of their proposition that "[t]he juvenile court has the authority to place juveniles

adjudicated as delinquents in the care of the Department of Social Services under the statutory scheme enumerated in Neb. Rev. Stat. § 43-246 and § 43-286." Brief for Appellees at 1. Again we do not agree.

Section 43-286 does not provide for placing any children with the department. It provides:

> When any juvenile is adjudicated to be a juvenile described in subdivision (1), (2), (3)(b), or (4) of section 43-247 the court may:
>
> (1) Continue the dispositional portion of the hearing, from time to time . . . and . . . may:
>
> (a) Place the juvenile on probation subject to the supervision of a probation officer;
>
> (b) Permit the juvenile to remain in his or her own home, subject to the supervision of the probation officer; or
>
> (c) Cause the juvenile to be placed in a suitable family home or institution, subject to the supervision of the probation officer . . . ;
>
> (2) Except as provided in section 43-287, the court may commit such juvenile to the care and custody of the Department of Correctional Services . . . ;
>
> . . . .
>
> (4) When a juvenile is placed on probation or under the supervision of the court for conduct under subdivision (1), (2), (3)(b), or (4) of section 43-247 . . . a motion to revoke probation or supervision or to change the disposition may be filed and proceedings held . . . ;
>
> . . . .
>
> (e) If the juvenile is found by the court to have violated the terms of his or her probation, the court may modify the terms and conditions of the probation order . . . or, in the case of the juvenile adjudicated to be within the definitions of subdivision (3)(b) of section 43-247, the court . . . may in addition commit such juvenile to the Department of Public Institutions or the Department of Correctional Services under section 43-287; . . .
>
> . . . .

Section 43-287 deals specifically with children adjudged

under § 43-247(3)(b) and explicitly provides for placement with the department. It provides in part:

> Notwithstanding the provisions of subdivision (2) of section 43-286, when any juvenile is found by the court to be a juvenile defined by subdivision (3)(b) of section 43-247, the court may (1) enter such order as it is empowered to enter in the case of a juvenile described in subdivision (1) or (2) of section 43-247, except that no such juvenile shall be committed to the Youth Development Centers at Kearney or Geneva, or (2) enter an order committing or placing the juvenile to the care and custody of the Department of Social Services.

These statutes present the relevant choices for disposition of juveniles adjudged under § 43-247. None of the provisions in the dispositional statutes authorize placing juveniles adjudged as law violators under § 43-247(1) with the Department of Social Services. To the contrary, the dispositional statutes specifically provide that juveniles adjudged under § 43-247(3)(a) or (b) may be placed with the department.

We hold that the juvenile court lacks the statutory authority to place children adjudged under § 43-247(1) with the Department of Social Services. The orders of the juvenile court are therefore reversed, rendering the second issue moot, and the causes are remanded for further proceedings consistent with this holding.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FIRST NATIONAL BANK IN MITCHELL, APPELLEE, V. PAUL BOLZER, APPELLANT.

377 N.W.2d 533

Filed December 6, 1985. No. 85-227.

1. **Jury Instructions.** The purpose of an instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the

principles of law which are necessary to enable the jury to accomplish the purpose desired.

2. **Jury Instructions: Appeal and Error.** It is error to refuse a proffered instruction which is warranted by the evidence and correctly states the law of the case, unless the principles involved are covered by other instructions.
3. **Prejudgment Interest.** Prejudgment interest is interest due, pursuant to statute, prior to the rendition of a judgment. In the case of a written instrument, it is allowed on liquidated claims pursuant to the provisions of Neb. Rev. Stat. § 45-104 (Reissue 1984).
4. **Interest: Contracts.** While the rule is generally to the effect that unliquidated demands do not bear interest until the amounts have been liquidated, the rule is otherwise where the parties have contracted to do otherwise.
5. _____: _____. Where the parties have contracted for the payment of a particular lawful rate of interest, to be paid after the maturity of the debt and on default in payment, such contract controls and the rate thus fixed is recoverable, provided the rate is not unconscionable. Thus, if the contract provides for a certain rate of interest until the principal sum is paid, such contract generally will control the recovery as to the rate after maturity.
6. **Case Overruled.** To the extent that *Aetna Cas. & Surety Co. v. Nielsen*, 217 Neb. 297, 348 N.W.2d 851 (1984), is in conflict with this opinion, it is overruled.
7. **Guaranty: Contracts: Time.** A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension.
8. **Guaranty: Notice.** Under an absolute guaranty of payment there is no condition as to demand and notice of default.
9. **Contracts.** The general rule has been said to be that in the absence of fraud one who signs a written agreement is bound by its terms whether or not he can read; a person unable to read is still bound by contracts which he signs and which are otherwise valid and enforceable. A party's mere ignorance, occasioned by his limited intelligence and understanding of the language and of the contents of the contract which he voluntarily executes, is not, in the absence of fraud, a ground for avoiding it, although it is different from what he supposed; one who is unable to read is not permitted to make contracts without the usual precaution to ascertain what they mean.

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

Frederick B. Allan, Jr., of Allan, Brauer & Mullally, for appellant.

John A. Selzer of Wright, Simmons & Selzer, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Paul Bolzer appeals from a judgment entered by the district court for Scotts Bluff County, Nebraska, following a trial to a jury, finding Bolzer indebted to the appellee, First National Bank in Mitchell (First National), in the total sum of $143,838.69. The judgment was based upon a certain guaranty allegedly signed by Bolzer, in which he guaranteed to pay First National the indebtedness owed by his son, Orin Bolzer. Bolzer assigns several errors, including that the district court erred in granting First National "pre-judgment interest." He also claims that the district court erred in giving certain instructions and refusing to give certain instructions.

Though there are disputes regarding the facts, the record reasonably supports the conclusion that, sometime prior to December 1982 or January 1983, First National had made certain loans to Orin Bolzer. In December of 1982 or January 1983, First National determined that it could no longer continue to provide financing to the son without some further security. First National testified that it decided unless Paul Bolzer agreed to guarantee his son's loans, First National would not continue the son's line of credit. As a result of that request, First National maintains, Bolzer signed a guaranty on February 25, 1983. The guaranty, purportedly signed by Bolzer to First National, was offered in evidence and provided as follows:

GUARANTEE

TO: The First National Bank in Mitchell, Mitchell, Nebr.

We, the undersigned, being interested in the business success of Orin Bolzer (hereinafter referred to as the debtor), and desiring to assist said debtor in obtaining credit and money from you, hereby request and authorize you to extend or advance to the said debtor such credit accomodations [sic] and money as he may from time to time request or make application for, and in case you have heretofore purchased or discounted or may hereafter purchase or discount, for debtor any note or notes, or may hereafter advance to said debtor any money, or if said debtor be now or shall hereafter become indebted to you in any manner or upon any account; I do hereby promise

> and agree to pay the same and do hereby guarantee full payment to you at maturity of all such notes and of all sums of money now or hereafter due or owing by said debtor to you or any account or liability whatsoever, and I hereby consent to any extensions of time of payment or other accomodations [sic] you may make to said debtor.
>
> We further agree that you may, without notice to us, pledge, sell, or assign any and all indebtedness covered by this guarantee.

The guaranty was allegedly signed by Paul Bolzer and witnessed by an officer of the bank on February 25, 1983.

Bolzer denied that he signed the guaranty of February 25, 1983, and denied that he guaranteed any amount already advanced to his son, or any subsequent advances. He did admit, however, that he had signed a guaranty for a family corporation on August 25, 1978. Upon default, Bolzer paid the family corporation's debt to First National.

Bolzer further introduced evidence that he could neither read nor write except for his signature and certain numbers and that he had only a third-grade education.

As to the debt itself, the evidence was without dispute that Bolzer's son had in fact signed the two notes allegedly guaranteed by Bolzer. First National testified that as of the date of trial, there was due and owing on one of the notes the principal sum of $115,500 plus interest of $20,990.01, for a total owing on the note as of that date of $136,490.01. It further testified that on the second note there was due and owing as of the date of trial the principal sum of $5,520.81 plus interest of $1,829.58, less a credit life insurance rebate of $48.43, for a total of $7,301.96. The jury returned a verdict for First National on the first note in the amount of $115,500 and on the second note in the amount of $7,287.46, apparently being the principal amount due as of that date. Thereafter, and within time, First National filed a document which it entitled "Motion to Include Prejudgment Interest." The district court granted its motion and amended the judgment on the first note to include interest in the sum of $21,034.31, and on the second note the additional amount of $16.92.

Bolzer contends that the district court erred in not instructing

the jury, as requested by Bolzer, that "[i]n order for the Bank to recover, it must prove by a perponderance [sic] of the evidence that Paul Bolzer signed the guaranty marked Exhibit 3." The trial court refused to give the instruction as requested by Bolzer and, instead, instructed the jury that

> the plaintiff claims that the defendant guaranteed the debts of Orin Bolzer . . . .
>
> The defendant denies any guaranty agreement was made.
>
> . . . .
>
> Before the plaintiff can recover, it must prove, by a preponderance of the evidence, all the following elements:
>
> 1. Mutual assent or agreement to the guaranty contract.
>
> 2. Consideration.
>
> 3. Breach of the guaranty contract by defendant's refusal to pay; and,
>
> 4. Damages, amounting to the unpaid debt of Orin Bolzer guaranteed by the defendant.
>
> If the plaintiff has failed to establish any of the above-numbered elements, your verdict will be for the defendant.

The court further instructed the jury:

> A contract is an agreement between two or more persons consisting of a promise or mutual promises which the law will enforce.
>
> In order that there be an agreement it is clear that at least two parties are necessary. The parties must agree with definiteness on the same thing, on the same terms, and at the same time. . . .

While all of these instructions were correct and fairly reflected the law, and while it is true that "[i]nstructions must be taken as a whole and construed together, and when instructions cover the issues and fairly submit the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous," *Ellis v. Far-Mar-Co*, 215 Neb. 736, 742, 340 N.W.2d 423, 427 (1983), nowhere was the jury advised here, in so many words, that the bank must prove that Bolzer in fact signed the warranty contract. It may be argued that in order for the jury to find that there was an "agreement to the guaranty

contract," it must obviously find that the agreement was signed by Bolzer. That argument, however, is not sufficient when we recognize that the purpose of the instructions is to advise lay persons with regard to the law. While lawyers and judges might recognize that an agreement to pay the debt of another must be in writing in order to satisfy the statute of frauds, and, therefore, the jury must find that the agreement was signed in order for it to be a binding agreement, lay members of a jury are not likely to be aware of that distinction.

As we observed in *Bodtke v. Bratten*, 166 Neb. 36, 45, 88 N.W.2d 159, 166 (1958):

> " 'The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired.' . . ."

See, also, *Coyle v. Stopak*, 165 Neb. 594, 86 N.W.2d 758 (1957).

Furthermore, "it is error to refuse a proffered instruction which is warranted by the evidence and correctly states the law of the case, unless the principles involved are covered by other instructions." *Pearse v. Loup River Public Power District*, 137 Neb. 611, 617, 290 N.W. 474, 477 (1940). We have regularly said that it is the duty of the trial judge to instruct the jury upon the law of the case. "The instruction should be definite and certain, free from obscurity, involvement, and doubt." *Giveen v. Matthews*, 118 Neb. 125, 128, 223 N.W. 649, 650 (1929). In the instant case there was a clear issue of fact raised by both the pleadings and the evidence as to whether Bolzer signed the guaranty. Moreover, Bolzer specifically asked the district court to instruct the jury regarding this issue. The trial court, for whatever reason, chose to avoid calling the jury's attention to the fact that Bolzer denied signing the guaranty contract. Under the issues and evidence in the case, such an avoidance was error. For that reason the judgment rendered by the district court, based upon the jury verdict, must be reversed and the cause remanded for a new trial.

In light of the fact that the matter must be retried, we believe that several of the other errors assigned by Bolzer should be

considered so as to avoid the necessity of having to review those matters at a later time.

Bolzer further maintains that the district court erred in granting "prejudgment interest" because there was a dispute as to whether Bolzer was obligated on the guaranty. In support of that claim Bolzer cites to us the case of *Aetna Cas. & Surety Co. v. Nielsen*, 217 Neb. 297, 348 N.W.2d 851 (1984). While it is true that *Aetna* does stand for the proposition suggested by Bolzer, we believe that it is not dispositive of the issue in the present case. The difficulty with both the *Aetna* case and the instant case is that all of the parties have characterized the interest as "prejudgment interest." Prejudgment interest is interest due, pursuant to statute, prior to the rendition of a judgment. In the case of a written instrument, it is allowed on liquidated claims pursuant to the provisions of Neb. Rev. Stat. § 45-104 (Reissue 1984).

In the instant case, however, the amount due as interest prior to judgment was not by reason of a statute but, rather, by reason of an agreement of the parties. Therefore, the general rule regarding when prejudgment interest may be paid has no application.

In *Prudential Ins. Co. v. Greco*, 211 Neb. 342, 318 N.W.2d 724 (1982), we pointed out that where a lease agreement provided that unpaid rent shall bear interest from the date the rent was due, the lessor was entitled to recover not only the rent but the interest as well, even though the claim was in dispute. We said at 347-48, 318 N.W.2d at 727-28:

> Having "otherwise agreed," the provisions of § 45-104 were superseded by section 34 of the lease. . . . While the rule is generally to the effect that unliquidated demands do not bear interest until the amounts have been liquidated, the rule is otherwise where the parties have contracted to do otherwise. [Citations omitted.] Specifically, in 47 C.J.S. *Interest & Usury* § 40 a. at 99-100 (1982), the author notes: "Where the parties have contracted for the payment of a particular lawful rate of interest, to be paid after the maturity of the debt and on default in payment, such contract controls and the rate thus fixed is recoverable, provided the rate is not unconscionable.

> Thus, if the contract provides for a certain rate of interest until the principal sum is paid, such contract generally will control the recovery as to the rate after maturity; in other words, the contract governs until the payment of the principal or until the contract is merged in a judgment."

See, also, *Schuett v. Hargens*, 173 Neb. 663, 114 N.W.2d 508 (1962).

First National testified that as of the date of trial there was due on the first note the principal sum of $115,500 plus interest as set out in the note in the amount of $20,990.01, for a total owing on the note as of that date of $136,490.01. First National further testified that there was owing on the second note as of the date of trial the principal sum of $5,520.81 plus interest of $1,829.58, less a credit life insurance rebate of $48.43, for a total amount owing as of the date of trial of $7,301.96. The first note, on its face, provided that interest would be paid "from date until maturity at the annual rate of 14 per cent." The second note also provided on its face that the principal would be paid with interest "at the rate of 16% per year until December 2, 1985." It would be a strange anomaly if, by merely disputing the validity of a note, one was relieved of paying the interest agreed to in the note on the theory that the claim was now unliquidated. Just as the principal was due once the jury believed that Bolzer signed the note, so, too, was due the interest provided for by the note. It is unfortunate that the parties have referred to this as "prejudgment interest" when in fact it is simply the interest contracted for by the parties and agreed to be paid in addition to the principal. To the extent that *Aetna Cas. & Surety Co. v. Nielsen, supra*, is in conflict with this opinion, it is overruled.

By sustaining First National's motion the district court did not award prejudgment interest. What, in effect, the court did in the instant case was to amend the verdict so as to have it conform to the proof. In *Calnon v. Fidelity-Phenix Fire Ins. Co.*, 114 Neb. 194, 206 N.W. 765 (1925), the jury returned a verdict in favor of an elevator building owner in the amount of $12,000. Under the terms of the policy, which was the basis of the claim, the policyholder was entitled to recover interest 60 days after the proof of loss was presented to the company. The

jury did not include the amount of the interest, and the district court denied the motion. On appeal to this court we said at 203, 206 N.W. at 768:

> It may be said that under the facts disclosed by the record the plaintiff was, by law, entitled to the sum of $12,000, with interest from January 10, 1922, to November 23, 1922. [Citations omitted.] Upon presentation of the motion to include interest, the court was empowered to do either one of two things: (a) Amend the verdict by adding interest and including it in the amount of the judgment rendered thereon; or (b) make the computation and cover the amount of interest in the judgment without any amendment to the verdict whatsoever. The latter seems to be indicated by this court as proper practice in such cases.

To the same effect is the case of *Bank of Axtell v. Johnson*, 125 Neb. 154, 249 N.W. 302 (1933). The bank sued on two promissory notes. The jury brought back a verdict for the principal amount of the notes only. The bank then moved the court to compute the interest and add it to the judgment. The district court refused to do so, and on appeal to this court we said at 161, 249 N.W. at 304:

> [I]t is obvious from the verdict that the jury intended to render a verdict in favor of plaintiff on the $4,600 note, for it is not contended that this note did not draw interest nor that interest should not have been added; naturally, interest would follow. The court would not necessarily have to resort to the evidence to perform this act. While this is a function of the jury, the jury failed to complete its act properly.

In the instant case the action of the district court was even more appropriate in view of the fact that the bank testified specifically to the amount of interest due and owing. Bolzer's assignment of error regarding the awarding of interest is without merit.

Bolzer next maintains that the judgment must be reversed because a guarantor is released by failure of the creditor to give notice of the extension of a debt, the giving of additional credit, or default. Bolzer argues that the evidence is clear that he did not receive notice of any additional sums being loaned to Orin

Bolzer or any extension of time of payment, nor did he receive any notice of default. We do not believe that First National's failure to provide Bolzer with this information is relevant. The alleged guaranty in this case is an absolute guaranty; and insofar as either extending additional credit or the time of payment, the guaranty specifically waives notice to the guarantor. The alleged guaranty specifically requests First National to make additional loans from time to time. The alleged guaranty further consents "to any extensions of time of payment or other accomodations [sic] you may make to said debtor." As noted in 38 C.J.S. *Guaranty* § 76 at 1244 (1943), "A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension . . . ." In *First West Side Bank v. Herzog*, 204 Neb. 356, 282 N.W.2d 38 (1979), we said: "Under an absolute guarantee of payment there is no condition as to demand and notice of default." (Syllabus of the court.) Bolzer's third assignment of error is without merit.

Bolzer's last claim is that it was error for the court not to give the jury a special instruction regarding Bolzer's literacy or lack thereof. However, Bolzer's literacy or lack thereof was not material to the issues in this case. Bolzer's answer denied the execution of the guaranty. He made no claim that he mistakenly signed the guaranty or that his signature was obtained by fraud due to his inability to read. He simply claimed that he did not sign the document. The issue to be resolved by the jury, therefore, was, Did Bolzer sign the guaranty? If it believed that he did not sign the guaranty, whether he could read or write was of no significance. And, moreover, absent a claim of fraud, if it believed he did sign the agreement, the fact that he could not read was also of no moment. In 17 C.J.S. *Contracts* § 139 at 885-86 (1963), the author notes:

> The general rule has been said to be that in the absence of fraud one who signs a written agreement is bound by its terms whether or not he can read; a person unable to read is still bound by contracts which he signs and which are otherwise valid and enforceable. A party's mere ignorance, occasioned by his limited intelligence and

> understanding of the language and of the contents of the contract which he voluntarily executes, is not, in the absence of fraud, a ground for avoiding it, although it is different from what he supposed; one who is unable to read is not permitted to make contracts without the usual precaution to ascertain what they mean. So, where a person cannot read the language in which a contract is written, it is ordinarily as much his duty to procure some person to read and explain it to him before he signs it as it would be to read it before he signed it if he were able so to do, and his failure to obtain a reading and an explanation of it is such negligence as will estop him to avoid it on the ground that he was ignorant of its contents, nor may he thereafter be heard to say that he did not assent to its provisions; and, in the absence of a charge of fraud or error, he cannot be heard to complain that the contract should have provided otherwise than it did.

There were no issues raised by the pleadings regarding Bolzer's literacy or whether the guaranty was obtained by fraud. Absent that, there was nothing to submit to the jury by way of instruction on that issue.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

CYNTHIA A. SWOBODA, APPELLEE, V. DENNIS A. SWOBODA, APPELLANT.

377 N.W.2d 118

Filed December 6, 1985. No. 85-337.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Jan E. Beran, for appellant, and, on brief, Dennis A. Swoboda, pro se.

John C. Hurd of Wolfe, Hurd, Rierden & Luers, for appellee.

Donald R. Witt of Baylor, Evnen, Curtiss, Grimit & Witt, guardian ad litem.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This appeal involves a domestic relations matter in which appellant questions the division of property, award of alimony, granting of the custody of the parties' minor child, award of child support, and payment of fees and costs. Upon de novo review we conclude that the record fails to show an abuse of discretion with respect to any of these issues. The judgment is therefore affirmed.

Appellant shall pay the costs, including $750 to apply on appellee's attorney fee in this court.

AFFIRMED.

RICHARD A. JAMROS, APPELLEE, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLANT.

377 N.W.2d 119

Filed December 6, 1985. No. 85-358.

1. **Implied Consent Law: Appeal and Error.** On an appeal from an order revoking a motor vehicle operator's license under the implied consent law, the findings of the trial court are reviewed de novo as in equity.
2. _____: _____. On appeal to the district court the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal.
3. **Implied Consent Law: Blood, Breath, and Urine Tests.** A refusal to submit to a chemical test for purposes of the implied consent law occurs 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.
4. _____: _____. A motorist's conduct may constitute a refusal for purposes of

an implied consent statute.

5. **Implied Consent Law: Blood, Breath, and Urine Tests: Time.** The State is entitled to have a chemical test administered at a time when it will be effective to disclose blood alcohol content in relation to the time when the vehicle was operated.
6. _____: _____: _____. A delay in chemical testing is not prejudicial unless it materially affects the results of the test.
7. **Implied Consent Law: Blood, Breath, and Urine Tests.** Without an implied consent advisement a motorist cannot be cited for a refusal.
8. _____: _____. A motorist's justifiable refusal to submit to a chemical test depends upon some illegal or unreasonable aspect in the nature of the request, the test itself, or both.
9. _____: _____. Physical inability to perform a breath test may excuse conduct which might otherwise be treated as a refusal.

Appeal from the District Court for Dawson County: HUGH STUART, Judge. Affirmed.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellant.

W.A. Stewart, Jr., of Stewart & Smith, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The director of the Department of Motor Vehicles appeals from an order setting aside her order which revoked the motor vehicle operator's license of Richard A. Jamros under the Nebraska implied consent law.

Jamros was arrested in Lexington, Nebraska, at approximately 12:39 a.m. on June 26, 1983, for driving while under the influence of intoxicating liquor. The arresting officer, Diane LeDroit Reiber, testified that she initially observed Jamros asleep in the driver's seat of his car with the motor running. The car was parked next to the curb on a street in front of a residence. Reiber awakened Jamros and observed that his eyes were bloodshot and watery and that he had an odor of alcoholic beverage about him. She also observed that Jamros' speech was slurred and that his balance was unsteady. Jamros was placed under arrest after failing two field sobriety tests.

As Officer Reiber escorted him to her patrol car, Jamros lit a cigarette. Reiber advised Jamros to extinguish the cigarette and

to refrain from smoking or putting anything in his mouth until she had completed all the tests. Jamros continued to smoke, but on a second advisement extinguished the cigarette. Jamros had not been asked to submit to a chemical test at this time.

Jamros was taken to the Lexington police station, where he was placed in a squad room containing an Intoxilyzer. In the squad room Jamros lit another cigarette. Again he was advised not to smoke or put anything in his mouth until a breath test was obtained. Jamros responded that he was not going to take a test. Officer Reiber then read an implied consent form to Jamros, stating the penalties for refusing to submit to a chemical test. Jamros appeared to understand the advisement. He was then asked to submit to a breath test. After signing the implied consent advisement, Jamros never stated that he would not take the test.

After verifying the maintenance and calibration of the Intoxilyzer, Officer Reiber initiated a 15-minute observation period of Jamros, as required by the Department of Health rules. Approximately 13 minutes into this observation period, Jamros took a Rolaids out of his pocket and placed it into his mouth. Both Officer Reiber and Officer Bill Engler, who was present as a witness to the testing, advised Jamros not to take the tablet as he moved it toward his mouth. Jamros responded to the effect that "you're damn right I'm going to, because I've got an ulcer." After he swallowed the tablet, Jamros was advised that he would be cited for a refusal and was released. The record does not show that Jamros was ever specifically advised that putting anything into his mouth would constitute a refusal to submit.

Jamros testified that he took the Rolaids because of an ulcer problem which was causing him extreme stomach pain and which could only be relieved by taking an antacid. According to Jamros, without the antacid he would not have been physically able to perform the breath test. The pain and the contraction of his stomach muscles would have prevented him from being able to exhale sufficiently into the machine.

Officer Reiber did not recall Jamros' having any difficulty breathing that night, nor did she inquire if Jamros was ill or taking medication.

The district court found that there was no evidence that the Rolaids would have affected the test nor that Jamros was unwilling to take the test then or wait another 15 minutes, and reversed the revocation order. The court also found that Jamros' action in taking the Rolaids was not unreasonable, given his physical discomfort, and that the officer's suspension of the test was unreasonable. The trial court concluded that Jamros' act did not constitute a refusal.

The director contends that the district court erred in finding that Jamros did not refuse to submit to a chemical test of his breath.

On an appeal from an order revoking a motor vehicle operator's license under the implied consent law, the findings of the trial court are reviewed de novo as in equity. *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979); *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973). On appeal to the district court the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal. *Bapat v. Jensen*, 220 Neb. 763, 371 N.W.2d 742 (1985); *Wohlgemuth v. Pearson, supra*.

We have held that a refusal to submit to a chemical test for purposes of the implied consent law occurs "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." *Martinez v. Peterson*, 212 Neb. 168, 171, 322 N.W.2d 386, 388 (1982). See, also, *Wohlgemuth v. Pearson, supra*; *Hoyle v. Peterson*, 216 Neb. 253, 343 N.W.2d 730 (1984).

In the present case the uncontradicted evidence is that Jamros understood that he had been asked to submit to a breath test and he had expressly consented to the test. The issue is whether he manifested an unwillingness to take the test by ingesting the Rolaids tablet.

A motorist's conduct may constitute a refusal for purposes of an implied consent statute. S. Brent & S. Stiller, Handling Drunk Driving Cases § 15:6 (1985). The conduct in the present case did not amount to a refusal in light of Jamros' express consent to take the test, unless the ingestion of the Rolaids

exhibited an objective unwillingness to submit to the test.

In other jurisdictions a motorist's refusal to refrain from chewing gum, eating, or smoking may constitute a refusal to submit to a chemical test. But a theme common among such cases is the idea that such conduct amounts to a refusal because the motorist was expressly forewarned that it would amount to a refusal. See, *Matter of Dykeman v Foschio*, 90 A.D.2d 892, 456 N.Y.S.2d 514 (1982); *Mathie v. Schwendiman*, 656 P.2d 463 (Utah 1982); *Matter of Sullivan v Melton*, 71 A.D.2d 797, 419 N.Y.S.2d 343 (1979); *Com., Dept. of Transp. v. Mumma*, 79 Pa. Commw. 108, 468 A.2d 891 (1983). There was no such warning in the present case. The lack of an express warning detracts from the argument that Jamros' ingestion of the Rolaids was a refusal to take the test.

Jamros was not given an opportunity to give a breath sample after ingesting the Rolaids. It was not only Jamros' conduct which prevented the acquisition of a breath sample. The State is entitled to have a chemical test administered at a time when it will be effective to disclose blood alcohol content in relation to the time when the vehicle was operated, but there is no evidence here that the State would have been prejudiced by initiating another 15-minute observation period followed by administration of the breath test. See *Sedlacek v. Pearson*, 204 Neb. 625, 284 N.W.2d 556 (1979). In *Sedlacek, supra*, we held that a delay in chemical testing is not prejudicial unless it materially affects the results of the test. The evidence in the present case does not show that the test results would have been so affected. It is of some significance that the observation period was terminated at 1:03 a.m., just 20 minutes after Jamros had signed the implied consent advisement.

The director also contends that Jamros expressly refused to submit to a test when he stated, prior to being read an implied consent advisement, that he would not take a test. A refusal prior to the advisement is not relevant, since the statute requires an advisement. Neb. Rev. Stat. § 39-669.08(5) (Reissue 1984). The elements in an implied consent case include reasonable grounds to believe the motorist (1) was guilty of driving while under the influence of intoxicating liquor, (2) was arrested on that charge, (3) was thereafter informed of the implied consent

law, (4) was requested to submit to a chemical test for blood alcohol content, and (5) refused to do so. *Doran v. Johns*, 186 Neb. 321, 182 N.W.2d 900 (1971). The evidence is undisputed that Jamros had not been asked to submit to a breath test when he made the statement that he was not going to take a test. As such, his statement could not constitute a refusal.

Under the Nebraska implied consent law there can be no revocation of the driver's license and operating privileges if the refusal to submit to a chemical test is reasonable under the circumstances. See, Neb. Rev. Stat. § 39-669.16 (Reissue 1984); *Hoyle v. Peterson*, 216 Neb. 253, 343 N.W.2d 730 (1984). A motorist's justifiable refusal to submit "depends upon some illegal or unreasonable aspect in the nature of the request, the test itself, or both." *Id.* at 256, 343 N.W.2d at 733. The trial court specifically found that Jamros' ingestion of the Rolaids was not unreasonable and that termination of the test at that point was unreasonable.

At trial Jamros testified that without the Rolaids, the pain he was experiencing from ulcers would have prevented him from exhaling enough breath to activate the Intoxilyzer. He testified that the basis for his belief that he could not activate the machine with the pain he was experiencing stemmed from experience with Breathalyzer tests in his employment and at conventions. When Jamros began to move the Rolaids toward his mouth and was warned not to do so, he informed the officers that he was going to take the medication because of the pain.

Several other jurisdictions have recognized that physical inability to perform a breath test may excuse conduct which might otherwise be treated as a refusal. See, *Newman v. Stinson*, 489 S.W.2d 826 (Ky. 1972) (refusal where insufficient sample given, in the absence of a showing of the impossibility of compliance or the likelihood of harm resulting therefrom); *Woolman v. Dep't of Motor Vehicles*, 15 Wash. App. 115, 547 P.2d 293 (1976) (failure to give adequate breath sample is a refusal where motorist presents no evidence excusing her inability to comply); *Pfeffer v. Dept. of Public Safety*, 136 Ga. App. 448, 221 S.E.2d 658 (1975) (sore throat or swollen glands which might cause pain, but not prevent motorist from being

able to give adequate breath sample, not the type of inability excusing compliance).

The only evidence concerning Officer Reiber's observations of Jamros' health was that she did not notice that he was having any difficulty breathing and that he complained about heartburn when he ingested the Rolaids. At no time, including when Jamros made the statement regarding his ulcer, did Officer Reiber ask him if he was sick or ill.

In *State v. Morse*, 211 Neb. 448, 318 N.W.2d 893 (1982), the defendant claimed that he was unable to activate the Intoxilyzer due to stuffed-up nasal passages. In reviewing the evidence we noted that the question of whether the defendant was unable to activate the machine was one of fact to be resolved by the trial court.

Although we review the evidence de novo in appeals from administrative revocations under the implied consent law, where there is a conflict in the evidence, we give great weight to 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." *Bauer v. Peterson*, 212 Neb. 174, 177, 322 N.W.2d 389, 392 (1982). See, also, *Martinez v. Peterson*, 212 Neb. 168, 322 N.W.2d 386 (1982); *Zadina v. Weedlun*, 187 Neb. 361, 190 N.W.2d 857 (1971).

In the present case the trial court found that Jamros was in pain and, therefore, did not act unreasonably in taking the Rolaids. If Jamros' pain was as severe as the trial court apparently found it to be, Jamros did not act unreasonably in taking the Rolaids tablet, his opportunity to submit to a chemical test was unreasonably terminated, and his conduct did not constitute a refusal.

The judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, J., concurs in the result.

VIRGIL PIERCE, APPELLANT, V. CITY OF OGALLALA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

378 N.W.2d 140

Filed December 13, 1985. No. 84-475.

1. **Summary Judgment.** Before summary judgment may be granted, the court must determine there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law.
2. _____. In a hearing on a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence.
3. **Records: Costs: Attorneys at Law: Rules of the Supreme Court: Appeal and Error.** The transcript filed on an appeal to the Supreme Court is limited in content by the Supreme Court rules; when those rules are ignored by the attorney requesting the transcript, the attorney will be taxed personally with the costs of its preparation.

Appeal from the District Court for Keith County: HUGH STUART, Judge. Reversed and remanded for further proceedings.

Gregory J. Beal of Gregory J. Beal & Associates, P.C., for appellant.

Paul D. Merritt, Jr., of McGinley, Lane, Mueller, O'Donnell & Merritt, P.C., for appellee City.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and GRANT, JJ.

GRANT, J.

Appellant, Virgil Pierce, filed this action seeking disability retirement benefits under the pension and retirement plan of the City of Ogallala, Nebraska (hereinafter City). Pierce had received a 40-percent vesting percentage based upon his time with the police force under the plan but, in this action, sought 100 percent vesting based upon the provision of the plan for 100 percent vesting if an employee was injured, rendered incapable of fully performing his duties, and, therefore, terminated. The action was filed against the City and Republic National Life Insurance Company (hereinafter Republic). Republic issued its policy containing a retirement plan to the City. Each defendant,

after filing demurrers, answered, and each defendant moved for summary judgment. The trial court sustained both motions. Appellant now seeks review only of the summary judgment entered in favor of the City. We reverse and remand for further proceedings.

In the first 15 paragraphs of his second amended petition, Pierce pled the existence of a policy issued by Republic to the City providing for pension and retirement benefits to persons "regularly employed by Participating Employer [the City] whose employment is in the Police Department of the Participating Employer . . . ." Pierce further pled that the City had discharged him from employment as a police officer "due to disability," that the City had applied to Republic for benefits for Pierce, but that in preparing such application the City had not consulted with Pierce as to his medical condition nor informed Republic of that condition, although the City knew that Pierce was disabled. Pierce further alleged that Republic had informed him, after his discharge, that the determination of disability under the policy rested solely with the City and that if the City had determined that Pierce was disabled, Pierce would have been entitled to 100 percent vesting under the pension plan rather than the 40-percent vesting allowed to him by Republic based on the information furnished to Republic by the City.

Pierce then alleged that the City "was obligated to the employee as a third party beneficiary . . . of the policy" to perform the City's duty, as a fiduciary under the policy, to make the determination whether plaintiff was disabled under the terms of the policy and that the City had breached "its contractual duty to Plaintiff." Pierce sought damages "against Defendant," and further pled: "That to the extent that the Defendant, Republic . . . has any obligation towards the Plaintiff, or to the other Defendant, the City . . . the Court should include as part of its judgment, a requirement that the said Defendant pay over such funds to the Defendant, City . . . or to the Plaintiff . . . ."

In his "Second Cause of Action," Pierce alleged that the City, "as plan trustee or plan administrator," owed a duty to secure for its employees all benefits to which the employee

might be due under the plan and that the City had, either intentionally or negligently, breached that duty. Pierce alleged that the City was negligent in failing to make a determination that he was disabled when the City forwarded the application to Republic for Pierce's benefits; in failing to advise him as to available options under the plan; in failing to certify that he was disabled under the terms of the policy; and in failing to state in the application for benefits that plaintiff was disabled as defined in the contract between the City and Republic.

In its answer to Pierce's petition, the City alleged that on December 12, 1978, Pierce was notified by Howard C. Greene, the City's chief of police, and the chairman of the city council that his employment was terminated effective December 26, 1978, and that on December 18, 1978, Pierce was notified by letter from Greene that he had "reconsidered" his action and Pierce was not terminated and was expected to return to duty after his doctor released him. The City further alleged that "subsequent to September [sic; obviously meaning December] 18, 1978, and prior to December 26, 1978," Pierce notified the City that he had taken another job and would not return to his employment with the City's police department. The City further alleged that on January 18, 1979, the city clerk for the City sent a "Termination, Notice and Request" to Republic setting out Pierce's termination date as January 1, 1979, and that on March 6, 1979, the city clerk mailed a "retirement refund check" from Republic to Pierce in the amount of $17,111.31, which represented "his contribution" under the plan. The City also alleged that when it delivered "the refund of employee contribution" to Pierce, the City understood that it was settling all rights which Pierce might have against the Republic policy and that when Pierce accepted the check as payment in full, the resulting "accord and satisfaction is a bar to Plaintiff's recovery . . . ." The City further alleged that by his acceptance of the Republic check, Pierce was estopped from claiming any further interest in the pension plan.

The City and Republic each moved for summary judgment. A hearing was held on the motions. The City and Pierce submitted evidence in the form of affidavits and depositions. Republic submitted no evidence. The trial court then found that

there was "no showing that [Pierce had been] 'terminated,' as required by Article II, Section 7" of the Republic group annuity contract, and there was "no showing that the Plaintiff's 'impairment' (based upon 'competent medical opinion'[)] would 'render him incapable of performing his duties,' as an Ogallala police officer, as required by said Article II, Section 7."

The trial court then sustained each motion and ordered that Pierce's second amended petition be dismissed. Pierce appeals only from the sustaining of the City's motion for summary judgment.

The evidence submitted by Pierce and the City at the hearing on the City's motion for summary judgment showed the following.

Pierce began his employment with the City on June 9, 1966, as a police officer. As a patrolman, Pierce's duties included: "Enforcing all state statutes, city ordinances . . . protecting the people in the city of Ogallala . . . . Investigating accidents, any bar room brawl calls . . ., assisting the ambulance crews, assisting the state patrol officers if . . . requested to do so, making arrests with warrants and so forth."

On July 1, 1974, the City and Republic entered into a group annuity contract which provided disability and retirement benefits to members of the City's police department. Pierce was a "participant" in the contract program from its beginning.

On January 8, 1977, while on duty, Pierce injured his back, while assisting an ambulance crew, when he lost his footing on some icy steps while helping to transport a heavy, unconscious man from an upstairs apartment. Pierce experienced pain in his lower back and right leg. He consulted a doctor and was hospitalized from January 10 to January 17, 1977. Pierce was then referred to Dr. Frederick Teal on or about March 19, 1977. In April 1977 Dr. Teal performed surgery on Pierce in a Denver hospital to remove a ruptured disk. Pierce continued under Dr. Teal's care until December 2, 1977.

In June of 1977 Pierce was allowed to return to part-time duty as a patrolman on a restricted basis. While the restrictions continued to apply, he returned to full-time duty on December 2, 1977. Pierce testified that he returned to full-time duty

without restrictions and was fully capable of performing his duties on January 1, 1978. As of December 2, 1977, Dr. Teal rated appellant as "8 percent permanently physically impaired as a working unit."

Pierce was injured a second time on July 14, 1978. On his arrival at work that day, Pierce stated, he entered the darkened officers' equipment room, stumbled over some floormats, and fell in a twisting motion. He experienced lower back pain and pain in his legs and immediately was taken by the chief of police for medical attention. Pierce was hospitalized in Ogallala for 14 days and then consulted a partner of Dr. Teal's on August 8, 1978. Dr. Teal hospitalized Pierce and performed a myelogram on August 29, 1978. Pierce was discharged on August 31. Pierce was readmitted to the hospital and underwent further surgery on September 9. He was discharged from the hospital on September 14. Pierce returned to work as a patrolman on a part-time basis, with restrictions, on November 20, 1978.

During the entire course of Pierce's treatment for the injuries of January 8, 1977, and July 14, 1978, Dr. Teal had sent medical reports and evaluations to the City's workmen's compensation insurance carrier, Cornhusker Casualty Company. That company, in turn, kept the City informed by sending them copies of much of the company's correspondence concerning those injuries.

The chief of police of the City and the chairman of the city council sent a letter to Pierce on December 12, 1978, stating: "This is to notify you that your employment with the Police Department of the City of Ogallala, Nebraska, is hereby terminated effective December 26, 1978." The chief of police stated in his deposition that at the time he sent the letter he doubted if Pierce could fulfill his duties as a patrolman. Before the chief of police had notified Pierce of this termination, the law firm representing the City sent a letter to Chief Greene stating that "the letter of termination to Virgil Pierce . . . should not contain any reasons for the termination, but should simply be a statement that it is a notice of termination of employment. . . ." The letter further stated that "[i]f Virg contacts you regarding the reasons for his termination, your response should be along the lines that we discussed on the phone. That is, his

dismissal results from his physical inability to perform all the duties required of a police officer."

On December 14, 1978, after he received this letter, Pierce obtained employment in an Ogallala business, to begin January 15, 1979. In his deposition Pierce stated that the prospective employer hired him to work at the counter in an auto parts store. Pierce stated that the work was light and that his prospective employer was aware of Pierce's physical condition and requested him to obtain a release from his doctor.

Chief Greene sent another letter to Pierce on December 18, 1978. In this letter Greene stated:

> This is to advise you that I have reconsidered the action which is the subject of my letter to you dated December 13, 1978.
>
> That letter resulted from a misunderstanding as to whether you were still under a doctor's care. In light of the fact that you are still under the care of a doctor, please be advised that it is not the wish of myself or the City of Ogallala to terminate your employment.
>
> However, in light of the fact that there will be no part-time work available for you after Christmas, please be advised that I will expect you to remain at home, beginning December 26, until you have been released by your doctor to return to your regular duties as a patrolman for the Ogallala Police Department.
>
> My apologies for the misunderstanding. If you have any questions, please feel free to contact me.

Sometime after receiving the letter of December 18, 1978, Pierce wrote a letter to Greene stating that after Pierce received the termination letter and before he had received the "reconsideration" letter, he had accepted another job "because employment is necessary to meet the family needs." Pierce declined what he termed the "offer."

On a date not shown, Greene sent to the city clerk the following interdepartmental correspondence:

> DUE TO THE FACT THAT OFFICER VIRGIL PIERCE HAS TURNED ALL EQUIPMENT ISSUED TO HIM AND HAS ACCEPTED EMPLOYMENT ELSE WHERE AS HE INDICATED IN A LETTER

GIVEN TO ME ON JANUARY 1, 1979. I BELIVE [sic] THAT HE HAS QUIT AND RESIGNED HIS EMPLOYMENT JUDGING FROM WHAT THE LANGUAGE UTILIZED IN THE LETTER INDICATES.

MR. V. PIERCE IN THE LETTER STATES, "IT DOES NOT APPEAR THAT I WILL BE ABLE TO ACCEPT YOUR OFFER AND I RESPECTFULLY DECLINE IT WITH ALL DUE RESPECT TO THE POLICE DEPARTMENT, YOURSELF, AND ALL OF THE PERSONNEL THAT I HAVE ENJOYED WORKING WITH FOR MANY YEARS," AND THIS I WOULD REGARD AS HIS NOTICE OF TERMINATION AND DECLINE OF THE OFFER THAT HE RETURN TO FULL TIME STATUS PER THE LETTER OF DECEMBER THE 18TH, 1978.

On or about January 19, 1979, the city clerk applied to Republic for Pierce's benefits. In this application the city clerk indicated that Pierce's date of employment was June 9, 1969, his date of termination was January 1, 1979, and Pierce's contribution was $2,786.10. The application did not, in any way, indicate that Pierce was disabled at all. Based on this information, Republic forwarded to the City, for delivery to Pierce, its check for $17,111.31. This amount represented a 40-percent vesting in Pierce based on Pierce's time with the police force while under the plan. Pierce cashed the check.

While Pierce assigned three errors below, he has briefed only one; therefore, we consider only the assigned error that was discussed in his brief. Neb. Ct. R. 9D(1)d (rev. 1983). Pierce assigned as error the granting of summary judgment to the City, thereby dismissing his claim against the City.

As noted above, at the time of submission of the City's motion for summary judgment, Pierce's petition presented two "causes of action"; one in contract seeking recovery from the City under the theory that Pierce was a third-party beneficiary under the agreement between the City and Republic, and the other seeking recovery against the City on the theory that the City was negligent toward Pierce in submitting an application to Republic for Pierce's benefits under the annuity contract.

Whether Pierce's allegations are properly causes of action or theories of recovery and whether the petition presents a misjoinder of contract and tort actions are questions not before us. We are presented only the problem of the correctness of the trial court's granting the City's motion for summary judgment. Before summary judgment may be granted, the court must determine there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law. *Mayer v. Howard*, 220 Neb. 328, 370 N.W.2d 93 (1985); *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985).

In making that determination on a motion for summary judgment, we stated in *Witherspoon v. Sides Constr. Co., supra* at 119, 362 N.W.2d at 39, "the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence."

Based on those holdings, we first examine the trial court's determination that there was no showing that Pierce was terminated as required by article II, § 7, of the contract between the City and Republic. That section provides in part:

> SECTION 7. DISABILITY BENEFITS
>
> If a participant is terminated prior to his Normal Retirement Date as a result of a medically determinable physical or mental impairment, which on the basis of competent medical opinion may be expected to result in death or to be of long, continued duration and which renders him incapable of performing his duties, he shall be 100% vested in the benefits which have been paid for on his behalf at such time of disability.

None of the words in the phrase "terminated prior to his Normal Retirement Date" are defined in the agreement between the City and Republic. Whatever the precise meaning of "terminated," however, the City used the word in its letter of December 12, 1978, to Pierce when it said "your employment . . . is hereby terminated effective December 26, 1978," and the meaning was clear to both the City and Pierce. At that point it might well be said that there was no genuine issue as to that material fact, but the necessary conclusion is that Pierce was

terminated, not *not* terminated. Such a conclusion, of course, would support Pierce's position, not the City's, and could not be the basis of granting summary judgment to the City.

The letter of December 12, 1978, however, is not the sole evidence as to termination. In the City's letter of December 18, 1978, the chief of police informed Pierce that the chief had "reconsidered" his action and that it was "not the wish of myself or the City of Ogallala to terminate your employment." The effect of this "reconsideration" letter, when considered together with the facts that Pierce had sought and accepted another job after the City's first letter, Pierce's actions in turning in his equipment to the police department, and the memo of the chief of police to the city clerk characterizing his "reconsideration" letter as an "offer," presents a factual issue that could not be the subject of a motion for summary judgment.

The other issue determined by the trial court was based on the court's finding that there was "no showing that the Plaintiff's 'impairment' (based upon 'competent medical opinion'[)] would 'render him incapable of performing his duties,' as an Ogallala police officer . . . ." As to that question, the City views as conclusive a note signed by Pierce's physician, Dr. Teal, on December 28, 1978, as follows: "TO WHOM IT MAY CONCERN: Virgil Pierce may return to work as of January 15, 1979." As noted in the City's brief at 20, "This form contained no restrictions and TEAL assumed that it would be relied upon by an employer." In its brief the City also notes that Dr. Teal testified, at the time of his deposition, that he was under the impression that Pierce was employed as a police officer. If that were all the testimony and evidence on this issue, there would have been no question of fact, and the motion for summary judgment would be properly granted.

The evidence on the question, however, was not confined to the doctor's note on a 6- by 3-inch slip of yellow paper. Five such slips were introduced as exhibits, and none contained any reference to restrictions. One note of May 11, 1977, in connection with Pierce's first accident, stated that Pierce would not return to work until June 1, 1977, and that a later determination would be made whether he would be able to

return to "full duty." (Emphasis in original.) Another note of November 15, 1978, stated that Pierce could "return to work on a part-time basis . . . as of November 20, 1978, for a period of six weeks." This note covered the times in question—that is, Pierce's "termination" of December 12, 1978, his "reconsideration" of termination of December 18, 1978, and his acceptance of what he described as a counterman's position, filling orders for automotive parts.

There were other of Dr. Teal's reports received at the time of his deposition that indicated that Pierce's medical situation was not fully described in the brief note of December 28, 1978. A "Doctor's Supplemental Report" furnished by Dr. Teal to Cornhusker Casualty Company on December 26, 1978, indicated that the doctor's prognosis "As to Permanent Disability" would be reevaluated in February, while stating Pierce could return to work on January 1, 1979.

As to Dr. Teal's deposition statement that he thought Pierce was to return to his employment as a police officer when he signed the December 28, 1978, slip, the doctor's office notes indicate to the contrary. Those notes state that in Pierce's visit to the doctor on December 15, 1978, "Patient has been relieved of his job as of 26th December with no plans for further employment. . . . I recommended that he see me in late Feb. for follow-up."

Further, in other deposition testimony, Dr. Teal made numerous references to Pierce's condition, including the doctor's opinion that after Pierce's second surgery in 1978, while some of Pierce's duties as a police officer would be compatible with his condition, there were certain duties "that would definitely be contraindicated, those being, being in a situation where he would have to confront a suspect and become involved physically in subduing a suspect . . . ." The doctor then expanded the list of contraindicated activities to include lifting in excess of 50 pounds and riding in a patrol car for extended periods.

Dr. Teal also testified that Pierce's impairments "being permanent in nature, yes, I would expect them to be of long duration."

Considering Dr. Teal's deposition testimony in conjunction

with article II, § 7, of the agreement between the City and Republic, we hold there is a genuine issue of material fact as to whether Pierce was terminated "as a result of a medically determinable physical . . . impairment, which on the basis of competent medical opinion may be expected . . . to be of long, continued duration and which renders him incapable of performing his duties . . . ." The judgment is therefore reversed and the cause remanded for further proceedings.

The presentation of this appeal raises another issue in this case. On appeal it is the duty of Pierce, as appellant, to cause the transcript to be prepared. See Neb. Ct. R. 4 (rev. 1983). Rule 4A specifies what the transcript shall contain: the pleadings on which the case is tried, the judgment or order appealed from, the instructions given, a copy of the supersedeas bond (if any), and "[s]uch, and only such, other parts of the record as are necessary to include for the proper presentation of the assigned errors in this court."

In the case at bar Pierce's attorney caused a 265-page transcript, full of multiple copies of documents and irrelevant filings, to be prepared. The letter of transmittal of the transcript from the clerk of the district court to this court contained the language that the attorney for the appellant "insisted that I follow his Praecipe and forward a copy of all filings of any nature by any of the parties in my Court." As a result, the transcript included, inter alia, (1) four copies of the annuity plan, (2) the petition, first amended petition, and second amended petition, (3) demurrers and briefs on demurrers, (4) a witness list, and (5) irrelevant preliminary motions.

Neb. Ct. R. 14B(2) (rev. 1983) states: "When unnecessary costs have been made by either party, the court may order the same to be taxed to the party making them, without reference to the disposition of the case." Accordingly, the cost of the transcript filed in this court is taxed to appellant. Since these costs are the direct result of the actions of Pierce's attorney, the attorney is ordered to reimburse his client for such costs.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SHANAHAN, J., not participating.

CARMEN G. EMMONS, APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, ET AL., APPELLEES.

378 N.W.2d 147

Filed December 13, 1985. No. 84-575.

1. **Implied Consent Law: Appeal and Error.** On appeal from a revocation of a motor vehicle operator's license under the implied consent statute, this court reviews the finding of the trial court de novo as in equity.
2. **Implied Consent Law: Blood, Breath, and Urine Tests.** A condition precedent to a valid request by an officer to submit to a chemical test under Neb. Rev. Stat. § 39-669.08 (Reissue 1984) is that the officer must have reasonable grounds to believe that the licensee was either driving a motor vehicle or in the actual physical control of same while under the influence of alcoholic liquor.

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

John J. Hanley, for appellant.

Patrick T. O'Brien, Deputy Attorney General, and Michele M. Wheeler, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Carmen G. Emmons was charged with failure to submit to a test of the alcoholic content of her body fluids, pursuant to Nebraska's implied consent statute, Neb. Rev. Stat. § 39-669.08 (Reissue 1984).

The Department of Motor Vehicles determined that there was no reason appearing in the record to justify the refusal by Emmons to submit to such test and found her refusal unreasonable.The department then revoked her operator's license and driving privileges for 1 year. On appeal the Douglas County District Court affirmed the department's order, stating the department "acted properly and in accordance with law in issuing said Order of Suspension suspending plaintiff's operator's license and operating privileges pursuant to Neb. Rev. Stat. § 39-669.08."

Emmons timely appealed to this court. Her sole assignment of error is that the district court "erred in finding that the

arresting officer had reasonable grounds to believe that [Emmons] was the driver of the vehicle and was under the influence of liquor at the time." We affirm.

In a case such as this we review the findings of the trial court de novo as in equity. *Jamros v. Jensen, ante* p. 426, 377 N.W.2d 119 (1985); *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979). We also take into account that on appeal to the district court the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal of the department's order. *Mackey v. Director of Department of Motor Vehicles*, 194 Neb. 707, 235 N.W.2d 394 (1975).

At 11:35 p.m. on October 17, 1983, Officer Robert West of the Omaha Police Department was dispatched to 42d and Farnam Streets in Omaha to investigate a property damage accident. Officer Edward Hale joined West at this location. Hale had overheard the dispatch on his police radio. Both officers testified that a metal light pole on the northwest corner of the intersection had been struck. There was grillwork, a part from around a headlight, and various other debris from an automobile against and near the light pole. Officer West testified that within a minute upon arriving at the scene, a gentleman, whose name the officer did not note, came up to him and said that he had seen a vehicle hit the pole and continue westbound on Farnam. The witness could not give a description of the auto itself nor of the person driving it.

Officer Hale testified he observed a "gouge mark" in the pavement beginning at the light pole and proceeding westbound on Farnam Street. He further testified that it was a steady gouge mark, "probably a quarter inch deep and . . . very plain to see." Hale was able to follow the indentation in the pavement while driving his cruiser. Hale traced the gouge mark from the scene of the accident west to 49th and Farnam Streets. From there he followed the gouge mark north on 49th Street to Capitol Avenue, and west on Capitol into a private parking lot which is located on the north side of the Dundee Dell bar and Dundee Theatre at 4904 Dodge Street.

Officer Hale went into the parking lot, where he observed the gouge mark leading up to the right front wheel of a vehicle. The

tire on that wheel was pushed to one side with the wheel rim exposed. It appeared that the gouge mark was caused by the exposed wheel rim scraping the pavement as it traveled on the streets. Officer Hale also testified that the right front end of the car was heavily damaged and steam or smoke was coming from under the hood.

Officer Hale traced the license plates on the automobile and determined that the registered owner was the appellant, Carmen Emmons. Officer West arrived shortly thereafter to further assist Hale in the investigation.

While continuing to investigate, Officer Hale testified at trial, he noticed two parties standing in the parking lot. He determined that they had not been driving the car but that a lady had been driving and she had walked into the Dundee Dell bar. Officer Hale had one of the parties accompany him and point out the woman whom the witness had seen get out of the damaged car. In the department hearing, Officer Hale gave a somewhat different account of what transpired, stating he saw four men in the parking lot instead of two. He also said that he obtained a description of the woman from the people in the parking lot and that he identified Emmons pursuant to this description. Officer Hale took down the eyewitnesses' names. They did not testify at trial.

Officer West testified that as both of the officers entered the Dundee Dell, a man came out of the bar. The man told the officers that a woman had just come into the bar claiming her car was on fire and that he was going to check it. The man then pointed out the woman for the officers. She was just inside the rear door of the Dundee Dell using the telephone.

Once inside the Dundee Dell, the officers approached the woman, asking her if she was Carmen Emmons. The woman initially denied she was Carmen Emmons, but then she admitted she was and produced a driver's license. Officer Hale testified that Emmons "had a strong odor of alcohol on her breath; her pupils were dilated; she had slurred speech and she had difficulty walking without using a wall for support." Based on Emmons' condition, it was Officer Hale's opinion that she was intoxicated.

Emmons was then arrested and taken to the Omaha police

station, where she was booked for operating a motor vehicle while intoxicated and leaving the scene of an accident.

At the police station Emmons was given an opportunity to telephone an attorney. She made two telephone calls. Officer West testified that he, Hale, and an I.D. technician then walked Emmons back to a room where the Breathalyzer test is administered. After several requests to take the Breathalyzer test were made and after she was apprised of the penalties for not doing so, Emmons still refused to submit, stating she would not take the test until she "saw a friendly face." Because of Emmons' refusal to submit to the chemical test, Officers West and Hale prepared and signed the required "Sworn Report of Officer of Refusal to Take Chemical Test" and submitted it to the Department of Motor Vehicles pursuant to Neb. Rev. Stat. § 39-669.15 (Reissue 1984).

It is established that as a condition precedent to a valid request by an officer to submit to a chemical test under the implied consent law, the arresting officer must have "reasonable grounds" to believe that the licensee was either driving a motor vehicle or in actual physical control of same while under the influence of intoxicating liquor. § 39-669.08.

Section 39-669.08(2) provides as follows:

> Any law enforcement officer . . . may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor to submit to a chemical test of his or her blood, breath, or urine for the purpose of determining the alcoholic content of his or her body fluid, when the officer has reasonable grounds to believe that such person was driving or was in the actual physical control of a motor vehicle upon a public highway in this state while under the influence of alcoholic liquor.

If the driver's refusal to submit to the test is not reasonable, revocation of the driver's license and operating privilege is a consequence of such refusal. Neb. Rev. Stat. § 39-669.16 (Reissue 1984); *Stevenson v. Sullivan*, 190 Neb. 295, 207 N.W.2d 680 (1973). We have held that "[j]ustifiable refusal of the test depends upon some illegal or unreasonable aspect in the

nature of the request, the test itself, or both." *Hoyle v. Peterson*, 216 Neb. 253, 256, 343 N.W.2d 730, 733 (1984).

Given the totality of the circumstances in this case, we hold that the police officers had reasonable grounds to believe that Carmen G. Emmons was operating a motor vehicle while under the influence of alcohol and to arrest her. The officers' later request to Emmons to submit to a breath test was proper and Emmons' refusal was unreasonable.

The judgment of the district court is affirmed.

AFFIRMED.

JOAN JERABEK, APPELLEE, V. CLARK RITZ, ALSO KNOWN AS CLARENCE RITZ III, APPELLANT.

377 N.W.2d 540

Filed December 13, 1985. No. 84-755.

Appeal from the District Court for Howard County: JOSEPH D. MARTIN, Judge. Appeal dismissed.

Andrew J. McMullen, for appellant.

Mary Morgan Cote of Cunningham, Blackburn, VonSeggern, Livingston & Francis, for appellee.

KRIVOSHA, C.J., HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired, and OTTE, D.J.

PER CURIAM.

This is an appeal from an order of the district court which overruled respondent's motion to vacate or modify judgment.

On April 29, 1983, the district court sustained petitioner's motion for summary judgment in this paternity action and decreed that respondent was the father of the minor child born to the petitioner but retained jurisdiction to determine the remaining issues relating to cost of birth and support. A motion for rehearing (new trial) was timely filed by the respondent on May 5, 1983, but to date no ruling has been made as to that

motion.

Additional hearings were had, and on March 2, 1984, a journal entry was filed ordering respondent to pay certain medical expenses as well as monthly support. Respondent filed his motion to vacate or modify the judgment on May 14, 1984. He claimed that no notice of judgment, required by Neb. Rev. Stat. § 25-1301.01 (Reissue 1979), was received by him, and no copy of the proposed journal entry was served on his counsel, as required by rules of the district court.

However, when a motion for a new trial is seasonably filed and pending, as in this case, the cause remains in the district court so long as the motion is undisposed of, and there can be no final judgment until its disposition. *Versch v. Tichota*, 192 Neb. 251, 220 N.W.2d 8 (1974).

The attempted appeal in this instance having been filed prematurely, it is ordered dismissed.

APPEAL DISMISSED.

RICHARD L. FERGUSON, APPELLANT, V. ROBERT C. KRUPICKA, APPELLEE.

377 N.W.2d 541

Filed December 13, 1985. No. 84-855.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

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

Steven J. Flodman of Barlow, Johnson, DeMars & Flodman, for appellee.

KRIVOSHA, C.J., CAPORALE, and SHANAHAN, JJ., and GARDEN, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

Plaintiff, Richard L. Ferguson, a farm laborer, was injured

while hanging a barn door for his employer, defendant Robert C. Krupicka. A jury verdict was returned in favor of defendant. Plaintiff appeals; his sole assignment of error is that the court's jury instruction No. 4 concerning defendant's duty of safety toward plaintiff should have provided a higher degree of care because of the hazardous nature of farmwork.

This court has consistently applied the same safety rules in farm-employer liability cases as in nonfarm cases. *Lyons v. Wagner*, 185 Neb. 214, 174 N.W.2d 730 (1970). The given instruction No. 4, along with all of the other instructions, fully and adequately submitted the case to the jury, and the evidence supports the verdict.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDALL S. WHITMORE, APPELLANT.

378 N.W.2d 150

Filed December 13, 1985. No. 84-950.

1. **Wiretaps.** An application for a wiretap shall include sufficient facts which will support a believable conclusion that reasonable or ordinary investigatory techniques had been tried and had failed, or appeared unlikely to succeed, in obtaining evidence regarding a defendant's illegal activity.
2. **Confessions: Miranda Rights.** 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. 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. _____: _____. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect amounts to interrogation under *Miranda*.
4. _____: _____. Where there is no expectation of an admission and the police conduct is not an attempt to obtain an admission, there is no interrogation.
5. **Motions to Suppress: Appeal and Error.** Factual findings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong, looking at a totality of the circumstances.
6. **Confessions: Miranda Rights.** A neutral question which falls within the class of

brief, spontaneous reactions to the situation then confronting a police officer, and was not designed to obtain evidence to establish guilt, is not interrogation under *Miranda*.

7. **Trial: Testimony: Appeal and Error.** Under the harmless error rule, for an error to be prejudicial, it must be demonstrated that the State's case was significantly less persuasive had the disputed testimony been excluded.
8. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
9. _____: _____. We are not required to disturb an otherwise entirely appropriate sentence solely because someone else was treated more leniently.

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

Emil M. Fabian and Barbara Thielen of Taylor, Fabian, Thielen & Thielen, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

KRIVOSHA, C.J., WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ.

HASTINGS, J.

The defendant, Randall S. Whitmore, was convicted by a jury of five felony counts involving violations of the Nebraska Uniform Controlled Substances Act (Neb. Rev. Stat. §§ 28-401 et seq. (Reissue 1979 & Cum. Supp. 1984)). In his appeal to this court he assigns as error: (1) The admission of evidence obtained by claimed illegal wiretaps; (2) The failure to suppress certain statements made by the defendant; (3) Insufficiency of the evidence to support verdicts of guilty; and (4) Excessiveness of the sentences imposed. We affirm.

The violations were alleged to have occurred on or about November 23, 1981. The wiretap surveillance covered the period of October 21 to December 1, 1981. Whitmore claims, inter alia, that the wiretap order was facially insufficient; that the police officers failed to minimize the intrusiveness of the search; and that the interim reports filed with the district court intentionally or recklessly misrepresented information.

These three issues were disposed of adversely to the defendant in a one-judge opinion, *State v. Whitmore, White, and Henderson*, 215 Neb. 560, 340 N.W.2d 134 (1983). That

opinion was adopted in toto by the court in *State v. White*, 220 Neb. 527, 371 N.W.2d 262 (1985), and disposes of those issues here.

In this appeal the defendant makes one new argument with regard to the wiretap, i.e., lack of necessity, citing *State v. Lane*, 211 Neb. 46, 317 N.W.2d 750 (1982). Whitmore asserts that the government must show by *facts* in its application that there is a retrospective and prospective failure of alternative investigative techniques before a wiretap may issue. See *State v. Golter*, 216 Neb. 36, 342 N.W.2d 650 (1983).

In *Golter* this court expounded at length on the necessity requirement embodied in Neb. Rev. Stat. § 86-705(1)(c) and (3)(c) (Reissue 1981). In stating that the purpose of the necessity requirement is not to foreclose a wiretap until every conceivable investigative technique has been exhausted, we went on to say: "Rather, the full and complete statement informs a court of the nature and progress of the investigation, explains the difficulties involved in normal investigative techniques, and assures that a wiretap is not obtained where conventional investigative techniques would be sufficient to expose a crime." 216 Neb. at 42, 342 N.W.2d at 654.

While requiring a showing of failure of alternative means, necessity

> "does not require the exhaustion of all other possible or reasonable avenues of investigation. It does not, in fact, require that other methods even be tried if the application demonstrates other procedures are unlikely to succeed or are too dangerous. . . . '. . . It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation. The government must, however, *fully explain* . . . the *basis* for such a conclusion.' . . ."

Id. at 41, 342 N.W.2d at 653-54 (quoting *State v. Kolosseus*, 198 Neb. 404, 253 N.W.2d 157 (1977)).

Defendant argues that the affidavits in support of the issuance of search warrants did not contain necessary facts regarding the investigative technique or surveillance. The affidavit of October 21, 1981, does indeed contain statements

of a conclusory nature which recited that surveillance had been tried and had failed with no hope of future success.

However, there are facts recited throughout the affidavit in support of that conclusion. It is stated that surveillance of the large apartment building at 2560 Marcy Street was difficult because it was not possible for the individual doing the surveillance to remain stationary and watch the front door without detection. Additionally, it was claimed, observing a party to enter the complex would not reveal to which apartment that individual was going.

At another point in the affidavit it was recited that in attempting surveillance of the defendant's farm home located near Louisville, it was not possible to have either a fixed or moving surveillance. This was because officers were not able to get close enough to the farmhouse to see any activity that would disclose narcotics transactions. This was explained as being due to the close proximity of trees and growing crops to the farmhouse. The affidavit also contained a recitation of attempts by various law enforcement officials to place the defendant under surveillance while driving his car, which was unsuccessful because of the erratic manner of his driving, i.e., changing directions, driving down alleys, and suddenly stopping to see if someone was following him.

The use of informants was employed to gain detailed information regarding the defendant's drug activities. However, one or more of the informants who identified defendant as their source of drugs did not want to become involved in the investigation and would not agree to testify against defendant.

There were facts recited in the affidavit from which it could be concluded that pen registers would not be productive. One of the critical phone numbers was used only for recording incoming messages and was not used to dial out. A pen register, it was stated, could not be used because it did not record incoming calls.

Considering all of the affidavits in support of the various applications, we are convinced that they supported a believable conclusion that reasonable or ordinary investigatory techniques had indeed been tried and had failed, or appeared

unlikely to succeed, in obtaining evidence regarding the defendant's illegal drug trafficking. That is all the law requires.

Defendant's second assignment of error has to do with the ruling of the trial court which refused to quash an admission made by the defendant absent *Miranda* warnings. This admission had to do with the defendant's ownership of certain keys which included keys to a 1971 brown Plymouth Valiant automobile and a toolbox located in the trunk.

On November 23, 1981, the police searched that particular automobile, pursuant to a search warrant. The warrant had been issued on the strength of an affidavit which recited in substance that, according to informants, this particular automobile was used by the defendant and John White to cache illicit drugs, and which, although registered in the name of a fictitious Mark Salem, was nevertheless owned by the defendant. The search revealed several items which, upon analyzation, were found to be controlled substances. It was necessary for the State to somehow tie the defendant into the ownership or use and control of this automobile. Its attempt to do so is the crux of defendant's objection.

On November 23, 1981, the police executed a search warrant permitting the search of the defendant's person and the premises at 2722 North 64th Street. The premises were entered by way of the front door through a glass panel that had been kicked out. The defendant was placed under arrest, which was on the strength of probable cause, without the issuance of an arrest warrant. He was not given *Miranda* warnings.

Nevertheless, the officers asked the defendant if he was the owner of a specific set of keys found on the dresser in the room in which defendant was located, and he answered that he was. Two of the keys were found to fit the trunk and door lock of the 1971 Valiant, and one fit a toolbox in the trunk. Because the admission as to ownership of the keys was obtained at a time when the defendant was under arrest and had not been read his *Miranda* rights, defendant claims his motion to suppress that evidence should have been sustained.

> [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.

Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). See, also, *State v. Andersen*, 213 Neb. 695, 331 N.W.2d 507 (1983).

In *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), the U.S. Supreme Court further defined interrogation by stating:

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

See, also, *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

The defendant was clearly questioned, while in custody, without the protection of his *Miranda* warnings. However, the State argues that the questioning here did not rise to the level of "interrogation" which triggers the requirements of *Miranda*, citing *State v. Simoneau*, 402 A.2d 870 (Me. 1979) (a brief neutral question not part of an effort to elicit a confession). It was, the State continues to urge, a natural response to a spontaneous question which had nothing to do with investigating criminal activity. *State v. Link*, 289 N.W.2d 102 (Minn. 1979) (innocuous biographical questions). See, also, *State v. Lamb, supra* at 502, 330 N.W.2d at 466 (citing *Com. v. Shepherd*, 269 Pa. Super. 291, 409 A.2d 894 (1979)): " 'Where there is no expectation of an admission and the police conduct is not an attempt to obtain an admission, there is no interrogation.' "

The State further calls attention to the testimony of the arresting officer who said that they knew they were going to transport the defendant and his companion to the police station

before completing the search of the residence, so they were looking for a key to resecure the premises. It was against that background, the State insists, that the defendant was first asked if the keys were his, and then whether there was a key to the front door on the ring.

In other words, the claim is made that the question regarding ownership of the key was a neutral question not designed to elicit a confession or admission, and it was only fortuitous that a key to the Valiant automobile was later discovered and tied to defendant's earlier admission of ownership.

However, it is questionable that it was necessary to determine ownership of the keys to ascertain whether a key to the front door was among them. Secondly, it would be difficult to secure the premises by locking a door which had never been unlocked, but which had permitted entrance through a kicked out glass panel. Finally, as the defendant points out, the arresting officer, on cross-examination, stated that he noted, in checking the evidence they had gathered, that there were two Chrysler Corporation keys on one of the keyrings. He admitted that he was aware of the earlier search of the Plymouth Valiant and, knowing those facts, wanted to check the keys to see if they fit the ignition and trunk lock of that vehicle.

However, there is nothing in the record to suggest that the officer recognized the Chrysler keys on the ring before inquiring as to ownership. Whether he did or not is a question of fact. Factual findings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong, looking at a totality of the circumstances. *State v. McCarthy*, 218 Neb. 246, 353 N.W.2d 14 (1984).

In *State v. Barnes*, 54 N.J. 1, 252 A.2d 398 (1969), defendant was convicted of receiving stolen goods. Those goods were checks. Defendant had been arrested as an escapee, while driving an automobile. After stopping the defendant the police noticed the checks on the floor and asked to whom they belonged, and the defendant stated that they were hers. In concluding that the defendant had not been subjected to questioning within the meaning of *Miranda*, the court stated as follows:

What was comprehended by *Miranda* was a process of

> "custodial interrogation" which the Supreme Court found to be inherently coercive. The single question asked in this case was not part of the investigation which led to the defendant's apprehension, nor was it one of a series of investigatory queries. Most important, it was not the type of question which centered blameworthiness on the defendant. . . .
>
> . . . It seems clear to us that the essence of the situation was not an officer imposing a process of interrogation upon a suspect, but an officer reacting naturally and spontaneously to the scene before him.

State v. Barnes, supra at 6, 252 A.2d at 401.

We believe the question as to the ownership of the keys in the present case was a neutral question which would fall within the class of brief, spontaneous reactions to the situation then confronting the officer, and was not for the purpose of interrogating the defendant to obtain evidence to establish guilt. It cannot be said that the trial court was clearly wrong in overruling the motion to suppress.

There is yet another reason why defendant's second assignment of error must be overruled, and an explanation of that position will meet defendant's argument as to the sufficiency of the evidence to support his convictions.

Even though a ruling on the admissibility of evidence is erroneous, it may be considered to be harmless error not requiring reversal of an otherwise valid conviction. For the error to be prejudicial, we must find that the State's case was significantly less persuasive had the disputed testimony been excluded. *State v. Andersen*, 213 Neb. 695, 331 N.W.2d 507 (1983).

The record disclosed that both the Plymouth Valiant and a Lincoln automobile were registered in the fictitious name of Mark Salem. Both defendant and John White drove the Lincoln. A tape of a telephone conversation between White and the defendant appeared to refer to the ownership or control of these two vehicles. Specifically, in what seemed to be a conversation regarding the Lincoln, the defendant suggested that White contribute on some of the repair bills. White refused and the defendant said he would take the car back.

Discussion then centered on use of the "brown mobile" (Plymouth Valiant), which White said he would then have to use and the defendant would have to find someplace else to keep "something" then, and defendant replied he would have to sell it. White said he was referring to defendant's "tools and stuff." When it became apparent that White was serious about driving that vehicle, the defendant said "Okay."

In that same conversation, when White suggested that he would have to drive the "brown mobile," the defendant replied that he would have to get the transmission fixed, but White merely stated that he would keep putting "quarts" in it, suggesting that the vehicle was leaking oil. Further connecting the "brown mobile" to the brown Plymouth Valiant in which the drugs were found, a police officer testified that at the time of the search there was an oil slick underneath the transmission case where the Valiant was parked.

As previously stated, the keys were located on the dresser immediately adjacent to the bed which defendant occupied at the time. The keyring contained a key to defendant's "toolbox" located in the trunk of the automobile. The keyring also contained numerous keys to video games, such as Donkey Kong and Pac-Man. It is undisputed that defendant was in the business of operating these video games.

Defendant's admission that the keys were his merely confirmed the obvious, and the evidence of defendant's control of the vehicle and the drugs inside would not be made any the less persuasive had the evidence been kept out.

Control of the drugs found in the automobile was really the key issue in the State's case against the defendant. Our stated conclusion in that regard adequately disposes of the defendant's claim that the evidence was insufficient to support the verdicts. There is no merit to that assignment of error.

The defendant was sentenced to terms of imprisonment of 3 to 5 years on count I; 2 to 4 years on each of counts II, III, and IV, concurrently with each other but consecutively to count I; and, on an additional charge in a companion case, to a term of 1 to 3 years, to run concurrently with the sentences in counts II, III, and IV.

These were, respectively, Class II, Class III, and Class IV

felonies. Therefore, each sentence was within the terms prescribed by statute. Neb. Rev. Stat. § 28-105 (Reissue 1979). A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. McKichan*, 219 Neb. 560, 364 N.W.2d 47 (1985).

However, defendant argues that his coconspirator, John White, received substantially lesser penalties. Neither White's nor, for that matter, defendant's presentence investigation has been made a part of the record. But assuming that White's sentences, as stated by defendant, amounted to a total of 3 to 5 years' imprisonment, as compared to defendant's 5 to 9 years, there was ample justification for the different treatment accorded defendant.

The record discloses that Whitmore, for whom White worked, was engaged in a large-scale, wholesale, illicit drug operation. Clearly, the defendant, by having a greater degree of responsibility in the distribution of controlled substances, is the more culpable. Defendant was in the business purely for monetary gain. Any sentences less than those imposed in this instance might tend to depreciate the seriousness of the offense. There was no abuse of discretion on the part of the trial judge in imposing the sentences. They were entirely appropriate, and we are not required to disturb those sentences solely because someone else was treated more leniently. *State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985).

The judgments of the district court are affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

WHITE, J., concurs in the result.

CAPORALE, J., concurring.

I agree with the majority's holding that the admission into evidence of Whitmore's response concerning ownership of the keys was, beyond a reasonable doubt, harmless error. There was ample evidence beyond that response which identified the Valiant as the automobile discussed by White and Whitmore and, therefore, to connect Whitmore with the Valiant. It is that evidentiary consideration which, pursuant to *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978), and *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.

Ed. 2d 705 (1967), permits us to affirm the district court's judgment. Accord *State v. Andersen*, 213 Neb. 695, 331 N.W.2d 507 (1983).

I write separately, however, because I cannot agree with the majority's obiter dictum that Whitmore's *Miranda* rights were not violated.

As noted in the majority's opinion, the prosecution may not use statements stemming from custodial interrogation of a criminal defendant unless it demonstrates that the *Miranda* warnings were first given and waived. Since the State admits Whitmore was in custody when he was questioned about ownership of the keys, the relevant issue becomes whether such questioning constituted interrogation.

Interrogation has been variously defined in our cases. *State v. McNitt*, 207 Neb. 296, 299, 298 N.W.2d 465, 466 (1980), noted that "[t]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Interrogation occurs, according to *State v. Weinacht*, 203 Neb. 124, 130, 277 N.W.2d 567, 571 (1979), "when the subject is placed under a compulsion to speak." See, also, *In re Interest of Durand. State v. Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980). The following language from *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), shows up frequently in our decisions: "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." See, also, *State v. Sutton*, 207 Neb. 778, 301 N.W.2d 335 (1981); *In re Interest of Durand. State v. Durand, supra.*

In *State v. Thunder Hawk*, 212 Neb. 350, 322 N.W.2d 669 (1982), we held that statements made by the defendant after he had been placed under arrest violated *Miranda* and were inadmissible. The defendant in *Thunder Hawk* had been involved in an automobile accident and, before being transported to a hospital, was arrested for driving a motor vehicle while under the influence of alcohol. At the hospital a police officer questioned Thunder Hawk about the accident

without first informing him of his rights under *Miranda*. Among other questions, Thunder Hawk was asked if he was driving, to which he replied yes, and was also asked who owned the vehicle, to which he replied that he did not know. At the time of this questioning the officer had in his possession the vehicle's registration, which indicated the vehicle was titled to a third party. The defendant was subsequently charged with theft of movable property. The questioning officer testified that he asked the questions solely for assistance in filling out his accident report. The officer's explanation was quickly rejected by this court, which determined that the interrogation was clearly aimed at soliciting incriminating statements. Even though the type of questioning which occurred in *Thunder Hawk* was found not permissible, we did note that "[v]olunteered and general on-the-scene questioning is not prohibited" by *Miranda*. *Id.* at 355, 322 N.W.2d at 672.

In the present case Whitmore was not subjected to some general on-the-scene questioning. Rather, he was asked whether he owned a specific set of keys. Just as in *Thunder Hawk*, the police officer's reason for asking the question does not withstand scrutiny. Why it was necessary to determine ownership of a set of keys before such could be used to lock an already locked door which had been partially destroyed in gaining entrance is far from readily apparent. The officer knew of the earlier successful search of the Plymouth Valiant and of the need to connect Whitmore with that vehicle. The officer surely knew that people usually carry their car keys on some type of chain even if he did not notice the Chrysler Corporation keys until after he had questioned Whitmore—a fact which is not clear from the evidence. The officer should have known that his questioning was "reasonably likely to elicit an incriminating response." Indeed, the officer's failure to give a plausible reason for his question inescapably leads to the conclusion that an incriminating response is exactly what he wanted and got.

This conclusion is also compelled by the *Thunder Hawk* decision itself. The relevant question in that case involved ownership of a vehicle, whereas in this case it involved ownership of a set of keys. How the one constitutes

interrogation and the other does not cannot be explained on any rational basis. Furthermore, *State v. Barnes*, 54 N.J. 1, 252 A.2d 398 (1969), cited by the majority to support its conclusion, on close examination does not do so. In *Barnes* the defendant was stopped and arrested on an escape charge, at which time the police noticed numerous checks on the floor of the automobile. Several persons other than the defendant were also in the automobile. The police asked to whom the checks belonged, and the defendant's response that they were hers was admitted in her later trial for receiving stolen goods. In finding no interrogation had occurred, the *Barnes* court noted that "the question was open-ended in its form, not focusing on any particular suspect, and unrelated to the cause of her arrest as an escapee." *Id.* at 6, 252 A.2d at 401. The same cannot be said of the question asked in the present case.

KRIVOSHA, C.J., and SHANAHAN, J., join in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. BRET EWING, ALSO KNOWN AS BRET ESAU, APPELLANT.

378 N.W.2d 158

Filed December 13, 1985. No. 85-130.

1. **Criminal Law: Statutes.** A penal statute must be strictly construed, but should also be construed in the context of the object sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purposes for which it serves.
2. **Criminal Law: Police Officers and Sheriffs: False Reporting.** The underlying purpose of Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984) is to prevent the public from willfully furnishing erroneous information to law enforcement officers and thus interfering with the performance of their duties.
3. **Criminal Law: Police Officers and Sheriffs: False Reporting: Words and Phrases.** The phrase "the investigation of an actual criminal matter" as used in Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984) requires that there be a legitimate and valid investigation of facts which could constitute a predicate criminal offense.
4. **Criminal Law: Intent.** The intent with which an act is done is inferable from the act itself and the facts and circumstances surrounding it.

Appeal from the District Court for Merrick County: JOHN M. BROWER, Judge. Affirmed.

Richard T. Vanderheiden of Phares, Torpin, Vanderheiden & Mesner, for appellant.

Robert M. Spire, Attorney General, and Calvin D. Hansen, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

The defendant-appellant, Bret Ewing, also known as Bret Esau, age 17, was charged in the county court for Merrick County, Nebraska, with false reporting "with the intent . . . to impede the investigation of an actual criminal matter" in violation of Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984). After trial Ewing was found guilty as charged and was sentenced to unsupervised probation for a 31-day period, during which time he was required to complete 15 hours of community service work with the Central City Police Department. On appeal to the district court for Merrick County, Ewing's conviction and sentence were affirmed. Ewing appeals to this court, assigning as error that the trial court erred by inferring the intent required by § 28-907(1)(a) on Ewing's part and in determining that an "actual criminal matter" was being investigated. For the reasons hereinafter set out, we affirm.

On the afternoon of May 15, 1984, Angela Marti, age 16, received permission from her mother to visit a friend, Tanya Dubey, who lived in a trailer home about 10 blocks from the Marti home in Central City, Nebraska. The trailer home that Angela sought to visit was rented and occupied by Valerie Shanklin, age 21 or 22, and Tanya Dubey, age 16, who was either a stepsister of Valerie's or about to become one.

Angela was instructed by her mother to return home by dark. She did not do so. At 9 p.m. Mrs. Marti went to the trailer home, where she found her daughter, Valerie Shanklin, Tanya Dubey, defendant Bret Ewing, and Bill Zikmund, age 17, in the trailer. Mrs. Marti saw Ewing and Angela sitting at a table with

a beer can on the table in front of each of them. When asked by her mother about the beer, Angela said that it was Tanya's. Angela had a cigarette in her hand.

When Mrs. Marti asked her daughter what was going on, Ewing told Mrs. Marti not to get upset, that "it was just a cigarette." Mrs. Marti then asked her daughter to come home. Angela refused and a heated argument ensued. Mrs. Marti told her daughter to be home in 15 minutes and that if she did not do so, she (Mrs. Marti) would call the police. Ewing testified he was present when Mrs. Marti and Angela were arguing in the trailer and that he also could hear the two arguing in the alley after they both left the trailer.

When Angela did not return home as directed, Mrs. Marti called the Central City Police Department at approximately 10 p.m. Officer William Fitzgerald was sent to speak with Mrs. Marti. She told Fitzgerald that her daughter and other juveniles were at the trailer. She also said that there were "beer cans and cigarettes and other things involved and she just didn't like that atmosphere that her daughter was in." When called as a witness by Ewing, Mrs. Marti further testified that she told Officer Fitzgerald that her 9-year-old daughter had returned home earlier and told her mother that she had seen drinking going on at the trailer. Mrs. Marti further testified that she told the officer that "I had reason to believe that there was drinking going on in the house with minors. I did not want my daughter in that environment." She asked Officer Fitzgerald to "go over to the house and check for her."

Officer Fitzgerald went over to the trailer at approximately 10:15 p.m. and spoke only with Tanya Dubey. Dubey denied that Angela Marti was in the trailer. Angela Marti testified that she was in the trailer at that time. Fitzgerald left the scene without having seen or spoken with Ewing.

Fitzgerald then returned to Mrs. Marti's residence and told her he was unable to locate her daughter. Mrs. Marti suggested that Fitzgerald drive by the trailer to see if Angela's bicycle was there. Fitzgerald did so and saw the bicycle in front of the trailer. Officer Fitzgerald then radioed his superior officer, Sergeant Koss, explaining that he was unable to locate the Marti

girl. Koss told Fitzgerald there was not much more he could do.

The radio transmission between Fitzgerald and Koss was overheard by State Patrolman Ronald McGuire, who was on the west edge of Central City. McGuire went to Mrs. Marti's residence, where Mrs. Marti and Officer Fitzgerald were present. McGuire testified that he was informed by Mrs. Marti that her daughter was 16, that there was "booze" present in the trailer, that her daughter was smoking, and that she (Mrs. Marti) had met with resistance in removing her daughter from that environment.

Officer McGuire also testified he decided to investigate because it was his opinion that there was a possibility of a minor in possession of alcohol. He further testified he felt, based upon the information Mrs. Marti had given him, "that there may be a delinquent minor along with maybe somebody contributing to the delinquency of a minor." Contributing to the delinquency of a minor, as defined by Neb. Rev. Stat. § 28-709 (Reissue 1979), is a Class I misdemeanor, and possession of alcohol by minors is a violation of Neb. Rev. Stat. § 53-180.02 (Reissue 1984).

Officer McGuire, along with Mrs. Marti and Officer Fitzgerald, then went over to the trailer at about 11 p.m. McGuire testified he approached the trailer, knocked on the door, and Dubey, Ewing, and Zikmund came out on the front porch. McGuire asked Ewing several times during the conversation if the Marti girl was in the trailer house. Ewing responded that Angie was not in the trailer, that she had left. Ewing later testified that he, in fact, knew Angela Marti was hiding in the trailer at the time. McGuire testified that he smelled alcohol coming from Ewing and Zikmund. After failing to find Angela Marti and having been refused admittance to the trailer, McGuire, Mrs. Marti, and Fitzgerald left.

Angela Marti testified that, once the officers and Mrs. Marti left, she, Dubey, Ewing, and Tony Davis all went over to Davis' house. Mrs. Davis later came home. Defendant's mother was with Mrs. Davis, apparently looking for her son, the defendant, because Ewing testified he also was hiding from his mother that evening. Angela also testified she had a fight with Mrs. Davis.

According to Officer McGuire's police report, both Mrs. Davis and defendant's mother went down to the police station and told the police where they could find the youths. The police arrived at the Davis home around 1 a.m. All of the youths scattered, but the police did apprehend Ewing.

Angela Marti did not return to her home that night and spent the night in a shed. She went to school the following morning and later called her mother.

After trial the county court found Ewing guilty. In its judgment the county court found:

> In this case, there was a possible criminal charge of contributing to the delinquency of a minor under R.R.S. Neb. 28-709. Whether or not the investigating officers intended to ask the county attorney to file such a complaint is immaterial in relation to the application of R.R.S. Neb. 28-907.

In effect, the court determined that when Officer McGuire questioned the appellant concerning the whereabouts of Angela Marti on May 15, 1984, McGuire was investigating an actual criminal matter pursuant to § 28-907(1)(a).

Section 28-907(1)(a) states:

> (1) A person commits the offense of false reporting if he or she:
>
> (a) Furnishes information he or she knows to be false to any peace officer or other official *with the intent* to instigate an investigation of an alleged criminal matter or *to impede the investigation of an actual criminal matter.*

(Emphasis supplied.)

Section 28-907(1)(a) requires three elements be present in order to be convicted of false reporting. There must be a false statement to a peace officer; it must be given with the intent to impede an investigation; and the investigation must be of an actual criminal matter. Ewing admits that he lied to the police when questioned as to Angela Marti's whereabouts on May 15, 1984. His two assignments of error are that the trial court erred in determining that he possessed the requisite intent to impede an investigation and in determining that the police were investigating an actual criminal matter.

We agree with Ewing that the phrase "actual criminal

matter" has never been defined in Nebraska case law, statute, or legislative history. A review of other states' false reporting statutes and case law also indicates that Nebraska is the only state which uses the words "actual criminal matter" in conjunction with its false reporting statute.

Interpreting a statute is a question of law. The general overriding principle of statutory construction as it relates to a penal statute is that the penal statute be strictly construed. *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980). However, a criminal statute should also be construed in the context of the object sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purposes for which it serves. A statute should be given a sensible construction. *State v. Lewis*, 184 Neb. 111, 165 N.W.2d 569 (1969). Additionally, while a penal statute must be strictly construed, it is not proper to give it a strained or unnatural construction. *State v. Reich*, 186 Neb. 289, 183 N.W.2d 223 (1971), *cert. denied* 404 U.S. 846, 92 S. Ct. 149, 30 L. Ed. 2d 83. The rule requiring strict construction of penal statutes is not violated by giving words of the statute their full meaning in the connection in which they are employed. *State v. Simants*, 182 Neb. 491, 155 N.W.2d 788 (1968).

As noted earlier, although the phrase "actual criminal matter" has never been interpreted, this court recently discussed the underlying purpose of § 28-907(1)(a) in *State v. Fix*, 219 Neb. 674, 679, 365 N.W.2d 471, 475 (1985), where we noted:

> The law enforcement department for this community is extremely small. The record indicates that it consisted of only two officers, one working days and one working nights. Because of the statement made by Fix, the one officer was required to occupy his entire evening investigating the allegedly missing money and was taken away from his real purpose, that of patrolling the community during the night hours.

While *Fix* was a case that dealt with the furnishing of false information to a police officer with the intent to instigate an investigation of an alleged criminal matter, we believe the same reasoning applies where one impedes the investigation of an

actual criminal matter. The underlying purpose of § 28-907(1)(a) is to prevent the public from willfully furnishing erroneous information to law enforcement officers and thus interfering with the performance of their duties.

Ewing argues that in order for § 28-907(1)(a) to apply there must be an actual crime committed. We do not read the statute so. If the Legislature intended that an investigation of an actual crime be the subject of the official investigation, then it would have simply used the word "crime." The fact of the matter is it did not, and instead used the phrase "actual criminal matter," which is a broader term.

In using the words "actual criminal matter," the Legislature intended that law enforcement officers be required to prove the existence of a legitimate and valid investigation of facts which could constitute a predicate offense before a violation of the false reporting statute may stand. This would be a reasonable construction, given the abuses the statute is intended to prevent. It would protect the public from being harassed by police officers asking questions concerning a feigned or false criminal matter. The word "actual" adds an element of objectivity to ensure that before a person is questioned concerning a criminal matter, the police must be able to point to particular facts and circumstances which would lead a reasonable person to believe that criminal activity was afoot.

In this case the information given to Officer McGuire concerning the activity in the trailer house was by an eyewitness, Mrs. Marti. Mrs. Marti told McGuire that she saw her daughter and Ewing sitting at a table. There were beer cans on the table. Mrs. Marti was told by her daughter that the beer belonged to Tanya, another 16-year-old. She indicated the age of her daughter. She also told him that she had had trouble removing her daughter from this trailer. When presented with these facts and the late hour that Angela was absent from her home on a school night, it was certainly reasonable for Officer McGuire to believe that a minor could be in the possession of alcohol and that someone could be contributing to the delinquency of a minor. Officer McGuire acted within the ambit of § 28-907(1)(a).

Ewing's second assignment of error is that the trial court

erred "by inferring knowledge and intent on [his] part . . . in impeding the investigation of an actual criminal matter from the circumstances surrounding the false information told to the police officers . . . ."

Ewing argues that the evidence was insufficient to find that he had formed the requisite intent to impede an investigation. In support of this proposition he argues that if intent is to be shown by circumstantial evidence, the circumstantial evidence proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion. We have held that any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. *State v. Doyle*, 205 Neb. 234, 287 N.W.2d 59 (1980).

We held in *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981), that one accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.

As stated in *State v. Schroder*, 218 Neb. 860, 869, 359 N.W.2d 799, 806 (1984):

> [I]n determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

With regard to the question of the determination as to the required intent, we held in *State v. Journey*, 201 Neb. 607, 616, 271 N.W.2d 320, 325 (1978): " 'The intent with which an act is done is inferable from the act itself, and from the facts and circumstances surrounding it. * * * But it is sufficient in such cases to prove facts from which the specific intent may be inferred. . . .' "

We believe the standards set forth in *Schroder*, *Buchanan*, and *Journey* have been met by the State in this case.

The record shows that Ewing was present when Mrs. Marti

asked her daughter to come home. Ewing witnessed the argument between the two. He knew there was beer in the trailer and that Mrs. Marti had been told that Tanya Dubey, a 16-year-old girl, had beer in her possession. Ewing was also aware that Tanya had lied about Angela's whereabouts when questioned by the police the first time. With this in mind he purposefully lied to the police when questioned about Angela Marti.

Ewing argues that the police never informed him that they were investigating a criminal matter, and, therefore, he could not form the requisite intent to impede such investigation. The facts in this case do not support Ewing's contention. Ewing knew that efforts were being made to hide Angela from the police and that a situation existed which raised a question about possibly contributing to her delinquency. Ewing had personal knowledge of the legal ramifications resulting from the drinking of alcohol by minors. Ewing testified that he had gotten drunk the year before at a school dance when he was a junior in high school and had been taken to the police station in Central City, where he got "really mouthy" with Officer McGuire "because I was so drunk I didn't remember what he was saying to me . . . ." Ewing certainly did not need to be apprised specifically by the police that an investigation was taking place.

We note that Ewing had two options when asked about the location of Angela Marti. He could have remained silent, as constitutionally privileged, or told the truth. In either case he could not have been charged under the false reporting statute. But, rather, he chose to lie. We can conclude that he affirmatively intended to impede the officer's investigation. The conviction and sentence are affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. As the majority notes, before one may be found guilty of violating Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984), three elements must be present: (1) there must be a false statement to a police officer; (2) the statement must be given with the *intent* to impede an investigation; and (3) the investigation must be of an *actual* criminal matter. Although it

is obvious that a false statement was made to a police officer, I do not believe that the evidence in this case will permit a finder of fact to conclude that the second and third elements of the crime have been established beyond a reasonable doubt.

As noted by the majority, there was no investigation of an actual criminal matter going on, at least as long as Officer Fitzgerald was involved. When he radioed his superior officer, Sergeant Koss, explaining that he was unable to locate the Marti girl, he was told that there was not much more he could do. No one intended to conduct any further investigation or do anything more about the matter.

Therefore, in order to find that there was an investigation of an actual criminal matter which was impeded, one must find that somehow the activity of Trooper McGuire constituted such an investigation. In my view the evidence will not support that conclusion. Trooper McGuire testified that after he overheard the conversation between Officer Fitzgerald and Sergeant Koss, he drove over to Bolling's trailer court, where he met Mrs. Marti. His purpose of taking Mrs. Marti into his cruiser and going to the Shanklin trailer was simply to get Mrs. Marti's daughter. Specifically, he was asked the following questions and gave the following answers: "Q- What did you do at that time? A- I told her [Mrs. Marti] if she wanted her daughter home to get in my patrol car, we'd go get her daughter."

When specifically asked what actual crimes he was investigating, he answered:

> From what Mrs. Marti had described and the environment she had described, I felt that there was a *possibility* of her daughter being a minor in possession of alcohol. I also felt that if — was fact what she had described in the confrontation that she had with the other people in the trailer house and the environment, that there may be a delinquent minor along with maybe somebody contributing to the delinquency of a minor.

(Emphasis supplied.) Further, on cross-examination Trooper McGuire testified:

> The reason I went over to Tanya Dubey's was to assist Mrs. Marti in returning her child to her home. The information that Mrs. Marti gave me put information into my head that in fact, *after* I got to that trailer house, there may be

crimes being committed.

(Emphasis supplied.)

On the basis of that testimony, I find it difficult to conclude beyond a reasonable doubt that there was an investigation of an actual criminal matter taking place. This is, in my view, further supported by the fact that no one was charged with being a minor in possession or contributing to the delinquency of a minor.

Section 28-907(1)(a) also mandates that the statement must be given with the intent to impede an investigation. The record is, however, devoid of any evidence indicating that Ewing either knew or should have known that Trooper McGuire was conducting an investigation of "an actual criminal matter." The majority suggests that he should have known that there was the *possibility* that someone was guilty of being a minor in possession or of contributing to the delinquency of a minor. I am unable to equate "possibilities" with the need that the defendant have an intent to impede an investigation of an "actual criminal matter" before one may be guilty of violating § 28-907(1)(a). Ewing might just as well have concluded that the trooper had come to secure custody of a runaway, as the trooper in fact told Mrs. Marti he was doing, and was not at all concerned about a criminal investigation. It would seem that a person must know, or should have known, that an investigation of an actual criminal matter is being conducted before a person can intend to impede that investigation by giving false information. Here, even the majority admits that there was only a possibility that Ewing knew or should have known that an actual criminal investigation was ongoing. It does not seem to me to be too onerous a burden to require a police officer to advise persons who are being interrogated that the officer is in the process of conducting an investigation of an actual criminal matter. In my view the record does not establish the requisite intent necessary to constitute the crime charged.

Ewing is not to be commended for lying, but the fact that he committed a moral sin does not equate to establishing proof beyond a reasonable doubt of the commission of a criminal act.

CAPORALE, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DONALD E. SCHULZ, APPELLANT.

378 N.W.2d 165

Filed December 13, 1985. No. 85-132.

1. **Probation and Parole: Evidence: Records: Appeal and Error.** If a sufficient record exists which establishes the grounds for the revocation of probation by clear and convincing evidence, such revocation need not be reversed solely and only on the ground that, through inadvertence, a complete record of the revocation hearing was not preserved.
2. **Statutes: Appeal and Error.** The Nebraska Supreme Court is not free to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.
3. **Criminal Law: Statutes.** A penal statute is to be strictly construed.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Judgment affirmed. Sentence affirmed in part, and in part reversed and cause remanded for further proceedings.

Bradley E. Barrows of Svehla & Barrows, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

KRIVOSHA, C.J., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Upon a plea of guilty Donald E. Schulz was convicted of second offense driving while intoxicated and was later sentenced to probation for a period of 1 year. Among the terms and conditions of the probation were that his operator's license be suspended for 6 months and that he serve 48 hours in the county jail, abstain from the use of alcoholic beverages, and submit to chemical tests at the request of the probation officer. Five months later, that probation was revoked by the county court as a result of Schulz' refusal to submit to a chemical test requested by his probation officer. By this time Schulz had already spent the 48 hours in jail which was required by his probation. Upon revoking probation the county court also revoked Schulz' operator's license for an additional period of 12 months and sentenced him to 30 additional days in jail, fined

him $500, and assessed costs. The district court affirmed. On appeal to this court Schulz assigns as error (1) the failure of the district court to remand the case to the county court for further proceedings, as a full record was not made of the probation revocation hearing in the latter court, and (2) the affirmance of an illegal sentence, in that it (a) imposed too long a jail term and (b) revoked his operator's license for too long a period. We affirm the revocation of probation but direct modification of the sentence by limiting the suspension of Schulz' operator's license to a period of 1 year from the judgment of conviction. Accordingly, we remand for further proceedings consistent with this opinion.

The record establishes that, through inadvertence, only Schulz' testimony was preserved at the revocation hearing. That testimony establishes that after an evening of playing softball, Schulz and a friend went to a local bar where he sat and drank only a nonalcoholic beverage. His probation officer, who was apparently in the bar and saw Schulz, requested that he "accompany her to the sheriff's office" to be tested. He refused because he was embarrassed and felt the request was "just kind of out of line," as he had not been to the bar since the night he had been arrested. He further admitted that it was "bad judgment" on his part to violate his probation by refusing to submit to a test.

After an earlier presentence report was brought up to date, the county court, noting that Schulz had previously had his probation revoked under his first drunk driving conviction, refused to continue probation on this second conviction.

Neb. Rev. Stat. § 24-541.05 (Cum. Supp. 1984) requires that testimony be preserved in all civil and criminal cases tried in the county court. It appears, however, that we have not heretofore been called upon to decide the effect of failing to make a complete record.

In *People v. Fuentes*, 132 Cal. App. 2d 484, 282 P.2d 524 (1955), the court reporter lost part of his notes. The *Fuentes* court placed the burden on the defendant to show either prejudicial error or that the record was so inadequate that he was unable to show such error. This the defendant was unable to do, and the appellate court, in affirming the trial court, held

the record contained ample evidence to support the verdict.

People v Wilson, 96 Mich. App. 792, 293 N.W.2d 710 (1980), reached a similar result, even though the court found the prosecutor was primarily responsible for the gap in the record. In that case the defendant had been identified both in a photographic display and in court. After trial the prosecutor lost three of the nine photographs used in the display, the defendant's being one of these three. At trial defense counsel had objected to the admission of these nine photographs, claiming that a mark on the defendant's photograph singled him out from the others. This was also an issue on appeal. Noting that there was no indication of an improper motive on the part of the prosecutor, the *Wilson* court recognized that an incomplete lower court record could jeopardize the appeal guaranteed by that state's Constitution. It reasoned, however, that

> not every gap in a record on appeal requires reversal of a conviction. When the surviving record is sufficient to allow evaluation of the appeal, the defendant's right is satisfied. [Citations omitted.] Whether a record is sufficient in a particular case will of course depend upon the questions that must be asked of it.

Id. at 797, 293 N.W.2d at 712. The court concluded that while its review would have been easier if all the photographs were in the record, the surviving record was still sufficient to show that the trial judge had not abused his discretion in holding that the array was not unduly suggestive.

Citing the same general rule is *People v Audison*, 126 Mich. App. 829, 338 N.W.2d 235 (1983). In *Audison* the court held the incompleteness of the trial transcript had not denied the defendant her right to appeal, since there was reversible error on another ground.

In *People v Cash*, 28 Mich. App. 1, 184 N.W.2d 216 (1970), *rev'd on other grounds* 388 Mich. 153, 200 N.W.2d 83 (1972), a portion of the testimony from the preliminary examination was missing. The remaining record did not disclose that the allegedly false testimony given by the defendant was given under oath, a failure of proof fatal to defendant's perjury conviction. The court of appeals noted that the defendant at

trial had not raised the failure of proof issue and even now on appeal did not assert that such evidence had not been adduced. Finding there was no showing there had been a failure of proof, the court stated that the fortuitous loss of part of the testimony did not require a reversal of the defendant's conviction.

In *McKnight v. State*, 356 N.W.2d 532 (Iowa 1984), a post conviction case, the entire record of the original proceeding was missing. The Iowa court noted that it was the State's statutory duty to provide the defendant with a record of the earlier proceeding. However, nearly 10 years had elapsed since the defendant's guilty plea, and the reporter's notes, which had been stored in the courthouse basement, could not be located. Based on these facts, the *McKnight* court held that

> when the State shows that the original records of a criminal proceeding cannot be produced notwithstanding its good faith effort to make and preserve those records, a postconviction court should allow the State to offer substitute proof of what occurred in those proceedings.

Id. at 535.

However, *Parrott v. State*, 134 Ga. App. 160, 214 S.E.2d 3 (1975), *overruled on other grounds*, *Mathis v. State*, 147 Ga. App. 148, 248 S.E.2d 212 (1978), appears to adopt a per se rule that the

> failure of the state to file the transcript, or a correct transcript, even where caused, as here, by its inability to file it (and not by the appellant's fault), effectively denied the appellant his right to appeal because a complete and correct transcript of his trial is not available to him.

Id. at 161, 214 S.E.2d at 4. *Parrott* involved a record in which a police officer was quoted as saying the property had a value of 10 cents to 3 dollars. The actual testimony was claimed to be $100 to $300, but the State could not locate the tapes of the hearing, and the reporter had died.

We believe the better reasoned rule to be that a revocation of probation need not be reversed solely and only on the ground that, through inadvertence, a complete record of the hearing resulting in the revocation was not preserved. It is necessary, of course, that a sufficient record exist which establishes the grounds for revocation by clear and convincing evidence.

Schulz argues that the reasonableness of his probation officer's request cannot be reviewed in the absence of the entire record, because he chose not to testify about mitigating circumstances already testified to by others. It is true that *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980), holds that a condition of probation requiring the probationer to submit to warrantless searches must be conducted in a reasonable manner. See, also, *State v. Lingle*, 209 Neb. 492, 308 N.W.2d 531 (1981). Assuming, but not deciding, that such a reasonableness requirement exists with respect to the condition in question, it nonetheless cannot be said that the trial court abused its discretion in finding that the evidence clearly and convincingly establishes the probation officer's request to have been a reasonable one, no matter what other circumstances might have been presented. *State v. Clark*, 197 Neb. 42, 246 N.W.2d 657 (1976). After all, Schulz was sitting and drinking something at a bar which sold alcoholic beverages, not at a church social serving only coffee, tea, or milk.

Schulz' first assignment of error is meritless.

We proceed, then, to Schulz' second and final assignment, that the sentence imposed is illegal as requiring him to spend more time in jail than the relevant statute mandates and as depriving him of his operator's license for more than the 1 year directed by statute.

Neb. Rev. Stat. § 29-2268(1) (Reissue 1979) provides: "If the court finds that the probationer did violate a condition of his probation, it may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted."

Neb. Rev. Stat. §§ 39-669.07(2) (Reissue 1984) and 28-106 (Cum. Supp. 1984) set forth the sentence for driving while intoxicated, second offense. Section 39-669.07(2) states in relevant part:

> If such person (a) has had one previous conviction . . . such person shall be guilty of a Class W misdemeanor and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for any purpose for a period of one year from the date of his or her conviction, and shall order that the operator's license of

such person be revoked for a like period.

If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of six months from the date of the order and such order of probation shall include as one of its conditions confinement in the city or county jail for forty-eight hours.

Section 28-106 states the mandatory penalty for the second conviction of a Class W misdemeanor is 30 days' imprisonment and a $500 fine.

The original 48 hours of jail time served by Schulz were served as a condition of his probation and not as a part of the mandatory sentence under § 28-106. Thus, the county court was free, under the language of § 29-2268(1) permitting the court to obligate a former probationer to serve such sentence as "might have been imposed originally," to require Schulz to serve, after the revocation of probation, the 30 days of jail time mandated by § 28-106 without regard to the 48 hours he had already served. See, *State v. Osterman*, 197 Neb. 727, 250 N.W.2d 654 (1977), and *State v. Williams*, 194 Neb. 483, 233 N.W.2d 772 (1975), which quote and rely on § 29-2268 in determining that sentences imposed following the revocation of probation were not excessive.

The issue concerning the operator's license suspension is, however, a different matter. Section 39-669.07(2) provides that the court shall, "as part of the judgment of conviction," suspend such person's operator's license "for a period of one year *from the date of his or her conviction . . .*." (Emphasis supplied.) The record does not show the date of Schulz' conviction, but he was originally sentenced on July 3, 1984, and therefore could not have been convicted any later than that date. Following the revocation of his probation, Schulz was sentenced on December 4, 1984, to a 1-year license revocation beginning December 4, 1984. Obviously, this 1-year suspension did not run "from the date of his conviction" as required by § 39-669.07(2).

The State argues that the division of § 39-669.07(2) into two paragraphs, one for cases in which probation is granted and one for cases in which probation is withheld, indicates that probation revocation cases are not to be governed by the "date of conviction" language found in the paragraph concerned with a sentence other than probation. The paragraph dealing with probation requires that the probationer's license be suspended for 6 months from the date of the order, not from the date of conviction.

The fact remains, however, that § 29-2268(1) limits the sentence imposed following revocation of probation to such "as might have been imposed originally." Since § 39-669.07(2) requires that the 1-year suspension run from the date of conviction, not from the revocation of probation, Schulz' operator's license may not be suspended beyond 1 year from the judgment of conviction; that is to say, 1 year from the date the sentence of probation was imposed. See, *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980); *In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980).

Stewart v. Ress, 164 Neb. 876, 83 N.W.2d 901 (1957), *modified* 165 Neb. 211, 85 N.W.2d 260, reached a similar result in connection with the revocation of one's operator's license upon the accumulation of 12 violation points within 2 years. It held that the language of then Neb. Rev. Stat. § 39-7,129 (Cum. Supp. 1955), that the revocation be for a period of 1 year "from the date of the latest conviction," meant that the revocation clock began to run from the date of the latest conviction and not from the date the license was actually surrendered to the Director of Motor Vehicles. The statute was later amended to provide that the period of revocation run "from the date of the signing of the order of revocation." 1957 Neb. Laws, ch. 275, § 1, p. 1002. (See present Neb. Rev. Stat. § 39-669.27 (Reissue 1984), to which § 39-7,129 was later transferred and further amended.)

The State observes that requiring the revocation to run from the date of conviction provides a probationer with little or no incentive to live up to the terms of his probation. That argument overlooks, however, that if one is placed on probation, his operator's license is suspended for 6 months

rather than being revoked for 1 year when a sentence other than probation is imposed. (Whether that fact can result in a longer period of suspension than imposed as a condition of probation of course depends upon the timing of a revocation of probation.) There are also the matters of the additional 30 days of jail time and the $500 fine which must be imposed as a part of a sentence other than probation.

More importantly, however, the State's concern is one to be addressed by the Legislature rather than by this court. We are not free to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. See, *Anderson v. Peterson, ante* p. 149, 375 N.W.2d 901 (1985); *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985). Further, it "is a fundamental principle of statutory construction that a penal statute is to be strictly construed." *State v. Suhr*, 207 Neb. 553, 560, 300 N.W.2d 25, 29 (1980); *State v. Beyer*, 218 Neb. 33, 352 N.W.2d 168 (1984).

This cause is remanded to the district court with the direction that it remand to the county court for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED. SENTENCE AFFIRMED IN PART, AND IN PART REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., participating on briefs.

BOSLAUGH and WHITE, JJ., concur in the result.

GRANT, J., dissenting in part.

I dissent only from the imposition of a 30-day jail term after the court determined that defendant had violated the terms of his probation. As part of that probation, he had served 2 days in jail before his 30-day jail sentence. The penalty under Neb. Rev. Stat. § 28-106 (Cum. Supp. 1984) for the second conviction of a Class W misdemeanor is 30 days in jail—not 32 days in jail. I agree that a penal statute should be strictly construed, and I would limit defendant's sentence herein to an additional 28 days.

STATE OF NEBRASKA, APPELLEE, V. LAUREL LEA OZMUN, APPELLANT.

378 N.W.2d 170

Filed December 13, 1985. No. 85-223.

1. **Prior Convictions: Right to Counsel: Waiver: Appeal and Error.** It is plain error to have no showing in the record that defendant either had assistance of counsel or waived such at the time of her conviction if the conviction is used for enhancement purposes.
2. **Rules of Evidence: Probation and Parole.** Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1979) provides the Nebraska Evidence Rules (Neb. Rev. Stat. §§ 27-101 et seq. (Reissue 1979 & Cum. Supp. 1984)) do not apply to proceedings for the granting or revoking of probation.
3. **Sentences: Probation and Parole.** The court should consider the whole record, including probative evidence of matters arising subsequent to conviction, but a violation of one of the terms of probation is sufficient for revocation.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Sentence vacated and cause remanded for resentencing.

Gary L. Hogg, Buffalo County Public Defender, and, on brief, Larry E. Butler, for appellant.

Robert M. Spire, Attorney General, and Calvin D. Hansen, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

In this criminal case defendant, Laurel Lea Ozmun, appeals the March 5, 1985, revocation of her 3 years' probation, claiming two errors: (1) The court received and considered hearsay testimony; and (2) The proof fell short of being clear and convincing as required by Neb. Rev. Stat. § 29-2267 (Reissue 1979).

Defendant, age 25 years, is married and the mother of three children, who are now supervised by foster care. She is an admitted alcoholic with a history of issuing bad checks since March of 1980. The present offense charged her with issuing a no-account check for $20 in violation of Neb. Rev. Stat. § 28-611 (Reissue 1979), a second offense and Class IV felony,

in that on April 3, 1981, she was convicted of issuing a no-account check—all done in Buffalo County, Nebraska. On the second offense defendant entered a plea of guilty on September 1, 1983. On January 25, 1984, she was sentenced to 3 years' probation, which, on October 24, 1984, was extended for 3 more years. On December 17, 1984, a motion to revoke probation was filed. After notice and a hearing had on March 5, 1985, with defendant present, the last probation order was revoked and defendant was sentenced to 2½ years' imprisonment in the Nebraska Center for Women.

Before addressing the two assigned errors, we note the suggestion of plain error in the record, brought to our attention by counsel for the State during oral argument, that there is no showing in the record that defendant either had assistance of counsel or waived such at the time of her conviction of the alleged first offense, as required by *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984), *State v. Jones*, 219 Neb. 184, 362 N.W.2d 58 (1985), and *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980). From a review of the record before us, there is neither a transcript of the first offense conviction or a record of an enhancement proceeding nor the trial court's findings thereon. As directed in *Smith*, the defendant's sentence of imprisonment was invalid and it is set aside.

One condition of probation required defendant to "Participate in and successfully complete in-patient treatment with follow-up residence at a half-way house as recommended." Defendant was voluntarily admitted on November 29, 1984, to St. Gabriel's Treatment Center in Omaha, Nebraska, for a 30-day inpatient treatment. She left on December 10, 1984, without completing the ordered treatment. She had failed to complete a similar halfway house living requirement under the terms of the January 25, 1984, probation order.

Concerning the claimed hearsay error, defendant objected to the testimony of her probation officer, who testified that he was advised via telephone by defendant's counselor at St. Gabriel's that defendant had violated rules, she had left voluntarily on

December 10, 1984, and no readmittance had been requested. Defendant had admitted to the witness that she left St. Gabriel's voluntarily without completing the required 30-day treatment. Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1979) provides the Nebraska Evidence Rules (Neb. Rev. Stat. §§ 27-101 et seq. (Reissue 1979 & Cum. Supp. 1984)) do not apply to proceedings for the granting or revoking of probation. From this record there was no prejudice to defendant; the questioned evidence was properly received and considered by the trial court. See, *State v. Kartman*, 192 Neb. 803, 224 N.W.2d 753 (1975); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

There is no merit to the claim that the proof did not meet the standard of clear and convincing evidence required by § 29-2267. The record, including the presentence report, shows that the trial court twice made an effort to provide defendant with a program of rehabilitation. Both times she voluntarily removed herself from those programs. The court should consider the whole record, including probative evidence of matters arising subsequent to her conviction. *State v. Nevells*, 185 Neb. 58, 173 N.W.2d 395 (1970). See, also, *State v. Jaworski*, 194 Neb. 645, 234 N.W.2d 221 (1975). However, a violation of one of the terms of probation is sufficient. *State v. Clark*, 197 Neb. 42, 246 N.W.2d 657 (1976).

The court's finding and the order of revocation entered March 5, 1985, were supported by clear and convincing evidence.

The order revoking probation is affirmed. This cause is remanded for further proceedings and for the trial court to make findings concerning whether the record of the alleged first offense meets the requirements of *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983).

SENTENCE VACATED AND CAUSE REMANDED FOR RESENTENCING.

GERALD KORF, APPELLEE, V. CYNTHIA L. KORF, APPELLANT.
378 N.W.2d 173

Filed December 13, 1985. No. 85-270.

1. **Child Custody.** An award of custody to a parent should not be interpreted as a sentence of immobilization. A custodial parent will not be placed in a position of deciding between custody of one's child and a different career, be it job-related or matrimonial.
2. _____. An award of joint custody of minor children is not favored. Such an award must be reserved for the most rare of cases.

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

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

Larry F. Fugit, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Respondent has appealed from an order of the district court modifying the original decree of dissolution to permit alternating annual shared custody by the parties to their 9-year-old son. We affirm as modified.

On July 23, 1980, a decree of dissolution was entered which granted custody of Brent Korf to the respondent. An application to modify that decree was filed by respondent on October 5, 1984, seeking permission to move with the minor child to Kansas, where respondent was to reside after her remarriage. Petitioner filed an application to modify on October 15, 1984, seeking custody of the minor child himself.

Respondent in fact moved with the minor child to Kansas on October 5, 1984, the same day her application for permission to do so was filed. It was her testimony that she had discussed the proposed move with petitioner some 6 weeks earlier, had talked about visitations, and was under the assumption that everything had been agreed to. However, she testified it was not until October 5 that she found out that her former husband would not sign the papers agreeing to the move.

Both parties profess to love Brent very much, although their actions in dealing with each other tend to tarnish that observation to some degree. In spite of petty bickering by each as to the actions of the other, the care and environment furnished by them separately indicate fitness to have custody.

It was the observation of the trial judge that he was going to ensure that Brent had an equal opportunity to share in a relationship with his father.

A report of the guardian ad litem, received in evidence, made no recommendation relating to custody as between the two parties, but it is apparent that he favored single parent custody with generous visitation rights for the noncustodial party.

Also received in evidence were psychological evaluations which disclosed nothing remarkable in either parent or in Brent. However, Brent disclosed to the psychologist that he (Brent) was comfortable with the present custody arrangements, and he expressed the desire that he remain in the custody of his mother with frequent visits with his father. Brent did volunteer that the then-current visitation arrangements, whereby he made a 16-hour round trip every week, were somewhat stressful.

The district court's order provided for shared, alternate custody between the two parents from July 1 to June 30 each year. The court also provided for alternate weekend visitations with the minor child and the noncustodial parent, which, as previously noted, required a 16-hour round trip. The parents were to meet at a point halfway between petitioner's and respondent's homes each time to effectuate the visitation. The court granted respondent permission to move from the State of Nebraska but denied her request for increased child support.

We view this arrangement as a heroic attempt by the court to preserve the status quo of the parent-child relationship which existed during the marriage. However, this ignores the fact that the parties have chosen to dissolve that marital status. The court, in its order, reminded the respondent that she had twice before unsuccessfully sought to secure the court's permission to remove the child from the jurisdiction, but did accept her third request, in order to get married, to be a sufficient reason for the change.

An award of custody to a parent should not be interpreted as

a sentence of immobilization. A custodial parent will not be placed in a position of deciding between custody of one's child and a different career, be it job-related or matrimonial. *Boll v. Boll*, 219 Neb. 486, 363 N.W.2d 542 (1985).

An award of joint custody of minor children is not favored. Such an award must be reserved for the most rare of cases. *Trimble v. Trimble*, 218 Neb. 118, 352 N.W.2d 599 (1984).

In citing this rule with approval, we are not unmindful of Neb. Rev. Stat. § 42-364(3) (Supp. 1985), which *permits* shared or joint custody only when both parents agree to such arrangements. We hasten to point out that the Legislature has provided that even in those cases where parental agreement or consent exists, the court must still conduct a public hearing on that issue. It must then find that joint custody is in the best interests of the child, *regardless* of agreement or consent by the parents. This is not one of the rare cases where the best interests of the child would be served by shared custody.

From a de novo review of the record, which we are required to do, we find that the order of the district court represented a good faith effort to solve a nearly insolvable situation, but nevertheless must be considered an abuse of discretion, under the circumstances. We see no reason to disturb the custody arrangement which existed during the 5 years following the dissolution. There has been no change in circumstances relating to respondent's fitness to be the custodial parent. We also conclude that alternate weekend visitations are oppressive to both Brent and the parents.

Accordingly, we modify the judgment of the district court and order that permanent custody of Brent be awarded to respondent, effective at the conclusion of the first semester of the 1985-86 school year. Petitioner is granted reasonable rights of visitation in the city of respondent's home, at such times as shall not interfere with Brent's schoolwork and activities, and upon reasonable advance notice to respondent.

In addition thereto: (1) Petitioner shall have visitation of 8 consecutive weeks during the summer vacation, beginning the second Saturday after the conclusion of Brent's regular school year; (2) Petitioner shall be entitled to 1 week's visitation during the Christmas holidays, which shall include Christmas Day

only in each even-numbered year; and (3) Assuming that Brent shall have additional school vacations of 2 or more days during the school year, petitioner shall be entitled to have visitations during two of those periods each year as may be agreed upon by the parties, but respondent shall be entitled to have Brent for Thanksgiving on odd-numbered years and for Easter on even-numbered years. Such visitations may be at such places as the petitioner may decide and shall be at his expense.

The judgment of the district court is modified accordingly.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. VERNON G. RICHTER, APPELLANT.

378 N.W.2d 175

Filed December 13, 1985. No. 85-275.

1. **Criminal Law: Right to Counsel: Words and Phrases.** Indigency, as used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1979), means the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family.
2. **Ordinances: Judicial Notice: Appeal and Error.** This court will not take judicial notice of a municipal ordinance which is not in the record.
3. **Criminal Law: Right to Counsel: Trial.** A defendant is entitled to be represented by counsel at all critical stages of a criminal proceeding against him, which includes the trial itself.
4. **Criminal Law: Right to Counsel.** Entitlement to the assistance of counsel and entitlement to the provision of counsel at public expense are different matters.
5. _____: _____. The requirement of Neb. Rev. Stat. § 29-1804.05 (Cum. Supp. 1984) is that before counsel be provided at public expense for a criminal defendant, there be a "reasonable inquiry to determine" the defendant's "financial condition."
6. _____: _____. In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1979), a court is to consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
7. **Motions for Continuance: Appeal and Error.** A motion for the continuance of a trial is addressed to the sound discretion of the trial court, and the trial court's

ruling on such a motion will not be disturbed on appeal in the absence of a showing of an abuse of that discretion.

8. **Criminal Law: Right to Counsel: Trial.** The exercise of the right to the assistance of counsel is subject to the necessities of sound judicial administration and requires a balancing of a criminal defendant's right to a reasonable opportunity to prepare for trial and to consult counsel with the necessity for the orderly and prompt disposition of cases in the orderly course of the administration of justice.
9. _____: _____: _____. Where a criminal defendant is financially able to engage an attorney, he may not use his neglect in hiring one as a legitimate reason for delay.

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

Philip M. Kelly of Winner, Nichols, Douglas and Kelly, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Following a county court bench trial, defendant, Vernon G. Richter, was convicted of third offense driving while under the influence of alcohol pursuant to a Scottsbluff city ordinance. He was thereafter sentenced to incarceration in the county jail for a period of 6 months, to pay a fine of $500, to have his operator's license permanently revoked, and to pay costs. On appeal the district court affirmed the conviction and sentence. Richter's assignments of error in this court merge into claims that the district court erred by affirming the county court's (1) determination that Richter was not indigent and therefore not entitled to appointed counsel, (2) failure to grant a continuance, and (3) finding that the evidence was sufficient to support the charge. We remand with the direction that a further inquiry be conducted to determine whether Richter was indigent at the time of trial. If so, he is to be granted a new trial; if not, the judgment of conviction and sentence stand affirmed.

On October 13, 1984, Officers James Moore and Edwin Mayo of the Scottsbluff Police Department observed Richter's

vehicle proceeding along a street in an area to which they had earlier been dispatched because of a disturbance. Richter, who was not involved in the disturbance, pulled his vehicle to the side of the road and parked it about a half block away from the scene of the disturbance.

After the officers had taken care of the disturbance, they noticed that Richter had slumped down in the seat of his automobile. They thereupon approached the automobile and pounded on the windows; Richter, however, failed to respond. The officers saw that Richter was lying on the front seat and, with the help of a tool, unlocked a door. As they went to shake him, Richter awoke.

The officers then detected a strong smell of alcohol on Richter's person and observed that his eyes were bloodshot and that his speech was slurred.

The officers thereupon advised Richter not to drive any more that night, and Richter agreed. Shortly thereafter, Officer Mayo saw Richter's automobile proceeding down a street with the headlights off. After radioing Officer Moore, Mayo stopped the vehicle and found that Richter was driving.

Richter was then asked to perform some field sobriety tests, which he performed unsatisfactorily. After concluding that Richter was intoxicated, the officers arrested him and took him to the police station. Richter subsequently submitted to a chemical test of his breath, which indicated that he had fourteen-hundredths of 1 percent of alcohol in his blood.

Richter appeared at the arraignment hearing on October 26, 1984, without counsel and pled not guilty. In response to the county judge's questioning, he informed the court that he intended to hire a Scottsbluff attorney with whom he had spoken. The court then instructed Richter to get a trial date from the clerk of the court and to get in touch with his attorney. Trial was set for December 18, 1984.

The Scottsbluff attorney wrote the court on November 16, 1984, explaining that he had received a notice of trial regarding Richter and the charges against him. The attorney explained that he had not been "officially" retained by Richter and asked whether, if he were retained, the matter could be continued, as he was committed to taking depositions in another state on the

scheduled trial date. The letter to the court indicates that a copy was sent to Richter.

On the scheduled trial date Richter appeared without counsel. The dialogue between Richter and the county judge establishes that Richter could not borrow and therefore could not pay the $3,000 fee the Scottsbluff attorney wanted in advance of trial. Richter had known for a "couple of weeks" prior to the scheduled trial that he could not "come up" with the money, but nonetheless continued in his efforts to borrow. Richter also indicated he had discussed the matter with a Gering attorney, who indicated that his total fee would be between $2,500 and $3,000, $1,000 of which would have to be paid before trial. Richter indicated "it's going to take me a little while to save up that kind of money" and asked that an attorney be appointed for him. The county judge then inquired as to Richter's income. Richter replied it was between $1,400 and $1,500 a month. The record does not disclose whether that was gross or net income. The following exchange then took place.

> [Judge]: It's pretty hard to call you a pauper.
>
> [Richter]: Well, yeah, but, you know, I've got other debts too. They want it all at once. Owe 3,000, and I can't come up with it.
>
> [Judge]: And are you supporting anybody besides yourself?
>
> [Richter]: My wife and four kids.
>
> [Judge]: That sounds like a lot of income for a pauper.
>
> . . . .
>
> [Judge]: I don't believe that you're within the guidelines of the public defender's office at all, Mr. Richter. I'm going to have to turn you down on that application.

Richter then moved for a continuance in order that he might see whether he could come up with the $1,000 in "maybe a month's time" or perhaps less, as he was to receive a check on "the 28th of this month." The prosecutor objected on the ground that his client had incurred expenses in procuring the presence of its witnesses. In denying Richter's motion for continuance, the county judge observed that Richter knew he could have called the clerk of the court or the judge prior to the day of trial to ask for more time in order to secure the services of

an attorney.

The matter then proceeded to trial. In addition to establishing the facts surrounding the arrest and blood alcohol content, as set forth earlier, the prosecution offered in evidence certified copies of two prior counseled convictions of Richter for driving while under the influence of alcohol.

After the State's closing argument, the court asked Richter whether he wanted to argue. Richter informed the court that he had two witnesses he wanted to bring to court but that he did not have them ready that day. The court told Richter that "[t]hat might have been grounds for a continuance [before evidence was introduced] but it's too late to bring that up now."

Richter first claims that the county court erred in refusing to appoint the public defender to represent him and that such refusal constituted a violation of his sixth amendment right to counsel.

Neb. Rev. Stat. § 29-1804.05 (Cum. Supp. 1984) provides:

> At a felony defendant's first appearance before a court, the court shall advise him or her of the right to court-appointed counsel if he or she is indigent.
>
> If he or she asserts indigency, the court shall make a reasonable inquiry to determine his or her financial condition, and may require him or her to execute an affidavit of indigency. If the court determines him or her to be indigent, it shall formally appoint the public defender to represent him or her in all proceedings before the court, and shall make a notation of such appointment and appearances of the public defender upon the felony complaint. The same procedure shall be followed by the court in misdemeanor cases punishable by imprisonment.

Neb. Rev. Stat. § 29-1804.04 (Reissue 1979) defines indigent, as used in the foregoing statute, as meaning

> the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family. Before a felony defendant's initial court appearance, the determination of his or her indigency shall be made by the public defender, but thereafter it shall be made by the court.

Neb. Rev. Stat. § 29-1804.03 (Cum. Supp. 1984) provides

that "[i]t shall also be the duty of the public defender to represent all indigent persons charged with misdemeanor offenses punishable by imprisonment, when appointed by the court."

The Scottsbluff ordinance under which Richter was charged does not appear in the record. While this court will not take judicial notice of a municipal ordinance which is not in the record, *State v. Austin*, 219 Neb. 420, 363 N.W.2d 397 (1985), it cannot ignore the fact that Richter was sentenced to incarceration and that there is no claim that such sentence is outside the penalties authorized by the ordinance. Consequently, we must treat the offense as one punishable by imprisonment and therefore as one which requires the appointment of the public defender if Richter is an indigent as defined in § 29-1804.04.

Richter claims that the "cursory examination [conducted by the county court] concerning the Defendant's finances does not meet the guidelines set forth in the Statutes" and that the county court's refusal to appoint counsel resulted in a violation of his right to counsel under the sixth amendment to the U.S. Constitution. Brief for Appellant at 11.

It is beyond dispute that a defendant is entitled to be represented by counsel at all critical stages of a criminal proceeding against him. *State v. Jost*, 219 Neb. 162, 361 N.W.2d 526 (1985). Obviously, the trial itself is a critical stage. See, *State v. Sondag*, 214 Neb. 659, 335 N.W.2d 306 (1983); *State v. Moore*, 203 Neb. 94, 277 N.W.2d 554 (1979). Entitlement to the assistance of counsel and entitlement to the provision of counsel at public expense are, however, different matters.

The requirement of § 29-1804.05 is that before counsel be provided at public expense, there be a "reasonable inquiry to determine" the defendant's "financial condition." There is authority for the proposition that evidence of earnings alone may support a determination that indigency does not exist. *United States v. Allen*, 596 F.2d 227 (7th Cir. 1979) ($25,000 annual income), *cert. denied* 444 U.S. 871, 100 S. Ct. 149, 62 L. Ed. 2d 97; *Glenn v. United States*, 303 F.2d 536 (5th Cir. 1962) ($5,700 annual income). Other courts, however, require a

consideration of factors such as the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents. *State v. Lathe*, 132 Vt. 631, 326 A.2d 147 (1974); *Bolds v. Bennett*, 159 N.W.2d 425 (Iowa 1968), *questioned, State v. Gilroy*, 313 N.W.2d 513 (Iowa 1981), *but followed, In re Marriage of Kopp*, 320 N.W.2d 660 (Iowa App. 1982); *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 227 S.E.2d 314 (1976).

This court considered whether the "reasonable inquiry" required by § 29-1804.05 was conducted in *State v. Radford*, 202 Neb. 440, 276 N.W.2d 82 (1979). The defendant therein earned "about 116 every four days," *id.* at 441, 276 N.W.2d at 83, was single, had no cash or bank accounts, and owned no property except an automobile on which he owed more than it was worth. The trial court denied the defendant's request for appointment of an attorney. Following a continuance, the defendant appeared for trial without an attorney. On a motion for post conviction relief, the defendant asserted that the trial court should have appointed counsel for him. Characterizing the case as "borderline," this court nonetheless held that the record sustained the county court's finding that without a further showing of inability to obtain counsel, the defendant was not entitled to court-appointed counsel at the public's expense.

While in *State v. Radford, supra*, there was a showing that the defendant was single, the showing here is that defendant had a wife and four children to support and had an undisclosed amount of indebtedness. It may be that further inquiry will demonstrate that, notwithstanding those circumstances, Richter's financial situation was such that he could nonetheless "retain legal counsel without prejudicing [his] financial ability to provide economic necessities for [himself] or [his] family." § 29-1804.04. That determination cannot be made, however, on the basis of the limited inquiry conducted by the county judge.

Therefore, the cause is remanded with the direction that another inquiry be conducted into the factors considered by

other courts, as set forth above, and a new determination made as to Richter's indigency at the time of trial. If the determination so made is that Richter was indigent at the time of trial, he shall be granted a new trial on the ground that the public defender should have been appointed as counsel for him.

If a new trial is had as a result of the foregoing, the question of whether a continuance ought to have been granted obviously resolves itself. If, on the other hand, the new inquiry does not result in a new trial, the continuance issue will remain a viable one. Since we cannot determine at this time whether a new trial is to be had, we consider Richter's claim that the overruling of his motion for a continuance deprived him of his constitutional right to counsel.

We begin by recalling that a motion for the continuance of a trial is addressed to the sound discretion of the trial court and that the trial court's ruling on such a motion will not be disturbed on appeal in the absence of a showing of an abuse of that discretion. *State v. Broomhall, ante* p. 27, 374 N.W.2d 845 (1985).

The exercise of the right to the assistance of counsel is subject to the necessities of sound judicial administration. As stated in *United States v. Arlen*, 252 F.2d 491, 494-95 (2d Cir. 1958):

> Although the right to assistance of counsel is absolute, United States v. Morgan, 2 Cir., 1955, 222 F.2d 673, the exercise of that right is subject to the necessities of sound judicial administration. Further, the right itself, being personal, may be waived. See Johnson v. Zerbst, 1938, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461. We think it clear that although a defendant able to retain counsel is entitled to a reasonable time to secure counsel, he may not indefinitely postpone trial by continued applications for more time to seek representation. Whether additional time should be granted is within the sound discretion of the trial court. Further, where a defendant able to retain counsel has been advised by the court that he must retain counsel by a certain reasonable time, and where there is no showing why he has not retained counsel within that time, the court may treat his failure to provide for his own defense as a waiver of his right to counsel and require such

> defendant to proceed to trial without an attorney. Such a waiver is similar in its consequences to an election made by an indigent defendant.

See, also, *United States v. Casey*, 480 F.2d 151 (5th Cir. 1973), *cert. denied* 414 U.S. 1045, 94 S. Ct. 550, 38 L. Ed. 2d 336; *United States v. Terry*, 449 F.2d 727 (5th Cir. 1971); *Commonwealth v. O'Brien*, 380 Mass. 719, 405 N.E.2d 650 (1980); *Hendrix v. State*, 145 Ga. App. 170, 243 S.E.2d 112 (1978); *Com. v. Andrews*, 282 Pa. Super. 115, 422 A.2d 855 (1980); *State v. McCrowre*, 312 N.C. 478, 322 S.E.2d 775 (1984). As the court stated in *Gottschalk v. State*, 602 P.2d 448, 451 (Alaska 1979), *cert. denied* 447 U.S. 920, 100 S. Ct. 3010, 65 L. Ed. 2d 1112 (1980), "Where a defendant is financially able to engage an attorney, he may not use his neglect in hiring one as a legitimate reason for delay."

We addressed an argument similar to Richter's contention in *State v. Peterson*, 183 Neb. 826, 164 N.W.2d 649 (1969). Therein, the defendant was arrested and charged with a misdemeanor offense. Trial was set for approximately 3 weeks later, during which time the defendant was free on bond. At the time of trial the defendant requested a continuance so that he could retain counsel. The motion was overruled, and the case proceeded to trial with the defendant representing himself. Following his conviction, the defendant appealed the denial of a continuance, claiming a violation of his right to counsel. In view of the fact that defendant did nothing to retain counsel during the time he was free on bond prior to trial, this court held that the trial court did not abuse its discretion in denying the motion. It was observed that

> [t]he court must balance the considerations of the right to a reasonable opportunity to prepare for trial and to consult counsel, with the necessity for the orderly and prompt disposition of cases in the ordinary course of the administration of justice, and must be mindful that such rights may be exercised to subvert the orderly processes of justice by the disappearance of witnesses and other considerations not necessary to discuss here.

Id. at 829, 164 N.W.2d at 651.

It is true that *Peterson* is factually distinguishable from the

case presently before us. Whereas the defendant in *Peterson* had made no attempts to obtain counsel prior to appearing for trial, Richter did make such attempts but concluded he was unable to afford private counsel. Nonetheless, if it is determined that Richter was not indigent, he had ample time to retain counsel, and the county court will not have abused its discretion in overruling his motion for a continuance.

Once again, Richter's final contention, that there was not sufficient evidence to sustain his conviction for third offense driving while under the influence of alcohol, will remain viable only if a new trial is not required. Richter's only argument in this regard is that he was not given the opportunity to review the records of his prior convictions and to bring mitigating factors to the attention of the court, as required by Neb. Rev. Stat. § 39-669.07 (Reissue 1984).

Section 39-669.07 provides in part:

> For each conviction under this section, the court shall as part of the judgment of conviction make a finding on the record as to the number of the defendant's prior convictions under this section prior or subsequent to July 17, 1982, and the defendant's prior convictions under a city or village ordinance enacted pursuant to this section either prior or subsequent to July 17, 1982. The defendant shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions.

A preliminary point to be noted is that the statutory language provides: "For each conviction *under this section* . . . ." (Emphasis supplied.) For purposes of this opinion, we assume, but do not decide, that the last sentence quoted above of § 39-669.07 applies to this case notwithstanding the foregoing emphasized language.

At trial the prosecutor displayed to Richter the certified documents evidencing the prior convictions, and the county judge asked, "Mr. Richter, do you have any objection" to the exhibits? Richter replied, "No, Your Honor."

At the sentencing hearing the county judge reviewed the

contents of Richter's presentence report, then asked Richter, "Would you like to say anything before the Court imposes sentence?" At this point Richter made several comments about how his drinking behavior had decreased, how the police who testified against him were lying, and about how the police in Scottsbluff were trying to "nail" him.

The county judge then asked, "Is there anything more you'd like to say before the Court imposes the sentence?" Richter replied, "Nothing, only that . . . the only way I'm going to be able to live in peace, I guess, is to move away from here because I sure can't live in peace around here."

Assuming the pertinent language of § 39-669.07 to be applicable, the bill of exceptions establishes that Richter was given ample opportunity to review the record of his prior convictions, to object to its validity, and to bring mitigating circumstances to the attention of the court prior to sentencing. Thus, Richter's final contention is without merit.

We remand the cause to the district court with the direction that it remand to the county court for further proceedings consistent with this opinion.

REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RICHARD GALYEN, APPELLANT.
378 N.W.2d 182

Filed December 13, 1985. No. 85-332.

1. **Taxation.** An excise tax is a tax imposed on the performance of an act.
2. _____. A property tax is a tax levied on both real and personal property; the amount of the tax being dependent on the value of the property, generally expressed as a uniform rate per thousand of valuation.
3. _____. A tax imposed upon the doing of an act is an excise tax and not a property tax.
4. **Constitutional Law: Taxation.** The generally accepted rule of construction is that state constitutional provisions relating to property taxes do not apply to excise taxes.
5. _____: _____. A tax imposed upon the privilege of doing business is in fact an excise tax and not a property tax and, as such, is not required to be levied by

valuation uniformly and proportionately.

6. _____: _____. The imposition of an excise tax need not be uniform and proportionate but, rather, may be imposed upon each transaction.
7. **Legislature: Taxation: Statutes: Public Purpose.** What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard-and-fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.
8. **Constitutional Law: Taxation: Public Purpose.** If a tax levy is for a public purpose, it is no objection to its validity that the benefits paid and the persons to whom they are paid are unrelated to the persons taxed.
9. **Constitutional Law: Statutes.** The inability of government to enforce an act to its fullest does not affect the constitutionality of the act.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

John M. Gerrard and Douglas J. Stratton of Domina & Gerrard, P.C., for appellant.

Robert M. Spire, Attorney General, and Bernard L. Packett, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

KRIVOSHA, C.J.

Although brought in the form of a criminal prosecution, this appeal concerns the constitutionality of Neb. Rev. Stat. §§ 54-2113 et seq. (Reissue 1984).

The appellant, Richard Galyen, was convicted of failing to pay a fee of 25 cents per head on cattle sold, as required by the provisions of §§ 54-2113 et seq. Galyen orally moved the Holt County Court, where the action was filed, to dismiss the complaint on the grounds that §§ 54-2113 et seq. violate both Neb. Const. art. VIII and U.S. Const. amend. XIV. The Holt County Court found the statute to be unconstitutional on both grounds and dismissed the complaint. The State appealed the decision of the Holt County Court to the district court for Holt County, where the decision was reversed and the action remanded for trial. Trial was held on February 27, 1985. The

facts of the case were stipulated to by the parties. On January 11, 1984, in Holt County, Nebraska, Galyen sold 495 head of cattle and refused to pay the fee required by §§ 54-2113 et seq. Following trial, Galyen was convicted of the charge. On appeal to the district court for Holt County, the conviction was affirmed.

Galyen's single assignment of error is that §§ 54-2113 et seq. violate Neb. Const. art. VIII, or, more specifically, Neb. Const. art. VIII, § 1, and U.S. Const. amend. XIV. By this opinion we decide only that limited issue. On the basis of our examination we determine that §§ 54-2113 et seq. do not violate Neb. Const. art. VIII, § 1, or U.S. Const. amend. XIV, and we, therefore, affirm the judgment of the district court.

Section 54-2113 provides as follows:

> (1) There shall be paid to the [Nebraska Beef Industry Development Board] a fee of twenty-five cents per head upon all cattle sold in the State of Nebraska during the first year of operation of the program. After the first year of operation, the fee may be raised or lowered by the board after a public hearing in each of the six districts. The raise shall not exceed fifteen cents per head during any twelve-month period and the total fee shall not exceed fifty cents per head. The board may raise or lower the fee as it deems necessary to generate sufficient revenue to finance the programs created and administered to carry out the intent and general purpose of sections 54-2101 to 54-2119. Whenever a new fee is prescribed by the board, it shall remain in effect at least twelve calendar months.
>
> (2) Cattle shall be subject to the fee each time they are sold.
>
> (3) The fee shall be paid by the seller at the time of sale or delivery.
>
> (4) For purposes of sections 54-2101 to 54-2119, when cattle are sold to an out-of-state buyer who transacts business in Nebraska, the sale shall be deemed to have occurred in Nebraska if the cattle sold were being raised, fed, or otherwise maintained within Nebraska immediately prior to sale.

Neb. Const. art. VIII, § 1, provides in part as follows:

> The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises . . . . Taxes, other than property taxes, may be authorized by law. . . . The Legislature may provide that livestock shall constitute a separate and distinct class of property for purposes of taxation and may further provide for reciprocal and proportionate taxation of livestock located in this state for only part of a year.

By reason of the manner in which Galyen attacks the statute, several specific questions must be addressed by us. Those questions are: (1) Is the fee of 25 cents per head a property tax or an excise tax? (2) If an excise tax, must it meet uniformity and proportionality requirements of Neb. Const. art. VIII, § 1? (3) Is the imposition of this fee on all cattle sold discriminatory against a particular class? For reasons which we shall detail hereinafter, we believe that the fee of 25 cents imposed on each head of cattle sold is an excise tax and not a property tax and, as such, need not be imposed uniformly and proportionately. Moreover, we believe that there is no discrimination against the class upon which the fee is imposed.

Black's Law Dictionary (5th ed. 1979) at 506 defines an excise tax as "A tax imposed on the performance of an act . . . . Tax laid on manufacture, sale, or consumption of commodities . . . ." On the other hand, Black's Law Dictionary, *supra* at 1097, defines a property tax as "A tax levied on both real and personal property; the amount of the tax being dependent on the value of the property, generally expressed as a uniform rate per thousand of valuation."

In *Licking v. Hays Lumber Co.*, 146 Neb. 240, 19 N.W.2d 148 (1945), we held that a tax imposed as an annual charge upon the right to continue corporate existence is not a property tax but is an excise tax, although computed on the basis of the amount of capital stock. In doing so we said at 243, 19 N.W.2d at 150: " 'An excise tax, using the term in its broad meaning as opposed to a property tax, includes taxes sometimes designated by statute or referred to as privilege taxes, license taxes,

occupation taxes, and business taxes.' " See, also, *State, ex rel. Smrha, v. General American Life Ins. Co.*, 132 Neb. 520, 272 N.W. 555 (1937).

On a number of occasions this court has similarly recognized that a tax imposed upon the doing of an act is an excise tax and not a property tax. In a series of cases beginning with *Burke v. Bass*, 123 Neb. 297, 242 N.W. 606 (1932), this court has held that fees similar to those imposed in the instant case are an excise tax and not a property tax. In *Burke, supra*, motor vehicle fuel sold and distributed in the State of Nebraska was subject to the payment of a tax of 4 cents per gallon on the sale of *all motor fuels* without regard to either the type, the selling price, or the value of the motor fuel. In upholding the statute we said at 298-99, 242 N.W. at 607:

> The tax is an excise tax upon the use and distribution of gasoline within the state. *Pantorium v. McLaughlin*, 116 Neb. 61. It is not an impost tax. It applies to all motor vehicle fuels used and distributed within the state. . . .
>
> . . . . The tax is in effect an excise tax imposed upon the sale and use of motor vehicle fuels within the state.

The instant tax is similar in all respects to the excise tax imposed in the *Burke* case, *supra*. See, also, *State v. Cheyenne County*, 127 Neb. 619, 256 N.W. 67 (1934); *State v. Smith*, 135 Neb. 423, 281 N.W. 851 (1938).

In the case of *Bowman v. Continental Oil Co.*, 256 U.S. 642, 41 S. Ct. 606, 65 L. Ed. 1139 (1921), the U.S. Supreme Court was asked to pass upon a tax imposed on the domestic sale of gasoline under a state constitution similar to our own. In upholding the validity of the act, the U.S. Supreme Court said at 649:

> The tax imposed by the act under consideration upon the "sale or use of all gasoline sold or used in this State" is not property taxation, but in effect, as in name, an excise tax. We see no reason to doubt the power of the State to select this commodity, as distinguished from others, in order to impose an excise tax upon its sale and use . . . .

Here, it seems clear that the tax is imposed on the privilege of selling cattle within this state without regard to the value of the property and, as an occupation or business tax, is an excise tax

and not a property tax.

Having determined that the tax thus imposed by § 54-2113 is an excise tax and not a property tax, we turn to the question of whether the tax must be assessed uniformly and proportionately under the provisions of Neb. Const. art. VIII, § 1. We have previously addressed this issue and have concluded that the requirements of article VIII, § 1, are not applicable to an excise tax. In *State v. Cheyenne County, supra* at 622, 256 N.W. at 69, we said: "The generally accepted rule of construction appears to be that state 'constitutional provisions relating to property taxes do not apply to excise taxes.' " The reason is because "[l]icense or excise taxes and property taxes are separate and distinct species of taxes, [and] are controlled and governed by rules and principles entirely different, and are essentially different, in both their character and their mission . . . ." 53 C.J.S. *Licenses* § 3 at 459 (1948).

In *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967), we held that a tax imposed upon the privilege of doing business and called a franchise tax was in fact an excise tax and not a property tax and, as such, was not required to be levied by valuation uniformly and proportionately. Such a view is totally consistent with the language of Neb. Const. art. VIII, § 1. To begin with, article VIII, § 1, provides that "[t]he necessary revenue of the state and its governmental subdivisions shall be raised by taxation *in such manner as the Legislature may direct*." (Emphasis supplied.) By such direction the Legislature is not limited to imposing property taxes but may, in fact, impose taxes other than property taxes. Moreover, article VIII, § 1, further provides that "[t]axes, other than property taxes, may be authorized by law." These two provisions make it clear that all taxes need not be property taxes. A further reading of article VIII, § 1, makes it clear that only property taxes must be uniform and proportionate. The language of the Constitution reads: "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises . . . ." If article VIII, § 1, consisted only of that sentence, one might argue that "taxes" refers to all taxes. But when it is read with the preceding sentence, which states that "[t]he necessary revenue of the state and its governmental subdivisions shall be raised by

taxation in such manner as the Legislature may direct," and which is followed by the language "[t]axes, other than property taxes, may be authorized by law," it becomes clear that the reference to "taxes" which must be levied uniformly and proportionately refers to taxes upon "all tangible property and franchises" as a property tax and not as an excise tax. See, also, *In re Estate of Sanford*, 90 Neb. 410, 133 N.W. 870 (1911), *modified and rev'd on other grounds* 91 Neb. 752, 137 N.W. 864 (1912); *State v. Vinsonhaler*, 74 Neb. 675, 105 N.W. 472 (1905); *Rocky Mountain Lines v. Cochran*, 140 Neb. 378, 299 N.W. 596 (1941). We therefore believe that as an excise tax its imposition need not be uniform and proportionate but, as here, may be upon each transaction.

That leaves us, then, with the final question as to whether the imposition of this fee on all cattle sold is discriminatory against a particular class. As we have indicated, we believe it is not.

To begin with, Neb. Const. art. VIII, § 1, itself authorizes treating livestock, including cattle, generally as a separate class without violating Neb. Const. art. III, § 18. The constitutional provision provides: "The Legislature may provide that livestock shall constitute a separate and distinct class of property for purposes of taxation . . . ." The next question that then arises is whether separating out cattle from other forms of livestock creates an unreasonable classification. In *Gossman v. State Employees Retirement System*, 177 Neb. 326, 335, 129 N.W.2d 97, 103 (1964), we said:

> The principles to be applied to testing legislative classification have been well established. The difficulty arises in their application to a particular set of facts or a particular legislative act. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The Legislature may, and many times must, carve out classes or distinctions that would appear arbitrary or unreasonable. But, on closer examination, it is found that the classifications are related to and are necessary for the accomplishment of the legitimate purposes of the legislation. The question is

> always whether the things or persons classified by the Act form by themselves a proper and legitimate class with reference to the purposes of the Act.

The legislative purpose of the Nebraska Beef Industry Development Act, Neb. Rev. Stat. §§ 54-2101 et seq. (Reissue 1984), is specifically set out by the Legislature: "The Legislature declares it to be in the public interest that individuals involved in beef production and marketing be permitted and encouraged to develop, carry out, and participate in programs of research, education, market development, and promotion." § 54-2103. In that regard we have previously held:

> What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.

State ex rel. Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. 445, 457-58, 283 N.W.2d 12, 21 (1979). See, also, *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956).

It appears to us that the promotion of the beef industry in this state is indeed a public purpose, and imposing an excise tax on all cattle sold in order to promote the industry is a reasonable and distinct classification and not one that is discriminatory.

Galyen further argues, however, that the classification is unreasonable in that the benefits of the act may inure to those outside of the beef industry who do not pay the tax. That argument has previously been made and rejected. In *Sandberg v. State*, 188 Neb. 335, 196 N.W.2d 501 (1972), this court considered the constitutionality of an increase in the cigarette tax. Revenues from the increased tax were allocated to the Beatrice State Home, the State Office Building Fund, and the University of Nebraska at Lincoln Field House Fund. In

rejecting an argument that one class of people was being required to pay for the benefit of another, we said at 340-41, 196 N.W.2d at 505:

> "If a tax levy, however, is for a public purpose, it is no objection to its validity that the benefits paid and the persons to whom they are paid are unrelated to the persons taxed. Nothing is more familiar in taxation than the imposition of tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied by the tax. A tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class."

If that argument had any validity at all, then persons without minor children, or corporations, could very easily argue that they cannot be required to pay for public education. Such a position has never been recognized in the law.

Galyen further argues that the imposition of the tax does not operate uniformly upon every member of the designated class because of the variances between cattle feeder operations and cow/calf operations. We may dispose of that argument by noting, first, that there is no evidence in the record to support that distinction and, further, that the assessment is levied upon the sale of each head of cattle. Therefore, the difference between full-grown cattle and calves appears immaterial.

Finally, Galyen argues that, as a practical matter, there is no effective method of policing the collection of the tax in certain situations, and therefore certain individuals may not pay the tax. This court has previously held that the inability of government to enforce an act to its fullest does not affect the constitutionality of the act. In *State, ex rel. Loseke, v. Fricke*, 126 Neb. 736, 742, 254 N.W. 409, 412 (1934), we said that the fact that an agency may have difficulty enforcing the act

> does not affect the validity of the act. It goes to the wisdom of the legislation. With that the court has no concern. Whether the legislature is wise or unwise; whether the enterprise may be profitable or unprofitable,

was a matter for the consideration of the legislature, and evidently the legislation deemed the legislation proper.

For these reasons we find that §§ 54-2113 et seq. do not violate Neb. Const. art. VIII, § 1, or U.S. Const. amend. XIV. The judgment of the district court affirming the judgment of the county court finding Galyen guilty as charged must be affirmed.

AFFIRMED.

WILLIAM H. MITCHELL, APPELLANT, V. DONALD G. KESTING AND VRANA PAVING CO., A NEBRASKA CORPORATION, APPELLEES.

378 N.W.2d 188

Filed December 20, 1985. No. 84-579.

1. **Motor Vehicles: Juries: Trial.** Where a motorist looks and does not see an approaching vehicle, or seeing one, erroneously misjudges its speed and distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury.
2. **Motor Vehicles: Negligence.** Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position.
3. _____: _____. It is established law that a driver who fails to see another who is favored over him is guilty of negligence as a matter of law.
4. **Directed Verdict.** In reviewing an order sustaining a motion for a directed verdict, all controverted facts and all inferences arising from the evidence shall be construed most strictly against the moving party and in favor of the party against whom the verdict was granted.

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

John J. Hanley, for appellant.

Dean F. Suing and Mark S. Dickhute of Katskee & Henatsch, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is a case of personal injury arising from an automobile accident which occurred on May 14, 1981. At approximately 6:50 that morning plaintiff, William H. Mitchell, was proceeding northbound on 79th Street in Omaha, Nebraska, in his 1973 Plymouth automobile. Defendant Donald G. Kesting was driving a pickup truck of his employer, Vrana Paving Co., in the course of his employment, southbound on 79th Street. The vehicles were involved in a collision at the intersection of 79th and Lake Streets. Plaintiff suffered injuries and sued defendants in the district court for Douglas County. The case was tried to a jury in May of 1984. At the close of plaintiff's case the trial court sustained the motion for directed verdict in favor of defendants and dismissed plaintiff's suit. Plaintiff's motion for a new trial was overruled, and this appeal followed.

Plaintiff assigns as error the trial court's sustaining of defendants' motion for directed verdict and dismissing plaintiff's case. We find that the trial court acted properly, and we affirm.

On the morning of the accident Mitchell entered the intersection of 79th and Lake Streets in preparation for making a left-hand turn. He testified at trial that he had his left turn signal on and that he looked to the north and did not see any approaching cars. He also testified that he did not remember whether he saw any approaching cars when he looked to the north. Mitchell described the accident as an explosion and stated that he did not remember whether he had started his left turn when he felt the explosion. He testified further that only an instantaneous period of time elapsed from the moment he entered the intersection until he felt the explosion.

The following two statutes are applicable to the facts of this case. Neb. Rev. Stat. § 39-652 (Reissue 1984) provides in part: "(1) No person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal in the manner provided in sections 39-653 and 39-654." Neb. Rev. Stat. § 39-636 (Reissue 1984) provides:

> The driver of a vehicle who intends to turn to the left within an intersection or into an alley, private road, or

> driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard.

Plaintiff argues that this case should have been allowed to go to the jury. In support of his position is a rule that applies where there is evidence showing that one vehicle was not in a favored position. "[T]he applicable rule is that where a motorist looks and does not see an approaching vehicle, or seeing one, erroneously misjudges its speed and distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury." *Kremlacek v. Sedlacek*, 190 Neb. 460, 465, 209 N.W.2d 149, 154 (1973). "Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position." *Treffer v. Seevers*, 195 Neb. 114, 118, 237 N.W.2d 114, 117 (1975). However, "*it is established law* that a driver who fails to see another who is favored over him is guilty of negligence as a matter of law." (Emphasis supplied.) *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 408, 308 N.W.2d 503, 510 (1981).

The question which had to be decided by the trial court was whether there was evidence that Kesting's vehicle was not located in a favored position. In reviewing an order sustaining a motion for a directed verdict, "all controverted facts and all inferences arising from the evidence shall be construed most strictly against the moving party and in favor of the party against whom the verdict was granted." *Otto v. Hongsermeier Farms*, 217 Neb. 45, 49, 348 N.W.2d 422, 425 (1984).

In a recent case involving a left-hand turn onto Lake Street in Omaha, we found that the evidence, viewed in the light most favorable to the defendants, indicated that the plaintiff was not indisputably in a favored position. In that case there was direct testimony that the traffic light had turned red prior to the defendant's left turn. *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984).

In the instant case there is absolutely no evidence disputing the fact that Kesting's vehicle was in a favored position. Mitchell attempted to cast doubt on the location of Kesting's

vehicle prior to the collision, but the testimony of his witnesses failed to accomplish this. Maria Szablowski, the driver of the vehicle behind Mitchell's that morning, testified that the impact occurred in the middle of the street. Her testimony concerning which way Mitchell's car was facing before the impact was conflicting and not persuasive. The police officer who investigated the accident testified that the skid marks he observed were made by Kesting's truck and were right down the middle of the street. He testified further that the debris which indicates the point of impact was in the southbound lane. Finally, Mitchell's expert reconstruction witness testified that the impact occurred in the southbound lane, near the center of the intersection.

Even construing the facts strictly against Kesting, no evidence was presented to show that his vehicle was not in a favored position over Mitchell's vehicle. If we believe Mitchell's testimony that the impact was almost instantaneous as he prepared to make his left-hand turn, reasonable minds could not differ in finding that Kesting's truck was in a position to be seen by Mitchell had he not been negligent.

> He is not absolved from liability by a failure to see what he could have seen by the exercise of due diligence, but is chargeable with seeing what he should have seen. He is also chargeable with seeing that which is apparent or in plain view, with seeing that which he could have seen had he looked, and with knowledge of all that a prudent and vigilant operator would have seen. His failure to see that which he should have seen constitutes as much negligence as though he had not looked at all . . . .

60A C.J.S. *Motor Vehicles* § 284(3) at 158-60 (1969). The intersection where the collision occurred was virtually unobstructed, in that there was an absence of any curves or hills. The weather was clear and sunny at the time of the collision.

There is little doubt that the evidence in the record establishes negligence on the part of the plaintiff or that reasonable minds would have found otherwise. We conclude that the trial court had no alternative, under the facts before it, but to direct a verdict in favor of defendants.

AFFIRMED.

GRANT, J., dissenting.

I respectfully dissent because I believe the questions of defendant's negligence and plaintiff's contributory negligence should have been submitted to the jury. Construing the evidence most favorably to plaintiff, it shows that the defendant Kesting was driving down a 25-foot-wide residential street with a speed limit of 25 miles per hour. Defendant was approaching the intersection of that street with another residential street at a speed of at least 45.5 miles per hour. This speed was calculated by the plaintiff's expert witness and was based primarily on the fact that plaintiff was proceeding north and turning west when his car was struck by the defendant's vehicle, proceeding south, with enough force to drive the plaintiff's vehicle 55 feet back south and to allow the defendant's truck to go through the collision point and end up at the southwest corner of the intersection. The fair inference to be drawn is that the defendant's vehicle was proceeding at high speed.

The evidence shows that plaintiff did not see the defendant's pickup truck. This would mean that plaintiff was negligent. It should be noted, however, that the driver behind plaintiff saw the impact and did not see defendant's vehicle either.

I believe, in this posture of the case, the jury should have determined the comparative negligence of the two drivers. In view of the inference that could be drawn from the evidence that the defendant's vehicle was proceeding at a rate of speed approximately twice the speed limit allowable, it should be a jury question to determine whether plaintiff's failure to see defendant was more than slight when compared to defendant's illegal speed in a residential area.

I think this case should be one of those "usually . . . for the jury" as set out in *Kremlacek v. Sedlacek*, 190 Neb. 460, 465, 209 N.W.2d 149, 154 (1973), quoted in the majority opinion. It would certainly be a jury question if the defendant was driving 100 miles per hour down this narrow street. Defendant's speed of approximately twice the speed limit is a matter of degree of his negligence. I think we should give no legal approbation to such speeds. I believe the matter should have been left to the jury to decide.

KRIVOSHA, C.J., joins in this dissent.