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STATE OF NEBRASKA, APPELLEE, V. MERLE D. CARLSON, APPELLANT.

406 N.W.2d 139

Filed May 22, 1987. No. 86-996.

Sentences. Although a trial judge should take into account facts obtained from a victim's statement under the provisions of Neb. Rev. Stat. § 29-2261 (Reissue 1985), as he or she should consider all facts pertinent to sentencing, a judge must not and cannot allow the judgments and conclusions of the victim to be substituted for those of the court in imposing sentence. To do so constitutes an abuse of discretion.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Affirmed as modified.

Paul W. Snyder of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

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

PER CURIAM.

Defendant was sentenced to concurrent terms of 5 years' imprisonment following pleas of no contest to Class IV felony charges of selling mortgaged property and causing a false entry on the books of a financial institution. He appeals, contending the sentences were excessive under the circumstances. We agree.

There is no question but that the defendant and his wife, Patricia, misrepresented the existence of certain livestock, which they mortgaged to two different financial institutions, and sold some of the livestock they actually owned without permission and without paying the entire proceeds to the mortgage holders.

However, considering the facts that defendant had no prior record, that this was not a crime of violence, and that his wife, who was equally culpable, was sentenced to a term of imprisonment of only 2 years, we believe defendant's sentence was excessive. This court may reduce the sentence imposed by the district court when the sentence is excessive. Neb. Rev. Stat.

§ 29-2308 (Reissue 1985).

The sentencing judge appeared to rely heavily upon the demands of the victims in this case that the punishment be severe. We realize that Neb. Rev. Stat. § 29-2261 (Reissue 1985) requires that the presentence investigation report include statements made by the victim of the crime, or, if not, that the probation officer preparing the report certify that contact was made with the victim and an offer made to accept such statements. A judge should take into account facts obtained from such source in imposing sentence, as he or she should consider all facts pertinent to sentencing, but a judge must not and cannot allow the judgments and conclusions of the victim to be substituted for those of the court in imposing sentence. To do so constitutes an abuse of discretion.

The judgment of the district court is modified to provide that the sentences imposed in this case be reduced to 2 years on each count, to run concurrently, and, as modified, is affirmed.

AFFIRMED AS MODIFIED.

VIRGIL L. HAMMOND AND RUTH I. HAMMOND, APPELLANTS AND CROSS-APPELLEES, V. DONALD W. STREETER, JR., DOING BUSINESS AS STREETER AVIATION, APPELLEE AND CROSS-APPELLANT.

406 N.W.2d 633

Filed May 29, 1987. No. 85-437.

1. **Courts: Appeal and Error.** On appeal from the county court, the district court is required to review the case for error appearing on the record.
2. **Judgments: Appeal and Error.** In a law action the disposition of the trial court has the effect of a jury verdict and is not to be disturbed on appeal unless it is clearly wrong. When such judgment is not supported by the evidence, it is clearly wrong and must be set aside.
3. **Uniform Commercial Code: Contracts: Sales: Words and Phrases.** Neb. U.C.C. § 2-709 (Reissue 1980) applies to the sale of goods, which are generally defined in the code as things which are movable at the time of identification to the contract for sale.
4. **Uniform Commercial Code: Contracts: Sales: Appeal and Error.** Even though a contract for sale of property was a mixed one, for the sale of both "goods" and

"nongoods," where the case was presented to the trial court and to this court on appeal on the theory that the sales article of the Uniform Commercial Code applied, Neb. U.C.C. §§ 2-101 et seq. (Reissue 1980), the Supreme Court will dispose of the case on appeal on that theory.

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

Bruce E. Sandahl of Person, Dier & Person, for appellants.

Kenneth C. Fritzler of Ross, Schroeder & Fritzler, for appellee.

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

HASTINGS, J.

The plaintiffs appeal an order of the district court for Buffalo County, which vacated their judgment for $7,124 obtained in a county court bench trial on their claim for breach of contract and entered judgment for $124. We affirm.

On April 13, 1983, the plaintiffs conducted an auction sale of the assets of the Hammond Flying Service, an aerial spraying business, at the Alma Municipal Airport in Harlan County, Nebraska. The defendant was the high bidder for a meter, for which he bid $110; a chemical hose, for which he bid $10; a mixing tank, for which he bid $4; and the flying service business itself, for which he bid $7,000. The flying service business was represented to include three hangars, a paid-up lease on real estate for 1983, a customer list, an agreement not to compete, runway markers, and airplane tiedowns. The defendant delivered a check for $7,124 to the clerk of the sale, but subsequently stopped payment on the check.

The plaintiffs filed suit for breach of contract, relying on Neb. U.C.C. § 2-709 (Reissue 1980) at trial as the basis for recovery. The defendant asserted the affirmative defenses of breach of warranty, misrepresentation, impossibility of performance, and failure to mitigate damages. The county court for Buffalo County entered judgment for the plaintiffs for $7,124.

On appeal the district court found that the evidence presented to the county court did not bring the measure of

damages as to the sale of the flying service within § 2-709. The district court found that the requirements of § 2-709 were not satisfied concerning the flying service because the defendant did not accept the goods and also because there was no proof that the plaintiffs had made reasonable efforts to mitigate their damages. The district court thus vacated the county court's judgment of $7,124 and entered judgment for $124, the amount that the defendant had bid for the items other than the flying service.

On appeal from the county court, the district court is to review the case for error appearing on the record. Neb. Rev. Stat. § 24-541.06 (Reissue 1985). In a law action the disposition of the trial court has the effect of a jury verdict and is not to be disturbed on appeal unless it is clearly wrong. However, when such judgment is not supported by the evidence, it is clearly wrong and must be set aside. *Chilton Accts. Rec. Mgmt. v. Project Life Min.*, *ante* p. 482, 406 N.W.2d 133 (1987).

On appeal to this court the plaintiffs contend that the district court erred in determining that the evidence did not bring the measure of damages as to the flying service business within § 2-709 and in vacating the county court's judgment with respect to the $7,000 that the defendant bid on the business. On cross-appeal the defendant contends that the district court erred in not finding for the defendant on the additional grounds of breach of warranty, misrepresentation, and impossibility of performance.

The defendant, Donald W. Streeter, Jr., operated an aerial spraying business in Kearney and Holdrege, Nebraska, ran a flight school, and was involved in other aviation-related activities. He and Bruce Allred, who was not made a party to this action, formed Streeter Aviation for the purpose of establishing an aerial spraying operation based at the Alma Municipal Airport.

The plaintiffs, Virgil L. and Ruth I. Hammond, were partners in Hammond Flying Service, an aerial spraying business near Alma, Nebraska. The plaintiffs had run the spraying business for 19 years and decided to sell the business and various other items at an auction sale in April 1983. The sale bill for the auction described the Hammond Flying Service

as follows: "Includes: Paid up lease on property for year of 1983. (3) Hangers [sic], (1) closed, (2) open, pole and wood frame, covered with strong barn metal, runway markers and tie-downs." At the auction it was announced that the flying service business included the items described on the sale bill plus a customer list and a noncompetition agreement. The terms of the sale were cash.

The Alma Municipal Airport is located next to the Harlan County Reservoir on land leased from the Army Corps of Engineers. The lease listed on the sale bill referred to a privately-owned tract of land adjoining the airport runway. The hangars were located partially on this land and partially on land owned by the federal government. No fuel or chemicals could be stored or loaded on government land, so the leased tract of land was used for those purposes.

On the day of the sale the defendant wrote a check for $7,124 payable to "Hammond Sale." The defendant testified that he stopped payment on the check sometime between April 13 and 21, 1983, but did not remember the exact date. Payment was stopped because the defendant and Allred were concerned about various aspects of the business. The concerns were brought about when the defendant and Allred learned that the Alma Municipal Airport was scheduled to be closed in November 1983 by the Corps of Engineers and that the lease on the tract of land was only an oral agreement and, according to Virgil Hammond's testimony, would expire on May 1, 1983, and at the time of the sale the land's owner and the plaintiffs had not entered into a new lease agreement.

The plaintiffs rely on § 2-709 of the Uniform Commercial Code as their basis of recovery. Section 2-709 provides in pertinent part:

> (1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price
>
> (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
>
> (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a

> reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

The defendant's defense of failure to mitigate damages also relies on the U.C.C.

Neb. U.C.C. art. 2 (Reissue 1980) applies to transactions in goods. § 2-102. "Goods" are defined in § 2-105 as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action." Whether § 2-709 applies to the items involved in the present case depends on whether they are "goods." The definition of "goods," as used in article 2, stresses the element of "movability" of the item in question. *Guaranteed Foods v. Rison*, 207 Neb. 400, 299 N.W.2d 507 (1980). Because the meter, chemical hose, and mixing tank on which the defendant bid were movable at the time of their identification to the contract for sale, they clearly fall within the U.C.C.'s definition of "goods." The defendant took possession of the three items after the sale, and thus § 2-709 was properly applied to the sale of those items.

Whether article 2 of the U.C.C. was properly applied to the sale of the flying service business depends on whether such a sale is a "transaction in goods." In the present case, as is often true in the sale of a business, the sale of the Hammond Flying Service involved a mixed sale of goods, such as the runway markers, and nongoods, such as the lease on real estate. However, both parties concede and argue that the case was tried as and argued in this court as a § 2-709 case.

For that reason, we will dispose of the case on appeal on the theory on which it was presented to the trial court and to this court. In *O'Keefe Elevator v. Second Ave. Properties*, 216 Neb. 170, 173, 343 N.W.2d 54, 56 (1984), we said:

> We observe that although the contract involved is a mixed one, both for the sale of goods as defined by Neb. U.C.C. § 2-105(2) (Reissue 1980) and for services, the parties tried this case on the theory that the sales article of the Uniform Commercial Code (article 2) applies. That being the case, we make no independent analysis of the issue, and assume for the purposes of this case, without

deciding, that the contract does in fact come within the purview of the sales article of the Uniform Commercial Code, which encompasses transactions in goods. Neb. U.C.C. § 2-102 (Reissue 1980). See *Kearney Clinic Bldg. Corp. v. Weaver*, 211 Neb. 499, 319 N.W.2d 95 (1982), stating that this court will dispose of a case on appeal on the theory on which it was presented to the trial court.

Under the approach used in *O'Keefe Elevator*, it appears that the district court in the present case was correct in vacating the county court's judgment because there was no proof by the plaintiffs that reasonable efforts were made to resell the business assets at a reasonable price after the defendant failed to complete the purchase, as required by § 2-709. When the plaintiff Virgil Hammond was asked whether he had made any attempt to sell the Hammond Flying Service to anyone other than the defendant since April 13, 1983, Hammond said, "Good gracious, no." In addition, although the plaintiffs contend that the circumstances reasonably indicated that such an effort to resell would have been unavailing and resale efforts thus excused under § 2-709, the district court found that the hangars have some value, indicating that efforts to resell at least some of the business assets might not have been unavailing. Also, the district court found that acceptance was not proven. See *French v. Sotheby & Company*, 470 P.2d 318 (Okla. 1970) (to recover under § 2-709, the record must show that goods were accepted, or that they were lost after risk had passed to defendant, or that plaintiff was unable to sell them at a reasonable price).

Defendant concedes that he took possession of the meter, chemical hose, and mixing tank, for which he bid $124, and he raises no objection to that sale. Accordingly, the judgments in that amount, which were entered by both the county court and the district court, were correct.

Because we find in favor of the defendant on the issue of § 2-709, it is not necessary for us to consider his cross-appeal.

The judgment of the district court is affirmed.

AFFIRMED.

INTERSYSTEMS, INC., A NEBRASKA CORPORATION, FORMERLY DOING BUSINESS AS INTERNATIONAL-STANLEY CORPORATION, A NEBRASKA CORPORATION, APPELLANT, V. FARMERS CO-OP EXCHANGE, WAUNETA, NEBRASKA, APPELLEE.

406 N.W.2d 344

Filed May 29, 1987. No. 85-536.

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

Anthony J. Fejfar of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Gregory B. Bartels of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

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

PER CURIAM.

InterSystems, Inc., appeals from the judgment entered for Farmers Co-op Exchange (Farmers). InterSystems filed an action based on Farmers' alleged breach of contract and prayed for damages from Farmers. In its answer, Farmers claimed that InterSystems breached the contract. The case was tried to the court. Both parties presented evidence supporting their respective contentions. The trial court found that InterSystems had breached the contract with Farmers and that the parties had mutually terminated the contract. As we expressed in *H & L Equip. v. Schardt*, 217 Neb. 653, 653-54, 349 N.W.2d 924, 925 (1984):

> In a law action tried to the court, the findings of the trial court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In a nonjury law action the evidence must be considered in the light most favorable to the successful party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can be reasonably deduced from the evidence.

There is evidence to support the trial court's findings. The

findings of the trial court are not clearly wrong. The judgment of the trial court is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

K.S.R., APPELLANT, V. NOVAK AND SONS, INC., DOING BUSINESS AS NOVAK AND SONS REALTY, A CORPORATION, APPELLEE.

406 N.W.2d 636

Filed May 29, 1987. No. 85-592.

1. **Landlord and Tenant: Negligence.** A landlord has a duty to protect a tenant against the foreseeable criminal acts of a third person.
2. **Negligence: Proximate Cause: Trial.** Questions of foreseeability, negligence, and proximate cause are questions for the trier of fact.

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

John J. Bedel and Jon H. Johnson, for appellant.

William J. Dunn of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee.

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

WHITE, J.

This is an appeal from the district court for Douglas County. K.S.R. appeals from the district court's order granting the appellee's motion for summary judgment.

In her petition appellant alleged that the appellee, Novak and Sons, Inc., doing business as Novak and Sons Realty, failed to provide adequate security to persons living in the apartment complex owned and operated by Novak and failed, though requested to do so, to repair the lock on the front door of

appellant's apartment, and, as a result thereof, appellant was sexually assaulted in her apartment. Taking a view most favorable to appellant of the evidence adduced at the hearing on the motion for summary judgment, the facts appear as follows.

In August of 1980 the appellant lived in an apartment building located at 1965 Jones Street in Omaha, Nebraska, owned and operated by Novak. The apartment complex was not equipped with locks on the outside doors, and thus the common areas were accessible to any person wishing entrance. On August 27, 2 days before the assault which gave rise to these proceedings, the appellant observed James Quarrels masturbating in a laundry room directly across from her apartment. The incident was reported to the police, who interviewed the appellant in connection with her report. The appellant next saw Quarrels on the evening of August 29, at approximately 8:30, in her apartment, at which time she was sexually assaulted at knifepoint.

Approximately a week prior to the assault, the door to the appellant's apartment was kicked in and the dead-bolt lock on the door separating the apartment from a common hallway was broken. Appellant reported the incident to the apartment manager and made daily requests that the lock be repaired. No action was taken to repair the lock until the morning after the assault. The assailant, Quarrels, had a history of frequenting the building. The building manager, in his deposition, acknowledged that Quarrels had been caught several times masturbating in the building. The manager told the police that the assailant had previously broken into a tenant's apartment and stood naked at the foot of her bed in a nearby building owned and managed by Novak. The apartment manager also told the police that the appellant's building has lost 8 to 10 tenants as a result of Quarrels' activities.

K.S.R. alleges as error that the district court incorrectly found that the landlord had no duty to protect his tenants from the criminal activities of third parties, that a landlord has no contractual duty to protect his tenants, and that the alleged negligence of the landlord furnished only a condition and not a proximate cause of the injuries suffered by K.S.R. Finding that

there exists a question of fact which prevents the granting of summary judgment, we reverse.

Addressing appellant's first assignment of error, we note that our review of a lower court's decision granting a motion for summary judgment is limited to a determination of whether a genuine issue of fact exists, as opposed to deciding the issue. *Gilbert v. City of Tekamah*, 221 Neb. 614, 379 N.W.2d 758 (1986). When viewing a motion for summary judgment, the evidence must be viewed most favorably toward the party against whom the motion is directed. *Marshall v. Radiology Assoc.*, *ante* p. 75, 402 N.W.2d 855 (1987).

The district court order correctly held that a landlord is not an insurer of a tenant's safety. However, a landlord has a duty to protect a tenant against the foreseeable criminal acts of a third person. *C.S. v. Sophir*, 220 Neb. 51, 368 N.W.2d 444 (1985). The issue of foreseeability in the context of assaults upon tenants has been addressed by this court in the cases of *C.S. v. Sophir, supra*, and *Childers v. LCW Apartments*, 214 Neb. 291, 333 N.W.2d 677 (1983). In *C.S. v. Sophir, supra* at 53, 368 N.W.2d at 446, this court held: "Under the facts as alleged in this case, it would be unfair to impose a duty upon the landlord based on a single prior assault at the complex."

The case at hand is readily distinguishable from *Sophir*. In the instant case repeated intrusions with related objectionable sexual conduct by the assailant were known to the landlord. Here, unlike *Sophir*, there was a history of criminal activity at the leased premises.

In *Childers* we merely noted that in excluding evidence of criminal activity the trial court does not abuse its discretion unless it can be shown that the activities are similar to the incident which is the subject of the suit. Other courts have imposed liability upon landlords for the criminal acts of third parties where such acts were reasonably foreseeable. In *Waters v. New York City Housing Authority*, 69 N.Y.2d 225, 228, 505 N.E.2d 922, 923, 513 N.Y.S.2d 356, 357 (1987), the New York Court of Appeals wrote:

> It is also now beyond dispute that a landlord, private or public, may have a duty to take reasonable precautionary measures to secure the premises if it has notice of a

> likelihood of criminal intrusions posing a threat to safety [citations omitted]. . . . [A] building owner who breaches such a duty may be held liable to an individual who is injured in a reasonably foreseeable criminal encounter that was proximately caused by the absence of adequate security [citations omitted].

Although the facts differ from the case at hand in that they involved a young woman being accosted on the street and forced to the roof of the apartment building, where she was sexually assaulted and robbed, the opinion accurately summarizes the responsibilities of a landlord to provide, and the rights of tenants to be provided, a safe place to live. See, *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970); *Paterson v. Deeb*, 472 So. 2d 1210 (Fla. App. 1985); *Gomez By and Through Munoz v. Ticor*, 145 Cal. App. 3d 622, 193 Cal. Rptr. 600 (1983); *Sawyer v. Carter*, 71 N.C. App. 556, 322 S.E.2d 813 (1984); Annot., 43 A.L.R.3d 331 (1972). Questions of foreseeability, negligence, and proximate cause are questions for the trier of fact. *Brown v. Nebraska P.P. Dist.*, 209 Neb. 61, 306 N.W.2d 167 (1981); Annot., 72 A.L.R.3d 1269 (1976). We are unable to state as a matter of law that the assault by Quarrels on a tenant was not reasonably foreseeable.

REVERSED AND REMANDED.

BOSLAUGH and HASTINGS, JJ., concur in the result.

BERYL ANN DAHL, APPELLEE, V. CARL L. DAHL, APPELLANT.
406 N.W.2d 639

Filed May 29, 1987. No. 85-633.

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

Earl J. Witthoff of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellant.

Sarah J. Shofstall of Sidwell & Shofstall, for appellee.

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

PER CURIAM.

Carl L. Dahl, respondent, appeals from the decree of the district court for Kearney County dissolving the marriage between him and petitioner, Beryl Ann Dahl. In his appeal the respondent alleges that the district court erred in its division of the marital estate of the parties and in awarding an amount of alimony to petitioner which is patently unfair and which is not based on the considerations and requirements of Neb. Rev. Stat. § 42-365 (Reissue 1984).

The division of marital property in a dissolution action is a matter entrusted to the sound discretion of the trial judge, which, on appeal, will be reviewed by this court de novo on the record, and in the absence of an abuse of that discretion, the decision of the trial court will be affirmed. In such a review, where the evidence is in conflict, this court will give weight to the fact that the trial court observed and heard the witnesses and accepted one version of the facts rather than another. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). In the case on appeal, the only issue presented by appellant is his contention that the trial court erred in finding that the appellant's "testimony is not credible with respect to the purported disappearance of $184,239.34 of the parties' savings . . . ." We have examined the record, and we determine that the trial court's finding is fully supported by the evidence. We further agree with the trial court's finding that in the distribution of the parties' assets, such funds are chargeable to appellant. The court's division of the marital assets of the parties is affirmed.

Appellant also contends the alimony allowance granted to appellee is unfair. The trial court ordered appellant to pay alimony of $250 per month for 49 months beginning August 1, 1985, $500 per month for the succeeding 24 months, and $750 per month for the succeeding 156 months. The parties were 42 and 43 years old at the time of the decree and had been married for 21 years at that time.

Income tax records before the trial court showed that the adjusted gross income of the parties between 1977 and 1982 ranged from $10,835 to $21,304 annually; 1983 adjusted gross income was $31,706. Appellant testified his income in 1984 was approximately $12,000. Appellee earned approximately $5,000 a year as a cook in the Axtell, Nebraska, school system.

The parties stipulated in evidence that between March 26 and July 1, 1984, appellant withdrew $197,082.09 in assets of the parties from various banks. There is no showing in the record as to either party's receiving an inheritance. There is no explanation in the record as to how this sum of money could be accumulated on the earnings of the parties.

In view of the fact that the trial court observed the witnesses and has made a factual determination on the evidence produced by such witnesses, we will not make any different orders as to the proper alimony due appellee. Any necessary changes in the amount of alimony due, or the length of time alimony should be paid, should be considered at the time either party seeks a change in the existing court order. At that time, the moving party can establish facts justifying a change by evidence more illuminating than that in the record before us.

The trial court's order is affirmed in its entirety.

AFFIRMED.

RAYMOND D. BOREN, APPELLEE, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, ET AL., APPELLEES, UNIVERSAL UNDERWRITERS INSURANCE COMPANY, A CORPORATION, APPELLANT.

406 N.W.2d 640

Filed May 29, 1987. No. 85-720.

1. **Declaratory Judgments.** Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute.
2. **Appeal and Error.** The factual finding of the trial court in a law action tried without a jury has the effect of a finding made by a jury and will not be set aside unless clearly wrong.

3. **Insurance: Estoppel.** An insurer which gives one reason for its conduct and decision as to a matter in controversy cannot, after litigation has begun, defend upon another and different ground.
4. **Motor Vehicles: Certificate of Title: Assignments.** One who purchases an automobile and obtains possession thereof but does not obtain a duly assigned certificate of title thereto acquires no ownership interest in the automobile.
5. **Insurance: Contracts: Liability.** Where each of multiple applicable automobile insurance policies contains mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance, the owner's policy provides primary coverage and the driver's policy provides excess coverage.
6. **Insurance: Contracts.** Absent ambiguities, language in a policy of insurance is to be given its plain and ordinary meaning.

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

Thom K. Cope of Bailey, Polsky, Cada, Todd & Cope, and, on brief, Stanley F. Wilson, for appellant.

Patrick W. Healey of Healey, Wieland, Kluender, Atwood & Jacobs, for appellee State Farm.

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

CAPORALE, J.

Plaintiff-appellee, Raymond D. Boren, brought this action pursuant to the provisions of Neb. Rev. Stat. §§ 25-21,149 through 25-21,164 (Reissue 1985) for a declaration as to whether defendant-appellant, Universal Underwriters Insurance Company, a corporation, or defendant-appellee State Farm Mutual Automobile Insurance Company, a corporation, was obligated to pay a $2,092.23 judgment he obtained against defendant-appellee Julianne H. Byram and her father, defendant-appellee Harold E. Byram. In seeking a reversal of the judgment declaring Universal to be the primary insurer and State Farm to provide only excess insurance, Universal assigns two errors: (1) the ruling that Universal was barred by reason of the position it had taken prior to litigation from denying coverage; and (2) the finding that the Universal policy provided coverage for the accident giving rise to Boren's judgment. We affirm.

On April 13, 1983, Thomas, Patrick, and Cynthia Herrick assigned their certificate of title to a 1980 Ford Pinto automobile to Misle Chevrolet Company, a corporation engaged in the business of, among other things, the selling of new and used automobiles. Misle sold the Pinto to Harold E. Byram and his wife, Janet, on July 9, 1983. The Byrams gave Misle a check for the purchase price and took possession of the Pinto on the same day. While Misle gave the Byrams a copy of the purchase agreement, it did not execute the "reassignment by licensed dealer" on the certificate of title to the Pinto, nor did it deliver the duly assigned certificate of title to the Byrams until July 15, 1983. Although not clear from the record, it appears that Misle wanted to hold on to the certificate of title until the Byrams' check had been paid by the bank.

While driving the Pinto on July 14, 1983, the Byrams' daughter was involved in an accident with Boren. On that day, Universal had in force a policy providing garage operations and automobile hazard coverages to Misle, and State Farm had in force three separate policies providing automobile liability coverages to the Byrams and their daughter. None of the State Farm policies, however, described the Pinto as the owned automobile to which the policy applies. The limit of liability under the Universal policy is more than sufficient to cover Boren's judgment, as is true of the limit of State Farm's liability under any one of its policies.

The first assignment of error questions the correctness of the trial court's factual finding that, prior to litigation, Universal rested its denial of liability on grounds other than a claim that its policy provided no coverage for the subject occurrence, and the trial court's legal conclusion that, as a consequence, Universal could not now deny that its policy provided coverage.

Our analysis must necessarily begin by determining the scope of our review. Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute. See, *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986); *Occidental S. & L. v. Bell Fed. Credit Union*, 218 Neb. 519, 357 N.W.2d 198 (1984). Since no equitable relief is sought, the action is to be treated as one at law. As a consequence, a jury having been

waived, the factual finding of the trial court has the effect of a finding made by a jury and will not be set aside unless clearly wrong. See, *InterSystems, Inc. v. Farmers Co-op Exch.*, *ante* p. 497, 406 N.W.2d 344 (1987); *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, *supra; Occidental S. & L. v. Bell Fed. Credit Union*, *supra.*

State Farm adduced evidence that prior to this suit's being filed, attorney John E. Beltzer, who is associated with the law firm appearing for Universal in this case and which represented the interests of Julianne and Harold Byram in the underlying tort action resulting in the money judgment in favor of Boren, wrote a letter to attorney Richard D. Sievers, who is associated with the firm representing Boren in the underlying tort action and in this suit. That letter, a copy of which was sent to Universal and to attorney Patrick W. Healey, who is associated with the firm representing State Farm's interests in this case, recognized that if Universal were to question whether its policy provided coverage, Beltzer would have a conflict of interest, in which case he would withdraw; if, however, Universal would consent "to not argue that issue," Beltzer would then continue acting in "Universal's defense." The letter then offers an analysis of various provisions of the Universal and State Farm policies and concludes that the best construction from Universal's point of view would render Universal's coverage excess, and the worst construction from its point of view would render both the Universal and State Farm coverages primary, obligating the two companies to share the loss. There is no claim that Beltzer and his firm withdrew from the representation of Julianne and Harold Byram in the underlying tort action. Neither is there any showing that the defense Universal provided Julianne and Harold Byram through Beltzer and his firm was under an agreement whereby Universal reserved whatever policy defenses might operate to relieve it of liability for any judgment Boren might recover. Indeed, so far as the record shows, the first time Universal denied liability for Boren's judgment was when it answered interrogatories in garnishment in the underlying tort action. (Unbelievably enough, this was done through the very same firm of attorneys which had defended Julianne and Harold Byram in the

underlying tort action.)

Under the circumstances, it cannot be said the trial court was clearly wrong in finding that Universal did not assert a lack of coverage as a ground for refusing to pay the judgment Boren obtained in the underlying tort action. The denial of coverage which came after Boren obtained his judgment against Julianne and Harold Byram came too late. See *National Union Fire Ins. Co. v. Bruecks*, 179 Neb. 642, 139 N.W.2d 821 (1966), concerning the effect of counsel's role in the matter.

Once the trial court's factual finding is determined to not be clearly wrong, the controlling rule of law is that an insurer which gives one reason for its conduct and decision as to a matter in controversy cannot, after litigation has begun, defend upon another and different ground. *Mutual Benefit Life Ins. Co. v. Chisholm*, 213 Neb. 301, 329 N.W.2d 103 (1983). Julianne and Harold Byram were entitled to the full protection of the Universal policy. Thus, the trial court's legal conclusion that Universal is barred from asserting that Julianne and Harold Byram were not "insureds," as defined in its policy, and thus not covered is correct.

That being so, we do not reach the second assignment of error and need only determine to what extent, if any, Universal and State Farm become liable under the terms of their respective policies to pay the money judgment Boren obtained against Julianne and Harold Byram.

Since the Byrams had not yet received a duly executed reassignment of the certificate of title to the Pinto, Misle was the owner of the automobile at the time of the accident giving rise to Boren's money judgment. *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986); *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 214 Neb. 226, 334 N.W.2d 168 (1983); Neb. Rev. Stat. § 60-105(1) (Reissue 1984). The State Farm policies read that under such a circumstance the coverages provided are "excess" but do not apply at all if the nonowned automobile is "OWNED BY ANY ***PERSON*** OR ORGANIZATION IN A ***CAR BUSINESS***" and there exists "OTHER LIABILITY COVERAGE WHICH APPLIES IN WHOLE OR IN PART AS PRIMARY, EXCESS OR CONTINGENT COVERAGE." The definition of "car

business" includes a business whose purpose is to sell land motor vehicles. Thus, the language of the State Farm policies specifically excludes coverage if there is other insurance. However, in its answer State Farm prays that it be declared to provide only excess coverage. Consequently, we ignore the exclusionary language and read the State Farm policies as containing excess coverage clauses. The Universal policy reads that the "insurance afforded by" its garage operation and automobile hazard coverage "is primary," except in circumstances not involved in this controversy.

We have been required on a number of past occasions to resolve controversies arising because each of the applicable policies contained mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance. Where such conflict has existed, we have held the owner's policy to provide primary coverage and the driver's policy to provide excess coverage. E.g., *Jensen v. Universal Underwriters Ins. Co.*, 208 Neb. 487, 304 N.W.2d 51 (1981); *Bituminous Cas. Corp. v. Andersen*, 184 Neb. 670, 171 N.W.2d 175 (1969); *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co.*, 180 Neb. 555, 143 N.W.2d 923 (1966); *Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963); *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959).

In this case there is no conflict in the language of the applicable policies. The owner's policy says it is primary, and the driver's policy says it is excess. Absent ambiguities, language in a policy of insurance is to be given its plain and ordinary meaning. *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co., supra; Roth v. Farmers Mut. Ins. Co.*, 220 Neb. 612, 371 N.W.2d 289 (1985); *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985); *Charley v. Farmers Mut. Ins. Co.*, 219 Neb. 765, 366 N.W.2d 417 (1985); Wojcik, *Tracing the Fibers of Asbestos Litigation: When Do An Insurer's Duties of Defense and Indemnity Arise?*, 36 Fed'n Ins. & Corp. Couns. Q. 283 (1986). It necessarily follows, therefore, that the trial court's judgment declaring the obligations of the parties is correct and must be affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. FRANK ROUBICEK, RESPONDENT.

406 N.W.2d 644

Filed May 29, 1987. No. 86-143.

1. **Disciplinary Proceedings: Appeal and Error.** In disciplinary proceedings, the Supreme Court reviews the evidence de novo on the record to determine if discipline of a lawyer should be imposed and, if it should, the extent of the sanction.
2. **Disciplinary Proceedings.** Similarity of the substance of a complaint, charge, or formal charge to the material allegations of pending criminal or civil litigation shall not in itself prevent or delay disciplinary proceedings against the member involved in such litigation.
3. **Disciplinary Proceedings: Proof.** In disciplinary proceedings, the charges must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** An attorney before a court violates his oath as an attorney if he willfully conceals or misrepresents facts or law material to the court's decision.
5. _____. In disciplinary proceedings, the extent of the sanction imposed by this court upon an offending lawyer cannot be controlled by the sanction imposed upon an equally offending lawyer in the same case in a local proceeding before a committee on inquiry.
6. _____. To determine whether and to what extent discipline should be imposed, it is necessary that we consider 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.

Paul E. Galter of Bauer, Galter & O'Brien, for respondent.

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

PER CURIAM.

This is an original proceeding in this court where the Nebraska State Bar Association, as relator, has filed amended formal charges against Frank Roubicek, respondent, who was admitted to the practice of law in this state on June 25, 1954.

The amended formal charges allege that on May 8, 1981, respondent filed an "Inheritance Tax Worksheet, Voluntary

Appearance and Waiver of Notice" in the estate of Loyd West in the county court for Knox County and that the worksheet was signed by respondent and the county attorney for Knox County. The charges further allege that the worksheet showed that the inheritance tax due Knox County was $48,375, but that the amount of the inheritance tax, if properly computed, would not have been more than $9,900. The charges then allege that at the time of the proceedings in the West estate, pursuant to Neb. Rev. Stat. §§ 77-2101.01 et seq. (Reissue 1981), the estate tax due to the State of Nebraska was the amount by which the maximum credit allowance deduction for state death taxes from the federal estate tax filed in connection with the West estate exceeded the Nebraska inheritance tax due; that the maximum credit in the West estate was $48,375; and that by showing all of that sum due as inheritance tax due Knox County, the liability for Nebraska estate tax was eliminated.

The charges then allege that on June 4, 1981, respondent, as attorney for the personal representative of the estate, filed a Nebraska estate tax return showing no Nebraska estate tax due; that on June 16, 1981, the county court for Knox County entered a "Formal Order for Complete Settlement after Informal Testate Proceedings," which order approved the inheritance tax in the amount of $48,375, to be paid to Knox County; that the county court in making the inheritance tax determination relied upon the inheritance tax worksheet executed by the respondent, as attorney for the personal representative of the estate, and the county attorney for Knox County; that the attorneys signed the inheritance tax worksheet with the expectation that the county court would approve and assess the inheritance tax shown thereon; and that the worksheet was executed and submitted with the purpose of increasing the inheritance tax payable to Knox County at the expense of the estate tax payable to the State of Nebraska.

Relator further alleges in the amended charges:

> That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office, as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and a violation of the following provisions of the Code of Professional

Responsibility, to-wit:

DR 1-102 Misconduct.

(A) A lawyer shall not:

1. Violate a Disciplinary Rule.

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

That attorney's oath requires, as it did in 1954 when respondent was admitted to the bar, that every attorney shall take an oath in the following form: "You do solemnly swear that you will support the Constitution of the United States, and the Constitution of this state, and that you will faithfully discharge the duties of an attorney and counselor, according to the best of your ability."

Respondent answered the amended charges, admitting the preparation of the worksheet as described, generally denying the other allegations, and requesting that the charges be dismissed.

A hearing was held before a referee appointed by this court. At the conclusion of that hearing, the referee determined that the allegations in the amended formal charges were proved by a clear preponderance of the evidence by the relator, and that respondent's actions "constituted a violation of his oath of office, as an attorney . . . and that his actions constitute a violation of DR1-102 (A)(1) and (5) of the Code of Professional Responsibility." For the reasons later discussed herein, the referee recommended that respondent be placed on probation rather than disbarred or suspended from the practice of law.

Relator filed exceptions to the recommendations of the referee as to sanctions to be imposed, but did not except as to the referee's findings of fact. Respondent filed exceptions to the findings of the referee and specifically excepted to the findings that respondent's actions violated DR 1-102(A)(1) and (5) of the Code of Professional Responsibility. Respondent's further position was that if this court "concludes that such violations occurred, the Respondent does not except to the Referee's recommendation of sanctions to be imposed."

For the reasons set out hereinafter, we determine that the findings of fact and conclusions of law are correct, but that the sanction recommended to be imposed was inadequate.

Initially, we observe that in disciplinary proceedings such as the case at bar, the Supreme Court reviews the evidence de novo on the record to determine if discipline of a lawyer should be imposed and, if it should, the extent of the sanction. *State ex rel. Nebraska State Bar Assn. v. McArthur*, 212 Neb. 815, 326 N.W.2d 173 (1982); *State ex rel. Nebraska State Bar Assn. v. Michaelis*, 210 Neb. 545, 316 N.W.2d 46 (1982).

As a general factual background, we agree with the statements of the referee, as both relator and respondent apparently do also.

The referee's report sets out the following:

> This matter generally arises out of allegations of wrongdoing by Mr. Roubicek concerning probate matters which he handled. Specifically, the alleged wrongdoing has to do with the manner in which Mr. Roubicek prepared and submitted state inheritance tax worksheets. . . . In estates which are substantial, both a Federal Estate Tax Return and a State Estate Tax Return are required to be filed. The Federal Estate Tax Return is due nine months after death and the State Estate Tax Return is due 12 months after death. Accordingly the Federal Estate Tax Return is filed first. On the Federal Return, the estate is entitled to a credit for State Death Taxes. This is commonly referred to as the State Death Tax Credit and the amount of the credit is simply derived from a chart as determined by the federal government. After the Federal Estate Tax Return is filed and the State Death Tax Credit determined, the State Estate Tax Return is prepared and filed. The preparer first determines the amount of inheritance tax due. The inheritance tax is that tax which is assessed against persons who inherit from the estate and that tax is paid to County government. There is a prescribed form which embodies the statutory law in the State of Nebraska to assist the preparer in determining the amount of the inheritance tax to be paid. After the inheritance tax is figured, if the inheritance tax is less than the State Death Tax Credit as derived from the federal return, the balance goes to the State of Nebraska as a State Estate Tax.

> When the person preparing the inheritance tax worksheet has completed same, he submits same to the local county attorney who either gives his approval or rejection. If rejected, usually because of an argument over values placed on listed inventory, the matter is either negotiated until a settlement is reached or the matter is submitted to the County Court for a hearing to determine the disputed issues. If the County Attorney and the preparer of the inheritance tax worksheet are in agreement, they so indicate on the worksheet, submit same to the County Judge for his approval. It is the County Judge who ultimately determines the amount of the inheritance tax. As a matter of practical fact, the local County Judge will nearly always approve the worksheet once it has been agreed to by both the preparer of the inheritance tax worksheet and the County Attorney.

As stated above, the estate in which respondent's specific wrongdoing is alleged was the Loyd West estate. West died on September 7, 1980. Application for informal probate of his will was filed in the Knox County Court by respondent on September 17, 1980. This application states that the heirs and devisees of West who were to take under his will were his widow and four children and that there were no other "interested parties" in the estate. On May 8, 1981, respondent filed an inheritance tax worksheet, voluntary appearance, and waiver of notice. The worksheet, which was signed by respondent as attorney for the personal representative and by the county attorney for Knox County showed a gross estate of $2,319,355; no allowances for exempt property; no deductions for funeral expenses, attorney fees, court costs, or any other items; and "[s]uccession interest deduction" of $1,069,744. The worksheet then states that the "[t]otal gross estate (Federal Estate Tax Return, Form 706)" and "[n]et estate" were the same amount of $2,319,355 and that the "[t]otal deductions and exemptions" were $1,069,744, resulting in a "[n]et value of estate subject to Nebraska Inheritance tax" of $1,249,611. The second page of the worksheet, consisting of 13 numbered lines, with many additional lines for requested information, is not filled in, with the exception of three identical dollar amounts: the "Nebraska

inheritance tax balance due" of $48,375; the "Nebraska Inheritance Tax Apportionment," showing the balance due to Knox County of $48,375; and balance due of $48,375. In answer to the information sought on line 45, which states, "Complete the name, relationship, class, value, exemption, taxable amount and tax due for each recipient," respondent filled in only the words, "As per material filed."

Other evidence in the record shows that the county attorney for Knox County believed that the phrase "as per material filed" "referred to the inventory that was in the West Estate, at least to the inventory." The specific "material filed" is not explained by respondent. The inventory filed showed "Total Value at Date of Death" as $2,319,355. No amended inventory was ever filed in the estate, as required by Neb. Rev. Stat. § 30-2469 (Reissue 1985).

Neb. Rev. Stat. § 77-2004 (Reissue 1981), in effect at the time of Loyd West's death, provided that heirs or devisees of the degree of kindred of those receiving the entire West estate (that is, his widow and children), in calculating the inheritance tax they must pay, were entitled to an exemption of $10,000, with the remainder of the inheritance taxed at 1 percent.

This worksheet was submitted to the county judge for Knox County. Three county judges acted as county judge for the counties of Knox, Antelope, Pierce, Madison, Wayne, Stanton, and Cuming. One of the judges ordinarily came to Knox County on a rotating basis not shown in the record. Inheritance tax in the amount of $48,375 was paid to the Knox County treasurer on June 2, 1981.

On June 4, 1981, a Nebraska estate tax return for the Loyd West estate was filed. This return was signed by respondent after a line on the return stating, "Under penalties of perjury, I declare that I have examined this return, and to the best of my knowledge and belief, it is correct and complete." This return requests information as to eight dollar figures. The return states that the "[t]axable estate (line 3, page 1, Federal Form 706)" is $1,249,611; that the "[g]ross Nebraska estate tax (credit for state death taxes [line 13, page 1, Federal Form 706])" is $48,375; that the inheritance tax paid was $48,375; and that the "[n]et Nebraska estate tax due," the estate tax previously paid

to Nebraska, the "TAX DUE," the interest per year, and the "BALANCE DUE" are $0. A "Formal Order for Complete Settlement" was issued by the county judge on June 16, 1981.

The circumstances leading to the state's discovery of this transaction are set out below. With regard to the West estate transactions, the record shows that on November 4, 1983, the Nebraska Tax Commissioner, through the office of the Attorney General of Nebraska, filed a petition in the county court for Knox County to vacate the order approving the inheritance tax determined in the West estate and requesting redetermination of those taxes. After lengthy hearings in the county court, the court ordered that the 1981 inheritance tax determination be set aside and that a redetermination of inheritance tax and Nebraska estate tax be made. This ruling was appealed to the district court for Knox County, where the county court order was affirmed. That affirmance was appealed to this court, where the case is now pending.

We note that our Neb. Ct. R. of Disc. 20 (rev. 1986) provides for the situation presented in these proceedings. That rule provides:

> (A) Similarity of the substance of a complaint, Charge or Formal Charge to the material allegations of pending criminal or civil litigation shall not in itself prevent or delay disciplinary proceedings against the member involved in such litigation.
>
> (B) The acquittal of the member on criminal charges, or a verdict or judgment in his favor in civil litigation involving material allegations similar in substance to a complaint, Charge or Formal Charge shall not in and of itself justify termination of disciplinary proceedings predicated upon the same or substantially the same material allegations.

Accordingly, we have proceeded with disposition of the charges against respondent without waiting for the ultimate disposition of the civil case involving the Loyd West estate.

The manner in which the West estate inheritance tax questions came to light sheds great light on the whole question of respondent's alleged wrongdoing. The record before the referee shows that on July 25, 1983, respondent, who was the

attorney for the personal representative of the Verna J. Rice estate, which was being probated in Knox County, wrote to the county attorney for Knox County, Steven Scholer, and county attorney for Antelope County, Alan Brodbeck, with a proposal for distribution of inheritance tax of the Rice estate. Respondent's letter stated:

> Enclosed please find:
>
> 1. Copy of inventory.
> 2. Copy of appraisal.
> 3. Copy of facing sheet and page 2 of federal estate tax return.
> 4. Original and copy of state inheritance tax worksheet for each of you.
> 5. Copy of letter from Colorado attorney, Samuel L. Andersen.
>
> Here's how it works out:

Net total property	$2,509,686.00
Colorado land	- 55,000.00
Federal estate tax	- 828,559.00
Net Nebraska property	$1,626,127.00
Heirs (1 son, 6 grandchildren)	- 70,000.00
Taxable property	$1,556,127.00
	x 1%
Nebraska tax to divide up between Antelope & Knox	$ 15,561.00

> However, federal credit is $139,575.00, so rather than pay difference into the state on a State Estate tax return, I propose tax as follows:

Credit	$139,575.00
Colorado share	- 2,998.07
Net for Nebraska	$136,576.93

> Total state inheritance tax = $136,576.93
>
> Division:
>
> Knox $\frac{2,381,725}{2,560,225}$ of $136,576.93 = $127,054.73
>
> Antelope $\frac{178,500}{2,560,225}$ of $136,576.93 = $ 9,522.20
>
> State estate tax = 0
>
> If you agree, please execute and return to me the enclosed waiver and agreement.

The county attorney for Antelope County testified that when he received the July 25, 1983, letter and the inheritance tax worksheet for the Rice estate from respondent, he determined not to sign the worksheet.

After the original calculation submitted by respondent, additional property belonging to the estate was discovered. By letter dated July 28, 1983, respondent informed the two county attorneys of the increase and suggested a division of inheritance tax of $133,016.21 to Knox County and $9,659.72 for Antelope County, based on a state death tax credit of $145,674. The then county attorney for Antelope County, Alan Brodbeck, testified, "I couldn't sign the inheritance tax worksheet as it was presented to me because I didn't believe that the inheritance taxes were being determined properly." Brodbeck testified that he

> looked at the computation, the manner in which would be the statutory level, the requirements, and determined that there was too much inheritance tax being paid to both of the counties, Antelope and Knox County, and that it was in excess of what the statute would prescribe for the inheritance tax.

Brodbeck further testified that respondent called him in August of 1983 to ask why Brodbeck had not returned the inheritance tax worksheet on the Rice estate. Brodbeck told respondent that he did not think the worksheet had been properly done and that he did not intend to sign it. Brodbeck testified that respondent indicated that "the problem with this was that it was being done by a stipulation rather than by figures presented by the statute prescribed that it be determined. . . . [H]e [respondent] said that this was done all the time this way." Brodbeck testified that when he told respondent that he would not sign the worksheet, respondent asked him "if the supervisors in Antelope County, what they would think of me turning down approximately $8,000 in inheritance taxes. And he then said if Antelope didn't want the money that Knox County could have it . . . ."

By letter dated August 2, 1983, with a copy to the county attorney for Knox County, Brodbeck rejected respondent's proposal and recalculated Antelope County's share of the

inheritance tax to be $1,153.33, based on the tax rates under the inheritance tax statute.

Further evidence shows that after Brodbeck's refusal to go along with respondent's original computation, respondent prepared a new inheritance tax worksheet, showing the inheritance tax due Knox County to be $141,522.60 and the amount due Antelope County to be $1,153.33 (the amount calculated by Brodbeck), for a total of $142,675.93, which is the exact difference between the $145,674 state death tax credit and the inheritance tax of $2,998.07 paid to the State of Colorado. This worksheet was signed by respondent and the county attorney for Knox County, Scholer, who entered his voluntary appearance on behalf of the county and state, waived notice, and acknowledged that he had examined the foregoing worksheet and had no objections thereto for inheritance tax purposes only. A receipt dated October 26, 1983, from the Knox County treasurer, shows that in the Rice estate $141,522.50 had been paid in and the "[a]mount refunded 126,515.60" and "[b]alance in fund 15,007.00."

Sometime after refusing to sign the last worksheet, Brodbeck called County Judge Philip Riley, who was the presiding judge in Knox County, and advised him that the inheritance tax was not being properly determined in the Rice estate. Judge Riley notified the Nebraska Attorney General of the situation.

On September 14, 1983, a hearing was conducted by Judge Riley for a determination of inheritance tax in the Verna Rice estate. On October 19, 1983, Judge Riley determined that the "inheritance tax due to the State of Nebraska by reason of the death of Verna J. Rice is the sum of $16,121.00, which tax should be apportioned as follows: Knox County, $15,007.00 and Antelope County $1,114.00 . . . ." The amount apportioned to each county was paid to the respective counties, and the record shows that on November 4, 1983, the Nebraska estate tax in the amount of $126,554.93 was paid. The personal representative in the Rice estate was discharged on December 17, 1984.

Further evidence adduced before the referee showed that in four other estates, in addition to the West and Rice estates, respondent had arranged for the payment of the exact amount

of the state death tax credit as the inheritance tax due in each of the estates. In addition, apparently to show that respondent did know how to properly compute inheritance taxes due various counties and a concurrent Nebraska estate tax, evidence as to three other estates probated by respondent was submitted, and in these estates respondent apparently accurately differentiated between inheritance taxes due and estate taxes due and showed that no estate tax was due.

Respondent, in his exceptions to the report of the referee, has excepted specifically only to the conclusion of the referee that respondent's actions violated the disciplinary rules of this court. He does not specify any objection to the referee's findings of fact. The respondent states in the conclusion to his brief at 18 that "[t]he allegations . . . are not supported by the evidence."

In disciplinary proceedings, the charges must be established by clear and convincing evidence. That standard of proof has been sometimes referred to as " 'a clear preponderance of the evidence. . . .' " See *State ex rel. NSBA v. Kelly*, 221 Neb. 8, 12, 374 N.W.2d 833, 836 (1985). The two phrases set out the same standard. For the sake of uniformity and clarity, the rule as to the burden of proof in disciplinary proceedings shall hereafter be by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. Clear and convincing evidence means more than a preponderance but less than evidence beyond a reasonable doubt. See *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984). In our de novo review, we determine that the factual findings of the referee are correct and are supported by clear and convincing evidence.

Respondent's legal arguments will be addressed as set forth in the "propositions of law" set out in his brief. In respondent's first legal proposition addressed, he asserts that because the formal charges against him involve only the West estate, and because respondent admitted his actions were intentional in that estate, evidence from other estates should not have been received into evidence, or should have been received only to show intent, motive, or a common scheme or plan.

Our examination of the record discloses that the bulk of the

evidence concerning the other estates was in the form of exhibits which were offered and received into evidence without objection. A party on appeal may not assign the admission of evidence as error where no objection was made thereto in the trial. *PWA Farms v. North Platte State Bank*, 220 Neb. 516, 371 N.W.2d 102 (1985). Neither may a party except to the admission of evidence in a disciplinary proceeding where no objection was made before the referee.

Aside from that disposition of the point, we note that the evidence from the other estates in which respondent improperly filed an inheritance tax worksheet is admissible under Neb. Evid. R. 404(2), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Neb. Rev. Stat. § 27-404(2) (Reissue 1985). The evidence from these estates showed a pattern of behavior on the part of respondent which served as proof not only of his intent to avoid payment of state estate tax in violation of § 77-2101.01 but as proof of a plan to avoid state estate tax and as proof of the absence of mistake on respondent's part in preparation of the inheritance tax form in the West estate. Evidence as to other estates handled by respondent was properly received by the referee.

Respondent next contends that inheritance tax determinations are adversary proceedings in which the county attorney has the responsibility of representing the state and in which the county court has the final responsibility of determining the amount of inheritance tax.

In support of this argument, respondent cites the pertinent Nebraska statutes, Neb. Rev. Stat. §§ 77-2018.01 to 77-2023 (Reissue 1986), which set out the procedures for determining the amount of inheritance tax.

Section 77-2018.03 provides in part:

> In all matters involving the determination of inheritance tax, notice served upon the county attorney

> shall constitute notice to the county and the State of Nebraska. It shall be the duty of the county attorney to represent the county and the State of Nebraska in such matters as its attorney.

Section 77-2018.05 provides in part:

> [T]he court shall have the authority, upon the written application of any of the parties . . . to determine a final inheritance tax on any property devised, bequeathed, or otherwise transferred, based upon the probabilities at the time of the decedent's death rather than taxing the property at the rates specified in such sections.

Respondent asserts in his brief at 13 that "the ultimate responsibility for determining the amount of inheritance tax rests with the court" and contends that even if a stipulation is submitted to the court by the county attorney and the attorney for the personal representative, the county judge is not bound to accept such stipulation. Respondent suggests that because both the county attorney and county judge involved in an inheritance tax proceeding have statutory responsibilities in the determination of the tax, and since respondent did not represent either the county or the state, respondent therefore had no duty to inform the court that the inheritance tax worksheet was not prepared pursuant to §§ 77-2101.01 et seq.

The basis of such an argument has to be that respondent, as an attorney, has no responsibility to fully and truthfully inform the court as to the facts on which the respondent has requested the court to act. To state such a proposition is to show its obvious error. An attorney before a court violates his oath as an attorney if he willfully conceals or misrepresents facts or law material to the court's decision.

In *State ex rel. Nebraska State Bar Assn. v. McArthur*, 212 Neb. 815, 819, 326 N.W.2d 173, 175 (1982), we stated:

> There can be no question that concealing material facts from a probate court and presenting a report known by respondent to be less than a true, accurate, and full accounting of the proceeds which came into his client's possession on behalf of the estate served to demean that court of justice and its judicial officer, impeded and obstructed the administration of justice, and brought

discredit to respondent, the profession, and the courts.

In the worksheet presented to the county court in the West estate, respondent stated that the net value of the estate "subject to Nebraska Inheritance tax" was $1,249,611 and that the Nebraska inheritance tax due was $48,375. Respondent stated his computation was made "As per material filed." Respondent knew the individuals inheriting in the Rice estate had the obligation under Nebraska law to pay $15,561 as inheritance taxes. Respondent so stated in his private letter of July 25, 1983, to the county attorneys for Knox and Antelope Counties. Nonetheless, respondent formally informed the county court that the inheritance tax due was $141,522.60. To put the matter simply, respondent lied to the county court.

Respondent takes the position that because the county attorney for Knox County who preceded Scholer was willing to let him lie, and because the county judge, in the press of his many duties, did not catch his lie, the fault lies with others and not with respondent.

Such a position is taken by respondent in spite of his oath that he "will faithfully discharge the duties of an attorney," and in spite of the fact that the disciplinary rules of the attorney's profession require that he "shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice." DR 1-102(A)(5).

Respondent seeks to avoid any personal responsibility for his actions. The refusal to accept personal responsibility has been the source of much grief in the world in the last 50 years. In the field of the law, with the burgeoning number of cases in all courts, if courts cannot rely on the truthfulness of attorneys practicing before the courts, our system of justice will not be able to function efficiently or effectively.

Respondent's contentions that other members of the legal profession have an overriding duty not to let respondent attempt to circumvent the law and that he has no affirmative duty to observe the law are without merit.

Respondent then puts forward the proposition of law that, as stated in the index to his brief, "Within the bounds of law, a lawyer has a duty to represent the best interests of his client." We wholeheartedly agree with that statement of the law. The

problem with respondent's position in these proceedings is that, as set out above, respondent has not acted "[w]ithin the bounds of law."

The evidence fully supports the referee's finding "that the conduct engaged in by Mr. Roubicek in the Lloyd [sic] West Estate matter constitutes wrongdoing." The referee also found that respondent's intent in so acting "may have been . . . to divert money to the local county or counties, money that should rightfully have been paid to the State of Nebraska." In our de novo review, we find that respondent's intent was to wrongfully divert moneys from the State of Nebraska. We further agree with the referee's findings that respondent "knowingly took advantage of a situation wherein to a certain extent he could 'control' or count on the cooperation of the County Attorneys that he was dealing with and rely upon the trust of the County Judge."

We agree with the referee

> that the actions of the respondent, Frank Roubicek, have in fact constituted a violation of his oath of office, as an attorney licensed to practice law in the State of Nebraska as provided by §7-104 R.R.S. 1943, as amended, and that his actions constitute a violation of DR1-102(A)(1) and (5) of the Code of Professional Responsibility.

The remaining point to be discussed is the appropriateness of the sanction recommended by the referee. The referee recommended that respondent be placed on probation, in lieu of suspension or disbarment. Respondent has stated that if this court determines him to be subject to discipline, he is willing to accept such probation. The relator excepts to the referee's recommendation as to the sanction.

The reasons for the referee's recommendation are set out in his report. The referee stated that respondent's motives for his actions in the West estate were the same as the motives of the county attorney for Knox County at the time, that is, he wanted "to get as much inheritance tax as [he] easily could for the county at the expense of the state."

The referee concluded that it was "very hard" to distinguish the conduct of the county attorney from the conduct of respondent, and noted that the county attorney had received

only a private reprimand from the Committee on Inquiry for the Third Disciplinary District, and no formal charges were filed against him. In view of that situation, the referee felt it was appropriate to place respondent on probation rather than more severe sanctions. The referee also noted that respondent testified that he believed the Nebraska estate tax law to be unconstitutional and that he could therefore circumvent it.

With regard to the question of the unconstitutionality of the law, we note only that respondent has no standing to raise the constitutionality of the law in these proceedings. That consideration is irrelevant to determine the nature of respondent's actions in this matter.

With regard to the referee's concern that respondent should not be treated more severely than the county attorney for Knox County in the West estate, we note our decision in *State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985). That case involved a criminal appeal from a sentence which appellant contended was too harsh because a codefendant had received a lesser sentence. In the *Morrow* case we stated at 252, 369 N.W.2d at 92: "Where it is apparent that the lesser sentence imposed upon a codefendant is erroneous, the sentencing court is not required to reduce all more severe though properly imposed sentences just to obtain uniformity." In that case we held that the lengthier sentence was not too severe but that the lighter sentence was too lenient.

While disciplinary proceedings are not criminal in nature, the same concept must be considered. Proceedings involving the county attorney for Knox County were not presented to this court. In our efforts to preserve the high standards of the practice of law in this state, we cannot allow our judgments to be controlled by local decisions in similar matters. In disciplinary proceedings, the extent of the sanction imposed by this court upon an offending lawyer cannot be controlled by the sanction imposed upon an equally offending lawyer in the same case in a local proceeding before a committee on inquiry.

We are here faced with a conscious violation of this state's laws by a practicing lawyer. When confronted with the allegations of his misconduct, respondent, in an intemperate written response to the Counsel for Discipline, attacked the

assistant attorney general who was requested by the county judge to investigate the matter, and the tax attorney representing the state Tax Commissioner. In his testimony before the referee, respondent intimated that the county judge in the West estate was biased. As has been discussed, when the county attorney for Antelope County refused to sign the proposed inheritance tax hearing waiver, respondent intimated political reprisal against him. Respondent has never suggested that he has been at all at fault in this protracted matter. There has been no showing by respondent that he contemplates acting at any time in an appropriate manner in practicing law.

As stated in *State ex rel. Nebraska State Bar Assn. v. McArthur*, 212 Neb. 815, 819, 326 N.W.2d 173, 175-76 (1982):

> To determine whether and to what extent discipline should be imposed, it is necessary that we consider 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.

Since respondent's actions have not been shown to have benefited him financially, we feel disbarment is not appropriate. Suspension from the practice of law is more responsive to the respondent's wrongful actions.

Accordingly, respondent is suspended from the practice of law for a period of 2 years, beginning June 15, 1987.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V. KEVIN L. LAUE, APPELLANT.
406 N.W.2d 345

Filed May 29, 1987. No. 86-733.

Appeal from the District Court for Johnson County: ROBERT T. FINN, Judge. Motion overruled.

Thomas L. Morrissey of Morrissey, Morrissey & Dalluge, for appellant.

Robert M. Spire, Attorney General, and Elaine A. Catlin, for appellee.

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

PER CURIAM.

This matter came before the court for consideration of appellant's motion for rehearing, which claims that our opinion in *State v. Laue, ante* p. 57, 402 N.W.2d 313 (1987), erroneously recited at 59, 402 N.W.2d at 315, that the patrol car "had its engine running" when no such evidence appeared in the record, and, further, that we incorrectly recited at 60, 402 N.W.2d at 315, that the trooper said to the defendant, "[I]t didn't quite make it to the ditch."

Upon reexamination of the record, at page 27, line 13, of the bill of exceptions, during cross-examination of the trooper by the appellant's counsel, the question was asked, "Now, in the time it took him to do that you went and got in your car; was you [sic] car — engine already started?" to which the witness responded, "Yes, it was," and at page 18, line 24, the question was asked, "And, the statement was?" and the answer given was "That it didn't quite make it to the ditch."

The court finds that there is no basis in fact, or in law, to support the allegations of the appellant's motion for rehearing.

It is therefore ordered that the motion for rehearing be, and the same is, overruled.

MOTION OVERRULED.

RAYMOND A. NORQUAY, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE.

407 N.W.2d 146

Filed June 5, 1987. No. 85-582.

1. **Pretrial Procedure.** A purpose of the discovery process is exploration of all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute.
2. _____. The discovery process provides adequate pretrial preparation as a basis for an informed cross-examiner and informative cross-examination. Further, the discovery process enables litigants to prepare for a trial without the element of an opponent's tactical surprise.
3. **Pretrial Procedure: Expert Witnesses.** As a result of Neb. Ct. R. of Disc. 26(b)(4)(A)(i) (rev. 1983), the liberal discovery of potential testimony of an expert witness is not merely for convenience of the court and litigants, but exists to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact.
4. _____: _____. Under Neb. Ct. R. of Disc. 26(e)(1)(B) (rev. 1983), there is an explicit duty seasonably to supplement a response to a request for discovery directed toward identity of an expert witness expected to be called at trial, the subject matter of expected testimony from such expert, and the substance of the expert witness' expected testimony. As a consequence of Rule 26(e) and within the purview of that rule, a litigant has the right to have interrogatories answered and the duty to supplement answers previously given in response to an adversary's interrogatories, which is a continuing duty to supplement prior responses.
5. **Pretrial Procedure.** Sanctions under Neb. Ct. R. of Disc. 37 (rev. 1983) exist not only to punish those whose conduct warrants a sanction but to deter those, whether a litigant or counsel, who might be inclined or tempted to frustrate the discovery process by their ignorance, neglect, indifference, arrogance, or, much worse, sharp practice adversely affecting a fair determination of a litigant's rights or liabilities.
6. _____. To avoid sanctions under Neb. Ct. R. of Disc. 37(d) (rev. 1983), an interrogated party must either answer or object to the interrogatories or move for a protective order relieving the interrogated party from answering the interrogatories.
7. **Pretrial Procedure: Expert Witnesses.** As a sanction for noncompliance with Neb. Ct. R. of Disc. 26(b)(4)(A)(i) (rev. 1983) and the duty to supplement required by Rule 26(e)(1)(B), preclusion of an expert witness' testimony, insofar as such testimony concerns an opinion or facts known in the witness' capacity as an expert, may be an appropriate sanction under Neb. Ct. R. of Disc. 37(d) (rev. 1983).
8. _____: _____. In determining whether to exclude testimony of an expert witness called by a party who has failed to comply with a request for discovery, the trial court should consider the explanation, if any, for the party's failure to

respond, or respond properly, to a request for discovery concerning an expert witness; importance of the expert witness' testimony; surprise to the party seeking preclusion of the expert's testimony; needed time to prepare to meet the testimony from the expert; and the possibility of a continuance.

9. **Pretrial Procedure.** For preclusion of testimony as a sanction for noncompliance with Neb. Ct. R. of Disc. 26(b)(4)(A)(i) (rev. 1983) (interrogatories) and Rule 26(e)(1)(B) (supplemental responses), Neb. Ct. R. of Disc. 37(d) (rev. 1983) does not require noncompliance with a prior order for discovery.
10. **Pretrial Procedure: Trial.** When a party has not complied with Neb. Ct. R. of Disc. 26(b)(4)(A)(i) (rev. 1983) (interrogatories) or Rule 26(e)(1)(B) (supplemental responses), the adverse party must make an appropriate objection, move to strike certain testimony, request a continuance, or move for a mistrial.
11. **Appeal and Error.** In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.
12. **Juror Misconduct: New Trial: Proof.** As a ground for setting aside a verdict in view of alleged misconduct by a juror, one must show that the questioned conduct entered into a verdict prejudicial or adverse to the party alleging such misconduct.
13. _____: _____: _____. Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that the juror's conduct was of such character that prejudice may be presumed.
14. _____: _____: _____. When a new trial is sought for juror misconduct, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Donald J. Loftus, P.C., for appellant.

Gayla L. Fletcher, for appellee.

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

SHANAHAN, J.

Raymond A. Norquay appeals the verdict for Union Pacific Railroad Company in a personal injury action tried in the district court for Douglas County. We affirm.

THEORIES OF THE PARTIES

Norquay sued Union Pacific for negligence based on the railroad's alleged last clear chance to avoid injury to Norquay

as he lay in intoxicated unconsciousness between the rails of Union Pacific's track.

Under Norquay's theory of liability, Union Pacific's two-unit diesel switch engine had come to an emergency stop without striking Norquay when the engine crew realized Norquay was between the rails, but, without ascertaining the location of Norquay, who was under the engine units after such emergency stop, the engineer moved the units forward over Norquay, striking him and causing bodily injury to Norquay. Thus, according to Norquay, as the result of the switch engine's complete stop and subsequent movement during which Norquay was struck, the doctrine of last clear chance would entitle a jury to find in Norquay's favor.

Among its defenses, Union Pacific asserted that Norquay assumed the risk or was contributorily negligent under the circumstances. Union Pacific contends its switch engine did not stop before striking Norquay because it was impossible to complete an emergency stop before hitting Norquay. Rather, the Union Pacific suggests that, after unavoidably striking Norquay, the switch engine's units passed over and beyond him, thereby rendering any second movement of the switch engine irrelevant in determining liability for Norquay's injuries, and exonerating the Union Pacific from liability.

Thus, on the issue of liability the crucial question involved the time and distance for an emergency stop of the Union Pacific's switch engine.

THE ACCIDENT

In the early morning of June 9, 1982, Norquay, after an evening of heavy drinking and admittedly intoxicated, was crossing the Union Pacific tracks when he slipped and fell, striking his head on a rail and momentarily losing consciousness. When Norquay regained consciousness, over him there was a "big noise." When he tried to get up, Norquay discovered he was "underneath a train," which began to move and struck the back of Norquay's head, inflicting bodily injury and causing Norquay to lose consciousness again.

The "train" was a Union Pacific switch engine, consisting of two "GP-9" (general purpose) diesel units, which was traveling eastbound at 10 m.p.h. The first, or leading, unit was GP No.

209 and contained the engineer and assistant engineer. The second unit, GP No. 291, was coupled to unit 209. The area ahead was illuminated by the headlights of unit 209.

According to the engineer, while he was "[l]ooking out ahead," he saw the "shape of a body" between the rails, but the units never stopped until the engineer carried out an emergency stop of the units, which had completely passed over Norquay.

However, the assistant engineer related a slightly different account of the incident. When the front faceplate, or cowcatcher, of unit 209 was approximately "five or six feet" from Norquay, the assistant engineer realized there was a human body between the rails and immediately thereafter said, "I think that was a guy," at which time the engineer exclaimed, "Oh, sh—" and "hit the brakes" for an emergency stop accomplished within 25 feet. After the lapse of approximately 45 seconds, the engineer suggested, "Let's move the train ahead and see what we have got." The engineer moved the units forward and gradually stopped the switch engine. When the engineer and assistant engineer dismounted from the cab, they found Norquay between the rails, 50 feet behind unit 291.

DISCOVERY AND PRETRIAL MATTERS

On April 17, 1984, Union Pacific served answers to Norquay's interrogatories, which included:

> INTERROGATORY NO. 14: State the name and address of each person whom you expect to call as an expert witness at the trial of this lawsuit and with respect to each give the following information:
>
> (a) The subject-matter on which each expert is expected to testify;
>
> (b) The substance of the facts and opinions to which each said expert is expected to testify;
>
> (c) A summary of the grounds for each opinion or factual conclusion with respect to which each said expert is expected to testify.
>
> ANSWER: Unknown at this time.

A "Defendant's Witness List" was filed on January 17, 1985, informing Norquay that: "Defendant expects to call the following experts to testify at this trial: 1. Mr. P. Rhine, Doctor of Physics, to testify about breaking [sic] systems of GP 9's and

stopping distances." Shortly after filing its witness list, and apparently pursuant to court order, Union Pacific delivered to Norquay a "printout" concerning the "GP-9 Locomotive Emergency Stopping Distance," prepared by P.E. Rhine. That document indicated a complete emergency stop of GP units 209 and 291, traveling at 10 m.p.h., required 11 seconds and a distance of 119 feet. The Rhine document recited that the stopping distance was "calculated based upon assumptions of an initial speed of 10 mph, 1.33% descending grade and dry rail," and "[t]he stopping distance calculation included a set of computations for speed, brake cylinder pressure, milepost and distance travelled for each one second of elapsed time. . . . The calculated values . . . are based upon a number of characteristics of the GP-9 locomotive unit." Norquay did not depose Rhine.

After trial had been set for May 28, Norquay, on May 24, filed a "Motion in Limine" to preclude testimony from any expert for Union Pacific because the railroad had failed to respond to Norquay's interrogatory No. 14. At the hearing on Norquay's motion, the Union Pacific produced several documents as "data which was the basis for [a GP-9's] stopping distance estimate," which Norquay's attorney characterized as a "bushel basket full of equations and factual matter but no data for [a GP-9's] stopping distance estimate" and which the court described as a "pile of stuff on my desk."

Responding to the complaint about absence of an answer to Norquay's interrogatory No. 14, Union Pacific's counsel offered no explanation, but remarked: "Well, I think the appropriate thing for [Norquay's lawyer] to do is to have compelled the answers to the interrogatories."

In overruling Norquay's motion for preclusion of testimony from Union Pacific's expert witness, the court commented:

> It seems to me that if the names of the witnesses have been furnished since January and the bare bones of their testimony set forth in the witness list, that if an expansion was required, why, I think the burden was on [Norquay] to request it. That's the basis for my ruling.

THE TRIAL, OR BATTLE OF EXPERTS

Trial commenced on May 28, and the Union Pacific called Paul Rhine, manager of train energy conservation for the

Union Pacific, as its expert witness concerning time and distance involved in emergency braking for a GP-9 locomotive. In the course of the trial, Norquay did not object to Union Pacific's calling Rhine as an expert witness. During Rhine's testimony, Norquay did object to Rhine's expressing an opinion about a GP-9's braking distance for an emergency stop, objecting that the question soliciting the opinion was an "[i]mproper question." After the court overruled Norquay's objection, Rhine explained that there are three steps in an emergency stop of a GP-9: first, the engineer's decision to stop (human reaction time); second, actuation of the brake lever, resulting in a buildup of air in the brake cylinder; and third, the stopping process, after a full braking force is developed. Based upon a GP-9's speed of 10 m.p.h., Rhine expressed his opinion that an emergency stop of a GP-9 consumed a minimum of 11 seconds and required a distance of 119 feet, plus 15 feet during the engineer's reaction time, or 134 feet for the total distance in an emergency stop. The length of the two units involved in the accident was 112 feet "coupler to coupler." (This means that the length of each unit was 56 feet.) The total time for the emergency stop, 11 seconds, included 8 seconds for sufficient air buildup in the brake cylinder to complete the emergency stop. Consequently, given 6 feet (distance between the unit's front faceplate and Norquay, when observed) and 112 feet (combined length of locomotive units), or a total of 118 feet, the 134 feet necessary for an emergency stop prevented a complete stop by the units to avoid striking Norquay and bolstered Union Pacific's theory that the switch engine never stopped while Norquay was beneath the units.

To respond to Rhine's opinion, Norquay called Ted T. Sokol, a professor of engineering and technology, who gave his opinion disputing the figures for Rhine's conclusion about the emergency stopping distance of a GP-9. According to Sokol, Rhine had used a figure of 8 seconds as the maximum time for air pressure buildup in a GP-9's brake cylinder during an emergency stop, whereas only 4 seconds were required in such buildup in an emergency stop. The emergency stopping distance for GP-9 units, in Sokol's opinion, was between 48 and 60 feet. (Sokol's computation, therefore, placed Norquay

under the GP-9 units at completion of the emergency stop.) On cross-examination, and referring to the buildup of air pressure in a GP-9 brake cylinder, Union Pacific's counsel inquired, "You didn't do anything to verify that four seconds, did you?" and "you didn't do anything to test a GP 9?" to which Sokol answered, "No." Shortly after Sokol concluded his testimony, trial was adjourned for the day.

The next morning, Union Pacific recalled Rhine. Referring to the time for buildup of air pressure in a GP-9 brake cylinder, especially the contrast of 8 seconds (Rhine's testimony) versus 4 seconds (Sokol's testimony), Union Pacific's attorney asked: "How did you derive the eight seconds?" Without objection, Rhine responded:

> I went down to the Union Pacific shops where we maintain and store the locomotive. I got a locomotive mechanic and went out to some GP 9's and went through the brake emergency. I timed with a stop watch the length of time for the pressure to reach its full amount in the brake cylinder.
>
> . . . .
>
> . . . Eight seconds.

In further questioning by Union Pacific's attorney, Rhine acknowledged that he had "run that test on more than one occasion," and, on each occasion, the test results were "the same" or "consistent."

After Rhine had testified about the results of his tests involving the "charging time" in the buildup of air pressure for an emergency stop of a GP-9, Norquay did not move to strike Rhine's testimony concerning the tests or request a continuance. Rather, during cross-examination of Rhine, Norquay's counsel prefaced part of the interrogation with "you testified on direct examination that something that we didn't know during your first testimony . . . was . . . figures that you used . . . from an actual on-site investigation where you observed an engine . . . ." Counsel then continued cross-examination of Rhine and inquired about the airbrake test performed on a GP-9. When interrogation of Rhine was concluded, Norquay immediately recalled Sokol as a witness. Sokol testified about recomputation of the stopping distance of

a GP-9, incorporating the "eight seconds of cylinder pressure build-up time" utilized by Rhine in his calculations. According to Sokol, even with the 8-second interval used by Rhine, "after the brake handle was put into the emergency position, the train would have traveled 53.2 feet until it came to a stop."

CONDUCT OF JUROR AND VERDICT

While en route to the jury room during a recess, the jury passed by a one-way glass partition, that is, the jurors were able to see Norquay on the other side of the partition, but Norquay was unable to see the jurors. One juror thumbed his nose at Norquay, but only one other juror observed the gesture directed at Norquay. The jury later returned an 11 to 1 verdict for the Union Pacific. When Norquay discovered the nose-thumbing incident, such conduct was alleged as a ground for a new trial. In a posttrial hearing, court and counsel interrogated the juror who had observed the gesture toward Norquay. That juror testified that the conduct and gesture by the other juror in no way affected the "vote" of the observant juror who, in fact, had not signed the verdict but had "voted for the plaintiff."

ASSIGNMENTS OF ERROR

For assignments of error, Norquay argues the trial court erred (1) in allowing the jury to consider the testimony of Rhine, who, as an expert witness, testified about airbrake "tests" as facts or bases for his opinion, when Union Pacific, in answering Norquay's interrogatories, had failed to disclose such facts; (2) in failing to grant a new trial on account of "prejudicial surprise," namely, disclosure during trial that Rhine utilized "tests" as a basis or support for his opinion; and (3) in failing to grant a new trial in view of juror misconduct, the nose-thumbing incident.

NEBRASKA DISCOVERY RULES

The parts of the Nebraska Court Rules of Discovery applicable in this case are:

[RULE 26]

Rule 26. General Provisions Governing Discovery.

. . . .

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

. . . .

(4) Trial Preparation: . . . .

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

. . . .

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his or her response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his or her response with respect to any question directly addressed to

. . . .

(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.

[RULE 33]

Rule 33. Interrogatories to Parties.

(a) Availability; Procedures for Use. . . .

Each interrogatory shall be repeated and answered separately and fully in writing under oath . . . . The party submitting the interrogatories may move for an order under Rule 37 (a) with respect to any objection to or other failure to answer an interrogatory.

[RULE 37]

Rule 37. Failure to Make Discovery: Sanctions.

. . . .

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party . . . fails

. . . .

> (2) To serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, . . .
>
> (3) . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule.
>
> . . . .
>
> The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26 (c).

A sanction authorized by Neb. Ct. R. of Disc. 37(b)(2)(B) (rev. 1983) is: "An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him or her from introducing designated matters in evidence."

Quite obviously, resolution of the entire issue of liability in the present case turned on the testimony and opinions from expert witnesses.

With some modification irrelevant to the questions presently before us, the Nebraska Court Rules of Discovery for Civil Cases are the same as the rules for discovery prescribed in the Federal Rules of Civil Procedure.

OBJECTIVES OF DISCOVERY PROCESS

A purpose of the discovery process is exploration of all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute. See *Tabatchnick v. G. D. Searle & Company*, 67 F.R.D. 49 (D.N.J. 1975). Also, the discovery process provides adequate pretrial preparation as a basis for an informed cross-examiner and informative cross-examination. Further, the discovery process enables litigants to prepare for a trial without the element of an opponent's tactical surprise, a circumstance which might lead to a result based more on counsel's legal maneuvering than on the merits of the case. See *Gebhard v. Niedzwiecki*, 265 Minn. 471, 122 N.W.2d 110 (1963).

As a result of Neb. Ct. R. of Disc. 26(b)(4)(A)(i) (rev. 1983), the liberal discovery of potential testimony of an expert witness is not merely for convenience of the court and litigants, but exists to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact. See *Weiss v. Chrysler Motors Corporation*, 515 F.2d 449 (2d Cir. 1975).

Neb. Ct. R. of Disc. 33 (rev. 1983), authorizing appropriate written interrogatories, is one of the means to accomplish the general goals of the discovery process designed to facilitate trial. "As is true of the other discovery rules, Rule 33 is intended to enable a party to prepare for trial, to narrow the issues and thus help determine what evidence will be needed at the trial, and to reduce the possibility of surprise at the trial." 8 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2162 at 484-85 (1970).

Therefore, as authorized by Rule 26(b)(4)(A)(i), Norquay's interrogatory No. 14 sought information concerning the identity of any expert whom the Union Pacific expected to call at trial; the subject matter of the expert's opinion; the substance of the *facts* and opinions in the expected testimony from the expert witness; and a summary of the *grounds* for the expert's opinion. Without question, any test performed by Rhine regarding air buildup in a GP-9 brake cylinder to effect an emergency stop was a fact disclosed to the jury during Rhine's testimony offered by the Union Pacific and a factual basis or support for Rhine's opinion that the Union Pacific's units could not have been stopped before injury to Norquay. The information sought by Norquay's interrogatory No. 14 was, therefore, proper matter for discovery.

CONTINUING DUTY TO SUPPLEMENT ANSWERS TO INTERROGATORIES

Under Rule 26(e)(1)(B), there is an explicit duty seasonably to supplement a response to a request for discovery (here, a response to an interrogatory) directed toward identity of an expert witness expected to be called at trial, the subject matter of expected testimony from such expert, and the substance of the expert witness' expected testimony. As a consequence of Rule 26(e) and within the purview of that rule, a litigant has the

right to have interrogatories answered and the duty to supplement answers previously given in response to an adversary's interrogatories, which is a continuing duty to supplement prior responses. See, *Weiss v. Chrysler Motors Corporation, supra; Price v. Lake Sales Supply R. M., Inc.*, 510 F.2d 388 (10th Cir. 1974); *Voegeli v. Lewis*, 568 F.2d 89 (8th Cir. 1977). As expressed in 8 C. Wright & A. Miller, *supra* at § 2048 at 320-21:

> For a party to sit idly by, knowing that a previous answer he has given in response to discovery is no longer truthful in the light of his present information, is intolerable. It is inconsistent with the purpose of the rules to avoid surprise and it is inconsistent with the standards of conduct that one expects in a learned and honorable profession.

In reference to expected testimony from an expert,

> [I]f a party changes his plans about the expert witnesses he will use at trial or if there is a change in the subject matter on which an expert will testify or the substance of his testimony a supplemental response must be made. This is necessary to carry out the provisions of Rule 26(b) (4) with regard to expert witnesses. With the expert witnesses, as with the persons having knowledge of discoverable facts, any change in plan would routinely come to the attention of the lawyers for the party and the burden of supplementation is very small.

8 C. Wright & A. Miller, *supra* § 2049 at 322-23. The existence of the airbrake tests by Rhine and results from those tests were facts which the Union Pacific did not disclose until adduction of testimony during trial and which went to the substance of Rhine's opinion testimony.

The continuing duty to supplement responses quickly dispatches the ill-advised suggestion by Union Pacific that "the appropriate thing for [Norquay's lawyer] to do is to have compelled the answers to the interrogatories."

SANCTION UNDER RULE 37

Under the obligation imposed by Rule 26(e)(1)(B), Union Pacific was under a continuing duty to supplement its answers to Norquay's interrogatory No. 14 regarding an expert witness. That the Union Pacific before trial knew about existence of the

airbrake tests by Rhine is reasonably inferable from, if not compelled by, counsel's cross-examination of Sokol, Norquay's expert witness, before recalling Rhine to testify further about the airbrake test, namely: "You didn't do anything to verify that four seconds, did you?" and "you didn't do anything to test a GP 9?" By such questions and beyond question, counsel was alluding to the tests performed to substantiate Rhine's opinion about the maximum time to build up cylinder air pressure for an emergency stop of the locomotive units. Therefore, we find that Union Pacific failed to satisfy its duty to supplement its previous responses to Norquay's interrogatory concerning an expert witness and such witness' expected testimony to be given at trial.

Sanctions under Rule 37 exist not only to punish those whose conduct warrants a sanction but to deter those, whether a litigant or counsel, who might be inclined or tempted to frustrate the discovery process by their ignorance, neglect, indifference, arrogance, or, much worse, sharp practice adversely affecting a fair determination of a litigant's rights or liabilities. See *National Hockey League v. Met. Hockey Club*, 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976). Sanctions under Rule 37 are designed to prevent a party who has failed to comply with discovery from profiting by such party's misconduct. *Dellums v. Powell*, 566 F.2d 231 (D.C. Cir. 1977); *Gebhard v. Niedzwiecki*, 265 Minn. 471, 122 N.W.2d 110 (1963).

An appropriate sanction under Rule 37 is determined in the factual context of a particular case and is initially left to the sound discretion of the trial court, whose ruling on a request for sanction or a sanction imposed will be upheld in the absence of an abuse of discretion. See, *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251 (8th Cir. 1985); *Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981); *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975).

To avoid sanctions under Rule 37(d), an interrogated party must either answer or object to the interrogatories or move for a protective order relieving the interrogated party from answering the interrogatories. Rule 37(d)(2) and (3). See, *Dellums v. Powell, supra; Monogram Models, Inc. v. Industro*

Motive Corporation, 492 F.2d 1281 (6th Cir. 1974); *Szilvassy v. United States*, 82 F.R.D. 752 (S.D.N.Y. 1979).

As a sanction for noncompliance with Rule 26(b)(4)(A)(i) and the duty to supplement required by Rule 26(e)(1)(B), preclusion of an expert witness' testimony, insofar as such testimony concerns an opinion or facts known in the witness' capacity as an expert, may be an appropriate sanction under Rule 37(d). See, *Easley v. Anheuser-Busch, Inc., supra; Murphy v. Magnolia Elec. Power Ass'n*, 639 F.2d 232 (5th Cir. 1981); *E. E. O. C. v. Kenosha Unified Sch. Dist. No. 1*, 620 F.2d 1220 (7th Cir. 1980). In a hierarchy of harshness in permissible sanctions under Rule 37, ranging from the least to the most harsh, preclusion of evidence lies somewhere between the reimbursement to an opposing party for expenses incurred as the result of noncompliance for discovery and dismissal or default judgment. See *Cine Forty-Second St. Theatre v. Allied Artists*, 602 F.2d 1062 (2d Cir. 1979). In determining whether to exclude testimony of an expert witness called by a party who has failed to comply with a request for discovery, the trial court should consider the explanation, if any, for the party's failure to respond, or respond properly, to a request for discovery concerning an expert witness; importance of the expert witness' testimony; surprise to the party seeking preclusion of the expert's testimony; needed time to prepare to meet the testimony from the expert; and the possibility of a continuance. See *Murphy v. Magnolia Elec. Power Ass'n, supra*. See, also, *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894 (3d Cir. 1977).

For preclusion of testimony as a sanction for noncompliance with Rule 26(b)(4)(A)(i) (interrogatories) and Rule 26(e)(1)(B) (supplemental responses), Rule 37(d) does not require noncompliance with a prior order for discovery. As previously pointed out in this opinion, Rule 37(d) places on the interrogated party the burden to answer interrogatories, object, or seek a protective order under Rule 26(c) of the Nebraska Court Rules of Discovery. See *Easley v. Anheuser-Busch, Inc., supra* (2 days before trial, defendant served supplemental answers to interrogatories concerning defendant's expert witnesses; at trial, plaintiff objected to "expert opinion

testimony" from the witnesses in question; objection sustained; ruling on preclusion affirmed). See, also, *Murphy v. Magnolia Elec. Power Ass'n, supra* (objection to expert witness' testimony at trial; procedure correct, but abuse of discretion found on appeal); *Holiday Inns, Inc. v. Robertshaw Controls Co.*, 560 F.2d 856 (7th Cir. 1977) (failure to supplement interrogatories concerning expert's alternative theory; preclusion after objection at trial); *Barnes v. St. Francis Hospital & School of Nursing*, 211 Kan. 315, 507 P.2d 288 (1973) (failure to supplement discovery regarding a physician's opinion based on pathological slides undisclosed before trial; on objection at trial, preclusion of physician's testimony was proper). A prior order to answer or supplement interrogatories is unnecessary for sanction under Rule 37(d), since it is a party's responsibility, not the court's, to satisfy conditions and burdens for admission of evidence bearing upon that party's claim or defense. Sanction for failure in the continuing duty to make supplemental responses, without a prior order to compel discovery, avoids frustration of Rule 33(a) of the Nebraska Court Rules of Discovery ("Unless otherwise permitted by the court for good cause shown no party shall serve upon any other party more than fifty interrogatories") and avoids judicial involvement in the day-to-day discovery process. Also, if a prior order for discovery were necessary before a sanction could be imposed under Rule 37(d) for noncompliance with Rule 26(b)(4)(A)(1) (interrogatories) and Rule 26(e)(1)(B) (supplementation of responses), a party failing to fulfill the continuing duty to answer an interrogatory would be able to take advantage of and benefit from the misconduct in such noncompliance. Discovery must not degenerate into a game of evasion. See *Voegeli v. Lewis*, 568 F.2d 89 (8th Cir. 1977).

PROCEDURE FOR PRECLUSION OF TESTIMONY AS A SANCTION UNDER RULE 37(d)

When a party has failed to respond, or respond properly, to an interrogatory authorized by Rule 26(b)(4)(A)(1), or has failed to make supplemental responses required under Rule 26(e)(1)(B) of the Nebraska Court Rules of Discovery, and such noncomplying party calls an expert witness to offer testimony within the scope of the interrogatory in question, the adverse

party must object to a previously unidentified expert witness' testifying in general or object to testimony of an expert witness testifying about a previously undisclosed but discoverable matter sought to be disclosed by the interrogatory in question. If the court, over objection, allows such expert witness to testify, notwithstanding nondisclosure before trial, when appropriate the adverse party must move to strike the expert witness' testimony, request a continuance to give the surprised adversary an opportunity to investigate further and secure rebuttal evidence, or, under certain circumstances, move for a mistrial. See, *Sather v. Lindahl*, 43 Wash. 2d 463, 261 P.2d 682 (1953); *Hoey v. Hawkins*, 332 A.2d 403 (Del. 1975); *Seaboard Air Line Railroad Company v. Cain*, 175 So. 2d 561 (Fla. App. 1965).

Although Norquay's pretrial motion was sufficient to raise preclusion of testimony as a permissible sanction under Rule 37(d), Norquay did not move to strike Rhine's testimony about the tests on the airbrake system for a GP-9. As we stated in *State v. Archbold*, 217 Neb. 345, 352, 350 N.W.2d 500, 505 (1984): "Failure to make a timely objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony." Norquay's failure to make a motion to strike Rhine's testimony precludes our reviewing any question concerning submission of such evidence for the jury's consideration. Also, Norquay did not move for a continuance, in view of Rhine's testimony, or seek a mistrial. Whatever may have been an appropriate remedial measure for Norquay at trial we do not decide in the absence of a motion for a particular remedial measure in the trial court. In *Holden v. Urban*, 224 Neb. 472, 474, 398 N.W.2d 699, 701 (1987), we stated:

> In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition. *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

The district court committed no error in disposing of questions pertaining to Rhine's testimony.

JUROR MISCONDUCT

Norquay's contention that a new trial should be granted on

account of juror misconduct is without merit. As a ground for setting aside a verdict in view of alleged misconduct by a juror, one must show that the questioned conduct entered into a verdict prejudicial or adverse to the party alleging such misconduct. See, *Zancanella v. Omaha & C.B. Street R. Co.*, 96 Neb. 596, 148 N.W. 158 (1914); *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982).

As we noted in *Ellis v. Far-Mar-Co*, 215 Neb. 736, 743-44, 340 N.W.2d 423, 427 (1983):

> Proof of mere indiscretion in the conduct of a juror is not suffucient [sic] to avoid a verdict unless the proof establishes that his conduct was of such character that prejudice may be presumed. [Citations omitted.]
>
> . . . .
>
> When a new trial is sought for juror misconduct, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing. [Citation omitted.]

Although we do not condone the juror's activity in question, Norquay has failed to demonstrate that the juror's conduct resulted in prejudice to Norquay. The district court properly denied Norquay a new trial on the ground of juror misconduct.

AFFIRMED.

LARRY R. MALERBI AND LINDA MALERBI, APPELLEES, V. CENTRAL RESERVE LIFE OF NORTH AMERICA INSURANCE COMPANY, APPELLANT.

407 N.W.2d 157

Filed June 5, 1987. No. 85-757.

1. **Judgments: Appeal and Error.** On appeal from an action at law, this court will not reweigh the facts. Instead, the court is obligated to examine the evidence to determine whether, under a view most favorable to the successful party, the facts support the trial court's judgment.
2. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning.

3. **Insurance: Contracts.** Where a clause in an insurance contract can be fairly interpreted in more than one way, the ambiguity is to be resolved by the court as a matter of law. In the case of such ambiguities, the construction favorable to the insured prevails so as to afford coverage.
4. _____: _____. The insurer as drafter of the policy is responsible for language creating an ambiguity.
5. _____: _____. Resolution of an ambiguity in a policy of insurance turns not on what the insurer intended the language to mean, but what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made.
6. **Trial: Pretrial Procedure.** Pretrial conferences are conducted to simplify the issues, amend pleadings, and avoid unnecessary proof of facts at trial. They are also conducted to avoid traps and surprises at trial.
7. _____: _____. Issues specified at a pretrial conference control the course of an action and, unless altered by the court, constitute the issues on which the case is tried.
8. **Pretrial Procedure: Pleadings: Waiver: Appeal and Error.** The issues set out in a pretrial order supplant the issues raised in the pleadings. Failure to object to the specification of issues in a pretrial order waives error claimed in that regard on appeal.
9. **Insurance: Contracts: Pleadings.** Provisions in an insurance policy which limit the benefits payable thereunder are generally defensive in character and must be pleaded and proved by the insurer.
10. **Pleadings.** A pleading should not be amended to conform to the proof where the proposed amendment substantially changes the nature of the claim or defense.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Richard A. Rowland, for appellant.

Jeffrey A. Silver, for appellees.

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

BOSLAUGH, J.

This action was brought by Larry R. and Linda Malerbi for benefits under a certificate of insurance issued by the defendant, Central Reserve Life of North America Insurance Company (hereinafter Central Reserve).

On October 1, 1982, Central Reserve issued a group insurance policy to Younglove Career Consultants, Inc. As a Younglove employee, Larry Malerbi and his dependents, including his stepson Bryan Buckley, were insured by the policy.

The policy included comprehensive major medical coverage, the purpose of which was to indemnify for major loss through accident or sickness.

On December 15, 1982, Bryan Buckley was hospitalized for inpatient treatment at the Nebraska Psychiatric Institute (NPI) in Omaha, Nebraska. This hospitalization was based on the recommendation of Dr. Jane Bottlinger, a psychiatrist, following psychological testing of Bryan. Also, prior to his hospitalization at NPI, a question arose regarding insurance coverage for Bryan's treatment. In a letter from Glenn Shipley, a general agent for Central Reserve, to Theodore Liapis, Central Reserve's director of technical claims service, Shipley indicated that the claim would be paid according to the cause of the treatment. If the cause was physiological, Central Reserve would pay as on any illness. If it was entirely psychological, benefits would be paid according to the limitations for psychological treatments. This information was relayed to the Malerbis by Theodore Lange, the representative who delivered the policy to the employer Younglove. In discussions with both the Malerbis and Lange, Dr. Bottlinger indicated the cause of Bryan's treatment was a physical problem.

An intake evaluation indicates Bryan was admitted on complaints of behavioral problems. As related by his mother at trial, Bryan's previous medical history included a series of hospitalizations in 1976, at the age of 5 years. Bryan was hospitalized then for an illness and fever of unknown etiology. He eventually developed hepatitis and became semicomatose. He also experienced his first seizures during this time. Eventually, he was diagnosed as having epilepsy and was still experiencing some seizures at the time of trial. Following his 1976 illnesses, Linda Malerbi noted a distinct change in her son's personality. Prior to this time, she had observed no significant behavior problems in Bryan.

Bryan was first treated as an outpatient by Dr. Bottlinger in 1980. He was then experiencing behavior problems at home and at school. In 1981 he received treatment from a neurologist for seizures. On his admission to NPI, Bryan was taking anticonvulsant medication.

During his hospitalization at NPI, Bryan was subjected to

many diagnostic tests, including an electroencephalogram (EEG) and a computerized axial tomography (CAT) scan. As a result of these tests and those of the Luria-Nebraska neuropsychological battery performed prior to Bryan's admission, Dr. Bottlinger testified that she formed an opinion, based upon a reasonable degree of medical certainty, that Bryan had a dysfunction in the temporal lobe region of his brain. Brain dysfunction in this case meant that there was something physically wrong with Bryan's brain. According to Dr. Bottlinger, the structural deficit in the temporal lobe of Bryan's brain was the cause of his epileptic seizures as well as his behavioral and emotional problems.

Dr. Bottlinger's final diagnosis as to Bryan Buckley was atypical organic brain syndrome with obsessive-compulsive features. She explained that organic brain syndrome involves impairment of behavioral or emotional functioning coupled with a physical brain dysfunction. The term organic indicates a physical etiology or cause. According to exhibit 14, 3 H. Kaplan, A. Freedman & B. Sadock, Comprehensive Textbook of Psychiatry/III (3d ed. 1980), a recognized text in the field of psychiatry, "When disturbed behavior is encountered in a child with evidence of neurological impairment, the diagnosis of brain damage is commonly regarded as constituting a sufficient cause for the psychiatric disorder." *Id.* at 2435. According to Dr. Bottlinger, and consistent with the above statement, Bryan Buckley's neurological problem was identified as a seizure disorder with evidence of some degree of temporal lobe brain structural damage.

Bryan's treatment at NPI included administration of the drug Haldol to address inappropriate behaviors, administration of the drug Tofranil for depression, behavior modification, emotional counseling, educational training, structured recreational activities, group therapy, individual therapy, and counseling for his parents. He was also treated by a neurologist. Dr. Bottlinger testified that because there was no surgery available to treat a brain dysfunction such as Bryan's, the only treatment approach available was to treat his symptoms.

During the course of his treatment a question of insurance

coverage again arose. Dr. Bottlinger was asked to clarify her diagnosis because some of the code numbers on Bryan's bills did not match the doctor's diagnosis. Dr. Bottlinger responded by sending a letter to Glenn Shipley of Group Sales Associates, the company that originally distributed the Central Reserve contract to Theodore Lange. In that August 17, 1983, letter, Dr. Bottlinger indicated that Bryan's diagnosis was organic brain syndrome (atypical) with obsessive-compulsive features. She also indicated that in her opinion, Bryan's emotional and behavioral problems were secondary to the neurological deficits identified.

Bryan was released from inpatient treatment on August 27, 1983. The evidence shows the Malerbis were billed a total of $41,865 by NPI and $5,735.35 by the Nebraska Clinicians' Group for charges related to his hospitalization. Central Reserve paid a total of $3,459.80 on these claims. Theodore Liapis testified that this amount was paid in accordance with limitation 19 of the Central Reserve policy, which limits benefits for the treatment or care of nervous, mental, or alcoholic conditions. The rest of the claim was denied, based on Central Reserve's view that the claim was for treatment of a mental condition. The bill from NPI also reflects that $7,500 was paid by Union Casualty Company. A Union major medical policy had been obtained by Linda Malerbi to insure Bryan, in August of 1981. At the time of trial, suit was pending by the Malerbis against Union for denial of their claim for the same hospitalization as involved in this case.

On January 5, 1984, the Malerbis filed their petition, in which they prayed for judgment against Central Reserve in the amount of $45,205.35, plus an attorney fee and the costs of the action. In its answer, Central Reserve affirmatively alleged that Larry Malerbi had been paid all claims due and owing on his claim under the terms of the policy in question. Trial was had to the court on July 8 and 9, 1985.

During the course of the trial, Central Reserve attempted to elicit testimony from Theodore Liapis regarding preexisting conditions. The court sustained the Malerbis' objection to this line of questioning on grounds that it was irrelevant and immaterial. Central Reserve's motion to amend its pleadings to

include preexisting condition as a defense was also denied.

Following submission of all the evidence, the trial court found that Bryan's bills were covered expenses under the policy and that it was premature to make a determination regarding coordination of benefits because there were no sufficient other final determinations as to the legal obligations under the Union policy.

Pursuant to these findings, the court entered judgment for the Malerbis and against Central Reserve in the amount of $43,318.13, plus an attorney fee of $14,000, plus other costs of the action. Central Reserve's motion for new trial was overruled, and it has appealed.

Two issues are raised by Central Reserve on appeal to this court: (1) whether the trial court erred in determining that the treatment and care of Bryan Buckley was not for a mental condition; and (2) whether the trial court erred in not considering specific clauses of the insurance contract, such as preexisting conditions and coordination of benefit insurance limitations.

Several clauses of the certificate of insurance are relevant to Central Reserve's first assignment of error.

> BENEFITS
>
> Comprehensive Major Medical is one policy which provides benefits for hospital, surgical and other medical expenses in an all inclusive insurance program. . . .
>
> COVERED EXPENSES
>
> Covered expenses include reasonable and customary charges actually incurred for necessary medical care and treatment for a non-occupational sickness or injury and recommended by a qualified physician. . . .
>
> . . . .
>
> LIMITATIONS
>
> Covered Expenses will not include and no benefits will be payable for expenses incurred:
>
> . . . .
>
> 19. in connection with treatment or care of nervous, mental or alcoholic conditions other than: (a) charges for administration of convulsive therapy; (b) charges incurred during hospital confinement as an in-patient; (c) charges

by a physician for professional psychiatric services provided that the maximum eligible charge per such visit is $20.00 (but limited to one visit per day); and (d) drugs and medicines which are otherwise considered eligible charges. Expenses (c) and (d) are subject to the annual deductible. The maximum payable under coverages (a), (b), (c) and (d) will be 50% of the eligible charges subject also to the maximum payable in any one calendar year of $2,000 for in-patient expenses and $550 for out-patient expenses.

. . . .

DEFINITIONS

. . . .

6. The term "sickness" means physical sickness, disease, illness, bodily infirmity, mental illness or functional nervous disorder. A recurrent disability will be considered one disability. Concurrent disability will be considered one disability.

As previously stated, the trial court determined that Bryan's bills were covered expenses under the terms of the contract. This was based on the court's determinations that "mental condition," as used in the policy, required a finding of a primary psychological basis before Central Reserve could deny full coverage; that a preponderance of the evidence showed that Bryan's problem was primarily physical, and he was therefore not treated for a nervous or mental condition; that Bryan's problem was a sickness as defined by the policy; and that he had a physical injury to his brain which manifested itself through various forms.

On appeal, Central Reserve takes issue with the trial court's construction of the phrase "mental condition" as used in limitation 19. Central Reserve contends the term should be defined to include treatment for problems stemming from more than a psychological basis. The insurer argues further that the plain language of the contract was not so much concerned with the cause of the condition in limitation 19 as it was with whether the *treatment or care* was for a mental condition.

In support of these arguments, Central Reserve relies on evidence that Dr. Bottlinger, as well as Central Reserve's two expert witnesses, testified that the American Psychiatric

Association, Diagnostic and Statistical Manual of Mental Disorders (2d ed. 1968) (DSM-II) had defined organic brain syndrome as a mental condition. The full definition of organic brain syndrome in the DSM-II indicated that it was a mental condition resulting from diffuse impairment of brain tissue function from whatever cause. Central Reserve's psychiatric experts, Drs. Long and Aita, testified that the DSM-II language was outdated and, according to Dr. Long, was superseded as of 1980 in American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. 1980) (DSM-III). Dr. Bottlinger testified that Bryan had atypical organic brain syndrome, which is defined in DSM-III at 123 as

> a residual category reserved for syndromes that do not meet the criteria for any of the other Organic Brain Syndromes and in which there are maladaptive changes during the waking state with evidence, from either physical examination, laboratory tests, or history, of a specific organic [physical] factor that is judged to be etiologically related to the disturbance.

Dr. Bottlinger also testified that there is no special medical meaning attributed to the word "condition." She and the other two experts agreed that the phrases "mental disorder" and "mental illness" are synonymous. Dr. Long testified further that there is no difference between a mental condition and a mental disorder or illness. Because the experts saw no difference between the terms, Central Reserve contends that the cause of the problem precipitating treatment is irrelevant, apparently on grounds that the problems categorized in DSM-III are broadly classified as mental disorders, conditions, or illnesses.

Based on this interpretation of the limitation 19 language, Central Reserve maintains the evidence was insufficient to show that Bryan was treated for other than a mental condition.

An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *Waylett v. United Servs. Auto. Assn.*, 224 Neb. 741, 401 N.W.2d 160 (1987). Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning. *Waylett, supra*. On the other hand, where a clause in an

insurance contract can be fairly interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law. *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 334 N.W.2d 463 (1983). Our rules of construction require that in the case of such ambiguities, the construction favorable to the insured prevails so as to afford coverage. *Denis, supra.* This rule has evolved from recognition of the fact that the insurer as drafter of the policy is responsible for the language creating the ambiguity. See, *Denis, supra; Dale Electronics, Inc. v. Federal Ins. Co.*, 205 Neb. 115, 286 N.W.2d 437 (1979).

The resolution of an ambiguity in a policy of insurance turns not on what the insurer intended the language to mean, but what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made. *Denis, supra.*

Given the fact that all three experts agreed there was a possible organic (physical) basis for Bryan's problems, i.e., a structural deficit in the temporal lobe region of his brain, the Malerbis could reasonably have understood that treatment for a problem such as Bryan's would not be for a mental condition.

In *Sachs v. Commercial Insurance Co.*, 119 N.J. Super. 226, 290 A.2d 760 (1972), *aff'd* 124 N.J. Super. 258, 306 A.2d 83 (1973), the court addressed the issue of whether treatment for the insured's deteriorating intellectual powers caused by arteriosclerosis and amyotrophic lateral sclerosis fell within the meaning of a clause limiting coverage for mental illness or disorders. In concluding that the treatment was not for a mental illness or disorder, the court stated:

> It is reasonable to assume that the limitation was intended to delimit claims in cases of insanity or other degrees of mental aberration which are functional in origin. The public would not expect that such a limitation would control merely because the end result of an organic disease may affect the mental function of the individual.

Sachs, supra at 234, 290 A.2d at 764.

It is irrelevant that the experts characterized Bryan's diagnosis under DSM-II, a classification system utilized by psychiatrists, as a mental condition. As stated in *Prince v. U. S. Life Ins. Co.*, 42 Misc. 2d 410, 412, 248 N.Y.S.2d 336, 338

(1964), "[t]he average person is not familiar with mental disease from the strictly medical point of view—and a layman is not required to read his policy as if he were a psychiatrist."

In the instant case, there is evidence of the onset of Bryan's behavioral problems following his illness in 1976. The medical evidence suggested a structural deficit in his brain. With these facts in mind, the Malerbis could reasonably have concluded that Bryan's illness would be a covered expense.

Inconsistencies in the policy language also create ambiguity in the present situation. While mental illness is included within the definition of sickness, the treatment of which when nonoccupational is a covered expense, mental condition is subject to limited coverage. Neither mental illness nor mental condition are defined in the policy. How the terms relate is not clarified by the policy. As such, it is appropriate to interpret limitation 19 in favor of the Malerbis. It was Central Reserve's duty to draft the terms more precisely if it desired to limit its coverage.

On appeal from an action at law, this court will not reweigh the facts. Instead, the court is obligated to examine the evidence to determine whether, under a view most favorable to the successful party, the facts support the trial court's judgment. *Armstrong v. Hartford Life Ins. Co.*, 219 Neb. 128, 361 N.W.2d 511 (1985). There was considerable evidence in this case that Bryan required treatment for a physical condition. Central Reserve's experts both agreed with Dr. Bottlinger's diagnosis of organic brain syndrome. Both also agreed that the diagnosis involves a physical deficit in the brain. Dr. Bottlinger testified that in her opinion based on a reasonable degree of medical certainty, Bryan's behavior problems were a result of his brain dysfunction. She also testified that the charges incurred were customary and reasonable and that the treatment and care provided were medically necessary.

Taking the view most favorable to the Malerbis, the evidence was sufficient to support the trial court's judgment that Bryan's treatment and care were covered expenses and not subject to limitation 19 of the policy.

Central Reserve next maintains the trial court erred in refusing to consider limitation 21, the preexisting condition

clause in its policy. At trial, the court refused to allow Theodore Liapis to testify regarding limitation 21. The court also refused to allow Central Reserve to amend its pleadings to present the issue of preexisting condition as a defense.

Central Reserve claims the court should not have ignored the preexisting condition clause because it was raised by the evidence as an issue. The court concluded that it was physical injury to Bryan's brain that necessitated treatment. Central Reserve argues the court should have considered the effect of limitation 21 on the Malerbis' benefits because the evidence also showed the injury was incurred prior to the effective date of the policy.

The trial court refused to allow Liapis' testimony because neither Central Reserve's answer nor the pretrial stipulation made as a result of the pretrial conference provided that preexisting condition would be an issue at trial.

Paragraph 6 of its answer provides that Central Reserve "[a]ffirmatively alleges that Plaintiff Larry Malerbi has been paid all claims due and owing on his claim under the terms of the insured's policy Number 28-K-408-001."

The pretrial stipulation, an agreement between the parties themselves, provided that two issues remained to be resolved by the court:

> 1. Whether the charges incurred for Bryan Buckley's admission to Nebraska Psychiatric Institute, and attending physician bills are covered by the defendant's certificate of insurance, or fall within the limitation for treatment of a mental condition.
>
> 2. Coordination of Benefits as a result of the existence of an insurance policy issued by Union Casualty Company.

Pretrial conferences are conducted to simplify the issues, amend pleadings, and avoid unnecessary proof of facts at trial. *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986). They are also conducted to avoid traps and surprises at trial. *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985).

Central Reserve's answer, specifically paragraph 6, may originally have been broad enough to encompass a defense

based on limitation 21 of the policy. However, our cases hold that "[i]ssues specified at a pretrial conference control the course of an action and, unless altered by the court, constitute the issues on which the case is tried." *Bump v. Firemens Ins. Co., supra* at 684, 380 N.W.2d at 273. The issues set out in a pretrial order supplant the issues raised in the pleadings. *Bump, supra*. Further, failure to object to the specification of issues in a pretrial order waives error claimed in that regard on appeal. *Bump, supra; Little v. Gillette, ante* p. 70, 402 N.W.2d 852 (1987). The pretrial stipulation in this case was the equivalent of a pretrial order. Because Central Reserve stipulated to the issues to be tried, it cannot now complain that other issues should have been included.

Also, admission of the entire policy into evidence was not sufficient to raise a question as to the preexisting condition clause. Provisions in an insurance policy which limit the benefits payable thereunder "are generally defensive in character and must be pleaded and proved by the insurer." *Miller v. Industrial Hospital Assn.*, 183 Neb. 704, 705, 163 N.W.2d 891, 893 (1969).

Under Neb. Rev. Stat. § 25-852 (Reissue 1985), the trial court may, before or after judgment, permit amendment of a pleading in the furtherance of justice. A pleading should not be amended to conform to the proof where the proposed amendment substantially changes the nature of the claim or defense. *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 341 N.W.2d 588 (1983). The decision to allow or deny such an amendment rests in the sound discretion of the trial court. *West Town Homeowners Assn., supra.*

Several reasons justified the trial court's rulings denying both the admission of Liapis' testimony and the motion to amend the pleadings.

The record suggests that the preexisting condition clause was not contemplated as a defense until 1 1/2 days into a 2-day trial, after the Malerbis had rested their case, and after their expert witness had left the state. Central Reserve had several opportunities prior to this time to raise the issue but failed to do so specifically in its pleadings, in the pretrial conference, in the pretrial stipulations, and in its answers to interrogatories. In its

answers to interrogatories, Central Reserve stated that limitation 19 provided the basis of its claim of full payment. It did not indicate reliance on the defense of preexisting condition. Further, the testimony by Theodore Liapis was that the payments made to the Malerbis were made in accordance with limitation 19.

Under these circumstances the trial court correctly refused to consider limitation 21, as the pretrial stipulation did not specify an issue to which it was relevant. Further, the court committed no abuse of discretion in excluding Theodore Liapis' testimony as to limitation 21 nor in refusing Central Reserve's motion to amend its answer. The testimony of Liapis was irrelevant to the issues designated in the pretrial stipulation to which Central Reserve did not except. Permitting Central Reserve to amend its answer at such a late stage in the trial would not have served the ends of justice. Instead, the result would have been to allow Central Reserve to make a substantial change in its defense and to provide a trap into which the Malerbis might unwittingly fall.

In its next argument, Central Reserve claims the trial court erred by refusing to determine the coordination of benefits issue.

The Central Reserve coordination of benefits provision provides in relevant part:

> If you or one of your Dependents is eligible to receive benefits under another plan which provides medical or dental benefits, the benefits provided under this plan will be coordinated with the benefits from all of your other plans so that up to 100% of the "allowable expenses" incurred during a calendar year will be paid jointly by all plans.
>
> A plan is considered to be any Group insurance coverage or other arrangements of coverage for individuals in a group which provides medical or dental benefits or services on an insured or an uninsured basis, individual Blue Cross/Blue Shield contracts, service group plans or prepayment coverage, any coverage under government programs and any coverage required or provided by any statute including any national or state no-fault motor vehicle insurance act.

. . . .

When benefits of another plan or plans are involved, a determination must be made to identify one plan as the primary plan and the remaining plan as the secondary plan. The primary plan will pay regular benefits as if no other plan existed. The secondary plan would pay the excess allowable expenses, but not to exceed more than the plans [sic] regular benefits.

The rules establishing the order of benefit determination are:

(a.) The plan which does not have the coordination provision is considered the primary plan.

The evidence shows Bryan was covered by a group health insurance policy issued by Union Casualty Company on August 19, 1981. That policy, which was in evidence, does not contain a coordination of benefits clause. The NPI billing which is in evidence shows that Union paid $7,500 of Bryan's hospitalization expenses on July 14, 1983. The Union policy contains a provision limiting the maximum amount payable for covered expenses incurred for mental, nervous, or emotional disease or disorder to $7,500 for any one insured person during that person's lifetime.

The evidence shows that at the time of trial, a suit for benefits by the Malerbis was pending against Union because Union had denied coverage under its policy. Union was not a party to this action. The trial court concluded that it should not decide the coordination of benefits issue, as there was no final determination as to Union's obligation. The trial court entered judgment against Central Reserve for $43,318.13.

Central Reserve maintains that by refusing to consider the issue of coordination of benefits the court awarded the Malerbis $7,500 more than they were entitled to at the time of the judgment order.

The problem with this argument is that at the time of trial, Union's obligation to the Malerbis was unclear. Central Reserve's claims director, Theodore Liapis, acknowledged this fact at trial and admitted that there could be no coordination of benefits absent another group plan under which benefits were either paid or payable.

The record does not show what issues were involved in the litigation between the Malerbis and Union. The only evidence concerning the litigation is that Union was denying coverage. The trial court did not have the necessary parties or evidence before it to determine whether Bryan was eligible to receive benefits under the Union plan. As the record stands, the trial court could not determine the coordination of benefits issue.

With coordination of benefits a nonissue, the trial court's judgment was correct. In *Hollister v. Government Emp. Ins. Co.*, 192 Neb. 687, 224 N.W.2d 164 (1974), we held that the availability of a collateral means of discharging liability actually incurred within the meaning of an insurance policy does not bar recovery for those expenses under the policy. Applied to this case, the fact that the Malerbis received $7,500 from Union did not preclude recovery against Central Reserve for covered expenses under its policy.

Finally, Central Reserve summarily asserts for the first time in the last paragraph of its reply brief that the attorney fee awarded below was unreasonable and excessive. In *Smith v. Union Ins. Co.*, 218 Neb. 797, 359 N.W.2d 113 (1984), we held that the amount of attorney fees allowed pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1984) rests generally in the sound discretion of the trial court. Factors to be considered in determining the value of the services rendered include

> "the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised and the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. . . ."

Smith v. Union Ins. Co., supra at 798, 359 N.W.2d at 114.

In view of these considerations, the record does not reflect an abuse of discretion by the trial court in the allowance of the attorney fee. The judgment is affirmed.

The Malerbis are awarded an additional attorney fee of $2,500, pursuant to § 44-359, for the services of their attorney in this court.

AFFIRMED.

GREAT PLAINS CONTAINER COMPANY, APPELLANT, V. JOSEPH C. HIATT AND RONALD E. SORENSEN, NEBRASKA COMMISSIONER OF LABOR, APPELLEES.

407 N.W.2d 166

Filed June 5, 1987. No. 86-084.

1. **Employment Security Law: Appeal and Error.** Appeals to this court under the provisions of the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984), are reviewed de novo on the record. It is the duty of this court to retry the issues of fact involved in the findings complained of and to reach an independent conclusion.
2. **Employment Security Law.** Neb. Rev. Stat. § 48-628(b) (Reissue 1984) requires that misconduct for which a disqualification from receiving unemployment benefits may result must be committed in connection with the employee's work.
3. **Employment Security Law: Garnishment.** Conduct of an employee in so acting as to create a situation where garnishments are filed with his or her employer is not "misconduct connected with his or her work."
4. _____: _____. Suffering repeated garnishments is not generally such misconduct as to disqualify a discharged employee from receiving unemployment compensation benefits.

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

Timothy D. Loudon of Tate and Alden Law Firm, P.C., for appellant.

Laureen Van Norman, for appellee Sorensen.

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

GRANT, J.

Great Plains Container Company (hereafter Great Plains) appeals from an order of the district court for Adams County affirming a decision of the Nebraska Department of Labor Appeal Tribunal. The tribunal had reversed the determination of a claims deputy of the Nebraska Department of Labor ordering a 9-week disqualification of claimant, Joseph C. Hiatt, from unemployment benefits. Claimant had been terminated from his employment with Great Plains for excessive wage garnishments. The appeal tribunal held that claimant's conduct did not constitute misconduct within the meaning of the Nebraska Employment Security Law, Neb.

Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984). The district court for Adams County affirmed. Great Plains appeals to this court, alleging that the district court erred in ruling the claimant's conduct did not constitute misconduct within the meaning of the Nebraska Employment Security Law and in requiring the company to establish "gross" misconduct where only ordinary misconduct is alleged. For the reasons hereafter stated, the judgment of the district court is affirmed.

At the hearing before the district court the record before the appeal tribunal was introduced in evidence and additional testimony was taken, as authorized by § 48-639. The record shows that the claimant began working for Great Plains in August of 1983 at a salary of $3.75 per hour. When he was hired, claimant was given a copy of the company's employee handbook. The handbook provides in part that "[i]t is expected that each employee will handle his/her own financial affairs. Great Plains discourages any pay garnishments to creditors." At the time of his termination of employment the claimant was a press operator earning $5.25 per hour. In the company's evidence, claimant was described as a well-skilled employee.

The claimant's problems with the company began when his former wife instituted garnishment proceedings in November of 1984 for unpaid court-ordered child support payments. The claimant met with company supervisors regarding the garnishment in January of 1985. It was the company's policy to interview the employee regarding garnishments, explain the company's practice concerning garnishments, and to extend to employees the opportunity to straighten out their financial affairs. The child support garnishment was released in February of 1985.

The company received a summons in garnishment in March of 1985. This summons was based on a judgment obtained by a collection agency seeking to enforce judgment for general debts owed by claimant. The claimant was again called to a meeting, where he was advised of the company rules and warned that if his affairs were not put in order, his employment would be terminated. A company witness testified that claimant "simply shrugged his shoulders" and left the meeting. The company received another summons in garnishment from the same

collection agency in early April 1985. The claimant was fired on April 11, 1985, and filed a claim for unemployment benefits with the Nebraska Department of Labor.

Appeals under the provisions of §§ 48-601 to 48-669 are reviewed de novo on the record made in the district court. It is the duty of this court to retry the issues of fact involved in the findings complained of and to reach an independent conclusion. *Smith v. Sorensen*, 222 Neb. 599, 386 N.W.2d 5 (1986); *School Dist. No. 21 v. Ochoa*, 216 Neb. 191, 342 N.W.2d 665 (1984). Bearing this in mind, we must decide whether claimant's conduct constituted misconduct within the meaning of the Nebraska Employment Security Law. Pursuant to § 48-628(b) a claimant may be disqualified for benefits if he has been discharged for misconduct connected with his work. The term "misconduct" itself is not defined in the statute. This court has defined the term to include

> " 'behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.' . . ."

Smith v. Sorensen, supra at 603, 386 N.W.2d at 8; *McCorison v. City of Lincoln*, 215 Neb. 474, 339 N.W.2d 294 (1983); *Stuart v. Omaha Porkers*, 213 Neb. 838, 331 N.W.2d 544 (1983).

Great Plains argues that the misconduct that resulted in claimant's disqualification was not the repeated garnishments themselves but the deliberate violation of the work rule prohibiting excessive garnishments unless the employee can demonstrate mitigating factors. If it is established that claimant has violated the company's work rules, such a violation of the rules, pursuant to the definition of misconduct in *Smith v. Sorensen, supra*, may constitute misconduct sufficient to disqualify the claimant for unemployment benefits. In determining if a violation of a company rule constitutes misconduct, we must first determine if the rule is reasonable. *Smith v. Sorensen, supra; Snyder Industries, Inc. v. Otto*, 212

Neb. 40, 321 N.W.2d 77 (1982). The determination as to reasonableness must be made in light of § 48-628(b), which requires that misconduct for which a disqualification from receiving unemployment benefits may result must be committed in connection with the employee's work.

In the case before us, the record shows that claimant's actions, in so conducting his private life in its financial aspects that multiple garnishment resulted, were not done in connection with his employment with Great Plains. Insofar as his employment, Great Plains characterized him as a "[w]ell skilled employee." In his 20 months' employment with Great Plains, claimant's wage rate increased from $3.75 per hour to $5.25 per hour. Aside from the effects of the garnishments against his wages, the record does not show any company dissatisfaction with claimant's work performance. We hold that the conduct of an employee in so acting as to create a situation where garnishments are filed with his or her employer is not "misconduct connected with his or her work." Suffering repeated garnishments is not generally such misconduct as to disqualify a discharged employee from receiving unemployment compensation benefits. Individual financial reverses may well be the result of a person's inability to cope with the system in which that person is trying to make a living. Bankruptcies, both personal and corporate, are almost a way of life in our society. To deprive a debtor of the right to unemployment benefits for a limited time, where the unemployment results from his position as a debtor unable to pay his bills, would be to defeat the purpose of the Nebraska Employment Security Law. The "Employment Security Law is to be liberally construed in order that its beneficent purpose of paying benefits to involuntarily unemployed workers may be accomplished." *Sorensen v. Meyer*, 220 Neb. 457, 462, 370 N.W.2d 173, 177 (1985).

In so holding, the court does not say a company rule against garnishments is unreasonable for all purposes. Such a rule may govern whether or not an employee is retained in employment. A violation of the rule may warrant termination of employment, but the resulting discharge cannot be considered to be for misconduct connected with one's work in determining

the right to receive unemployment compensation benefits. Unemployment benefits to aid individuals in financial difficulties should not punish them for being in that condition. A violation of a garnishment policy may warrant termination but cannot operate so as to result in disqualification from receiving unemployment benefits.

In so holding, we agree with the holding of the Supreme Court of Michigan in *Reed v. Employ. Security Comm.*, 364 Mich. 395, 397, 110 N.W.2d 907, 908 (1961), where that court stated:

> Garnishment of plaintiff's wages may well have been a nuisance to defendant company. Many acts of an employee might meet with the displeasure or disapproval of an employer and be prohibited by rule by him. Breach of such rule might, in a sense, be considered misconduct warranting discharge from employment. Unless the rule and its violation bear some reasonable application and relation to the employee's task, can the breach be said to be misconduct within the disqualifying language of section 29(1)(a)(2) of the statute? The purpose of the act is to benefit unemployed in financial straits, not to penalize them for being in that condition. We do not believe that the language of the statute discloses or its purpose permits reading into it a legislative intent to stamp the conduct here involved as misconduct within the meaning of the cited section.

See, also, *Chalker v. First Federal Savings and Loan Ass'n*, 126 N.E.2d 475 (Ohio Ct. of Common Pleas 1955); *Horns v. Brown*, 243 La. 936, 148 So. 2d 607 (1963).

Great Plains further argues the district court erred in requiring a showing of intentional misconduct, when only ordinary misconduct is pled. This assignment of error is without merit. A reading of the statutes indicates two standards of error, i.e., ordinary misconduct resulting in partial disqualification or a gross, flagrant, and willful misconduct resulting in total disqualification from recovering unemployment benefits. This case involved a partial disqualification of 9 weeks. Therefore, only a showing of ordinary misconduct was necessary. Great Plains seems to

derive its argument from the language of the tribunal's opinion stating it "can find no *intentional* misconduct . . . ." (Emphasis supplied.) Great Plains contends that this language indicates a requirement of showing something other than ordinary misconduct. Our review is de novo, and we have held that claimant's conduct did not constitute misconduct so as to disqualify him for unemployment benefits for the 9 weeks. Since claimant's violation of the company rule did not constitute ordinary misconduct, we do not reach the issue of gross misconduct. The judgment of the district court is affirmed.

AFFIRMED.

FIRST WEST SIDE BANK, A BANKING CORPORATION, APPELLANT, V. CHARLES S. HIDDLESTON AND JOYCE HIDDLESTON, APPELLEES.

407 N.W.2d 170

Filed June 12, 1987. No. 85-593.

1. **Appeal and Error.** Where a case is tried on a particular theory, the Supreme Court will dispose of the case on appeal on that theory.
2. _____. A party cannot be heard to complain of error which such party was instrumental in bringing about.
3. **Jury Instructions: Appeal and Error.** Jury instructions are to be read as a whole, and when they fairly submit the case and do not mislead the jury, there is no prejudicial error.
4. _____: _____. It is not error for the trial court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
5. _____: _____. While it is the duty of the trial court, without any request to do so, to instruct the jury on issues raised by the pleadings and supported by the evidence, failure of counsel to object to the giving of certain instructions after they have been submitted to counsel for review will preclude raising an objection to the instructions on appeal, unless there is plain error indicative of a probable miscarriage of justice.
6. **Verdicts: Appeal and Error.** The verdict of a jury based on conflicting evidence will not and should not be set aside unless it is clearly wrong.

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

Ronald L. Eggers of Thompson, Crounse, Pieper & Quinn, for appellant.

Gerald P. Laughlin of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellees.

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

HASTINGS, J.

This is an action by the plaintiff bank to enforce a personal guaranty agreement executed by the defendants in connection with credit extended to a business. The jury returned a verdict for the defendants, and the bank has appealed.

On appeal the plaintiff assigns the following errors: that the court erred in giving certain instructions to the jury, which instructions included statements contrary to law; that the court erred in failing to give certain instructions to the jury that were requested by the plaintiff, which instructions accurately reflected applicable law; and that the court erred in entering judgment in favor of the defendants, which judgment is contrary to law. We affirm.

The defendants, Charles S. and Joyce Hiddleston, signed a personal guaranty in April 1979, guaranteeing 24 1/2 percent of the outstanding debt of the E.E. Kelley & Co., Inc. (Kelley Co.), doing business as Virgie's Town & Country clothing stores. Joyce Hiddleston owned 24 1/2 percent of the stock of the Kelley Co. The plaintiff extended a $100,000 line of credit to the company, secured by the company's assets, with each of the shareholders guaranteeing a proportion of the indebtedness according to his or her percentage ownership of the stock.

The portions of the guaranty pertinent to the issues in this litigation, paragraphs 4 and 6, are set out in part as follows:

> I hereby waive notice of the acceptance of this Guaranty and of the giving of credit from time to time; and consent to any number of extensions or renewals of any note, indebtedness or liability for any periods without notice to me, and waive notice of nonpayment of the same and any renewals thereof.
>
> . . . .

> This Guaranty shall continue indefinitely and nothing shall affect my liability except receipt by the Bank of written notice from me of the discontinuance thereof, or notice of my death, but termination shall not affect then existing obligations, and in the event of my death, my obligations shall continue in full force and effect against my estate; and my liability in respect thereto shall continue although such notes, indebtedness or liability may, from time to time, be extended or renewed.

In 1981 business at the stores began to decline. In early 1982 the shareholders apparently began to disagree as to the future direction that the business should take, with the defendants wanting to slow down its operations or close some of the stores. In March or April of 1982 the defendants contacted an employee of the plaintiff bank, expressing their concerns about the company and indicating that they wanted to discontinue their guaranty. On May 7, 1982, the defendants delivered a notice of discontinuance to the plaintiff. The defendants then received a letter from the plaintiff's attorney, stating that the bank rejected the alleged notice of discontinuance of guaranty and considered the guaranty as remaining in full force and effect.

There was credible evidence in the record to support the conclusion that as of May 7, 1982, there were assets of Kelley Co. which, if liquidated, would have been sufficient to more than cover the indebtedness to the plaintiff. In April of 1983 the company began a liquidation sale, and in January of 1984, the guarantors other than the defendants paid on their guaranties. The plaintiff then filed suit to recover on the defendants' guaranty.

The principal issue upon which this case was tried was whether defendants' notice of discontinuance of their guaranty was sufficient to discharge them of liability as to extensions or renewals of prenotice debts. In other words, did the language of paragraph 6 following the semicolon, "and my liability in respect thereto shall continue although such notes . . . be extended or renewed," apply to termination of liability by notice of discontinuance or only by notice of death?

The bank argues on appeal that the interpretation of a

contract of guaranty is a question of law for the court and that obviously the continuation of liability upon extension applies whether the guaranty is terminated by notice of discontinuance or of death. It cites in support of that contention *Corn Exchange Bank Trust Co. v. Gifford*, 268 N.Y. 153, 197 N.E. 178 (1935). Defendants take the opposite position, i.e., that the continuation of liability upon extension does not apply to termination due to notice of discontinuance, and cite in support of their position *Federal Deposit Ins. Corp. v. Manion*, 712 F.2d 295 (7th Cir. 1983).

However, it is not necessary for us to make this interpretation. That question was decided by the jury at the request of the plaintiff. At the close of plaintiff's case the defendants moved to dismiss plaintiff's petition or, in the alternative, to direct a verdict for the defendants, because, as a matter of law, the guaranty agreement could not be construed as granting to the plaintiff permission to make extensions and renewals after receiving a notice of discontinuance. In opposition to that motion plaintiff's counsel argued to the court "basically that all of the matters raised by [defendants' counsel] are all factual matters that are for the jury's consideration. . . . All these matters, the matter of whether or not there was consent to extensions or renewals, are all matters for the jury's consideration." Where a case is tried on a particular theory, the Supreme Court will dispose of the case on appeal on that theory. *Hammond v. Streeter, ante* p. 491, 406 N.W.2d 633 (1987).

A further indication of plaintiff's theory on trial was its requested instructions Nos. 12, 16, and 18. These instructions recite that *if* renewals and extensions were contemplated by the parties, then a notice of discontinuance does not extinguish the liability for such renewals or extensions. The substance of these requested instructions was embodied within the court's instruction No. 13, which in effect told the jury that if note renewals and extensions were contemplated within the guaranty contract, a notice of discontinuance would not extinguish the guarantors' liability on that account, and that the burden was on the plaintiff to prove the intention of the parties in that regard. If this was error on the part of the trial court, it was not

only condoned but invited by the words and actions of the plaintiff. A party cannot be heard to complain of error which such party was instrumental in bringing about. *Fuel Exploration, Inc. v. Novotny*, 221 Neb. 17, 374 N.W.2d 838 (1985).

Next, the plaintiff now objects to instructions Nos. 13, 17, 22, 23, 24, 25, and 26 given by the court. Instruction No. 13 has been discussed previously, and from that discussion it is obvious that we do not agree that such instruction constituted prejudicial error. The same reasoning applies to instruction No. 23, which was essentially an embodiment of plaintiff's requested instruction No. 13.

Instruction No. 17 permitted the jury to determine whether the guaranty was continuing in nature; instruction No. 22 permitted a verdict for the defendants if the jury found that defendants gave notice of discontinuance and that the plaintiff thereafter extended or renewed the existing indebtedness without defendants' consent. The issue as to consent contained in that last instruction was inextricably tied to the previously discussed instructions relating to the intent of the parties. Jury instructions are to be read as a whole, and when they fairly submit the case and do not mislead the jury, there is no prejudicial error. *Hennis v. O'Connor*, 223 Neb. 112, 388 N.W.2d 470 (1986).

Instruction No. 24 related to the execution of new loans after the notice of discontinuance. No such finding was made by the jury. Also, this instruction tracked the argument to the trial court made by plaintiff's counsel that "the factual questions that exist, I think the Court's well aware of the questions on the factual segment of this, disputes as to matter of new loans versus existing loans . . . ."

The final two criticized instructions, Nos. 25 and 26, related to defendants' defense of good faith and fair dealing. It is plaintiff's position that there was no evidence of a lack of good faith or fair dealing. There was evidence, as pointed out by defendants, that the bank informed defendants that they could not discontinue the guaranty, and the bank specifically rejected in writing the written notice of discontinuance and thereafter, by refusing to cause a liquidation of the debtor's assets at a time

when the debt could have been paid in full, thereby permitted "gambling" with defendants' money. We see no merit to plaintiff's argument.

Plaintiff also contends that the court erred in refusing to give its requested instructions Nos. 5, 12, 13, 14, 16, and 18. The substance of all of these instructions was embodied in those given by the court on its own motion, some of which the plaintiff now insists were erroneous. It is not error for the trial court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case. *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985).

Perhaps an even more compelling reason to reject plaintiff's claim of error regarding instructions is counsel's actions at the instruction conference. Upon inquiry by the court, counsel replied, "I do not have any objection to the proposed instructions." Later on, he was asked if he had any requested instructions. To that question he answered: "I also had prepared and filed earlier requested instructions, but in light of our — in reviewing instructions earlier today, I don't have any objection to the instructions that the Court is giving."

> "[I]t is the duty of the trial court, without any request to do so, to instruct the jury on the issues presented by the pleadings and supported by the evidence. [Citations omitted.]
>
> "In applying that principle we have established that the failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice."

Ellis & Guy Advg. v. Cohen, 219 Neb. 340, 342-43, 363 N.W.2d 180, 182 (1985), quoting *McCauley v. Briggs*, 218 Neb. 403, 355 N.W.2d 508 (1984).

It should be quite apparent from our earlier discussion that we find no plain error indicative of a miscarriage of justice regarding the giving or refusing to give instructions.

The plaintiff's final assignment of error is that the judgment

rendered by the trial court was contrary to law. We have previously disposed of plaintiff's argument in this regard because its theory at trial was that the interpretation of the particular segment of the guaranty contract at issue was a question of fact for the jury. There was evidence to support the jury's conclusion. The verdict of a jury based on conflicting evidence will not and should not be set aside unless it is clearly wrong. *Bourke v. Watts*, 223 Neb. 511, 391 N.W.2d 552 (1986).

The judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

EVELYN SMITH, APPELLANT, V. DR. MICHAEL WEAVER ET AL., APPELLEES.

407 N.W.2d 174

Filed June 12, 1987. No. 85-684.

1. **Summary Judgment.** A summary judgment is to be granted where there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law.
2. _____. The party moving for summary judgment must make a prima facie showing that if the evidence were uncontroverted at trial, he or she would be entitled to judgment as a matter of law. Such a showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. The court then views the evidence in a light most favorable to the party opposing the motion, and decides only whether there is an issue of fact, not how such an issue should be decided.
3. **Medical Malpractice: Expert Witnesses: Proof.** Whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony.
4. **Medical Malpractice: Informed Consent: Proof.** Before there may be recovery in a medical negligence case based upon the failure of a medical care provider such as a physician to obtain an informed consent to the treatment, the plaintiff must establish that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed. Neb. Rev. Stat. § 44-2820 (Reissue 1984).
5. **Medical Malpractice: Informed Consent: Words and Phrases.** Informed consent

> is consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Neb. Rev. Stat. § 44-2816 (Reissue 1984).

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

Jesse O. Irvin II, for appellant.

Joni R. Kerr of Kennedy, Holland, DeLacy & Svoboda, for appellee Weaver.

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

CAPORALE, J.

Appellant, Evelyn Smith, sued appellee Dr. Michael Weaver, a Nebraska physician qualified under the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 et seq. (Reissue 1984), and practicing at Omaha, alleging that he breached the professional duties he owed her as his patient. The district court sustained Weaver's motion for summary judgment, thereby dismissing Smith's petition as to him. She appeals and assigns that action as error, claiming that there exists a genuine issue of material fact. We affirm.

Smith alleged that Weaver was negligent in a number of respects, but the specific allegation on which this appeal is grounded asserts that Weaver was negligent in failing to warn Smith of the adverse side effects attendant to the taking of the prescribed medication, Clinoril.

The record establishes that Weaver first saw Smith as a patient from August through November of 1977. Smith had been experiencing, among other symptoms, fatigue, itching, hair loss, sores, and facial bumps. After hospitalizing her for a week during this period, Weaver diagnosed Smith's condition as possible systemic lupus erythematosus, a disorder of the connective tissue.

When Smith next saw Weaver, on July 24, 1979, she was experiencing increased swelling of her hands and feet and stiffness of her whole body, and was lightheaded and dizzy. After his examination and study of laboratory tests, Weaver

diagnosed joint complaints and, as he had earlier, possible lupus. According to Smith, she had also been diagnosed as having arthritis. Weaver reviewed the situation with Smith on August 7, 1979, and prescribed Clinoril. According to Weaver, he advised Smith of the "primary," or "common," side effects of the drug, being dermatologic and gastrointestinal in character, and instructed her to call him if she experienced any problems. Smith denies being told of any side effect whatsoever, and states she was told only that the drug was new and "good and strong" and that Weaver wanted her to try it.

On August 8, 1979, Smith reported to Weaver by telephone that she had taken two Clinoril tablets as instructed and that her hands were swollen. According to Smith, she had also vomited and her entire body swelled and itched. Weaver believed these manifestations resulted from the disease process, and advised Smith to continue taking the Clinoril but to see him if she did not improve. Smith took two more tablets and saw Weaver the following day, August 9, 1979. Smith reported that her hands and feet were swollen, and itched. It was still Weaver's impression that Smith was most likely experiencing a flareup of the lupus but could not rule out an allergic reaction to the Clinoril. According to Weaver, there exists no test for determining whether one is allergic to Clinoril. He thus instructed her to discontinue the Clinoril, and put her on different medication. During three more telephone calls in August of 1979, Smith reported she was improving somewhat but still had pain, and her hands had peeled. Smith last saw Weaver on September 5, 1979, at which time she complained of a shoulder problem and that her hands had continued to peel.

Smith asserts that following her experience with Clinoril, she lacks energy, has pain, develops sores, has white spots on her head, her cuticles grew over her nails and were pussy, and her mouth has become dry, as the result of which her ability to speak has been adversely affected, as has her ability to eat and sleep. She can no longer work or enjoy life.

Weaver stated that he exercised the reasonable and ordinary care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession in Omaha and similar communities, an opinion confirmed by the medical

review panel convened pursuant to the Nebraska Hospital-Medical Liability Act. The record contains no countervailing expert evidence.

A summary judgment is to be granted where there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law. *Naidoo v. Union Pacific Railroad*, 224 Neb. 853, 402 N.W.2d 653 (1987); *Bohannon v. Guardsman Life Ins. Co.*, 224 Neb. 701, 400 N.W.2d 856 (1987); *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985). The party moving for summary judgment must make a prima facie showing that if the evidence were uncontroverted at trial, he or she would be entitled to judgment as a matter of law. Such a showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. The court then views the evidence in a light most favorable to the party opposing the motion, and decides only whether there is an issue of fact, not how such an issue should be decided. *Marshall v. Radiology Assoc., ante* p. 75, 402 N.W.2d 855 (1987); *Naidoo v. Union Pacific Railroad, supra.*

Applying those principles in *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982), we reversed the summary judgment entered in favor of the defendant physician, where the plaintiff patient's esophagus was perforated during a dilation procedure and the physician had offered no evidence that he had met the requisite standard of care. In doing so, we held that whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony. Accord *Marshall v. Radiology Assoc., supra.* On remand, the physician in *Hanzlik v. Paustian*, 216 Neb. 575, 344 N.W.2d 649 (1984), *cert. denied* 469 U.S. 854, 105 S. Ct. 179, 83 L. Ed. 2d 113, again moved for summary judgment and on this occasion filed an affidavit to the effect he had followed the generally accepted and recognized standard of care or skill in the relevant and similar communities. We concluded that in the absence of countervailing evidence the affidavit established the physician's entitlement to a summary judgment dismissing the plaintiff patient's petition.

Smith contends, however, that the *Hanzlik* cases have no application when the claim is that a physician failed to warn of the possible side effects of a drug, thereby rendering the patient's consent to the treatment an uninformed one. She argues, in effect, that in such a situation the conclusion to be drawn from the facts does not require specific, technical, or scientific knowledge and that since the circumstances surrounding the injury are within the common experience, knowledge, and observation of laymen, expert testimony is not required. *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 387 N.W.2d 486 (1986).

In so arguing, she places heavy reliance upon *Mitchell v. Robinson*, 334 S.W.2d 11 (Mo. 1960), which stated that because the insulin shock therapy used was a rather new and radical procedure producing a high incidence of serious and permanent injuries, the treating physician had a duty to warn the plaintiff patient generally of the risks attendant to the treatment and that a jury question was presented as to whether the physicians had properly executed their respective duty in that regard. As Smith acknowledges, however, *Aiken v. Clary*, 396 S.W.2d 668 (Mo. 1965), disapproved *Mitchell*. The *Aiken* court did so on the basis that there had been no expert testimony to establish what the patient should have been told. *Aiken* held that where the nature and sufficiency of the warning given the patient is in issue, expert evidence is required to show what disclosures a reasonable medical practitioner would have given under the same or similar circumstances. The *Aiken* court, however, distinguished the situation in which no warning was given from the situation in which the issue relates to the sufficiency of a warning which was given.

With all due respect, it seems to us that such a distinction is illusory. The question of whether, under a particular set of circumstances, anything at all should be said to a patient is no different in character than the question of how much should be said. Nonetheless, as *Woolley v. Henderson*, 418 A.2d 1123 (Me. 1980), details, there are two views on the nature of the duty of a physician to disclose the risks of a particular treatment. The "professional" theory holds that the duty is measured by the standard of the reasonable medical

practitioner under the same or similar circumstances, and must be determined by expert medical testimony establishing the prevailing standard and the defendant practitioner's departure therefrom. On the other hand, the "material risk" theory holds the duty to disclose is measured by the patient's need for information to balance the probable risks against the probable benefits in making the decision to either undergo or forgo the treatment proposed. Although under this theory expert medical testimony may be necessary to establish the undisclosed risk as a known danger of the procedure, expert testimony is not required to establish the physician's duty to disclose, and the fact finder can decide, without the aid of a medical expert, whether a reasonable person in the patient's position would have considered the risk significant in making his or her decision.

The Legislature of this state has declared that before there may be recovery in a medical negligence case based upon the failure of a medical care provider, such as a physician, to obtain an informed consent to the treatment, the plaintiff must establish that a "reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed." § 44-2820.

Informed consent is defined in § 44-2816 as "consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities." Nebraska has therefore been committed by its Legislature to the "professional" theory, under which expert evidence is indispensable to establish what information would ordinarily be provided under the prevailing circumstances by physicians in the relevant and similar localities.

That being so, the uncontradicted evidence that Weaver followed the generally accepted and recognized standard of care or skill in the relevant and similar communities renders the genuine factual issue as to whether he gave Smith any warning an immaterial one, for there is no competent evidence that he was required to give any warning at all.

The district court's judgment, being correct, is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. I do so on two grounds.

First, I do not accept the conclusion that the propriety or necessity of a warning is not medically established by the record before us. In his affidavit, Dr. Weaver states:

> 3. At the time he prescribed Clinoril, Affiant also advised the Plaintiff of the primary side-effects of the drug, and instructed her to contact him if she had any problems.
>
> . . . .
>
> 10. In *prescribing* the Clinoril to the Plaintiff on August 7, 1979, in instructing the Plaintiff to continue taking the Clinoril on August 8, 1979, in instructing the Plaintiff to discontinue the Clinoril on August 9, 1979, and in all care and treatment rendered to the Plaintiff on or after July 24, 1979, Affiant exercised the ordinary and reasonable care, skill and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in Omaha, Nebraska, and in similar communities.

(Emphasis supplied.) If in fact expert testimony was required, Dr. Weaver provided that testimony. It was not therefore incumbent upon the appellant to provide her own medical testimony, but, rather, she could take advantage of the affidavit filed by Dr. Weaver.

Second, I believe that the majority is in error in concluding that because of the definition of informed consent set out in Neb. Rev. Stat. § 44-2816 (Reissue 1984), Nebraska has been committed "by its Legislature to the 'professional' theory, under which expert evidence is indispensable to establish what information would ordinarily be provided under the prevailing circumstances by physicians in the relevant and similar localities."

I believe that the majority is in error in that regard. Quite to the contrary, I believe that by adopting Neb. Rev. Stat. § 44-2820 (Reissue 1984), the Legislature of the State of

Nebraska has committed this state to the "material risk" theory. Section 44-2820 specifically establishes the burden of proof which must be met by one who has actually suffered damages because the treating physician did not first obtain an informed consent. The statute provides:

> Before the plaintiff may recover any damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.

This is the definition of the "material risk" theory, and not the "professional" theory. As noted by the majority, the " 'professional' theory holds that the duty is measured by the standard of the reasonable medical practitioner under the same or similar circumstances," while the "material risk" theory holds that the duty to disclose is to be measured by the patient's need for information to balance the probable risks against the probable benefits in making the decision to either undergo or forgo the treatment proposed. An example of the "material risk" theory is found in the case of *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977). The central issue in the *Sard* case was whether the appellants had presented evidence legally sufficient to permit a jury to decide whether the appellee doctor was negligent in failing to advise the appellants that a tubal ligation, which he performed on Mrs. Sard, might not succeed in preventing future pregnancies, and in failing to disclose alternative means of achieving the desired result. In concluding that there was sufficient evidence, the Maryland court reviewed the concept of "informed consent," and said:

> The doctrine of informed consent, which we shall apply here, follows logically from the universally recognized rule that a physician, treating a mentally competent adult under non-emergency circumstances, cannot properly undertake to perform surgery or administer other therapy without the prior consent of his patient. [Citations omitted.] In order for the patient's consent to be effective,

> it must have been an "informed" consent, one that is given after the patient has received a fair and reasonable explanation of the contemplated treatment or procedure.

Id. at 438-39, 379 A.2d at 1019.

The court then went on to observe:

> The major areas of dispute focus on: (1) the scope of the physician's duty to warn, that is, whether the duty is to be measured by a professional standard of care or a general reasonableness standard; (2) whether expert medical testimony is required to prove the standard of care; and (3) the appropriate test for proving causal connection between the failure to disclose and any resulting injury or damage.

Id. at 440, 379 A.2d at 1020.

The Maryland court then concluded that Maryland followed the "material risk" theory, saying:

> "The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is whatever is material to the decision. Thus, the test for determining whether a potential peril must be divulged is its materiality to the patient's decision." [Citation omitted.]
>
> . . . Whether a physician has fulfilled his duty to disclose, then, is to be determined by reference to a general standard of reasonable conduct and is not measured by a professional standard of care.

Id. at 443-44, 379 A.2d at 1022. In my view, the definition as set out by the Maryland court is what is required under § 44-2820.

Even if we are said to be a "professional" theory jurisdiction, or some hybrid, I believe the majority opinion is in error insofar as the granting of a summary judgment is concerned.

The Kansas Supreme Court's decision in *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093 (1960) (*Natanson I*), is generally recognized as the leading authority in support of the "professional" theory in cases of informed consent. See *Sard v. Hardy, supra*. In *Natanson I*, the Kansas court said:

> In our opinion the proper rule of law to determine whether a patient has given an intelligent consent to a proposed form of treatment by a physician was stated and

> applied in *Salgo v. Leland Stanford, Etc. Bd. Trustees*, [154 Cal. App. 2d 560, 317 P.2d 170 (1957)]. This rule in effect compels disclosure by the physician in order to assure that an informed consent of the patient is obtained. The duty of the physician to disclose, however, is limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances. How the physician may best discharge his obligation to the patient in this difficult situation involves primarily a question of medical judgment. So long as the disclosure is sufficient to assure an informed consent, the physician's choice of plausible courses should not be called into question if it appears, all circumstances considered, that the physician was motivated only by the patient's best therapeutic interests and he proceeded as competent medical men would have done in a similar situation.

186 Kan. at 409-10, 350 P.2d at 1106.

Nevertheless, after declaring Kansas to be a "professional" theory state, the Kansas court on rehearing held that expert testimony was not necessary in order to present the issue to the trier of fact. In *Natanson v. Kline*, 187 Kan. 186, 189-90, 354 P.2d 670, 673 (1960) (*Natanson II*), the Kansas court went to great lengths to explain this difference:

> Conceivably, in a given case as indicated in the opinion, no disclosures to a patient may be justified where such practice, under given facts and circumstances, is established by expert testimony to be in accordance with that of a reasonable medical practitioner under the same or similar circumstances. But on the state of the record here presented the appellant was not required to produce expert medical testimony to show that the failure of Dr. Kline to give any explanation or make any disclosures was contrary to accepted medical practice. To hold otherwise would be a failure of the court to perform its solemn duty.
>
> Whether or not a physician has advised his patient of the inherent risks and hazards in a proposed form of treatment is a *question of fact* concerning which lay witnesses are competent to testify, and the establishment of such fact is not dependent upon expert medical

> testimony. It is only when the facts concerning the actual disclosures made to the patient are ascertained, or ascertainable by the trier of the facts, that the expert testimony of medical witnesses is required to establish whether such disclosures are in accordance with those which a reasonable medical practitioner would make under the same or similar circumstances.

(Emphasis in original.)

In the instant case, appellant maintains that she received no warnings. On that basis, even under the "professional" theory, appellant has established a genuine issue of a material fact so as to preclude the appellee from being granted summary judgment.

The majority suggests that the distinction between "no warning" and an "inadequate warning" is illusory. I do not agree. By his own affidavit, Dr. Weaver established that Clinoril had known side effects. If, as appellant alleges, appellee failed to disclose any known side effects to the appellant, appellee would be liable as a matter of law, as noted by the Kansas court in *Natanson II*: "He made no disclosures. He was silent. On this state of the record Dr. Kline failed in his legal duty to make a reasonable disclosure to the appellant who was his patient *as a matter of law*." (Emphasis in original.) *Id.* at 189, 354 P.2d at 673. It may be that there is a legal defense for failing to make the disclosure. The appellee may present expert testimony justifying his action either in failing to give any warnings, as alleged by appellant, or in giving the warnings which he did give, as alleged by the appellee. Nevertheless, those are questions of fact to be resolved in a trial and not to be disposed of by summary judgment. The judgment of the district court should have been reversed and the matter ordered to trial.

I am authorized to state that WHITE and SHANAHAN, JJ., join in this dissent.

GARY R. ALDRIDGE, APPELLANT, V. SCHOOL DISTRICT OF NORTH PLATTE, LINCOLN COUNTY, NEBRASKA, ET AL., APPELLEES.

407 N.W.2d 495

Filed June 12, 1987. No. 85-744.

1. **Pleadings: Appeal and Error.** Where an issue is not raised by the pleadings, it will not be addressed for the first time on appeal.
2. **Summary Judgment.** A motion for summary judgment can properly be granted where there exists no genuine issue of material fact, the ultimate inferences to be drawn from those facts are clear, and the movant is entitled to judgment as a matter of law.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Baskins & Rowlands, for appellant.

Frank E. Piccolo of Murphy, Pederson, Piccolo & Pederson, for appellees.

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

WHITE, J.

Gary R. Aldridge appeals from an order of the district court for Lincoln County, Nebraska, granting summary judgment in favor of the appellees, the school district of North Platte and six members of its board of education. Aldridge is a registered voter, taxpayer, and resident of the school district of North Platte, Nebraska, and, as a citizen, has standing under Neb. Rev. Stat. § 84-1414(3) (Cum. Supp. 1986) to require the board to comply with the Nebraska public meetings law. He assigns as error that the district court incorrectly found there were no issues of fact and no evidence tending to support the causes of action alleged in the petition. We affirm.

The petition in this case attacked decisions made by the board in regard to the employment status of the superintendent of schools. On August 31, 1984, the superintendent was found guilty of third degree sexual assault. The board called a meeting on September 5, 1984, a week before the next scheduled meeting. The meeting was largely attended, and when the matter concerning the superintendent's conviction arose, board

member Linda L. Gale requested that there be no discussion on the subject. Dallas F. Darland, a board member, announced that he had been tendered a resignation by the superintendent and read aloud the letter, which stated that the superintendent would resign voluntarily in December. Darland moved to accept the offer to resign; the motion was seconded and passed. Board member Myra Satterfield then made a motion to suspend the superintendent from his duties with pay until his resignation was effective. The motion also was seconded and passed. There was no discussion of these motions except for the reading of the letter and the making of the motions.

Aldridge's petition alleges two causes of action: first, that a quorum of the board met with the attorney for the school district and discussed and made policy in violation of the public meetings law; and second, that the motion by Satterfield to suspend the superintendent with pay passed without public discussion based on the prior nonpublic briefing and meeting alleged in the first count.

In his deposition Aldridge stated he based his allegations that the public meetings law was violated on two facts: that a major motion passed without discussion and that a witness saw a quorum (four of six) of the board members at the school board attorney's office earlier in the day of the September 5 meeting. The witness, Kathy Seacrest, testified on deposition that she saw four board members in the "entryway" of the attorney's office and that two of them were leaving as she left. She heard no discussion or comments made by the members.

A reading of the depositions of the board members exposes no discrepancies in their stories. The four members met with the attorney to discuss the legal ramifications of various options to remove the superintendent from office. Each feared a long legal battle and was informed that the superintendent had due process and contractual rights in his employment. Each was aware that certain of the benefits would vest in December and that the superintendent knew this. They specifically denied that a quorum ever met to decide policy and testified that they left the office having made no decision in the matter.

Donald E. McFarland, board member, met with the attorney at approximately 1:30 p.m., and shortly thereafter Satterfield

joined the meeting. Darland and board member Delmar E. Bailar arrived for a meeting with the attorney and waited in the reception area until McFarland and Satterfield left the attorney's office. The four exchanged greetings; Seacrest came in, dropped off some letters, and left as McFarland and Satterfield left the building. After Darland and Bailar met with the attorney, they went to talk to the superintendent on their own volition and received the letter offering his resignation in December. McFarland, Gale, Satterfield, and board member James K. States were unaware of the tendered resignation until the letter was read at the meeting.

At oral argument counsel for Aldridge argued that Gale's statement limiting discussion on the issue was a violation of the public meetings law. The petition shows two causes of action: that an illegal meeting of a quorum of the board took place prior to the public meeting and that, without public discussion, the board passed a motion based on the previous illegal deliberations. The petition does not maintain that public discussion may not be limited or prohibited by the board at its meetings. See Neb. Rev. Stat. § 84-1412(2) (Cum. Supp. 1984). Since the issue of the propriety of the rule limiting discussion by board members was not raised by the pleadings, we will not address it here. *Ford v. County of Perkins*, 190 Neb. 304, 207 N.W.2d 694 (1973).

Appellant's counsel conceded at argument that the attorney for the board could advise members two at a time without violating the public meetings law. However, he still argues that the lack of discussion at the meeting implies that the real decision was made illegally prior to the meeting.

The appellant based his case on Seacrest's statements that she saw four board members in the attorney's office. She corroborated their statements that two were leaving as two were waiting. Obviously, no meeting of the board members in which a quorum was present occurred.

A motion for summary judgment may be granted where there exists no genuine issue of material fact, the ultimate inferences to be drawn from those facts are clear, and the movant is entitled to judgment as a matter of law. *De Los Santos v. The Great Western Sugar Co.*, 217 Neb. 282, 348

N.W.2d 842 (1984). The appellees' testimony establishes that no improper meeting occurred. The appellant then had the burden to introduce evidence in opposition to the motion for summary judgment that would tend to prove that a meeting did occur. *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984). He could not produce such evidence. Since no issue of fact existed, the motion for summary judgment was properly granted in favor of the appellees.

AFFIRMED.

IN RE COMPLAINT AGAINST JAMES A. KELLY, COUNTY JUDGE IN AND FOR THE 11TH JUDICIAL DISTRICT OF THE STATE OF NEBRASKA.
STATE OF NEBRASKA EX REL. COMMISSION ON JUDICIAL QUALIFICATIONS, RELATOR, V. JAMES A. KELLY, RESPONDENT.

407 N.W.2d 182

Filed June 12, 1987. No. JQ86-003.

1. **Judges: Disciplinary Proceedings: Appeal and Error.** Where the Supreme Court receives no additional evidence in a judicial discipline proceeding, the scope of review is de novo on the record.
2. _____: _____: _____. In an original action on a complaint against a judge by the Commission on Judicial Qualifications, the Supreme Court must first determine if the allegations are supported by the evidence; second, the canons of the Code of Judicial Conduct and subsections of Neb. Rev. Stat. § 24-722 (Reissue 1985) which were violated; and third, the appropriate discipline.
3. **Judges: Disciplinary Proceedings: Proof.** The Commission on Judicial Qualifications must prove allegations of judicial misconduct by clear and convincing evidence.
4. **Judges: Disciplinary Proceedings: Words and Phrases.** Crucial to the finding that a judge's misconduct is willful is a showing of bad faith. Willfulness involves more than an error of judgment or mere lack of diligence. Neb. Rev. Stat. § 24-722(1) and (2) (Reissue 1985).
5. **Judges: Disciplinary Proceedings.** A certain amount of honest error is expected and does not necessarily warrant discipline. However, blatant, flagrant, or repeated errors or failures in the performance of judicial duties will not be condoned. Neb. Rev. Stat. § 24-722(2) (Reissue 1985).
6. _____: _____. A finding that a judge's conduct was prejudicial to the administration of justice, bringing the judicial office into disrepute, is not

dependent on the judge's motives but upon the impact the conduct could have on knowledgeable observers.

7. _____: _____. The object of the Code of Judicial Conduct adopted by this court is to delineate what conduct should be avoided for its prejudicial potential. Therefore, a finding that the code has been violated results in a finding that a judge committed conduct prejudicial to the administration of justice. Neb. Rev. Stat. § 24-722(6) (Reissue 1985).
8. _____: _____. The purpose of judicial discipline is not vengeance; it is to preserve the integrity of and the public confidence in the judiciary.
9. _____: _____. Sanctions should be imposed where necessary to safeguard the bench from those who are unfit. The discipline imposed must prohibit the respondent and others from engaging in prohibited conduct.

Original action. Judgment of disciplinary sanctions.

Robert M. Spire, Attorney General, and Mel Kammerlohr, for relator.

John A. Wagoner of Wagoner Law Offices, for respondent.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

On April 10, 1986, an amended complaint was filed by the Nebraska Commission on Judicial Qualifications alleging, in three counts, misconduct of James A. Kelly, a county judge of the 11th Judicial District. Pursuant to Neb. Const. art. V, § 30, and Neb. Rev. Stat. § 24-721 (Reissue 1985), this court entered an order, at the request of the commission, appointing a special master to conduct a formal hearing concerning the allegations. The hearing was held on July 10, 1986. With respect to count I the master found that clear and convincing evidence existed showing that Judge Kelly's actions violated Canon 2 of the Code of Judicial Conduct and Neb. Rev. Stat. § 24-722(2) and (6) (Reissue 1985). He further found that the acts of Judge Kelly described in count II were proved and that the judge's conduct, while violating Canon 7A(3) and (4) of the Code of Judicial Conduct, did not fall within the prohibitions set out in § 24-722. Concerning count III, the master found the allegations to be unsupported by the evidence.

The findings and recommendations of the commission similarly determined the allegations in count III to be

unfounded and recommended that the count be dismissed. The commission's report further stated

> [A]fter full discussion it was by unanimous vote of the members of the Commission present and participating decided that . . . clear and convincing evidence [proved] that Judge Kelly's conduct as set out in Counts I and II was prejudicial to the administration of justice and that his actions brought his judicial office into disrepute in violation of Neb. Rev. Stat. § 24-722.

This language corresponds to a finding of a violation of subsection (6) of § 24-722, which is what the special master found for count I. However, later in the commission's report much broader findings of violations were listed. Specifically, it found that Judge Kelly violated Canons 1, 2, 3A(1) and (5), 3B(1), and 3C(1) of the Code of Judicial Conduct, and § 24-722(1), (2), and (6), with respect to count I, and further violated Canon 7 of the Code of Judicial Conduct and § 24-722(1) and (6), with respect to count II.

The statute on which these charges are based, § 24-722, reads in relevant part:

> A Justice or Judge of the Supreme Court or judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed six months, or removed from office for (1) willful misconduct in office, (2) willful disregard of or failure to perform his or her duties . . . or (6) conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . .

We received no additional evidence; hence, our scope of review is de novo on the record. Neb. Const. art. V, § 30(2); Neb. Rev. Stat. § 24-723 (Reissue 1985); *In re Complaint Against Kneifl*, 217 Neb. 472, 351 N.W.2d 693 (1984). We must "determine upon our own independent inquiry, as to the charges of alleged misconduct referred to us, whether the evidence clearly and convincingly proves that respondent acted in such a manner" as to have violated § 24-722(1), (2), or (6). *In re Complaint Against Kneifl, supra* at 477, 351 N.W.2d at 696-97.

Our tasks are first to decide if the evidence supports the

allegations set out in counts I and II; second, if proved, what canons and subsections of § 24-722 may have been violated as a result of the acts complained of in the two counts; and third, what type of discipline, if any, is appropriate under the circumstances.

COUNT I

Count I of the amended complaint charged that

> the said James A. Kelly, between February 24, 1984, and May 9, 1985, prevented the normal processing of an original traffic citation against his son, Timothy C. Kelly, filed in the court in which said James A. Kelly is a judge. The result was that no waiver, plea, or other appearance was made by Timothy C. Kelly in that court for over a year after the original citation was issued by Nebraska State Trooper, W.J. Mach, on or about February 24, 1984. No warrant for said Timothy C. Kelly's arrest was issued by said court during this period, as is usually done when no appearance is made by an alleged traffic violator. A conviction on this traffic violation charge would have resulted in revocation of Timothy C. Kelly's driver's license for an accumulation of 12 points in a 2 year period from July 15, 1982, to July 15, 1984.

The facts are not in dispute. Judge Kelly's son, Timothy Kelly, received a citation for speeding, with an appearance date of March 8, 1984. One copy of the citation was filed in the "appearance date" file and another in the "abstract of judgment" file in the clerk's office of the Hall County Court. Shortly thereafter, Timothy visited his father at the courthouse and discussed the ticket with him. Judge Kelly advised him to plead guilty and pay the ticket. The judge secured the copy of the citation in the appearance date file, prepared a plea and waiver of appearance for his son to sign, and told his son to sign it and take it to the clerk and pay the fine. Timothy had no funds at the time. The judge refused to lend money to him and told him to get some money and come back.

The fine was not paid until the spring of 1985, when the ticket was found between phone books in a desk drawer. When the ticket was found, Timothy promptly appeared and paid the fine. His driver's license was revoked for an accumulation of 12

points in a 2-year period.

Timothy's speeding case was not called up for a hearing for over a year because the physical presence of the citation is necessary to trigger the process. At all times a copy of the citation remained in the abstract of judgment file. This was never removed by Judge Kelly, and it was here that a court employee noticed the ticket and reported that its duplicate was missing from the appearance date file in April of 1985. An inquiry was started into the matter. In early May of 1985 an investigator for the Commission on Judicial Qualifications, Samuel Van Pelt, interviewed Judge Kelly about the missing citation. The judge replied that he did not know anything but that he would look into it. The next day Judge Kelly notified the investigator that he had found the ticket and that he had forgotten about it. At the hearing the judge stated he had not hidden it and that he could not recall ever seeing it prior to the time he found it. As stated in the commission's report, "No material or relevant evidence was offered to explain why the file was not discovered by Judge Kelly for more than 14 months or why the file was not returned to its proper place."

We find that the evidence clearly and convincingly proves the allegations of count I, that Judge Kelly did prevent the normal processing of a traffic citation against his son. We now will determine what canons and what subsections of § 24-722 have been violated.

In the opinion of the commission, Judge Kelly violated subsections (1) and (2) of § 24-722, which prohibit willful misconduct in office and the willful disregard of or failure to perform his or her duties. The special master found the acts to be negligent.

This is our first opportunity to construe the meaning of "willful misconduct in office." The Arizona and California Supreme Courts describe willful misconduct as

> "unjudicial conduct which a judge acting in his judicial capacity commits in bad faith, while the [charge of conduct prejudicial to the administration of justice] should be applied to conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but

> conduct prejudicial to public esteem for the judicial office. . . ."

Matter of Haddad, 128 Ariz. 490, 497-98, 627 P.2d 221, 228-29 (1981) (quoting *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973)). The North Carolina and Mississippi Supreme Courts define the charge as follows: " '*Willful misconduct in office* is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. . . .' " *In re Inquiry Concerning Garner*, 466 So. 2d 884, 885 (Miss. 1985) (quoting *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977)).

Crucial to a finding that the respondent violated subsection (1) is a showing of bad faith. As stated in *Gubler v. Commission on Judicial Performance*, 37 Cal. 3d 27, 45-46, 688 P.2d 551, 562, 207 Cal. Rptr. 171, 182 (1984):

> Bad faith is the touchstone for testing whether misconduct committed by a judge while acting in a judicial capacity constitutes wilful misconduct. [Citation omitted.] " '[B]ad faith' is quintessentially a concept of specific intent, requiring consciousness of purpose as an antecedent to a judge's acting maliciously or corruptly." [Citation omitted.] When the judge has " 'intentionally committed acts which he knew or should have known were beyond his lawful power,' [citation], . . . 'bad faith' entails actual malice as the motivation for a judge's acting ultra vires. The requisite intent must exceed mere violation; negligence alone, if not so gross as to call its genuineness into question, falls short of 'bad faith.' " [Citation omitted.] Even when the acts in question were within the judge's lawful power, they may involve bad faith, and thus constitute wilful misconduct, if "committed for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties."

For cases clearly involving bad faith, see, *Matter of Coruzzi*, 95 N.J. 557, 472 A.2d 546 (1984), *appeal dismissed* 469 U.S. 802, 105 S. Ct. 56, 83 L. Ed. 2d 8 (bribe); *In re Hunt*, 308 N.C. 328, 302 S.E.2d 235 (1983) (bribe); *In re Jordan*, 290 Or. 303, 622

P.2d 297 (1981) (false testimony under oath); *Matter of Davila*, 631 S.W.2d 723 (Tex. 1982) (gave paid appointment to relative, willfully and persistently violated several statutes); *In re Anderson*, 412 So. 2d 743 (Miss. 1982) (inflated fines for traffic violators, officially reported having received a lesser amount, and converted the difference for his personal gain).

We find clear and convincing evidence of bad faith or willful misconduct in the present case. Judge Richard Weaver found the missing ticket a few days before Samuel Van Pelt approached Judge Kelly about the matter. Weaver testified that he was looking for a book in Kelly's desk when he lifted a current phone book and saw the ticket. He could tell at a glance that it was Timothy Kelly's traffic citation. As the ticket was missing for 1 1/4 years, the fact that it was under a current phone book tends to establish an inference that Kelly used the drawer within the last year. However, the evidence also establishes that Judge Kelly was under severe emotional and financial strain during this period. In July of 1983 Judge Kelly surrendered his son to the police after Timothy related the facts of his involvement in a felony. In November of 1983 Timothy was convicted of one count of burglary. That same month, due to business reverses, the judge lost his home while proceeding through bankruptcy. On December 12, 1983, Timothy was sentenced to probation for the felony conviction. On January 25, 1984, the judge's wife became ill, and died on January 26. The incident with the traffic citation occurred in February 1984. Shortly thereafter, his son moved away from home.

Exhibit 12 consists of reports, letters, and documents accumulated by Samuel Van Pelt as part of his investigation for the Commission on Judicial Qualifications. Counsel for Judge Kelly moved for the admission of exhibit 12 and entered no hearsay objection concerning the matters discussed in it. The exhibit contains notes from meetings Van Pelt had with various courthouse employees. One overheard Judge Kelly threaten to find in contempt the person who notified the commission. Van Pelt also met with Timothy's probation officer and the judge who sentenced Timothy to probation and later granted him an early release from probation. The notes reflect that both the judge and the probation officer told Van Pelt about ex parte

contacts of the sentencing judge by Judge Kelly on his son's behalf. Both believed that Judge Kelly misrepresented his son's compliance with the terms of probation.

Had Timothy been timely prosecuted for the traffic violation, a conviction would have resulted in having Timothy's driver's license revoked and also would have constituted a violation of probation. We believe that Judge Kelly was aware of these consequences.

Although the ex parte communications with his son's sentencing judge are not part of the complaint, they do tend to show that Judge Kelly would, and did, intervene on his son's behalf through improper and inappropriate avenues to secure an early release from probation for his son. The ticket would have jeopardized his son's probationary status. The fact that the ticket was under a current phone book and the fact that Judge Kelly should not have called for the ticket in the first place, when looked at with the other evidence of improper acts on behalf of his son, convince us that the prosecution of the ticket was delayed in bad faith. We find a violation of § 24-722(1), which prohibits willful misconduct in office.

With respect to the commission's opinion that the acts alleged in count I constitute a violation of § 24-722(2), willful disregard of or failure to perform his or her duties, we find that this view is supported by clear and convincing evidence. All error is not punishable. As stated in *Matter of Carstensen*, 316 N.W.2d 889, 893 (Iowa 1982), "A certain amount of 'honest' error . . . may be expected. However, when the violations are blatant, flagrant, and repeated, they should not and will not be condoned." Since we have found the violation to be willful and to involve a case in Judge Kelly's court, the failure to return the file is a blatant, flagrant breach of his judicial duties. We find a violation of § 24-722(2).

Both the special master and the commission found a violation of § 24-722(6), which prohibits "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." We find that the evidence clearly and convincingly proved that Judge Kelly violated this subsection.

In *In re Complaint Against Kneifl*, 217 Neb. 472, 475, 351 N.W.2d 693, 695-96 (1984), we stated:

> Conduct which falls short of reaffirming one's fitness for the high responsibilities of judicial office constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute. . . . It includes conduct which would justify a reasonable man in believing that a result achieved by a judge was achieved because of his position and prestige . . . and conduct which would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office . . . . It depends not so much on the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers.

Judge Kelly contends the object of the conversation with his son was to expedite his plea of guilty by drawing up a waiver of appearance. However, the motives of the judge are not the main concern when deciding whether a violation of subsection (6) has occurred; the integrity of the judicial office is at issue. The acts of the judge caused a delay of the prosecution of his son and could not have been achieved absent the judge's position. That Judge Kelly's acts constitute a violation of the plain language of this subsection is obvious.

However, we have an additional guide to measure whether the conduct complained of violates subsection (6). In our view the Code of Judicial Conduct works in tandem with § 24-722. The code provides the standards against which judicial conduct is measured and the statute provides for discipline for different breaches of the standards. As discussed above, the statute differentiates between willful and negligent offenses and offenses related or unrelated to the performance of official duties. The code, on the other hand, has no provisions for discipline and, like subsection (6), is unconcerned with motive or culpability. It sets out what conduct is expected and counsels against conduct that is inappropriate.

Today, we adopt the conclusions of the Supreme Court of Minnesota that the purpose of the code is, as expressed in Canon 1, to set "high standards of conduct so that the integrity and independence of the judiciary may be preserved" and the focus of the code is on what conduct may be prejudicial to the

administration of justice. *Complaint Concerning Winton*, 350 N.W.2d 337 (Minn. 1984). (We note that Minnesota has Rule 4(a)(5), Rules of Board on Judicial Standards, which provides for discipline for a violation of the code.) Since the code's object is to set out clearly what conduct should be avoided for its prejudicial potential, and since the code has been adopted by this court, we find that a clear violation of the code constitutes, at minimum, a violation of § 24-722(6). See, also, Neb. Const. art. V, § 1, which grants the Supreme Court the power to establish rules, and confers general administrative authority.

We find that the acts complained of in count I were in violation of Canons 2 and 3. Canon 2 provides that "[a] Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities." Part B of Canon 2 states that "[a] judge should not allow family, social, or other relationships to influence his or her judicial conduct or judgment." The judge's involvement in a traffic matter concerning his son, however innocent it may have been, clearly violated Canon 2, part B, and brought the judicial office into disrepute. Canon 3 requires that "[a] Judge Should Perform the Duties of the Office Impartially and Diligently." Part A(5) provides that "[a] judge should dispose promptly of the business of the court." Part B(1) is similar to part A(5), in that it requires diligent discharge of administrative responsibilities. The delay that resulted in the prosecution of the traffic violation clearly runs counter to the requirements of Canon 3, parts A(5) and B(1), and was prejudicial to the administration of justice. For all of the above-stated reasons, we find that Judge Kelly violated § 24-722(6).

We now address the issue of what discipline is proper under the circumstances. The commission recommended that Judge Kelly be removed from office on this count. We feel that the violation of § 24-722(1), (2), and (6) in this case justifies the imposition of the sanction of removal.

The object of judicial discipline is not vengeance or retribution, but to preserve the integrity of and the public confidence in the judiciary. *In re Complaint Against Kneifl*, 217 Neb. 472, 351 N.W.2d 693 (1984). Sanctions should be imposed where necessary to safeguard the bench from those who are unfit. *Matter of Reeves*, 63 N.Y.2d 105, 469 N.E.2d 1321, 480

N.Y.S.2d 463 (1984). "The discipline we impose must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future." *In re Complaint Against Kneifl, supra* at 485, 351 N.W.2d at 700.

The removal of his son's citation from the appearance date file is the kind of act which, out of dedication to the principle that ours is a state governed by laws and not individuals, cannot be condoned. This act was clearly improper and is a serious blow to the public's confidence in the impartiality of the bench.

We must weigh the nature of the offense, which we feel is serious, with the purpose of sanctions in these cases. We feel that the nature of the interventions of Judge Kelly on his son's behalf shows a lack of fairness and impartiality and demonstrates that Judge Kelly is unfit to hold office. We order that he is to be removed from office.

COUNT II

Count II of the amended complaint charges as follows:

> James A. Kelly was elected to the Hall County, Nebraska Airport Authority Board, a publicly elected position in November, 1980, and took office on said board in January, 1981; said Kelly was appointed County Judge in 1981 and has continued to hold his Airport Authority Board position continuously since becoming a County Judge and continues to be a member of said Airport Authority Board, contrary to §24-722 (6) (R.S. Supp 1984) and Canon 7 of the Code of Judicial Ethics.

As determined at the hearing before the special master, Judge Kelly took office on the airport authority board January 1, 1981. On February 1, 1981, he was appointed a judge and, as evidenced by the record, consulted with counsel and fellow judges about whether his elected position would violate Canon 7. Canon 7A(4) provides, "A judge should not engage in other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice." It is clear, and we therefore find, that Judge Kelly's retention of his position on the board runs counter to the intent of Canon 7. Judge Kelly entered no objection to the above findings of fact

or to the finding of the Canon 7 violation.

The special master found a violation of the canon, but no statutory violation. The commission found Judge Kelly committed a subsection (1) violation, willful misconduct, and a subsection (6) violation, conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Consistent with our holdings in the disposition of count I, we conclude that the violation of Canon 7 also constitutes a violation of § 24-722(6) and find no subsection (1) violation because there is no allegation or showing of bad faith on this count.

We strongly believe that Canon 7 is in the best interests of the public and the judicial system. In fact, the record demonstrates that Judge Kelly was put in the position of giving legal advice concerning some contracts before the board at one of the meetings. While this is not a count in the Commission on Judicial Qualifications' amended complaint, it does reflect on the wisdom of Canon 7's prohibition against involvement of judges in political activities.

In determining the proper sanctions to be imposed, we take into account that it is not in dispute that Judge Kelly relied in good faith on the advice he received, *Matter of Amended Canon 7 of Code of Judicial Conduct: Lyons*, 101 N.M. 220, 680 P.2d 601 (1984), and that there is no showing that his political activities had impinged on his judicial duties. After the charges were filed he resigned his position on the board. The commission recommended, and we hereby endorse, censure on this count.

The court agrees with the recommendation of the commission and orders that Judge Kelly shall be, and hereby is, censured, and is further removed from the office of county judge.

JUDGMENT OF DISCIPLINARY SANCTIONS.

KRIVOSHA, C.J., not participating.

WHITE, J., dissenting in part.

The master found that the activities of Judge Kelly were negligent and not willful. I would therefore limit the sanction to a suspension for a period of 6 months and an order of censure.

IN RE INTEREST OF K.L.N. AND M.J.N., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. T.A.N., APPELLANT.

407 N.W.2d 189

Filed June 12, 1987. No. 86-540.

1. **Parental Rights: Juvenile Courts: Appeal and Error.** The law in the State of Nebraska concerning review of an order terminating parental rights is well settled. Such an order will be reviewed by this court de novo on the record, while according great weight to the findings of the trier of fact, the juvenile court, because that court heard and observed the parties and witnesses.
2. **Parental Rights.** The right of parents to maintain custody of their children is a natural one, and the order terminating that right must be supported by clear and convincing evidence and should only be issued as a last resort when no other alternative exists.
3. _____. The primary consideration in a termination proceeding is the best interests of the children.
4. _____. When a rehabilitation plan is implemented, the plan must be reasonable and conducted under the direction of the juvenile court before failure to comply with the plan can be an independent reason for termination.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Carolyn A. Rothery of Byrne, Rothery, Lewis, Bedel, Tubach & Zielinski, for appellant.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky, for appellee.

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

GRANT, J.

This is an appeal from an order of the separate juvenile court of Douglas County, terminating the parental rights of appellant, T.A.N., to her minor children, K.L.N. and M.J.N. Appellant contends that the court erred in terminating her parental rights based on her poverty and that the State failed to prove by clear and convincing evidence that her rights should be terminated. Appellant further contends that she was coerced into voluntarily relinquishing her children to foster care prior to the filing of the juvenile court petition, that the court-ordered plan of rehabilitation was impossible for her to complete, and

that the decision of the juvenile court should be set aside in the absence of a record of the review proceeding of June 17, 1985. For reasons hereafter stated, the decision of the separate juvenile court of Douglas County is affirmed.

The record shows the following. The female children, K.L.N. and M.J.N., were born out of wedlock on January 31, 1982, and February 10, 1984, respectively. Each child had a different father. On April 6, 1984, appellant voluntarily placed the children with the Nebraska Department of Social Services, which placed them in foster homes on April 9. This was done because the appellant did not think it was fair to the children that they be "bounced around to different homes" just because appellant was having difficulty maintaining a permanent residence. Due to the difficulty of placing two children of such a young age in the same foster home, the children were separated. On April 11, 1984, a petition was filed by the Douglas County attorney's office alleging that the children came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982), in that they lacked proper parental care by reason of the faults and habits of the appellant, their natural mother. A detention hearing was held on April 19, 1984, to determine where the children would reside pending adjudication of the matter. The appellant did not resist continued detention, and the court ordered that custody of the children remain in the Nebraska Department of Social Services for temporary placement in foster homes.

An adjudication hearing was held on July 9, 1984. At this hearing witnesses for the State testified with regard to appellant's parenting skills. Bonnie Bremer, a worker for Child Protective Services (CPS), testified she responded to a call from a relative of the appellant, alleging that the living situation of appellant and her two children was not fit for children. The witness testified that initially the appellant would not cooperate with the investigation. The CPS worker finally met with the appellant after the appellant and her children were asked to leave the home in which they were staying and had moved into a women's temporary shelter in Omaha, Nebraska. The evidence adduced at the adjudication hearing showed the appellant had been living in public housing in Lincoln, Nebraska, until

January of 1984, when she was asked to leave because she was behind on her rent and had "trashed out" the apartment. Subsequent to being evicted by the housing authority the appellant and her children moved to Omaha, where she lived at two different locations with friends. The appellant voluntarily left one residence due to "personal problems and arguing" and was asked to leave the second residence because the friends did not want to be responsible for appellant's improper care of the children. The appellant then took the children to the women's shelter, at which time Bremer was able to meet with her. By the time of this initial meeting on April 6, 1984, the appellant had already spent her entire ADC check for the month of April. Appellant told the CPS worker that she would stay at the shelter until her next check arrived, as she had done on earlier occasions at similar temporary shelters. Evidence adduced at a subsequent hearing showed appellant was receiving approximately $350 per month in ADC payments. Appellant testified that while receiving that amount she just could not keep food in the house for herself or her children.

Additional testimony adduced at the adjudication hearing showed CPS workers had been referred to appellant's case on at least nine other occasions. Most of the referrals involved allegations of general neglect, such as the care of the children and the amount of food on hand. Two of the referrals involved allegations of medical neglect. On one such occasion Sandy Carmichael, a CPS worker, was asked to investigate a "labial tear" on the older child. The appellant had no idea how or when the injury had occurred. Carmichael testified that the physician who examined the child was concerned, in that such an injury would be extremely painful and it would be very difficult not to know when it had occurred. The second medical neglect referral involved a bump on the child's groin area which was not receiving any attention.

The State adduced additional testimony showing that appellant exhibited poor care and supervision of the children and was uncooperative with those people trying to assist her in her parenting skills. Finally, there was testimony showing that appellant had been mistakenly giving medication to the younger child rather than to the older child for whom it had

been prescribed.

A parent aide testifying on behalf of the appellant told the court she found appellant to be cooperative and an adequate housekeeper. At the time of the parent aide's involvement with the appellant, the appellant was pregnant with her second child. However, when asked by the court whether she had any concerns about the care the child was receiving, the witness told the court she was concerned in that the appellant would often have men come into her house and this caused some concern about the appellant's neglecting the child when there were other people in the house. The witness also told the court she felt that appellant was not being completely honest with her concerning the circumstances of her life.

At the close of this hearing, the separate juvenile court of Douglas County found the children to come within the meaning of § 43-247(3)(a) in that the appellant had failed to provide a permanent, stable, and independent residence for the family; had failed to properly budget her ADC money, resulting in the children's not having sufficient food and many of the bills' not being paid; and had failed to cooperate with the many agencies attempting to help her in improving her less than adequate parenting skills. The court found it to be in the best interests of the children that they remain in the custody of the Nebraska Department of Social Services foster care placement. A dispositional hearing was set for August 29, 1984.

At the dispositional hearing the State adduced in evidence, without objection, reports of Karen Swartz of CPS and Frank Kros, the court service officer, as well as the psychological report on the appellant as prepared by Peter Knolla, a psychologist. The report of Swartz indicated the children were adjusting well in their respective foster homes. The report also indicated that appellant had visited the children on 14 of 17 scheduled visitations. The report of Kros showed that appellant had moved for approximately the seventh time since April of 1984. The psychological report indicated that appellant was functioning in the borderline retarded range of intelligence. She was diagnosed as having a mental deficiency and a passive-aggressive personality. She was found to behave extremely impulsively without thinking of the consequences of her

actions. It was also shown at this hearing that appellant had just begun a new job that was to pay more than ADC. The court ordered that the children remain in foster care placement. Additionally, the court's order required that appellant (1) maintain steady employment, (2) obtain and maintain appropriate permanent housing, (3) complete a parent training program, (4) be allowed reasonable visitation rights, and (5) establish and maintain a budget.

The matter was before the court on review hearings on December 3, 1984, and January 21 and May 2, 1985, at which times substantially similar orders were entered by the court.

An additional review hearing was held on June 17, 1985. The court reporter could not find the record of the proceedings of this hearing, and no record of those proceedings is before this court. By affidavit of the court reporter, the reports submitted at that hearing are before this court. Those reports show that compliance with the rehabilitation plan was minimal. The appellant had been unable to maintain suitable housing or employment. Visitation was poor despite all transportation arrangements being made by CPS. It was the recommendation of the court service worker that a motion for termination of parental rights be filed, and the court ordered said motion be filed.

The motion for termination of parental rights was filed on July 26, 1985, alleging that the children came within the meaning of Neb. Rev. Stat. § 43-292(6) (Reissue 1984) in that reasonable efforts under the direction of the court had failed to correct the conditions that led to the determination that the children came within the meaning of § 43-247(3)(a). A hearing was held on November 13, 1985. The appellant was not present at the hearing. After a preliminary examination, the court found proper notice had been served on appellant and had been received by her. Evidence was adduced showing that the court-ordered plan of rehabilitation had not been followed. Testimony was adduced showing that in the 15-month period from April of 1984 through June of 1985 the appellant had moved at least 15 times and had resided at a minimum of 10 different locations, in addition to time spent living on the street. It was also shown that appellant refused to follow through with

counseling or cooperate with CPS and that appellant did not visit with her children on all available dates. During the time from April 11, 1985, after appellant had moved to Lincoln, to the date of the filing of the motion for termination, the appellant only made three visits to the children, despite the fact that all transportation needs were being provided by CPS. From July of 1985 to November of 1985, the appellant visited her children on only six occasions. Appellant herself, at a later date, testified that her visits were at times once a week, once every 2 weeks, or 1 or 2 months apart. After the close of the State's evidence appellant's attorney requested a continuance until the appellant was before the court. The juvenile court granted this motion.

The adjudication hearing was continued to April 10, 1986, at which time appellant appeared. Appellant adduced evidence to show that while on ADC, a legitimate source of income, she was able to provide proper housing for herself and her children. The appellant also testified that her oldest child did not want to remain in foster care. On cross-examination the appellant admitted she had no proper housing nor suitable employment. Appellant testified that she had not fully cooperated with the service workers assigned to help her in her parenting skills, but she would not accept responsibility for not cooperating.

In an order dated April 23, 1986, the separate juvenile court of Douglas County, having found that the minor children came within the meaning of § 43-292(6), terminated the parental rights of the appellant to the children. The appellant timely appealed to this court.

The law in the State of Nebraska concerning review of an order terminating parental rights is well settled. Such an order will be reviewed by this court de novo on the record, while according great weight to the findings of the trier of fact, the juvenile court, because that court heard and observed the parties and the witnesses. *In re Interest of J. W.*, 224 Neb. 897, 402 N.W.2d 671 (1987); *In re Interest of D.J. et al.*, 224 Neb. 226, 397 N.W.2d 616 (1986). The right of parents to maintain custody of their children is a natural one, and the order terminating that right must be supported by clear and convincing evidence and should only be issued as a last resort

when no other alternative exists. *In re Interest of J. W., supra; In re Interest of Hochstetler*, 215 Neb. 546, 339 N.W.2d 916 (1983). In any event, however, the primary consideration in a termination proceeding is the best interests of the children. *In re Interest of J. W., supra; In re Interest of J.S., S.C., and L.S.*, 224 Neb. 234, 397 N.W.2d 621 (1986).

The appellant first assigns as error the terminating of parental rights based on appellant's poverty, and the lack of clear and convincing evidence in support of the termination order. She contends that her rights were terminated based on her poverty, but we find, after a de novo review of the record, that the termination was not dependent on the circumstance that appellant is not a rich person but, rather, that appellant has failed to correct the conditions which led to the determination the minor children were children under § 43-247(3)(a), although reasonable help was offered to her under the direction of the court. We have held that while the juvenile court is not required to implement a plan of rehabilitation, the failure to comply with a plan which has been implemented presents an independent reason justifying termination of parental rights. *In re Interest of J. W., supra*. The question we are presented with is whether the evidence supporting the termination order is clear and convincing. We believe that such clear and convincing evidence is in the record.

At the disposition hearing held on August 29, 1984, the appellant was again ordered to comply with a five-step plan of rehabilitation. This plan called for the appellant to maintain suitable employment and suitable housing, to complete a parent training program, and to maintain a budget with assistance, and provided for reasonable visitation. At the first review hearing held on December 3, 1984, it was shown that appellant had accomplished two of the goals set in the court's order. Appellant had obtained and maintained steady employment between August and December of that year and was able to secure a two-bedroom house which was suitable for the children. The parenting program called for in the court's order was postponed until the appellant had maintained her employment and housing and had custody of the children. The appellant was also complying with the order in that she was

working on her budget with Betty Cartwright, an ENCOR worker, and was faithfully visiting the children. Even though the appellant was maintaining employment, it was shown that she had temporarily quit her job for 10 days in connection with a move to Lincoln. Through the intervention of Cartwright, the appellant was able to regain her job upon her return to Omaha. The evidence further showed that, while appropriate housing had been found, the appellant was facing possible eviction for violating her rental agreement by allowing other adults to live in the house. The court issued substantially the same order but provided for extended visitation.

On January 21, 1985, the matter was again reviewed. At this time it was shown that appellant's compliance was improving in that she had maintained her employment and regular visitation. The appellant's housing situation was not shown to have improved. Appellant was still allowing other adults to reside at the residence, in violation of the rental agreement. In addition, a problem had arisen concerning the possible sexual abuse of the older child during an extended visitation with appellant. The record shows appellant had the children on extended visitation during the weekends of December 7 and 8, and 24 and 25, 1984. After the children returned to the foster homes following these visits, the foster mother of the older child had noticed the child was exhibiting sexually acting-out behavior. Specifically, the foster mother reported to Karen Swartz of CPS that the older child was playing with her vagina all the time. Swartz conducted an interview of the child, at which time the child stated, "Daddy hurt me, Daddy hurt my butt." An investigation into the matter was conducted by the Omaha Police Division. Appellant was questioned concerning the two adult males living with the appellant at the time of the alleged sexual abuse. When asked if she was alone, the appellant held up two fingers to the investigating police and pointed to the closet. Appellant then told the officers that the two men who were living with her were hiding in the closet. Appellant stated that they were hiding because they were afraid the CPS worker or the landlord would find them. After this hearing, extended visits were canceled until the matter of the alleged sexual abuse was resolved.

Appellant's next review hearing was held on May 2, 1985. It was shown that in the time since her last review in January, the appellant had lost her job as well as her place of residence. Compliance with the rehabilitation plan was again minimal. The record shows that appellant had moved to Lincoln without notifying the court of her whereabouts, had been fired from her job due to excessive absenteeism, and had been evicted from her house because she failed to adhere to the rental agreement, in that she allowed other adults to live with her. At this time the court again ordered appellant to show compliance with the plan within 45 days.

The appellant's compliance with the program was never shown to have improved. We hold that the record establishes clear and convincing evidence to support the termination of appellant's parental rights based on her failure to follow the court-ordered plan of rehabilitation.

The appellant further contends that she was deceived into the voluntary relinquishment of her children to foster care on the promise that they would be provided with temporary, stable housing, only to have a juvenile court petition filed immediately thereafter. The record is devoid of any showing of inducement or deception on behalf of the Nebraska Department of Social Services in connection with the voluntary relinquishment of appellant's children. Appellant testifies that the children were placed in foster care because the appellant felt it was unfair to subject them to the lifestyle she was leading. The record shows that in the 3 months preceding April 6, 1984, the date on which the children were placed in foster care, the appellant had had three different residences. The placement of the children was done voluntarily by appellant, and at the first adjudication hearing, appellant did not object to the children's remaining in foster care. There is no merit in appellant's argument that she was deceived into giving up her children.

The appellant further argues the court-ordered plan of rehabilitation was unreasonable. We have held that when a rehabilitation plan is implemented, the plan must be reasonable and conducted under the direction of the juvenile court before failure to comply with the plan can be an independent reason for termination. *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985). The plan involved in the case

at bar required only that the appellant maintain suitable housing and suitable employment, participate in a parent training program, maintain regular visitation, and establish and maintain a budget. The evidence showed that for a short time the appellant generally complied with the plan, but she did not continue to do so. We cannot say that a plan is unreasonable when compliance therewith is prevented only by the fault of the appellant. The appellant demonstrated compliance was possible for her, but she refused to continue the plan for unknown reasons. The plan in and of itself was not unreasonable.

Finally, the appellant contends the decision of the juvenile court should be set aside in the absence of a record of the proceedings of the review hearing held on June 17, 1985. An affidavit of the court reporter stating that the record of the June 17 proceedings is missing is in the record before this court. Exhibits 1, 2, and 3, which were offered into evidence at that hearing, are before this court. The exhibits include a report of the court service officer and a case plan review submitted by Karen Swartz. These reports recommend that a motion for termination be filed in light of appellant's lack of cooperation and failure to comply with the rehabilitation plan. We review the record de novo. We have before us a complete record of the adjudication hearing and the hearing on the motion for termination. We find that it is not prejudicial to the interests of the appellant that a record of the proceedings of the review hearing of June 17, 1985, is not before the court.

It has now been over 3 years since the children were first placed in foster care. We find it to be in the best interests of the children in this case that the parental rights of appellant be terminated. We have held that we will not gamble with a child's future and that children cannot be made to wait uncertain parental maturity. *In re Interest of J.S., S.C., and L.S.*, 224 Neb. 234, 397 N.W.2d 621 (1986); *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985); *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979). We hold the evidence supporting the termination to be clear and convincing, and in the absence of error the decision of the separate juvenile court of Douglas County is affirmed.

AFFIRMED.

CAROLINE R. PEREZ, APPELLEE, V. THOMAS L. PEREZ, APPELLANT.
407 N.W.2d 196

Filed June 12, 1987. No. 86-641.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Richard A. Rowland, for appellant.

Carolyn A. Rothery of Byrne, Rothery, Lewis, Bedel, Tubach & Zielinski, for appellee.

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

PER CURIAM.

This appeal is one in a dissolution of marriage case. The appellee, the wife, filed for a dissolution of the marriage. The trial court granted the dissolution; determined, as requested by the parties, that their only child under the age of majority be considered emancipated; divided the parties' property and debts; and ordered the husband to pay $100 per month alimony for 2 years.

The husband has appealed, alleging that the division of property and award of alimony are "contrary to law."

We have examined the record before us de novo, as is our duty. We find the decision of the district court correct in all respects. The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF C.G.C.S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. C.S., APPELLANT, D.S. AND B.S., INTERVENORS-APPELLEES.
407 N.W.2d 196

Filed June 12, 1987. No. 86-655.

1. **Presumptions: Evidence.** A presumption arises when questions of fact are tried by the court that it will consider only such evidence as is competent.

2. **Parental Rights: Appeal and Error.** This court reviews orders terminating parental rights de novo on the record and will not consider evidence which is erroneously admitted.
3. **Motions for Continuance: Appeal and Error.** The Supreme Court will not reverse a judgment because of the granting or refusing to grant a continuance, except where there has been an abuse of discretion.
4. **Parental Rights.** It is not necessary that a juvenile court await the time that a child shows permanent scars of a parent's inabilities and shortcomings before acting to terminate the relationship.
5. _____. Generally, it is in the best interests of a child that a final disposition be made without undue delay. A court should not gamble with a child's future, awaiting uncertain parental maturity.
6. _____. As a general rule, parents should make reasonable efforts on their own to bring about a rehabilitation so as to resume a parental role.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

Larry D. Ohs, for appellant.

Laurie J. Campbell, Deputy Lancaster County Attorney, for appellee State; Thomas E. Keefe of Peterson Nelson Johanns Morris & Holdeman, for intervenors-appellees; and Randall T. Smith, guardian ad litem.

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

HASTINGS, J.

The mother of C.G.C.S., the juvenile, has appealed from the order of the juvenile court terminating her parental rights. She assigns as error the admission of certain testimony relating to her mental illness; the finding that the evidence clearly and convincingly supported the order of termination; the finding that it was in the best interests of the juvenile that the parental rights be terminated; and the refusal to grant a continuance of the hearing at which parental rights were terminated.

The juvenile was born to the appellant, an unwed mother, on July 14, 1982. When the child was 3 days old, Child Saving Institute received the child from appellant for voluntary foster care. The child was placed with one set of foster parents immediately and, on October 1, 1982, was placed in the foster care of the intervenors, where he remained at the time of the final hearing. The foster parents were allowed to intervene in

this action because the juvenile court concluded that they were necessary parties to these proceedings. No objection has been raised to their appearance, and we do not discuss it.

On September 10, 1984, the juvenile was referred to the Nebraska Department of Social Services from Child Saving Institute when it was learned that the appellant had given birth to another child in April of 1984, which child was placed with the Missouri Department of Social Services when the child was 2 weeks old. Prior to that time, Child Saving Institute had worked with appellant to help her work out a reunification plan, during which she would learn the necessary child care skills. That plan was not carried out because appellant left Nebraska about 2 weeks later, and when she recontacted the agency, it was from Missouri, where she was hospitalized at the time. A second reunification plan was worked out with the appellant in August of 1983, which was to last a year. At the end of the year certain parts of the plan had not been carried through.

In a medical and psychiatric assessment conducted by the Missouri Department of Mental Health on July 9, 1984, appellant reported long-term psychiatric problems. Appellant, who at the time was 26 years old, was found to be immature, naive, and tangential, reporting excessive dependency and attachment to her mother.

On December 11, 1984, the juvenile court found the juvenile to be a child as defined by Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982), lacking proper parental care through no fault of the mother. Specifically, the court found that the appellant was not able to resume care of the juvenile. Temporary legal custody of the juvenile was granted to the Department of Social Services, with reasonable rights of visitation by the appellant as long as the visitations did not produce anxiety and emotional disturbance in her child.

The Child Protective Services caseworker for the Department of Social Services expressed that she had a willingness to apply for funds from the reunification program to assist with visitations. However, as of March 5, 1985, that caseworker testified that appellant had not visited with her son since the last court hearing. The only previous court hearing

which appears from the record was conducted on December 11, 1984.

At the time of the next hearing, held on July 30, 1985, on the motion of the guardian ad litem for the juvenile to suspend visitation, this same caseworker testified that only two visitations had been held, one on May 1 and 2, 1985, and the one on July 15 which precipitated the hearing. On that latter date, according to the testimony of the caseworker, it was a very stressful visit. The appellant accosted her son, who had told her that he did not want to see her. She threatened to grab him and take him away to St. Louis. She verbally abused and physically attacked the caseworker in the presence of the juvenile. This caused the juvenile great emotional stress, nightmares, and sleeplessness, even up until the final hearing on July 10, 1986.

In addition to the testimony of the caseworker and the foster mother, as detailed above, a psychiatrist testified that, in his opinion, from prior observations of appellant in a court proceeding, she showed typical signs of long-term paranoid schizophrenia. In his opinion it would be detrimental to have any further contact between the juvenile and his mother.

At the conclusion of the July 30, 1985, hearing, the juvenile court ordered personal visits by the appellant to be suspended until such time as she presented proof that she had corrected her behavior and could visit her child without producing anxiety and emotional disturbance in the child. No such proof has ever been offered.

The hearing conducted on July 10, 1986, to terminate parental rights was substantially a rehash of the previous hearings. In addition, there was testimony by the foster mother that since the July 1985 hearing, the appellant had made two telephone calls to her, one very abusive, and had written two letters. In fairness, it should be said that the boy refused to talk to his mother, and the foster mother did not answer the letters addressed to the juvenile because he said he did not want them answered.

There was also testimony that three different mental health examinations had been set up for appellant, the last being in February of 1986, none of which appointments she kept. Her attorney-guardian ad litem argued that she missed those three

appointments because, at the time of the first appointment, she did not have transportation arranged; at the time of the second one, she had just started working; and at the time of the third one, she was in the hospital. There is nothing else in the record to substantiate those claims. The record does not disclose that she ever contributed anything to her son's support or that she ever worked longer than 2 or 3 weeks at a time.

The juvenile court found at the hearing on the petition to terminate parental rights that appellant had failed to comply with any plan for reunification and had failed to submit as ordered to various mental health examinations. Additionally, the court found that appellant had failed to demonstrate that she could accomplish visitations without producing anxiety and emotional disturbance of the child. Finally, the court concluded that grounds existed for the termination of the parental rights of appellant under Neb. Rev. Stat. § 43-292(2) and (6) (Reissue 1984): "The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection"; and "[f]ollowing 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."

Appellant first argues that the court erred in receiving the testimony of the psychiatrist because there was no allegation in the petition to terminate parental rights for the reason that appellant was "unable to discharge parental responsibilities because of mental illness . . . ." § 43-292(5). There is nothing in the findings of the court to reveal that it relied in any way on such evidence.

A presumption arises when questions of fact are tried by the court that it will consider only such evidence as is competent and relevant. *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980). In any event, we review an order terminating parental rights de novo on the record and will not consider evidence which is erroneously admitted. There was no prejudice to the appellant.

The other specific error claimed was the refusal of the court to grant to appellant a continuance of the hearing on the

petition to terminate. Hearing was originally set for June 4, 1986. On motion of appellant's attorney-guardian ad litem, filed on May 30, requesting that the case be continued until July, it was rescheduled for July 10. On that date, counsel once again moved for a continuance, alleging that his client could not get to court from St. Louis, since her mother was unable to bring her. The mother had been injured in an accident in March. There was no showing that any effort had been made since May 30 to arrange for other means of transportation. In the past, as is apparent from the record, the Department of Social Services had made arrangements for her transportation for visitations.

Neb. Rev. Stat. § 25-1148 (Reissue 1985) provides that an application for a continuance shall be by written motion and supported by affidavits. No reversal by the Supreme Court of an order granting or refusing a continuance shall be had, except where there has been an abuse of sound legal discretion by the lower court. At the time of trial, the juvenile had been in foster care for the entire first 4 years of his life. The court had been frustrated time and again by the appellant's failure to comply with its orders. There was no abuse of discretion.

Finally, we deal with appellant's claim that the evidence failed to clearly and convincingly support the order of termination and the finding that termination would be in the best interests of the juvenile.

We have said many times, in effect, that it is not necessary that the court await the time that the child shows permanent scars of the mother's inabilities and shortcomings before acting to terminate the relationship. *In re Interest of R.L.T.*, 221 Neb. 251, 376 N.W.2d 310 (1985). Generally, it is in the best interests of the child that a final disposition be made without undue delay. We will not gamble with a child's future, awaiting uncertain parental maturity. *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985).

This child has been forced by the recalcitrance of his mother to wait his entire lifetime. He has known no parents but his foster parents. The evidence is overwhelming that to force him out of this relationship would create emotional trauma of undetermined dimensions.

Appellant not only failed to follow the plan of the court to

rehabilitate herself, she failed to make reasonable efforts on her own to bring about such rehabilitation. *In re Interest of W.*, 217 Neb. 325, 348 N.W.2d 861 (1984). As far as the mother ever being able to raise this child, the situation is hopeless.

The judgment of the juvenile court is affirmed.

AFFIRMED.

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

SHERRI K. GERBER, APPELLEE, V. HELMUT GERBER, APPELLANT.
407 N.W.2d 497

Filed June 12, 1987. No. 86-678.

1. **Divorce: Appeal and Error.** In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Child Custody.** In placing a child's custody with a parent in a dissolution proceeding, a court's primary and paramount consideration is the best interests of the child. Some factors or circumstances which may be considered in a court's determination of a child custody issue include considerations of the fitness of the parents; the respective environments offered by each parent; the emotional relationship between a child and each parent; the child's age, general health, welfare, and social behavior; the effect on a child, if a particular parental relationship is continued or disrupted; parental attitude and stability of character; parental capacity to furnish physical care, education, and other reasonable needs of a child; and, when appropriate, the desires and wishes of a child.
3. _____. In determining whether a noncustodial parent will have visitation rights and the nature of such visitation rights, the best interests of a child are the primary and paramount consideration by a court.
4. _____. Ordinarily, a noncustodial parent's visitation rights are exercisable within the jurisdiction, unless the best interests of the child require otherwise.
5. _____. In proceedings to dissolve a marriage, placing a child in the custody of a parent does not prevent the custodial parent's departure from the jurisdiction at the risk of losing child custody.
6. _____. Before a court will permit removal of a child from the jurisdiction, generally, a custodial parent must establish that such removal is in the best

interests of the child and must demonstrate that departure from the jurisdiction is the reasonably necessary result of the custodial parent's occupation, a factually supported and reasonable expectation of improvement in the career or occupation of the custodial parent, or required by the custodial parent's remarriage.

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

James D. Livingston of Cunningham, Blackburn, Livingston & Francis, for appellant.

Gwyer Grimminger of Grimminger & VonSeggern, for appellee.

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

PER CURIAM.

On May 17, 1982, Sherri K. Gerber filed her petition in the district court for Hall County, Nebraska, and sought a dissolution of her marriage with Helmut Gerber. The petition alleged that the Gerbers were married on August 7, 1972. As petitioner, the wife also requested a division of marital property and custody of the parties' minor children: Elizabeth Gerber, born on January 14, 1975; David Gerber, born on June 28, 1977; and Helmut Gerber, Jr., born on January 4, 1981. The case was heard on November 16, 1982, and on that date, as announced from the bench and shown in unsigned "court notes," the court found that the marriage of the parties was irretrievably broken and reserved all other dissolution matters for later disposition, when the parties might request to reopen the record regarding custody and support issues.

Petitioner "married" Kendall Soll on September 7, 1983. As shown in its journal entry, the court, on September 22, divided marital property between the parties but did not dispose of the custody and support issues. On September 23, respondent filed his notice of appeal to this court.

In our opinion issued on August 3, 1984, in *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984), we noted our previous disapproval of bifurcated trials on issues in a dissolution proceeding, see *Humphrey v. Humphrey*, 215 Neb.

664, 340 N.W.2d 381 (1983), and stated:

> [T]here is no final order that may be appealed from as to *any* of the issues between these parties, including the issue of dissolution of the marriage.
>
> . . . In this case, as presented, we adopt the statement set out in *Z & S Constr. Co., Inc. v. Collister*, 211 Neb. 348, 350, 318 N.W.2d 728, 729 (1982), "When, as in this case, substantial rights of the parties remain undetermined and the cause is retained for further action, the order is interlocutory and not final. . . . There being no final order in the District Court, the appeal is dismissed." We apply this holding to dissolution of marriage cases.
>
> The appeal is ordered dismissed. The district court is ordered to, within 5 days of the entry of the mandate from this court, determine all issues between these parties and to make findings and orders as to *all* issues between these litigants.

(Emphasis in original.) 218 Neb. at 231, 353 N.W.2d at 6.

Sometime during October 1984, petitioner, with the Gerber children, moved to Fort Morgan, Colorado, where they resided with Kendall Soll. There was no further court activity in the case until October 31, 1984, when the court entered its "Decree," which, among its provisions, contained the following:

> 1. The marriage of the parties is irretrievably broken and was dissolved on November 16, 1982.
>
> 2. The legal custody of the minor children is retained by the Court and their physical custody is placed with petitioner under supervision of the Department of Social Services.

The decree of October 31, 1984, also set out respondent's visitation rights of his children and ordered respondent to pay child support. On November 2 respondent filed a motion for new trial and, on November 13, an "Application for change of custody . . . for the reason that the Petitioner, Sherri K. Gerber, has moved from the State of Nebraska without the permission of this Court and without any type of consent from your Applicant . . . ." That application was never submitted for disposition, and on November 20, in response to respondent's

motion, the court granted a new trial in the case.

In court notes under the date of November 21, 1984, there appears the following: "Motion for removal of minor children to Colorado [is] set for 11-27-84 @ 1:30 p.m." However, neither the motion for removal of the Gerber children to Colorado nor the date on which such motion was filed appears in the record presented to this court. As further reflected in the court's notes, on December 21, 1984, attorneys for the parties were present before the court when the court entered an order concerning respondent's visitation rights: "Resp's visittion [sic] to be every other weekend. 1 weekend in G.I. [Grand Island, Nebraska] Pet and Resp to each pay 1/2 transp and every other holiday. Resp to have visitation 12-22-84 thru 12-23-84 at the home of his parents." Later, in the court's notes, there appears the following as an entry on March 29, 1985:

> Parties and attys present re Resp. app. for contempt order. Pet orally moves for modification of visitation rt. test and arguments heard. App for order of contempt denied. Visitation modified as follows on the weekends visitation. Resp. to have from 4 p.m. Friday to 7 p.m. Sunday. Ft Morgan time or wherever children reside. Pet to keep Resp's advised of her address or telephone # if any. Attys stip that the child Elizabeth visit with ct in chambers. Resp. to notify Pet at least 2 days prior to visitation.

The next activity in the case occurred on July 15, 1985, when, after a trial based on "the Bill of Exceptions submitted from the previous trial," the court entered a decree which recited: "That the marriage between the Petitioner and the Respondent is irretrievably broken . . . and the marriage is hereby dissolved." The July 15 decree then stated that petitioner was granted custody of the Gerber children, ordered respondent to pay child support for each of the Gerber children, and set forth respondent's "right to reasonable visitation with the minor children" at specific times on "every other weekend starting with the first weekend after this Decree is entered . . . ." The decree also contained:

> It is recognized that the children are now residing outside of the State of Nebraska, and it is the responsibility of Petitioner to file appropriate pleadings in this Court,

> requesting consent to reside with the children outside of Nebraska, at which time visitation schedules may be subject to modification upon the Respondent's request.

On July 17, 1985, respondent filed a motion for new trial, which was granted by the court on August 30.

Retrial occurred on October 28, 1985.

At trial, petitioner testified that she and the children reside in Fort Morgan, Colorado, and that Mr. Soll is gainfully employed. Petitioner also testified that Elizabeth and David were enrolled in school, where they were "doing fine . . . doing real good." At the time of trial Helmut, Jr., then 4 years of age, was not in any type of school. During the summer months the children participated in swimming and baseball. Elizabeth was receiving counseling from a school counselor for some condition which causes Elizabeth to cry, scream, and beg her mother "not to send [the Gerber children] back to her father's." Petitioner further testified about a time when Elizabeth went to visit the respondent for 2 days and returned with a broken arm, which had not been broken before visitation with the respondent. On one occasion, after Elizabeth's return from visitation with her father, the petitioner observed bruises on Elizabeth's buttocks. Also, petitioner testified about an incident after one of Helmut, Jr.'s, weekend visits with his father. As testified by the petitioner, Helmut, Jr.,

> had a butcher knife stab wound in his hand and his hand was so infected you couldn't see his knuckles and we had to rush him to the hospital and get him a shot; and they said it should have had stitches, but it was too late so they taped it up with butterflies as good as they could and gave me antibiotics and gave him a shot and stuff.

Respondent testified that he lives in Grand Island, Nebraska, and it is approximately 1,000 miles round trip from Grand Island to petitioner's home in Colorado. Respondent also testified he never had any problems with the children. The respondent further testified that Elizabeth had sustained a broken arm when she fell from her bicycle and that the bruises on Elizabeth were present when respondent had picked up the children for visitation. The knife wound to Helmut, Jr., happened when the boy accidentally cut himself with a utility

knife, not a butcher knife as testified by the petitioner. Respondent then described summer visitation with the children, including such activities as swimming, roller skating, and bicycling. At the time of trial respondent was laid off from his employment at Sperry-New Holland and was self-employed in repair work of mobile homes. Respondent's employment involves between 30 and 50 hours per week for 2 weeks out of each month.

Trial concluded on October 28, and the matter was taken under advisement pending receipt of "home studies" suggested by the court.

On December 24, 1985, petitioner, with her attorney, and respondent's attorney appeared before the court concerning respondent's "motion for visitation over holidays." The court, on December 24, ordered respondent's visitation of his children for 2 days, that is, on December 26 and 28, from 9 a.m. to 7 p.m., at the home of respondent's parents.

When the hearing, which had been adjourned from October 28, 1985, resumed on July 17, 1986, apparently the home studies had been received but are not a part of the record presented to this court. At the hearing on July 17, the court found that the parties' marriage was irretrievably broken and placed custody of the Gerber children with the petitioner. The journal entry for the July 17 hearing recites:

> [This] matter came on for hearing on dissolution the 28th day of October, 1985, on which date testimony was taken and adduced and the matter adjourned pending receipt of a home study of the parties' homes rendered by appropriate agencies in Hall County, Nebraska, and Weld County, Colorado. Upon receipt of the referred to home studies, the matter was further heard on the 23rd day of June, 1986, and the matter was thereupon taken under advisement until this the 17th day of July, 1986.
>
> . . . .
>
> Petitioner is granted custody of the minor children, subject to Respondent's visitation as hereinafter set out:
>
> 1. Respondent shall be entitled to visitation with the minor children, in Fort Morgan, Colorado, the last Saturday of each and every month, between the hours of

10:00 A.M. and 6:00 P.M.

2. Respondent shall be entitled to visitation on every other 4th of July, Thanksgiving and Christmas Day, commencing on Thanksgiving, 1986, on which holiday Respondent shall be entitled to visitation.

a. On the concerned holidays, when Respondent shall be entitled to visitation, Petitioner shall deliver the children to an agreed upon place in Ogallala, Nebraska, where they shall be picked up by Respondent, no later than 8:00 A.M. on the concerned holiday and returned to that same place no later than 8:00 P.M. on the same date unless otherwise agreed by the parties.

3. Respondent shall be further entitled to custody of the minor children for a two (2) week period during the summer, such custody to be under the supervision of the Hall County Welfare department, they to undertake such supervision upon notification by the Petitioner. The visitation referred to shall take place during the last two (2) weeks of the month of July.

4. Respondent shall pay child support in the sum of $100.00 per month per child, commencing forthwith. The Court in setting child support is taking into consideration the travel time involved on the part of the Respondent in light of the Petitioner's present residence in Fort Morgan, Colorado.

Respondent has appealed to this court and, as assignments of error, claims that the trial court abused its discretion in awarding custody to the petitioner, in setting the visitation rights for respondent, and in failing to make any finding whether petitioner was granted permission to leave the jurisdiction with the parties' children, which departure from the jurisdiction was a substantial change of circumstances constituting sufficient basis for changing custody from petitioner to respondent. In addition to the foregoing assignments of error, the respondent claims that the "doctrine of 'unclean hands' " prevents "affirmative relief under the court's equity jurisdiction."

In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de

novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). See, also, *Parsons v. Parsons*, 219 Neb. 736, 365 N.W.2d 841 (1985).

In placing a child's custody with a parent in a dissolution proceeding, a court's primary and paramount consideration is the best interests of the child. Some factors or circumstances which may be considered in a court's determination of a child custody issue include considerations of the fitness of the parents; the respective environments offered by each parent; the emotional relationship between a child and each parent; the child's age, general health, welfare, and social behavior; the effect on a child if a particular parental relationship is continued or disrupted; parental attitude and stability of character; parental capacity to furnish physical care, education, and other reasonable needs of a child; and, when appropriate, the desires and wishes of a child. See, Neb. Rev. Stat. § 42-364 (Reissue 1984) (custody determination); *Moeller v. Moeller*, 215 Neb. 360, 338 N.W.2d 749 (1983); *Wible v. Wible*, 209 Neb. 708, 310 N.W.2d 515 (1981).

After our de novo review of the record and in view of the conflicting evidence presented to the trial court, we are unable to conclude that the trial court abused its discretion in deciding the issue of custody of the Gerber children, and, therefore, we affirm the district court's judgment on custody of the Gerber children placed with the petitioner.

In determining whether a noncustodial parent will have visitation rights and the nature of such visitation rights, the best interests of a child are the primary and paramount consideration by a court. See, *Gottschall v. Gottschall*, 210 Neb. 679, 316 N.W.2d 610 (1982); *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980); *Jafari v. Jafari*, 204 Neb. 622, 284 N.W.2d 554 (1979).

Ordinarily, a noncustodial parent's visitation rights are

exercisable within the jurisdiction, unless the best interests of the child require otherwise. See, *Boll v. Boll*, 219 Neb. 486, 363 N.W.2d 542 (1985); *Gottschall v. Gottschall, supra; Jafari v. Jafari, supra; Erks v. Erks*, 191 Neb. 603, 216 N.W.2d 742 (1974).

In proceedings to dissolve a marriage, placing a child in the custody of a parent does not prevent the custodial parent's departure from the jurisdiction at the risk of losing child custody. See, *Korf v. Korf*, 221 Neb. 484, 378 N.W.2d 173 (1985); *Boll v. Boll, supra.*

Before a court will permit removal of a child from the jurisdiction, generally, a custodial parent must establish that such removal is in the best interests of the child and must demonstrate that departure from the jurisdiction is the reasonably necessary result of the custodial parent's occupation, a factually supported and reasonable expectation of improvement in the career or occupation of the custodial parent, or required by the custodial parent's remarriage. See, *Vanderzee v. Vanderzee*, 221 Neb. 738, 380 N.W.2d 310 (1986); *Korf v. Korf, supra; Boll v. Boll, supra; Gottschall v. Gottschall, supra.*

Ordinarily, if parental visitation is in a child's best interest, a court determines the nature and extent of visitation rights on a case-by-case basis and may consider many factors and circumstances in each individual case, such as age and health of the child; character of the noncustodial parent; the place where visitation rights will be exercised; frequency and duration of visits; the emotional relationship between the visiting parent and the child; the likely effect of visitation on the child; availability of the child for visitation; likelihood of disrupting an established lifestyle otherwise beneficial to the child; and, when appropriate, the wishes of the child. See *Heyne v. Kucirek*, 203 Neb. 59, 277 N.W.2d 439 (1979). See, also, 24 Am. Jur. 2d *Divorce and Separation* §§ 999 et seq. (1983); 27C C.J.S. *Divorce* §§ 632 et seq. (1986). The aforementioned factors or circumstances are neither exhaustive nor absolutely inflexible in determining any aspect of a noncustodial parent's visitation rights.

We find that the Gerber children's living with petitioner at

Fort Morgan, Colorado, is appropriate under the circumstances and is in the best interests of the Gerber children. Also, such finding is implicit in the district court's order on respondent's visitation of his children, especially in light of the fact that the children have resided with petitioner at Fort Morgan since October 1984. Under the circumstances, however, we find there has been an abuse of discretion by the trial court in its judgment entered concerning respondent's visitation rights, which we hereby modify as follows:

1. On the last Saturday of each month and the immediately succeeding Sunday after such last Saturday of the month, respondent shall be entitled to visit his children in Fort Morgan, Colorado, between the hours of 9 a.m. and 7 p.m. on each such day of weekend visitation, as aforedescribed, provided, if such visitation regarding the final Saturday and succeeding Sunday would occur on a weekend otherwise involved in visitation specifically prescribed by this modification, then the provisions regarding such other prescribed visitation shall control respondent's visitation of his children.

2. During the Christmas holiday, namely, between Christmas Day and New Year's Day, respondent will be entitled to visit his children at respondent's residence in Grand Island, Nebraska, provided, in odd-numbered years such visitation shall include Christmas Day and shall exclude New Year's Day. When such visitation includes Christmas Day, respondent is entitled to pick up his children at Fort Morgan, Colorado, at noon on December 24 and shall return his children to petitioner's residence in Fort Morgan not later than 5 p.m. on December 31. In even-numbered years, respondent shall be entitled to pick up his children in Fort Morgan at noon on December 26 and shall return his children to petitioner's residence in Fort Morgan not later than 5 p.m. on January 2, provided, if January 2 is a schoolday for any of respondent's visiting children, respondent shall return all his children to petitioner's residence in Fort Morgan not later than 5 p.m. on January 1.

3. For the last 2 consecutive weeks in July of each year, respondent shall be entitled to visit his children at Grand Island, Nebraska.

4. For Thanksgiving occurring in an odd-numbered year,

respondent shall be entitled to visit his children in Grand Island. Such visitation shall include Thanksgiving Day and the Friday, Saturday, and Sunday immediately following Thanksgiving. Respondent shall return his children to petitioner's residence in Fort Morgan not later than 5 p.m. on the Sunday immediately after Thanksgiving.

5. For Easter occurring in an even-numbered year, respondent shall be entitled to visit his children in Grand Island. Such visitation shall include the Friday and Saturday immediately before Easter Sunday and Easter Sunday itself, provided, respondent shall return his children to petitioner's residence in Fort Morgan not later than 5 p.m. on Easter Sunday.

6. All times designated for respondent's picking up and returning his children are governed by local time prevailing at Fort Morgan, Colorado. Respondent is responsible for travel arrangements for his children, when travel is necessary for respondent's exercise of his visitation rights. Respondent shall pay all travel expenses for his children concerning exercised visitation rights. All visitation by respondent which occurs at Grand Island, Nebraska, as prescribed by this modification, shall be supervised by the Hall County Welfare Department, as previously ordered by the district court in these proceedings. Petitioner shall notify the Hall County Welfare Department sufficiently in advance of respondent's visitation of his children at Grand Island, Nebraska.

While it is true that respondent, in his November 1984 application, alleged a lack of permission to remove the children from Nebraska and for that reason sought a change of child custody granted to petitioner under the later-vacated decree of October 1984, nevertheless, prior to trial respondent never formally objected to location of his children with petitioner in Colorado. After learning that his children were living in Colorado and without objection on his part, respondent, personally or by counsel, attended at least three hearings and asked the court to determine and specify visitation rights in the light of the children's residence outside Nebraska. We believe that respondent's conduct in requesting visitation rights based on his children's living outside Nebraska and his acquiescence in

the children's living with the petitioner in Colorado for nearly a year after he learned of that situation preclude respondent's invoking any equitable maxim of "clean hands" in relation to petitioner's departure from Nebraska, with the Gerber children, to reside in Colorado.

Respondent has not appealed from the district court's order for child support, which remains in effect as entered.

The judgment of the district court is, therefore, affirmed as modified.

AFFIRMED AS MODIFIED.

GRANT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. BILLY ROY TYLER, APPELLANT.
407 N.W.2d 200

Filed June 12, 1987. No. 86-798.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Billy Roy Tyler, pro se.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

PER CURIAM.

Billy Roy Tyler appeals the decision of the district court for Douglas County, denying Tyler's motion for postconviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1985). We affirm.

While incarcerated in the Douglas County Corrections Center, Tyler was found by correctional officers to be in possession of hashish. Tyler was charged with unlawfully and knowingly or intentionally possessing a controlled substance other than marijuana, namely, tetrahydrocannabinol (hashish).

Possession of a controlled substance, other than marijuana, is a Class IV felony, punishable by up to 5 years' imprisonment, or a fine of $10,000, or both. See Neb. Rev. Stat. §§ 28-105 and 28-416 (Reissue 1985). After being fully advised of his constitutional rights, Tyler, pro se, entered a plea of "no contest" to the charge. From evidence presented when Tyler entered his "no contest" plea, the court determined there was a factual basis underlying the plea and accepted Tyler's plea. Later, the court sentenced Tyler to the Nebraska Penal and Correctional Complex for a period of not less than 20 months nor more than 5 years.

On July 18, 1986, we affirmed Tyler's conviction and sentence, finding that the plea of no contest was made freely, knowingly, and voluntarily, and that the sentence imposed was within statutory limits and free of an abuse of discretion. See *State v. Tyler*, 223 Neb. 473, 390 N.W.2d 40 (1986).

On July 22, 1986, Tyler, pro se, filed a motion for reduction of sentence in the district court for Douglas County pursuant to Neb. Rev. Stat. § 29-2308.01 (Cum. Supp. 1986), claiming that his sentence of 20 months to 5 years was cruel and unusual punishment in violation of the eighth amendment to the U.S. Constitution. The district court overruled Tyler's motion. Tyler did not file a notice of appeal regarding disposition of his motion for reduction of sentence.

On August 26, 1986, Tyler, again pro se, filed a "Motion for Vacation of Sentence" and requested postconviction relief under § 29-3001. Tyler moved to have his conviction and sentence set aside, arguing that evidence was insufficient to establish possession of a controlled substance because there was no evidence before the court showing that the hashish which Tyler possessed was 10 percent or more by weight of tetrahydrocannabinols (THC), as required by Neb. Rev. Stat. § 28-401(34) (Reissue 1985). On September 9, 1986, the district court, after reviewing the files and records of Tyler's case, found that Tyler was not entitled to postconviction relief, refused to order an evidentiary hearing, and, therefore, overruled Tyler's motion for postconviction relief. On September 15, Tyler filed a "Motion to Reconsider," which, under the circumstances, we construe to be a motion for new

trial, asking the district court to reconsider its order of September 9 and arguing the same grounds for relief, insufficiency of evidence concerning the percentage of THC contained in the hashish in Tyler's possession. Tyler's motion to reconsider was overruled by the district court on September 17, 1986. On September 23, Tyler filed a notice of appeal in the district court, appealing the orders entered on September 9 and 17, 1986.

Tyler's pro se briefs filed in support of his appeal do not raise any issues adjudicated in reference to his motion for postconviction relief, but, rather, argue that Tyler's sentence of 20 months to 5 years is cruel and unusual punishment in violation of the eighth amendment to the U.S. Constitution. Tyler also filed several motions in this court, seeking to have the issues on appeal changed so that his appeal relates to the district court's overruling Tyler's motion for a reduced sentence, which raised the eighth amendment issue.

Tyler's motion for reduction of sentence was overruled by the district court on July 22, 1986. In order for this court to obtain jurisdiction to hear an appeal of the district court's judgment overruling Tyler's motion for reduction of sentence, it was necessary for Tyler to have filed a notice of appeal in the district court within 1 month after the court's order was entered on July 22. See, Neb. Rev. Stat. § 25-1912 (Reissue 1985); *State v. Bridger*, 223 Neb. 250, 388 N.W.2d 831 (1986). No notice of appeal was filed concerning disposition of Tyler's motion for reduction of sentence. Therefore, this court has no jurisdiction to address any issues raised by Tyler in his motion for a reduced sentence.

Tyler's brief neither assigns as error nor discusses any issues or rulings by the district court regarding his motion for postconviction relief. The Supreme Court's consideration of an appeal is limited to errors assigned and discussed in the appellant's brief. See, Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Therefore, the judgments of the district court on September 9 and 17, 1986, denying postconviction relief for Tyler, are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH L. BURKE, APPELLANT.

408 N.W.2d 239

Filed June 12, 1987. No. 86-809.

1. **Appeal and Error.** Errors assigned but not discussed will generally not be considered by this court.
2. **Trial: Evidence: Appeal and Error.** A defendant may not permit questionable or incompetent evidence to be admitted without objection, take the chance of a favorable result, and after an unfavorable outcome complain that the evidence was received.
3. **Trial: Evidence: Stipulations: Appeal and Error.** A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with the stipulation.
4. **Constitutional Law: Appeal and Error.** Generally, this court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated.
5. **Constitutional Law: Statutes: Standing.** A defendant who would receive no benefit from a declaration of invalidity does not have standing to challenge the constitutionality of a statute.
6. _____: _____: _____. The traditional rule is that one to whom a statute may be applied constitutionally does not have standing to challenge that statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the court; however, an exception to that rule is made when a statute is overbroad. In the latter instance one is allowed to assert the rights of others and attack the overbreadth of a statute even though the behavior of the person making the attack clearly may be unprotected and could be proscribed by a law drawn with the requisite narrow specificity.
7. _____: _____: _____. Where conduct and not merely noncommercial speech is involved, the overbreadth of the statute attacked must not only be real but substantial as well, judged in relation to the statute's plainly legitimate sweep.
8. **Constitutional Law: Legislature: Presumptions: Statutes.** Legislative enactments are afforded a presumption of constitutionality.
9. **Criminal Law: Statutes.** A penal statute is construed strictly and must be sufficiently clear so that a person of ordinary intelligence has fair notice of exactly what conduct is forbidden.
10. **Constitutional Law: Statutes.** Where a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted.
11. _____: _____. A statute challenged as overbroad should be construed so as to avoid constitutional problems if it is subject to such a limiting construction.
12. _____: _____. Unconstitutionality must be clearly established before this court is authorized to declare a statute void.
13. **Constitutional Law: Statutes: Standing.** One who has engaged in conduct which is clearly prohibited by the questioned statute cannot complain that the statute is vague when applied to the conduct of others.

14. **Criminal Law: Statutes.** A penal statute is given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
15. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
16. **Criminal Law: Statutes: Prosecuting Attorneys.** Where a single act violates more than one statute, a prosecutor is free to prosecute under any statute he or she chooses, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.
17. **Statutes: Presentence Reports: Mentally Disordered Sex Offender.** A sentencing court has a mandatory duty under Neb. Rev. Stat. § 29-2912 (Reissue 1985) to order an evaluation of one convicted of a felony sexual offense for the purpose of determining whether he or she is a mentally disordered sex offender.
18. **Mentally Disordered Sex Offender: Words and Phrases.** A mentally disordered sex offender is one who, because of a mental disorder, has been determined to be disposed to repeated commission of sexual offenses which are likely to cause substantial injury to others.
19. **Mentally Disordered Sex Offender: Sentences.** One found to be a treatable mentally disordered sex offender shall be committed for treatment if treatment is available in this state, as well as sentenced in accordance with law.
20. **Mentally Disordered Sex Offender: Words and Phrases.** A sexual offense within the meaning of Neb. Rev. Stat. § 29-2911 (Reissue 1985) includes any felony in which the sexual excitement of the offender is a motivational factor.
21. **Records: Appeal and Error.** An assignment of error requiring an examination of the evidence cannot prevail on appeal in the absence of a proper bill of exceptions.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Donald B. Fiedler and Martin J. Kushner of Fiedler Law Offices, for appellant.

Robert M. Spire, Attorney General, and Marie C. Pawol, for appellee.

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

CAPORALE, J.

Following a bench trial, defendant, Joseph L. Burke, was adjudged guilty of having violated Neb. Rev. Stat. § 28-1463.03(1) (Reissue 1985), a part of the Child Pornography Prevention Act as adopted by 1985 Neb. Laws, L.B. 668, and codified as Neb. Rev. Stat. §§ 28-1463.01 through 28-1463.05 (Reissue 1985), inclusive. Burke was

thereafter sentenced to serve a term of not less than 2 nor more than 5 years at the Nebraska Penal and Correctional Complex. He appeals and assigns as error the district court's determination that (1) the participants were under the age of 16, (2) the statute is constitutional, (3) the offense constitutes a Class III felony, and (4) he is not a mentally disordered sex offender. (Burke undertook to raise via a supplemental brief a claim that the sentence imposed is technically defective, but withdrew that claim when appearing for oral argument.) We affirm.

Gerald High, during the course of an investigation of his activities, informed the Lincoln Police Department that Burke owned a large library of pornographic material, some of which was child pornography. The Lincoln police passed the information along to the Omaha Police Division, which then undertook an investigation of Burke's activities. On November 12, 1985, High telephoned Burke from the Omaha Police Division and arranged a meeting at Burke's home. High brought Omaha Police Sgt. John Beers along, who posed as a friend of High.

High asked Burke to copy a videocassette tape which High had himself filmed at an earlier time. The High tape shows a number of nude males, at least one of whom is under 16 years of age, displaying their genitals, touching each other's unclothed genitals, and engaging in masturbation, oral-genital sex, and simulated anal-genital sex.

While the High tape was being copied, High asked Burke to play another videocassette tape for them to watch. Burke complied by playing a tape of a commercial 8-millimeter movie, "Cousin Bill," which had been filmed in 1975 and transferred to videocassette tape at an undisclosed time. This tape shows boys approximately 10 to 13 years old displaying their genitals, touching each other's unclothed genitals, and engaging in masturbation, oral-genital sex, and anal-genital sex. During the process of copying the High tape and watching "Cousin Bill," other officers who had been monitoring the conversation in the Burke home via a hidden microphone on Beers were summoned into the home, and Burke was arrested.

New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed.

2d 1113 (1982), in upholding the constitutionality of a statute which prohibited persons from knowingly promoting sexual performances by children under age 16 by distributing material which depicts such performances, ruled that even nonobscene child pornography is entitled to no protection under the first amendment to the U.S. Constitution, provided the conduct to be prohibited is adequately defined by applicable state law, as written or authoritatively construed. In so holding, the U.S. Supreme Court recognized that states have a compelling interest in safeguarding the physical and psychological well-being of minors and that states are therefore entitled to great leeway in regulating pornographic depictions of children.

With the *Ferber* holding in mind, Judiciary Committee Hearing, L.B. 668, 89th Leg., 1st Sess. 112 (Mar. 5, 1985), our Legislature enacted § 28-1463.03(1), which provides: "It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers."

Some of the terms employed in the foregoing provision are defined in § 28-1463.02, which at the relevant time read:

> As used in the Child Pornography Prevention Act, unless the context otherwise requires:
>
> (1) Child shall mean any person under the age of sixteen years;
>
> (2) Erotic fondling shall mean touching a person's clothed or unclothed genitals or pubic area, breasts if the person is a female, or developing breast area if the person is a female child, for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more persons involved. Erotic fondling shall not be construed to include physical contact, even if affectionate, which is not for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved;
>
> (3) Erotic nudity shall mean the display of the human male or female genitals or pubic area, the human female breasts, or the developing breast area of the human female child, for the purpose of real or simulated overt sexual

gratification or sexual stimulation of one or more of the persons involved;

(4) Sadomasochistic abuse shall mean flagellation or torture by or upon a nude person or a person clad in undergarments, a mask, or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained when performed to predominantly appeal to the morbid interest;

(5) Sexually explicit conduct shall mean: (a) Real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal between persons of the same or opposite sex or between a human and an animal or with an artificial genital [sic]; (b) real or simulated masturbation; (c) real or simulated sadomasochistic abuse; (d) erotic fondling; (e) erotic nudity; or (f) real or simulated defecation or urination for the purpose of sexual gratification or sexual stimulation of one or more of the persons involved; and

(6) Visual depiction shall mean live performance or photographic representation.

The first assignment of error, that the State failed to prove the age of those depicted in the tapes, is easily resolved. Although Burke assigns such claimed failure as error, he does not discuss the issue in his brief. Errors assigned but not discussed will generally not be considered by this court. *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986); Neb. Ct. R. of Prac. 9D(1)d (rev. 1986).

While the foregoing rule makes any further consideration of the first assignment unnecessary, it should perhaps be noted that there was in fact no failure of proof concerning the ages of the participants depicted in the tapes. A police report received in evidence reflects that High described all the minors he filmed as being "between the ages of 13 and 16." If all the minors depicted in the High tape were between 13 and 16 years of age, at least one of them had to be under 16. While Burke objected to "those portions [of the report which] aren't relevant," the age of the depicted participants was relevant as a critical element of the State's burden of proof and thus not within the ambit of

Burke's objection. A defendant may not permit questionable or incompetent evidence to be admitted without objection, take the chance of a favorable result, and after an unfavorable outcome complain that the evidence was received. See *Vinciquerra v. State*, 127 Neb. 541, 256 N.W. 78 (1934). Similarly, Beers' report was received in evidence without objection and under a stipulation that if he were called as a witness, he would "probably mirror" his report. The Beers report describes the participants in "Cousin Bill" as "approximately 10 to 13 years of age." A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with the stipulation. *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987).

The trial court could properly consider the contents of those reports when looking at the tapes. This court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. Such matters are for the trier of fact, and the findings and conclusions of the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support those findings and conclusions. See, *State v. Brown, ante* p. 418, 405 N.W.2d 600 (1987); *State v. El-Tabech, ante* p. 395, 405 N.W.2d 585 (1987); *State v. Meints, ante* p. 335, 405 N.W.2d 15 (1987). While, as a later portion of this opinion demonstrates, the "Cousin Bill" tape alone is sufficient to support Burke's conviction, the evidence establishes that the High tape depicted at least one participant under 16 and that both the boys depicted in "Cousin Bill" were under 16.

In his argument regarding the second assignment of error, Burke contends the entire act is overbroad in violation of the 1st, 5th, 9th, and 14th amendments to the U.S. Constitution and is vague in violation of the due process clauses of the 5th and 14th amendments to the U.S. Constitution. He further maintains that the act offends the "analogous sections" of the Nebraska Constitution.

Our first task is to determine the scope of our analysis. Generally, this court will not consider a constitutional challenge in the absence of a specification of the constitutional provision

which is claimed to be violated. *State v. Meints*, 223 Neb. 199, 388 N.W.2d 813 (1986). Since Burke has not designated the provisions of the Nebraska Constitution he considers "analogous" to the 1st, 5th, 9th, and 14th amendments to the U.S. Constitution, our analysis must be limited to a consideration of the relevant provisions of the U.S. Constitution. Further, although Burke has said that the reach of the act is so broad that it offends the 1st, 5th, 9th, and 14th amendments to the U.S. Constitution, he has limited his overbreadth argument to the 1st amendment guarantee of free speech as applied to this State through the 14th amendment. Any overbreadth analysis which may be required must therefore be so limited as well. It is also significant that while Burke questions the constitutionality of the entire act, he was convicted only of a violation of § 28-1463.03(1). Since one who would receive no benefit from a declaration of invalidity does not have standing to challenge the constitutionality of a statute, *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986), we further limit our consideration as aforesaid to § 28-1463.03(1) and the statutory definitions of the terms used in that section.

Burke's overbreadth challenge, as applied to § 28-1463.03(1), is that the "portrayed observer" language of that section prohibits more than the visual depiction of child pornography, that it in fact prohibits, for example, a nonobscene portrayal of a nude youth under the age of 16 or a nonobscene portrayal of one under 16 looking at an adult nude, even if such portrayal was an important and necessary part of a literary performance or scientific or educational work.

Neither of the two films in the record involves the portrayal of a child as an observer. The first question to be answered, then, is whether Burke has standing to question the "portrayed observer" language as being unconstitutionally overbroad. The traditional rule is that one to whom a statute may be applied constitutionally does not have standing to challenge that statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the court. *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985). This traditional rule reflects both the personal nature of

constitutional rights and prudential limitations on constitutional adjudication. *New York v. Ferber, supra.* However, an exception to the traditional rule is made when a statute is overbroad. *New York v. Ferber, supra; State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). In such a situation, one is allowed to assert the rights of others and attack the overbreadth of a statute even though the behavior of the person making the attack clearly may be unprotected and could be proscribed by a law drawn with the requisite narrow specificity. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985); *Secretary of State of Md. v. J. H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984). This is so because persons whose noncommercial speech or expression is constitutionally protected may choose to refrain from exercising their rights for fear of criminal sanctions under a statute susceptible of application to protected behavior. *New York v. Ferber, supra.* However, where conduct and not merely noncommercial speech is involved, the overbreadth of the statute attacked must not only be real but substantial as well, judged in relation to the statute's plainly legitimate sweep. *Regan v. Time, Inc.*, 468 U.S. 641, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984); *New York v. Ferber, supra; Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

Thus, determining whether Burke has standing to challenge the "portrayed observer" language on grounds of overbreadth is inextricably entwined with determining whether § 28-1463.03(1) reaches a substantial amount of speech or expression protected under the first amendment to the U.S. Constitution. See Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 3.

It therefore becomes necessary to determine whether the "portrayed observer" language impermissibly expands the application of § 28-1463.03(1), as Burke claims.

In affording a presumption of constitutionality to legislative enactments, *Illinois v. Krull*, ____ U.S. ____, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987), and *State v. Edmunds*, 211 Neb. 380, 318 N.W.2d 859 (1982), we, while construing penal statutes strictly, nonetheless give them a sensible construction in the

context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served, *State v. Hicks, ante* p. 322, 404 N.W.2d 923 (1987). Moreover, where a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted. *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983). As observed in *New York v. Ferber, supra*, a statute challenged as overbroad should be construed so as to avoid constitutional problems if it is subject to such a limiting construction. Unconstitutionality must be clearly established before this court is authorized to declare a statute void. *State v. Copple, supra*.

Application of the foregoing rules compels the conclusion that the "portrayed observer" language applies only to the visual depictions of persons under the age of 16 observing sexually explicit conduct as defined by § 28-1463.02. That being so, the questioned language does not reach the portrayals of children in nonpornographic settings; the phrase "portrayed observer" does not, therefore, render § 28-1463.03(1) overbroad under the first amendment to the U.S. Constitution.

Burke next claims that § 28-1463.03(1) is impermissibly vague because it does not specify when the visually depicted participants or observers must have been less than 16 years of age, nor who, in certain circumstances, must be sexually gratified or stimulated: those depicted; the makers, publishers, directors, creators, providers, or generators of the depiction; or the viewer.

With respect to this claim the traditional rule of standing applies; that is, one who has engaged in conduct which is clearly prohibited by the questioned statute cannot complain that the statute is vague when applied to the conduct of others. *New York v. Ferber, supra; State v. Copple, supra*.

There is no question but that to meet the due process requirements of the 5th and 14th amendments to the U.S. Constitution, a penal statute must be sufficiently clear so that a person of ordinary intelligence has fair notice of exactly what conduct is forbidden. *Kolender v. Lawson*, 461 U.S. 352, 103 S.

Ct. 1855, 75 L. Ed. 2d 903 (1983); *State v. Copple, supra.*

As noted in the foregoing overbreadth analysis, a penal statute is given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.

The suggestion that there is any doubt about when the visually depicted participants or observers must have been under the age of 16 is disingenuous, to say the least. The statute in question prohibits the "visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." Child was then defined in § 28-1463.02 as "any person under the age of sixteen years." Thus, § 28-1463.03(1) prohibited the visual depiction of sexually explicit conduct which has a child under the age of 16 as one of its participants or portrayed observers. In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986). The plain and ordinary meaning of the language used in § 28-1463.03(1) prohibited the depiction of one then under age 16 as a participant in or observer of sexually explicit conduct.

Burke's concern about who is to be sexually gratified or stimulated is also misplaced. Although, as the analysis of the third assignment of error demonstrates, the "Cousin Bill" tape alone supports the conviction, the fact is that both the High tape and "Cousin Bill" depict conduct which is clearly prohibited without regard to whether there existed sexual gratification or stimulation of anyone, namely, masturbation, oral-genital sex, and simulated anal-genital sex in the High tape and masturbation, oral-genital sex, and anal-genital sex in "Cousin Bill."

Accordingly, § 28-1463.03(1), as applied to Burke, is not impermissibly vague under the 1st and 14th amendments to the U.S. Constitution.

In his third assignment of error Burke argues the trial court should have determined that the offense was but a Class I misdemeanor rather than a Class III felony. The first fallacy in that position is that § 28-1463.04 specifies that a first time violation of any part of § 28-1463.03 constitutes a Class III

felony.

Nonetheless, Burke argues that as he had not provided any tape to anyone before he was arrested, his conduct was not complete, and he should therefore have been charged under a section of the act dealing with the possession of certain material with the intent to distribute it (§ 28-1463.05), violation of which then constituted but a Class I misdemeanor. The applicable rule, however, is that where a single act violates more than one statute, a prosecutor is free to prosecute under any statute he or she chooses, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986); *State v. Loschen*, 221 Neb. 315, 376 N.W.2d 792 (1985).

The second fallacy in Burke's position is that his conviction does not rest upon whether he "provided" a tape to anyone. He played or showed the "Cousin Bill" tape and therefore "published" it in the sense that he disclosed its contents and made them generally known. Webster's Third New International Dictionary, Unabridged 1837 (1981). Burke's publication of the "Cousin Bill" tape constitutes a violation of § 28-1463.03(1). That being so, and since he was charged in but a single count which thus covered either the "Cousin Bill" tape or the High tape, we need not determine whether the copying of the High tape constituted the making, directing, creating, or generating contemplated by § 28-1463.03(1).

Finally, Burke assigns as error the district court's failure to deal with him as a mentally disordered sex offender. Burke correctly argues that a sentencing court has a mandatory duty under Neb. Rev. Stat. § 29-2912 (Reissue 1985) to order an evaluation of one convicted of a felony sexual offense for the purpose of determining whether he or she is a mentally disordered sex offender. *State v. Klappal*, 218 Neb. 374, 355 N.W.2d 221 (1984). A mentally disordered sex offender is one who, because of a mental disorder, has been determined to be disposed to repeated commission of sexual offenses which are likely to cause substantial injury to others. Neb. Rev. Stat. § 29-2911(2) (Reissue 1985). If such person is found to be a treatable mentally disordered sex offender and if treatment is

available in the state, then such person shall be committed for treatment, as well as sentenced in accordance with law. Neb. Rev. Stat. § 29-2915 (Reissue 1985). A sexual offense for these purposes includes any felony in which the sexual excitement of the offender is a motivational factor. *State v. Klappal, supra*; § 29-2911.

The insurmountable obstacle to a consideration of this assignment is that while the record tells us the trial court took evidence on and overruled Burke's motion that he be determined to be a mentally disordered sex offender, the bill of exceptions does not contain the evidence submitted at that hearing. An assignment of error requiring an examination of the evidence cannot prevail on appeal in the absence of a proper bill of exceptions. *State v. Dittrich*, 223 Neb. 461, 390 N.W.2d 527 (1986); Neb. Ct. R. of Prac. 5A(2) (rev. 1986).

Burke's suggestion that he could not have been found guilty without an implicit finding that he was sexually excited in the process of the conduct for which he was charged is spurious. Our analysis of Burke's ill-fated vagueness claim establishes that sexual excitement is not an element or substantial motivational factor of some of the conduct proscribed by § 28-1463.03(1).

Since the record fails to sustain any of Burke's assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

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

The majority opinion in the instant case finds as support for its holding the decision of *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). I, too, find comfort in *Ferber*. I write separately, however, because my comfort comes in the concurrence filed by Justice Stevens, in which he points out that while the specific conduct that gave rise to the criminal prosecution is not protected by the federal Constitution, the state statute that Burke is charged with violating does prohibit some conduct that is protected by the first amendment. Little purpose would be served for me to plagiarize the concurrence of Justice Stevens. Suffice it then to say that I adopt the views expressed by Justice Stevens in his concurrence in *New York v. Ferber*, as though it had direct

application to the facts in this case. The facts in *Ferber* are almost identical with the facts herein, and Justice Stevens' concurrence in *Ferber* could be filed herein and it would make perfectly good sense. As did Justice Stevens in *Ferber*, I will await the appropriate case to concern myself about what aspects of the first amendment to the U.S. Constitution Neb. Rev. Stat. §§ 28-1463.01 through 28-1463.05 (Reissue 1985) violate. What is clear is that in the instant case there was no first amendment violation.

LEONARD R. ANDERSON, APPELLEE, V. FRANK O. GUNTER ET AL., APPELLANTS.
407 N.W.2d 202

Filed June 12, 1987. No. 87-073.

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

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, Special Deputy Public Defender, for appellee.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellants.

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

PER CURIAM.

In a declaratory judgment action brought by Leonard R. Anderson, the district court for Lancaster County held that the Nebraska Department of Correctional Services lacked authority to withhold credit for meritorious good time, see Neb. Rev. Stat. § 83-1,107(1) (Cum. Supp. 1974), earned before Anderson violated his mandatory parole. On appeal by the State, the parties stipulated that the only issue involved in

the present case is the same as the question answered in *Wounded Shield v. Gunter, ante* p. 327, 405 N.W.2d 9 (1987), filed by this court on May 1, 1987. The parties have further stipulated that the decision in *Wounded Shield v. Gunter, supra*, controls disposition in the case now before us.

In *Wounded Shield v. Gunter, supra*, we stated: "[C]redit for meritorious behavior which had been earned before Wounded Shield's release on mandatory parole may be forfeited or withheld, after reincarceration for violation of mandatory parole." *Ante* p. 335, 405 N.W.2d at 14.

Therefore, we hold that credit for meritorious behavior which had been earned before Anderson's release on mandatory parole may be forfeited or withheld, after reincarceration for violation of mandatory parole.

The judgment of the district court is reversed, and this matter is remanded to the district court with direction to enter judgment for the appellants herein, consistent with our opinion rendered in *Wounded Shield v. Gunter, supra*, and in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

CECIL M. NICHOLS, APPELLEE, V. FRANK O. GUNTER, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, ET AL., APPELLANTS.

407 N.W.2d 203

Filed June 12, 1987. No. 87-075.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Reversed and remanded with direction.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, Special Deputy Public Defender, for appellee.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellants.

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

PER CURIAM.

In a declaratory judgment action brought by Cecil M. Nichols, the district court for Lancaster County held that the Nebraska Department of Correctional Services lacked authority to withhold credit for meritorious good time, see Neb. Rev. Stat. § 83-1,107(1) (Cum. Supp. 1974), earned before Nichols violated his mandatory parole. On appeal by the State, the parties stipulated that the only issue involved in the present case is the same as the question answered in *Wounded Shield v. Gunter, ante* p. 327, 405 N.W.2d 9 (1987), filed by this court on May 1, 1987. The parties have further stipulated that the decision in *Wounded Shield v. Gunter, supra*, controls disposition in the case now before us.

In *Wounded Shield v. Gunter, supra*, we stated: "[C]redit for meritorious behavior which had been earned before Wounded Shield's release on mandatory parole may be forfeited or withheld, after reincarceration for violation of mandatory parole." *Ante* p. 335, 405 N.W.2d at 14.

Therefore, we hold that credit for meritorious behavior which had been earned before Nichols' release on mandatory parole may be forfeited or withheld, after reincarceration for violation of mandatory parole.

The judgment of the district court is reversed, and this matter is remanded to the district court with direction to enter judgment for the appellants herein, consistent with our opinion rendered in *Wounded Shield v. Gunter, supra*, and in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

REBECCA GILMORE, GUARDIAN AND CONSERVATOR OF THE ESTATE OF ROXANNE GOSHINSKA AND JOANN GOSHINSKA, MINORS, APPELLANT, V. NEBRASKA CRIME VICTIM'S REPARATIONS BOARD, APPELLEE.

407 N.W.2d 736

Filed June 19, 1987. No. 85-728.

1. **Administrative Law: Crime Victims: Venue: Appeal and Error.** When an order appealed from is the order of the Crime Victim's Reparations Board, and not the recommendation of the hearing officer, the "county where the action is taken" for purposes of filing an appeal is the county in which the board acted, not the county where the hearing took place. Neb. Rev. Stat. § 84-917 (Reissue 1981).
2. **Statutes: Jurisdiction: Appeal and Error.** The requirements of a statute governing the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction.

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

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

Robert M. Spire, Attorney General, and John R. Thompson, for appellee.

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 Lancaster County, which dismissed the appeal to that court from a decision of the Nebraska Crime Victim's Reparations Board for lack of jurisdiction. A brief recitation of the facts is necessary.

The appellant, Rebecca Gilmore, who appears by new counsel in this appeal, on behalf of herself and as guardian of her two minor sisters, filed a claim with the reparations board after their mother had been murdered. A hearing officer, on September 17, 1980, recommended an award be made in favor of Rebecca for funeral expenses, nothing for the two minors, and an attorney fee. On October 22, 1980, in a decision by the reparations board, the recovery was limited to burial expenses, apparently relying on the hearing officer's interesting rationale that since the sisters were being provided for by Rebecca and

social security, they had suffered no monetary loss. That theory, however, is not before us, and we will not comment on it further.

On November 21, 1980, a petition was filed in the district court for Douglas County, praying that the order of the reparations board be vacated and the claims of the appellant be allowed. A special appearance was filed on December 29, 1980, by the Attorney General, alleging only that the "plaintiff [has] failed to comply with the provisions of Neb. Rev. Stat. §84-917 (Reissue 1976)." On February 13, 1981, an answer was filed by the Attorney General, in which it is alleged that the Nebraska Crime Victim's Reparations Board held its meeting of October 22, 1980, in Lancaster County, and to which is attached a copy of the order of the board and a copy of the minutes of the board. The order does not reflect where the board met and took action; however, the minutes do so reflect.

On June 22, 1981, the Attorney General filed a "Motion to Dismiss or in the Alternative for a Change of Venue." The trial court overruled the separate special appearance, denied the motion to dismiss, and granted a change of venue to Lancaster County. Subsequently, the matter was submitted to a judge of the district court for Lancaster County, and that court, on April 2, 1985, held that it was without jurisdiction to hear the appeal and ordered the action dismissed. This appeal followed.

Essentially only one error is assigned, that the court erred in dismissing the appeal for lack of jurisdiction. Since the merits of the cause are not involved, no discussion will be had concerning them. We confine ourselves to the jurisdictional issue.

At the time this claim was heard and decided, Neb. Rev. Stat. § 81-1806 (Reissue 1981) provided for the appointment of hearing officers to conduct hearings and to report their findings of fact and conclusions of law to the board. After considering the report, the board could then take such action as it considered appropriate.

The board and the hearing officer are granted complete discretion in the selection of the times and places of hearings and meetings. Neb. Rev. Stat. § 81-1810 (Reissue 1981). See, also, rule 3 of the Rules and Regulations of the Nebraska Crime

Victim's Reparations Board (May 16, 1979). An appeal from a determination of the board is governed by chapter 84, article 9, of the Nebraska statutes. Neb. Rev. Stat. § 81-1832 (Reissue 1981); *Lambert v. Nebraska Cr. Vict. Rep. Bd.*, 214 Neb. 817, 336 N.W.2d 320 (1983).

The pertinent part of Neb. Rev. Stat. § 84-917 (Reissue 1981) involved here is set out as follows:

> (2) Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. Summons shall be served as in other actions except that a copy of the petition shall be served upon any such agency together with the summons. The court, in its discretion, may permit other interested persons to intervene.

In the discussion in her brief, appellant seems to argue that the "action taken" was taken in Douglas County and that if the venue transfer was erroneous, the cause should be remanded to the district court for Douglas County. It is true that, unlike Neb. Rev. Stat. § 48-650 (Cum. Supp. 1986), where the district court for Lancaster County is the designated repository of contribution liability disputes, the Nebraska Crime Victim's Reparations Act does not designate one district court as the tribunal having sole jurisdiction of disputes. Rather, the act allows board or hearing officer action at any place, presumably in the state, and the appeal would lie in the geographical county where the act appealed from took place. Appellant urges that the appeal should be brought in the county where the hearing examiner conducted the hearing. The recommendation of the hearing examiner is not the order from which appeal is taken. It is the board's order. The meeting occurred in Lancaster County. As the appeal was not taken within 30 days to the district court, the district court did not acquire jurisdiction and the appeal should be dismissed. The requirements of a statute governing the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction. *Northern Messenger v. Sorensen*, 218 Neb. 846, 359 N.W.2d 787 (1984).

However, the appellant suggests that since the appeal was

timely docketed in Douglas County, the action can be transferred to Lancaster County, and the filing date, as in civil actions, relates back to the original filing date. Appellant misses the point. The district court for Douglas County never acquired jurisdiction of the appeal. Any purported transfer after the 30 days following the board's decision was ineffective in conferring jurisdiction on the Lancaster County District Court. *Northern Messenger v. Sorensen, supra.*

The judgment is affirmed.

AFFIRMED.

IN RE ESTATE OF ALMA Z. THOMPSON, DECEASED.
LOIS C. THOMPSON, APPELLANT, V. GEORGE W. HAESSLER, SPECIAL ADMINISTRATOR OF THE ESTATE OF ALMA Z. THOMPSON, DECEASED, APPELLEE.

407 N.W.2d 738

Filed June 19, 1987. No. 85-739.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.
2. _____. In considering a motion for summary judgment the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence.
3. **Decedents' Estates: Witnesses.** While a nonexpert witness who is shown to have had intimate acquaintance with a deceased may be permitted to state an opinion concerning the mental condition of the deceased, the person testifying must give the facts and circumstances upon which the opinion is based.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

Wilbur C. Smith of Smith & Hansen, and H. Jeanne Thorough, for appellant.

Gerald L. Friedrichsen of Fitzgerald & Brown, for appellee.

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

GRANT, J.

Alma Z. Thompson died on July 15, 1984, at the age of 90, while domiciled in Saunders County, Nebraska. On July 16, 1984, appellee filed a petition in the county court for Saunders County seeking formal probate of the will of Mrs. Thompson, in which will appellee was named personal representative. The will had been executed on March 2, 1972. Appellee was appointed special administrator of the estate.

Appellant, Lois C. Thompson, filed an "Objection to Probate of Will," in which she alleged an interest in the estate of Alma Thompson arising out of appellant's marriage to Verner Thompson, whom appellant alleged had been named as the son of Alma Z. and Ernest L. Thompson, and the fact that the testatrix allegedly "had promised all of her estate after her death to her son, Verner LeRoy Thompson, and if he predeceased her, then all of her estate to his wife, Lois C. Thompson." In that pleading appellant also alleged that Verner Thompson had died before testatrix; that testatrix and her deceased husband, Ernest Thompson, had executed a joint and mutual will on August 10, 1961; and that, by the terms of that joint will, Alma Thompson and her husband provided that at the time of the death of the first, the survivor of the two would have a life estate in all the couple's property and that on the death of the survivor of the two, the property was to be given to appellant.

Upon examining the filed objection, the county court continued the hearing on the probate of the March 2, 1972, will, to afford appellant time to transfer the case to the district court for Saunders County if she desired. Pursuant to the provisions of Neb. Rev. Stat. § 30-2429.01 (Cum. Supp. 1982), appellant did so.

In the district court, appellee filed a motion for summary judgment, seeking judgment in favor of appellee by determining that the will of March 2, 1972, was valid. The district court granted appellee's motion, entered summary judgment in favor of appellee, and remanded the cause to

county court for further proceedings. Appellant timely appealed to this court, assigning as error: (1) The trial court "failed to give credence to the affidavits of contestant [appellant] which raises [sic] the issue of testementary [sic] capacity of textatrix [sic] . . ."; (2) the trial court failed to follow properly the "statutory method of will contest . . ."; and (3) the trial court failed "to interpret the new probate code which allows equity jurisdiction in all probate matters . . ." where the contestant, in order to prevent fraud, proposed to show that testatrix had made a joint will in 1961 which would have transferred the estate of testatrix to appellant. We affirm the order of the district court.

We have held that summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law. *Bohannon v. Guardsman Life Ins. Co.*, 224 Neb. 701, 400 N.W.2d 856 (1987). In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence. *Naidoo v. Union Pacific Railroad*, 224 Neb. 853, 402 N.W.2d 653 (1987); *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987).

The evidence in the case at bar, when viewed in the light most favorable to the appellant, shows that the testatrix, Alma Thompson, was married to Ernest Thompson. The record, by way of the certified copy of the entire probate of Ernest Thompson's estate, indicates that the couple had no children. Appellant's pleadings in this case allege, in the appellant's "Objection to Probate of Will," that Verner LeRoy Karlson was accepted by Ernest and Alma Thompson into their home, that the child's last name was changed to Thompson, and that the couple raised him as their son. There is no indication in the record that a legal adoption took place.

Appellant's objection to the probate then alleges that Verner Thompson died on March 7, 1970. The record indicates that on

July 24, 1970, the testatrix's husband, Ernest Thompson, died intestate. His estate was probated in Saunders County beginning July 31, 1970, and concluding on June 16, 1972, when Alma Thompson was discharged as administratrix of the estate. The final decree for the settlement of the Ernest Thompson estate lists as his sole and only heirs at law his widow, two sisters, and several nieces and nephews. That final decree does not name, as heirs at law or as devisees, the children born to Verner Thompson and appellant, Lois Thompson.

Affidavits received at the hearing further show that on March 2, 1972, Alma Thompson executed a will. As stated above, a petition for formal probate of this will was filed, and an objection to probate of that will was filed by appellant, Lois Thompson. The objection alleged that the will could not be admitted to probate because of the existence of a joint and mutual will executed by Alma and Ernest Thompson on August 10, 1961. The objection alleged that the joint and mutual will was to give to the survivor a life estate and that upon the death of the remaining parent, the estate would pass to Lois Thompson.

At the hearing on the motion for summary judgment filed by proponent appellee, the appellee offered into evidence affidavits of the witnesses to the will attesting to the testatrix's testamentary capacity, as well as to the execution of the will itself; his own affidavit as attorney for testatrix; the record of the proceedings in the Ernest Thompson estate; and the certificate of death of Alma Thompson. Appellant, as objector to the will, offered as evidence two affidavits setting out her relationship to testatrix and challenging the decedent's testamentary capacity. The proponent objected to the affidavits in their entirety on the grounds of relevance and to specific paragraphs on the grounds that they were hearsay and conclusions.

Appellant contends that the district court erred in failing to give credence to the affidavits introduced by objector, which allegedly raised the issue of the testatrix's testamentary capacity, and that the district court did not follow proper procedures. Neb. Rev. Stat. § 30-2431 (Reissue 1985) provides that the proponent of a will has the burden of establishing prima facie

proof of due execution, death, testamentary capacity, and venue and that an objector or contestant has the burden of establishing undue influence, fraud, duress, mistake, or revocation. The statute further provides that "[p]arties have the burden of persuasion as to matters with respect to which they have the initial burden of proof." The affidavits submitted by appellee established, without dispute, prima facie proof of a valid will executed by the testatrix.

The objector offered her affidavit and that of DeLene Maxwell. Typical of the appellant's affidavit was paragraph 14, which stated:

> Based upon Lucille Larson's observations of Alma Z. Thompson, which she conveyed to me during our numerous conversations throughout the years, and based upon my own observations of Alma Z. Thompson made in December 1971 and January and February of 1972, Alma Z. Thompson was suffering from severe emotional and mental problems resulting from the death of her husband, Ernest L. Thompson and Verner L. Thompson, who Alma claimed as her son, she would not have had the emotional and mental capacity to change and execute a will, and would have been a good subject, in that condition, to succum [sic] to undue influence.

Typical of DeLene Maxwell's affidavit was paragraph 8, which stated:

> That I accompanied Lois C. Thompson on or about December 10, 1984 to the apartment of Howard Johnson; that in my presence, Lois C. Thompson asked Mr. Johnson, if he had been a neighbor of Alma Z. Thompson; if he knew and was acquainted with Alma A. [sic] Thompson; if he had helped Alma Z. Thompson and had conversations with her; Howard Johnson stated he had moved next door to Alma Z. Thompson in 1978; that he would cut her grass and had conversations with her; that she invited him into her home and upon entering he seen [sic] pictures of the family on the piano; that she showed him a picture of Verner saying "this is my son, Verner" and showed him a picture of her five grandchildren saying "these are my grandchildren."

Both affidavits set out the conclusions of the affiants that in "late 1971 and early 1972" (DeLene Maxwell) and "in December 1971 and January and February of 1972" (appellant), Alma Thompson did not have capacity to make a will. These affidavits were objected to by appellee as being irrelevant and in part hearsay and conclusions. The district court overruled the objection as to relevance, but sustained appellee's objection to specific paragraphs as being hearsay and conclusions. The district court properly sustained appellee's objection on hearsay and was correct in the determination that portions of the affidavits were conclusory. While a nonexpert witness who is shown to have had intimate acquaintance with a deceased may be permitted to state an opinion concerning the mental condition of the deceased, the person testifying must give the facts and circumstances upon which the opinion is based. *In re Estate of Fehrenkamp*, 154 Neb. 488, 48 N.W.2d 421 (1951). Appellant's affidavits do not set out any facts and circumstances upon which the affiants' opinions could be based. The affidavits themselves, without the specific paragraphs objected to, do not carry the burden necessary to rebut the proponent's prima facie case of a valid will. The district court properly sustained appellee's objection to the appellant's affidavits and did not err in sustaining appellee's motion for summary judgment. Appellant's contention that the district court followed a wrong procedure is also without merit.

Insofar as appellant claims as error that the district court erred in failing to interpret the probate code to allow equity jurisdiction in probate matters, when the contestant is within the legal framework to prevent fraud and multiplicity of suits, it appears from appellant's assigned error and her brief that she is referring to the court's failure to acknowledge the joint and mutual will allegedly executed by the decedent and her deceased husband on August 10, 1961. Appellant's argument is without merit. The record shows, without dispute, that the decedent's husband died intestate. Appellant has not addressed, factually or legally, the uncontroverted fact that the county court for Saunders County in 1970 determined that Ernest Thompson had died intestate and apparently did not leave a will, mutual and joint or otherwise.

Even if a 1961 will had been executed by testatrix, and even if that will was a joint and mutual will, the fact remains that the 1961 will could not be admitted to probate because it was not the last will of Alma Thompson in 1984. Without objection on any basis, factual or legal, the proceedings in the instant case established that the last will of Alma Thompson was her will executed on March 2, 1972. The district court correctly so held. See *Kimmel v. Roberts*, 179 Neb. 25, 136 N.W.2d 217 (1965).

Further, if the testatrix had executed a will in 1961, that will was effectively revoked by the execution of the will of March 2, 1972. Appellant argues the joint will could not be revoked. Execution of a mutual will, without more, is not a bar to the modification or revocation of the mutual will. *Kimmel v. Roberts, supra; McKinnon v. Baker*, 220 Neb. 314, 370 N.W.2d 492 (1985). Appellant's assigned error in this regard is also without merit.

We hold, then, that the district court was correct in its determination that there was no genuine issue as to a material fact and appellee was entitled to judgment as a matter of law. The order of the district court sustaining appellee's motion for summary judgment is affirmed.

AFFIRMED.

WHITE, J., not participating.

FLORENCE SHANKS, APPELLANT, V. JOHNSON ABSTRACT & TITLE, INC., AND A.C. JOHNSON, APPELLEES.

407 N.W.2d 743

Filed June 19, 1987. No. 85-779.

1. **Brokers.** Before a broker may recover a commission, the broker must establish that he produced a purchaser ready, willing, and able to buy on the terms fixed by the owner.
2. **Actions: Words and Phrases.** An action should be held to be frivolous only when it is prosecuted for an improper motive or when it indisputably has no merit. An action is frivolous when the result is obvious and the circumstances are so clear in fact and in law that competent counsel could not possibly fail to recognize it.

3. _____: _____. All doubts as to whether an action is frivolous should be resolved in favor of the petitioner. Sanctions should not be imposed except in the clearest cases.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Randall J. Shanks of Peters Law Firm, P.C., for appellant.

Robert J. Bulger of Bulger & Jensen, for appellees.

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

PER CURIAM.

The appellant, Florence Shanks, filed suit in the district court for Morrill County, Nebraska, against the appellees, Johnson Abstract & Title, Inc., and A.C. Johnson (jointly referred to as Johnson), for the purpose of recovering a real estate commission paid by Shanks to Johnson. The district court sustained a motion for summary judgment filed by Johnson and dismissed Shanks' petition. Thereafter, Johnson filed a motion to tax costs, pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1985), alleging that the suit filed by Shanks was frivolous. The district court sustained the motion on the basis that the allegations by Shanks in her amended and substituted petition were made in bad faith. For reasons more specifically set out hereinafter, we believe that the district court was correct in sustaining the motion for summary judgment, but was in error in allowing attorney fees. For that reason, the judgment of the district court is in part affirmed, and in part reversed and remanded.

The evidence discloses that Shanks hired Johnson to sell some real estate, which Shanks owned, in Bridgeport, Nebraska. A listing agreement was executed on March 30, 1983, which provided in part that Johnson was to have the sole and exclusive right until July 1, 1983, to sell Shanks' property for an amount between $30,000 and $35,000 cash. The agreement also provided that Johnson would be paid a cash commission of 5 percent if the sale was made at that price or at other terms to which Shanks agreed.

On May 9, 1983, the buyers, Robert and Kaye Tribble, signed the purchase agreement providing that they would purchase Shanks' property for $35,000, under the following terms: a deposit of $100 to be paid at the time of the signing of the agreement; a payment of $1,900 at the time of closing; the sum of $300 per month for 12 months beginning June 1, 1983, and the remaining balance of $29,400 in June of 1984.

The parties agreed to close the transaction on or before June 1, 1983, and to transfer possession of the property to the Tribbles at that time. On May 10, 1983, Shanks accepted the terms of the agreement, and on May 18, Johnson prepared the buyers' and seller's settlement statements. The buyers and seller also executed a memorandum of sale and filed it with the county clerk of Morrill County. The memorandum provided that the property had been sold by Shanks to Tribbles and that the deed was held in escrow by Johnson "pending payment of the balance of the purchase price." The Tribbles paid $300 per month to Shanks from June of 1983 to May of 1984. On July 21, 1984, the Tribbles paid Shanks an additional $600, with a notation on the check that it was for June and July. At this point, apparently, Shanks became aware that the Tribbles did not intend to complete the transaction, and, in fact, on August 7, 1984, the Tribbles executed a quitclaim deed, conveying their interest in the property back to Shanks "in consideration of cancellation of contract." The quitclaim deed was filed in the office of the county clerk of Morrill County, Nebraska, and the plaintiff retained all payments made except for the expenses of sale and a broker's commission in the amount of $1,750 earlier paid by Shanks to Johnson. It was the broker's commission which Shanks sought to recover by her suit.

Shanks now maintains that the district court (1) erred in granting Johnson's motion for summary judgment and dismissing Shanks' petition, because there was a genuine issue as to whether the prospective purchasers were ready, willing, and able to buy the plaintiff's property on the terms fixed by Shanks and (2) erred in sustaining Johnson's motion to tax expenses and in finding that the allegations in Shanks' amended and substituted petition were made in bad faith, thereby entitling Johnson to an attorney fee. With that background, we

now turn to Shanks' first assignment of error, that there was a genuine issue of a material fact.

Recently, in the case of *Naidoo v. Union Pacific Railroad*, 224 Neb. 853, 856, 402 N.W.2d 653, 656 (1987), we said with regard to summary judgment:

> [O]n a motion for summary judgment, the moving party is entitled to judgment as a matter of law where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom. . . . In considering such a motion, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. . . . The moving party bears the burden of showing that no genuine issue of material fact exists and must produce enough evidence to demonstrate his entitlement to judgment if the evidence remains uncontroverted. . . . If he is successful in doing so, the burden of producing contrary evidence shifts to the nonmoving party.

See, also, *Marshall v. Radiology Assoc.*, *ante* p. 75, 402 N.W.2d 855 (1987); *Carlson v. Waddle*, 223 Neb. 671, 392 N.W.2d 777 (1986). Shanks' argument really is to the effect that there was a burden upon Johnson to prove affirmatively the financial condition of the Tribbles before Johnson was entitled to recover the commission. Shanks is in part correct, in that we have held that in order for a broker to be entitled to his commission, the broker must prove that he has produced a ready, willing, and able buyer. *Marathon Realty Corp. v. Gavin*, 224 Neb. 458, 398 N.W.2d 689 (1987); *Dworak v. Michals*, 211 Neb. 716, 320 N.W.2d 485 (1982); *DaLee Realty, Inc. v. Kuhl*, 209 Neb. 6, 305 N.W.2d 891 (1981). This does not, however, fully reflect the law applicable to a case of this nature.

In the instant case, the evidence discloses that the closing occurred and the purchasers proceeded to fulfill the terms of the contract. It was only after some 12 months, during which the purchaser performed, that a breach occurred. Nor is there any evidence to indicate that at the time of the closing, the purchasers were not ready, willing, and able. The evidence to

the contrary, as presented on the motion for summary judgment, was that not only were the purchasers ready, willing, and able, but that, in fact, the purchasers did complete the transaction by closing in accordance with provisions of the contract. Possession was transferred to the purchasers and title placed in escrow.

Shanks argues that the rule should be that before a broker may recover a commission, the broker must prove the adequacy of the purchaser's financial condition. Shanks further argues that the commission is not earned until the contract has been *fully* performed. As suggested by Johnson, Shanks' argument, carried to its logical position, would mean that no realtor's commission would be earned until the last payment on a contract was made, even if the payment was deferred for 10 or 20 years. It would also place upon the realtor the burden of proving 10 or 20 years later that at the time of entering into the contract, the purchaser was "ready, willing, and able." We do not believe that such rule could be tolerated. Thus, we believe that when evidence was presented to the district court that the transaction closed, that the title was placed in escrow, and that the buyer was given possession of the property, sufficient evidence was presented to entitle Johnson to judgment as a matter of law, absent evidence produced by Shanks that the buyers were not "ready, willing, and able." Viewing the evidence most favorably to Shanks, against whom the motion is directed, and giving Shanks the benefit of all favorable inferences which may reasonably be drawn from the evidence, there was at that point no genuine issue of material fact existing.

Shanks' amended and substituted petition, which alleged in a conclusory manner that "the prospective buyers, were not ready, willing or able to buy said property on the terms fixed by the Plaintiff, and the prospective purchasers did not complete the transaction by closing title in accordance with the provisions of the contract," without any evidence to support the conclusion, was insufficient to raise a genuine issue of a material fact. We believe that for that reason, the district court was correct in granting Johnson's motion for summary judgment and dismissing Shanks' petition.

The issue with regard to attorney fees poses a more difficult

question. Section 25-824 now provides in part as follows:

> Allegations or denials which are frivolous or made in bad faith shall subject the party or attorney pleading the same to the payment of such reasonable expenses, including reasonable attorney's fees, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such pleading. If a pleading is frivolous or made in bad faith, it may be stricken.

Specifically, in their motion to tax expenses, Johnson alleged that

> all allegations [after the sustaining of defendants' demurrer to plaintiff's original petition] were frivolous and made in bad faith and the conduct thereafter of the Plaintiff and her attorneys was vexatious, unfounded and dilatory and all pleadings and proceedings after the sustaining of the Demurrer to the original Petition are based on the same operative facts contained in the original Petition and ruled on in sustaining the Demurrer to the original Petition.

The district court, in its journal entry entered on October 8, 1985, specifically found that "the Motion falls within the provisions of Sec. 25-824, Neb. Rev. Stat. [Reissue 1985] and that the pleadings in the Amended And Substituted petition were made in bad faith and that the Defendants are entitled to have expenses taxed in their favor."

Unfortunately, until today, there have only been two cases decided under this version of § 25-824. They are *Stratman v. Hagen*, 221 Neb. 157, 376 N.W.2d 3 (1985), and *Graham v. Waggener*, 219 Neb. 907, 367 N.W.2d 707 (1985). In each of those cases, however, a previous lawsuit involving the same parties had determined the matter, which one of the parties was then trying to relitigate. As we observed in *Graham v. Waggener, id.* at 911, 367 N.W.2d at 710:

> The cleverly crafted, but nonetheless disingenuous, argument presented to us by Graham in this case does not conquer the overriding fact that he, and his attorneys, simply chose to ignore a fully binding adverse final judgment. While Graham was certainly entitled to an adjudication of his rights, a proliferation of actions in

> which the same issues are raised is not proper and will not be tolerated. *Stones v. Plattsmouth Airport Authority*, 193 Neb. 552, 228 N.W.2d 129 (1975). See, also, *Cedars Corp. v. Sun Valley Development Co.*, 213 Neb. 622, 330 N.W.2d 900 (1983). Such a tactic engenders disrespect for law and justice and unnecessarily adds to the caseload of an already overburdened judicial system.

Accordingly, we awarded the appellees an attorney fee in that case.

The difficulty with the present case is that there was a dispute regarding when, in the law, the "closing" in fact took place and what the appropriate rule of law was. While we have now, hopefully, resolved that issue, we cannot say as a matter of law that Shanks' amended and substituted petition, filed after a previous demurrer was sustained, but which added the allegation that "the prospective buyers, were not ready, willing or able to buy said property on the terms fixed by the Plaintiff, and the prospective purchasers did not complete the transaction by closing title in accordance with the provisions of the contract," was frivolous or constituted bad faith within the meaning of § 25-824, thereby entitling Johnson to an attorney fee. See Annot., Construction and Application of State Statute or Rule Subjecting Party Making Untrue Allegations or Denials to Payment of Costs or Attorneys' Fees, 68 A.L.R.3d 209 (1976).

In the case of *Ltown Ltd. v. Sire Plan*, 108 A.D.2d 435, 489 N.Y.S.2d 567 (1985), the New York Supreme Court, Appellate Division, addressed a somewhat similar question and, while in that case the court found that the action was brought frivolously and in bad faith, nevertheless set out some significant observations with which we are in agreement. The court in *Ltown Ltd.*, 108 A.D.2d at 442-43, 489 N.Y.S.2d at 573-74, said:

> We are cognizant that attorneys and litigants should not be inhibited in pressing novel issues or in urging a position that can be supported by a good-faith argument for an extension, modification or reversal of existing law . . . . Accordingly, the determination of whether an appeal is frivolous must depend upon the facts of the particular case . . . .

> . . . The California Supreme Court has stated that "an appeal should be held to be frivolous only when it is prosecuted for an improper motive — to harass the respondent or delay the effect of an adverse judgment — or when it indisputably has no merit — when any reasonable attorney would agree that the appeal is totally and completely without merit" . . . . Federal decisions express the concept similarly, finding an appeal to be frivolous when "the result is obvious and the arguments of error are wholly without merit" [citation omitted] and "[t]hat circumstance was so clear in fact and law that competent counsel could not possibly have failed to recognize it" [citation omitted].
>
> We emphasize, as did the California Supreme Court, that "[a]n appeal that is simply without merit is *not* by definition frivolous" . . . . Furthermore, "all doubts as to whether an appeal is frivolous should be resolved in favor of the appellant" . . . . Sanctions should not be imposed except in the "clearest cases" . . . .

While we recognize that in the present case, the district court did not find that the action was frivolous, but rather was brought in bad faith, we believe that the evidence viewed in light of the standards suggested in *Ltown Ltd.* does not support that position.

While we are sympathetic with the position taken by the district court and wholeheartedly join in both the purpose of § 25-824 and the view that courts should not be cluttered with suits brought frivolously or in bad faith, we do not believe that in the instant case the conclusion reached by the district court can be supported by the record. See, also, *Hessenius v. Schmidt*, 102 Wis. 2d 697, 307 N.W.2d 232 (1981). For that reason, the judgment of the district court, awarding Johnson an attorney fee in the amount of $500, pursuant to the provisions of § 25-824, is reversed and remanded with directions to disallow the request for attorney fees. The judgment of the district court is, therefore, affirmed in part, and in part reversed and remanded with directions.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. CHARLES A. KANDT, LINCOLN COUNTY ATTORNEY, APPELLEE, V. NORTH PLATTE BAPTIST CHURCH OF NORTH PLATTE, NEBRASKA, A CORPORATION, ET AL., APPELLEES, ROBERT D. GELSTHORPE, APPELLANT.

407 N.W.2d 747

Filed June 19, 1987. No. 85-835.

1. **Contempt: Words and Phrases.** Criminal contempt is a prosecution to preserve the power and vindicate the dignity of the court and to punish for disobedience of the court's orders.
2. **Contempt: Final Orders.** A criminal contempt order is in the nature of a final order in that the sentence imposed is absolute and unconditional.
3. **Contempt: Proof.** In contempt proceedings it is necessary to establish guilt beyond a reasonable doubt.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

David C. Gibbs, Jr., and Charles E. Craze of Gibbs & Craze Co., and George C. Clough of Clough & Hays, P.C., for appellant.

Kent D. Turnbull, Deputy Lincoln County Attorney, for appellee State.

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

BOSLAUGH, J.

On March 7, 1983, the North Platte Baptist Church, the North Platte Christian School, and the Reverend Robert D. Gelsthorpe were permanently enjoined from further operation of the North Platte Christian School until such time as it received approved school status and was operated in compliance with state school laws and regulations. The judgment was affirmed in *State ex rel. Kandt v. North Platte Baptist Church*, 216 Neb. 684, 345 N.W.2d 19 (1984), *cert. denied* 469 U.S. 1016, 105 S. Ct. 428, 83 L. Ed. 2d 355 (hereinafter *Kandt I*).

On December 5, 1983, the State filed a motion for an order directing the defendant Gelsthorpe to show cause why he should not be proceeded against for contempt. The motion

alleged that Gelsthorpe had disregarded the order of March 7, 1983, by reopening and operating the North Platte Christian School without receiving approved school status from the State Department of Education.

An order to show cause was issued on December 6, 1983.

Following a December 15, 1983, hearing on the matter, the trial court found that the defendants were in willful violation of the March 7, 1983, order. The court ordered that

> commencing on December 19, 1983, at 9:00 o'clock a.m., each of the Defendants will be fined the sum of two hundred dollars ($200.00) per day as long as the Order is continually being violated. In that regard I will Order the Sheriff of Lincoln County to, as unobtrusively as possible, check on the school to see if it's in operation; that it's further Ordered that the Defendant Robert Gelsthorpe report to the Lincoln County Sheriff's Office at 9:00 o'clock a.m., each day the school is in operation and remain there until three o'clock p.m.; that the sanctions imposed shall terminate at 9:00 o'clock a.m., December 22, and be reimposed at 9:00 o'clock a.m. on January 3, 1983 [sic], until the Order of the Court is complied with.

Although the order of December 15, 1983, found that the contempt was "willful," the order was prospective in that no penalty was imposed for the defendant's violation of the injunction up to that time.

On March 15, 1984, the trial court modified the order of December 15, 1983, on its own motion, to require that Gelsthorpe be accompanied and transported by the Lincoln County sheriff to the sheriff's office each day. The modification was in response to a letter from Gelsthorpe to the court, in which he indicated that he could no longer report to the sheriff's office in good conscience and that he felt compelled to resume his responsibilities as administrator of the school.

On a consolidated appeal to this court from the above orders, this court determined that it had no jurisdiction to entertain the appeals because the orders were coercive in nature and were not final orders. *State ex rel. Kandt v. North Platte Baptist Church*, 219 Neb. 694, 365 N.W.2d 813 (1985) (hereinafter *Kandt II*).

On September 4, 1985, the State filed an application to determine the amount of the fines due from Gelsthorpe based on the December 15, 1983, order.

On October 9, 1985, the trial court found "by a preponderance of the evidence" that Gelsthorpe had been in violation of the order for 95 days and that the amount due from him was $19,000. It is from that order that the defendant Gelsthorpe has appealed.

On appeal, Gelsthorpe makes four assignments of error: (1) The district court erred in employing a standard of proof by a mere preponderance of evidence rather than guilt beyond a reasonable doubt; (2) the court erred in judging the appellant to be in violation of the court's order since there was insufficient evidence to support such a finding; (3) the court erred in not holding that mitigating circumstances compelled dismissal of the fines imposed against Gelsthorpe; and (4) the court erred in not permitting Gelsthorpe to demonstrate that because of constitutional violations, the State's allegations of contempt failed to state a claim upon which relief could be granted.

In *Kandt I* it was determined that the defendant was operating the North Platte Christian School in violation of the laws of Nebraska as they existed at that time. That adjudication is now the law of the case and will not be reexamined.

The order of December 15, 1983, imposed a fine of $200 per day for each day the defendant violated the order of March 7, 1983, which enjoined the defendant from operating the school in violation of the laws of Nebraska. The order of October 9, 1985, found that the defendant had operated the school on 95 days in violation of the March 7, 1983, order and that under the order of December 15, 1983, fines in the amount of $19,000 were due from the defendant. The only issue now before this court is whether the order of October 9, 1985, was erroneous in any respect.

Although the original proceedings were civil in nature, after a fine or fines were imposed for further violation of the judgment of the trial court, and the defendant disregarded the order of the court, the proceeding became one in the nature of a criminal contempt, and the rules applicable to such a proceeding become applicable. In the case of *In re Contempt of*

Sileven, 219 Neb. 34, 361 N.W.2d 189 (1985), we held that a criminal contempt order is in the nature of a final order in that the sentence imposed is absolute and unconditional.

The defendant attempted to appeal from the order of December 15, 1983, but that appeal was dismissed because the order was civil in nature and coercive, and therefore not a final order. *Kandt II, supra.* In that case we said:

> If a contempt is criminal, the judgment is final and a proper subject for appeal. If the contempt is civil, the judgment is not final; the order is interlocutory and not subject to appeal. [Citations omitted.] A civil contempt order can be attacked by a party litigant only through a habeas corpus proceeding.

219 Neb. at 696, 365 N.W.2d at 815.

Civil contempt orders are treated as interlocutory because the sentence imposed is coercive in nature and the defendant is in a position to mitigate the sentence by complying with the court's order. *In re Contempt of Sileven, supra.* An order of civil contempt typically lacks certainty as to the term of the sentence or the amount of the fine.

The October 9, 1985, order is a criminal contempt judgment because it possesses the indicia of finality. The fines, which have been determined to be $19,000, are no longer subject to mitigation by Gelsthorpe.

As stated in *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 977 (11th Cir. 1986), *cert. denied* ____ U.S. ____, 107 S. Ct. 187, 93 L. Ed. 2d 120:

> [T]he general rule is that "a contempt order entered in a postjudgment proceeding that does not terminate that proceeding is . . . non-appealable." J. Moore, *supra*, at ¶ 110.14[1] at 198. There must be *both* a finding of contempt and a *noncontingent* order of sanction. *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 (9th Cir. 1983). Only at that point may the contemnor have his appeal.

Gelsthorpe's first assignment of error relates to the standard of proof applicable in this proceeding. On October 9, 1985, the trial court found that

> the plaintiff has proved, by unrebutted testimony, by a preponderance of the evidence that the number of days

that the defendant, Robert D. Gelsthorpe, was in violation of this Court's order is ninety-five (95). The Court further finds that the total fine due and owing as of this date is the sum of $19,000.00 less any amount previously collected by the plaintiff.

Gelsthorpe contends that the trial court incorrectly applied the preponderance of the evidence standard of proof.

In *In re Contempt of Liles*, 217 Neb. 414, 416, 349 N.W.2d 377, 378 (1984), we stated that "in contempt proceedings it is necessary to establish guilt beyond a reasonable doubt." The requirement of proof beyond a reasonable doubt is justified in contempt cases because of the penalties that may be imposed. See, *Ross v. Superior Court*, 19 Cal. 3d 899, 569 P.2d 727, 141 Cal. Rptr. 133 (1977); *Farace v. Superior Court for County of Orange*, 148 Cal. App. 3d 915, 196 Cal. Rptr. 297 (1983).

The trial court erred in applying the preponderance of the evidence standard in the proceedings below. As we stated in *In re Contempt of Liles, supra* at 416, 349 N.W.2d at 378, the case must be treated as if it involved "a jury verdict of guilt based upon an erroneous instruction setting forth an improper burden of proof." The findings must be set aside, and we cannot conduct our own review to determine Gelsthorpe's guilt or fine under the proper standard.

On October 22, 1985, Gelsthorpe filed a motion for a stay of execution or for a supersedeas. On October 28, 1985, the trial court ordered that execution of the judgment was stayed pending further order of the court. The State argues that the motion for a stay of execution waived all prior defects and errors in the judgment under Neb. Rev. Stat. § 25-1505 (Reissue 1985).

The statute referred to has no application to these proceedings. The order of October 28, 1985, was in the nature of a discretionary supersedeas and did not waive any errors or defects in the judgment.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DELMAN R. POLLY, APPELLEE AND CROSS-APPELLANT, V. RAY D. HILDERMAN & COMPANY, A PARTNERSHIP, APPELLANT AND CROSS-APPELLEE.

407 N.W.2d 751

Filed June 19, 1987. No. 85-880.

1. **Restrictive Covenants: Employer and Employee.** There are three considerations used to test the validity of a partial restraint of trade such as a covenant not to compete: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.
2. _____: _____. An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.
3. **Restrictive Covenants: Employer and Employee: Words and Phrases.** To distinguish between "ordinary competition" and "unfair competition," it is generally necessary to focus on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers.
4. **Restrictive Covenants: Employer and Employee.** A restrictive covenant not to compete must be no greater than is reasonably necessary before it will be enforced.
5. _____: _____. As a general rule, a covenant by an employee not to compete is valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact.

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

Donn C. Raymond of Raymond, Olsen, Ediger & Ballew, P.C., for appellant.

John F. Wright of Wright & Sorensen, for appellee.

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

HASTINGS, J.

This is an appeal in a wage collection matter from an order of the district court for Scotts Bluff County, Nebraska, in which the court sustained the plaintiff's motion for summary judgment and entered judgment in his favor. The defendant's

motion for summary judgment on its cross-petition was overruled, and that cross-petition was dismissed. Defendant appeals, and plaintiff cross-appeals.

The plaintiff, Delman R. Polly, and the defendant, Ray D. Hilderman & Company, a certified public accountancy firm, entered into a written employment contract which provided that Polly would supervise Hilderman's bookkeeping and data processing department. As part of the agreement, Polly was to bring his present clients to Hilderman, for which he would receive a deferred bonus of up to $300 per month for 60 months, based on fees generated by Polly during that first year. Polly earned this maximum bonus, which was, in effect, payment for the accounts he brought with him. He received the monthly installments until he terminated his employment in August of 1984. Upon this termination, Hilderman stopped paying the monthly bonus.

Polly filed suit, seeking recovery of the balance due on the bonus. Hilderman answered that it did not owe the remaining bonus because Polly, when he became office manager for a former account of Hilderman, had breached the covenant not to compete contained in the written employment contract. Hilderman also cross-petitioned for lost income of $640 per month due to the loss of that account.

On motions for summary judgment the district court found there was no dispute as to any material fact and that the covenant not to compete was unreasonable and unenforceable as a matter of law. The judgment entered for Polly was for the accrued bonus of 14 months from September 15, 1984, through October 15, 1985, at the rate of $300 per month, or a total of $4,200. The judgment also required Hilderman to pay the balance of the deferred bonus commencing November 15, 1985, and continuing for a total of 28 months. Judgment was also entered for Polly for mandatory attorney fees of $1,050, pursuant to Neb. Rev. Stat. § 48-1231 (Reissue 1984).

Hilderman contends the court erred when it found that the covenant not to compete was unreasonable and unenforceable as a matter of law and when it refused to find that Polly had forfeited his right to deferred bonus payments when he breached that covenant not to compete. Polly contends on

cross-appeal that the court erred in failing to award Polly attorney fees based on the full amount of the judgment. We affirm.

The further facts necessary to understand the disposition of this case are as follows. Hilderman had three offices—the main one in Scottsbluff, Nebraska, and two branch offices, one in Torrington, Wyoming, and one in Bridgeport, Nebraska. Polly did all of his work in the Scottsbluff office, never went to the Torrington office, and may have gone to the Bridgeport office once or twice. During Polly's first year of work with Hilderman, Polly worked on 96 accounts, 86 of which Polly brought with him. The following year, Polly serviced approximately 76 accounts, 36 of which he brought with him. During each of those years, Hilderman handled approximately 900 to 1,000 accounts. Hilderman admitted that it had clients with whom Polly had no contact and that it had clients Polly would not even have known. While Polly worked for Hilderman he serviced the Arthur E. Smith & Son Trucking account. When Polly terminated his employment, he went to work for that company.

Paragraph 11 of the written contract between Polly and Hilderman contained the restrictive covenant as follows:

> EMPLOYER may consider EMPLOYEE a competing accountant and bookkeeper if, after termination of the EMPLOYER-EMPLOYEE agreement, EMPLOYEE practices public or private accountancy or bookkeeping services within three (3) years of the date of the termination and within thirty-five (35) miles of EMPLOYER'S office in Scottsbluff, Nebraska, or within thirty-five (35) miles of any branch office maintained by EMPLOYER in any city outside of Scottsbluff, Nebraska. Any of EMPLOYER'S accounts or clients retained by or which employ the EMPLOYEE for accounting or bookkeeping services during the three year time period shall be considered business of the EMPLOYER. In the event of EMPLOYEE'S breach of this covenant not to compete all deferred bonus payments due EMPLOYEE shall forthwith terminate. In addition EMPLOYER shall be entitled to enforce this covenant by

> any other available legal remedies, and shall be entitled to any legal and associated expenses of any accounting action necessitated to enforce this covenant.

Based on the foregoing facts, the district court found that the restrictive covenant was unreasonable and unenforceable as a matter of law. We agree.

> [T]here are three general requirements for a valid, partial restraint of trade such as a postemployment covenant not to compete, namely: "First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee."

American Sec. Servs. v. Vodra, 222 Neb. 480, 486, 385 N.W.2d 73, 78 (1986). Because the record does not suggest that enforcement of the restrictive covenant will be detrimental to the public, we will address the second requirement; that is, whether the restriction is reasonable in the sense that it is no greater than is reasonably necessary to protect Hilderman in some legitimate interest.

In *American Sec. Servs., supra*, a case in which a salesperson and a security company entered into an employment contract which contained a postemployment covenant not to compete, we addressed this requirement of a legitimate interest of the employer. We stated: "[A]n employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee." *Id.* at 486, 385 N.W.2d at 78. Quoting *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986), we went on:

> "To distinguish between 'ordinary competition' and 'unfair competition,' courts and commentators have frequently focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. Where an employee has substantial personal contact with the employer's customers, develops goodwill with such

> customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition."

222 Neb. at 486-87, 385 N.W.2d at 78. Applying this reasoning, we then determined that the security company had a legitimate business interest in customer goodwill which it could protect through the use of a postemployment covenant not to compete.

Although the record is somewhat sketchy as to the nature of services Polly performed for Hilderman, the record does reflect that Polly had substantial personal contact with approximately 46 of Hilderman's accounts. Consequently, just as a salesperson had the opportunity to appropriate the customer goodwill belonging to his employer in *American Sec. Servs.*, so did Polly have the opportunity to appropriate Hilderman's customer goodwill. We thus believe, as we similarly did in *American Sec. Servs.*, that Hilderman had a legitimate business interest in customer goodwill which it could protect through the use of a postemployment covenant not to compete.

However, the fact that Hilderman had a legitimate business interest in customer goodwill does not automatically validate its postemployment covenant not to compete. That covenant must also be "no greater than is reasonably necessary" before it will be enforced by this court.

The language of the covenant between Polly and Hilderman is confusing at best. The first sentence does not really prohibit Polly from practicing accounting or bookkeeping for 3 years within 35 miles of each of Hilderman's offices; it just states that Hilderman may consider Polly a competing accountant if he so practices. The second sentence does not really prohibit Polly from being employed for the next 3 years by clients of Hilderman; it only provides that if Polly is employed by Hilderman's clients during the next 3 years, that employment shall be considered business of Hilderman's. Then, the third sentence provides that if Polly breaches this "covenant not to compete," all deferred bonus payments will terminate. Finally, Hilderman was given the right to enforce the covenant by any other available legal remedies.

From this, it is unclear what Polly promised he would not do. But even if we were to interpret the covenant in the narrowest way possible—that for 3 years Polly could not be employed by any of Hilderman's clients who lived within 35 miles of any of Hilderman's three offices—we still believe that the covenant is greater than is reasonably necessary to protect Hilderman's legitimate interest in customer goodwill.

In reaching this conclusion we are guided by the principles announced in our former decisions involving covenants not to compete when appropriation of customer goodwill was involved. In *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982), we determined that a covenant which required an ex-partner in an accounting partnership to pay any wages he earned to the other partners if he worked for clients or former clients of the partnership for 3 years following his termination was overly broad and unenforceable. We stated:

> The covenant in question undertakes to prohibit Salmen from earning fees from clients or former clients of the partnership, or from such clients' officers and agents, no matter where they may be. Whatever interest Johnson may have in its present clients, it certainly can have none in its former clients; in any event, the forfeiture of fees is not limited to those generated from serving Johnson clients in Hastings, where Salmen rendered his personal services. It may well be that the nature of the accounting practice is such that a partner may serve clients in cities other than where he offices. That fact, however, does not meet the objection that the restriction includes services to former Johnson clients *and clients which Salmen had not served and did not know. On that ground alone, the covenant is impermissibly broad and is therefore unreasonable and unenforceable.*

(Emphasis supplied.) *Id.* at 129, 317 N.W.2d at 904.

However, in *Dana F. Cole & Co. v. Byerly*, 211 Neb. 903, 320 N.W.2d 916 (1982), we held that a covenant which restricted a former branch manager of an accounting firm from practicing accounting within 75 miles of the office he managed was reasonable and enforceable. In so deciding, we stated:

> The evidence shows that the branch managers have a very personal relationship with the clients served. . . . While the

> trade area within which the covenant controls seems broad, there is no evidence introduced which would show that the area is actually smaller. In fact, Mr. Hinze testified that 75 to 80 percent of the clients were located in the 75-mile radius.

Id. at 907, 320 N.W.2d at 918.

Finally, in *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986), the salesperson for the security company signed a noncompetition agreement which provided that he would not, for 3 years, solicit business from, contract with, or take employment with any customer or former customer of the security company where he had "(a) worked physically upon said customers premise (b) acted in a supervisory capacity with respect to said premises (c) acted as a salesman for the American Security Services in soliciting said customers business." *Id.* at 482, 385 N.W.2d at 75. In determining that that covenant was reasonable and enforceable, we stated:

> Vodra was not unconditionally prohibited from seeking customers within the sales territory covered during his employment with American. Rather, the covenant not to compete prohibited Vodra's soliciting American's customers contacted in the combined circumstances, conditions, or situations specified in that covenant. Such restriction on Vodra, as a former employee of American, provides minimal restraint on competition and is reasonable.

Id. at 490, 385 N.W.2d at 80.

From these cases, then, a rule regarding the validity of a covenant not to compete which is aimed at preventing a former employee from unfairly appropriating the customer goodwill which properly belongs to the employer can be gleaned. Such a covenant may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact. This is in accord with our decision in *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986), in which we determined that one of the reasons a covenant not to compete was unreasonable and unenforceable was because the employee had no personal and business-based contact with the employer's customers or prospective

customers. Because the covenant not to compete in this case attempts to restrict Polly from soliciting or working for Hilderman's clients with whom Polly did not work and did not even know, it is greater than is reasonably necessary to protect Hilderman's legitimate interest in customer goodwill, and is thus unreasonable and unenforceable.

In previous cases of this nature we have declined, for various reasons, to rewrite the covenant so as to make it "no greater than is reasonably necessary." See, e.g., *Boisen v. Petersen Flying Serv., supra; Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982). We once again do not believe that this is a proper case for reformation of the covenant not to compete. First, the covenant itself is so ambiguous that we are not even sure it is a true covenant not to compete. Second, Hilderman did not request reformation in its answer and cross-petition and did not argue that issue either at the trial court level or on appeal.

This brings us, then, to the issue raised by Polly on cross-appeal. Polly complains to this court about the amount of attorney fees Hilderman was ordered to pay as part of the judgment. Section 48-1231 provides in pertinent part:

> An employee having a claim for wages which are not paid within thirty days of the regular pay day designated or agreed upon may institute suit for such unpaid wages in the proper court. If an employee shall establish a claim and secure judgment on the claim, such employee shall be entitled to recover (1) the full amount of the judgment and all costs of such suit, and (2) if such employee has employed an attorney in the case, an amount for attorney fees assessed by the court *which fees shall not be less than twenty-five per cent of the unpaid wages.* If the cause is taken to an appellate court and plaintiff shall recover judgment, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney fees in such appellate court which fees shall not be less than twenty-five per cent of the unpaid wages.

(Emphasis supplied.) Polly argues that the court did not figure the attorney fees using the proper amount of unpaid wages.

The record reflects that Polly's bonus was $300 per month, to

be paid on the 15th of each month for 60 months. Hilderman had paid Polly $300 for 18 months, and then stopped when Polly terminated his employment. Judgment was rendered on October 15, 1985, at which time Hilderman had not been paying bonuses for 14 months. The court therefore entered judgment for Polly and against Hilderman in the amount of $4,200, which is 14 months multiplied by $300 per month. The court then went on and ordered Hilderman to pay to Polly $300 per month from November 15, 1985, and continuing for a total of 28 months, as payable under the employment contract. Finally, the court ordered Hilderman to pay attorney fees of $1,050, which is 25 percent of the $4,200 Hilderman was ordered to pay immediately.

Polly believes the court should have figured attorney fees using the amount Hilderman was ordered to pay immediately plus the amount it was ordered to pay as it became due. This would amount to 25 percent of $12,600 (28 months multiplied by $300 per month, plus $4,200). This $12,600 is what Polly believes is "unpaid wages" as used in § 48-1231.

The definition section of the Nebraska Wage Payment and Collection Act does not define "unpaid wages." However, § 48-1231 itself does state in part that "[a]n employee having a claim for wages which are not paid within thirty days of the regular pay day designated or agreed upon may institute suit for *such unpaid wages* in the proper court." (Emphasis supplied.) Thus, "unpaid wages" means "wages which are not paid within thirty days of the regular pay day designated or agreed upon."

The parties in this case had agreed that the bonus payments would be paid monthly over 60 months. At the time of the judgment, Hilderman owed 14 payments, and attorney fees were properly figured on those "unpaid wages." However, the remaining 28 payments were not yet overdue and therefore were not "unpaid wages" upon which an order of attorney fees could properly be figured.

We therefore affirm the judgment of the district court and also order the defendant to pay to the plaintiff $1,050 as attorney fees on appeal, pursuant to § 48-1231.

AFFIRMED AS MODIFIED.

JAMES B. JACKSON, APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

407 N.W.2d 758

Filed June 19, 1987. No. 85-920.

1. **Implied Consent: Blood, Breath, and Urine Tests: Venue.** An appeal from an order of the Director of Motor Vehicles entered under the provisions of Neb. Rev. Stat. § 39-669.18 (Reissue 1984) relating to a refusal to take a blood, breath, or urine test must be filed in the district court of the county in which the alleged events occurred for which the operator was arrested.
2. _____: _____: _____. The venue requirements of Neb. Rev. Stat. § 39-669.18 (Reissue 1984) governing the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction.
3. **Jurisdiction: Venue.** A court which never acquires jurisdiction permitting it to act has no authority to transfer venue under the provisions of Neb. Rev. Stat. § 25-410 (Reissue 1985).
4. **Records: Appeal and Error.** A transcript of the proceedings in the lower tribunal must be filed with the petition in error in order to confer jurisdiction upon the district court.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Michael Kelley and William G. Latka, for appellant.

Robert M. Spire, Attorney General, and Michele M. Wheeler, Special Assistant Attorney General, for appellee.

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

HASTINGS, J.

Plaintiff appeals from an order which sustained defendant's demurrer and dismissed his petition on appeal. The plaintiff attempted to appeal from an order of the defendant, director of the Department of Motor Vehicles, which had revoked his motor vehicle operator's permit because of an alleged refusal to take a breath test. This followed an arrest for suspected driving while intoxicated in Sarpy County.

Neb. Rev. Stat. § 39-669.18 (Reissue 1984) of the Nebraska implied consent law permits any person who feels aggrieved because of a revocation of driving privileges to appeal to the district court of the county where the alleged events occurred

for which the operator was arrested. Defendant demurred to the petition filed in the district court for Douglas County, which the court sustained because of improper venue. Shortly thereafter, plaintiff filed a motion to transfer his petition to the district court for Sarpy County, which was denied.

According to the dictates of *Peck v. Dunlevey*, 184 Neb. 812, 172 N.W.2d 613 (1969), Sarpy County was the proper and only jurisdiction capable of hearing this case. The requirements of a statute such as § 39-669.18 governing the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction. *Gilmore v. Nebraska Crime Vict. Rep. Bd., ante* p. 640, 407 N.W.2d 736 (1987).

Plaintiff's contention that his motion to transfer his case to Sarpy County under the provisions of Neb. Rev. Stat. § 25-410 (Reissue 1985) should have been granted is unavailing because the district court for Douglas County never acquired jurisdiction permitting it to act. *Gilmore v. Nebraska Crime Vict. Rep. Bd., supra.*

Similarly, his request that we recognize his petition on appeal as an error proceeding is also without merit because Neb. Rev. Stat. § 25-1905 (Reissue 1985) requires that a transcript of the proceedings containing the final judgment sought to be reversed must be *filed with the petition in error.* The transcript was not filed until some days after the filing of the petition. A transcript of the proceedings in the lower tribunal must be filed with the petition in error in order to confer jurisdiction upon the district court. *School Dist. No. 39 v. Farber*, 215 Neb. 791, 341 N.W.2d 320 (1983).

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

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ROY M. BYRAM, RESPONDENT.
407 N.W.2d 759

Filed June 19, 1987. No. 86-341.

Original action. Judgment of disbarment.

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

PER CURIAM.

This is an original action. The respondent, Roy M. Byram, was charged with and convicted of issuing a check for insufficient funds. Upon his conviction he was sentenced to 3 years' imprisonment. Byram appealed his conviction, but the appeal was dismissed due to appellant's failure to file briefs.

Formal charges against Byram have been filed by the Counsel for Discipline, as well as a motion for judgment on the pleadings. On April 24, 1986, respondent's license to practice law was temporarily suspended.

After a careful review of the record, we find there exists no issue of fact or law. We see no reason why judgment should not be entered pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 1986).

It is the judgment of the court that the respondent, Roy M. Byram, be, and hereby is, disbarred from the practice of law effective June 19, 1987.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V. PATRICK A. PECHA, APPELLANT.
407 N.W.2d 760

Filed June 19, 1987. No. 86-675.

1. **Constitutional Law: Search Warrants: Words and Phrases.** What will amount to forbidden generality, or, to put it another way, insufficient particularity in a warrant necessarily depends upon the facts and circumstances of each case. Thus, to say that general warrants are outlawed by the federal and state

Constitutions merely initiates the inquiry. The same may be said of their expressed requirement of probable cause and their ultimate mandate of reasonableness. Like "particularity," these depend upon the facts and circumstances.

2. **Search Warrants: Probable Cause: Evidence.** There must be a sufficient nexus between the criminal activity, the place of the activity, and the persons in the place to show probable cause. This nexus has been described as whether there is sufficient particularity in the probable cause sense, that is, whether the information supplied the magistrate supports the conclusion that it is probable anyone in the described place when the warrant is executed is involved in the criminal activity in such a way as to have evidence thereof on his person.
3. _____: _____: _____. Where the inclusion in a warrant of the catchall phrase "John and/or Jane Doe" is not based upon any probable cause, and the premises to be searched is acknowledged to be a residence at which both persons engaging in illegal activity and persons engaging in legal activity might be found, such a warrant cannot be condoned.
4. **Search Warrants: Affidavits: Probable Cause: Presumptions: Police Officers and Sheriffs.** An officer could not manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. A warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Appeal from the District Court for Douglas County: LAWRENCE CORRIGAN, Judge. Reversed and remanded with directions to dismiss.

Thomas M. Kenney, Douglas County Public Defender, and Victor Gutman, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

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

KRIVOSHA, C.J.

This is an appeal from the district court for Douglas County, Nebraska. The appellant, Patrick A. Pecha, was charged with the offense of unlawfully and knowingly or intentionally possessing a controlled substance, to wit, methamphetamine, in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1985). This is a Class IV felony. Following the trial, Pecha was convicted of the offense and sentenced to 1 year's imprisonment. He now appeals to this court, maintaining that the district court erred in

not sustaining his motion to suppress certain evidence obtained by what Pecha maintains was an invalid search warrant. We have reviewed the record and believe that Pecha is correct in his assertion. For that reason the judgment of conviction must be reversed and set aside.

The record discloses that on April 2, 1986, Officer Dianna Clark of the Omaha Police Division narcotics unit filed an affidavit and application for issuance of a search warrant. The affidavit provided:

> Within the last 24 hours Omaha Police Narcotics Officer Dianna L. Clark recevied [sic] information from a confidential reliable source concerning the drug activities of a party identified only as LNU, Steve residing at 1721 South 28th Street. The confidential reliable source has proven his/her reliability to the members of the Omaha Police Narcoitcs [sic] Unit by making controlled purchases of marijuana, LSD, and assorted pills. The controlled purchases of marijuana, LSD, were turned into [sic] Chemist William Ihm of the Lutheran Medical Center and test revealed that these items were in fact marijuana and LSD. Henceforth this confidential source shall be referred to as Source #1.
>
> In the last 24 hours Affiant Officer had conversation with Source #1 concerning the drug activity of a party identified as LNU, Steve a white male, 22-23 years of age, 5'5, 150-155 lbs., with brown hair, and a beard residing at 1721 South 28th Street. At this time Source #1 advised Affiant Officer that within the last 48 hours Source #1 was inside of 1721 South 28th and observed LNU, Steve in possession of quantity of methamphetamine. Source #1 is aware of what methamphetamine looks like it's [sic] appearance and how it would be packaged for street sale. Source #1 also advised Affiant Officer that LNU, Steve resides at 1721 South 28th Street with a female known as MOHR, Edna.
>
> In checking the Omaha Police computer Officer Dianna L. Clark located a [sic] Edna MOHR a white female, DOB/10-17-48, 5'5, 120 lbs., with brown hair, and brown eyes using the address of 1721 South 28th

> Street, OPD#081561, Nebraska Drivers license #EO1-461086, SS#508-62-3892.
>
> Based on the foregoing information Affiant Officer has reason to believe and does believe that MOHR, Edna and LNU, Steve are involved in the distribution of controlled substances in the Omaha Nebraska area. Affiant Officer Dianna Clark further believes that LNU, Steve and MOHR, Edna are presently in possession of a quantity of methamphetamine and that if officers of the Omaha Police Narcotics Unit are authorized to execute a Search Warrant that officers will obtain enough evidence to arrest LNU, Steve and MOHR, Edna for the offense of Possession of a Controlled Substance and Possession of a Controlled Substance With Intent to Deliver which are violations against the Statutes of the State of Nebraska.
>
> Therefore it is requested that the court enter an order authorizing the officers of the Omaha Police Narcotics Unit to execute a Search Warrant on the residence of 1721 South 28th Street located in Omaha Douglas County Nebraska for the purpose of gathering evidence.

Based upon the affidavit, the county court for Douglas County issued a search warrant providing that there was probable cause to believe that "methamphetamine it's [sic] derivatives, and administrating instruments, either homemade or manufactured," as well as "[m]onies or records pertaining to an illegal narcotics operation and distribution," and "[r]ecords identifying those individuals residing at 1721 South 28th Street Omaha Douglas County Nebraska," were concealed on the following:

> [T]he premises located at 1721 South 28th Street a blue two story wood frame single family dwelling, AND/OR the person of MOHR, Edna, I., white female DOB/10-17-48, 5'5, 120 lbs., brown hair, brown eyes, OPD#081561, and LNU, Steve, white male, 22-23 years of age, 5'5, 150-155 lbs., with brown hair and a beard, and John and/or Jane DOE, who resides or is in control of the afore described premises.

The warrant authorized the search of the premises located on South 28th Street as well as "MOHR, Edna," and "LNU,

Steve," and authorized the seizure of the property described in the warrant.

At approximately 5 p.m. on April 2, 1986, seven or eight police officers went to 1721 South 28th Street to execute the warrant. They parked south of the residence and ran on foot. As they approached the residence, they observed a male who fit the description of the male identified in the search warrant as "LNU, Steve." He was later identified as Stephen Pecha, a brother of the appellant. Stephen Pecha was working under the hood of a car parked 20 feet in front of the residence. A second man, who was later identified as appellant, had been near the car when the officers began approaching the residence, but was walking away from it and was on the front porch by the time that the officers arrived.

Officer Kevin Donlan patted down Stephen Pecha as he stood by the car. The officer said that he was looking for weapons, but he did not find any. He also advised Stephen Pecha that they had a search warrant for the residence. A pat-down search of the appellant by Officer Greg Marchio at the same time did not yield any weapons, either. Other officers entered from the rear of the residence and gathered together all of the parties who were inside, consisting of Edna Mohr and several children. Officers Donlan and Marchio then escorted the Pecha brothers into the residence.

The officers then gathered everyone into the living room and advised them that they had a search warrant. While uniformed patrol car officers watched the parties, narcotics unit officers searched the residence. Officer Donlan searched the dining and living rooms and seized drug paraphernalia, including snorting-tube straws, razor blades, and mirrors, which he found in the middle of the dining room table.

Officer Donlan then searched Stephen Pecha thoroughly, but found nothing. Officer Clark searched Edna Mohr. Then Officer Donlan searched the appellant. He found in appellant's pants pocket a folded piece of paper wrapped around a little baggie containing a white powdery substance, which was later identified by William Ihm, a chemist at Lutheran Medical Center, as 40 milligrams of methamphetamine, a Schedule II drug. The piece of paper was stationery from a business where

Mohr once worked. No evidence was introduced to establish that the drug found on appellant came from the same "group" as traces of drug found on the paraphernalia located on the premises.

Prior to trial, Pecha moved to suppress the physical evidence obtained as a result of the search. At the hearing on the motion, the State called Officer Donlan, who testified about the execution of the warrant. Donlan testified at trial that the names "John and/or Jane DOE" appeared on the search warrant as "a catchall for anybody that might be inside the residence." The district court overruled the motion to suppress, and the case proceeded to trial. When appellant objected to the introduction of evidence or renewed his motion during trial, the court either indicated it was making "the same ruling," or simply overruled the motion or objection, and the evidence was admitted.

As part of his defense, Pecha attempted to show that the search of his person was outside the scope of the warrant because he was not a person who resided at or was in control of the premises at 1721 South 28th Street. Pecha testified that he lived next door or across the street and that he hardly ever visited the residence occupied by his brother and Mohr. On cross-examination, Officer Donlan admitted that he had found nothing, at the residence, that was identified as belonging to Patrick Pecha.

The issue presented to us by this appeal is one of first impression in this jurisdiction and concerns the question of the legality of the "John Doe warrant." While we have not specifically passed upon this issue, several other courts have, and their decisions are helpful in our deciding this matter. As we begin our analysis it is important for us to keep in mind the provisions of the fourth amendment to the U.S. Constitution as well as the provisions of Neb. Rev. Stat. § 29-814.04 (Reissue 1985).

The fourth amendment to the U.S. Constitution requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." To the same effect, § 29-814.04 provides in part that "[i]f the

magistrate or judge is satisfied that probable cause exists for the issuance of a search warrant . . . the magistrate or judge shall issue the warrant which shall *identify the person or place to be searched and the person or property to be seized*." (Emphasis supplied.) The reasons underlying the language of both the fourth amendment to the U.S. Constitution and § 29-814.04 are obvious to anyone familiar with the early history of our country. Both the framers of our Constitution and its subsequent Bill of Rights and the Legislature of the State of Nebraska were attempting to restrict the evils associated with the use of the general warrants known in England and the detested writs of assistance familiar in the Colonies. The reason the government was prohibited from indiscriminately searching persons and places was observed by the New York Court of Appeals in *People v Nieves*, 36 N.Y.2d 396, 330 N.E.2d 26, 369 N.Y.S.2d 50 (1975), where it said:

> Particularity is required in order that the executing officer can reasonably ascertain and identify . . . the persons or places authorized to be searched and the things authorized to be seized. To protect the right of privacy from arbitrary police intrusion, the "core" of the Fourth Amendment . . . nothing should be left to the discretion of the searcher in executing the warrant . . . .

Id. at 401, 330 N.E.2d at 31, 369 N.Y.S.2d at 57.

That is not to say, however, that under no circumstance may a warrant be issued for one whom the police cannot identify by name in advance.

> What will amount to forbidden generality, or, to put it another way, insufficient particularity in a warrant necessarily depends upon the facts and circumstances of each case. Thus, to say that general warrants are outlawed by the Federal and State Constitutions merely initiates the inquiry. The same may be said of their expressed requirement of probable cause and their ultimate mandate of reasonableness. Like "particularity", these depend upon the facts and circumstances.

Id. at 402, 330 N.E.2d at 32, 369 N.Y.S.2d at 58. See, also, *State v. Gilreath*, 215 Neb. 466, 339 N.W.2d 288 (1983); *State v. Abraham*, 218 Neb. 475, 356 N.W.2d 877 (1984).

Two Minnesota decisions, though reaching opposite results, point out the factors that should be considered. In the case of *State v. Hinkel*, 365 N.W.2d 774 (Minn. 1985), a search warrant was issued to permit police officers to search an "afterhours establishment." The warrant specifically authorized a search of the house and "all persons on the premises." In upholding the validity of the warrant authorizing the search of "all persons on the premises," the Minnesota court said:

> There must be a sufficient nexus between the criminal activity, the place of the activity, and the persons in the place to show probable cause. This nexus has been described as "whether there is sufficient particularity in the probable cause sense, that is, whether the information supplied the magistrate supports the conclusion that it is probable anyone in the described place when the warrant is executed is involved in the criminal activity in such a way as to have evidence thereof on his person."

Id. at 776.

The court then concluded that anyone who was in an "afterhours establishment" was likely to be a person who was engaging in illegal activity, and therefore innocent persons were not likely to be searched.

In the second case, *State v. Robinson*, 371 N.W.2d 624 (Minn. App. 1985), the warrant authorized the search of a licensed bar and "all persons on the premises" for drugs and evidence of drug-related activity. In determining that a warrant authorizing the search of "all persons" in a licensed bar was invalid, the Minnesota Court of Appeals, after first citing *State v. Hinkel, supra*, said at 626:

> In this matter, the police were dealing with the patrons of a licensed bar operating during normal business hours. There was little likelihood that everyone in the bar on a Friday night would be involved in criminal activity. The two controlled buys by unidentified informants and other allegations in the police affidavit did not demonstrate a sufficient nexus between the illegal activity and the 50 to 80 patrons in the bar that night. The "all persons" warrant in this matter was an illegal general warrant.

We believe an examination of the facts in the instant case

shows that they fail to satisfy the nexus requirement, and instead establishes that the warrant was an invalid general warrant.

Nothing in the affidavit filed by Officer Clark even made reference to a belief that there were or would be persons other than Edna Mohr and Stephen Pecha on the premises who were or might be involved in illegal activity. No evidence was introduced to show that there was anyone else residing at or in control of the premises other than Edna Mohr and Stephen Pecha. Further, Officer Donlan frankly admitted that the inclusion of the phrase "John and/or Jane DOE" was intended merely as a catchall. It is this very catchall which both the fourth amendment to the U.S. Constitution and the provisions of § 29-814.04 seek to prohibit.

If indeed the premises are of a type that is likely to be frequented only by persons engaged in illegal activity, or the affiant has sufficient information to generally describe individuals who are likely to be involved in illegal activity and who should be searched, a warrant of that nature may be valid. Where, as here, the inclusion of the catchall phrase "John and/or Jane DOE" is not based upon any probable cause, and the premises to be searched is acknowledged to be a residence at which both persons engaging in illegal activity and persons engaging in legal activity might be found, we cannot condone such a warrant. Were we to do so we would, in effect, eviscerate the protections intended by both the fourth amendment to the U.S. Constitution and the provisions of § 29-814.04. That we are unwilling to do.

The State further argues that even if the warrant was illegally issued, nevertheless, the conviction should be affirmed on the basis that the search was made "in good faith" and is therefore within an exception to the exclusionary rule. It is true that in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), the U.S. Supreme Court held that evidence obtained under an illegal warrant upon which police officers were acting in good faith should nevertheless be admitted in evidence. However, the Supreme Court further stated:

> The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his

> judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, [99 S. Ct. 2319, 60 L. Ed. 2d 920] (1979); in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." . . . Finally . . . a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

468 U.S. at 923.

We believe that the facts in this case fall squarely within the limitations imposed in *United States v. Leon*, and the good-faith exception created in that case is not applicable in the instant case. The defect in this warrant was apparent on its face.

For that reason, we find that the motion to suppress filed by Pecha should have been sustained and the evidence suppressed. Absent that evidence, the record is devoid of any further evidence sufficient to convict Pecha of the charge. For that reason the conviction and sentence must be set aside and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. CORELIA THREET, APPELLANT.

407 N.W.2d 766

Filed June 19, 1987. No. 86-729.

1. **Jury Instructions.** It is the duty of the trial court, upon the request of the accused, to instruct the jury on her theory of the case if there is evidence to support it.
2. _____. 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.

3. _____. Jury instructions must be read together, and if the instructions when taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error in not reading the defendant's proposed instruction.
4. **Trial: Appeal and Error.** Error may not be predicated upon a ruling unless a substantial right of the party is affected.
5. **Criminal Law: Juries: Discrimination: Proof.** In a criminal case, a defendant may establish a prima facie showing of purposeful racial discrimination solely on evidence concerning the State's use of peremptory challenges.
6. _____: _____: _____: _____. When prima facie showing of racial discrimination is established, the burden then shifts to the State to come forth with a neutral explanation for the peremptory challenge.
7. **Evidence: Trial: Appeal and Error.** It is within the trial court's discretion to admit or exclude evidence, and such rulings will not be disturbed on appeal absent a showing of abuse of that discretion.
8. **Homicide: Photographs.** In homicide cases, photographs of the victim may be received for purposes of identification, upon proper foundation. The fact that the photographs may present a gruesome spectacle does not prohibit their admission into evidence.

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

Richard M. Fellman of Fellman Law Offices, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

GRANT, J.

Defendant, Corelia Threet, appeals her conviction in the district court for Douglas County of murder in the second degree and use of a firearm during the commission of a felony in connection with the February 2, 1986, shooting death of Steven W. Johnson. The defendant was sentenced to imprisonment in the Nebraska Center for Women for a period of 30 years on the conviction of second degree murder and not less than 5 nor more than 10 years on the conviction of use of a firearm during the commission of a felony. On appeal, the defendant alleges the trial court erred in failing to properly instruct the jury on accidental shooting, when evidence thereof

was submitted, and in failing to rule on defendant's motion in limine in sufficient time to allow the defendant to present an orderly defense. The defendant further contends the court erred in failing to impanel a new jury after the State peremptorily challenged all black prospective jurors called to sit in the case, and in allowing into evidence an inflammatory and unnecessary photograph of the victim. Finally, the defendant contends the court committed reversible error in allowing the State to pursue improper redirect examination of a witness and in overruling defendant's objection concerning improper cross-examination of a defense witness. For the reasons hereafter stated, the judgment and sentence of the district court are affirmed.

There is little dispute concerning the events that led up to the actual shooting. Defendant admits to having shot the victim. The only issue at trial was whether the defendant had the requisite intent to kill, or whether the shooting was accidental as the defendant contends. The record shows that on February 2, 1986, the day of the shooting, the defendant and several friends decided to have a cookout. The day was unusually warm. The cookout took place at defendant's residence in Omaha, Nebraska. The defendant, with her boyfriend, Tony Williams, and his sister, Darlene Williams, went to the store to buy food and alcohol for the cookout. The defendant paid for the groceries as well as a rose given to her by Tony Williams. The group was joined at the defendant's home by the victim, Steven Johnson. Also present at the cookout were two other couples, Fred Moore and Margaret Watkins, and Carol and Janet Perkins.

At approximately 6 p.m., Carol and Janet Perkins left. Shortly thereafter, Fred Moore and Margaret Watkins left, after Moore borrowed the defendant's car to drive Watkins to work. The defendant, Tony Williams, Darlene Williams, and the victim remained at the cookout. The four then discussed going to a movie. It is at this point that the facts are in dispute. Tony Williams testified that an argument arose between himself and the defendant over the defendant's having loaned her car to Moore. The witness testified that the defendant went upstairs to change and when she came downstairs she began to yell at him

to get out of the house. When the witness attempted to take the rose that he had earlier given to the defendant, the defendant slapped it, causing the vase to fall and break. Tony Williams testified that the victim grabbed him by the arm and took him outside to cool off, and as the two men were walking from the house Tony Williams heard a gunshot and saw the victim fall to the ground. When Williams turned toward the house, he saw the defendant standing in the doorway, holding a gun.

This testimony was corroborated by Darlene Williams, who testified she was present at the time of the shooting and that an argument took place between the defendant and Tony Williams. Darlene Williams further testified that as the victim and Tony Williams were leaving, she saw the defendant pull a gun from defendant's blouse, step out the back door, and fire the gun. Immediately after the shot, the defendant told Ms. Williams she had shot the victim and that Ms. Williams had better call for an ambulance.

Testifying on her own behalf, the defendant said that she did not want to go to the movies because she did not want to spend any more money. Defendant further testified that Tony Williams was angered by defendant's refusal to go to the movies, threw the flower to the ground, and left with the victim. The defendant testified that approximately 10 to 20 minutes after the two men left, she was watching television, when she heard a noise coming from the back which she presumed was someone trying to enter her house. Defendant stated she then went to the back door, took a gun from a drawer, and, while standing inside, fired a shot into the air to scare off whoever was in her yard. According to the defendant, she then heard the victim call out that he had been shot. The defendant then told Darlene Williams, who, according to the defendant's testimony, had been upstairs when the shooting took place, to call an ambulance.

Other witnesses for the State included Officer Chris Toledo of the Omaha Police Division, Omaha Police Sgt. Robert Schafer, and Dr. Clarence McWhorter, the pathologist who performed the autopsy. Officer Toledo testified that when he arrived at the scene, he entered the defendant's home and asked her what happened. The defendant responded, "I shot the

m— f—, I know I did but it was an accident." Dr. McWhorter testified the cause of death was exsanguinating hemorrhage, secondary to disruption of blood vessels and disruption of the bowel as a result of the gunshot wound. The bullet entered the victim's back just below the waistband of his pants. When asked if he could testify as to the angle of the flight of the bullet, Dr. McWhorter stated that the bullet traveled at a downward angle of approximately 15°. The witness further testified that the wound was consistent with that which would have been received if the person firing the gun was standing at a higher point than the victim.

At the close of the evidence, the matter was submitted to the jury. The jury returned a verdict of guilty on the charges of both murder in the second degree and use of a firearm during the commission of a felony.

The defendant first assigns as error the district court's failure to properly instruct the jury on accidental shooting, when evidence thereof was submitted to the court. In Nebraska, it is the duty of the trial court, upon the request of the accused, to instruct the jury on her theory of the case if there is evidence to support it. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). However, 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. Taylor*, 221 Neb. 114, 375 N.W.2d 610 (1985); *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980). It is not error for the court to refuse to give the defendant's requested instruction when the substance of the requested instruction is covered by the instructions given. *State v. Samuels, supra*. In the case at bar the defendant offered an instruction which read in part, "[I]f you find the Defendant's shooting was accidental you should find the Defendant innocent." This instruction was refused. Instead, the court gave instruction No. 4, which explained the material elements the State needed to prove in order for the jury to find the defendant guilty of murder in the second degree or, as a lesser-included offense, manslaughter. Additionally, the court's instruction No. 8 defined murder in the second degree as causing the death of a person "intentionally, but without premeditation," and instruction

No. 9 defined the lesser-included offense of manslaughter. Finally, the court's instruction No. 11 defined "intentionally" to mean "willfully or purposely and not accidentally or involuntarily." These instructions, when read as a whole, correctly state the law and adequately cover the issues. The defendant's proposed instruction could have led to confusion of the jury, since nothing is said concerning the lesser-included offense of manslaughter. We have held that all jury instructions must be read together, and if the instructions when taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error in not giving a defendant's proposed instruction. *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986).

The defendant next assigns as error the trial court's failure to rule on defendant's motion in limine in sufficient time to allow the defendant to present an orderly defense. The defendant had made a motion in limine in order to keep out testimony on cross-examination of a proposed defense witness, Edward Threet. Threet, the defendant's ex-husband, was to testify concerning the dimensions of defendant's kitchen and back porch. Defense counsel wanted to avoid any inquiry by the State concerning an earlier assault charge against the defendant arising out of an incident in which the defendant shot Edward Threet in the chest. The trial court reserved ruling on the matter until the issue actually arose at trial. The trial court announced that it would permit the prosecution to inquire into these matters only if Edward Threet testified concerning the defendant's inability to use a weapon or defendant's peaceful nature. The defendant's argument that the court's reserved ruling was error is without merit. Defendant could have relied on this announcement of the court to enable her to call Edward Threet and limit his testimony to the dimensions of the kitchen and back porch. See *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986). Instead, the defendant decided not to call the witness. It was this decision of the defendant, not the court's ruling, that prevented the witness from testifying. It is the law in Nebraska that error may not be predicated upon a ruling unless a substantial right of the party is affected. Neb. Rev. Stat. § 27-103(1) (Reissue 1985). See, also, *Bernadt v. Suburban Air,*

Inc., 221 Neb. 537, 378 N.W.2d 852 (1985). The court's ruling in this matter did not substantially affect a right of the defendant; therefore, the court did not err in reserving its ruling until the issue arose at trial.

The defendant next assigns as error the trial court's failure to strike the jury and impanel a new jury after the State peremptorily challenged all black members of the prospective jury. The defendant relies on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), where the U.S. Supreme Court recognized that a state denies a black defendant equal protection if it puts him on trial before a jury from which members of his race have been purposely excluded. This court followed the *Batson* holding in *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986). In *Batson* the Court held that a defendant may establish a prima facie showing of purposeful racial discrimination in selection of the jury solely on evidence concerning the state's use of peremptory challenges and that, if a prima facie showing of racial discrimination is established, the burden then shifts to the state to come forth with a neutral explanation for the peremptory challenges. In the present case, the defendant contends the State purposefully discriminated against defendant, who is black, by removing all (in this case, two) black members from the prospective jury. Appellant's assignment of error is without merit. In this case, the State satisfactorily came forward with a neutral explanation for its challenges. The record shows that the State exercised its first and fourth peremptory challenges to remove two black members from the prospective jury. There is no showing that the challenges were racially motivated, in violation of *Batson*. On the contrary, the State explained why each of the two prospective jurors was stricken. The first prospective juror was removed after she had indicated she knew about the case and that her father had lived down the street from the defendant. The second black member of the prospective jury was challenged after he indicated that he knew a neighbor of the defendant who was a potential witness and who had been at the scene after the shooting and remained there while the police conducted their investigation. Absent a showing that the challenges were racially motivated, and in light of the reasons

articulated by the State, the district court did not err in failing to strike the jury and impanel a new jury.

The defendant's final three assignments of error concern the district court's allowing into evidence certain testimony on cross-examination and redirect examination, as well as the admittance of a certain photograph which defendant alleges was inflammatory and unnecessary. We have held that it is within the trial court's discretion to admit or exclude evidence, and such rulings will not be disturbed on appeal absent a showing of abuse of that discretion. *State v. Wilson, ante* p. 466, 406 N.W.2d 123 (1987); *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987). Additionally, the extent, scope, and course of cross-examination rest within the discretion of the trial court. *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985). After a review of the record, we find no abuse of discretion on behalf of the trial court. The State properly conducted the redirect examination of its witness, Sergeant Schafer, when questioning him about his report after the defendant had initiated questions on the report during cross-examination. As to the State's cross-examination of the defendant regarding previous incidents in which the defendant had allegedly pulled a gun from her purse, the questioning was also proper. While Neb. Rev. Stat. § 27-404(2) (Reissue 1985) prohibits the introduction of prior crimes, wrongs, or acts for the purpose of showing the character of the defendant in order to show that defendant acted in conformity therewith, such evidence may be admitted to prove the absence of mistake or accident. *State v. Wilson, supra.* The defendant's theory of the case is that she accidentally shot the victim. The State properly sought testimony regarding the previous incidents to prove absence of accident.

Finally, the trial court did not abuse its discretion by allowing photographs of the victim into evidence. In homicide cases, photographs of the victim may be received for purposes of identification, upon proper foundation. *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986). Additionally, the photographs were relevant to show that the shot that killed the victim had been fired from an elevation higher than the ground on which the victim was standing. The fact that the

photographs may present a gruesome spectacle does not prohibit their admission into evidence. *State v. West, supra.*

In absence of a showing of any error, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GERALD S. HIGH, APPELLANT.
407 N.W.2d 776

Filed June 19, 1987. No. 86-773.

1. **Constitutional Law: Waiver: Jury Trials.** The right to trial by jury is personal, and a defendant may waive that right.
2. _____: _____: _____. In order to waive the right to trial by jury, a defendant must be advised of the right to jury trial, must personally waive that right, and must do so either in writing or in open court for the record.
3. _____: _____: _____. In order for a court to permit a defendant to waive the right to trial by jury, it is not necessary that the defendant be informed of the precise role which the jury fulfills in a particular prosecution.
4. **Sentences: Appeal and Error.** A sentence imposed in a criminal case within the limits prescribed by the statute in question will not be disturbed on appeal in the absence of an abuse of discretion.
5. _____: _____. In reviewing a case for alleged excessiveness of the sentence, the question for this court is whether the defendant in this case received an appropriate sentence, not whether someone else in a different case received a lesser sentence.

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

Calvin D. Hansen, for appellant.

Robert M. Spire, Attorney General, and Marie C. Pawol, for appellee.

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

HASTINGS, J.

Gerald S. High appeals his conviction in the district court for Lancaster County, Nebraska, of generating child pornography

in violation of Neb. Rev. Stat. § 28-1463 (Reissue 1979).

The defendant was first arraigned on January 23, 1986, and on March 27 again appeared in court, and waived his right to a jury trial. He was represented by counsel in both instances. Later, on June 11, 1986, in the company of counsel, he appeared in court and entered a plea of guilty to the offense originally charged. The proceedings were conducted in full conformity with the requirements of due process as articulated by this court in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986); i.e., all of defendant's constitutional rights relating to a plea of guilty, including the right to a jury trial, were related to him, and the record discloses that he voluntarily and knowingly waived those rights. The court was informed of the factual basis for the plea, that being that defendant videotaped a certain 14-year-old boy performing acts of masturbation, fellatio, and simulated anal intercourse with other youths, production of this videotape having taken place at an apartment in Lincoln, Nebraska. The court accepted defendant's plea of guilty. A presentence investigation was conducted, and on September 5, 1986, sentencing was had. The court first found that defendant was not a mentally disordered sex offender, and then sentenced defendant to a term of imprisonment to the Department of Correctional Services of not less than 30 months nor more than 8 years. Defendant appeals.

The defendant contends the trial court erred in determining that he had knowingly, voluntarily, and intelligently waived his right to trial by jury, when he was not informed of the role the jury would play in determining whether the videotape was obscene. The defendant next believes that because he was not informed of this special role the jury would play in his prosecution, he did not knowingly, intelligently, and voluntarily enter his plea of guilty. Finally, defendant claims his sentence was excessive and disparate when compared to that of Joseph Burke, who was convicted of violating a later version of the same statute, Neb. Rev. Stat. § 28-1463.03(1) (Reissue 1985), a part of the Child Pornography Prevention Act. We affirm.

The statute under which defendant was charged reads as follows: "It shall be unlawful for a person to make, publish,

present, direct, create, provide, or in any manner generate any obscene material which has as one of its participants or portrayed observers a child under the age of sixteen or who appears as prepubescent." § 28-1463(1). Neb. Rev. Stat. § 28-814 (Reissue 1985) provides in part:

> (1) Criminal prosecutions involving the ultimate issue of obscenity . . . shall be tried by jury, unless the defendant shall waive a jury trial in writing or by statement in open court entered in the minutes.
>
> (2) The judge shall instruct the jury that the guidelines in determining whether a work, material, conduct, or live exhibition is obscene are: (a) The average person applying contemporary community standards would find the work taken as a whole goes substantially beyond contemporary limits of candor in description or presentation of such matters and predominantly appeals to the prurient, shameful, or morbid interest; (b) the work depicts in a patently offensive way sexual conduct specifically referred to in sections 28-807 to 28-829; (c) the work as a whole lacks serious literary, artistic, political, or scientific value; and (d) in applying these guidelines to the determination of whether or not the work, material, conduct or live exhibition is obscene, each element of each guideline must be established beyond a reasonable doubt.

The defendant recognizes that the following colloquy took place regarding the waiver of his right to trial by jury:

> MS. THORSON: Your Honor, this is State of Nebraska versus Gerald High, Docket 69, Page 189, and State of Nebraska versus Gerald High, Docket 69, Page 193. I believe the defendant is here at this time to waive his right to a jury trial.
>
> MR. POPPE: That's correct, Your Honor. For the record, I have discussed various aspects about the waiver of a jury trial with Mr. High and he is prepared to waive his right to have a jury trial in both of these cases.
>
> THE COURT: Okay. Mr. High, have you discussed this matter with Mr. Poppe?
>
> THE DEFENDNAT [sic]: Yes, sir.
>
> THE COURT: Okay. And do you understand that you

do have the right, a constitutional and statutory right to have a trial by a jury? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand that that is a very valuable right?

THE DEFENDANT: Yes, sir.

THE COURT: And do you wish to waive or give up your right in both these cases to have a jury trial?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone made any promises to you or threats against you to get you to —

THE DEFENDANT: No.

THE COURT: — to come in here today and give up this right?

THE DEFENDANT: No, sir.

THE COURT: Mr. Poppe, do you feel Mr. High is acting knowledgeably, voluntarily, intelligently and freely in regard to his waiver of his right to a jury trial?

MR. POPPE: Yes, I do, Your Honor.

THE COURT: The court does find that Mr. High is acting knowledgeably and voluntarily, freely. The jury trial will be waived.

It has long been the rule that the right to trial by jury is personal, and a defendant may waive that right. *State v. Carpenter*, 181 Neb. 639, 150 N.W.2d 129 (1967). See, also, *State v. Miles*, 202 Neb. 126, 274 N.W.2d 153 (1979).

Defendant concedes that in an ordinary criminal case the colloquy between the court and the defendant set out above was probably sufficient to constitute a waiver of the right to a jury trial. We agree.

The defendant contends, however, that such a colloquy is not sufficient to support a knowing, intelligent, and voluntary waiver of a defendant's right to jury trial when the prosecution involves a determination of what is or what is not obscene. He insists that the defendant must first be told of the function of the jury. This is because § 28-1463, in effect at the time, refers to the generation of "obscene material" and § 28-814 provides that "[c]riminal prosecutions involving the ultimate issue of obscenity . . . shall be tried by jury, unless the defendant shall

waive a jury trial in writing or by statement in open court entered in the minutes."

Counsel for the defendant cites no authority other than the statute quoted to support the position of why the function of the jury should be explained in detail in this case as opposed to any criminal case in which the jury has a specific function, i.e., the factual determination of guilt or innocence. We see no justifiable reason for applying a different rule to this case, and therefore decline defendant's invitation to require trial courts to inform defendants of precisely the role the jury will play in their obscenity prosecution. The defendant's waiver of his right to trial by jury was knowingly, intelligently, and voluntarily made.

The defendant's second assignment of error depended solely upon our decision regarding his first assignment of error. Because we have determined that defendant's waiver of his right to trial by jury was knowing, intelligent, and voluntary, and because all of the requirements of *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), were met, we find that defendant also knowingly, intelligently, and voluntarily entered his plea of guilty.

Finally, defendant asks this court to find that his sentence is excessive and disparate when compared to that of an equally culpable, similarly situated codefendant. We first note that defendant received a sentence of not less than 30 months nor more than 8 years, which is within the range of penalties set by the Legislature for violation of the statute with which defendant was charged. We have repeatedly held that a sentence imposed within the limits prescribed by the statute in question will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Sianouthai, ante* p. 62, 402 N.W.2d 316 (1987). Thus, the sentence imposed by the district court can be set aside only if the court abused its discretion.

The defendant urges us to compare the sentence imposed on Joseph Burke in *State v. Burke, ante* p. 625, 408 N.W.2d 239 (1987), with that which defendant himself received. The defendant then asks us to apply the rule regarding reduction of sentences announced in *State v. Nix,* 215 Neb. 410, 338 N.W.2d 782 (1983). In that case we stated:

> Where two or more defendants are convicted for the

> same offense and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may be necessary for this court to examine the evidence to determine whether there were justifiable reasons for the distinctions and whether the higher sentence should be reduced.

(Syllabus of the court.)

Nix, however, has no application in this case because the defendant and Burke were not convicted of the same offense, nor were they coperpetrators. The defendant was convicted of violating § 28-1463 because he filmed an obscene videotape, while Burke was convicted of violating § 28-1463.03(1) for publishing a different videotape.

Because the two men were not coperpetrators, the appropriate inquiry is that found in *State v. Sianouthai, supra*, and not that found in *Nix*. As we stated in *Sianouthai*, "the question is whether the defendant in this case received an appropriate sentence, not whether someone else in a different case received a lesser sentence." *Ante* p. 66, 402 N.W.2d at 319. Considering the gravity of the offense and defendant's prior record, the court did not abuse its discretion in sentencing defendant as it did. Its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GERALD S. HIGH, APPELLANT.

407 N.W.2d 772

Filed June 19, 1987. No. 86-772.

1. **Indictments and Informations: Pleas.** The purpose of the 24-hour waiting period provided for by Neb. Rev. Stat. § 29-1802 (Reissue 1985) is to ensure that the defendant has a reasonable amount of time to prepare his or her defense.
2. **Indictments and Informations: Pleas: Waiver: Presumptions.** The 24-hour waiting period between service of the information and requiring the defendant to plead may be waived by the defendant, and the failure of the record to show that the defendant made any objection to proceeding with the trial on the charge raises the presumption that he or she waived that right.

3. **Sentences: Appeal and Error.** In reviewing a case for alleged excessiveness of the sentence, the question for this court is whether the defendant in this case received an appropriate sentence, not whether someone else in a different case received a lesser sentence.
4. _____: _____. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion on the part of the sentencing court.

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

Calvin D. Hansen, for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

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

HASTINGS, J.

The defendant appeals his conviction in the district court for Lancaster County following a plea of guilty to attempted second degree sexual assault.

On appeal, defendant asserts that the court erred in not informing him of his right to have a copy of the amended information as amended by interlineation served on him at least 24 hours prior to being arraigned and entering a plea on that information. The defendant next asserts that, because he was not informed of that right, the court erred in finding that his guilty plea was voluntarily, knowingly, and intelligently made. Finally, defendant believes the court improperly sentenced him.

The facts necessary to understand defendant's first two assignments of error follow. On January 23, 1986, defendant was arraigned on a charge of first degree sexual assault on a child, and he pled not guilty. On June 11, 1986, the matter came before the court for the entry of a plea. Leave was granted to file an amended information, after which the following occurred:

> THE COURT: . . . .
>
> Mr. High, do you understand that you have a right to have a copy of the Amended Information served on you at least 24 hours prior to being arraigned on that charge and entering a plea to the charge?

THE DEFENDANT: Yes, sir.

THE COURT: Do you wish to wait 24 hours or do you wish to waive that 24-hour waiting period and be arraigned at this time?

THE DEFENDANT: Be arraigned now.

THE COURT: Have you discussed that matter with Mr. Poppe?

THE DEFENDANT: Yes, I have.

THE COURT: Has anyone made any promises to you or threats against you to get you to waive the 24-hour waiting period?

THE DEFENDANT: No, sir.

THE COURT: Mr. Poppe, do you feel Mr. High is acting knowledgeably and voluntarily in regard to this matter?

MR. POPPE: Yes, I do.

The defendant was then rearraigned on the amended information, which was read to defendant by the deputy county attorney, Mr. Sharp. After reading the amended information to defendant, Sharp stated: "What you've been charged with in the Amended Information is attempted second degree sexual assault. That is a Class IV felony rather than the original Class II felony." Defendant, who was represented by counsel, then pled guilty to that charge.

The court next informed defendant concerning the right to trial by jury, the right to confront the witnesses against him, and the privilege against self-incrimination, and explained that if the court accepted defendant's plea of guilty, defendant would be waiving those rights. The court then asked if defendant waived those rights freely and voluntarily, to which defendant responded affirmatively. The court next informed defendant that the sentence for attempted second degree sexual assault was up to 5 years in prison, or a $10,000 fine, or both. Finally, the court read aloud the charge against defendant as follows:

> The matter involving the attempted sexual assault in Docket 69, Page 189, charges that between December 1 and December 31, 1984, in Lancaster County, Nebraska, you did attempt to subject another person to sexual contact and overcame such person by force, threat of

force, expressed or implied, coercion or deception or knew or should have known that such person was physically or mentally incapable of resisting or appraising the nature of his conduct.

At that point the deputy county attorney asked to approach the bench. After an off-the-record discussion was held, the following colloquy occurred:

THE COURT: You're requesting that you be allowed to amend the Amended Information by interlineation?

MR. POPPE [defense counsel]: What are you going to interlineate now?

(A short discussion was held between counsel.)

MR. SHARP: I ask leave to amend the petition — or the Information by interlineation.

MR. POPPE: No objection.

THE COURT: Leave is given to amend the Amended Information by interlineation.

Any objection to rearraigning Mr. High on the Amended Information as amended?

MR. POPPE: No.

THE COURT: Okay.

Sharp then read the same charge the court had read previously, but added at the end "said sexual assault causing serious personal injury to the victim," that phrase being a necessary element of attempted second degree sexual assault as found in Neb. Rev. Stat. §§ 28-320 and 28-201 (Reissue 1985). Sharp also informed the defendant that the amended information as amended alleged a Class IV felony punishable by up to 5 years' imprisonment and/or a $10,000 fine.

The following then occurred:

THE COURT: Okay. Mr. High, any questions you have in regard to the Information as amended by interlineation?

THE DEFENDANT: No, sir.

THE COURT: And, again, how do you plead to that charge?

THE DEFENDANT: Guilty.

THE COURT: Do you understand again that you are waiving all of the rights that we went through before?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that by entering this plea of guilty that you are waiving your rights to a presumption of innocence to force the state to prove you guilty beyond a reasonable doubt, waiving your right to a jury trial or trial by a judge, waiving your right to confront your accusers, waiving your right to call and subpoena witnesses to appear for you, waiving your right to remain silent and waiving any right to object to any search and seizure or any statements or confessions that you may have made? Do you understand that you are waiving —

THE DEFENDANT: Yes.

THE COURT: — all of those rights?

THE DEFENDANT: Yes.

THE COURT: And without me going through them in the detail I went through before, do you have any questions in regard to those?

THE DEFENDANT: No, sir.

THE COURT: And do you waive those rights freely and voluntarily?

THE DEFENDANT: Yes.

The court then was informed by Sharp that defendant had sometime during December of 1984 engaged in fellatio and anal intercourse with a boy who was 15 years old, that activity having taken place in Lancaster County, Nebraska. The victim had experienced emotional distress necessitating mental health counseling. The court again asked defendant if he was freely, voluntarily, and knowingly entering his plea of guilty and waiving his rights, to which defendant responded, "Yes, sir." The court then accepted defendant's plea of guilty and found defendant guilty of the charge. On September 5, 1986, defendant was sentenced to the Department of Correctional Services for a period of imprisonment of not less than 1 nor more than 2 years.

The defendant first argues that he was not properly arraigned because he was not informed of his right to have a copy of the amended information as amended by interlineation served on him at least 24 hours prior to being arraigned on that charge, as required by Neb. Rev. Stat. § 29-1802 (Reissue

1985). We do not agree.

The purpose of this 24-hour waiting period is to ensure that the defendant has a reasonable amount of time to prepare his defense. *Shepperd v. State*, 168 Neb. 464, 96 N.W.2d 261 (1959). This right may be waived. *Kopp v. State*, 124 Neb. 363, 246 N.W. 718 (1933). Furthermore, we have held that the failure of the record to show that the defendant made any objection to proceed with the trial on the charge raises the presumption that he or she waived that right. *Kopp v. State, supra; Barker v. State*, 54 Neb. 53, 74 N.W. 427 (1898).

The record affirmatively shows that defendant initiated the amended information and change of plea proceedings and therefore required no additional time to prepare his defense. He knew he intended to plead guilty to attempted second degree sexual assault. Additionally, he did not object to proceeding with the taking of his guilty plea after the information was amended by interlineation. We believe that his failure to object raised the presumption that he waived his right to have a copy of the amended information as amended by interlineation 24 hours before he was arraigned. Additionally, it is obvious from the record that all of the parties, including defendant himself, understood from the outset of the taking of the guilty plea that defendant would be pleading guilty to attempted second degree sexual assault and that the leaving out of an essential phrase in the amended information was merely a mistake. Finally, before the court would accept defendant's plea of guilty to the amended information as amended by interlineation, it did ask if defendant was waiving "all of the rights that we went through before," to which defendant responded, "Yes, sir." All of this, together with the presumption of waiver, sufficiently establishes that defendant waived his right to have a copy of the amended information as amended by interlineation 24 hours before he was arraigned on that information.

The defendant next asserts that because he was not informed of his right to have a copy of the amended information as amended by interlineation served on him 24 hours prior to being arraigned on that information, his guilty plea was not voluntarily, knowingly, and intelligently made. Because we have determined that he had waived that right, and because the

requirements of *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), regarding the validity of a guilty plea have been met in this case, we hold that defendant's plea of guilty was voluntarily, knowingly, and intelligently made.

Finally, defendant asserts that his sentence is excessive and disparate when compared to that of an equally culpable, similarly situated codefendant. For the same reasons that we declined to compare High's sentence in *State v. High, ante* p. 690, 407 N.W.2d 776 (1987), with that of Joseph Burke, we also decline to compare High's sentence in this case with that of Melvin Armstrong. They were not coperpetrators. Although both men committed sexual assaults on the same victim, the assaults were committed at different times. Thus, the question for this court is whether the defendant in this case received an appropriate sentence, not whether someone else in a different case received a lesser sentence. *State v. High, supra.* We have examined the records submitted to us as to each of these men and, without going into the details, are able to state that in comparing their backgrounds and activities the sentence imposed in this case was not a disparate sentence.

The defendant was sentenced to 1 to 2 years to the Nebraska Department of Correctional Services. This sentence is within the statutory limits. Thus, we must apply the axiom that a sentence within statutory limits will not be disturbed on appeal absent an abuse of discretion on the part of the sentencing judge. *State v. High, supra.* The court concluded in this case that to place High on probation would certainly depreciate the seriousness of the offense and promote disrespect for the law. The court did not abuse its discretion in so finding, and its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICK J. HEATON, JR., APPELLANT.

407 N.W.2d 780

Filed June 19, 1987. No. 86-886.

1. **Probation and Parole.** The revocation of probation is a matter entrusted to the sound discretion of the trial court.
2. **Probation and Parole: Proof.** Unless a probationer admits to a violation, the fact that a condition of probation has been violated must be proved by clear and convincing evidence.
3. **Probation and Parole: Evidence: Restitution.** In order to revoke probation for the failure to make restitution, the evidence must clearly and convincingly show that the probationer has willfully refused to make restitution when he or she has the resources to pay or has failed to make sufficient bona fide efforts to seek employment and otherwise acquire the resources to make restitution.
4. **Probation and Parole.** A sentencing court's initial decision to place a criminal defendant on probation reflects a determination that the State's penological interests do not require imprisonment.
5. **Probation and Parole: Restitution.** A probationer's failure to make reasonable efforts to seek employment or otherwise acquire the resources required to repay his debt to society may indicate that the original determination to withhold imprisonment needs reevaluation, and imprisonment may now be required to satisfy the State's penological interests.
6. _____: _____. A probationer who has made sufficient bona fide efforts to make restitution, and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms.
7. **Courts: Equal Protection.** Courts have a duty to treat the rich and the poor equally.
8. **Probation and Parole: Restitution.** Only if alternative measures of punishment are not adequate to meet the State's interests in punishment and deterrence may a court imprison a probationer who has made sufficient bona fide efforts to make restitution.

Appeal from the District Court for Cheyenne County: ROBERT O. HIPPE, Judge. Reversed and remanded with direction.

Donald J. Tedesco, for appellant.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

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

CAPORALE, J.

Defendant, Patrick J. Heaton, Jr., appeals from the judgment of the district court which revokes his probation and sentences him to the Nebraska Penal and Correctional Complex for a period of not less than 18 nor more than 24 months, with credit to be given for the 2 months he served in the county jail as required by the terms of probation. He assigns as error the trial court's finding that the violation of a condition of his probation was willful and thus warranted revocation of probation. We reverse and remand with direction.

Heaton was adjudged guilty of perjury in violation of Neb. Rev. Stat. § 28-915 (Reissue 1985) and sentenced, on January 6, 1986, to 3 years' probation on condition, among others, that he make restitution, in the sum of $54,495.18, plus interest at the rate of $17.73 per day, to the estate of Alice R. Oliverius, deceased, on or before May 6, 1986. Additionally, Heaton owes over $158,000 to various other creditors and is obligated to pay alimony of $400 per month to his deaf former wife.

On July 22, 1986, an information was filed charging Heaton with violating his probation for the reason that he had failed to make restitution. At the hearing to revoke probation Heaton admitted the violation but wanted an opportunity to show the violation was not willful and that incarceration would therefore not be an appropriate remedy.

Rather than permit the adduction of evidence, the district court ordered a presentence investigation to develop the facts. As no issue has been made of the manner in which the facts were uncovered, we do not concern ourselves with that matter but, instead, confine ourselves to a review of the facts on the basis of which the court below made its decision.

At the time of the hearing, Heaton was 55 years old. He is educated as a lawyer and had practiced law for 32 years prior to surrendering his license. Nonetheless, his efforts to find employment, both in his hometown of Sidney and elsewhere, have proved unsuccessful. On January 23, 1986, Heaton's office furniture, equipment, supplies, and substantial law library were sold at a public auction resulting from the foreclosure of the Oliverius estate's judgment lien. From the gross receipts of $3,730, the sale netted $3,605.29, which was

applied to the debt owed the Oliverius estate. It appears, however, that the items sold were purchased by beneficiaries of the Oliverius estate and that they in turn sold the property for $7,500. On July 21, 1986, Heaton sold an office building he owned in Sidney for $30,000. After the mortgages and other expenses were paid, the Oliverius estate received $750. At the time of the original sentencing hearing there was an outstanding option to purchase the office building for $65,000 to another; that prospective purchaser, however, made it very clear that while he would like to buy the property, he could not guarantee he would, as he needed to know more about the premises.

The presentence report also shows that Heaton owns other property. There is an apartment building in Sidney which has an assessed value of $39,455. It is listed for sale at $50,000, and Heaton rejected an offer to purchase it at $35,000, believing the offer to be inadequate. He also owns two vacant lots in Alliance which are subject to a mortgage of $13,274.76 and are not likely to sell because of the decreased activity in the area. Efforts to sell his mobile home, which is valued at $14,000, have proved unsuccessful. The realtor who has the sales listing on the three lots Heaton owns in Keith County is of the opinion that Heaton was "making a reasonable effort to sell" those lots. However, a covenant which prohibits the placement of mobile homes on the properties makes selling the lots difficult, as prospective buyers do not want to build homes at the site.

The State suggests that Heaton has funds available in the cash surrender values of some insurance policies; however, those policies were in a bank box upon which a sheriff had levied in connection with an unrelated judgment. While the inventory lists certain monetary amounts alongside the descriptions of some of the policies, the inventory does not reveal whether these amounts reflect policy face values, paid up insurance values, cash surrender values, or any kind of values whatever. Moreover, Heaton has indicated that he is willing to apply such cash surrender values as exist to the Oliverius estate debt if the sheriff will release the policies for that purpose.

Just as the granting or withholding of probation is a matter entrusted to the sound discretion of the trial court, *State v. Donnelson, ante* p. 41, 402 N.W.2d 302 (1987), so too is the

revocation of probation a matter entrusted to the sound discretion of the trial court. However, unless, as Heaton did, a probationer admits to a violation, *State v. Burow*, 223 Neb. 867, 394 N.W.2d 665 (1986), the fact that a condition of probation has been violated must be proved by clear and convincing evidence, *State v. Painter*, 223 Neb. 808, 394 N.W.2d 292 (1986), and Neb. Rev. Stat. § 29-2267 (Reissue 1985). Moreover, where the violation is the failure to make restitution, the evidence must clearly and convincingly show that the probationer has willfully refused to make restitution when he or she has the resources to pay or has failed to make sufficient bona fide efforts to seek employment and otherwise acquire the resources to make restitution. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

The trial court's initial decision to place Heaton on probation reflects a determination that the State's penological interests did not require imprisonment. *Bearden v. Georgia, supra.* However, a probationer's failure to make reasonable efforts to seek employment or otherwise acquire the resources required to repay his debt to society may indicate that the original determination to withhold imprisonment needs reevaluation, and imprisonment may now be required to satisfy the State's penological interests. *Bearden v. Georgia, supra.* But a probationer who has made sufficient bona fide efforts to make restitution, and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms. *Bearden v. Georgia, supra.* Because courts have a duty to treat the rich and the poor equally (see *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956)), the factor of indigency takes on great importance whenever consideration is given to revoking probation because of noncompliance with a restitution order. *United States v. Atkinson*, 788 F.2d 900 (2d Cir. 1986). Only if alternative measures of punishment are not adequate to meet the State's interests in punishment and deterrence may a court imprison a probationer who has made sufficient bona fide efforts to make restitution. See *Bearden v. Georgia, supra.*

There is no evidence that Heaton has unreasonably refused

to seek employment or rejected employment offers or that he has unnecessarily refused to convert his assets to cash in order that he might make restitution to the Oliverius estate. It is true that he rejected an offer to purchase his apartment building which was within 88.7 percent of the assessed tax value of the property. The offer was, however, but 70 percent of the asking price. There is no evidence concerning the condition of the real estate market in Sidney, nor that the assessed value more accurately reflects the market value of the property than does the asking price.

The trial court's conclusion that Heaton willfully refused to make restitution is untenable under the record before us such as to unfairly deprive Heaton of a substantial right and deny him a just result. Thus, the trial court abused its discretion, and its judgment must therefore be reversed. *State v. Vrtiska, ante* p. 454, 406 N.W.2d 114 (1987).

The cause is remanded and the trial court directed to reinstate its sentence of probation. This resolution does not, of course, prevent future consideration of the nature of Heaton's efforts to make restitution to the Oliverius estate.

REVERSED AND REMANDED WITH DIRECTION.

IN RE INTEREST OF L.H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. J.H., APPELLANT.

407 N.W.2d 784

Filed June 19, 1987. No. 86-965.

1. **Trial: Evidence: Appeal and Error.** Error may not be predicated upon a ruling which excludes evidence unless a substantial right is affected and the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.
2. **Parental Rights.** While there is no requirement that the juvenile court implement a rehabilitation plan for the parent of a child coming within its jurisdiction, the failure to comply with a reasonable court-ordered plan of rehabilitation is an independent ground justifying termination of parental rights.

3. _____. If a parent does not become rehabilitated within a reasonable time, the prognosis for rehabilitation is poor, and it is in the best interests of the child, then a final disposition terminating parental rights should be made without delay.
4. _____. A child's future cannot be made to await his or her parent's uncertain maturity.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Elizabeth C. Schrock, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich, for appellee.

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

PER CURIAM.

J.H., the 22-year-old appellant mother, appeals from the judgment of the separate juvenile court which terminated her parental rights in and to her daughter, L.H., who was born out of wedlock on December 4, 1980. The mother's assignments of error challenge the juvenile court's exclusion of certain evidence, as well as the sufficiency of the evidence. We affirm.

This matter first came to the attention of the juvenile court on December 14, 1984, when it was alleged that the daughter came within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982) as lacking proper parental care by reason of her mother's faults or habits, in that the mother left the daughter in the care of the daughter's biological father, who sexually molested the daughter, and in that the mother failed to support or maintain regular contact with her daughter. Indeed, the biological father's conduct is the subject of *In re Interest of D.J. et al.*, 224 Neb. 226, 397 N.W.2d 616 (1986), which resulted in the termination of his parental rights in and to several of his other children. According to the mother, however, she had taken care of her daughter from her birth until shortly before these proceedings were commenced, when the biological father forcibly took the daughter from her.

The mother could not attend the dispositional hearing held on April 11, 1985, because she was then in jail on a warrant charging her with prostitution. Ultimately, however, the

juvenile court developed a rehabilitation plan, which is described later in this opinion.

The first assignment of error rests on the fact the juvenile court refused to receive testimony from the mother which she described as relating to the daughter's "infancy and early years and how she came to be placed in foster care." In arguing for admission of the evidence, the mother told the juvenile court, through counsel: "If the State is going to maintain that [she] did not follow a court order, then the Court has to have some idea of the person and the background and circumstances to which this order applies." In her brief in this court the mother argues that she brought the sum total of her life experiences along with her when she appeared before the juvenile court, and if she had suffered from any physical or mental impairment preventing her from following the court's order, evidence of such impairment would have been relevant to the issue of compliance.

Neb. Rev. Stat. § 27-103 (Reissue 1985) provides that error may not be predicated upon a ruling which excludes evidence unless a substantial right is affected and "the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." There was no offer of proof made, and no questions were asked from which it can be said the substance of the evidence was made known. The most that could be determined from the description of the proposed testimony and the argument made concerning its admissibility were the general topics to be covered by the proposed testimony. Accordingly, there is no merit to the first assignment of error. *Hulse v. Schelkopf*, 220 Neb. 617, 371 N.W.2d 673 (1985); *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984).

The second assignment is resolved by two well-established rules. While there is no requirement that the juvenile court implement a rehabilitation plan for the parent of a child coming within its jurisdiction, the failure to comply with a reasonable court-ordered plan of rehabilitation is an independent ground justifying termination of parental rights. See, *In re Interest of R.A. and V.A., ante* p. 157, 403 N.W.2d 357 (1987); *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474

(1985). If a parent does not become rehabilitated within a reasonable time, the prognosis for rehabilitation is poor, and it is in the best interests of the child, then a final disposition terminating parental rights should be made without delay. See, *In re Interest of K.L.N. and M.J.N., ante* p. 595, 407 N.W.2d 189 (1987); *In re Interest of A.L.N.*, 223 Neb. 675, 392 N.W.2d 780 (1986); *In re Interest of S.W.*, 220 Neb. 734, 371 N.W.2d 726 (1985); *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983).

The rehabilitation plan ordered by the juvenile court in this case required the mother to undergo a psychological evaluation, obtain housing suitable for herself and the daughter, obtain and maintain suitable employment, refrain from prostitution or other criminal activity, complete a parent training program, attend Parents United meetings, obtain a general equivalency diploma (she had dropped out of school at the 10th grade), maintain regular visitation with the daughter, and cooperate with the caseworkers assigned to the case.

The mother did not undergo a psychological evaluation, notwithstanding the fact one was arranged without cost. Yet the mother has the audacity to now argue that since a psychological evaluation was not performed, it cannot be determined that she had the capacity to comply with the rehabilitation plan, and, thus, her parental rights cannot be terminated. To the extent there may be any truth to the claim that her capacity to comply with the rehabilitation plan cannot be determined, and to the extent such a condition may have relevance to the issues pled, she herself is the author of that circumstance and therefore cannot complain of it.

The evidence also establishes that the mother failed to obtain suitable housing and did not obtain and maintain suitable employment during the almost 2 years this matter pended in the juvenile court. It is true, however, that by the time of the termination hearing on September 4, 1986, she had begun full-time employment as a receptionist with an automobile repair business. She did not complete a parenting program, attend Parents United meetings, or make any substantial progress toward obtaining a general equivalency diploma, and although she and the daughter interacted well with each other

during visitations, the mother kept only about one-half of the scheduled visitations with the daughter. While the mother was not arrested for prostitution during the pendency of this action in the juvenile court, she was incarcerated for other criminal offenses, including shoplifting, carrying a concealed weapon, disorderly conduct, and assault and battery.

We conclude from our de novo review of the record, having given weight to the fact the juvenile court judge observed the witnesses and judged their credibility, *In re Interest of R.A. and V.A., supra*, that the evidence clearly and convincingly establishes, *In re Interest of J.W.*, 224 Neb. 897, 402 N.W.2d 671 (1987), that the daughter lacks proper parental care by reason of her mother's faults or habits, that the rehabilitation plan ordered by the juvenile court was a reasonable one, that the mother has not substantially complied with the plan, that the prognosis for her rehabilitation is poor, and that it is in the best interests of the daughter that the mother's parental rights be terminated without further delay. *In re Interest of S.H., L.H., & A.H., ante* p. 452, 406 N.W.2d 112 (1987). As reaffirmed recently, a child's future cannot be made to await his or her parent's uncertain maturity. See *In re Interest of C.G.C.S., ante* p. 605, 407 N.W.2d 196 (1987).

Thus, grounds for terminating the mother's parental rights exist under the provisions of Neb. Rev. Stat. § 43-292(6) (Reissue 1984), in that "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination" that the daughter is a child described in § 43-247(3)(a).

AFFIRMED.

FIRST NATIONAL BANK OF OMAHA, A NEBRASKA BANKING CORPORATION, APPELLEE, V. GARY R. HAGEBUSH AND ROY E. SCHWASINGER, APPELLANTS.

407 N.W.2d 787

Filed June 19, 1987. No. 86-1016.

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

Gary R. Hagebush, pro se, and Roy E. Schwasinger, pro se.

Michael A. Nelsen and Geraldine L. Clanton of Schmid, Mooney & Frederick, P.C., for appellee.

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

PER CURIAM.

This appeal arises out of a suit brought by the plaintiff-appellee, First National Bank of Omaha, against defendants-appellants, Gary R. Hagebush and Roy E. Schwasinger, in which plaintiff secured a judgment in the district court against both of the defendants on two promissory notes. Defendants undertook an appeal of that judgment to this court, but failed to perfect the appeal steps in time. After plaintiff filed a motion for summary dismissal pursuant to Neb. Ct. R. of Prac. 7B(1) (rev. 1986), defendants voluntarily dismissed that appeal, assigning a number of legally frivolous reasons for so doing. 219 Neb. xxvii (case No. 85-156, Apr. 17, 1985).

Thereafter, defendant Hagebush filed in the district court an application to set aside the sheriff's sale and both defendants filed a motion to set aside and vacate the judgment against them. The district court overruled the application and motion, and defendants again improperly undertook an appeal to this court. We therefore sustained plaintiff's motion for summary dismissal pursuant to the provisions of rule 7B(1). 221 Neb. xxii (case No. 85-561, Jan. 23, 1986).

The present matter is before us on the recommendation of the prehearing conference officer that this purported appeal be dismissed pursuant to Neb. Ct. R. of Prac. 7A (rev. 1986), and

upon the motion of the plaintiff for summary dismissal pursuant to rule 7B(1).

In this case the defendants again filed in the district court an application to set aside and vacate the judgment. The district court again overruled that application, and the defendants again undertake an appeal to this court. There exists no legally viable basis for such an appeal, and it is therefore wholly frivolous.

Accordingly, the appeal is hereby dismissed, and plaintiff is awarded the sum of $1,000 to apply toward the services of its attorneys in this court, which is taxed to the defendants as costs. *Shanks v. Johnson Abstract & Title Co., ante* p. 649, 407 N.W.2d 743 (1987); *Stratman v. Hagen*, 221 Neb. 157, 376 N.W.2d 3 (1985); *Graham v. Waggener*, 219 Neb. 907, 367 N.W.2d 707 (1985); Neb. Rev. Stat. § 25-824 (Reissue 1985). All other costs are also taxed to the defendants.

APPEAL DISMISSED.

LARRY J. GUERZON, APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

407 N.W.2d 788

Filed June 19, 1987. No. 87-014.

1. **Implied Consent: Miranda Rights: Blood, Breath, and Urine Tests.** There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine.
2. **Right to Counsel: Blood, Breath, and Urine Tests.** A driver is not entitled to consult with an attorney nor is a delay in a requested blood, breath, or urine test required should a driver request to consult with an attorney prior to taking such test.
3. **Licenses and Permits: Revocation.** The revocation of a license to operate a motor vehicle is not a penalty.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

John B. McDermott of McDermott, Depue & Zitterkopf, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

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

WHITE, J.

This is an appeal from a judgment of the district court for Hall County, which affirmed the order of the director of the Department of Motor Vehicles suspending the operator's license of appellant for a 1-year period for a refusal to submit to a breath test under the implied consent law. We affirm.

Two errors are assigned: first, that the refusal was not unreasonable; and second, that the term of suspension should be 6 months, as the penalty provision was shortened to a period of 6 months while the action was pending.

We will discuss the assignments in order. Appellant, after arrest, was requested to submit to a breath test, but declined to do so until he could speak with his Chicago attorney. The arresting officers denied him the opportunity to make the call, as their jail rules do not allow charges for long-distance information calls. Appellant did not know his attorney's phone number. An opportunity to call the night number of several local attorneys was offered, but refused.

The appellant was fully advised that the *Miranda* rights do not attach to a custodial situation involving the request to submit to a chemical test of blood, breath, or urine, and though in this case an opportunity to contact counsel was granted, no right to contact an attorney exists in these circumstances. We said in *State v. Bishop*, 224 Neb. 522, 525, 399 N.W.2d 271, 274 (1987):

> There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine. . . . [A] driver is not entitled to consult with an attorney, nor is a delay in the test required should a driver request to consult with an attorney.

The officer was justified in concluding that there was a refusal to take a test. Anything short of an unqualified, unequivocal assent to an officer's request that the arrested motorist take the test constitutes a refusal. *Hoyle v. Peterson*, 216 Neb. 253, 343 N.W.2d 730 (1984). The first assignment of error is meritless.

As to the assignment concerning the change in the penalty during the pendency of the action, it is equally meritless. In *Brown v. Sullivan*, 195 Neb. 729, 730, 240 N.W.2d 51, 52 (1976), this court held:

> The ruling in State v. Randolph, 186 Neb. 297, 183 N.W.2d 225, that an amendatory act changing a penalty which becomes effective before final judgment in a criminal case shall govern the sentence is not applicable. The revocation of a license to operate a motor vehicle is not a penalty.

The judgment of the district court is affirmed.

AFFIRMED.

DONOVAN R. PICK AND NANCY C. PICK, APPELLEES, V. FORDYCE CO-OP CREDIT ASSOCIATION, A CORPORATION, AND DONOVAN L. WIESELER, APPELLANTS.

408 N.W.2d 249

Filed June 26, 1987. No. 85-436.

1. **Jury Instructions.** Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence.
2. **Actions: Mental Distress.** The elements of a cause of action based upon the intentional infliction of emotional distress are (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.
3. **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.

4. **Property: Appurtenances: Replevin.** Where a fixture annexed to a freehold is tortiously severed, the owner of the realty, at his option, may treat the fixture as personalty and recover the same by the action of replevin.
5. **Replevin: Damages.** The measure of damages in a replevin action where the property is not returned is the value of the property, together with interest, from the date of the unlawful taking.
6. _____: _____. When property is returned in a replevin action, the party recovering possession of the property is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention.

Appeal from the District Court for Cedar County: ROBERT E. OTTE, Judge. Affirmed in part, reversed and dismissed in part, and remanded for further proceedings.

Thomas E. Brogan of Brogan & Stafford, P.C., for appellants.

William J. Klimisch of Goetz, Hirsch & Klimisch, for appellees.

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

GRANT, J.

Plaintiffs-appellees, Donovan R. Pick and Nancy C. Pick, husband and wife, brought this action in the district court for Cedar County, Nebraska, against defendants-appellants, Fordyce Co-op Credit Association, a corporation (hereinafter Co-op), and Donovan L. Wieseler, an employee and agent of the Co-op. Plaintiffs' second amended petition alleged that defendants had "willfully and wrongfully removed certain items of personal property together with fixtures" from plaintiffs' building and converted such items to defendants' use. The petition itemized 11 "items of personal property and fixtures." The petition then set out what are denominated six causes of action: (1) for the return of the items; (2) damages for the cost of restoring the items to the condition they were in when taken; (3) damages for the plaintiffs' "wounded feelings, mental suffering, humiliation, degradation, disgrace and physical suffering" resulting from the taking of the items; (4)

damages arising from the fact that plaintiffs were unable to use or rent their real property because of the taking of the items and that plaintiffs had therefore lost rent and cost of electricity; (5) damages to plaintiffs' real property from which the items were removed; and (6) damages for the cost of reinstalling the wrongfully taken fixtures.

Defendants' answer to plaintiffs' second amended petition generally denied plaintiffs' allegations and as affirmative defenses alleged that the Co-op has owned the personal property described in the petition since January 2, 1936, and that plaintiffs had not pled "facts sufficient to show ownership in the personal property, nor an interest in the real estate as to any fixtures attached to the realty . . . ."

The case was tried to a jury on the pleadings set out above. The jury's verdict was on two forms. One ordered the return to plaintiffs of the following items, described as:

> 1 golden oak L shaped bank counter, length over all 22', (1sec. 14'6" other 7'6") with 2 customers windows with 2 marble dealing plates, 1 door, 6 pull drawers. Below the drawers are 3 double door cabinets and 3 pull drawer cabinets containing several various sized drawers. A swinging door. Inlaid marble pieces approximately 10½" high which were located in the lobby area of the bank building owned by Plaintiffs around the base of the wall and the base of the counter.

By the other verdict form, the jury awarded damages to the plaintiffs in the amount of $8,000. The items ordered to be returned as set out in the verdict form were the only items submitted to the jury to determine if replevin was proper.

Co-op and Wieseler appeal, setting out 10 assignments of error. For the reasons hereinafter set out, we affirm in part, reverse and dismiss in part, and remand on the issue of damages.

On appeal to this court, we will decide the case on the basis on which it was tried. By doing so, we do not necessarily approve of the manner in which the case was presented to the trial court. In the instant case, plaintiffs' petition sets out six "causes of action." An examination of those "causes of action" shows that a cause of action is pled in replevin, with resultant

damages as set out in five "causes of action," which are, in reality, five different items of damages. As the case was tried and submitted to the jury, it appears that two different causes of action were submitted: (1) the replevin action with resulting damages to property and (2) a case for severe emotional distress intentionally or recklessly caused by extreme and outrageous conduct. Plaintiffs, in their brief, state the latter issue was properly submitted, and the jury properly instructed, by the giving of the following instruction:

INSTRUCTION NO. 11

> You are instructed that one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and if bodily harm results from it, for such bodily harm. However, the conduct must have been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. The mental distress for which recovery may be had must be so severe that no reasonable man could be expected to endure it.

Defendants do not specifically complain as to the form of the instruction, but contend the evidence did not support the giving of an instruction as to emotional distress.

With regard to the replevin issue, the primary fact question is whether the items removed by defendants were fixtures or personalty. In the instruction conference defendants attempted to raise the issue as to whether the items in question were trade fixtures. The trial court properly held that this issue had not been raised in the pleadings and would not be submitted to the jury. " ' "Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. . . ." ' " *Steed v. Oak Ridge Equestrian Ctr.*, 224 Neb. 792, 799, 401 N.W.2d 495, 500 (1987). Plaintiffs' allegations as to personal property items allegedly taken were not submitted to the jury, and there was no cross-appeal on that issue. The other questions to be considered are whether fixtures may be the subject of a replevin action if severed from realty by a wrongdoer and, if damages may be assessed in connection with

such a taking, the nature of the damages.

The record shows the following. On November 27, 1973, the plaintiffs purchased a two-story building in Fordyce, Nebraska. The building contained three living units, and the Co-op was the tenant in part of the space on the first floor on the corner. The Co-op had leased the space in the building since 1935.

The building was originally owned by the Fordyce State Bank and was sold on April 28, 1937, to plaintiffs' predecessor in title by a receiver after the bank apparently went into bankruptcy. The receiver's agreement for sale of real estate attached includes in the list of "Furniture and fixtures" the items which are at issue in this case:

> 1 Goldon [sic] oak L shaped bank counter,,length over all 22', (1 sec. 14'6" other 7'6") with 2 customers windows with 2 marble dealing plates, 1 door, 6 pull drawers. below the drawers are 3 double door cabinets & 3 pull drawer cabinets containing several various sized drawers.
>
> 1 goldon [sic] oak customers wall desk 25 x 60" with glass top.

The district court for Cedar County authorized the sale and ordered the receiver to "deliver a Receiver's Deed to said real estate and a Bill of Sale to said furniture, fixtures and equipment" to plaintiffs' predecessor in title. The abstract on the real estate in question shows that a receiver's deed was issued to plaintiffs' predecessor and shows that plaintiffs are now the owners of said property. The record does not contain the bill of sale referred to.

Plaintiffs did not have a written lease agreement with the Co-op. The parties operated under an oral, month-to-month lease agreement from 1973 until December of 1982 when the Co-op terminated the lease and moved into a new building. At the time of the termination of the lease, the Co-op was paying $200 per month rent and was paying for electricity used.

On November 30, 1982, plaintiff Donovan Pick found that a customer counter and an oak cabinet had been removed from the walls of plaintiffs' building in the space leased by the Co-op. Pick testified that "[i]t was screwed right on to the walls in the corner. It was built-in."

The deputy sheriff of Cedar County who was present at the move on December 4, 1982, testified that the teller counter was attached to the floor with bolts or screws and some nails. Photographs taken of the building after the removal of the property were admitted into evidence. These exhibits indicate that the articles were attached to the floor and walls.

The record further shows that on December 4, 1982, Donovan Pick, who was out working on a service call, was notified by his wife, Nancy, that the Co-op was moving out of the building. Nancy Pick testified that she heard "a tremendous amount of racket on the side of my house which is towards the bank building" and that she rushed to the windows to see what was going on. She testified,

> Then when I saw people in a straight line going across the pavement, you know, walking towards my building from the—which is the new bank building now. Anyway they were wearing insulated unionalls and they had wrecking bars and things in their hands. . . . [M]y little girls were frightened and I didn't know what was going on. . . . [M]y first thought was to protect my home.

Nancy Pick testified further that "[i]t looked like Gun Smoke, walking towards the house." Thereafter, Nancy Pick testified that she called her husband; she called her husband's brother-in-law; she called her parents in California; and she called her brother-in-law in Lincoln. She testified that "I was scared, very scared." Nancy Pick reported that after her husband came, he went to the Co-op for awhile and "we decided that we couldn't do anything about it or anything. . . . Then he went back on his service call."

The record shows that 10 people, which included all of the members of the town board and the 5 members of the Co-op board, in addition to a work crew of other people, were present at the Co-op's move on December 4, 1982. The board members assisted in the move by carrying boxes and records across the street to the new location, and the work crew removed the articles of property claimed by plaintiffs. All were wearing usual working clothes. A deputy sheriff was present to observe the removal of the money and records.

When asked what effect the incident had on her husband,

Nancy Pick testified that "it was very humiliating and belittling." When asked if the experience bothered her, Nancy Pick stated, "Yes, very much. . . . I feel insecure. I don't want to get close or know anybody very well."

Donovan Pick testified that the incident on December 4, 1982, caused him a sleepless night, he became scared, he worried that somebody was going to come back and take something else, and he would not be able to do anything about it. Pick also testified that his wife was more reserved when she was talking to people and doing business with them, that he and his wife used to make decisions a lot faster than they do now, and that the incident has affected his life.

Donovan Pick's brother-in-law, George Kleinschmidt, testified that on December 21 of that year, he went on a 2 1/2-week trip to Florida with the plaintiffs. Kleinschmidt testified that the plaintiffs talked about the December 4 incident every night on the trip and appeared to be upset over it. There was no other evidence as to the emotional distress allegedly suffered by plaintiffs. The elements of a cause of action based upon the intentional infliction of emotional distress are (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985).

In the case at bar, the evidence submitted to the jury would support a finding that defendants' acts which were the basis of plaintiffs' claims for emotional distress were intentional. The evidence, however, does not support any determination that defendants' actions were of such a nature as to support a verdict for emotional distress, nor does the evidence support damages for such distress.

The record shows that defendants' actions could not have been a shock or surprise to plaintiffs. Plaintiffs knew at least 7 months before the incidents of December 4, 1982, that the Co-op was erecting a new building, because on May 20, 1982,

plaintiffs had submitted a bid to do the electrical, plumbing, and heating work on the new building for $14,739.42. On April 28, 1982, plaintiffs advertised the space "[p]resently occupied by Fordyce Coop Credit Assn." for rent. Considering the population of Fordyce was 148, plaintiffs, as a matter of law, had to have been informed of such events, and knew a move was forthcoming.

On November 30, 1982, Donovan Pick knew defendants were removing items from the building, preparing for the move. It was necessarily apparent to plaintiffs that defendants were removing items which had been used by the Co-op since 1935, and which apparently the defendants claimed belonged to the Co-op.

We have construed conduct far worse than that of defendants in this case as not being "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Gall v. Great Western Sugar Co., supra* at 358, 363 N.W.2d at 377.

In *Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221 (1981), after plaintiff had been splashed with hot radiator fluid, the defendant's service station attendant did not respond to plaintiff's request for a covering after she had removed her blouse on account of her burns. The attendant finally gave plaintiff a filthy fender cover to cover her partial nakedness. While attempting to leave the premises to secure medical attention, during which time plaintiff was upset, hysterical, and in pain, plaintiff found the attendant had removed an engine part and would not restore it until she returned the fender cover. Plaintiff was left partially clad on a major thoroughfare in Omaha, Nebraska, and forced to bargain for a used shirt to wear. In affirming the trial court's refusal to submit the cause to the jury, we held that plaintiff's embarrassment and humiliation in being so treated did not rise to the level of distress required, that is, distress so severe that no reasonable person could be expected to endure it.

In *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983), the plaintiff was harassed by her ex-husband, who drove by her house repeatedly and for a continued period of

time, who was seen crawling in the bushes outside her home, and who entered her home uninvited. The defendant sent numerous letters to plaintiff's family, neighbors, and employer revealing embarrassing information about the plaintiff and her new boyfriend, whom she later married. The plaintiff sought psychiatric help and hired a security guard for her wedding out of fear of her ex-husband. This court determined that defendant's conduct, described as childish, irresponsible, and inconsiderate, did not amount to extreme and outrageous conduct. The trial court's award of damages to plaintiff for emotional distress was reversed, and we held that plaintiff's fright, embarrassment, and worry did not amount to emotional distress so severe that no reasonable person should be expected to endure it.

The record shows that the circumstances of the Co-op's move from plaintiffs' building were not particularly unusual or out of the ordinary. There were a number of people present for the move, but it was for the purpose of making the new Co-op operational the next Monday, and many of them had to be known to plaintiffs. None wore unusual clothing, and there was no evidence of any threatening behavior, albeit they removed property claimed by the plaintiffs.

The conduct of the officers and employees of the Co-op during the December 4, 1982, incident does not rise to the level of the extreme and outrageous conduct which is essential for conduct to be actionable for intentional infliction of emotional distress.

It must be noted, also, that the damages alleged to be suffered by plaintiffs were not, as a matter of law, "so severe that no reasonable person should be expected to endure it." Although Nancy Pick testified that she was frightened by the unexpected noise and the number of people involved in the Co-op's move, since then she has been more reserved, and Donovan Pick suffered a sleepless night, humiliation, and fears that someone else would take his property, there is no evidence of extreme mental distress. This court had held that there is no occasion for the law to intervene in every case of hurt feelings. *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985), citing *Paasch v. Brown*, 193 Neb. 368, 227 N.W.2d 402

(1975), and *Davis v. Texaco, Inc., supra.*

The record fails to establish the essential elements of the intentional infliction of emotional distress and fails to establish "severe" damage. We conclude that, as a matter of law, there was not sufficient evidence to submit the issue of emotional distress to the jury.

We cannot tell from the general jury verdict awarding $8,000 in damages whether damages for emotional distress were included in this award. For this reason we reverse as to the damages award and remand for a redetermination of the plaintiffs' damages in connection with the replevin issue only.

With regard to the issue of replevin, we must first determine whether the articles for which plaintiffs seek return are fixtures. This court set out the definition of a fixture in *Fuel Exploration, Inc. v. Novotny*, 221 Neb. 17, 22-23, 374 N.W.2d 838, 842 (1985), as follows:

> 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.
> . . .
> . . . .
> . . . 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, . . . and the purpose or use for which the annexation has been made.

An instruction was submitted to the jury which sets out the guidelines for determining when an article becomes a fixture and therefore becomes a part of the realty. By virtue of the verdict in plaintiffs' favor, it must be assumed the jury found the articles to be fixtures. The evidence supports that determination.

The record shows that the articles claimed by plaintiffs were in the building when it originally operated as the Fordyce State Bank. The teller counter was bolted or screwed to the subfloor, with ceramic tile floor imbedded in cement poured up to the side of the counter. The teller counter was also set against the

subwall, and the wall was plastered up around the counter. There was testimony that the swinging door and customer counter were screwed or bolted to the walls. The original owner of these articles installed them in the building for the purpose of operating a bank. It can be inferred from the manner in which the articles were affixed to the realty that the original owner, the predecessor in title to plaintiffs, intended the articles to be permanently affixed.

We next address whether a fixture which is severed from the premises by a wrongdoer can be the subject of a replevin action. Generally, an action of replevin is one for recovery only of personal property and cannot be maintained to recover real property. 66 Am. Jur. 2d *Replevin* § 9 (1973). However, upon the wrongful severance of a fixture, the object becomes the personal property of the owner of the realty and may be recovered as personalty in an action of replevin. 35 Am. Jur. 2d *Fixtures* § 28 (1967). Although the severance of fixtures changes their legal character from realty to personalty, it does not change their ownership, and in case of wrongful severance, the owners of the fee can reclaim the fixtures or recover damages, at least. *Houle v. Guilbeault*, 70 R.I. 421, 40 A.2d 438 (1944).

Causes of action for conversion and replevin of property severed from realty do not involve real property, since the severance of fixtures and improvements from land change the character of the property from real to personal, irrespective of the means by which it is accomplished. *Peiser v. Mettler*, 50 Cal. 2d 594, 328 P.2d 953 (1958).

Where a fixture annexed to a freehold is tortiously severed, the owner of the realty, at his option, may treat the fixture as personalty and recover the same by the action of replevin. *Peiser v. Mettler, supra*, citing *Teater v. Good Hope Dev. Corp.*, 14 Cal. 2d 196, 93 P.2d 112 (1939). See, also, *Schulenberg v. Harriman*, 88 U.S. 44, 22 L. Ed. 551 (21 Wall. 1874) (timber is realty, but when severed from land becomes personalty; owner entitled to replevin action and to all remedies for wrongful removal or conversion of personal property); *Lieberman v. Clark*, 114 Tenn. 117, 85 S.W. 258 (1904) (owners of timber cut by another entitled to replevin action to recover).

The record shows that plaintiffs were the record owners of real property to which the articles were affixed. Defendants did not rebut this evidence with any proof of ownership of the articles. The jury verdict which found "for the Plaintiffs for the return of the . . . items" is by implication a finding that plaintiffs were the owners of the property. Defendants' removal of the fixtures belonging to plaintiffs entitles plaintiffs to a replevin action for the recovery of the items.

The measure of damages in a replevin action where the property is not returned is the value of the property, together with interest, from the date of the unlawful taking. *Wellman v. Birkel*, 220 Neb. 1, 367 N.W.2d 716 (1985). When property is returned in a replevin action, the party recovering possession of the property is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention. *Wellman v. Birkel, supra.*

Plaintiffs are also entitled to recover damages if the evidence establishes the cost to repair and reinstall the fixtures removed by defendants.

We find that the damages alleged for the loss of rent and cost of electricity are not proper measures of damages in this case. The record shows that the Co-op did not have a written lease with plaintiffs and therefore, after proper termination, had no obligation for rent or utility costs. In view of this disposition of the case, the other assignments will not be discussed.

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

WILLIAM LAWSON, APPELLANT, V. FORD MOTOR COMPANY, APPELLEE.

408 N.W.2d 256

Filed June 26, 1987. No. 85-649.

1. **Statutes.** This court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

2. **Statutes: Legislature: Intent.** Recognition that legislators typically vote on the language of a bill generally requires the Nebraska Supreme Court to assume that the legislative purpose is expressed by the ordinary meaning of the words used.
3. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
4. **Statutes: Legislature: Intent.** It is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of a statute.
5. **Words and Phrases.** The word "within" indicates enclosure or containment and means "inside of."
6. **Statutes: Words and Phrases.** One is "within the age of twenty years" until he or she becomes 21 years old.
7. **Statutes.** A heading, caption, or catchline is supplied in the compilation of the statutes and does not constitute any part of the law.

Appeal from the District Court for Butler County: WILLIAM H. NORTON, Judge. Reversed and remanded for further proceedings.

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

Gerald L. Friedrichsen of Fitzgerald & Brown, and John M. Thomas, for appellee.

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

CAPORALE, J.

Plaintiff-appellant, William Lawson, appeals from the summary judgment dismissing his action against defendant-appellee, Ford Motor Company. While Lawson's five assignments of error include constitutional challenges to Neb. Rev. Stat. § 25-224(2) (Reissue 1985), which bans product liability suits not commenced within 10 years after the product was first sold for use, they present the single question of whether the trial court erred in concluding that his action was time barred. Since we conclude the trial court misapplied the statute, we reverse and remand the cause for further proceedings without reaching the constitutional issues.

On June 11, 1978, Lawson was involved in a collision while driving a truck manufactured by Ford and first sold for use in 1966. Lawson was born on October 25, 1959, and filed this suit

on June 9, 1982, alleging, among other things, that the gasoline tank on the truck was unreasonably dangerous because of the manner in which Ford designed, manufactured, and installed it.

Section 25-224(4) provides that notwithstanding the 10-year ban imposed by § 25-224(2), "any cause of action or claim which any person may have on July 22, 1978, may be brought not later than two years following such date."

The foregoing 2-year period of limitation, however, is extended by Neb. Rev. Stat. § 25-213 (Reissue 1979). See *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984), discussed later in this opinion. Section 25-213 provides in relevant part that

> if a person entitled to bring any action mentioned in this chapter [25] . . . be, at the time the cause of action accrued, *within the age of twenty years*, insane or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter after such disability shall be removed . . . .

(Emphasis supplied.)

Since the collision occurred on June 11, 1978, Lawson had his cause of action "on July 22, 1978." On the day Lawson brought this suit he was 22 years and 227 days old. The controlling question therefore is whether that age falls inside the 2-year period from the time Lawson ceased being "within the age of twenty years."

The task is one of determining the meaning of the phrase "within the age of twenty years." There are a number of well-established rules applicable to the performance of that task. The first of these is that we do not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. See, *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986); *Galyen Petroleum Co. v. Svoboda*, 222 Neb. 268, 383 N.W.2d 49 (1986); *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985). Recognition that legislators typically vote on the language of a bill generally requires this court to assume that the legislative purpose is expressed by the ordinary meaning of the words used, *Amoco Production Co. v. Village of Gambell, Alaska*, ____ U.S. ____, 107 S. Ct. 1396,

94 L. Ed. 2d 542 (1987); thus, in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. *State v. Burke, ante* p. 625, 408 N.W.2d 239 (1987); *State v. Carlson, supra; Midwest Messenger Assn. v. Spire*, 223 Neb. 748, 393 N.W.2d 438 (1986). Finally, it is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of a statute. *Sorensen v. Meyer, supra.*

The word "within" indicates enclosure or containment, as in "his heart sank within him." It means "inside of," such as in "the water is stored within the soil." Webster's Third New International Dictionary, Unabridged 2627 (1981). Thus, one is "within the age of twenty years" until he or she becomes 21 years old. Accordingly, Lawson had 2 years from October 25, 1980, or through October 24, 1982, during which to institute his action. Since this action was commenced prior to October 24, 1982, it is not time barred.

While at first blush it might appear that the statute has been construed otherwise in the past, such is not in fact the case. In the early cases which discuss the attainment of majority, the ages of the children involved were so well within the time periods that it was not necessary for the opinions to expressly construe the word "within" as it operates in § 25-213. *Howe v. Blomenkamp*, 88 Neb. 389, 129 N.W. 539 (1911); *Albers v. Kozeluh*, 68 Neb. 529, 97 N.W. 646 (1903) (syllabus point in opinion upon rehearing). See, also, *Holmes v. Mason*, 80 Neb. 448, 114 N.W. 606 (1908) (silent as to ages of children involved).

The foregoing analysis of the meaning of "within" comports with our holding in *State v. Carlson, supra*, which rules that the phrase "fourteen years of age or younger," as used in Neb. Rev. Stat. § 28-320.01 (Reissue 1985), includes those persons who have not reached their 15th birthday. We are not unmindful of the fact that in *Hatfield v. Bishop Clarkson Memorial Hosp.*, 679 F.2d 1258 (8th Cir. 1982), the federal circuit court, in holding that § 25-213 tolled the application of Neb. Rev. Stat. § 25-222 (Reissue 1985) (which establishes time bars for professional negligence actions), said that the 13-year-old

plaintiff could bring the action which accrued while "she was under 20 years of age" at any time "before she reached age 20 or within two years thereafter." 679 F.2d at 1264. That dictum, stated before our decision in *Carlson*, does not, however, correctly reflect Nebraska law. *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984), in answer to a specific question certified to us by the U.S. Court of Appeals for the Eighth Circuit, ruled that § 25-213 tolls the running of the 2-year provision of § 25-224(4) in cases brought during a plaintiff's infancy. It is to be noted, however, that the question posed in *Macku* concerned itself only with whether an infant was required to commence an action not later than 2 years following July 22, 1978. That is different than asking the meaning of the phrase "within the age of twenty years."

Ford argues that when read in the context of the subsequent language in § 25-213, "such disability," the questioned phrase must necessarily be interpreted as in effect reading "an infant." It is Ford's claim that only infancy compares to the other designated disabilities.

However, the foregoing argument is unsound; "such disability" simply refers to the conditions previously mentioned in the sentence, that is, being within 20 years of age, being insane, or being imprisoned. We recognize that the caption to § 25-213 reads: "Actions by infants, persons insane or imprisoned; tolling of limitation." Such a heading, caption, or catchline is supplied in the compilation of the statutes and does not constitute any part of the law. *State v. Holmes*, 221 Neb. 629, 379 N.W.2d 765 (1986); Neb. Rev. Stat. § 49-802(8) (Reissue 1984). See, also, *Cosentino v. City of Omaha*, 186 Neb. 407, 183 N.W.2d 475 (1971). Neb. Rev. Stat. § 38-101 (Reissue 1984) states all persons "under nineteen years of age are declared to be minors; but in case any person marries under the age of nineteen years his minority ends." Thus, minority, or infancy, depends not only upon one's age but upon one's marital status. Section 25-213 concerns itself only with age; it makes no reference to marital status. Thus, the tolling of chapter 25 periods of limitation is tied to the plaintiff's age, not to his or her status as an infant.

The judgment of dismissal is erroneous and is therefore

reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., not participating.

BOSLAUGH, J., dissenting.

The statute involved in this case, Neb. Rev. Stat. § 25-213 (Reissue 1979), dates back to territorial days. It was a part of the Code of Civil Procedure adopted in 1866. See Rev. Stat. tit. II, § 17 (1866). It has existed in substantially its present form since that time. Its purpose is to extend the time in which a person under disability may bring certain actions. It provides that such a person may bring such an action "within the respective times limited by this chapter *after such disability shall be removed* . . . ." (Emphasis supplied.)

The disability we are concerned with in this case is infancy or minority. In 1969 the age of majority was reduced to 20 years. 1969 Neb. Laws, ch. 298, § 1, p. 1072. In 1972, the age stated in § 25-213 was reduced to 20 years. 1972 Neb. Laws, L.B. 1049. According to its title, one purpose of L.B. 1049 was to harmonize the provisions of the laws amended with previous legislation.

I agree that § 25-213 should be given its plain and ordinary meaning. That meaning is that *the disability referred to is removed when the person reaches the age of 20 years*, not 1 year after reaching that age.

In *Albers v. Kozeluh*, 68 Neb. 529, 97 N.W. 646 (1903) (opinion on rehearing), in discussing when an action might be brought, the opinion states at 533-34, 97 N.W. at 647:

> An examination of the record discloses that at the time the foreclosure proceedings were had on which the sheriff's deed in question is based, Stately's wife was an inmate of the insane asylum, and his children were all minors. It further appears that the oldest child did not reach the age of majority until some time in the year 1888, and, of course, the others became of age, in turn, much later. This action was commenced in the latter part of 1897, and ten years had not elapsed after the statute of limitations began to run and before it was commenced. Therefore the action was begun in time.

Syllabus No. 3 to that opinion provides: "The statute of limitations, as to adverse possession, does not run against persons while under disability, such as minors; and an action brought to recover an interest in real estate within ten years after they arrive at the age of majority, is commenced in time." (Syllabus of the court.) *Id.*

In *Holmes v. Mason*, 80 Neb. 448, 450-51, 114 N.W. 606, 607 (1908), this court said:

> The statute of limitations as to each of the several defendants commenced to run when he arrived at his majority. So as to the defendants who were more than ten years past their majority at the time this action was commenced the bar of the statute of limitations was complete.

In *Howe v. Blomenkamp*, 88 Neb. 389, 391, 129 N.W. 539, 540 (1911), this court said:

> The next defense is that plaintiffs did not bring suit within five years after attaining majority, and that consequently the action is barred by the statute of limitations. Comp. St. 1909, ch. 23, secs. 117, 118. This statute does not apply to a void sale of the property of a ward, and the rule applicable here is: "An action by an heir to quiet his title to the homestead of his ancestor may be maintained at any time within ten years after his right of action accrues, or the attainment of his majority." *Holmes v. Mason*, 80 Neb. 448. Under this rule the action is not barred.

In *Hughes v. Langdon*, 111 Neb. 515, 520, 199 N.W. 832, 833-34 (1924) (opinion on rehearing), this court said:

> Therefore, the only disability under which he is shown to have stood at the time of the discharge of the guardian was that of minority. This was removed when he became of the age of 21 in the year 1906, and this we find to be the correct date of the removal of his disability as affecting this suit.

In *Hatfield v. Bishop Clarkson Memorial Hosp.*, 679 F.2d 1258, 1264 (8th Cir. 1982), *on reconsideration* 701 F.2d 1266 (8th Cir. 1983), the court said, in construing § 25-213: "Plaintiff's cause of action accrued while she was under 20 years of age. Under section 25-222 as modified by section 25-213, she could bring this action at any time before she

reached age 20 or within two years thereafter."

State v. Carlson, 223 Neb. 874, 394 N.W.2d 669 (1986), involved a different problem involving different language. It has no application to the facts of this case.

The phrase "within the age" has been in the statute for more than 100 years. It has been construed to mean during the disability or period of minority. So far as I have been able to discover, until this case, it has never been construed to mean anything else.

The plain meaning of § 25-213 is that "within the age of twenty years" means before reaching the age of 20 years. As we said recently in *Macku v. Drackett Products Co.*, 216 Neb. 176, 183, 343 N.W.2d 58, 62 (1984), "*Section 25-213, suspending the statute of limitations during Amy's infancy*, exists for the exclusive and personal benefit of Amy Macku . . . ." (Emphasis supplied.)

The judgment should have been affirmed.

JOHN R. JOHNSTON, APPELLANT AND CROSS-APPELLEE, V. PANHANDLE COOPERATIVE ASSOCIATION, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

408 N.W.2d 261

Filed June 26, 1987. No. 85-676.

1. **Declaratory Judgments.** A declaratory judgment action is sui generis and may involve questions of both law and equity.
2. _____. Whether a declaratory judgment action is to be treated as an action at law or in equity is to be determined by the nature of the dispute.
3. **Appeal and Error.** In reviewing questions of law, this court has an obligation to reach an independent conclusion with respect to such issues without regard to the findings of the trial court.
4. **Employment Contracts: Termination of Employment.** When employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, generally, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability.
5. **Employment Contracts.** The fact that an employment contract was for an indefinite duration does not preclude job security provisions of an employee handbook from becoming a part of the employment contract.

6. _____. If the language of an employee handbook constitutes an offer definite in form which is communicated to the employee, and the offer is accepted and consideration furnished for its enforceability, the handbook provision becomes part of the employment contract.
7. **Employment Contracts: Case Disapproved.** In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. To the extent that *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), suggests that a handbook issued after an employee is hired cannot become part of that employee's contract, it is disapproved.
8. **Employment Contracts.** Generally, an agreement to give permanent employment simply means to give a steady job of some permanence, as distinguished from a temporary job or temporary employment.
9. **Employment Contracts: Due Process.** To have a property interest in employment, a person must have a legitimate claim of entitlement to it. Generally, an employee at will has no such reasonable expectation of continued employment or legitimate claim of entitlement to it.

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

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

Robert P. Chaloupka of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

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

HASTINGS, J.

The plaintiff, John R. Johnston, appeals the judgment of the district court for Scotts Bluff County dismissing his petition for declaratory judgment at the close of all the evidence. Plaintiff filed the declaratory judgment action to determine whether he was still employed by the defendant, Panhandle Cooperative Association (Co-op).

The plaintiff was hired by the Co-op in 1970 as the company's auditor or controller. He worked for the Co-op until October 25, 1984, when his employment was terminated after he and the defendant's general manager disagreed over inventory procedures.

The district court dismissed plaintiff's petition for declaratory judgment and made the following findings: There

was no express or implied contract of employment; the conduct involved was not outrageous and did not violate any public policy; the plaintiff did not voluntarily resign; the defendant's general manager was authorized to discharge the plaintiff; and the plaintiff was terminated without good cause.

The plaintiff appeals, alleging that the court erred in finding that he was not still an employee of the defendant; in finding that he could be dismissed without cause, when the defendant asserted before trial that the plaintiff had resigned; in finding that there was an employment at will; and in finding that the plaintiff's discharge was not against public policy. In its cross-appeal defendant alleges that the court erred in determining that no cause existed for plaintiff's termination of employment.

The record reveals the following. Before Johnston was hired by the defendant, he worked for a company that performed audits on cooperative associations in Nebraska and Wyoming. In 1970 he was hired by the defendant, Co-op, to be in control of its administrative staff and, as Johnston testified, to be in charge of "[a]nything that pertained to money," including accounting procedures.

When Johnston was first hired by the defendant, Co-op, there was no written agreement drawn up. Sometime after Johnston was hired, the Co-op started a policy of annually providing some salaried employees, including Johnston, with a written statement setting out the employee's salary and commission rate for the coming year. In 1975, the Co-op prepared an "Employee Handbook of Personnel Policies for Panhandle Cooperative Association," which was periodically updated. It contained information about employee benefits, insurance, and vacations, as well as general procedures.

Carl Montgomery was the Co-op's director of the food division, a position on the same managerial level as Johnston's. In 1982 the Co-op's general manager became ill, and Montgomery acted as interim general manager or president. Johnston testified that he and Montgomery had disagreements at times, but generally got along all right. Montgomery testified that his relationship with Johnston was strained. The Co-op's personnel manager testified that he had observed considerable

rivalry and animosity between Johnston and Montgomery. The chairman of the Co-op's board of directors said that he had observed jealousy or a power struggle between the two men. An accountant who worked under Johnston's supervision stated that Johnston and Montgomery had a very strained relationship.

The Co-op's general manager died in September 1984. Johnston and Montgomery both applied for the position, and sometime in September of 1984 the Co-op's board of directors selected Montgomery for the job.

On October 24, 1984, Johnston delivered to Montgomery's office a financial statement containing information for the fiscal year 1984 annual report, including information on inventory.

Earlier, in the spring of 1984, some new members of the Co-op's board of directors had requested that a more accurate inventory be taken. The external auditors suggested changes in inventory procedures, and the board authorized that they be used. The board chairman testified that the inventory issue was a "little touchy" with the board.

After reviewing the financial statement that Johnston prepared in October of 1984, Montgomery noticed a change in the inventory procedures used by Johnston, which he, Montgomery, considered to be a violation of his orders not to change procedures without his prior consent.

The next day, Montgomery called Johnston in to discuss the financial statement and accused Johnston of changing the inventory without Montgomery's knowledge. It was during this conversation that Johnston was terminated. According to Johnston's testimony, Montgomery said that they should quit playing accounting games and suggested that Johnston seek other employment. Johnston asked, "Effective when," and Montgomery replied, "Right now." According to Montgomery's testimony, he and Johnston "exchanged words" and then Montgomery asked, "Bob [Johnston's nickname], do you think we ought to continue? Maybe we ought to call it quits." Montgomery said that Johnston replied, "When do you want to?" Montgomery answered, "Let's do it now. I'll pay you through November," and Johnston said, "You'll pay me a hell

of a lot more than that."

Shortly after this occurred, the Co-op's attorney wrote a letter to Johnston's attorney, stating that it was the Co-op's position that Johnston resigned his position as controller of the company.

This was a declaratory judgment action tried to the court by agreement of the parties. A declaratory judgment action is sui generis and may involve questions of both law and equity. *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985). Insofar as fact questions are concerned in a declaratory judgment action, those issues may be tried and determined as in other civil actions. Neb. Rev. Stat. § 25-21,157 (Reissue 1985). All orders, judgments, and decrees under the declaratory judgments act may be reviewed as other orders, judgments, and decrees. Neb. Rev. Stat. § 25-21,155 (Reissue 1985). Whether a declaratory judgment action is to be treated as an action at law or in equity is to be determined by the nature of the dispute. *Boren v. State Farm Mut. Auto. Ins. Co., ante* p. 503, 406 N.W.2d 640 (1987).

Although plaintiff seeks damages for loss of wages and benefits under the terms of his prior employment, the basic issue in this case relates to the status of the parties; i.e., does an employee-employer relationship still exist? To determine this question it is necessary to determine whether a contract for permanent employment in favor of plaintiff existed. This is a question of law, and we have an obligation to reach an independent conclusion with respect to issues such as that without regard to the findings of the trial court. *OB-GYN v. Blue Cross, supra.*

Johnston's first and third assignments of error both involve the question of what kind of employment he had with the Co-op. Therefore, they will be discussed together. It is well established in Nebraska that when employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability. *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986). The plaintiff contends that the employee handbook and

his salary agreement together constituted an express contract of employment for a definite term, that term being until his retirement or until he be dismissed for cause.

The salary agreement for 1984 established Johnston's base salary and commission for 1984. The agreement also stated that salary and commission agreements for 1985 would be established after completion of the fiscal yearend audit and before January 1, 1985. The agreement was signed by the plaintiff and by the Co-op's then general manager. This agreement is consistent with an employment at will and merely provides what the salary would be for the specific year if an employee was still employed.

The employee handbook was first developed in 1975, several years after Johnston was hired by the Co-op. It set out employee benefits and general company procedures, and was distributed to all employees. The portions of the handbook at issue in this case provided as follows:

> Dismissals For Cause
>
> The following rules are intended to cover matters of fact rather than matters of judgement where you might make an honest mistake.
>
> 1. Willful insubordination or disregard of duty.
> 2. Dishonesty.
> 3. Unauthorized or unreported absence from work.
> 4. Use of beverage alcohol or illegal drugs on Company premises or Company time, or reporting for work under the influence.
> 5. Conduct which may cause damage or embarrassment to the Company.
> 6. Failure to comply with Company policy will be subject to dismissal.
>
> To permit violation of these rules would, in fact, be an injustice to all employees and member-patrons.
>
> . . . .
>
> Probationary Period
>
> The first three months of your employment with the association is a probationary period. This is an opportunity for you and the Association to determine whether your interests and abilities are compatible with

> our business. You will not have the status of a permanent employee until the probationary period is completed. Then, if your record is acceptable, you will be credited with the probationary period wherever benefits may apply.

The handbook contained no provision for a grievance procedure.

The plaintiff contends that after the probationary period an employee becomes a "permanent employee," which means that he or she cannot be dismissed without cause as provided for in the section regarding dismissals for cause. The case presents the question of when provisions in an employee handbook can become part of an employment contract. In *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983), we concluded that the fact an employment contract was for an indefinite duration did not preclude job security provisions of the employer's "Policy and Procedures" handbook from becoming part of the employment contract. In *Morris* we cited *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), as authority for the proposition that " '[t]here is no reason why the at-will presumption needs to be construed as a limit on the parties' freedom to contract.' " 215 Neb. at 680, 340 N.W.2d at 391.

The court in *Pine River* concluded that personnel handbook provisions, if they meet the requirements for formation of a unilateral contract, may become enforceable as part of the original employment contract. *Pine River, supra.* Thus, if the handbook language constitutes an offer definite in form which is communicated to the offeree, and the offer is accepted and consideration furnished for its enforceability, the handbook provision becomes part of the employment contract. *Id.* In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. *Id.* The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer. *Id.*

We agree with the reasoning of the Minnesota court. Therefore, even though the handbook in this case was not prepared until 5 years after Johnston was hired by the Co-op, if its provisions meet the requirements for formation of a unilateral contract, they may become enforceable. To the extent that *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), suggests that a handbook issued after an employee is hired cannot become part of that employee's contract, it is disapproved.

In the present case, we reject Johnston's argument that the handbook provision providing for permanent employment status after a 3-month probationary period sets a definite term of employment lasting until retirement or dismissal for cause. The provision does not meet the requirement that an offer be definite in form. " '[A]n agreement to give permanent employment simply means to give a steady job of some permanence, as distinguished from a temporary job or temporary employment.' " *Mau v. Omaha Nat. Bank, supra* at 314, 299 N.W.2d at 150.

Larry Sayles, the Co-op's personnel manager, testified that the probationary period is used as a period in which the company has no obligation to keep an employee and the employee has no obligation to keep the job. He testified that after the probationary period an employee is eligible to receive sick leave and is reviewed for a possible raise, but that the personnel department has never treated employees as though they could not be terminated after probation except for certain reasons. We conclude that neither the employee handbook nor the salary agreement promised any definite term of employment, but only pointed out the benefits that Johnston would receive *if* he remained a Co-op employee. See *Mau v. Omaha Nat. Bank, supra.*

We also reject Johnston's argument that a contract of employment for a definite term can be implied from the circumstances surrounding his employment. Johnston was hired by the Co-op in 1970 by the company's then general manager, Roy Chelf. Chelf testified by deposition that he made no specific promises as to how long Johnston would be employed by the Co-op, nor did he enter into a contract with

Johnston that included conditions under which Johnston could be terminated. Johnston admits that he could not remember any specific promises made to him by Chelf and that it was never promised that Johnston would be employed for a certain term.

However, Johnston contends that when he was hired by the Co-op, he considered job security to be evident because of the number of Co-op employees and the length of their service. Johnston asserts that this "job security," in conjunction with the employee handbook and salary agreement, constitutes an implied employment contract continuing until his retirement or dismissal for cause. However, Johnston's subjective understanding of "job security" is insufficient to establish an implied contract of employment to that effect. See *Thompson v. St. Regis Paper Company*, 102 Wash. 2d 219, 685 P.2d 1081 (1984).

Because Johnston's employment was for an indefinite term, unless there were contractual or statutory restrictions on the right to discharge, the Co-op could lawfully discharge him whenever and for whatever cause it chose without incurring liability. See *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986). Johnston argues that the handbook provisions regarding the probationary period and dismissals for cause restrict the Co-op's right to discharge. As stated earlier, whether the provisions do become part of the contract depends on whether they meet the requirements for formation of a unilateral contract.

In *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), the court determined that the language in the handbook section titled "Job Security" did not constitute any offer, but was no more than a general statement of policy. However, the court determined that the provisions of the handbook section titled "Disciplinary Policy" did set out in definite language an offer of a unilateral contract for procedures to be followed in job termination. *Id.* The section provided for a three-stage procedure consisting of reprimands for the first and second "offense," and thereafter suspension or discharge, but discharge only " 'for an employee whose conduct does not improve as a result of the previous action taken.' " *Id.* at 626.

The Minnesota Supreme Court thus concluded that the jury was justified in finding that the handbook provision on disciplinary procedures had become part of the plaintiff's employment contract. *Id.*

In a subsequent case involving the question of whether handbook provisions became part of an employment contract, the Minnesota Supreme Court determined that the handbook did not contain sufficiently definite terms which created a binding unilateral employment contract. *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853 (Minn. 1986). The court contrasted the definite and specific handbook language on disciplinary procedures found in *Pine River, supra*, with the vague language on disciplinary action and discharge in the IBM employee manual and concluded that there was no definite language to constitute an offer of a unilateral contract on job termination procedures.

> Mid America's manual fails to provide any detailed or definite disciplinary procedure. The *Pine River* manual provided a definite, detailed four-step procedure. Moreover, Mid America's manual omits any definite option of a probationary period for an employee before final termination. Here there is no definite language to constitute an offer of a unilateral contract on job termination procedures.

384 N.W.2d at 857.

In the case at bar, like in *Hunt*, the language in the handbook is not definite enough to constitute an offer of a unilateral contract on job termination. The handbook does nothing more than set out six examples of dismissals for cause. Nowhere does the handbook limit the reasons for dismissal to these six provisions or state that there are any restrictions on the employer's right to discharge. The handbook provides for no disciplinary procedures short of termination nor for any grievance procedure in the event of termination. Therefore, there is no merit in Johnston's contentions that the district court erred in finding an employment at will and in finding that Johnston was not still a Co-op employee.

There is also no merit to Johnston's claim that the court erred in finding that he, as an at-will employee, could be terminated

without cause, when the Co-op had originally asserted that he resigned. A letter sent from the Co-op's attorney to Johnston's attorney on November 2, 1984, stated: "It is Coop's position that Mr. Johnston resigned his position as controller of the company." Johnston argues that the Co-op should thus be estopped from asserting that the plaintiff was terminated. Johnston cites *Mutual Benefit Life Ins. Co. v. Chisholm*, 213 Neb. 301, 306, 329 N.W.2d 103, 106 (1983), for the proposition that "[w]here a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration."

While this is a long-recognized rule in Nebraska, it is not applicable in the present situation. The issue in this case is whether or not Johnston's employment was terminable at will. Because the court correctly determined that Johnston was an at-will employee, it does not matter whether he resigned or was terminated. Thus, the Co-op's original contention that Johnston resigned makes no difference to the outcome of this case and is of no effect.

Johnston's final assignment of error is that the court erred in finding his discharge did not violate public policy. Johnston asserts that his discharge violated a statutory requirement that cooperative companies prepare accurate financial statements so that patronage dividends, which are based on net earnings, can be properly computed. Neb. Rev. Stat. § 21-1302 (Reissue 1983). He also asserts that his discharge violated Neb. Const. art. I, § 5, which guarantees freedom of speech, by discouraging the writing of accurate financial statements. In addition, he asserts that his discharge violated Neb. Const. art. I, § 3, which guarantees that no person shall be deprived of life, liberty, or property, without due process of law.

Johnston cites cases from other jurisdictions that allow actions either in tort or implied contract for wrongful discharge based on violation of public policy. We discussed the public policy exception to the employment-at-will rule in *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985):

> "We recognize, however, that the 'employment at will' rule is not, in some jurisdictions, an absolute bar to a claim

> of wrongful discharge. In a number of jurisdictions, an exception to the 'terminable at will' rule has been articulated in recent years. Under this exception, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy. [Citations omitted.]
>
> So far as we are able to ascertain, Nebraska has not adopted this exception to the present time. Assuming *arguendo*, however, that such an exception were to be recognized in this jurisdiction, it is clear in this case that the plaintiff has failed in his burden to prove that his discharge was violative of a public policy of this state. We have held that '[c]ourts should be cautious in holding contracts void on ground of public policy and before they do so prejudice to the public interest should clearly appear.' *Beaver Lake Assn. v. Beaver Lake Corp.*, 200 Neb. 685, 691, 264 N.W.2d 871, 875 (1978)."

220 Neb. at 749-50, 371 N.W.2d at 737-38, quoting *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980).

We again decline to adopt the public policy exception at this time. Assuming, but not deciding, that such an exception were to be recognized in this jurisdiction, Johnston failed in his burden to prove that his discharge was violative of this state's public policy. The discharge was not, as Johnston asserts, based on Johnston's preparation of an accurate financial statement, when his employer wanted him to prepare an inaccurate one. This is clearly shown by the fact that the Co-op incorporated the figures from Johnston's financial statement into the final yearend audit report. Johnston was not fired because of what figures he included on the financial statement, but because Johnston's supervisor believed he was violating orders.

Johnston's contention that his discharge violated due process is also groundless. In order for Neb. Const. art. I, § 3, to apply, Johnston must have had a property interest in his employment. To have a property interest in employment, a person must have a legitimate claim of entitlement to it. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Because Johnston was an employee at will, he had no reasonable expectation of continued employment or legitimate

claim of entitlement to it.

Accordingly, it is unnecessary for us to discuss Co-op's cross-appeal.

We find no error in the judgment of the district court, and it is affirmed.

AFFIRMED.

ROBERT D. KIMBERLING, BY AND THROUGH HIS FATHER AND NEXT FRIEND, DONALD KIMBERLING, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT, APPELLEE.

408 N.W.2d 269

Filed June 26, 1987. No. 85-708.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), will not be set aside unless such findings are clearly wrong.
2. **Trial: Witnesses.** In a case tried without a jury, the court, as trier of the facts, is the sole judge of the credibility of the witnesses and the weight to be given such testimony.
3. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial, the Supreme Court does not reweigh evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Motor Vehicles.** Drivers of motor vehicles are obligated to maintain a proper lookout and have the duty to see what is in plain sight.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

John D. Sykora of Law Offices of John D. Sykora, for appellant.

Joseph E. Jones and Mary Kay Pryor of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

HASTINGS, J.

This tort action was brought by Robert D. Kimberling, a minor, by and through his father and next friend, Donald Kimberling. Further reference will be made only to Robert as plaintiff.

The action grew out of a collision between a motorcycle, driven by plaintiff, and a power pole installed and owned by the defendant, Omaha Public Power District (OPPD). The action sought damages for personal injuries, medical expenses, and property damage. OPPD counterclaimed for the cost of replacement of the power pole. The case was tried to the court without a jury under the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983). Judgment was entered in favor of the defendant on plaintiff's claim, and in favor of the plaintiff on defendant's counterclaim.

Only the plaintiff appeals. Although plaintiff details four assignments of error, he simply recites that the court erred in finding that plaintiff was guilty of contributory negligence as a matter of law sufficient to bar his recovery.

The accident in question occurred on July 23, 1982, at approximately 9 p.m., in the vicinity of Stony Brook Boulevard near 144th Street in Omaha, Nebraska. Plaintiff was proceeding east on Stony Brook Boulevard at speeds which he admitted to be from 40 to 45 miles per hour. The speed limit at that point was 30 miles per hour.

According to plaintiff's direct testimony, he was proceeding down the street, glanced in his left rearview mirror, and then focused back on the road and hit the power pole.

The Omaha city ordinances provided at the time that power poles shall, where practicable, be set back 2 feet from the edge of the street. There is no question but that the pole at the time of the accident was located less than 2 feet from the edge of the street.

It was plaintiff's testimony that at the time of the accident, he was riding his vehicle approximately 1 foot from the outside edge of the street. He claims that the right handlebar of the motorcycle struck the pole, causing the accident and resulting injuries and damages.

However, the photographs of the subject pole disclose several dents and damage and black scuff marks at approximately the lower foot or two of the pole. Additionally, according to the testimony of the deputy sheriff who investigated the accident, he found no evidence of metal contact with the pole, which, in his opinion, ruled out any possibility that the handlebar had collided with the pole. Also, he testified that the black scuff marks on the pole corresponded to scuff marks on the tire of the motorcycle.

The deputy's testimony, supported by photographs, disclosed that the front wheel of the vehicle had been badly mangled and the front fork was askew, indicating that the collision had been between the pole and the front wheel of the motorcycle. Also, the deputy had found a tire scuff mark on the curb approximately 10 feet 8 inches from the light pole, which, from his observation, matched up with a corresponding scuff mark of the tire of the motorcycle. That testimony would support a conclusion that plaintiff drove up over the curb some 10 feet before the accident, causing him to lose control of his vehicle, causing the collision.

The trial court made no specific findings. Rather, it made only general findings in favor of the defendant on plaintiff's claim and in favor of the plaintiff on defendant's counterclaim. A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act, §§ 23-2401 et seq., will not be set aside unless such findings are clearly incorrect. *Lynn v. Metropolitan Utilities Dist., ante* p. 121, 403 N.W.2d 335 (1987). In a case tried without a jury, the court, as trier of the facts, is the sole judge of the credibility of the witnesses and the weight to be given to that testimony. *Lynn, supra.* In reviewing a judgment awarded in a bench trial, the Supreme Court does not reweigh evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Lynn, supra.*

Drivers of motor vehicles are obligated to maintain a proper lookout and have the duty to see what is in plain sight. *McKenzie v. Ladd Trucking Co.*, 214 Neb. 209, 333 N.W.2d 402 (1983). There was evidence from which the trial court could

have found that plaintiff failed to maintain that lookout in this case and that his failure to do so was the proximate cause of the collision and resulting damages, notwithstanding the negligence on the part of OPPD in *apparently* violating the city ordinance.

We cannot say that the judgment of the district court was clearly wrong. It was supported by competent evidence which the trier of fact was entitled to believe. Its judgment is affirmed.

AFFIRMED.

DEMAHR SEAGREN, PERSONAL REPRESENTATIVE OF THE ESTATE OF EVODIA SEAGREN, DECEASED, APPELLANT, V. STEPHEN PETERSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF DUANE K. PETERSON, DECEASED, APPELLEE.

407 N.W.2d 790

Filed June 26, 1987. No. 85-788.

1. **Summary Judgment: Appeal and Error.** In reviewing a case wherein summary judgment has been granted, we are bound by the rule that where the pleadings, depositions, admissions, stipulations, and affidavits on file disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law, summary judgment should be granted.
2. **Limitations of Actions: Attorneys at Law.** A cause of action for malpractice accrues upon the violation of a legal right.
3. **Limitations of Actions: Damages.** For the purpose of extending a statute of limitations, discovery does not mean the final resolution of damages; it can be triggered at some time before the full extent of the damages is sustained.
4. **Limitations of Actions: Estoppel.** Generally, if a plaintiff has ample time to institute an action after the inducement of delay has ceased to operate, he or she cannot excuse the failure to act within the statutory time on the ground of estoppel.

Appeal from the District Court for Cedar County: EDWARD E. HANNON, Judge. Affirmed.

David A. Domina of Domina & Gerrard, P.C., and Mark Behm, for appellant.

Jewell, Gatz & Collins, for appellee.

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

HASTINGS, J.

Plaintiff, DeMahr Seagren, as personal representative of the estate of Evodia M. Seagren, deceased, filed an action for damages against Duane K. Peterson, who had represented plaintiff, alleging professional negligence for failing to file a federal estate tax return in time. Because of the death of Duane Peterson while this appeal was pending, the action has been revived in the name of the personal representative of his estate, Stephen Peterson.

The district court sustained defendant's motion for summary judgment on the theory that the action was barred under the provisions of Neb. Rev. Stat. § 25-222 (Reissue 1985). Plaintiff on appeal assigns as error the holding by the trial court that the claim was barred by the statute of limitations, and that the court erred in not holding that Peterson was equitably estopped from asserting the statute of limitations as a defense.

In reviewing this case we are bound by the rule that where the pleadings, depositions, admissions, stipulations, and affidavits on file disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law, summary judgment should be granted. See *Mayer v. Howard*, 220 Neb. 328, 370 N.W.2d 93 (1985).

The record submitted to us discloses without controversy the following: Evodia Seagren died on July 31, 1979; Peterson was employed by the personal representative to act as his lawyer within approximately 3 days after the decedent's death; the Internal Revenue Code required that a federal estate tax return be filed within 9 months of date of death, or by May 1, 1980, and that failure to file on time and to pay the eventual tax subjects the estate to the payment of interest and penalties; Peterson told plaintiff about the 9-month filing requirement and the possible penalty, but that Peterson would take care of all penalties and fines; no estate tax return was ever filed by Peterson; because of Peterson's suspension from the practice of

law on May 27, 1983, he advised plaintiff around June 1, 1983, that he could no longer represent plaintiff, and sent a letter to that effect to the plaintiff; plaintiff employed another attorney to represent him in June of 1983, who told plaintiff that the estate tax return had not been filed and that the tax, together with interest and penalty, would be due; an estate tax return was filed, with letter dated January 24, 1984; and an assessment of penalty and interest, which is the subject of this lawsuit, was made on June 4, 1984, and paid on approximately September 19. The petition in this case was filed on January 28, 1985.

Section 25-222 provides in part:

> Any action to recover damages based on alleged professional negligence . . . 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 . . . .

Our first task in conducting a review in this case is to determine the date of "the alleged act or omission in rendering or failure to render professional services providing the basis for such action."

In *Rosnick v. Marks*, 218 Neb. 499, 507, 357 N.W.2d 186, 191 (1984), "we reaffirm[ed] the rule in Nebraska that a cause of action for malpractice accrues upon the violation of a legal right."

In *Rosnick*, the offending attorney failed to file an amended petition by November 8, 1978, which filing had been ordered by the court. As a matter of fact, he never made the filing. The trial court dismissed the suit on August 26, 1980. Although the client, Rosnick, was unaware of his attorney's failure to comply with the court's order, which was the basis of the cause of action for malpractice, until July 3, 1980, when he engaged another attorney, we nevertheless held that the "alleged act or omission" complained of was the November 8, 1978, omission. Even under the discovery provision and its 1-year extended

limitation found in § 25-222, Rosnick failed to file his action within the additional period after being advised by his new attorney of the earlier failing of his former attorney. Thus, we held that the statute of limitations barred this malpractice suit.

In the present case, the act which constituted the alleged act of malpractice, as stated in plaintiff's petition, was the failure to file an estate tax return by May 1, 1980. This default was not discovered, according to the files and records, until sometime in June of 1983. Therefore, under the discovery extended-limitation portion of § 25-222, plaintiff had until June of 1984 to file his action. The petition was not filed until January 28, 1985, clearly outside the time limit.

Plaintiff's argument that he was not damaged until the penalty and interest were assessed is of no avail. Under the provisions of I.R.C. § 6601 (1982), the assessment of interest is automatic, and it commenced to run on May 1, 1980. I.R.C. § 6651 (1982) imposes a penalty as of the date of default, although for good cause shown it may be forgiven. However, as we stated in *Suzuki v. Holthaus*, 221 Neb. 72, 375 N.W.2d 126 (1985), for the purpose of extending a statute of limitations, discovery does not mean the final resolution of damages; it can be triggered at some time before the full extent of the damages is sustained.

Finally, plaintiff claims that his failure to comply with the statute of limitations may be excused on the ground of estoppel because Peterson assured him several times that he would take care of any interest and penalties. However, it became quite apparent by the time Peterson withdrew from the case in June of 1983 and plaintiff had engaged other counsel that Peterson was not going to make good on his promise. Seven more months went by before the estate tax return was filed, in the latter part of January 1984, and the amount of tax was determined and presumably paid. Plaintiff therefore had approximately an additional 5 months within which to file his action under the 1-year extended limitation.

> Judicial decisions almost uniformly support the proposition that if a plaintiff has ample time to institute his action, after the inducement for delay has ceased to operate, he cannot excuse his failure to act within the

> statutory time on the ground of estoppel. . . . Time periods ranging from 6 weeks to 6 months have been held to be ample opportunity under that rule.

Luther v. Sohl, 186 Neb. 119, 122, 181 N.W.2d 268, 270 (1970). See, also, *MacMillen v. A. H. Robins Co.*, 217 Neb. 338, 348 N.W.2d 869 (1984). Estoppel has no application in this case.

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

AFFIRMED.

LARRY LYNN BANKS, APPELLANT, V. MERCY VILLA CARE CENTER, APPELLEE.

407 N.W.2d 793

Filed June 26, 1987. No. 85-817.

1. **Employer and Employee: Wages.** The Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), requires that employers subject to its provisions pay each employee engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise which is engaged in commerce or in the production of goods for commerce, specified wages for all hours worked, certain of which are to be compensated at overtime rates.
2. **Employer and Employee.** The Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), is to be construed liberally so as to apply it to the furthest reaches consistent with congressional direction in recognition of the fact that broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency.
3. **Employer and Employee: Wages: Words and Phrases.** For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), an enterprise which provides a home to patients from other states is engaged in interstate commerce.
4. _____: _____: _____. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), the workweek ordinarily includes all the time during which an employee is necessarily required to be on the employer's premises, on duty, or at a prescribed workplace.
5. _____: _____: _____. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), bona fide meal periods are not worktime.
6. _____: _____: _____. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), work not requested but permitted is worktime and compensable.

7. _____: _____: _____. No matter how much time is designated as a meal period, if an employee is not free to follow pursuits of a purely private nature or the time is spent predominantly for the employer's benefit, the designated time is not, for the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), a bona fide meal period.

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

Peter C. Bataillon of Sodoro, Daly & Sodoro, for appellant.

Steven M. Lathrop of Lathrop & Lathrop, for appellee.

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

PER CURIAM.

The then small claims department of the municipal court of the city of Omaha entered a judgment for back wages in the amount of $1,000 in favor of plaintiff, Larry Lynn Banks, and against defendant, Mercy Villa Care Center. On appeal the district court found that plaintiff failed to establish he was entitled to damages under the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), and therefore reversed the judgment and dismissed plaintiff's action. In this appeal Banks challenges the district court's finding and resultant judgment. We reverse and remand with direction.

The center, located in Omaha, is described by the record as a retirement home for nuns and priests. According to Banks, some of the center's "patients" were "out of staters" from Iowa, Colorado, and Missouri who were visited by persons from other states. The center employed Banks as a security guard for the period from November 25, 1978, to December 1, 1983.

Banks' primary responsibilities were to remain at the front desk to answer the telephone and to periodically check the boilers between the hours of 11 p.m. and 7 a.m. At 7 a.m. the receptionist relieved him of his telephone answering duties, and the maintenance crew took over the boiler responsibility. Nonetheless, the center required Banks to remain on its premises until 7:30 a.m.

During that last half hour Banks would eat breakfast and get coffee for himself and the receptionist. In addition, he would go outdoors to check the grounds and would stand by the door to assist the residents if needed. Most often, he would read the newspaper.

For the first 6 to 8 months Banks was paid on the basis of a 42 1/2-hour workweek. Following that period of time, he was paid on the basis of a 40-hour workweek. When Banks inquired why he had to remain on the premises until 7:30, he was told that the center was required to provide him with a half-hour break for meals.

The act requires that employers subject to its provisions pay each employee engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise which is engaged in commerce or in the production of goods for commerce, specified wages for all hours worked, certain of which are to be compensated at overtime rates. 29 U.S.C. §§ 206 and 207; *Tennessee Coal Co. v. Muscoda Local*, 321 U.S. 590, 64 S. Ct. 698, 88 L. Ed. 949 (1944). The act defines commerce as meaning "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b). In short, commerce as used in the act means interstate commerce.

There is no proof that Banks was himself engaged in interstate commerce or in the production of goods for interstate commerce. Thus, Banks falls within the purview of the act only if the record establishes that the center was at the relevant time an enterprise engaged in interstate commerce or in the production of goods for interstate commerce.

An enterprise, as defined in 29 U.S.C. § 203(r), includes an "institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution," whether public or private, or whether for profit or not for profit. Thus, while the record is sketchy, the description of the center as a retirement home which had patients is sufficient to establish that the center was an enterprise as defined by the act. According to 29 U.S.C. § 203(s), an enterprise is "engaged in commerce" if it "has employees

engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person . . . ."

That an enterprise such as the center, which was not engaged in the production of goods, was engaged in interstate commerce is generally established by a stipulation or proof that the enterprise used, or its employees handled, goods which were manufactured, processed, or supplied by sources outside the state. *Marshall v. Brunner*, 668 F.2d 748 (3d Cir. 1982); *Marshall v. Child Care Center*, 23 Wage & Hour Cas. 477 (BNA 1977); *Brennan v. State of Iowa*, 494 F.2d 100 (8th Cir. 1974); *Shultz v. Union Trust Bank of St. Petersburg*, 297 F. Supp. 1274 (M.D. Fla. 1969).

However, the U.S. Supreme Court has consistently construed the act liberally so as to apply it to the furthest reaches consistent with congressional direction in recognition of the fact that broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency. *Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985); *Mitchell v. Lublin, McGaughy & Asso.*, 358 U.S. 207, 79 S. Ct. 260, 3 L. Ed. 2d 243 (1959). In keeping with that principle, *Marshall v. Sideris*, 524 F. Supp. 521 (D. Neb. 1981), concluded that an enterprise which operated a number of hotels was engaged in interstate commerce because it provided accommodations to transient guests. Similarly, *Wirtz v. Healy*, 227 F. Supp. 123 (N.D. Ill. 1964), ruled that employees of a travel agency who, as a part of the agency's business, escorted travel tours through several states and foreign countries and ordered, purchased, received, distributed, and otherwise handled tickets, vouchers, coupons, and documents relating to transportation, living accommodations, meals, and related facilities, as well as sent and received reports and other documents, were engaged both in interstate commerce and in the production of goods for interstate commerce.

The U.S. Supreme Court, in *Atlanta Motel v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964), concluded

that a motel which provided accommodations to interstate transient guests was subject to the provisions of the Civil Rights Act of 1964, which, among other things, prohibits racial discrimination in places of public accommodation affecting interstate commerce. *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719 (5th Cir. 1970), *appeal after remand* 470 F.2d 729 (5th Cir. 1972), teaches us that the provisions of the Civil Rights Act of 1964 and that of the subject act are interrelated and must be harmonized. Thus, it appears that activities which would be held to affect interstate commerce for the purposes of the Civil Rights Act of 1964 should be considered, as a general matter at least, as activities which would affect interstate commerce for the purposes of the act under consideration in this case.

It is obvious to us that while an enterprise which provides a home to residents or patients who come from states other than Nebraska and receives transient interstate visitors to its residents or patients does not affect interstate commerce any more than an enterprise which purchases foodstuffs manufactured, processed, or supplied by sources outside of Nebraska, neither does the former circumstance affect interstate commerce any less than the latter. We thus conclude that the center is an enterprise engaged in interstate commerce and within the purview of the act.

Having come to that conclusion, we must determine whether Banks is entitled to compensation for the last half hour of each day he worked at the center.

It has been held that the workweek ordinarily includes all the time during which an employee is necessarily required to be on the employer's premises, on duty, or at a prescribed workplace. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).

However, the Secretary of Labor has ruled in 29 C.F.R. § 785.19 (1986):

> (a) *Bona fide meal periods.* Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30

> minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. [Citations omitted.]
>
> (b) *Where no permission to leave premises.* It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

In essence the center argues that Banks is not entitled to compensation for the last half hour of the days he worked because those intervals of time constituted bona fide meal periods.

However, 29 U.S.C. § 203(g) defines "employ" as "to suffer or permit to work." Thus, it has been held that work not requested but permitted is worktime and compensable. *Mumbower v. Callicott*, 526 F.2d 1183 (8th Cir. 1975); *Handler v. Thrasher*, 191 F.2d 120 (10th Cir. 1951); *Republican Pub. Co. v. American Newspaper Guild*, 172 F.2d 943 (1st Cir. 1949). No matter how much time is designated as a meal period, if an employee is not free to follow pursuits of a purely private nature or the time is spent predominantly for the employer's benefit, the designated time is not a bona fide meal period. *Glenn L. Martin Nebraska Co. v. Culkin*, 197 F.2d 981 (8th Cir. 1952); *F.W. Stock & Sons v. Thompson*, 194 F.2d 493 (6th Cir. 1952); *Blain v. General Electric Company*, 371 F. Supp. 857 (W.D. Ky. 1971).

This court has used similar reasoning in determining that certain waiting time and lunch periods were compensable under the provisions of a collective bargaining agreement and a city ordinance. *Bolan v. Boyle*, 218 Neb. 85, 352 N.W.2d 586 (1984), *dismissed on other grounds after remand* 222 Neb. 826, 387 N.W.2d 690 (1986); *North v. City of Omaha*, 215 Neb. 107, 337 N.W.2d 409 (1983). Applying the aforesaid principles without so saying, the court in *Donovan v. Grantham*, 690 F.2d 453 (5th Cir. 1982), held that the employer had a duty to

compensate service station employees who ate during slow periods but left their meals to wait on customers as such presented themselves.

While in the present case the record fails to establish the center requested that during the last half hour of his day at the center Banks assist any of the residents or check the grounds, the record does establish that the center insisted that Banks remain on the premises and that it permitted Banks to perform services which predominantly benefited the center. Those circumstances compel the conclusion that the last half hour of Banks' day at the center was not a bona fide meal period but was, instead, a period of compensable worktime.

Accordingly, the judgment of the district court is reversed and the cause remanded with the direction that judgment be entered in favor of Banks and against the center in such amount as the record supports, subject to the limitation imposed by the fact that this case was commenced in the small claims department of the Omaha Municipal Court, and for the award of a reasonable attorney fee. Plaintiff is awarded the sum of $250 under the provisions of 29 U.S.C. § 216 to apply to the services of his attorney in this court.

REVERSED AND REMANDED WITH DIRECTION.

CAPORALE, J., dissenting.

I must respectfully dissent, for the majority, in my view, has stretched the meaning of being engaged in interstate commerce further than congressional direction, judicial precedent, or disciplined thought permits. The majority comes to the novel conclusion that people themselves can be articles of commerce, when they come from elsewhere to live in Nebraska on a permanent basis.

While it is true that the Fair Labor Standards Act is to be construed liberally, *Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985), it must nonetheless be applied with reason and commonsense, *Dunlop v. Ashy*, 555 F.2d 1228 (5th Cir. 1977), and consistent with congressional direction, *Brennan v. Plaza Shoe Store, Inc.*, 522 F.2d 843 (8th Cir. 1975).

The majority acknowledges that an enterprise such as the

Mercy Villa Care Center is usually found to be engaged in interstate commerce on the basis of a record which establishes that it uses, or its employees handle, goods which were manufactured, processed, or supplied by sources outside the state. The majority also acknowledges that no such record exists in this case. So far as the record tells us, the center may be an entirely self-sufficient and self-contained organization from which only intrastate telephone calls are made and which produces on its own premises all the commodities it and its residents or patients use and its employees handle; an unlikely condition to be sure, but a condition which the record does not belie and the nonexistence of which plaintiff had the burden to establish. *Warren-Bradshaw Co. v. Hall*, 317 U.S. 88, 63 S. Ct. 125, 87 L. Ed. 83 (1942).

Given that record, the majority relies on three cases to rationalize its result. It is true that the first of these, *Marshall v. Sideris*, 524 F. Supp. 521 (D. Neb. 1981), applied the act to an enterprise which operated hotels to accommodate transient guests. The focus of that case, however, was on whether the activities of the multiple owners were such as to make their combined operations a single enterprise. The case contains no analysis of what there was about the enterprise that engaged it in commerce. I am thus led to conclude that whether the enterprise was engaged in commerce was assumed and was not a contested issue. Even if the situation were otherwise, there was at least evidence that the enterprise in *Sideris* accommodated transients and the suggestion is that their movement affected commerce. The businesses in the remaining two cases relied upon by the majority, *Wirtz v. Healy*, 227 F. Supp. 123 (N.D. Ill. 1964), and *Atlanta Motel v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964), involved the interstate movement of people as an integral part of the operations in question. That element does not exist in the present case. So far as the record shows, the opposite is true; that is, the center provides its residents or patients with a place to live on a permanent basis, not with a place at which to stop while they travel through Nebraska. Neither does the fact that its residents or patients receive out-of-state visitors make the movement of people an integral part of the center's operations.

It seems to me we should review the correctness of the trial court's judgment on the basis of the record which was actually made before that court, not on the basis of a record which the majority assumes could have been made.

I submit that if the record in this case truly establishes that the center is engaged in interstate commerce, then Congress has greater control, through the commerce clause of the federal Constitution, over what is done within the borders of this state than has ever been known before.

SHANAHAN, J., joins in this dissent.

IN RE APPLICATION OF S.R.S. AND M.B.S.
S.R.S. AND M.B.S., HUSBAND AND WIFE, APPELLEES, V. M.C.C., JR., INTERVENOR-APPELLANT.

408 N.W.2d 272

Filed June 26, 1987. No. 86-130.

1. **Adoption: Abandonment: Evidence: Time.** In order for consent of a parent to an adoption to be unnecessary under Neb. Rev. Stat. § 43-104(3)(b) (Reissue 1984), abandonment must be shown in the 6-month time period preceding the petition for adoption.
2. **Adoption: Abandonment: Evidence: Proof.** Abandonment must be proven by clear and convincing evidence. Neb. Rev. Stat. § 43-104(3)(b) (Reissue 1984).
3. **Constitutional Law: Parental Rights.** The relationship between parent and child is constitutionally protected.
4. _____: _____. When an unwed father evidences a commitment to the responsibilities of raising the child and participates in the care of the child, his interest in continuing his relationship with his child merits substantial constitutional protection.

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

Barbara Thielen of Taylor, Fabian, Thielen & Thielen, for appellant.

A. Loy Todd, Jr., of Bailey, Polsky, Cada, Todd & Cope, for appellees.

James R. Mowbray of Mowbray, Chapin & Walker, P.C., guardian ad litem.

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

PER CURIAM.

The appellant in this case is the natural father of a child who was the subject of an adoption proceeding filed in the county court for Lancaster County by the appellees, the adoptive parents. The appellant appeared and contested the adoption. The county court ordered the adoption, holding that the consent of the father was unnecessary. The natural father appealed to the district court for Lancaster County, which affirmed the decision of the county court. He now brings this present appeal, challenging the separate grounds of the decision to allow the adoption to proceed without his consent. He assigns two errors: that Neb. Rev. Stat. §§ 43-104.02 et seq. (Reissue 1984) are unconstitutional on their face and as applied to him and that the court erred in finding that he had abandoned his son during the 6 months prior to the filing of the adoption proceeding. We reverse.

Prior to the birth of the child who is the subject of the action, the appellant and the natural mother lived together, and planned to marry before the child was conceived. However, she decided not to marry, preferring to remain single.

The child was born on September 2, 1982. The appellant's name appears on the birth certificate as the father of the child, and on September 3, 1982, the parties signed an agreement providing that the child would bear the appellant's last name.

After leaving the hospital the couple and their child lived together for approximately 19 months. They first lived with the birth mother's sister, the sister's husband, and their child. Under the financial arrangement between the two families, each was to pay half of the expenses. The mother testified that the appellant was employed at this time and that she was not. He provided for their support. After 3 months the three moved to the paternal grandmother's home, where they were obligated to pay $200 per month for rent and do household chores. In May of 1983, the appellant, birth mother, and child moved to the home of another of the mother's sisters, the sister's husband, and two children. Each family was to pay half of the expenses. Again,

the appellant was employed and supporting the child. At this time the mother started looking for work. She admitted that the appellant also helped out with the care of the child. After about a month the mother and her sister secured jobs. Since all four adults were employed, child care became difficult. Eventually, the appellant, mother, and child moved in with a friend who worked with the mother and worked the shift opposite that of the mother's. The two women paid the rent, while the appellant provided for the groceries. This arrangement lasted 3 months, until January 1984, when the friend moved out. The appellant, child, and the mother remained at the apartment until April 9, 1984, at which time the mother took the child and moved into the friend's new apartment for a month. The appellant attempted unsuccessfully to reconcile with the mother. He remained in the old apartment until the lease expired at the end of October of 1984.

During the month the mother lived with her friend, she was unemployed. For 10 days of this month the child stayed with the paternal grandmother, and the appellant visited him. When the mother returned and took the child after 10 days, a conflict arose between her and the paternal grandmother over custody of the child.

On June 10, 1984, the mother and child moved in with the mother's boyfriend. No one knew the address except possibly her mother, who was asked not to reveal it. Over the next couple of months the mother left the child with various relatives, including the paternal grandmother, the maternal grandmother, a brother of the mother (hereinafter "the uncle"), and another sister of the mother (hereinafter "the aunt"). The mother's family helped provide the father with information about the child's whereabouts. The appellant saw his child at the paternal grandmother's home on several weekends in June and July and on other occasions when the child was staying with the mother's family. He provided money, diapers, and medication for the child while the child was staying with the mother's family, and offered additional financial help which was not accepted. In addition to visits, the appellant took the child to his apartment for short periods and called the others inquiring about his son at other times. The maternal

grandmother, uncle, and aunt testified about the relationship between the appellant and his child, including how he made his child giggle and laugh as they played.

On June 29 the paternal grandmother instituted proceedings to have herself appointed guardian of the child. Her attorney also drafted consent forms for the mother and appellant. The attorney testified that these forms were drafted in accordance with the guardianship statutes. The mother testified that she saw a form signed by appellant. He denied he had signed, and testified he would have signed only if she had. The mother had been willing to sign, but refused to do so on advice from her boyfriend and her attorney. In July, the mother considered adoption. The appellant testified he called Legal Aid for help in getting custody of his son, but was informed he could not get legal custody unless the mother instituted a paternity action against him. The mother testified that in August she was aware the appellant wanted to get custody of his son.

In August, the mother, the boyfriend, and the child moved to an apartment which was within a mile of the appellant's apartment. The mother decided she did not want the appellant to see his son again. The maternal grandmother testified that she did not know the address of the apartment, but knew where her daughter lived because she had visited the apartment. She also testified that her daughter asked her not to reveal where she lived and that the boyfriend had threatened to kill the father, uncle, or paternal grandmother if they attempted to visit the apartment. The mother denied there were any threats, but testified there was a conversation among the three during which her mother disowned her. The mother testified that on one occasion she heard the appellant and the uncle were going to try to get the child, and she told her mother to tell them the house was being watched by the police. However, the appellant did see the child at least once during that period.

On September 28 the mother placed the child with the Child Saving Institute for adoption. The child was with a foster family until October 3, when he was placed with the adoptive parents, the appellees in this action. The mother did not tell the appellant about the adoption.

During the next few months the father contacted the

mother's family several times trying to get information about the child. They did not know where the child was. The maternal grandmother testified that she visited the mother's apartment several times, but the mother and her boyfriend would turn off the television, close the blinds, and refuse to answer the door. The maternal grandmother testified that her daughter finally told her about the adoption in the first part of February 1985. She told her son (the uncle) about it. The uncle testified that he immediately called the appellant upon learning about the adoption. The appellant testified he learned about the adoption on January 29, 1985. He subsequently called the Child Saving Institute. A social worker at the Child Saving Institute testified that she talked to the appellant on February 13, 1985. He asked that the child be returned to him, but was told the child had been placed for adoption.

The appellant obtained an attorney to help him. On March 1, 1985, the appellant filed an intent to claim paternity. The father testified that he never consented to the adoption, he never intended to relinquish his parental rights, and he wanted custody of his son. On March 27 the appellees filed a petition for adoption. They then filed an amended petition and a second amended petition on April 25 and May 7, respectively.

The adoptive father is a stockbroker; the adoptive mother is a homemaker. They have another adopted child. At the time of the hearing it appeared that the child had adjusted well to his new family.

The trial court held that the appellant's consent was not necessary for the adoption to proceed because clear and convincing evidence was adduced showing that the appellant had abandoned his child and his parental rights.

Neb. Rev. Stat. § 43-104 (Reissue 1984) provides:

> No adoption shall be decreed unless the petition therefor is accompanied by written consents thereto executed by (1) the minor child, if over fourteen years of age, or the adult child of the adopting person's spouse, (2) any district court or separate juvenile court in the State of Nebraska having jurisdiction of the custody of a minor child by virtue of divorce proceedings had in any district court or separate juvenile court in the State of Nebraska,

> and (3) both parents, if living; the surviving parent of a child born in lawful wedlock; or, subject to the provisions of sections 43-104.02 to 43-104.06, the mother of a child born out of wedlock; *except that consent shall not be required of any parent who shall* (a) have relinquished the child for adoption by a written instrument; (b) *have abandoned the child for at least six months next preceding the filing of the adoption petition*; (c) have been deprived of his or her parental rights to such child by the order of any court of competent jurisdiction, or prior to July 13, 1967, have been deprived of the custody of such child by an order of any juvenile court of competent jurisdiction by reason of such child having been declared a dependent or neglected child, within the provisions of sections 43-201 to 43-277; or (d) be incapable of consenting.

(Emphasis supplied.) Under the terms of the statute, the time period within which abandonment must be shown is the 6-month period immediately prior to the filing of the adoption petition by the appellees. § 43-104(3)(b); *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982). In this case the critical time period is from September 27, 1984, to March 27, 1985, which is the date the petition was filed. The child was placed with the Child Saving Institute on September 28, 1984.

In *In re Adoption of Simonton, supra*, this court defined the word "abandoned," when used in the context of adoption proceedings, as follows:

> " 'To constitute abandonment under our code it must appear . . . that there has been by the parents a giving-up or total desertion of the minor child. In other words, there must be shown an absolute relinquishment of the custody and control of the minor and thus the laying aside by the parents of all care for it.' " *In re Adoption of Christofferson*, 89 S.D. 287, 290, 232 N.W.2d 832, 834 (1975). North Carolina requires that there be "willful or intentional conduct on the part of the . . . parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child, or a willful neglect and refusal to perform the natural and legal obligations of parental care and support." *In re Cardo*, 41

N.C. App. 503, 507, 255 S.E.2d 440, 442 (1979).

> Willful abandonment has been defined as "a voluntary and intentional relinquishment of the custody of the child to another, with the intent to *never again* claim the rights of a parent or perform the duty of a parent; or, second, an intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love and his protection, maintenance, and the opportunity for the display of filial affection . . . ." *Young v. Young*, 588 S.W.2d 207, 209 (Mo. App. 1979).

(Emphasis in original.) 211 Neb. at 782-83, 320 N.W.2d at 453. Abandonment must be proven by clear and convincing evidence. *Id.; In re Guardianship of Sain*, 211 Neb. 508, 319 N.W.2d 100 (1982). The burden of proving abandonment is on the party petitioning for adoption. *In re Adoption of Simonton, supra.*

The conduct constituting abandonment as defined above must appear by clear and convincing evidence to be willful, intentional, or voluntary, without just cause or excuse. For all but 1 day of the 6-month period before the filing of the petition, the child was in foster care with the Child Saving Institute or the prospective adoptive parents, and beyond the reach or control of the appellant. The appellant's attempts to locate the child were thwarted by the mother's resolution to keep him from the child. She did not inform anyone about placing the child for adoption until late January or early February of 1985, after the child had been placed for over 3 months. When the appellant learned of the placement he called the Child Saving Institute. There is no question that the appellant asked that the child be returned to him and that the institute would not have surrendered the child to the appellant at any time, nor would it inform the appellant of the location of the child. A secret surrender of a child by one parent to an agency that refuses to let the other parent act as a parent to the child cannot result in a finding that the failure to exercise parental duties was willful, intentional, or voluntary.

Parental conduct before or after the statutory time period is relevant to a determination of the purpose and intent of the parent to abandon his child. *In re Adoption of Simonton,*

supra. The appellant filed a notice of intent to claim paternity on March 1, 1985, just before the appellees filed their adoption petition. The mother testified that the month before she placed the child with Child Saving Institute she was aware that the appellant was attempting to get physical custody of the child and took steps to keep the child from him. The appellant acknowledged the child as his son at birth. During the 19 months when the appellant lived with the mother and child he actively supported and cared for them. The relatives who cared for the child when the mother would drop him off testified that the appellant visited the child and engaged in playful behavior with him.

Although the appellant did not offer much in the way of support to the mother after she moved out, he did provide medicine and diapers when the child was staying at relatives' houses. He visited the child and took him overnight at least once despite the mother's attempts to part them.

We cannot find that the evidence shows an intentional and complete repudiation and abandonment of the child or a settled purpose to forgo all parental rights. Although the appellant has not been the most constant of fathers, there is no evidence of an unequivocal repudiation of his relationship with his child. Instead, the evidence shows his intent to get custody and take legal steps to claim paternity before the petition was filed and to maintain a relationship with his child over the obstacles between them. We hold that the appellees failed to meet their burden of proof with respect to showing abandonment by the appellant within the meaning of § 43-104(3)(b).

Although the trial court held that the appellant's consent was unnecessary because he had abandoned the child, it nevertheless stated in its decree that "the court is under the belief that no consent of [the appellant] is necessary, because of his failure to comply with [§§ 43-104.02 et seq.]." The court specifically found that the appellant "failed to comply with Sec. 43-104.02, et seq., in that his filing was made some 2-1/2 years late and [the court] refuses to find that said statute is unconstitutional as applied to this individual."

Section 43-104.02 provides in part as follows:

(1) Relinquishment or consent for the purpose of

> adoption given only by a mother of a child born out of wedlock pursuant to section 43-104 shall be sufficient to place the child for adoption and the rights of any alleged father shall not be recognized thereafter in any court unless the person claiming to be the father of the child has filed with the Department of Social Services on forms provided by the department, within five days after the birth of such child, a notice of intent to claim paternity.

The child was born out of wedlock. The appellant failed to file with the Department of Social Services within 5 days after the child's birth. He did not file until 2 1/2 years had passed. The appellees argue that these facts allow the adoption to proceed without the appellant's consent under § 43-104.02. The appellant argues that the statute is unconstitutional on its face and as applied to him.

In *State v. Metteer*, 203 Neb. 515, 521-22, 279 N.W.2d 374, 378 (1979), we stated that "[t]here is no doubt that among the fundamental rights retained by the people under Article IX of the Bill of Rights of the Constitution of the United States is that of integrity of the family." In *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 577, 385 N.W.2d 448, 451 (1986), we noted that " 'the relationship between parent and child is constitutionally protected.' " Quoting *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978). Since the right involved is fundamental in nature, the statute interfering with that right is subject to strict scrutiny. *Shoecraft, supra.*

The constitutionality of the statute involved in this case was attacked in *Shoecraft, supra*, where we determined that the statute, as applied in that case, was constitutional. In *Shoecraft* we recognized that the state has a compelling interest in the well-being of all children and the placement of children relinquished by their parents in homes with people willing and able to care for them. Rapid placement of newborns as soon as possible after birth with prospective adoptive parents was noted to be in the best interests of the child, the adoptive parents, and the parent making the difficult decision to relinquish the child. The 5-day filing requirement, although treating mothers and fathers differently, enabled a speedy determination of the rights of the father so as to make it possible for the state to achieve a

legitimate end, which is placement of children as soon after birth as possible.

Shoecraft was "not a case where [the father] lived with the child and nurtured and supported it and the mother," 222 Neb. at 580, 385 N.W.2d at 452, and on that ground we distinguished the rights of the father in *Shoecraft* from the rights of separated or divorced fathers, using the rationale established in *Quilloin v. Walcott, supra.*

The father in *Shoecraft* was aware of the impending adoption for 3 1/2 to 4 months prior to the birth. Until 9 days after the birth the father never exhibited any responsibility for the mother or child. At that point, the only tie between the child and father was biological.

In *Lehr v. Robertson*, 463 U.S. 248, 261, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983), the U.S. Supreme Court stated that "the mere existence of a biological link does not merit equivalent constitutional protection." The Court recognized the importance of familial bonds, stressing that "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' [citation omitted] his interest in personal contact with his child acquires substantial protection . . . ." 463 U.S. at 261.

That the facts and situation in this case differ dramatically from those in the *Shoecraft* case is readily apparent. In this case the rights of the appellant are not so easily distinguishable from those of the mother or of separated or divorced fathers. The appellant provided for and had daily contact with his child for the first 19 of the 24 months of the child's life, before the mother placed the child with the Child Saving Institute. Like that of a divorced or separated noncustodial parent, the appellant's contact with the child was diminished as a result of a rift between him and the custodial parent, not due to an aversion to parental responsibilities.

We found in *Shoecraft* the 5-day filing requirement for unwed fathers to be a legitimate means of attaining a worthy end, the rapid placement of newborns in families that could commit to raising them. However, the 5-day requirement secures no such result in cases such as this one, where the child is

no longer a newborn and has already established strong ties with a father who has acknowledged and supported him. The effect of the requirement is to allow a mother to singlehandedly sever a relationship between father and child, no matter what the quality of that relationship is.

In this case the appellant had a familial bond with the child which afforded his rights substantial protection. All witnesses agreed he lived with the child and provided for it; the mother testified he was involved with the care of the child; the relatives described his playing well with and being close to the child. The mother's friend described an incident months after the parents' breakup, just before relinquishment, in which the child rapped on a window and called "Daddy, Daddy" as the appellant was walking by the house. A parental interest as fundamental as the one the appellant has in the continuing relationship with his child requires that the 5-day rule be strictly scrutinized. We observe no compelling interest that the State secures by allowing a 2-year relationship to be severed for failure to file within 5 days of birth that justifies the disparate treatment of the appellant from those similarly situated on the grounds of gender and marital status. Section 43-104.02 is unconstitutional as applied in this case and cannot be used to allow the adoption to proceed without the appellant's consent.

In *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979), the U.S. Supreme Court struck as violative of equal protection a New York law that allowed an adoption to proceed without the consent of an unwed father who had a substantial relationship with the child involved. Justice Stevens commented in his dissenting opinion that "as I read the Court's opinion, the statutes now in effect may be enforced as usual unless 'the adoption of an older child is sought,' *ante*, at 392, and 'the father has established a substantial relationship with the child and [is willing to admit] his paternity.' *Ante*, at 393." 441 U.S. at 416. We reaffirm our holding in *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986), that § 43-104.02 does have possible constitutional applications. However, the statute was unconstitutionally applied in this case.

REVERSED.

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

While I concur in the result reached by the majority in this case, I write separately because I do not believe the court's view of our earlier decision in *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986), is correct, or that the distinction sought to be made by the majority can properly be sustained. Little purpose will be served in repeating at length my dissent in *Shoecraft, supra*. I have difficulty, however, agreeing that a father who files the form required by Neb. Rev. Stat. §§ 43-104.02 to 43-104.04 (Reissue 1984) within 9 days of the birth of a child is out of time, while one who files such a form nearly 30 months later is in time.

To have the constitutionality of a law such as this depend in each instance upon the facts determined after the fact is to fly in the very face of the act's purpose. No adoptive parent can now know with certainty whether the facts underlying the relationship between the natural father and the adoptive child are such as to render the provisions of §§ 43-104.02 to 43-104.04 constitutional or unconstitutional until after the facts have been examined by a court. Furthermore, this court has now ruled, in effect, that if the child is removed from the natural mother while in the hospital, thereby making it impossible for the natural father to establish a relationship with the child, the act will be held constitutional; but, if the natural mother delays placing the child out for adoption so that the natural father has the opportunity to develop a relationship with the child, the act will be declared unconstitutional. Such a holding is not, in my view, based upon any sound legal principles. Such uncertainty is bound to create much distress, as evidenced by the instant case. The scenario which I feared our decision in *Shoecraft* would ultimately bring about has, in my view, come to pass in the instant case, and will continue to repeat itself in future cases.

It was my view in *Shoecraft* that the provisions of §§ 43-104.02 to 43-104.04 were unconstitutional and inapplicable, and it remains my view that such is the case. I would resolve this matter by overruling our decision in *Shoecraft* and declaring the act unconstitutional in all cases.

MARGARITO MENDOZA, APPELLEE AND CROSS-APPELLANT, V. OMAHA MEAT PROCESSORS, THROUGH ITS INSURER, TOWER INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE, WAUSAU INSURANCE COMPANIES, INTERVENOR-APPELLEE AND CROSS-APPELLEE.

408 N.W.2d 280

Filed June 26, 1987. No. 86-558.

1. **Proximate Cause: Trial.** Determination of causation is, ordinarily, a matter for the trier of fact.
2. **Proximate Cause: Proof.** An independent intervening cause, as the proximate cause of an injury, is, generally, a matter of defense and, as such, must be proved by the party asserting that defense.
3. **Workers' Compensation.** Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributed to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. If the second injury is but a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury.
4. _____. To obtain an award for compensation on account of personal injury, an employee has the burden of proof to establish the causal relationship involving employment, an industrial injury, and disability.
5. _____. Mere possibility of an independent intervening cause does not relieve an employer from liability for an employee's otherwise compensable claim for workers' compensation and benefits.
6. **Workers' Compensation: Attorney Fees: Time.** As construed by this court, Neb. Rev. Stat. § 48-125 (Reissue 1984) authorizes a 50-percent payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation.
7. _____: _____: _____. Whether a reasonable controversy exists pertinent to Neb. Rev. Stat. § 48-125 (Reissue 1984) is a question of fact.
8. **Workers' Compensation: Attorney Fees: Time: Words and Phrases.** For the purpose of Neb. Rev. Stat. § 48-125 (Reissue 1984), a reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from

payment of compensation.

9. **Workers' Compensation: Expert Witnesses.** Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with direction.

Terry K. Gutierrez and William E. Gast of William E. Gast, P.C., for appellant.

J. Thomas Rowen of Miller, Carpenter, Rowen, Fitzgerald and Coe, P.C., for appellee.

Rodney G. Gnuse of Schmid, Mooney & Frederick, P.C., for intervenor-appellee.

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

SHANAHAN, J.

Tower Insurance Company (Tower) appeals the Nebraska Workers' Compensation Court award to Margarito Mendoza (Mendoza), an employee of Omaha Meat Processors (OMP). Mendoza cross-appeals from denial of an attorney fee and an additional payment of 50 percent for waiting time involving delinquent payment of compensation. See Neb. Rev. Stat. § 48-125 (Reissue 1984). We affirm in part and in part reverse and remand with direction.

BASIS OF CLAIM

OMP employed Mendoza as a "meatcutter," which involved cutting pieces of meat weighing "60 . . . up to 80 pounds." While a carcass is being moved on a conveyor belt, a cutter pulls and sometimes lifts the conveyed meat, which is then cut and trimmed of fat. Occasionally, when a carcass was too heavy for the conveyor system, a meatcutter, with the aid of a meathook, would "pull the meat to get the belt going again." On November 7, 1983, Mendoza, trimming meat, was beside the conveyor when he "reached for a piece of meat and the meat . . . hook ripped off the meat," causing Mendoza to fall backward

against a wall. Mendoza immediately experienced a "sharp pain" in his back, but continued working that day. Tower was the insurance carrier for OMP's workers' compensation coverage on November 7.

On November 11, 1983, Mendoza went to his family physician, Dr. Donald Gammel, and complained about sharp back pain, radiating into his legs. Dr. Gammel prescribed medication and physical therapy for Mendoza and ordered Mendoza not to return to work. When Mendoza's back pain persisted, Dr. Gammel, on November 28, reexamined Mendoza and found a "tenderness to palpation over both paralumbar musculature" and "[p]oint tenderness over the third lumbar spinous process and the right sciatic notch." Based on examination and x rays of Mendoza, Dr. Gammel diagnosed Mendoza's condition as an "[a]cute lumbar strain" and admitted Mendoza to the hospital later on November 28.

While in the hospital, Mendoza was examined by Dr. R.C. Pitner, an orthopedic surgeon, to whom Mendoza had been referred by Dr. Gammel. Dr. Pitner found that Mendoza experienced "some pain with flexion and dorsiflexion of the lumbosacral spine [and] tenderness to palpation over L4-5 and over L5-S1" and diagnosed Mendoza's injury as a "back strain." On December 3, Mendoza was discharged from the hospital and returned to work on December 19, but again experienced sharp pains, down the sides of his legs. During an examination on January 4, 1984, Dr. Pitner found that Mendoza "ha[d] pain with dorsiflexion and some with flexion," as well as "discomfort with lateral bending, particularly to the right" and "[t]enderness over L3-4, L4-5, and L5-S1." Dr. Pitner concluded that Mendoza should not return to work, and prescribed a "chair-back brace" for Mendoza, as well as an exercise program, including daily physical therapy and ultrasound treatment.

Dr. Pitner again saw Mendoza on January 19, 1984, when Mendoza indicated that his back pain was not as severe as it had been, but there was still some tenderness in his low back. Dr. Pitner authorized Mendoza's return to work on January 30. After he had gone back to work, Mendoza returned to Dr. Pitner on April 12 and complained of "numbness" and

"soreness in the low back and in his legs." Dr. Pitner suggested that Mendoza find a "lighter type of job" which did not require lifting heavy objects. When Mendoza's leg pain and soreness in his low back persisted, Dr. Pitner directed that Mendoza permanently refrain from heavy lifting and ordered a "CAT Scan" to ascertain whether Mendoza had a herniated disk.

The CAT scan on May 2 disclosed a protrusion and "mild diffuse posterior bulge" regarding Mendoza's lumbar vertebrae. Dr. Pitner informed Mendoza about the prospects of a myelogram and possible chemical dissolution of the problem disk. However, Mendoza, who had been absent from work since May 8 for medical reasons but without further treatment from Dr. Pitner, returned to his OMP job on May 29 and, because there was no "light duty work," resumed heavy lifting involving carcasses on the conveyor. In the fall of 1984, when Mendoza was reexamined on account of his continuing back pain, Dr. Pitner viewed Mendoza's x rays and recommended "surgical intervention with diskectomy." When Mendoza's back problem persisted, in February of 1985 Dr. Pitner referred Mendoza to Dr. Patrick Bowman, another orthopedic surgeon, for a second opinion regarding back surgery for Mendoza.

Dr. Bowman, on the basis of Mendoza's history, a copy of a report on the CAT scan (May 2, 1984), and his examination of Mendoza, reached a diagnostic "impression" on February 25, 1985; namely, Mendoza suffered from a "[l]umbar disc syndrome." Dr. Bowman did not recommend surgery on Mendoza, and Mendoza continued working for OMP.

In June 1985, Mendoza filed a petition in the Nebraska Workers' Compensation Court, alleging that he had suffered a herniated disk which had resulted from the accident of November 7, 1983.

On August 1, 1985, Mendoza was involved in a second accident at OMP and sustained bodily injury when he attempted to replace a carcass on the conveyor, twisted his back, and experienced intensified back pain and a previously unexperienced "burning" sensation in his legs.

Mendoza, on August 8, returned to Dr. Bowman for another examination regarding the back problem. During that examination, Mendoza did not mention anything concerning

the August 1 accident but complained about increased pain in his back and right leg. Dr. Bowman prescribed medication for Mendoza and authorized Mendoza's return to "light duty work," subject to reexamination on August 19. Because no light duty work was available at OMP, Mendoza did not return to employment with OMP, and reappeared for examination by Dr. Bowman on August 19. A CAT scan on August 23 disclosed Mendoza's "mild herniation of the central portion of the disc" at L4-5, but, when Mendoza indicated that his condition had improved, Dr. Bowman authorized Mendoza's return to work, effective September 16, "on a trial basis." However, Mendoza did not return to work, and was reexamined by Dr. Bowman on September 23. In the September 23 examination, Mendoza told Dr. Bowman about the back pain's "getting worse" after Mendoza had moved furniture into his family's new residence shortly before the return to work authorized for September 16. After the examination on September 23, Dr. Bowman, considering the physical rigors of employment at OMP, instructed Mendoza that he should not return to work.

Dr. Bowman last examined Mendoza on February 25, 1986, when Mendoza stated he was still experiencing pain in his right leg and low back and also informed Dr. Bowman that he had recently driven to Mexico, an automobile trip which had "caused major symptoms" for him. Based on his various examinations of Mendoza, including the examination of February 25, 1986, and the CAT scans, Dr. Bowman concluded that Mendoza's basic problem was a "herniated disk" and "disease process" caused by the "basic insult" (accident) which had occurred in November 1983.

On August 1, 1985, which was the date of Mendoza's second industrial accident, Wausau Insurance Companies (Wausau) provided workers' compensation coverage for OMP, and was permitted to intervene in the proceedings before the Nebraska Workers' Compensation Court. Wausau claimed that Tower was liable for compensation and benefits payable to Mendoza because Mendoza's accident in November 1983 was the "direct and proximate cause of the alleged August 1, 1985 injury." On August 30, 1985, Mendoza filed an amended petition, alleging that, as a result of the accidents in 1983 and 1985, he had

sustained a "herniated disc and aggravation of a herniated disc."

ONE-JUDGE HEARING

After the one-judge hearing on October 29, 1985, an award was entered, with a finding that the accident of August 1, 1985, was a cause of Mendoza's temporary total disability and "that, therefore, Wausau Insurance Companies is liable for all compensation due after that date and as a consequence of that injury," so long as Mendoza's temporary total disability continued. Tower had paid Mendoza for his total temporary disability benefits which had accrued before August 1, 1985. The one-judge award also contained a finding that no reasonable controversy existed and ordered Wausau to pay an additional amount (50 percent for waiting time involving delinquent payment of compensation) and an attorney fee. See § 48-125. Wausau took over payment of benefits to Mendoza for temporary total disability and requested a rehearing.

AWARD ON REHEARING

As evidence at the rehearing, Dr. Bowman expressed his opinion that the cause of Mendoza's condition "dates back to a fall at work on 7 November 1983." On cross-examination by Tower, Dr. Bowman described the relationship between Mendoza's disk pathology and the injury on November 7, 1983, as well as the injury of August 1, 1985:

> [B]asically, the disease process . . . which we have tagged him with from the beginning . . . was documented on the CT scan prior to my seeing him on 25 February 1985 . . . .
>
> . . . .
>
> . . . [I]f you're talking about basic causation, you know, what caused his condition, what was the straw that broke the camel's back as it were, I would have to relate that to 7 November 1983. I think there are many things which can cause an aggravation due to this pre-existing condition, including, you know, his long drives, a fall, [or] a lift . . . . It wouldn't surprise me at all, different things — different mishaps down the road subsequent to November 7th, 1983, caused different degrees of symptoms in his symptom level.

On redirect examination, Dr. Bowman testified:

> Q. . . . What do you think the primary cause of this man's condition is — the initial injury in November of '83, the reinjury of his accident, the second occurrence that he testifies to in August of '85, the sudden move that he tells you about in September — September 23rd, or the long drive to Mexico that he tells you about this last time?
>
> A. I think the real key here . . . on which I base the opinion is the dated CAT scan of 25 February 1985. That documents the pathology that this guy has. It's an ongoing thing. It's something that, you know, will continue to progress, and as I say, I'm beginning to be a little bit concerned that it will progress to the point where he needs surgery; but nonetheless, on the CT scan on February 25, 1985, he has definite disk pathology. That was done prior to — to August of '85, which would put it before that second on-the-job injury. That was done before the trip to Mexico, and it was done before the move and it was done before all the rest of it and based on the findings of that CT scan it was my opinion that the prime pathology occurred as of 7 November 1983 and everything subsequent to that could be only characterized, to one degree or another, as an aggravation of a pre-existing condition.

Dr. Bowman further testified that it was "conceivable" or "possible" that the accident of August 1, 1985, might have contributed to the pathology in Mendoza's back. As Dr. Bowman acknowledged, the "moving incident" and the accident of August 1, 1985, were just "possibles" as factors in Mendoza's pathology, but the trip to Mexico did not cause Mendoza's condition.

Dr. Bowman supplied the only medical evidence on causation of Mendoza's disability.

In its award after rehearing, the Workers' Compensation Court stated:

> The issue herein involves the cause of the plaintiff's disability from and after August 8, 1985. The plaintiff alleges that he suffered a new accident and injury on August 1, 1985. There is also evidence that the plaintiff may have injured his back in September, 1985, while

> moving furniture to a new residence. There is also a mention of a long drive to Mexico by the plaintiff as a possible cause.
>
> The [testimony] of Dr. Bowman clearly shows that the original injury of November 17 [sic], 1983, is *the* cause of all of [Mendoza's disability]. Therefore, Tower Insurance Company is liable for all of the compensation benefits awarded herein.

(Emphasis supplied.)

Thus, as a result of the rehearing, the Workers' Compensation Court found that the accident of November 1983 caused Mendoza's injury and temporary total disability, which had continued from the date of the accident until the rehearing (except the intermittent periods of Mendoza's return to work). The compensation court ordered Tower to pay Mendoza's medical expenses and compensation for Mendoza's total disability after the November 1983 accident and "so long in the future as [Mendoza] shall remain totally disabled as a result of [the accident on November 7, 1983]." In the award after rehearing, the compensation court also found:

> There is a reasonable controversy between the parties as to the cause of the plaintiff's disability starting August 8, 1985 and [Wausau] is therefore not liable for additions for waiting time and attorney fees. In addition, [Wausau] requested this rehearing and has succeeded in securing a reduction in the amount of the original award since the Coury [sic] has deleted that provision of the original award which provided for additional compensation for waiting time and an attorney's fee. Therefore, there is no attorney's fee awarded to the plaintiff for this rehearing.

Tower appeals the determination of its liability for Mendoza's compensation and benefits accruing after August 1, 1985. Mendoza cross-appeals from denial of an additional payment of 50 percent for waiting time (delinquency in payment of compensation) and an attorney fee allowable under § 48-125.

APPLICABLE LAW

Determination of causation is, ordinarily, a matter for the trier of fact. See, *Bender v. Norfolk Iron & Metal Co.*, 224 Neb. 706, 400 N.W.2d 859 (1987); *Ward v. City of Mitchell*, 224 Neb.

711, 400 N.W.2d 862 (1987). An independent intervening cause, as the proximate cause of an injury, is, generally, a matter of defense and, as such, must be proved by the party asserting that defense. Cf. *Lynn v. Metropolitan Utilities Dist., ante* p. 121, 403 N.W.2d 335 (1987) (contributory negligence is a defense to be proved by one asserting such defense).

> Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. Neb. Rev. Stat. § 48-185 (Reissue 1984); *Zaleski v. Farmland Foods*, 219 Neb. 157, 361 N.W.2d 523 (1985). In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986); *Knudsen v. Metropolitan Utilities Dist.*, 220 Neb. 902, 374 N.W.2d 56 (1985). Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly [erroneous]. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Vredeveld v. Gelco Express, supra; Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985). As the "trier of fact," the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.

Norris v. Iowa Beef Processors, 224 Neb. 867, 876, 402 N.W.2d 658, 666 (1987).

Tower contends that Mendoza's disability resulted from the accident of August 1, 1985, when Wausau had the coverage for OMP. According to Tower, because the 1985 accident and injury constituted an independent intervening cause rather than a recurrence of the industrial injury sustained on November 7, 1983, Tower is not liable for Mendoza's medical expenses and

benefits after August 1, 1985.

In support of its contention, Tower relies on *Towner v. Western Contracting Corp.*, 164 Neb. 235, 82 N.W.2d 253 (1957), where this court adopted the following rule: Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributed to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. If the second injury is but a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury. See, also, *Snowardt v. City of Kimball*, 174 Neb. 294, 117 N.W.2d 543 (1962); *Doty v. Aetna Life & Casualty*, 217 Neb. 428, 350 N.W.2d 7 (1984).

"[W]here there have been two injuries to an employee, the question of whether the disability sustained by him should be attributable to the first or to the second depends on whether or not the disability sustained was caused by the original injury or by an independent intervening cause." *Breed v. Interstate Glass Co.*, 188 Neb. 284, 285, 196 N.W.2d 169, 170 (1972).

Recognizing an employee's burden to show the cause-and-effect relationship involving employment, an industrial injury, and disability, we stated in *Caradori v. Frontier Airlines*, 213 Neb. 513, 516-17, 329 N.W.2d 865, 867 (1983):

> " 'Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries.' The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability." [Citing and quoting from *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981).]
>
> An award of compensation may not be based on

> possibilities or speculative evidence. [Citation omitted.] Thus, the mere possibility that a disability arose out of and in the course of employment does not satisfy the claimant's burden of proof.
>
> The claimant, Caradori, having only proved that the disability could have been caused by an accident arising out of and in the course of employment has not sustained her burden of proof.

As a corollary to the rule in *Caradori, supra*, mere possibility of an independent intervening cause does not relieve an employer from liability for an employee's otherwise compensable claim for workers' compensation and benefits.

Dr. Bowman's testimony is unequivocal that the cause of Mendoza's disability is the accident and injury of November 7, 1983. In his testimony, Dr. Bowman emphatically stated that Mendoza's automobile trip to Mexico played no causal role in Mendoza's disability. While Dr. Bowman did allow for the possibility that events after November 1983, that is, the industrial incident on August 1, 1985, and Mendoza's moving furniture, might have caused Mendoza's condition, Dr. Bowman testified that the disk pathology in Mendoza's back was actually caused by the industrial accident on November 7, 1983. According to Dr. Bowman, incidents after the accident of November 7, 1983, were merely possible causes of Mendoza's disability. Speculative or conjectural causes do not satisfy the burden of proof on the issue of causation, including the issue of an independent intervening cause.

Additionally, Tower refers to Professor Larson's treatise on workers' compensation law and suggests application of the "last injurious exposure" rule, which requires that, in successive-injury cases, full liability is placed on the insurance carrier which covers the risk "at the time of the most recent injury that bears a causal relation to the disability." 4 A. Larson, The Law of Workmen's Compensation § 95.20 at 17-112 (1987). Also, Tower points to *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981), a case involving a claim based on an occupational disease, peritoneal mesothelioma—a rare form of abdominal cancer caused by exposure to asbestos particles. Osteen had worked for 40

employers over a period exceeding 30 years. In affirming an award against the employer for which Osteen was working at the time of Osteen's last injurious exposure to asbestos fiber, we noted: "The last injurious exposure, to be 'injurious,' must indeed bear a causal relationship to the disease." 209 Neb. at 290, 307 N.W.2d at 520. Consequently, we need not discuss the "last injurious exposure" rule adopted in *Osteen, supra*, since the evidence in Mendoza's case failed to establish a "causal relationship" between Mendoza's disability and any event after November 7, 1983.

As aptly observed by Professor Larson:

> There is . . . a fine line separating aggravations from recurrences . . . .
>
> In order to find that there has been an aggravation, it must be shown that the second episode contributed independently to the final disability. Also, there must have been a second "injury" as that term is used in the jurisdiction. . . .
>
> If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. . . . This group . . . includes the kind of case in which a worker has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of disability precipitated by some lift or exertion.

4 A. Larson, *supra* §§ 95.22 and 95.23 at 17-125 to 17-127, 17-135.

The evidence fails to establish that any incident after November 7, 1983, was an independent intervening cause of Mendoza's disabling condition. Because Tower provided the workers' compensation insurance coverage at the date of the first accident (November 7, 1983), any industrial injury to Mendoza after November 7, 1983, is merely a recurrence of the injury in 1983, resulting in Tower's liability for Mendoza's disability. Tower has failed to demonstrate that the finding of causation made by the Nebraska Workers' Compensation

Court is clearly erroneous. Concerning Tower's liability for payment of Mendoza's medical expenses and benefits for Mendoza's temporary total disability, the award after rehearing in the Nebraska Workers' Compensation Court is affirmed.

MENDOZA'S CROSS-APPEAL

Section 48-125 of the Nebraska Workers' Compensation Act in part provides:

> (1) Except as hereinafter provided, all amounts of compensation payable under the provisions of this act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; *Provided*, fifty per cent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability. Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the court in all cases when the employee receives an award.

As construed by this court, § 48-125 authorizes a 50-percent payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation. See *Novotny v. City of Omaha*, 207 Neb. 535, 299 N.W.2d 757 (1980). In considering the application of § 48-125, we stated in *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 657, 358 N.W.2d 211, 216 (1984): "The reasonable controversy rule is still viable."

Whether a reasonable controversy exists pertinent to § 48-125 is a question of fact. *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 387 N.W.2d 709 (1986); *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985).

Illustrative cases where a "reasonable controversy" was found to exist in reference to § 48-125 include:

Novotny v. City of Omaha, supra: Resolution of a question of law (construction of a statute) was necessary to determine whether benefits paid under a municipal disability plan were in lieu of workers' compensation and benefits;

Mulder v. Minnesota Mining & Mfg. Co., supra: Physicians

testified concerning varying degrees of an employee's permanent disability; and

Wheeler v. Northwestern Metal Co., 175 Neb. 841, 124 N.W.2d 377 (1963): Conflicting medical evidence on the question whether an employee's injuries prevented return to work as a laborer, resulting in permanent total disability.

Included among the decisions of this court reflecting an absence of a "reasonable controversy" in reference to § 48-125 are the following:

Smith v. University of Nebraska Medical Center, 201 Neb. 730, 271 N.W.2d 852 (1978), *supp. op.* 202 Neb. 493, 276 N.W.2d 86 (1979): Delay in payment of disability benefits was attributable to the employer's erroneous understanding of "current law of the State of Nebraska." 201 Neb. at 735, 271 N.W.2d at 855. See, also, *Abel Construction Co. v. Goodman*, 105 Neb. 700, 181 N.W. 713 (1921);

Minshall v. Plains Mfg. Co., 215 Neb. 881, 341 N.W.2d 906 (1983): An employer's unilateral determination that the employee's total disability had ceased and was followed by permanent partial disability, resulting in a reduction of disability benefits; and

Franklin v. Pawley, 215 Neb. 624, 340 N.W.2d 156 (1983): Employer contended that a third party was a statutory employer, see Neb. Rev. Stat. § 48-116 (Reissue 1984), and, therefore, jointly and severally liable for payments due an injured employee, but this court reasoned that the employer's contention "would not in any manner have affected [employer's] independent liability." 215 Neb. at 630, 340 N.W.2d at 160.

Thus, for the purpose of § 48-125, and as some criteria to determine whether a reasonable controversy exists between an employer and employee, a reasonable controversy may exist: (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation,

which conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.

Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury. See, *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983); *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981); *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980); *Eiting v. Godding*, 191 Neb. 88, 214 N.W.2d 241 (1974).

Neither Tower nor Wausau denies that Mendoza was industrially injured on November 7, 1983, and August 1, 1985, in incidents arising out of and in the course of his employment with OMP. On the one hand, Tower maintains it has no liability for Mendoza's condition after August 1, 1985, and attempted to show an exonerating break in causation, an independent intervening cause, from the testimony and diagnosis by Dr. Bowman. On the other hand, Wausau apparently accepted Dr. Bowman's diagnosis concerning Mendoza's condition. As a resolution of the question concerning causation determinative of liability on the part of one of the insurance companies, the proceedings in the compensation court took on the character of a declaratory judgment action between two insurance companies, seeking to determine a legal issue of liability for an undisputed loss ostensibly indemnifiable under provisions of each company's policy. For such declaration, Mendoza was required to participate as a litigant and retry his case in the rehearing before the compensation court. Tower sought to build its case through Mendoza's expert witness and failed on the issue of an independent intervening cause. However, there is an indication that Wausau paid some benefits regarding Mendoza's disability. Of course, if Mendoza has received compensation and benefits otherwise payable on his

compensable claim, an additional payment of 50 percent, authorized by § 48-125, would not be required, because there would have been no delinquency in payments due Mendoza. The record before us does not indicate that all payments, to or on behalf of Mendoza, have been made. For that reason, we remand this matter to the Nebraska Workers' Compensation Court with direction to determine whether there is any delinquency in payment of compensation or benefits and, if such delinquency exists, to make the proper computation of an additional payment in accordance with § 48-125, which additional amount shall be paid by Tower to Mendoza, inasmuch as there was no factual basis for dispute on the issue of causation in reference to the industrial incidents of November 7, 1983, and August 1, 1985.

Regarding an attorney fee assessable under § 48-125, Tower contended that Mendoza's disability was caused by some event outside the industrial accident of November 7, 1983. After rehearing, the compensation court concluded that "the plaintiff *may* have injured his back in September, 1985, while moving furniture to a new residence. There is also a mention of a long drive to Mexico by the plaintiff as a *possible* cause." (Emphasis supplied.) Regarding the issue of a reasonable controversy between employer and employee, the conclusion reached by the compensation court suffers from the same fallacious premise suggested by Tower: Conjecture or speculation justified the delay in payment of compensation. The compensation court's conclusions about a reasonable controversy, reflecting speculative or conjectural causes after November 7, 1983, and causes unsubstantiated by any evidence, are not supported by permissible findings of fact. As we have previously pointed out in this opinion pertinent to Tower's assertion of an independent intervening cause, Dr. Bowman's diagnosis of Mendoza's condition contained the only expression of a causal relationship between the disk pathology, a subjective condition, and a specific event, the industrial accident on November 7, 1983. We find nothing internally inconsistent or self-contradictory in Dr. Bowman's testimony about causation in relation to the industrial accident of November 7, 1983. Without evidence from Tower contradicting

Dr. Bowman's opinion on causation as reflected in the record which we have reviewed, we are compelled to conclude that conjecture or speculation about causality was the basis for any assertion or conclusion that a reasonable controversy existed between Mendoza and OMP. If denial predicated on conjecture and speculation, or mere possibility asserted by an employer, creates a reasonable controversy within the meaning this court has ascribed to § 48-125, an employer's denial of a claim by an employee would necessarily and automatically include a reasonable controversy. Based on the record brought to this court, we find that no reasonable controversy existed between Mendoza and Tower. The compensation court's finding on rehearing that a reasonable controversy existed is clearly erroneous and is, therefore, set aside. Under the circumstances, Mendoza is entitled to an attorney fee authorized by § 48-125. Consequently, we remand this matter to the Nebraska Workers' Compensation Court with direction that the compensation court shall determine and award to Mendoza a reasonable attorney fee for services rendered by Mendoza's lawyer for the rehearing before the Workers' Compensation Court, which attorney fee shall be paid by Tower. See *Smith v. University of Neb. Medical Ctr.*, 201 Neb. 730, 271 N.W.2d 852 (1978), *supp. op.* 202 Neb. 493, 276 N.W.2d 86 (1979). Also, because Tower has failed to reduce the award after rehearing, Mendoza is allowed $1,000 for services of his attorney in this court. See § 48-125.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

BOSLAUGH, J., dissenting in part.

I dissent only from that part of the opinion which sustains the cross-appeal and holds that the evidence does not support the finding of the compensation court that a reasonable controversy existed as to the cause of the plaintiff's disability.

Following the hearing before a single judge, the compensation court found that the accident of August 1, 1985, contributed to the disabling condition and that there was no reasonable controversy as to the plaintiff's right to recover compensation by reason of the accident of August 1, 1985.

On rehearing, the panel of three judges found that the

deposition of Dr. Bowman, taken on February 25, 1986, approximately 4 months after the first hearing, "clearly shows that the original injury of November 17 [sic], 1983, is the cause of all of the disability."

It was the plaintiff's burden to establish not only his disability, but also the cause of the disability. The testimony of Dr. Bowman as the treating physician would have been available at the time of the first hearing, but since his deposition was not taken until long after that hearing, there is at least an inference that his testimony was not offered at the time of the first hearing.

There were at least four possibilities as to the cause of the plaintiff's disability: the accident of November 7, 1983; the accident of August 1, 1985; the furniture-moving episode in September 1985; and the Mexico City trip in February 1986.

It is of some significance that Dr. Bowman released the plaintiff to return to work on September 16, 1985, with no restrictions. And although Dr. Bowman was of the opinion that the injury on November 7, 1983, was the cause of all of the plaintiff's disability, his opinion was weakened by the fact that he had no note on his chart of *any* accident or injury in August of 1985 and testified that "I don't know any details about what happened in August."

As the majority opinion points out, there is but a fine line separating aggravation from recurrences. On cross-examination Dr. Bowman testified that "there are many things which can cause an *aggravation* due to this pre-existing condition, including, you know, his long drives, a fall, a lift, a lot of things . . . is it conceivable that he did have *aggravations* to this pre-existing, basic condition, *I would say it's quite likely that he did.*" (Emphasis supplied.) He further testified that "it was my opinion that the prime pathology occurred as of 7 November 1983 and *everything subsequent to that could be only characterized, to one degree or another, as an aggravation of a pre-existing condition.*" (Emphasis supplied.)

The interpretation of Dr. Bowman's testimony was a matter for the trier of fact. Until the matter had been submitted to the compensation court, a strong argument could be made that the plaintiff's increase in disability was not due to the 1983

accident. It seems to me that under those circumstances, the compensation court could find that a reasonable controversy existed.

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

JERRY R. TLAMKA, APPELLEE, V. GOODYEAR TIRE & RUBBER COMPANY, APPELLANT.

408 N.W.2d 291

Filed June 26, 1987. No. 86-689.

1. **Workers' Compensation: Attorney Fees.** Whether a reasonable controversy exists under Neb. Rev. Stat. § 48-125 (Reissue 1984) is a question of fact for the Workers' Compensation Court.
2. **Workers' Compensation: Appeal and Error.** Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Richard D. Sievers of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellant.

Tom F. Wilson, for appellee.

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

WHITE, J.

This is an appeal from the Nebraska Workers' Compensation Court. Goodyear Tire & Rubber Company appeals from the award to Jerry R. Tlamka on rehearing.

Tlamka's petition in the Nebraska Workers' Compensation Court was dismissed, after a hearing by a single judge of the court, on the basis that Tlamka failed to show that an accident at work was the cause of the injury at issue or that surgery was necessitated by the accident. On rehearing, a three-judge panel of the Workers' Compensation Court awarded the appellee $750 in attorney fees, $105.60 in deposition costs, $1,828.58 in

additional temporary total disability, and $3,696.20 in additional medical expenses. This appeal follows.

Goodyear Tire & Rubber Company alleges as error that the Workers' Compensation Court incorrectly awarded fees and costs, as there existed a reasonable controversy as to whether the appellee's injury and subsequent surgery were caused or necessitated by the accident and, therefore, the appellant properly withheld benefits. We affirm.

Neb. Rev. Stat. § 48-125 (Reissue 1984) states in part:

> (1) Except as hereinafter provided, all amounts of compensation payable under the provisions of this act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; *Provided*, fifty per cent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability. Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the court in all cases when the employee receives an award. If the employer files an application for a rehearing before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court. If the employee files an application for a rehearing before the compensation court from an order of a judge of the compensation court denying an award and obtains an award or if the employee files an application for a rehearing before the compensation court from an award of a judge of the compensation court where the amount of compensation due is disputed and obtains an increase in the amount of such award, the compensation court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such

rehearing, and the Supreme Court may in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in such court. A reasonable attorney's fee allowed pursuant to this section shall not affect or diminish the amount of the award.

Tlamka was injured at his place of employment, Goodyear Tire & Rubber Company, when a cure pot blew a gasket, causing the appellee to jerk away and fall. The accident occurred on December 10, 1984, and the appellee was off work, due to the injuries he suffered as a result of the accident, for the remainder of 1984 and periodically throughout 1985. Goodyear paid the appellee benefits throughout his recuperation period up and until September 4, 1985, when he underwent surgery to correct thoracic outlet syndrome. Appellee was absent from work until November 17, 1985, recovering from the surgery. During that time he was not paid any benefits.

Appellant does not argue that Tlamka did not meet the requisite level of proof necessary to show that the accident at work caused thoracic outlet syndrome or that the surgery was necessitated by the injury he suffered. Rather, appellant argues that there was a reasonable controversy surrounding the payment of weekly compensation and the costs of the surgery and subsequent recovery time. Therefore, pursuant to § 48-125, the lower court incorrectly awarded attorney fees and costs.

To support its argument, the appellant points to the deposition of Dr. Paul, introduced at the rehearing, to the effect that 50 percent of all thoracic outlet syndrome cases are of uncertain origin and that in many instances the cause is congenital. Appellant fails to note in its argument that both Drs. Paul and Schwab, another physician deposed, agree that Tlamka's thoracic outlet syndrome was probably caused by the trauma he suffered as a result of his accident in view of his previous medical history and absence of any evidence that his condition may be congenital.

Whether a reasonable controversy exists is a question of fact for the Workers' Compensation Court. *Mendoza v. Omaha Meat Processors, ante* p. 771, 408 N.W.2d 280 (1987).

Findings of fact made by the Nebraska Workers'

> Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. Neb. Rev. Stat. § 48-185 (Reissue 1984); *Zaleski v. Farmland Foods*, 219 Neb. 157, 361 N.W.2d 523 (1985). In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986); *Knudsen v. Metropolitan Utilities Dist.*, 220 Neb. 902, 374 N.W.2d 56 (1985). Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Vredeveld v. Gelco Express, supra; Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985).

Norris v. Iowa Beef Processors, 224 Neb. 867, 876, 402 N.W.2d 658, 666 (1987). We cannot say the action of the Workers' Compensation Court was clearly erroneous in failing to find that there existed a reasonable controversy in view of the evidence introduced at the rehearing and noted above. Attorney fees and costs were properly awarded.

Appellant also argues this court should hold that as a matter of law there exists a reasonable controversy in a case in which the employee appeals from a dismissal of his petition. The appellant presents no support for this contention, and we are unable to locate any. In *Mendoza, ante* p. 771, 408 N.W.2d at 280, we delineated the concept of reasonable controversy as follows:

> Thus, for the purpose of § 48-125, and as some criteria to determine whether a reasonable controversy exists between an employer and employee, a reasonable controversy may exist: (1) if there is a question of law previously unanswered by the Supreme Court, which

> question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for worker's compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.

This court in *Mendoza* adopted guidelines to aid courts in their determination of whether a reasonable controversy exists. Appellant's contention does not fall within these guidelines and is without legal support. We decline to hold that in every case where an employee appeals from an order of dismissal a reasonable controversy exists. To do so would prevent any employee who appeals from an adverse finding from being awarded attorney fees and costs on rehearing. This would be in direct conflict with the language of § 48-125, which provides for the award of attorney fees and costs at the discretion of the Workers' Compensation Court.

Goodyear argues that the appellee failed to introduce evidence at the first hearing which was introduced at the rehearing, enabling him to receive attorney fees and costs as a result of a finding in his favor. Appellant relies on *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984), where this court stated that an employee may not withhold evidence at the first hearing on the issue of medical expenses, then obtain attorney fees and costs on rehearing as a result of an increased award due to the introduction of evidence of additional medical expenses previously withheld. As the transcript of the first hearing is not before this court, we cannot speculate as to whether Tlamka withheld evidence.

Finally, pursuant to § 48-125, we award the appellee $750 in attorney fees, and costs, for this appeal.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICK WALKER, APPELLANT.

408 N.W.2d 294

Filed June 26, 1987. No. 86-816.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
2. **Trial: Witnesses: Appeal and Error.** Error cannot be predicated on rulings permitting answers to questions properly propounded to plaintiff's witness on redirect examination to explain opinions expressed in answer to similar questions propounded to the same witness on cross-examination.
3. _____: _____: _____. The extent to which a witness on redirect examination may explain testimony elicited on cross-examination lies primarily in the discretion of the court.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Cathy K. Bashner, for appellant.

Robert M. Spire, Attorney General, and Elaine A. Catlin, for appellee.

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

HASTINGS, J.

The defendant appeals his convictions in the district court for Douglas County for assault in the first degree and use of a firearm to commit a felony.

Defendant contends that the evidence was insufficient as a matter of law to find defendant guilty of those charges. Defendant also contends that the court committed reversible error by overruling defendant's objection to an ophthalmologist's opinion testimony as to whether the victim in this case could have accidentally shot himself. We affirm.

In determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A

verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. Hruza*, 223 Neb. 837, 394 N.W.2d 643 (1986); *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986).

The evidence in this case is, as is true with most cases, conflicting, and almost every witness was impeached on some detail of the incident. The State, however, produced evidence from which a jury could properly find the following facts as true. The victim, Brian Purdue, and three other men left the Shangrila bar in Council Bluffs, Iowa, at approximately 1:45 a.m. on Sunday, February 9, 1986. They all got into Larry West's pickup truck and headed into Omaha. At about 18th and Leavenworth they saw a friend some of them knew from high school. West pulled into a gravel parking lot, so they could talk to this friend. Purdue and Timothy Deal got out of the truck. Purdue was walking about 20 yards in front of Deal when a white car pulled out of an alley and blocked the sidewalk. The driver of the car, later identified to be the defendant, began to honk his horn. Remarks were exchanged between Deal and defendant and a shoving match ensued. Defendant said that he was going to take care of Deal, and then reached into the car and under the front seat. Purdue went to open the car door, which was locked. Purdue believed that defendant was going to get a gun and shoot Deal, so he broke defendant's passenger window with his elbow.

Defendant left in his car, so Purdue and Deal went back to their truck. The pickup and the car both went down Leavenworth, with the pickup slightly ahead of defendant's car. Both vehicles were traveling very rapidly, and an accident resulted. Defendant rammed into the back of the pickup, which caused the pickup to slide into a light pole.

Purdue got out of the truck to look for help for his friends, who were still in a daze. He went back to the gravel parking lot in hope of finding his high school friend again, but he did not find her. He then walked down the street to a teen club, where he asked to use a telephone, but was not allowed in because he did not have money for the cover charge.

Purdue began walking back to the pickup when he noticed

defendant's car come around the block and pull up close to the curb. Defendant asked Purdue if he was the one who had broken out his window. Purdue said that he had not and continued to walk down the street. Purdue began to run, and defendant chased him in his car. Purdue slipped on the ice and fell. As he got up and turned around to run the other way, defendant took a gun and shot Purdue twice. The first shot spread pellets in his arm and back; the second shot struck him in the face as he turned around to see from where the shots were coming. As defendant drove away, Purdue was able to flag down a car, which took him to a hospital in Council Bluffs.

Defendant, although he quibbles over details, does agree that he got into an argument with some of the four men, and into an accident with the four men's pickup truck. Defendant states, however, that after the accident someone got out of the truck with what looked like a shotgun, so defendant left. He continued to drive around the area, and when he stopped at a stop sign, he heard a loud explosion-type noise. He then discovered that his window had been broken. A man was standing next to his car with a shotgun, so defendant drove away as quickly as possible. This, defendant asserts, was the only involvement he had with a shotgun that evening.

From this, defendant argues that Purdue, when he slipped and fell, must have accidentally discharged the shotgun he was carrying. Purdue testified, however, that he was shot twice, and Officer Bell, who came to investigate the accident, said that he heard two gunshots coming from the area where Purdue was shot.

The only direct evidence of the shooting itself was provided by the victim. The alleged perpetrator of the shooting denies having shot the victim. The jury heard the witnesses, observed their demeanor, evaluated explanations, weighed the evidence, and determined that the defendant committed the crime. That conclusion is supported by sufficient evidence and therefore cannot be overturned by this court.

Defendant also argues that the court committed reversible error by overruling defendant's objection to the ophthalmologist's testimony as to whether the shot could have been accidentally self-inflicted. We do not agree.

Dr. Madson, the ophthalmologist who performed three surgical procedures on defendant's injured eye, testified that he treats generally two or three cases a year of eye injuries from shotguns. He also testified that since he is in a referral clinic he sees more gunshot wounds than an average ophthalmologist. Defense counsel, on cross-examination, then asked him the following:

> Q. I imagine on occasion some of these wounds are self-inflicted accidently too, isn't that true?
>
> A. I am not sure that I have seen a self-inflicted gunshot wound that would appear like this. The distance from the spread on the shotgun would have to be a ways away. In other words, I think it would be physically impossible to hold a shotgun close enough, you know, to get a spread of pellets like we normally see.

Then, on redirect examination, the prosecutor asked: "The injuries that you saw on Mr. Purdue, in your opinion from the basic outline of a shot, could that have been self-inflicted?" Defense counsel objected, and the court overruled his objection. Defense counsel then asked to voir dire the witness, which the court would not allow. Dr. Madson then answered the question: "I dealt with quite a few self-inflicted gunshot wounds to the head and . . . [a]nd on this basis, the spread of the pellets, I do not feel is consistent with the self-inflicted injury in Brian's case."

Defendant objects to the admission of Dr. Madson's opinion which was elicited by the prosecutor on redirect examination. Defendant objects because Dr. Madson was neither a ballistics expert nor a forensic pathologist; he is an ophthalmologist.

Defendant, however, cannot now complain that this was error, when he opened the door to the prosecutor's question. That question was propounded to explain the opinion Dr. Madson had expressed on cross-examination about the possibility that some gunshot wounds Dr. Madson treated were accidentally self-inflicted. As we stated in *Fitzgerald v. Omaha & C. B. Street R. Co.*, 97 Neb. 856, 151 N.W. 931 (1915): "Error cannot be predicated on rulings permitting answers to questions properly propounded to plaintiff's witnesses on redirect examination to explain opinions expressed in answer to similar

questions propounded to the same witnesses on cross-examination." (Syllabus of the court.) And, as we set forth in *State v. Fellman*, 187 Neb. 767, 771, 193 N.W.2d 775, 777 (1972): "The extent to which a witness on redirect examination may explain testimony elicited on cross-examination lies primarily in the discretion of the court." Because the doctor's answer to defense counsel's question was ambiguous, the court did not abuse its discretion by allowing the prosecutor to ask a question on redirect examination to explain that answer. See, also, *Chicago, R. I. & P. R. Co. v. Griffith*, 44 Neb. 690, 62 N.W. 868 (1895).

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH R. GROSS, APPELLANT.

408 N.W.2d 297

Filed June 26, 1987. No. 86-883.

Search and Seizure: Motor Vehicles: Investigative Stops. During an investigatory stop, officers may search a suspect's vehicle in order to secure their safety or the safety of another if they have a reasonable belief, based on articulable facts, that they or other persons are in danger.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

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

WHITE, J.

This is an appeal from the district court for Otoe County. Appellant, Kenneth R. Gross, was charged with possession of a controlled substance in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1985). Gross was convicted and sentenced to 1 year in the Nebraska Penal and Correctional Complex. This appeal follows.

Prior to trial, defense counsel filed a motion to suppress any and all evidence seized as a result of the Nebraska State Patrol's search of the appellant's trailer. The motion alleged that the search of the vehicle was based on evidence discovered without a warrant, not pursuant to a valid arrest, and without consent or probable cause. The district court denied the appellant's motion to suppress, finding that probable cause existed for the patrol to search the vehicle. The motion was renewed at trial. The facts surrounding the search of the appellant's trailer are as follows.

Early in the morning of August 26, 1985, a resident of rural Otoe County made three phone calls to the Nebraska State Patrol reporting a suspicious vehicle on the road near the caller's farm. The first phone call was made around 7 a.m., reporting the vehicle parked at a nearby corner approximately 1 mile east of Douglas. The caller also stated that there was a marijuana field nearby. The second phone call was made after the caller learned that a rifleshot had been heard in the area earlier that morning. The caller later observed the vehicle move further east and again called the State Patrol after a patrol car was seen in the area where the appellant's vehicle was earlier parked.

The State Patrol proceeded to the area where the vehicle was reported to have been. There they observed a black pickup truck, with a black shell, pulling an off-white trailer. These vehicles matched the description given by the caller. The troopers could not see into the trailer as they pulled up and, as they approached the vehicles, observed the trailer swaying from side to side. The troopers proceeded to call out for the inhabitants of the trailer to come out, but no one appeared for a period of 2 to 3 minutes. Finally a man, identified as the appellant, emerged from the trailer. The appellant stated that he

had just left his girlfriend in Lincoln and was on his way to his father's farm to return the trailer.

The patrolmen next requested identification, and as the appellant turned around and went partially back into the trailer to retrieve his wallet, one of the patrolmen observed two clear glass vials, with black lids on them, containing a cloudy liquid with what appeared to be a white powdery substance suspended in the liquid. The patrolman picked up one of the vials to get a closer look and showed it to the other patrolman. One of the troopers testified that he felt the substance in the vials was of a drug nature. The troopers also observed some plastic cans with spouts on them. Gross was then asked to provide the vehicle's registration, which was located in the truck. While one patrolman went with the appellant, the other entered the trailer to secure it and make sure no one else was inside. While inside the trailer, the trooper saw what he thought were marijuana seeds and leaves on a couch. Investigators were called to the scene, and a warrant was later obtained to search the trailer, where an amount of cocaine was found.

On appeal appellant assigns as error that the trial court incorrectly overruled the appellant's motion to suppress the results of the search of his trailer pursuant to the search warrant. We affirm.

Our review of the disposition of a motion to suppress is limited to determining if the lower court's action was clearly erroneous. Where evidence is conflicting regarding a motion to suppress, decisions concerning evidence are left to the trial court and will not be overturned on appeal absent an abuse of discretion. *State v. Vrtiska, ante* p. 454, 406 N.W.2d 114 (1987); *State v. Chamley*, 223 Neb. 614, 391 N.W.2d 99 (1986).

The appellant argues that the search of his trailer was conducted without a valid warrant, not pursuant to a valid arrest, and without the presence of any of the exceptions to the warrant requirement. The appellant contends that the troopers had no probable cause to initially enter his trailer, and, therefore, the results of the search with a warrant obtained on the basis of what was discovered upon the officers' initial and allegedly illegal search must be suppressed. Gross also contends that the troopers could not have entered his trailer using the

plain view exception, as the substance observed in the vials was not immediately recognizable as being an illegal drug.

The investigatory stop is sanctioned by the laws of this State. Neb. Rev. Stat. § 29-829 (Reissue 1985) provides:

> A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address and an explanation of his actions. When a peace officer has stopped a person for questioning pursuant to this section and reasonably suspects he is in danger of life or limb, he may search such person for a dangerous weapon. If the peace officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of questioning, at which time he shall either return it, if lawfully possessed, or arrest such person. For purposes of this section, peace officer shall include credentialed conservation officers of the Game and Parks Commission.

We have upheld investigatory stops when, based on articulable facts, the officers involved have a reasonable suspicion of criminal activity. In *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983), the appellants' vehicle was searched without a warrant after the officer had observed the suspects for some time and came to the conclusion that they were about to commit a crime. The facts upon which the police officer based his conclusion included the suspect's approaching the off-duty officer and asking him for cash in return for charging the officer's gas on his credit card; out-of-state plates on the car; the placement of the car in such a way so as to make a getaway possible; and the suspect's wandering around the gas station for some time without purchasing anything. The officer approached the suspect's car and, after observing the suspect attempting to place something under the right front seat of the car, proceeded to search the car.

In *Pierce and Wells*, we based our holding on *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), where the Supreme Court held that "a police officer may in appropriate circumstances and in an appropriate manner approach a person

for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." 392 U.S. at 22. Also, as we noted in *Pierce and Wells*, the *Terry* search was expanded to include automobiles in *Michigan v. Long*, 463 U.S. 1032, 1051, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), where the Supreme Court held: "Therefore, the balancing required by *Terry* clearly weighs in favor of allowing the police to conduct an area search of the passenger compartment to uncover weapons, as long as they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous." The rationale stated by the Court for the holding was that police officers are in a uniquely vulnerable position when approaching a suspect's car and must be able to protect themselves and others.

We have followed the reasoning of the High Court in our opinions involving investigatory stops. In *State v. Nowicki*, 209 Neb. 640, 645-46, 309 N.W.2d 89, 92-93 (1981), we said:

> "The U.S. Supreme Court has addressed the standards that must be met in an investigatory stop to satisfy the requirements of the fourth amendment in *United States v. Cortez*, [449] U.S. [411], 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). The Court held that an investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account.
>
> "Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, *as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior.* See, *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed 2d 660 (1979)." (Emphasis supplied.) [Quoting *State v.*

Ebberson, 209 Neb. 41, 305 N.W.2d 904 (1981).]

> This court has held that a police officer is authorized to arrest a person without a warrant if he has reasonable cause to believe that such person has committed a crime. In *State v. Jones*, 208 Neb. 641, 645, 305 N.W.2d 355, 358 (1981), we stated: " '[T]he test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.' " In this regard, we have also held that probable cause is to be evaluated by the collective information of the police engaged in a common investigation. *State v. Stickelman*, 207 Neb. 429, 299 N.W.2d 520 (1980).

See, *State v. Longa*, 211 Neb. 356, 318 N.W.2d 733 (1982); *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981).

Applying this reasoning to the case at hand, the facts which the troopers testified as being the bases of their decision to initially enter the appellant's trailer include the facts that the appellant's vehicle was parked not a great distance from a known marijuana field, they had received a report of a rifleshot in the area earlier that morning, the troopers were unable to see into the trailer upon their approach, and once they were able to see into the trailer there was a closed door behind which a portion of the trailer was hidden. The troopers testified that the trailer was rocking violently from side to side, and no one appeared after they called for someone to come out for a period of 2 or 3 minutes. Both troopers stated that they were concerned that there may have been someone in the trailer who was injured and needed assistance and that there may have been some sort of struggle taking place when they approached the vehicle. One of the troopers stated: "When Lincoln communications advises me that there's a possibility of a suspicious vehicle and that a rifle shot was heard in that area of the suspicious vehicle, I feel that I have to exercise safety for myself."

In view of these facts and the prior decisions of the court, we feel that the totality of the circumstances shows that the officers had a reasonable belief, based on articulable facts, that a search

of the appellant's trailer was necessary in order to secure their safety and possibly the safety of another. We hold that officers may search a vehicle when faced with a situation such as the one faced by the troopers in this case, having a reasonable belief based on articulable facts that they or another may be in danger. The trial court did not abuse its discretion in denying the appellant's motion to suppress the results of the search. The appellant's assignment of error is without merit.

The appellant also argues that the State Patrol could not have searched the trailer based on the plain view exception to the warrant requirement after finding the vials which the officers thought contained a drug substance. The State Patrol troopers stated that the discovery of the vials did not figure into their decision to search the trailer, although in our view the plain view exception would have been available. See, *State v. Haselhorst*, 218 Neb. 233, 353 N.W.2d 7 (1984); *State v. Longa, supra; State v. Sotelo*, 197 Neb. 334, 248 N.W.2d 767 (1977).

AFFIRMED.

MISLE CHEVROLET COMPANY, A NEBRASKA PARTNERSHIP, APPELLEE, V. MARTIN A. KOMETSCHER, APPELLANT.

408 N.W.2d 713

Filed July 2, 1987. No. 85-554.

1. **Trial: Appeal and Error.** The trial court has broad discretion over the general conduct of the trial and decisions on matters relating to the conduct of the trial will not be set aside on appeal absent an abuse of the court's discretion.
2. **Trial: Pretrial Procedure.** The purpose of a pretrial conference is to simplify the issues, amend the pleadings, and avoid traps and surprises at trial.
3. _____: _____. The issues specified at a pretrial conference control the course of an action and, unless altered by the court, constitute issues on which the case is tried.
4. **Pretrial Procedure: Pleadings: Waiver: Appeal and Error.** The issues set out in the pretrial order supplant the issues raised in the pleadings. Failure to object to the specification of the issues in the pretrial order waives error claimed in that regard on appeal.
5. **Evidence: Trial: Appeal and Error.** It is within the trial court's discretion to

admit or exclude evidence, and such rulings will not be disturbed on appeal absent a showing of abuse of that discretion.

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

Joseph J. Cariotto, for appellant.

Gary J. Nedved of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Plaintiff-appellee, Misle Chevrolet Company, brought this action in the district court for Lancaster County, seeking damages from the defendant-appellant, Martin A. Kometscher, in connection with the trade-in of Kometscher's 1977 Chevrolet pickup on the purchase of a 1982 Chevrolet pickup from Misle. Misle's petition alleged Kometscher failed to give the proper odometer recording on the odometer mileage statement in violation of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1981 et seq. (1982). After a trial to a jury, a verdict was returned in Misle's favor for damages in the amount of $1,500. Pursuant to 15 U.S.C. § 1989 and on Misle's motion, the district court entered judgment in favor of Misle in the amount of $4,500 plus $2,450 in attorney fees. Kometscher appeals to the court.

On appeal Kometscher alleges the district court erred in conducting the trial so as not to remove the jury while Kometscher moved for dismissal at the close of Misle's case, thus requiring the trial to be held partially in whispers. Kometscher also alleges that the verdict is contrary to law and that the court erred in failing to dismiss Misle's petition after Misle rested and in failing to sustain Kometscher's motion for judgment notwithstanding the verdict. For the reasons hereafter stated, the judgment of the district court is affirmed.

The record shows that on October 14, 1983, Kometscher went to Misle's business premises for the purpose of buying a newer truck. Richard Patton, a salesman for Misle, met with Kometscher, who indicated that he was interested in purchasing

a newer truck equipped with air-conditioning. Kometscher found a truck that was of interest to him. During the course of looking for a new truck, Kometscher indicated that he wanted to trade in his current vehicle. Patton testified that Kometscher said that the vehicle intended for trade-in was a good, clean, low-mileage vehicle. Kometscher took the newer truck for a test drive. On his return the parties reached an oral agreement that Kometscher would purchase the truck if he could receive enough money for his truck on the trade-in. Patton testified that the two proceeded to Patton's office to complete the sale. Patton testified he then filled out an appraisal slip on the truck intended for trade-in. Patton further testified that when Kometscher was asked the number of miles on the truck he replied, "a little over 40,000." Patton then went out to look at Kometscher's truck and saw the number of miles as shown on the odometer was 45,701.

Larry Storjohann, Misle's truck sales manager, appraised Kometscher's truck. After test driving the proposed trade-in, Storjohann said that he would give a trade-in allowance of $2,800 that, when subtracted from the sale price of $10,080, left a balance of $7,280. This figure was brought to Kometscher, who told the salesman that he could not deal at this figure. Kometscher offered a lower overall price to take to the sales manager. Patton testified that Kometscher referred to his trade-in as having less miles on it than the vehicle he was trying to purchase. Finally, Storjohann met with Kometscher in order to reach an agreeable price. Storjohann testified that during this conversation with Kometscher, Kometscher, as a bargaining tool, repeated that he was trading up in miles. Finally, a mutually agreeable figure was reached in which Kometscher was given a trade-in allowance of $4,000. Storjohann testified that this figure was based upon the assumption that the trade-in vehicle had only 45,701 miles on it.

After an agreement was reached, Kometscher was taken to the business office, where he filled out the necessary papers to complete the sale. Included in this paperwork was the filling out of the odometer mileage statement. Kometscher admitted he signed this statement which said that to the best of his knowledge the odometer reading of 45,701 miles reflected the

actual mileage of the vehicle in question and that the odometer had not been "altered, set back, or disconnected while in my possession . . . ." The record further showed that when Kometscher purchased the truck he was trading, 3 months prior to the transaction in question, he signed an odometer mileage statement which acknowledged that at that time the vehicle had in excess of 95,000 miles on it. Kometscher also admitted on cross-examination that he had removed the odometer to clean it. Kometscher testified that after turning the odometer to clean it, he did not pay any attention to whether or not the actual reading was the same when the odometer was returned to the vehicle as it was when it was removed. Kometscher further testified that he did not tell either the salesman or the sales manager that the mileage reading did not reflect the correct mileage and that he did not feel that it was important.

At the close of the evidence, the matter was submitted to the jury. A verdict was returned in favor of Misle for damages in the amount of $1,500. Misle later filed a motion requesting the court to enter its judgment for three times the amount of actual damages and for reasonable attorney fees as determined by the court. On June 6, 1985, the judgment for $4,500 plus $2,450 attorney fees was entered.

Kometscher assigns as his first error the irregularity of the proceedings of the court, by which Kometscher was prevented from having a fair trial, and specifically refers to the court's not sending the jury out of the courtroom when Kometscher wanted to move for dismissal. Kometscher argues that at this time, as well as on several other occasions, the attorneys for the parties were called to the bench and required to speak in whispers while the jury remained in the courtroom. Kometscher's argument is without merit. The trial court has broad discretion over general conduct of the trial. *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980); *State v. Holverson*, 130 Wis. 2d 300, 387 N.W.2d 124 (1986). Furthermore, decisions on matters relating to the conduct of the trial will not be set aside on appeal absent an abuse of the court's discretion. *Great Plains Supply Co. v. Erickson*, 398 N.W.2d 732 (N.D. 1986); *Ward v. Shipp*, 340 N.W.2d 14 (N.D. 1983). After a careful review, we find nothing in the record

before us that indicates an abuse of that discretion. It is apparent the trial was conducted so as to provide an atmosphere of fairness which best comports with substantial justice. No different procedural approach was requested by Kometscher.

Kometscher further alleges the verdict is contrary to law and that the trial court erred in failing to dismiss Misle's petition after Misle rested and in failing to sustain Kometscher's motion for judgment notwithstanding the verdict. With regard to the court's failure to sustain Kometscher's motion for judgment notwithstanding the verdict, we find no error. On such a motion the moving party is deemed to have admitted as true all material and relevant evidence which is favorable to the party against whom the motion is made. Furthermore, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced from the evidence. *Havlicek v. Desai, ante* p. 222, 403 N.W.2d 386 (1987); *Bourke v. Watts*, 223 Neb. 511, 391 N.W.2d 552 (1986).

When viewed in the light most favorable to Misle, the record shows that 3 months prior to the transaction which is the subject of this litigation, Kometscher signed an odometer statement which stated the actual mileage of his vehicle to be in excess of 95,000 miles. Kometscher admitted to having turned the numbers on the odometer in an effort to clean it. Furthermore, Kometscher signed an odometer statement at the time of the purchase which showed the mileage on his vehicle to be 45,701. The record discloses that during the course of negotiations on the sale, Kometscher repeatedly mentioned that his vehicle was low mileage and that he was trading up in miles. We find the evidence sufficient to sustain the verdict. The district court did not err in failing to sustain Kometscher's motion for judgment notwithstanding the verdict.

Kometscher further alleges the court erred in failing to dismiss the case for the reason that Misle's petition fails to state a cause of action and fails to specifically set forth the applicable federal statute. Kometscher argues that to recover under the Motor Vehicle Information and Cost Savings Act, Misle must show a violation of the act coupled with intent to defraud while committing the violation. Additionally, Kometscher relies on

Neb. Rev. Stat § 25-12,104 (Reissue 1985), which requires reasonable notice be given to an adverse party, either in the pleadings or otherwise, when a party wishes to offer evidence of the law of other jurisdictions. In the case at bar, it is true that Misle's petition does not conform with this state's rules of pleading and does not set forth an allegation of Kometscher's intent to defraud. Furthermore, there is no mention of the specific section of the Motor Vehicle Information and Cost Savings Act under which any liability of the appellant would arise. However, both of these contentions must fail for the same reason. The record shows that on February 20, 1985, a pretrial conference was held. The purpose of a pretrial conference is to simplify the issues, amend the pleadings, and avoid traps and surprises at trial. *Malerbi v. Central Reserve Life, ante* p. 543, 407 N.W.2d 157 (1987). The order from the pretrial conference specifically states: "The central issue in the case is the matter of intent under the statute." The pretrial order also states that the action arises out of a violation of 15 U.S.C. §§ 1981 et seq., and particularly 15 U.S.C. § 1988, and that damages would come under 15 U.S.C. § 1989. We have held that issues specified at a pretrial conference control the course of an action and, unless altered by the court, constitute the issues on which the case is tried. *Malerbi v. Central Reserve Life, supra; Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986). The issues set out in the pretrial order supplant the issues raised in the pleadings. Failure to object to the specification of the issues in the pretrial order waives error claimed in that regard on appeal. *Malerbi v. Central Reserve Life, supra; Little v. Gillette, ante* p. 70, 402 N.W.2d 852 (1987). The order specifically states that both counsel assented to the order. The court did not err in failing to dismiss the case. The failure of the petition to adequately state the cause of action or specifically set out the statute was remedied by the pretrial order to which both attorneys assented.

Finally, Kometscher contends that the court erred in sustaining Misle's motion in limine. The motion sought to exclude from evidence, as immaterial and irrelevant, all facts and conversation regarding Misle's subsequent sale of the vehicle traded in by Kometscher. Kometscher's contention is

without merit. It is the law in Nebraska that it is within the trial court's discretion to admit or exclude evidence, and such rulings will not be disturbed on appeal absent a showing of abuse of that discretion. *State v. Threet, ante* p. 682, 407 N.W.2d 766 (1987); *State v. Wilson, ante* p. 466, 406 N.W.2d 123 (1987). Furthermore, error may not be predicated on a ruling of the trial court unless a substantial right of the party is affected. Neb. Rev. Stat. § 27-103(1) (Reissue 1985). See, also, *Bernadt v. Suburban Air, Inc.*, 221 Neb. 537, 378 N.W.2d 852 (1985). After a careful review of the record, we find no abuse of discretion. The court's ruling on the motion in limine did not affect a substantial right of Kometscher.

In the absence of any error, the judgment of the district court is affirmed. Additionally, pursuant to 15 U.S.C. § 1989(a)(2), Kometscher is ordered to pay to Misle the sum of $1,000 for the services of appellee's attorney in this court.

AFFIRMED.

KRIVOSHA, C.J., not participating.

GLENDA JEAN NICKEL, APPELLEE, V. GARY J. NICKEL, APPELLANT.
408 N.W.2d 301

Filed July 2, 1987. No. 85-584.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Paul E. Galter of Bauer & Galter, for appellant.

Steven J. Flodman and Robert W. Shively of Barlow, Johnson, DeMars & Flodman, for appellee.

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

PER CURIAM.

This is an appeal from an order entered by the district court for Lancaster County, Nebraska, modifying an original decree

of dissolution by reducing the obligation of the appellant, Gary J. Nickel, to pay alimony to the appellee, Glenda Jean Nickel, from $1,650 per month to $1,200 per month. We have reviewed the record de novo, as we are required to do in cases of this nature, and have found that the order entered by the district court was not a result of any abuse of discretion. See, *Kelly v. Kelly*, 220 Neb. 441, 370 N.W.2d 161 (1985); *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985). For that reason the judgment of the district court is affirmed; each party is to pay his or her own fees and costs.

AFFIRMED.

RAYMOND GOERES AND DORA GOERES, HUSBAND AND WIFE, APPELLEES, V. PAUL A. ROSBERG ET AL., APPELLANTS, SMALL BUSINESS ADMINISTRATION ET AL., APPELLEES.

408 N.W.2d 302

Filed July 2, 1987. No. 85-670.

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

Paul A. Rosberg, pro se.

R.K. Baird of Curtiss and Baird, for appellees Goeres.

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

PER CURIAM.

This is an appeal from the entry of an order by the district court for Knox County, Nebraska, confirming a foreclosure sale. The court has reviewed the record de novo, as it is required to do in cases of this nature, and finds no error. See *Travelers Indemnity Co. v. Heim*, 218 Neb. 326, 352 N.W.2d 921 (1984). For that reason, the judgment of the district court confirming the sale is affirmed.

AFFIRMED.

WILLIAM E. NICHOL, APPELLEE, V. KATHERINE HETTINGER, APPELLANT.
408 N.W.2d 302

Filed July 2, 1987. No. 85-677.

1. **Adverse Possession: Appeal and Error.** In determining whether a claimant of title by adverse possession has met the required burden of proof, we review the record de novo and reach conclusions independent of the trial judge.
2. **Adverse Possession.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a full 10-year period.
3. _____. Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period.
4. _____. Title may not be quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period.

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

Frederick B. Allan, Jr., and Michael G. Mullally of Allan, Brauer & Mullally, for appellant.

Donn C. Raymond of Raymond, Olsen, Ediger & Ballew, P.C., for appellee.

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

GRANT, J.

The defendant, Katherine Hettinger, appeals from a judgment of the Scotts Bluff County District Court which found that the plaintiff, William E. Nichol, had proved all the elements of adverse possession in an equity action, quieted title to a .43-acre tract of land in Nichol, and awarded Nichol money damages. We reverse.

The undisputed facts are as follows. Nichol and Hettinger are owners of adjoining land in Scotts Bluff County, Nebraska. Nichol acquired his land in 1983 from his parents, who acquired title in 1937 from Nichol's grandfather, who had acquired title in 1929. Hettinger and her husband acquired their land in 1945, and Hettinger was awarded the land in a subsequent divorce

action. In 1929, a triangular 4-acre tract of land in the northeast corner of the Hettinger property was deeded to Nichol's predecessors in title by Hettinger's predecessors in title. A covenant in the deed stated, "It is a part of the consideration hereof that the said Grantee herein, his heirs and assigns [Nichol's predecessors], shall take care of a reasonable amount of the waste water off the adjoining 120 acres of land belonging to the said first party [Hettinger's predecessors]." Nichol's predecessor dug a ditch or "irrigation lateral" along the edge of the property deeded, to comply with the requirements of the covenant. The portion of the lateral between the Nichol and Hettinger farms is located on the .43 acres at issue in the case. The lateral, which remained in essentially the same location since 1929, consisted of dirt banks covered with brome grass. The lateral was used to transport irrigation water across Nichol's farm and to receive waste water from the Hettinger land.

To remove the waste water from the Hettinger land, a series of checks or cuts were made into the bank of the ditch in order for the water to drain into the lateral. When Nichol was using the lateral for irrigation he would close the cuts. Nichol testified that this practice had been continuous since the purchase of the 4-acre tract in 1929.

After 1973, problems with drainage of the Hettinger farm developed, and the difficulties in the cooperative use of the lateral grew worse. Hettinger testified that from 1979 to 1983 there was always waste water standing on her ground. In 1983, Hettinger initiated discussions with Nichol and expressed her desire to remove the banks of the lateral, making the ditch level with the field so her waste water could drain. Hettinger met with Nichol four times in the winter of 1983-84, telling him that "we had to do something with that ditch, it wasn't operating, and we were losing crop and drowning crop and we should do something with the ditch."

When she did not get a satisfactory response from Nichol, Hettinger contacted Orin Bolzer, who testified that Hettinger hired him to "take some bottom end of that field off and cut that ditch bank down and I wouldn't until it was surveyed by somebody else." Thereafter, Hettinger hired Duane Stott, a

registered land surveyor, to determine the exact legal boundary line of her property and the location of the irrigation lateral. The survey report submitted on April 3, 1984, showed the irrigation lateral on the .43 acres in question was located entirely on Hettinger's property.

Bolzer then removed the lateral and leveled the land on the Hettinger side of the surveyor's stakes. After removal of the lateral was completed, Nichol obtained a restraining order against Hettinger. Nichol subsequently had dirt hauled in to replace the lateral banks and reestablish the ditch in the same location as the lateral removed by Hettinger.

On April 27, 1984, Nichol filed a petition to quiet title in the .43 acres of land on a theory of adverse possession, claiming to have been in adverse possession "for more than ten years last past." On May 11, 1984, Nichol filed an amended petition, which was amended by interlineation to add allegations and a prayer for damages for reconstructing the lateral at a cost of $2,478.48.

Hettinger filed an answer on May 25, 1984, generally denying Nichol's allegation and alleging that Nichol's use of the land in question was not adverse to her. Hettinger applied for a temporary restraining order and temporary injunction and filed a motion to set aside the temporary injunction in effect against her. On June 6, 1984, the court overruled both. Later, Hettinger filed a second amended answer and cross-petition, seeking damages for loss of crops and for the costs of surveying the property.

Trial was held to the court on June 24, 25, and 26, 1985. On July 8, 1985, the court entered judgment for Nichol, finding that Nichol had "established adverse possession to the irrigation lateral and all land lying to the north and east thereof; that all right, title and interest in and to the following described real estate is quieted in Plaintiff; to-wit: A tract of land . . . containing an area of 0.43 acres more or less." The court awarded judgment against Hettinger in the amount of $2,478.48 for costs of reconstructing the irrigation lateral removed by Hettinger, and denied Hettinger's amended cross-petition.

After denial of a motion for new trial, Hettinger timely

appealed to this court. The sole error assigned by Hettinger asserts that the court erred "in holding that Appellee [Nichol] had proved all of the elements of adverse possession for the requisite statutory period, in that the evidence before the Court did not substantiate a finding that Appellee had had exclusive possession of the disputed tract."

In determining whether a claimant of title by adverse possession has met the required burden of proof, we review the record de novo and reach conclusions independent of the trial judge. *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987).

One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a full 10-year period. Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period. *Young v. Lacy*, 221 Neb. 511, 378 N.W.2d 192 (1985).

To determine whether Nichol proved adverse possession in this case, we consider only the "ten years last past" as alleged in Nichol's petition, which would run from April 27, 1974, to April 27, 1984, the date of the filing of Nichol's petition.

Hettinger asserts that Nichol did not have exclusive possession of the .43-acre tract because Hettinger and her tenants engaged in a continual, systematic use of the irrigation lateral to drain her waste water from the time she first acquired title.

Don Stricker, Jerry Kurtz, and George Lunniss, Hettinger's tenant farmers during the 1974 to 1984 time period, testified that they used the irrigation lateral for draining waste water from the Hettinger land. Lunniss testified that he and Robert Pieper, Nichol's tenant from 1974 to the date of the trial, "agreed to try to alternate watering from one end of the farm so that we both wouldn't be trying to use the ditch at the same time." Kurtz testified that in 1979, when he opened the cuts in the lateral to drain waste water, Pieper would close them. Kurtz testified that he opened them again "[b]asically about every day." Stricker testified that during the time he was a tenant farmer for Hettinger, he never had any problems with Pieper

concerning the draining of waste water, and both Stricker and Pieper used the ditch—Pieper for irrigation purposes and Stricker for the drainage of waste water.

Pieper testified that he never denied Hettinger's tenants the right to make cuts in the lateral and never refused to cooperate with a Hettinger tenant.

Nichol himself testified:

> [T]he understanding was that we took their waste water, there is no question about that . . . and whoever needed to drain the water in would open the checks and if he was going to use the ditch, he would use the checks. And it was just common sense whether you would open or close them. And both parties were free to open or close them as they wanted to. Naturally the tenant on the Hettinger farm would not open them when we were using the ditch. Likewise, if we were using the ditch, we would close them.

We stated in *Young v. Lacy, supra* at 514-15, 378 N.W.2d at 195:

> While the law does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the property for the purposes for which it is adapted, there must be an element of exclusivity under a claim of ownership. . . . Title may not be quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period. . . . There must be evidence of the intention of the claimant to appropriate and use the property as his own to the exclusion of all others.

The record in this case not only fails to show exclusive possession or use by Nichol, but shows that there was a joint use of the property in question by Nichol and Hettinger. "The use and possession of property with the permission of the owner can never ripen into title by adverse possession without some change in the nature of the possession being brought home to the true owner." *Young v. Lacy, supra* at 515, 378 N.W.2d at 195.

Nichol's argument in his brief on appeal that he exercised exclusive control of the lateral is contradicted by his own testimony and by the testimony of both his and Hettinger's

tenants. The record does not show any change in the nature of Nichol's possession of the lateral which was brought home to Hettinger, the record owner of the land in question, which appreciably affected the behavior of Hettinger or her tenants in their use of the irrigation lateral for the statutory 10-year period.

It is clear from the record in this case that Nichol has failed to prove by a preponderance of the evidence that he was in exclusive possession of the .43 acres in question, and therefore has failed to prove adverse possession. Accordingly, the judgment quieting title in plaintiff and awarding plaintiff damages is reversed and the petition dismissed.

REVERSED.

KATHERINE THIES, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

408 N.W.2d 306

Filed July 2, 1987. No. 85-818.

1. **Recreation Liability Act: Appeal and Error.** A finding that an owner of property protected by the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1984), did not act willfully or maliciously as described in § 37-1005 is a finding of fact which will not be disturbed unless clearly wrong.
2. **Trial: Pleadings: Proof.** Where the plaintiff has not been misled to her prejudice, the variance between an allegation in the pleading and the proof at trial is immaterial. Neb. Rev. Stat. § 25-846 (Reissue 1985).

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Elaine M. Martin of Martin & Martin, for appellant.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Denise A. Hill, for appellee.

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

PER CURIAM.

The appellant, Katherine Thies, brought this tort action against the City of Omaha, alleging that the city was willfully and maliciously negligent in its care of a slide, in the Central Park Mall, upon which she was injured. In a bench trial, the district court for Douglas County found that the slide was dangerously steep and short and caused Thies to be propelled at high velocity onto the ground, causing her injuries. It found that the city was negligent and that Thies was not contributorily negligent in failing to put her feet down, nor did she assume a risk of injury by sliding. However, the court noted that sliding was a recreational activity and found "as a fact that defendant's negligence was neither willful or malicious within the meaning of the [Recreation Liability] Act." In accord with this finding, judgment was rendered in favor of the City of Omaha.

Thies urges this court to reverse on three grounds: first, that the finding that the city did not act maliciously or willfully is contrary to the evidence; second, that the publicized attempts by the city to make the slides safe makes the city liable for negligence, because it gratuitously undertook to make the slides safe and was negligent in doing so; and third, that the city is not protected by the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1984), under the facts and pleadings of the case. We affirm the judgment of the district court.

The Recreation Liability Act seeks to encourage owners of land to make their land available free to the public for recreational purposes by limiting their liability. The owner owes no duty of care to keep the premises safe, § 37-1002. The only exceptions are for willful or malicious failure to guard or warn, and where the owner charges a fee for entry, § 37-1005.

In *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), which also involved a suit against the city for negligent care of a slide, a majority of this court determined that the municipal corporation as an entity was an owner of land and, as such, was protected from liability by the Recreation Liability Act. That holding was reaffirmed recently in the case of *Gallagher v. Omaha Public Power Dist., ante* p. 354, 405 N.W.2d 571 (1987). The evidence at trial is uncontroverted that the city owned the park and allowed the public access to it

free of charge. The act applies to limit the city's liability in this case unless the negligence was willful or malicious.

The trial court found, as a matter of fact, that the city did not act maliciously. The appellant's first assignment of error alleges that this finding was wrong. In *Boren v. State Farm Mut. Auto. Ins. Co., ante* p. 503, 505-06, 406 N.W.2d 640, 643 (1987), we stated,

> Since no equitable relief is sought, the action is to be treated as one at law. As a consequence, a jury having been waived, the factual finding of the trial court has the effect of a finding made by a jury and will not be set aside unless clearly wrong.

Hence, we must uphold the finding that the city's acts or omissions were not malicious or willful unless the finding is clearly wrong.

The trial court found the city negligent, and upon review of the record, we agree. However, the city did take steps to make the landing area of the slide safe by adding more pea gravel and raking the sand daily to replace the sand displaced by feet of the landing sliders. All city slides have displacement at the landing area; most are tended to only on a yearly basis. The city raked the slide area in question daily.

The landing area at the time of the plaintiff's accident had a deep pit in front of a high mound of gravel. Both the pit and the mound were created by the feet of sliders. The accident occurred on a weekend evening, and the area had not been raked since the morning. The use of the slide was proven to be heavier on the weekends, a fact known by the city. We agree that the city, if it had raked the area in the evening, could have prevented this injury, and was negligent in not doing so. However, in light of all of the attention spent on these slides by the city in adding gravel and raking, not once a year but daily, we cannot find that the trial court's finding that the city's negligence was not willful or malicious is clearly wrong. We uphold the finding.

The second assignment of error alleges that the city is liable under the standard of reasonable care, despite the application of the Recreation Liability Act, because it voluntarily undertook the task of making the slides safe and did so

negligently, while announcing publicly that the slides were safe. Section 37-1002 provides that, subject to the exceptions for willful or malicious failure to guard or warn, the owner of land owes no duty of care to make safe the area used by others for recreational purposes. We shall not impose a duty of reasonable care where the Legislature has decided that there shall be no duty. The fact that representations were made regarding safety goes to the issue of whether the city's failure to guard or warn was malicious or not, and not to whether a duty of care was created. The appellant's argument cannot be reconciled with the plain language of the statute.

The third assignment of error complains that the Recreation Liability Act cannot apply because (1) the city's answer denies that it is the owner and operator of the slides, and (2) the act does not cover custom-made equipment.

The city's amended answer contains a general denial of the allegations in the petition. Since the petition alleged that the city is the owner and operator of the slides, the plaintiff argues that the city should not be afforded protection from the Recreation Liability Act because of the denial. The proof at trial established that the city is the owner and operator of the slides. The plaintiff was not misled by the general denial as to ownership, nor did she rely on the denial to her prejudice, since the amended answer claims protection from the act in the paragraph following the general denial.

Since the plaintiff has not been misled to her prejudice, the variance between the allegation in the pleading and the proof at trial is immaterial. Neb. Rev. Stat. § 25-846 (Reissue 1985). With respect to the argument that the act does not apply to accidents involving custom-made slides, in our opinion in *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), we held specifically that sliding is a recreational activity covered by the act. We cannot see how the origin of the slide is in any way relevant to the application of the act, nor does the appellant provide us with any authority supporting the argument that custom-made equipment is excluded from the act. The decision of the trial court is affirmed.

AFFIRMED.

WHITE, J., dissenting.

I adhere to the view expressed in my dissent in *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), that the Recreation Liability Act is inapplicable to municipalities.

BARBARA JEAN VEGA, APPELLEE, V. VICTOR ORLANDO VEGA, APPELLANT.
408 N.W.2d 309

Filed July 2, 1987. No. 85-833.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Marianne Clare Vainiunas and Gary B. Randall of Marks, Clare, Hopkins, Rauth, Cuddigan, Offner & Watson, for appellant.

John C. Hurd of Wolfe, Hurd, Rierden & Luers, for appellee.

Ken Dudek, for amicus curiae Nebraska Civil Liberties Union Foundation.

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

PER CURIAM.

The respondent husband, Victor Orlando Vega, has appealed from the order of the district court, which modified the parties' decree of dissolution as to visitation. Having reviewed the record de novo as we are required to do, we conclude the trial court did not abuse its discretion in regard to setting the visitation allowed the appellant. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HUDSON BIRD HEAD, APPELLANT.

408 N.W.2d 309

Filed July 2, 1987. No. 86-263.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence needed to sustain a criminal conviction, the Nebraska Supreme Court is obligated to view the evidence in the light most favorable to the State.
2. **Judges: Recusal: Appeal and Error.** A motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's sound discretion, and an order overruling such a motion will ordinarily be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
3. **Judges: Recusal: Presumptions.** A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
4. **Venue: Appeal and Error.** A motion for a change of venue is addressed to the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed absent a clear abuse of that discretion.
5. _____: _____. The factors to be evaluated in determining whether a change of venue is required because of pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn.
6. **Juror Qualifications.** The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court.
7. **Juror Qualifications: Death Penalty: Constitutional Law.** A venireperson whose views on capital punishment are such as to prevent or substantially impair the performance of his or her duties as a juror may, under the provisions of Neb. Rev. Stat. § 29-2006(3) (Reissue 1985), be constitutionally excused from jury service in a capital case.
8. **Convictions: Circumstantial Evidence.** One may be convicted of a crime on the basis of circumstantial evidence if such evidence, taken as a whole, establishes guilt beyond a reasonable doubt.
9. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the function of the Nebraska Supreme Court to weigh the evidence; a verdict of guilt must be affirmed if the evidence, viewed and construed most favorably to the State, sufficiently supports some rational theory of guilt.
10. **Death Penalty: Aggravating and Mitigating Circumstances.** Mere proof that an offender was previously convicted of two assaults of unspecified degree and of

an attempted second degree assault does not in and of itself establish beyond a reasonable doubt the existence of the aggravating circumstance defined in Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1985).

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed in part, and in part reversed and remanded for resentencing.

James R. Wefso, for appellant.

Robert M. Spire, Attorney General, Melvin K. Kammerlohr, and William L. Howland, for appellee.

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

PER CURIAM.

A jury found defendant-appellant, Hudson Bird Head, guilty of robbery in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1985), first degree sexual assault in violation of Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1985), and first degree murder in violation of Neb. Rev. Stat. § 28-303(2) (Reissue 1985). He was adjudged accordingly and sentenced to imprisonment for a term of not less than 10 nor more than 15 years for the robbery, to a like term of imprisonment for the sexual assault, and to death for the murder.

By his original and supplemental briefs Bird Head assigns 14 errors, which combine to present 7 issues. The first asks (1) whether the trial judge erred in not disqualifying himself from the guilt and penalty determination phases of the proceeding. The next three issues relate solely to the guilt determination phase of the proceeding and ask (2) whether the trial judge erred in refusing a change of venue, (3) whether the trial judge erred in overruling defendant's motion to prohibit "death qualification" of the jury, and (4) whether the trial judge erred in considering the evidence sufficient to support each finding of guilt. For the reasons discussed in the remainder of this opinion, we answer each of the foregoing four inquiries in the negative and thus affirm each of the findings of guilt, as well as the sentences imposed for the robbery and sexual assault convictions.

The remaining three issues deal with the phase of the proceeding at which it was determined that the murder warranted imposition of the death penalty. One of these issues, (5), asks whether the sentencing panel erred in finding the presence beyond a reasonable doubt of certain statutory aggravating circumstances.

Because an error in the sentencing panel's determination that Bird Head had previously been convicted of crimes involving the use or threat of violence compels us to answer that inquiry in the affirmative, the remaining two issues need not be, and therefore are not, considered.

Accordingly, we reverse and vacate the sentence imposed for the murder conviction and remand the cause for further proceedings and resentencing in that regard.

FACTS

In our review we are obligated to view the evidence most favorably to the State. *State v. Walker, ante* p. 794, 408 N.W.2d 294 (1987). So viewed, the evidence establishes that at 8:58 p.m. on March 2, 1985, State Trooper George Gleason received a radio call warning him of a possible drunk driver headed on the highway from Alliance to Bridgeport. Gleason then came upon a 1966 Chevrolet which matched the description of the automobile reported to him. The Chevrolet was traveling at 36 m.p.h. and was weaving from the shoulder of the highway to the centerline. Gleason stopped the automobile, which proved to have been operated by Bird Head, its only occupant. Gleason noted that Bird Head had glassy eyes and that there was a blue clutch purse and five beer cans on the floor of the automobile.

Bird Head could produce neither a driver's license nor an automobile registration document. After failing several field sobriety tests, Bird Head was told he would be taken to Bridgeport for further testing. When asked if he wanted the vehicle towed or left where it was, Bird Head indicated he wanted it left where it was because he could not afford to have it towed. However, because the automobile could not be locked, Gleason arranged to have it towed.

The Intoxilyzer test administered at Bridgeport revealed that Bird Head had .315 of 1 percent of alcohol in his blood. Bird

Head was given the *Miranda* warnings, after which he answered questions.

Bird Head told Gleason he had been drinking wine but denied being intoxicated. He also said he thought he had been driving a Ford and that he had been in Lincoln, driving through Gordon, on his way to Colorado. When asked to empty his pockets, Bird Head produced a number of items, including a pair of sunglasses, a black comb, 2 keys, some lottery tickets, 12 slices of individually wrapped Velveeta cheese, and $22.23. The money consisted of three $5 bills, six $1 bills, and $1.23 in coins. During the questioning, Gleason noticed bloodspots in the area of Bird Head's left knee. Sheriff Roger Sterkel also observed those spots, as well as a bloodspot on the left sleeve of Bird Head's sweater.

In accordance with standard procedure the automobile Bird Head had been driving was inventoried. As a result, there was found, in addition to the items noted earlier, a three-quarters full bottle of wine, some Cheetos, a Kentucky Fried Chicken box, a pair of eyeglasses in its case, and two crumpled $1 bills. The blue clutch purse contained documents issued to Mrs. Lillian Lynch and a $2 bill, which had been tucked into one of the pockets. In addition, the registration document found on the visor of the automobile showed that the automobile was registered to Mrs. Lynch.

Upon discovery of the registration and other identifying documents, Sheriff Sterkel attempted to telephone Mrs. Lynch at her home in Gordon but received no answer. Gleason then contacted Nebraska State Patrol Trooper Gary Boyer. Boyer arrived at Mrs. Lynch's home at approximately 11:39 p.m. and found it completely dark. He knocked on the door but received no response. He then went to the dining room window, shined his flashlight into the room, and saw that shoes and clothing had been strewn about. Boyer then discovered that the kitchen door was partially open, with a key hanging in its lock. He entered the house, turned on the dining room light, and saw what looked like a pair of nylon stockings in the hallway leading to the bedroom. He again saw the shoes he noticed when looking through the window and, in addition, saw a bloodstained brown handbag lying on the buffet. Boyer

proceeded to the bedroom and found it to be in disarray; a nightstand had been tipped over, dresser drawers had been opened, and the mattress had been pulled onto the floor. Boyer lifted the mattress and found Mrs. Lynch's corpse lying face down on the floor under the mattress. He then called for assistance.

Further examination of the scene revealed the presence of a number of items in addition to those first seen by Boyer, including a pair of pants in the dining room, a sweater, a pair of glasses, a denture plate, and a nosepiece from a pair of glasses. A bloodspotted nightcap was found under a nightstand in the bedroom, and a Velveeta cheese wrapper was found on the mattress.

A bloody cloth was wrapped twice around the 85-year-old victim's face, covering her eyes, nose, and mouth. A blood-covered knee supporter was found under the victim's blackened chin. The victim's arms were tied tightly behind her back, and she had been bound with what appeared to be a jump rope, a bathrobe tie, and a white undergarment. She was unclothed below the waist, and her feet were tied with a pair of nylon stockings, but spread apart.

The autopsy revealed that Mrs. Lynch suffered multiple injuries prior to her death. She had been struck in the mouth, as the result of which her lower lip was cut; a blow had been administered in the area of an eye; and she had cuts on the left side of her neck. There was also a cut on the victim's vaginal area resulting from its penetration by some appendage such as a finger or penis. Tests revealed the presence of acid phosphatase within the victim's vaginal tract, a finding consistent with the past presence of semen, a substance which deteriorates rapidly. The victim's vagina also contained a substance secreted by one having Bird Head's type of blood. That same substance was found in some white crusty spots of semen found on a rug near the victim's body. The spots also contained a substance found in persons having the same blood type as did the victim. Mrs. Lynch had also received a series of blunt traumas of the sort administered by a flat object such as an open hand, foot, or sole of a shoe or boot. The blunt trauma broke three of the victim's ribs, fractured her thyroid cartilage, or adam's apple, and

injured the back of her head. In a pathologist's opinion, it is likely that with timely and proper medical intervention Mrs. Lynch would have survived; leaving her unattended made death a certainty.

During the last morning of her life, Mrs. Lynch had deposited her Social Security check and taken $20 of it in cash. The bank teller testified that Mrs. Lynch always asked for small bills, so that it is likely the teller had given the victim three fives and five ones. On the same day Bird Head had attempted to sell some furniture to a local merchant.

The nosepiece found in Mrs. Lynch's house came from the glasses Bird Head produced from one of his pockets, and the victim often kept Velveeta cheese on hand. The lottery tickets found in Bird Head's possession were of the kind given to the victim by a supermarket at which she traded. Additionally, one of the keys found in Bird Head's pocket opened the side door to the victim's garage.

A single head hair was found on a rug in the victim's house, which had characteristics similar to Bird Head's hair. In addition, 23 hairs similar to Bird Head's hair were found in sweepings of Mrs. Lynch's house, and bloodstains found on Bird Head's clothing were made by blood of the same type as that of the victim.

At approximately 5 p.m. on the day of the murder, Bird Head had been seen drunk, leaning in the doorway of an office located at a distance of about an 8-minute walk from Mrs. Lynch's house. One of the victim's neighbors heard a "bang" at approximately 6 p.m. Later, the antenna to Mrs. Lynch's automobile was found lying on the ground near the garage. The unconsumed blood-pressure-controlling pill Mrs. Lynch should have taken at 6 p.m. was found at the scene. At 8:02 p.m. Bird Head purchased some chicken at the Kentucky Fried Chicken store in Alliance, a distance of 70.9 miles from the victim's house.

ISSUES

(1) Nondisqualification

We now turn our attention to the first issue, whether the refusal of Judge Empson to disqualify himself from presiding over the guilt phase of the trial and from participating in the

sentencing phase of the trial unconstitutionally denied Bird Head a fair trial and subjected him to cruel and unusual punishment.

Bird Head argues Judge Empson was disqualified from participating in this case because as a former county attorney, he had both filed misdemeanor complaints against Bird Head and had prosecuted Bird Head's brother Wendell, and that as a judge he had earlier presided over a trial in which Bird Head was convicted of a felony and over a trial in which Bird Head's brother Vernon was convicted of two felony offenses. Bird Head calls particular attention to the fact that when sentencing Bird Head's brother Vernon in 1982, Judge Empson said:

> I am probably not the only frustrated judge today in this very vicinity, maybe in the state of Nebraska, I don't know what to do with you. If I had it in my power I would turn you into a frog. You could not hurt anybody else anymore if I could do that; but I can't. The most I can do is put you out of circulation for as long as I can so that people's property, and in an occasion like this, their lives will be safe from you. I think you better count yourself lucky already that you didn't get a habitual criminal rap, which could have been done which is such a thing that is meant for a person like you, who simply will not learn.
>
> . . . .
>
> I will probably do this every time you see me, give you the maximum I can.

We begin our analysis of this issue by recalling some fundamental rules. The first of these is that a motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's sound discretion, and an order overruling such a motion will ordinarily be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. *State v. Goodpasture*, 215 Neb. 341, 338 N.W.2d 446 (1983); *Kennedy v. Kennedy*, 205 Neb. 363, 287 N.W.2d 694 (1980); *State v. Davis*, 198 Neb. 823, 255 N.W.2d 434 (1977). Moreover, a party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Gillette*, 218 Neb. 672, 357 N.W.2d 472 (1984).

More specifically, *State v. Burnside*, 185 Neb. 234, 175 N.W.2d 1 (1970), held that a judge who had previously prosecuted the defendant but had no recollection of either the defendant or his past record properly refused to disqualify himself. In ruling on the disqualification motion in this case, Judge Empson noted that he neither recognized Bird Head nor recalled very much about the old prosecutions of Bird Head and his brothers. Moreover, *State v. Davis, supra*, held that a judge was not disqualified because, as a prosecuting attorney, he indicated his intention to prosecute the defendant to the maximum extent for any future crime. We recognize that Judge Empson's expressed intention of imposing a maximum sentence each time he encountered Vernon Bird Head was made as a judge and that such circumstance distinguishes the "turn you into a frog" speech from that involved in *State v. Davis, supra*. The overriding fact, however, is that whatever the speech may portend for Vernon Bird Head, it was not directed at Bird Head himself. We have also held that a judge was not disqualified because he had earlier presided over another case involving one of the parties. *Liberty Finance Corp. v. Jones*, 184 Neb. 529, 169 N.W.2d 289 (1969). Judge Empson was not disqualified as a matter of law because he had previously encountered Bird Head or his brothers as a prosecutor and judge or because of anything he had said to Bird Head's brother Vernon.

Bird Head further argues, however, that the following statement made by Judge Empson in overruling the disqualification motion shows that he considered himself biased against Bird Head:

> Well, knowing that I have done a number of silly things, and I will continue to do them, I am still smart enough to see what is in the wind here. I have read all these Motions, and I have listened to all the arguments of Counsel through all of these proceedings, and I have read the file, and I know that it is possible there may come a day when I may have to decide how to sentence Mr. Bird Head on a conviction of First Degree Murder. Because of that the temptation is very strong to grant this Motion, because you can't want to have to do that, there are a whole lot more pleasant things that I could be doing with my time.

> And if I were in a court that had a number of other judges available, Lincoln or Omaha, or even a court that had another judge available on whom I could impose I would grant this Motion just out of hand. But we're in a different situation here. For the right of the Plaintiff to have a fair and speedy trial and the right of the Defendant to have a fair and speedy trial by a judge that is able to devote his time and attention to the case, then it is not so easy.

On the contrary, stripped to its essence the foregoing comment, although perhaps best left unexpressed, says only that while Judge Empson would prefer to do other things, he would nonetheless do his duty. The record fails to establish that Judge Empson's roles as the trial judge and as a member of the sentencing panel deprived Bird Head of any constitutional right or otherwise denied him a fair trial. Accordingly, there was no error in the trial judge's refusal to disqualify himself.

(2) Venue

In arguing the second issue, that the trial judge erred in failing to grant a change of venue, Bird Head relies on evidence showing that the murder was given wide media coverage in the surrounding area and on an unscientific poll purporting to show that of the 45 persons questioned in the city of the trial, virtually everyone had heard about the killing and more than half had formed an opinion as to Bird Head's guilt. That evidence falls far short of establishing, as Bird Head claims, that he was unconstitutionally deprived of a trial by an impartial jury.

We recently reaffirmed the rule that under the provisions of Neb. Rev. Stat. § 29-1301.01 (Reissue 1985), a motion for a change of venue is addressed to the sound discretion of the trial judge and that the trial judge's ruling will not be disturbed absent a clear abuse of that discretion. The factors to be evaluated in determining whether a change of venue is required because of pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in selection of the

jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn. *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986).

The record in this case establishes that of the 68 venirepersons subjected to voir dire examination, the vast majority had heard of the case and many had views concerning Bird Head's guilt. The important fact, however, is that of those who had formed such views, only two said, in effect, that they could not put those views aside and decide the case on the basis of the evidence. Each of these two venirepersons was excused for cause.

The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court. *State v. Kern, supra; Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). The foregoing rule implements that portion of Neb. Rev. Stat. § 25-1636 (Reissue 1985) which reads:

> It shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of a crime with which a prisoner is charged, if such juror shall state on oath that it is the belief of said person that he or she can render an impartial verdict according to the law and the evidence; and the court shall be satisfied as to the truth of such statement . . . .

The cases relied upon by Bird Head from other jurisdictions which hold a change of venue should have been granted are inapposite. In *Fisher v. State*, 481 So. 2d 203 (Miss. 1985), the media coverage was far more extensive than that in this case and was inflammatory to the point it included a pretrial editorial pronouncement of Fisher's guilt. In *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985), the media coverage was not only both extensive and inflammatory, but the jury selected included persons who had known the victims and had attended their funeral. One of the jurors had known the victims for a period of 8 years and had worked with two of them.

Relying on *Fisher v. State, supra*, which stated that a motion for change of venue should be ruled upon before prospective

jurors are summoned, Bird Head further argues that it was improper for the trial judge to delay ruling on the change of venue motion until after the jury was selected. On the contrary, since the care exercised and the ease encountered in the selection of the jury and the number of challenges exercised during the voir dire are factors to be considered under Nebraska law in determining whether the venue should be changed, waiting until those factors can be experienced is entirely appropriate. See *State v. Kern, supra*. Indeed, the record establishes that notwithstanding the fact the trial judge was generous in excusing venirepersons from jury service, a jury was nonetheless selected with ease. There was no error in refusing a change of venue.

(3) "Death Qualification" of Jury

The third issue is whether it was error to excuse from jury service certain venirepersons because of their opposition to the death penalty. In essence, Bird Head argues that since the jurors do not impose the sentence, their views concerning the death penalty are immaterial, and to excuse from jury service those who are opposed to capital punishment unconstitutionally deprives him of a fair trial by subjecting him to a conviction-prone jury.

Neb. Rev. Stat. § 29-2006(3) (Reissue 1985) provides that it is good cause to challenge one called for jury service in a capital case if his or her opinions are such as to prevent "finding the accused guilty . . . ."

We have recently reviewed the applicable law in *State v. El-Tabech, ante* p. 395, 405 N.W.2d 585 (1987), and *State v. Burchett,* 224 Neb. 444, 399 N.W.2d 258 (1986), and reaffirmed the rule that a venireperson whose views on capital punishment are such as to prevent or substantially impair the performance of his or her duties as a juror may be constitutionally excused from jury service in a capital case. *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986); *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). No useful purpose would be served by reiterating the analyses which lead to this conclusion.

The record in this case reveals that of the venirepersons

subjected to voir dire examination, three were excused for cause because each said, in one way or another, that his or her views concerning the death penalty rendered it impossible to find Bird Head guilty. Those holding such views cannot perform their duties as jurors, and they were therefore properly excused from jury service in this case.

(4) Sufficiency of Evidence

In arguing the fourth issue Bird Head claims the evidence is insufficient to support the findings of guilt. That the evidence is circumstantial does not mean the State failed to prove its charges, for one may be convicted of a crime on the basis of such evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. *State v. El-Tabech, supra.* Moreover, it is not our function to weigh the evidence; a verdict of guilt must be affirmed if the evidence, viewed and construed most favorably to the State, sufficiently supports some rational theory of guilt. *State v. Walker, ante* p. 794, 408 N.W. 294 (1987).

The evidence overwhelmingly places Bird Head at the scene of the crimes. Among the more significant circumstances were the presence on Bird Head's clothing of bloodspots made by the same type of blood as that of the victim, the presence in Bird Head's pockets of cheese of the same type as that kept by Mrs. Lynch, the possession by Bird Head of a key fitting the victim's garage, the presence in the victim's house of a nosepiece from glasses found in Bird Head's possession, the presence of hairs similar to Bird Head's in the victim's home, the presence in the victim's body and in her home of a substance secreted by those of Bird Head's blood type, and Bird Head's presence near the victim's house on the day of the murder. Any one of the foregoing circumstances, standing alone, might be argued to be mere coincidence, but all of them together more than support beyond a reasonable doubt the conclusion that Bird Head was at the victim's house. Of course, that alone is not enough to prove Bird Head is guilty of any crime whatsoever. There is, however, much more.

(a) Robbery

When Bird Head was arrested, he was driving Mrs. Lynch's automobile. Her clutch purse was found on the floor of the

automobile. No money was found in it except for the $2 bill tucked into a pocket. Although earlier in the day Bird Head had been trying to raise money, upon his arrest he was found to have in his possession bills of a denomination likely obtained earlier in the day by the victim. Further, the clutch purse found in the automobile is of a type usually kept in a handbag and not carried separately; a circumstance which supports an inference that it was taken from the bloodstained brown handbag found on the buffet in Mrs. Lynch's home. The evidence unequivocally establishes that Mrs. Lynch was the victim of violence.

Neb. Rev. Stat. § 28-324 (Reissue 1985) provides that one commits robbery "if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever."

In *State v. Welchel*, 207 Neb. 337, 342-43, 299 N.W.2d 155, 159 (1980), this court stated:

> "The essence of [§ 28-324] is that the money or property must be in the possession or under the control of the victim and that violence or putting in fear was the means used by the robber to take it." As interpreted by this court, it is not necessary that the property be taken from the "person." It is sufficient if it is taken from the individual's personal presence, protection, or control. [Citation omitted.] . . .
>
> . . . "An essential element of the crime of robbery is that the theft be accomplished by the use of force, violence, or intimidation. [Citation omitted.] Force relied upon must be sufficient to effect a transfer of the property from the victim to the robber and if it is sufficient to overcome resistance, the degree is immaterial."

The evidence more than sufficiently fulfills the requirements of § 28-324 and supports beyond a reasonable doubt the conclusion that Bird Head robbed Mrs. Lynch.

(b) Sexual Assault

Neb. Rev. Stat. § 28-319(1) (Reissue 1985) provides in relevant part: "Any person who subjects another person to sexual penetration and (a) overcomes the victim by force . . . is guilty of sexual assault in the first degree."

The element of force, coupled with the presence of the

vaginal tear, the presence of a substance secreted by those having Bird Head's blood type in the victim's vaginal tract, and the pathologist's opinion that the victim was penetrated, more than adequately support beyond a reasonable doubt the conclusion that Bird Head was guilty of first degree sexual assault.

(c) Murder

Neb. Rev. Stat. § 28-303(2) (Reissue 1985) provides that a person commits murder in the first degree if he or she kills another person "in the perpetration of or attempt to perpetrate any sexual assault in the first degree . . . [or] robbery . . . ."

Establishing the robbery and the first degree sexual assault inevitably leads to the conclusion that the evidence more than adequately supports beyond a reasonable doubt that Bird Head killed Mrs. Lynch while in the perpetration of a robbery and a first degree sexual assault, and thus murdered her in violation of § 28-303(2).

(5) Aggravating Circumstances

A sentencing panel, consisting of the judge who presided over the trial and two others, was convened, pursuant to the provisions of Neb. Rev. Stat. § 29-2520 (Reissue 1985), to determine the penalty to be exacted for the murder.

In fulfilling its responsibilities in that regard, the panel undertook a consideration, among other things, of whether sufficient aggravating circumstances existed to justify the imposition of a sentence of death. Neb. Rev. Stat. § 29-2522 (Reissue 1985).

Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1985) specifies it is an aggravating circumstance that an "offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity . . . ."

In an effort to prove the existence of that aggravating circumstance, the State offered, and the court received over Bird Head's objection, those portions of the presentence report which reveal that prior to the crimes which are the subject of this appeal, Bird Head was convicted on two charges of assault in 1981 and of an attempted second degree assault in 1982. According to the report, Bird Head was sentenced to 1 year's

imprisonment at the Nebraska Penal and Correctional Complex on each of the aforesaid convictions. Reasoning that "the use or threat of violence to the person" was "[i]mplicit in [each of] those crimes," the sentencing panel unanimously found the existence of aggravating circumstance (1)(a).

Bird Head bases his contention on the fact the record does not show that he waived or had counsel on the occasions of the questioned convictions. He therefore urges that the receipt into evidence of those portions of the presentence report and the sentencing panel's reliance upon them violated his rights under the 6th and 14th amendments to the U.S. Constitution. We, however, need not, and therefore do not, reach this constitutional question because, in any event, there exists an error in the sentencing panel's determination that beyond a reasonable doubt aggravating circumstance (1)(a) exists. That circumstance requires that we set aside and vacate the finding in that regard and remand the matter for further proceedings and resentencing on the murder conviction.

The State elected not to adduce any evidence concerning the factual circumstances surrounding the assaults in question. We agree with the sentencing panel's conclusion that there are two aspects to aggravating circumstance (1)(a), one of which may be proved by establishing prior convictions for "another murder or crime involving the use or threat of violence to the person" and the other of which may be proved by showing that the offender "has a substantial history of serious assaultive or terrorizing criminal activity," irrespective of whether the offender was convicted for the conduct creating the history. We do not agree, however, that every assault conviction necessarily involves the type of "use or threat of violence to the person" contemplated by the first aspect of the aggravating circumstance. Given the fact the first aspect concerns itself with "murder" or another crime "involving the use or threat of violence to the person," we must conclude that the crime, other than murder, must be of a serious nature akin to the type of substantial history specified in the second aspect of the aggravating circumstance, that is, a crime which can be characterized as being "serious assaultive or terrorizing criminal activity."

Our statutes define three degrees of assault and range in seriousness from intentionally or knowingly causing another serious bodily injury to merely threatening one in a menacing manner. Neb. Rev. Stat. §§ 28-308, 28-309, and 28-310 (Reissue 1985). *In re Interest of Siebert*, 223 Neb. 454, 390 N.W.2d 522 (1986), for example, upheld an assault conviction where no blow was struck but a threat to injure was accompanied by simulated karatelike motions. While, to be sure, such behavior is not to be commended, it does not rise to the level of misconduct which should bear upon whether one's life is to be forfeited for a subsequent unrelated murder.

We therefore hold that, as a matter of law, merely showing that Bird Head had been convicted of two assaults of unknown degree and an attempted second degree assault without showing the factual circumstances surrounding those convictions does not establish the existence of aggravating circumstance (1)(a) beyond a reasonable doubt.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V. VERNON G. RICHTER, APPELLANT.
408 N.W.2d 717

Filed July 2, 1987. No. 86-420.

1. **Criminal Law: Right to Counsel: Appeal and Error.** A trial court's determination of a defendant's indigency, requiring court-appointed counsel for a defendant in a criminal case, will be upheld on appeal, unless the trial court has abused its discretion in such determination.
2. **Criminal Law: Right to Counsel.** Under Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), to determine whether a defendant in a criminal case is indigent, requiring court-appointed counsel, a court must consider various 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.
3. _____: _____. While a situation where expenses exceed income, considered by

itself, may or may not constitute indigency of a defendant in a criminal case, an unintended absence of income and lack of property may be considered in determining whether a defendant is an indigent entitled to court-appointed counsel.

4. **Trial: Appeal and Error.** A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded with direction.

Charles F. Fitzke, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

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

SHANAHAN, J.

Vernon G. Richter appeals the judgment of the district court for Scotts Bluff County, which affirmed the county court's judgment that Richter was not an indigent entitled to court-appointed counsel. We reverse and remand for a new trial.

As a result of his December 18, 1984, conviction for third offense drunk driving, prosecuted under a municipal ordinance of Scottsbluff, Nebraska, in a trial without defense counsel, Richter was sentenced to incarceration in the county jail for 6 months, ordered to pay court costs and a fine of $500, and had his motor vehicle operator's license permanently suspended. The factual basis for Richter's conviction is unimportant in the present appeal, but may be found in *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985), where Richter successfully contended that the county court had failed to conduct an adequate inquiry into Richter's claimed indigency, which, if existent, would have entitled Richter to court-appointed counsel for the 1984 trial. See Neb. Rev. Stat. § 29-1804.03(3) (Reissue 1985) (appointment of public defender to represent an indigent). Recognizing that conviction for the offense charged

against Richter was punishable by imprisonment and, therefore, a charge or offense requiring court-appointed counsel for an indigent, we stated in *State v. Richter, supra*:

> Neb. Rev. Stat. § 29-1804.05 (Cum. Supp. 1984) [now Reissue 1985] 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) [now Reissue 1985] 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. . . ."
>
> . . . .
>
> 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." . . . 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.

221 Neb. at 491-93, 378 N.W.2d at 179-80.

In *State v. Richter, supra*, after recognizing the foregoing factors bearing upon a question of a defendant's indigency, we

concluded:

> 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.

Id. at 493-94, 378 N.W.2d at 180.

On remand in response to our mandate, the county court conducted a hearing to determine whether Richter was indigent at the time of trial on December 18, 1984.

Richter, who is 39 years old and has an 11th-grade education, had lost his right leg while serving in Vietnam, received the Purple Heart, and was honorably discharged in 1969. Richter was unemployed and, as a result of his service-related disability, had been unable to maintain employment. In 1982 Richter worked as a bouncer at the Stable Club in Scottsbluff at $100 per month, but his employment at the club ended when the club went out of business. Richter's wife and two children were living with him in a rented house. Richter's older child was approximately 2 years of age and the younger child was approximately 3 months old when Richter was tried in 1984.

Richter's only sources of income were disability compensation benefits from the Veterans' Administration and social security benefits. Richter had none of the following: checking or savings account, investments, life insurance, ownership of real estate, or substantial personal property other than a 1975 Ford LTD automobile and nominal household furniture.

In addition to his normal living expenses, Richter had debts totaling at least $6,350—$2,000 unpaid on a bank loan for purchase of his car, $3,500 unpaid on a personal loan, and a $850 debt for purchase of carpeting for his home. Richter was making payments of $500 a month to repay the personal loan and had agreed to pay the bank $500 a month on the car loan, although he was unable to make such car payments. In August of 1984, Richter filed for bankruptcy in view of his

indebtedness, which ranged somewhere between $25,000 and $30,000. While the precise nature and ultimate disposition of Richter's bankruptcy proceedings are undisclosed in the record presented, existence of the bankruptcy proceedings is undisputed. Although Richter was uncertain about the amount, there were unpaid hospital bills as the result of his son's birth in September 1984. Attorneys in the Scottsbluff area required a fee ranging from $2,500 to $4,000 to represent Richter on the third offense drunk driving charge and demanded a $1,000 retainer for the 1984 trial.

Richter's monthly income and expenses for December 1984 are summarized as follows:

Income	
VA disability benefits	$1,568
Social security	342
Total monthly income	$1,910
Expenses	
Electric bill	$ 47
Gas bill	116
Rent for house	350
Food	350
Baby needs	143
Gasoline for car	130
Car loan payment	500
Personal loan payment	500
Total monthly expenses	$2,136
Net monthly income (loss)	($ 226).

Without explanation in the record, the county court found that Richter was not indigent when Richter requested court-appointed counsel for his trial in 1984, and ordered him to commence serving the 6-month sentence imposed in 1984. On appeal to the district court, Richter's sentence and conviction were affirmed.

Richter claims the county court abused its discretion in finding that Richter was not indigent.

A trial court's determination of a defendant's indigency, requiring court-appointed counsel for a defendant in a criminal case, will be upheld on appeal, unless the trial court has abused its discretion in such determination. *State v. Lafler*, 224 Neb.

613, 399 N.W.2d 808 (1987).

While a situation where expenses exceed income, considered by itself, may or may not constitute indigency of a defendant in a criminal case, an unintended absence of income and lack of property may be considered in determining whether a defendant is an indigent entitled to court-appointed counsel. In Richter's case, we are not oblivious to, and cannot disregard, Richter's bankruptcy proceedings, his service-related disability affecting earning capacity, and unavailability of retained counsel in view of the attorney fee and retainer demanded for representation of Richter. Richter's family situation needs no further elaboration as factors bearing upon the question of indigency in the present appeal. Based upon the foregoing circumstances, as well as the factors enunciated in *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985), which were mandated in *State v. Lafler, supra*, the record demonstrates that Richter was indigent at the time of his trial in 1984. Whether Richter may have been imprudent in his fiscal management is irrelevant to the determination of indigency in this case.

> " 'A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.' "

State v. Vrtiska, ante p. 454, 465, 406 N.W.2d 114, 122 (1987). See, also, *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986); *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986).

If an adequate and properly presented defense to a charge may result in acquittal or exoneration from imprisonment after a defendant's conviction, representation by counsel is a rather substantial right of an accused. Without the benefit of counsel in such a serious situation as confronted Richter, including prospective incarceration, it is difficult, if not impossible, to conclude that a just result was obtained in Richter's 1984 trial and disposition of the charge against him. Consequently, we find there has been an abuse of discretion regarding

determination of Richter's indigency and his request for court-appointed counsel. In accordance with our mandate in *State v. Richter, supra*, Richter shall have a new trial, inasmuch as counsel should have been appointed to represent Richter at his trial in 1984.

Although Richter has raised other issues in his appeal, we need not decide those questions for, in the light of our decision today, such questions raised by Richter will likely not recur at retrial with counsel.

The judgment of the district court is reversed, and this matter is remanded to the district court with direction to set aside Richter's conviction and order a new trial for Richter in the county court.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. RICHARD DEAN JACKSON, APPELLANT.

408 N.W.2d 720

Filed July 2, 1987. No. 86-667.

1. **Criminal Attempt: Convictions.** To sustain a conviction for the offense of criminal attempt in violation of Neb. Rev. Stat. § 28-201(1)(a) or (b) (Reissue 1985), evidence must establish beyond a reasonable doubt that the defendant intentionally engaged in conduct which (1) would constitute a particular crime, if the attendant circumstances were as the defendant believes such circumstances to be, or (2) under the circumstances as the defendant believes such circumstances to be, constitutes a substantial step in a course of conduct intended to culminate in the defendant's commission of the crime.
2. **Criminal Attempt: Trial.** Whether a defendant's conduct constituted a substantial step toward commission of a particular crime is, generally, a question for the trier of fact.
3. **Criminal Attempt: Sexual Assault.** To commit the crime of attempted sexual assault in any degree, actual sexual penetration or sexual contact between the victim and the defendant is not required.
4. **Sexual Assault: Lesser-Included Offenses: Jury Instructions.** In a prosecution for sexual assault in the first degree, Neb. Rev. Stat. § 28-319 (Reissue 1985),

where there is a factual dispute concerning an element of first degree sexual assault, but there is evidence which reasonably may establish a sexual assault in a degree less than first, a defendant is entitled to an instruction on the lesser degree of sexual assault as a lesser-included offense concerning the charge of sexual assault in the first degree.

5. **Criminal Attempt: Sexual Assault: Lesser-Included Offenses.** In the offense of a criminal attempt, Neb. Rev. Stat. § 28-201 (Reissue 1985), a substantial step in a course of conduct intended to culminate in a sexual assault in the first degree (sexual penetration) may include a substantial step in a course of conduct intended to culminate in achievement of sexual contact as well, that is, commission of a sexual assault in the second degree.
6. **Criminal Attempt: Lesser-Included Offenses.** Within the offense of "criminal attempt," Neb. Rev. Stat. § 28-201 (Reissue 1985), an attempt to commit a particular crime may also include an attempt to commit a lesser-included offense in reference to the designated crime alleged to have been attempted.
7. **Indictments and Informations.** The purpose of an information, Neb. Rev. Stat. § 29-1602 (Reissue 1985), is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.
8. **Indictments and Informations: Witnesses.** Endorsement of witnesses' names on the information is required to provide a defendant with the identity of persons who may testify against the defendant and to afford the defendant an opportunity to investigate concerning such witnesses, if necessary to prepare a defense at trial.
9. **Habitual Criminals: Sentences.** The habitual criminal penalty is not a separate criminal offense, but is an enhanced penalty permissible to punish repetitive criminal conduct after a defendant's conviction on a principal charge and a subsequent finding of the defendant's habitual criminal status.
10. **Sentences.** In a sentence hearing, a court, generally, has broad discretion concerning the source of information and the type of information to be considered.
11. **Constitutional Law: Habitual Criminals.** Regarding a hearing to determine whether a convicted defendant is a habitual criminal as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1985), the defendant is entitled to be present with counsel, have an opportunity to be heard at such hearing, be confronted with witnesses against the defendant, exercise the right of cross-examination, and offer evidence.
12. **Indictments and Informations: Habitual Criminals: Witnesses.** While Neb. Rev. Stat. § 29-2221(2) (Reissue 1985) requires that an information contain allegations of facts concerning a defendant's status as a habitual criminal, names of witnesses who may testify at the enhancement hearing are not required to be endorsed on the information charging the defendant with the crime for which a conviction will be the basis to impose the habitual criminal penalty.
13. **Habitual Criminals: Sentences: Appeal and Error.** In the absence of a sentencing court's abuse of discretion, the sentencing court's procedure utilized for

presentation of information at a hearing for imposition of the habitual criminal penalty prescribed by Neb. Rev. Stat. § 29-2221 (Reissue 1985) will be sustained on appeal.

14. **Habitual Criminals: Records: Names.** Under Neb. Rev. Stat. § 29-2222 (Reissue 1985), an authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.

15. **Habitual Criminals: Sentences: Time.** It is the term of a defendant's prior sentences, not time actually served, which controls applicability of the habitual criminal penalty found in Neb. Rev. Stat. § 29-2221 (Reissue 1985).

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

Charles D. Hahn, for appellant.

Robert M. Spire, Attorney General, and Lisa D. Martin-Price, for appellee.

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

SHANAHAN, J.

As the result of a jury trial in the district court for Richardson County, Richard Dean Jackson was found guilty of attempted second degree sexual assault, was later determined to be a habitual criminal, and, thereafter, was sentenced to imprisonment in the Nebraska Penal and Correctional Complex for a term of 20 to 60 years. We affirm.

BASIS OF CRIMINAL CHARGE

The victim, 59 years old and characterized at trial as "slow or semi-retarded," had grown up in the Beatrice State Home. On the evening in question, Jackson called upon the victim, and, seated in the living room of the victim's apartment, the pair watched television. Throughout the course of viewing television, Jackson frequently left the living room to use the bathroom in the victim's apartment. After his last trip to the bathroom, Jackson, stark naked, returned to the living room and asked the victim whether he "could have a little." The victim, realizing Jackson was requesting sexual intercourse, declined and told Jackson to put on his clothes and "get out" of

the victim's apartment. Jackson repeated his request "for a little," and, again, the victim refused. At that point, Jackson, still naked, approached the victim, seated on the couch, and asked to touch her breasts. Jackson sat down next to the victim, but was unable to touch the victim's breasts, genital area, or any other intimate area of the victim's body because the victim was "fighting him." Sometime during the struggle with the victim, Jackson ejaculated on the victim's pant leg. When the victim started screaming, escaped from Jackson's grasp, and ran to the front door of her apartment, nude Jackson followed the frightened victim, put his hand over her mouth, and said: "Shut up, or I'll kill you." With his hand covering the victim's mouth and her arm pulled behind the victim's back, Jackson dragged the victim back to the couch. After the victim had quieted, Jackson "apologized," put on his clothes, and left the apartment.

THE INFORMATION

The State's information charged Jackson with an attempt, see Neb. Rev. Stat. § 28-201 (Reissue 1985) (criminal attempt), to commit sexual assault in the first degree, see Neb. Rev. Stat. § 28-319(1) (Reissue 1985). The information also contained an allegation that Jackson was a habitual criminal according to the provisions of Neb. Rev. Stat. § 29-2221 (Reissue 1985) ("habitual criminal"; defined). Attempted first degree sexual assault is a Class III felony, punishable by imprisonment of 1 to 20 years, a fine of $25,000, or both such imprisonment and fine. See, §§ 28-201(4)(b) and 28-319(2).

JACKSON'S EVIDENCE AT TRIAL

Jackson, 30 years of age at the time of trial, testified and, on direct examination, acknowledged that he was "Ricky Dean Jackson" and had been previously convicted of three felonies. Jackson further testified that he was naked when he approached the victim in her apartment and asked for sex with her. Jackson, however, denied that he, by use of force, attempted to have sex with the victim and, further, denied that he attempted to touch the victim's genital area or other "intimate parts" of the victim's body or attempted in any manner to "penetrate" the victim's body. Jackson also testified that he "might have" ejaculated on the victim's pant leg. (Other

evidence substantiated that Jackson had, in fact, ejaculated on the victim's pant leg.) While admitting that he had grabbed the victim, covered her mouth, and dragged the frightened victim to the couch, Jackson also acknowledged that it was "possible" that he told the victim to "Shut up, or I'll kill you."

INSTRUCTIONS

Jackson requested, and the court gave, instructions allowing the jury to find Jackson guilty of attempted sexual assault in the first, second, or third degree, or to find Jackson not guilty. The jury found Jackson guilty of attempted sexual assault in the second degree. The court entered judgment on the verdict and ordered a hearing to determine whether Jackson was a habitual criminal and punishable by an enhanced penalty as a habitual criminal.

ENHANCEMENT PROCEEDINGS

As background for the enhancement hearing, all pleadings and filings in the proceedings against Jackson were captioned, "State of Nebraska, Plaintiff, vs. Richard Dean Jackson, Defendant." Jackson did not file a plea in abatement that proceedings were brought against him in a name other than his true name. See Neb. Rev. Stat. § 29-1813 (Reissue 1985) (misnomer; plea in abatement). In response to the county attorney's foundational questions during Jackson's trial, the victim, when asked whether "Ricky Jackson" was in court, pointed to the counsel table, whereupon the record reflected that the victim had "identified the defendant." Jackson, while testifying on direct examination, identified himself as "Ricky Dean Jackson." The verdict bore the same caption as all other filings in the proceedings against Jackson. After the verdict was returned and filed, the court, at entry of judgment in the presence of Jackson, stated: "And the Court, in accordance with the jury's verdict, finds and adjudges the defendant, Richard Dean Jackson, guilty of [attempted] sexual assault in the second degree." At commencement of the enhancement hearing for application of the habitual criminal penalty, the court directed: "The record should reflect that the defendant is present in court, Richard Dean Jackson, with his attorney . . . ."

At the enhancement hearing, the State introduced authenticated copies of the records concerning Jackson's

convictions in 1974, 1975, and 1979, as well as commitments to prison for not less than 1 year as a result of each of those convictions.

Regarding Jackson's conviction in 1974, the mittimus recited that "*Rickard* D. Jackson" (emphasis supplied) was found guilty of forgery and was sentenced to 1 year in the Nebraska Penal and Correctional Complex, with credit given for 2 days in custody while awaiting trial. The sheriff's certificate and return on the mittimus and the receipt by the warden at the Nebraska Penal and Correctional Complex reflect that on October 2, 1974, "*Richard* D. Jackson" (emphasis supplied) was delivered into custody at the penal complex.

The mittimus for Jackson's 1975 conviction reflected that the initial information, charging "Ricky D. Jackson" with three counts of sexual assault in the second degree, was amended to a single count of sexual assault in the second degree, on which "Ricky D. Jackson" was convicted and sentenced to 1 year in the Nebraska Penal and Correctional Complex, with credit given for 102 days in "jail confinement." On the mittimus, the sheriff's certificate and return, as well as the warden's receipt, recited that Ricky D. Jackson was delivered to the Nebraska Penal and Correctional Complex on February 10, 1976.

The mittimus for Jackson's third prior conviction related to the offense of sexual assault in the first degree. Although Jackson was initially convicted in 1977 and an examination was ordered to determine whether Jackson was a mentally disordered sex offender, see Neb. Rev. Stat. §§ 29-2911 et seq. (Reissue 1985), on Jackson's motion, his 1977 conviction was set aside by the trial court. On retrial in 1979, Jackson was convicted of sexual assault in the first degree. According to the mittimus for that conviction, "Ricky Jackson" was sentenced to not less than 8 years and 4 months nor more than 15 years in the Nebraska Penal and Correctional Complex with credit for "2 years presentence jail time." The return and receipt on the mittimus state that "Ricky Jackson" was delivered into the custody of the Department of Correctional Services of the State of Nebraska on August 8, 1979.

After the State had offered the foregoing documentary evidence concerning Jackson's prior convictions, Jackson

objected, claiming that the State had failed to establish that the "Richard Dean Jackson" named in the information and found guilty by the Richardson County jury was the same person designated in the records for the convictions in 1974, 1975, and 1979. When Jackson moved to dismiss the enhancement proceedings, the court adjourned the enhancement proceedings for a week. On resumption of the enhancement hearing, and over Jackson's objection, the State called witnesses whose names were not endorsed on the information filed against Jackson. One such witness was a fingerprint examiner for the Nebraska State Patrol, who testified that the fingerprints for "Richard Dean Jackson" were identical to the fingerprints for "Ricky D. Jackson," convicted in 1975, and "Ricky Jackson," convicted in 1979. The State also called three officers of the Lincoln Police Department, who were the arresting officers concerning crimes charged against Jackson in 1975 and 1979. Each of the officers identified Jackson as the person whom he had arrested and who was convicted as shown by the court records offered at the enhancement hearing.

The court found Jackson to be the same person who had been convicted as reflected in the documentary evidence presented by the State and determined that Jackson was a habitual criminal within the meaning of § 29-2221(1). After reviewing evaluative reports rendered pursuant to the court's ordered examination to ascertain whether Jackson was a mentally disordered sex offender, the court determined that Jackson was a mentally disordered sex offender whose disorder is nontreatable, see § 29-2914, and sentenced Jackson as a habitual criminal, that is, to imprisonment for a term not less than 20 years nor more than 60 years in the Nebraska Penal and Correctional Complex, as authorized by § 29-2221(1).

ASSIGNMENTS OF ERROR

In his appeal, Jackson assigns the following errors: (1) Evidence is insufficient to sustain his conviction, which is contrary to law; (2) the trial court committed reversible error by allowing witnesses whose names were not endorsed on the information to testify at the enhancement hearing; (3) the trial court erred in finding that Jackson is a habitual criminal; (4) the trial court committed error in its instruction on a lesser offense

concerning the crime charged; and (5) the sentence imposed is excessive.

STATUTES

Criminal Attempt

Section 28-201 provides in part:

> (1) A person shall be guilty of an attempt to commit a crime if he:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.
>
> (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
>
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

Sexual Assault: Degrees

Section 28-319 provides in part:

> (1) Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception, (b) knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct . . . is guilty of sexual assault in the first degree.
>
> (2) Sexual assault in the first degree is a Class II felony.

Neb. Rev. Stat. § 28-320 (Reissue 1985) provides in part:

> (1) Any person who subjects another person to sexual contact and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception, or (b) knew or should have known that the victim was physically

or mentally incapable of resisting or appraising the nature of his or her conduct is guilty of sexual assault in either the second degree or third degree.

(2) Sexual assault shall be in the second degree . . . if the actor shall have caused serious personal injury to the victim.

Statutory Definitions

As a definitional statute pertaining to sexual assaults, Neb. Rev. Stat. § 28-318 (Reissue 1985) provides in part:

(4) Serious personal injury shall mean great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ;

(5) Sexual contact shall mean the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party;

(6) Sexual penetration shall mean sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen . . . .

Jackson contends his conviction must be set aside because the evidence does not support the jury's findings concerning the elements of attempted sexual assault in the second degree (§ 28-320(1) and (2)). Jackson argues there is no evidence that he made any effort to contact the sexual or intimate areas of his victim's body. Also, according to Jackson, the only force used was an effort to quiet the victim and not a means to achieve any

sexual act or contact with the victim. Therefore, Jackson argues, there is the absence of force necessary to sustain a conviction for sexual assault in the second degree (§ 28-320(1)(a)) and the absence of serious personal injury sustained by his victim, which injury is an element required in the offense of sexual assault in the second degree (§ 28-320(2)). Jackson further argues that the evidence fails to establish that his victim was physically or mentally incapable of resisting or appraising the nature of Jackson's conduct toward the victim (§ 28-320(1)(b)).

To sustain a conviction for the offense of criminal attempt in violation of § 28-201(1)(a) or (b), evidence must establish beyond a reasonable doubt that the defendant intentionally engaged in conduct which (1) would constitute a particular crime, if the attendant circumstances were as the defendant believes such circumstances to be, or (2) under the circumstances as the defendant believes such circumstances to be, constitutes a substantial step in a course of conduct intended to culminate in the defendant's commission of the crime. See, *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986); *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985); *State v. Sodders*, 208 Neb. 504, 304 N.W.2d 62 (1981).

Whether a defendant's conduct constituted a substantial step toward commission of a particular crime is, generally, a question for the trier of fact. *State v. Sodders, supra.*

To commit the crime of attempted sexual assault in any degree, actual sexual penetration or sexual contact between the victim and the defendant is not required. *State v. Swoopes, supra.*

Before we consider whether the evidence is sufficient to sustain Jackson's conviction, we must dispose of an issue implicit in Jackson's claim that his conviction is "contrary to law." The information charged Jackson with attempted sexual assault in the first degree. The court instructed not only on the offense of attempted sexual assault in the first degree but, also, at Jackson's request, instructed on the offenses of attempted sexual assault in the second and third degrees.

In reference to the question whether attempted sexual assault in the second degree is a lesser-included offense regarding the

crime or offense of attempted sexual assault in the first degree, we note our opinion in *State v. Swoopes, supra*, which recited background for a charge of Swoopes' attempted sexual assault in the first degree. In *Swoopes*, the defendant, wielding a knife, "fondled" his female victim's breast during a struggle in which the victim sustained a knife laceration, but managed to extricate herself and fled. Although the court instructed the jury on attempted sexual assault in the first degree, Swoopes claimed he was entitled to an instruction on sexual assault in the third degree. See § 28-320(1) and (3). An issue in *State v. Swoopes, supra*, was the relationship between criminal attempt and another crime, insofar as such other crime may be a lesser-included offense concerning the offense of criminal attempt. In *Swoopes*, we stated:

> Because an attempted crime as defined by § 28-201 may be committed without the crime itself being committed, no offense can be a lesser-included offense of an *attempted* crime prosecuted under § 28-201. There are no lesser-included offenses to § 28-201, and the district court was correct in refusing to instruct the jury on a lesser-included offense.

(Emphasis in original.) 223 Neb. at 922, 395 N.W.2d at 506.

This court has recognized that in a prosecution for sexual assault in the first degree, where there is a factual dispute concerning an element of first degree sexual assault, but there is evidence which reasonably may establish a sexual assault in a degree less than first, a defendant is entitled to an instruction on the lesser degree of sexual assault as a lesser-included offense concerning the charge of sexual assault in the first degree.

For instance, in *State v. Tamburano*, 201 Neb. 703, 705-07, 271 N.W.2d 472, 474-75 (1978), this court stated:

> All parties concede that the offense of sexual assault, second degree, is a lesser-included offense of sexual assault, first degree. . . .
>
> . . . Second degree sexual assault requires only sexual contact as opposed to sexual penetration. . . .
>
> . . . .
>
> . . . "The test which must be applied in determining whether or not to submit a lesser-included offense is

> whether there is evidence which produces a rational basis for a verdict acquitting defendant of the offense charged and convicting him of the lesser offense." [Citing and quoting from *State v. McDonald*, 312 Minn. 320, 251 N.W.2d 705 (1977).] . . . As for the type of evidence which would require the lesser charge . . . "The controverted evidence to dispute the proof of the element separating the crime charged from the lesser offense can be supplied by inference as well as by direct testimony." [Citing and quoting from Barnett, *The Lesser-Included Offense Doctrine*, 5 Conn. L. Rev. 255 (1972).]

Acknowledging that there must be some basis in the evidence to rebut the greater charge as a prerequisite to an instruction on a lesser offense, we then observed in *Tamburano*:

> Evidence which requires the submission of a lesser-included offense is necessarily left to a case-by-case basis. It is sufficient to say that that evidence does not rise to that required level by speculating that an essential element uncontroverted in the evidence may be disbelieved by the jury.

201 Neb. at 708, 271 N.W.2d at 475.

A similar conclusion was reached in *State v. Beasley*, 214 Neb. 918, 336 N.W.2d 601 (1983), where the only evidence established defendant's forcible sexual penetration of his victim, although the defendant denied such penetration and asserted he was not at the victim's home when the sexual assault occurred. Beasley claimed error in the trial court's refusing to instruct on sexual assault in the second and third degrees, but we expressed:

> These lesser offenses do not require penetration as an element of the offense. Rather, only "sexual contact" is required. Neb. Rev. Stat. § 28-320 (Reissue 1979). . . .
>
> . . . .
>
> Here, the evidence did not rise to the level of proof required by *Tamburano*. In that case we held that if, under a "different but reasonable" view, the evidence would be sufficient to establish guilt of the lesser offense and leave a reasonable doubt as to some element included in the greater offense but not the lesser, the jury should be

> instructed on the lesser offense. The defense here was an alibi, and the evidence relied upon by the defendant did not tend to support a view that sexual contact occurred but a reasonable doubt existed as to penetration.

Id. at 922-23, 336 N.W.2d at 604. See, also, *State v. Schwartz*, 219 Neb. 833, 366 N.W.2d 766 (1985) (fact of sexual assault was undisputed, but dispute existed whether the victim had sustained a serious personal injury; held, under the circumstances, sexual assault in the third degree was a lesser-included offense regarding sexual assault in the second degree).

> The test for determining whether a lesser-included offense exists in this jurisdiction is that a lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. *State v. Miller*, 215 Neb. 145, 337 N.W.2d 424 (1983); *State v. Ebert*, 212 Neb. 629, 324 N.W.2d 812 (1982); *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982).

State v. White, 217 Neb. 783, 785, 351 N.W.2d 83, 85 (1984).

Recently, in *State v. Pribil*, 224 Neb. 28, 32, 395 N.W.2d 543, 547 (1986), we noted:

> "When some of the elements of the crime charged in the information, without the addition of any element irrelevant to the original crime charged, *may* constitute another crime or crimes, such other crime or crimes are included within the crime charged." [Emphasis in original.] [Citing and quoting from *State v. McClarity*, 180 Neb. 246, 142 N.W.2d 152 (1966).]

In view of the definitions or characterizations in § 28-318 pertaining to sexual assault, there may be sexual contact without sexual penetration, but, ordinarily, sexual penetration does not exist without some form of sexual contact. Thus, sexual assault in the second degree (sexual contact), under appropriate circumstances, may be a lesser-included offense concerning a charge of sexual assault in the first degree (sexual penetration).

In the present case the question becomes: As a result of the

charge of an attempt to commit a sexual assault in the first degree, may an attempt to commit a sexual assault in the second degree be a lesser-included offense concerning the attempted first degree sexual assault? Under the circumstances, the answer to the immediately preceding question is in the affirmative.

Bearing in mind our previous statements in this opinion concerning criminal sexual assaults, and depending on the context in which an attempted sexual assault occurs, a substantial step in a course of conduct intended to culminate in a sexual assault in the first degree (sexual penetration) may include a substantial step in a course of conduct intended to culminate in achievement of sexual contact as well, that is, commission of a sexual assault in the second degree. Consequently, within the offense of "criminal attempt," § 28-201, an attempt to commit a particular crime may also include an attempt to commit a lesser-included offense in reference to the designated crime alleged to have been attempted. However, in *State v. Swoopes*, 223 Neb. 914, 922, 395 N.W.2d 500, 506 (1986), we stated: "[N]o offense can be a lesser-included offense of an *attempted* crime prosecuted under § 28-201." (Emphasis in original.) To the extent that *State v. Swoopes, supra*, indicates or holds that an attempt to commit a sexual assault in a degree less than first degree cannot be a lesser-included offense in a prosecution for an attempt to commit a sexual assault in the first degree, *Swoopes* is disapproved and overruled.

Thus, the information charging Jackson with attempted sexual assault in the first degree permitted the court to submit to the jury resolution of the charge concerning attempted sexual assault, including the offenses of attempted sexual assault in the first and second degrees, and the verdict, if sustained by sufficient evidence, is not contrary to law.

SUFFICIENCY OF EVIDENCE

In view of the evidence, commonsense dictated that the jury could reasonably infer that Jackson intentionally engaged in conduct which constituted a substantial step toward commission of a sexual assault. Nude Jackson, having ejaculated on his victim, persisted in very forcefully grappling

with his victim, who was threatened with homicide. At this point, no further reiteration of the facts is necessary in considering whether Jackson took a substantial step toward forcible sexual contact with his victim. Although Jackson asserts in his brief at 8 that "[t]he only threat of force . . . was to quiet [his victim] . . . not to have sex with her," tranquility might have been more readily restored if Jackson had simply put on his trousers and, without further adieu, left the apartment.

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

State v. Brown, ante p. 418, 428, 405 N.W.2d 600, 606 (1987). See, also, *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987); *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986).

> On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

State v. Robertson, 223 Neb. 825, 830, 394 N.W.2d 635, 638 (1986). We have also held that "after a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt." *State v. Evans*, 215 Neb. 433, 443, 338 N.W.2d 788, 794 (1983).

The evidence is sufficient to sustain a jury finding that Jackson attempted a forcible sexual assault in the second degree. The sexual contact condemned by § 28-320(1) may exist by force on the victim *or* by the victim's incapability, physically or mentally, in resisting or appraising the nature of the conduct involved in the sexual assault. In view of the alternative violations of § 28-320(1), sufficiency of evidence for Jackson's

conviction of attempted forcible sexual assault in the second degree, § 28-320(1)(a), makes it unnecessary to answer Jackson's argument regarding his victim's physical or mental capability as an element for conviction of attempted sexual assault in violation of § 28-320(1)(b).

ENDORSEMENT OF WITNESSES

Jackson next contends that the State must endorse on the information the name of any witness who will testify at the enhancement hearing to determine applicability of the habitual criminal penalty. Jackson points to § 29-2221(2), which, in part, provides: "Where punishment of an accused as an habitual criminal is sought, the facts with reference thereto must be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted. . . ."

In the information filed against Jackson, there is the allegation that Jackson committed a felony in the State of Nebraska and had "been twice previously convicted of a crime, sentenced and committed to prison, in this state or any other state, or by United States for terms not less than one year each be deemed to be an habitual criminal."

Jackson then refers to Neb. Rev. Stat. § 29-1602 (Reissue 1985), which requires that the prosecuting attorney shall endorse on the information the names of the witnesses known to such prosecutor at the time the information is filed.

As noted in *State v. Golgert*, 223 Neb. 950, 953, 395 N.W.2d 520, 523 (1986), the purpose of an information, § 29-1602, is to " ' "inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense." ' " (Quoting *State v. McGee*, 221 Neb. 557, 378 N.W.2d 674 (1985).)

Endorsement of witnesses' names on the information is required to provide a defendant with the identity of persons who may testify against the defendant and to afford the defendant an opportunity to investigate concerning such witnesses, if necessary to prepare a defense at trial. See, *State v. Ellis*, 223 Neb. 779, 393 N.W.2d 719 (1986); *State v. Keith*, 189

Neb. 536, 203 N.W.2d 500 (1973); *Hallett v. State*, 109 Neb. 311, 190 N.W. 862 (1922); *Ossenkop v. State*, 86 Neb. 539, 126 N.W. 72 (1910).

The habitual criminal penalty, however, is not a separate criminal offense, but is an enhanced penalty permissible to punish repetitive criminal conduct after a defendant's conviction on a principal charge and a subsequent finding of the defendant's habitual criminal status. See, *State v. Luna*, 211 Neb. 630, 319 N.W.2d 737 (1982); *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981); *State v. Sheldon*, 179 Neb. 377, 138 N.W.2d 428 (1965); *Gamron v. Jones*, 148 Neb. 645, 28 N.W.2d 403 (1947); *Rains v. State*, 142 Neb. 284, 5 N.W.2d 887 (1942).

In a sentence hearing, a court, generally, has broad discretion concerning the source of information and the type of information to be considered. See, *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972); *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949); *United States ex rel. Welch v. Lane*, 738 F.2d 863 (7th Cir. 1984). In *State v. Goodpasture*, 215 Neb. 341, 345, 338 N.W.2d 446, 449 (1983), this court expressed that, in gaining information for the purpose of sentencing, a sentencing court " 'may consider reports of probation officers, police reports, affidavits, and other information including his own observations of the defendant. A presentence investigation has nothing to do with the issue of guilt. . . .' " (Citing and quoting from *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969).) See, also, *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986). In addition, the Nebraska Evidence Rules do not apply at a sentence hearing. *State v. Dillon, supra*. See Neb. Evid. R. 1101(4) (Neb. Rev. Stat. § 27-1101(4) (Reissue 1985)). As noted in *State v. Goodpasture, supra* at 345, 338 N.W.2d at 449: " 'The latitude allowed a sentencing judge at a presentence hearing to determine the nature and length of punishment, *other than in recidivist cases*, is almost without limitation as long as it is relevant to the issue.' " (Emphasis supplied.) See, also, *State v. Rose, supra*.

However, as the U.S. Supreme Court expressed in *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393

(1977): "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." In *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967), the U.S. Supreme Court, examining Colorado's Sex Offenders Act, which authorized sentencing a habitual sex offender to an indeterminate sentence from 1 day to life in prison, concluded:

> The case is not unlike those under recidivist statutes where an habitual criminal issue is "a distinct issue" . . . on which a defendant "must receive reasonable notice and an opportunity to be heard." . . . Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own.

386 U.S. at 610. See, also, *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962); *Chandler v. Fretag*, 348 U.S. 3, 75 S. Ct. 1, 99 L. Ed. 4 (1954); *Government of Virgin Islands v. George*, 741 F.2d 643 (3d Cir. 1984); A. Campbell, Law of Sentencing §§ 67, 85 (1978).

Regarding a hearing to determine whether a convicted defendant is a habitual criminal as defined in § 29-2221, we hold that the defendant is entitled to be present with counsel, have an opportunity to be heard at such hearing, be confronted with witnesses against the defendant, exercise the right of cross-examination, and offer evidence. See *Specht v. Patterson, supra*. We further hold that, while § 29-2221(2) requires that an information contain allegations of facts concerning a defendant's status as a habitual criminal, names of witnesses who may testify at the enhancement hearing are not required to be endorsed on the information charging the defendant with the crime for which a conviction will be the basis to impose the habitual criminal penalty. Cf. *State v. Davis*, 199 Neb. 165, 256 N.W.2d 678 (1977) (for imposition of the habitual criminal penalty, the information on which the defendant is prosecuted must allege that the defendant has twice previously been convicted of a crime, sentenced, and committed to prison for a term not less than 1 year for each such previous conviction).

In the absence of a sentencing court's abuse of discretion, the

sentencing court's procedure utilized for presentation of information at a hearing for imposition of the habitual criminal penalty prescribed by § 29-2221 will be sustained on appeal. See *Waite v. State*, 169 Neb. 113, 98 N.W.2d 688 (1959).

In *State v. Davis*, 224 Neb. 518, 521, 398 N.W.2d 729, 731 (1987), we stated:

> "It is well established that the existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities."

(Quoting *State v. Luna*, 211 Neb. 630, 319 N.W.2d 737 (1982).)

> "An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto."

State v. Micek, 193 Neb. 379, 386, 227 N.W.2d 409, 414 (1975) (citing and quoting from *State v. Roan Eagle*, 182 Neb. 535, 156 N.W.2d 131 (1968)). See, also, *State v. Marlenee*, 199 Neb. 543, 259 N.W.2d 923 (1977).

We note that Jackson did not request a continuance after the previously undisclosed witnesses had testified at the enhancement hearing. Jackson does not claim that his cross-examination of any witness at the enhancement hearing was prevented or restricted as a result of the State's nondisclosure of the identity of any witness before such witness testified at the enhancement hearing. Additionally, Jackson does not claim that the State's nondisclosure of witness identification prevented or restricted Jackson from presentation of any evidence bearing upon applicability of the habitual criminal penalty. Further, Jackson acknowledged at trial that his name was Ricky Dean Jackson and that he had three prior felony convictions. Jackson did not deny that he was the same person named in the court records for the felony convictions, judgments, and commitments in 1974, 1975, and 1979. Also,

Jackson did not offer any evidence to contradict that he was the person named in each commitment to prison for a term not less than 1 year, as reflected in the authenticated copies of the judgments and commitments. There was sufficient and appropriate evidence before the trial court to establish Jackson's identity with the person named in the documentary evidence, that is, the duly authenticated copies of the former judgments and commitments from courts in the State of Nebraska. Such authenticated copies presented a prima facie case of such former judgments and commitments. See Neb. Rev. Stat. § 29-2222 (Reissue 1985). In addition, Neb. Rev. Stat. § 29-2308 (Reissue 1985) provides in part: "No judgment shall be set aside, or new trial granted . . . for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

We find no abuse of discretion by the sentencing court, "no substantial miscarriage of justice," and no prejudice to Jackson by the court's allowing witnesses whose names had not been endorsed on the information to testify at the hearing to determine whether Jackson was a habitual criminal.

"COMMITTED TO PRISON"

Section 29-2221(1) states in part: "Whoever has been twice convicted of crime, sentenced and committed to prison . . . for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal . . . ."

Jackson claims that the district court erred in finding that he was a habitual criminal because Jackson was given credit for 2 days' jail time regarding his first felony conviction and 102 days' jail time toward the 1-year sentence on his second felony conviction. In view of such credit, Jackson argues, his prior convictions for which credit was given were for terms less than 1 year each, and, therefore, he has not been twice sentenced and twice committed to prison for a term of not less than 1 year as prescribed by § 29-2221(1).

In *State v. Nance*, 197 Neb. 257, 248 N.W.2d 339 (1976), we construed language in the habitual criminal statute and stated:

> It is a fundamental rule of statutory construction that if

> possible a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.

Id. at 260, 248 N.W.2d at 341.

The statutory reference in § 29-2221(1) is to the "term" to which a defendant is sentenced, not the time or number of days the defendant is actually incarcerated. Therefore, it is the term of a defendant's prior sentences, not time actually served, which controls applicability of the habitual criminal penalty found in § 29-2221. See, *State v. Robinson*, 262 N.W.2d 270 (Iowa 1978); *State v. Houston*, 209 N.W.2d 42 (Iowa 1973). Also, the provisions in § 29-2221(1), namely, that a defendant has been "committed to prison" on conviction for prior crimes, does not necessitate a showing that the defendant was incarcerated for the entire term of a prior sentence but, rather, requires only that the defendant was delivered into the custody and control of the Nebraska Department of Correctional Services for incarceration according to the rules and regulations of that agency. See *People v. Woodruff*, 90 Ill. App. 3d 236, 412 N.E.2d 1171 (1980).

JURY INSTRUCTIONS

Jackson's brief does not discuss the assignment of error regarding jury instructions, and, therefore, we do not consider that assignment of error. See, Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987).

EXCESSIVE SENTENCE

In addition to the fact that Jackson is a habitual criminal, Jackson's record of prior convictions is reflected in six pages contained in the presentence report. As Jackson was properly found to be a habitual criminal, his sentence of not less than 20 years nor more than 60 years was within the statutory limits. A sentence imposed within the statutory limits will not be modified on appeal absent an abuse of discretion on the part of the trial court. *State v. Brown, ante* p. 418, 405 N.W.2d 600 (1987); *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987).

We find no abuse of discretion by the trial court in the sentence imposed on Jackson.

AFFIRMED.

WHITE, J., concurs in the result.

KATHY STAMAN, APPELLANT, V. TROY STAMAN, APPELLEE.
JOHN W. BALLEW, JR., GUARDIAN AD LITEM, APPELLANT.
408 N.W.2d 320

Filed July 2, 1987. No. 86-745.

1. **Child Custody.** The paramount consideration in determining who should have the care and custody of minor children following dissolution of a marriage is the best interests of the children.
2. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the sound discretion of the trial court, and, on appeal, although we review these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of a clear abuse of discretion. Additionally, we give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.
3. **Property Division: Appeal and Error.** The division of marital property is a matter which is initially entrusted to the discretion of the trial court and will not be disturbed on appeal unless the record establishes that the trial court abused its discretion.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed as modified.

Robert M. Brenner of Robert M. Brenner Law Office, for appellant Kathy Staman.

Philip M. Kelly of Winner, Nichols, Douglas, Kelly and Arfmann, for appellee.

John Ballew, guardian ad litem.

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

HASTINGS, J.

This is an appeal in a proceeding for dissolution of a

marriage. The trial court dissolved the marriage; divided the property of the parties; awarded custody of the minor children to the respondent, Troy Staman, subject to reasonable rights of visitation in the petitioner, Kathy Staman; and awarded child support.

The petitioner appeals the award of custody of the minor children to the respondent, the division of property, the determination that no alimony should be awarded, and the determination that the parties should bear their own attorney fees and court costs. The guardian ad litem also appeals the award of custody of the children to the respondent.

The parties were married May 24, 1980. Petitioner has one child, Cameron Snell, by a former marriage. Petitioner and respondent have two children as a result of the marriage—Brandon, born April 20, 1982, and Trevor, born June 22, 1983. Those two children are the subjects of the custody dispute.

The parties separated on January 29, 1986. Thereafter, petitioner and the three children established a home in Scottsbluff. Respondent continued to live on his parents' farm.

During the pendency of this matter petitioner had custody of Brandon and Trevor, but while petitioner was at work the boys spent their time with respondent. This arrangement proved difficult at best.

Trial was had on June 18 and 19, 1986, and again on August 13. In a memorandum opinion dated August 14, 1986, the court awarded custody of the two minor children to the respondent.

Petitioner and the guardian ad litem contend the trial court abused its discretion in awarding custody to the respondent. Petitioner and the guardian ad litem argue that the award of custody to the respondent goes against the great weight of the evidence and is clearly not in the best interests of the children.

It is true that the paramount consideration in determining who should have the care and custody of minor children following dissolution of a marriage is the best interests of the children and that our review in such a case is de novo on the record. *Ainsworth v. Ainsworth*, 224 Neb. 160, 396 N.W.2d 285 (1986). Child custody determinations are, however, matters initially entrusted to the sound discretion of the trial court. On appeal the trial court's determination will be affirmed in the

absence of a clear abuse of discretion. *Id.* Additionally, we give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other. *Id.*

In this case the trial court wrote a memorandum opinion, in which it summed up the entire trial rather succinctly:

> Viewed negatively, the children have an adulterous, lying, substance abusing, social butterfly for a mother and a physically abusive, lying, sexually deviant recluse for a father. That would not be a very hopeful state of affairs from the kids' standpoint and I disbelieve both claims as exaggerations. . . .
>
> When the positive tint is used, there are many strengths to note.
>
> First, both parents have high quantities and qualities of family support.
>
> Second, both are intelligent, healthy, capable, and free of emotional disability. They are very different, but that is an asset from the standpoint of the childrens' [sic] exposure to role models and lifestyles.
>
> Third, the parents are living close enough to offer the prospect of continuing access to both parents.
>
> Fourth, except for litigation expenses, there are resources available to provide basic needs of housing, food, medical and educational services.
>
> Fifth, both parents genuinely love and care for the children and want to remain in their lives.
>
> Sixth, both parents have sought professional counsel to deal with their emotional setbacks caused by the breakup. Hopefully, that will continue.
>
> The only difference between these two parents viewed positively is that Troy has the opportunity to devote much more time to child care. From the standpoint of the best interests of the children, he should be awarded custody for this reason.

Although we do not approve of the expressed reason the trial court awarded custody of the children to respondent, that being that respondent had more time to devote to child care, we have read the record, as we are required to do, and believe that the

court's decision was not an abuse of discretion.

During the trial each party tried to establish that he or she was the primary caretaker of the children's physical and emotional needs. The truth, or as near as can be established, is that both parents were heavily involved with the care of these two children during the marriage. While petitioner was at work respondent took care of the boys. When petitioner came home from work she usually handled the care of the children and the household tasks. Both played with the children and tried to teach them what they needed to know.

Also, during the trial, each party tried to discredit the other. Petitioner presented evidence that respondent had physically abused Cameron Snell, while respondent presented evidence that petitioner had an extramarital affair. Both accusations were largely uncorroborated, and the court specifically noted that both were exaggerations. We agree with this determination. We also agree with the court's finding that both parents are fit and capable of having sole custody.

Thus, the court was faced with, as is often the case, the arduous task of trying to determine which parent, in light of all the circumstances involved, would be the better parent to have custody of the children. The guardian ad litem, in reviewing the evidence at the end of trial, found that petitioner was more self-sufficient and independent than respondent, but that neither was unstable. He found that petitioner was more mature, dependable, and exhibited more self-control, but that respondent was more unselfish. Additionally, he found that both parents had contributed to and provided continuity with respect to child care, and are nurturing parents. Finally, he found that the children seem to have an extra affection for respondent, but that they genuinely love both parents. We believe that the record supports those conclusions. The guardian ad litem then recommended that custody of the children be awarded to petitioner. The court determined otherwise. In so doing, the court did not go against the great weight of the evidence, and its decision was not an abuse of discretion.

Regarding division of the marital property, the court wrote the following in its memorandum opinion, which was

incorporated into the order for purposes of interpreting the order:

> For property division, I simply can't make sense from the record. I enclose my notesheet but it doesn't help much. I believe the only thing I can do is order that each party be the sole owner of property presently in their possession subject to any debt against it.

We thus will consider the division of property based on the above-quoted paragraph from the memorandum opinion and the attached notesheet to that opinion.

Those items upon which the court placed a value in its notesheet follow. The court's value and a determination from our reading of the record as to who possessed each item at the time of trial are included.

Planter	$1,500	Respondent
Vibrashank	150	Respondent
Jewelry	2,000	Petitioner
Ultralight	5,000	Respondent
Hang glider	200	Respondent
Coin collection	89	Respondent
Irrigation pipe	300	Respondent
Wedding gifts	4,000	Petitioner

Although there was some dispute as to the value of some of the items, there is evidence to support the court's valuations, and they will therefore be accepted as correct.

The court also valued respondent's corn crop at $8,200. That, however, is not the value of the corn as shown by the record. The corn was under government loan and respondent had already received $8,700 from the federal government. Under those circumstances, the fact that the corn was worth only $8,200 in the open market was irrelevant. The relevant fact is that respondent had received $8,700 for a marital asset and must account for it. The asset is no longer the corn; it is the $8,700 respondent received for that corn.

The court also found no evidence as to the value of respondent's 1982 Subaru and petitioner's Toyota Land Cruiser. This is despite the fact that petitioner valued the Land Cruiser at $500 and the 1982 Subaru at $3,700. The respondent valued the Land Cruiser at $1,700 and offered no evidence as to the 1982

Subaru's value. The court did find, however, that the 1982 Subaru was subject to a $500 debt, which is supported by the evidence.

The court did not even list as assets the respondent's Ultralight parts, which both parties had testified as having a value of $500. The court also did not list respondent's $20 gold piece, which petitioner valued at $900, and the life insurance policies out of which respondent took $1,087 in cash. Finally, the court did not take into consideration that respondent sold premarital property for $2,000 and used that money to purchase his Ultralight and that petitioner traded in premarital property worth $3,000 to purchase the 1982 Subaru.

Once the above determinations of value and adjustments to the list of property are made, the court's list must be amended to add the following items:

1982 Subaru	$3,700	Respondent
Land Cruiser	500	Petitioner
Ultralight parts	500	Respondent
Gold piece	900	Respondent
Proceeds from life insurance	1,087	Respondent
Proceeds from corn	8,700	Respondent

Total net value of assets awarded to respondent	$21,626
Respondent's contribution from premarital assets	- 2,000
Net value of respondent's share of marital estate	$19,626
Net total of petitioner's assets	$ 6,500
Petitioner's contribution from premarital assets	- 3,000
Net value of petitioner's share of marital estate	$ 3,500

We have continuously stated that the division of marital property is a matter which is initially entrusted to the discretion of the trial court and will not be disturbed on appeal unless the

record establishes that the trial court has abused its discretion. *Bryan v. Bryan*, 222 Neb. 180, 382 N.W.2d 603 (1986). The fact that the court did not value some of the assets upon which the parties had presented evidence and did not make the adjustments to the value of those assets supported by the record makes it clear that the trial court abused its discretion when it awarded the marital property to the party in possession of the property. Once we make the necessary adjustments, it is clear that the marital assets were inequitably divided. To rectify that situation, respondent is hereby ordered to pay petitioner $5,000.

Additionally, we must address the division of the parties' marital debt. Petitioner has been making monthly payments on approximately $1,814 of unsecured marital debt, while respondent has been making payments on approximately $126 of marital debt. Additionally, toward the end of 1983, petitioner borrowed $2,000 from her parents to pay respondent's fertilizer bill. The debt had been partially repaid when respondent gave petitioner's parents a boat trailer worth $300 to $400. In order to bring some equality to the payment of these debts, we order respondent to pay petitioner's parents the remainder of the fertilizer debt, in addition to the approximately $126 debt he had assumed the payment of. Petitioner is ordered to continue to make payment on the debts on which she had assumed payment.

Regarding alimony and attorney fees, the court awarded no alimony and ordered the parties to bear their own expenses in the matter. We find no abuse of discretion in this regard.

The judgment of the district court is therefore affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. HERBERT L. RICHTER, APPELLANT.

408 N.W.2d 324

Filed July 2, 1987. No. 86-884.

1. **Drunk Driving: Evidence.** Evidence that the defendant had the odor of alcohol on his breath, he slurred his speech, he had bloodshot eyes, his recitation of the alphabet was unintelligible, he could not pass a second sobriety test, and he had swerved his vehicle over the centerline of the road is sufficient to sustain a finding that the defendant had ingested sufficient alcohol to impair his ability to operate a motor vehicle.
2. **Implied Consent: Blood, Breath, and Urine Tests.** The test as to whether a driver has refused to submit to a breath test is whether the driver conducted himself in such a way that a reasonable person would have been justified in believing the driver had understood he had been asked to take the test but refused to do so.
3. **Jury Trials: Ordinances.** Neb. Rev. Stat. § 24-536 (Reissue 1985) does not provide a right to a jury trial for the violation of a municipal ordinance where the offense charged is petty.

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

Herbert L. Richter, pro se.

Barry Waid, Special Scottsbluff City Prosecutor, Robert M. Spire, Attorney General, and Lisa D. Martin-Price, for appellee.

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

PER CURIAM.

The defendant, Herbert L. Richter, was charged with third offense driving while intoxicated and with refusing to submit to a chemical blood, breath, or urine test in violation of ordinances of the city of Scottsbluff.

At the arraignment on February 4, 1986, the defendant pleaded not guilty, the public defender was appointed to represent him, and he was released on his own recognizance. The defendant moved to suppress all evidence derived from the stop of the defendant's vehicle on February 4, 1986, on the grounds the stop was warrantless and without probable cause. This motion and his motion for a jury trial were denied after a hearing.

At the start of the trial, March 7, 1986, the defendant's motion to sequester the witnesses was sustained. The trial court found the defendant guilty on both counts, reserved ruling on the validity of prior convictions as to count I, and set a date for the enhancement hearing.

The defendant then filed several motions, including a motion to "fire public defender," a motion for a posttrial hearing, and a motion for "forma pauperis." The public defender moved for leave to withdraw from continued representation of the defendant. The defendant then moved to strike the testimony of the arresting officer, for a stay of execution of sentence pending appeal, and for additional discovery.

The motions were heard at the sentencing hearing on July 10, 1986. The trial court granted the public defender's motion to withdraw and overruled the defendant's motions for a posttrial hearing, to strike the officer's testimony, and for discovery. The court sustained the defendant's motions to proceed in forma pauperis, granted a stay of sentence for the purpose of an appeal, and waived filing fees due to the defendant's indigency.

The trial court then found the State had proved three valid prior convictions and found the defendant guilty of third offense driving while under the influence of alcoholic liquor. On count I the defendant was sentenced to 180 days in jail, fined $500 and costs, and his license was suspended for 15 years. On count II he was sentenced to 7 days in jail, he was fined $200 and costs, and his license was suspended for 6 months, the sentence and suspension on each count to run concurrently.

The defendant appealed to the district court, which affirmed the judgment of the county court. This appeal followed.

The defendant contends the district court erred in finding him guilty beyond a reasonable doubt, in not finding his constitutional rights had been violated, in finding he had competent counsel, and in affirming the judgment even though there had been an allegedly improper communication with a witness.

The record shows the defendant was stopped by Officer Mayo of the Scottsbluff Police Department on February 4, 1986, after the officer had observed the vehicle swerve and

accelerate beyond the posted speed limit. Prior to stopping the vehicle the officer had paced the vehicle and estimated it was traveling 43 miles per hour in a 30 miles-per-hour zone.

The officer observed the defendant stumble and nearly fall when exiting from the driver's side of his vehicle. Upon approaching the defendant the officer detected the odor of alcohol and observed that the defendant's face was flushed, his eyes red and watery, and his speech thick and slurred. When asked to do two field sobriety tests, the defendant failed both of them. The officer then arrested the defendant for driving while under the influence of alcoholic liquor.

Because the defendant wanted the passenger to drive his vehicle home, the officer asked the defendant's passenger to show his driver's license. The passenger said he did not have a license and was too intoxicated to drive. The officer then observed some alcohol in the vehicle. All of the conversation with the defendant and the passenger was recorded by the officer.

The defendant was taken to the police station and advised of the implied consent statutes. At first the defendant refused to take a breath test, but finally agreed to do so. The officer was unable to get an accurate reading from the breath test because the defendant did not blow into the mouthpiece of the machine in the correct manner. A videotape of the breath test was received in evidence.

The defendant first contends the evidence presented was insufficient to sustain his convictions. This argument is not supported by the record or the law.

The evidence is that the officer observed the defendant had the odor of alcohol on his breath, he slurred his speech, he had bloodshot eyes, his recitation of the alphabet was unintelligible, he could not pass a second sobriety test, and he had swerved his vehicle over the centerline of the road. This evidence was sufficient to sustain a finding that the defendant had ingested sufficient alcohol to impair his ability to operate a motor vehicle. *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987).

Further, this court will not

> "resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or

> weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it."

State v. Klingelhoefer, 222 Neb. 219, 223, 382 N.W.2d 366, 369 (1986) (quoting *State v. Warnke*, 221 Neb. 625, 380 N.W.2d 241 (1986)).

Similarly, the evidence was sufficient to sustain the conviction for refusing a chemical breath test. The test as to whether a driver has refused to submit to a test is whether the driver conducted himself in such a way that a reasonable person would have been justified in believing the driver had understood he had been asked to take the test but refused to do so. *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987). Here, the evidence shows the defendant understood he had been asked to take a breath test, but refused to do so correctly.

The defendant next argues that his constitutional rights were violated because his request for a jury trial was denied. In *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986), we held that the denial of a jury trial pursuant to Neb. Rev. Stat. § 24-536 (Reissue 1985) for a violation of a municipal ordinance was proper where the offense charged was petty. Section 24-536 provides that jury trials are not required for criminal cases arising under city or village ordinances. Accordingly, this assignment of error is overruled.

The defendant next contends his appointed counsel was incompetent. This assignment of error is wholly unsupported by the record. Further, the defendant has not shown that but for the alleged errors there is a reasonable probability the result of the case would have been different. *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986). This assignment of error is also overruled.

The defendant's last assignment of error concerns testimony of William E. Smith, the chief of police of Mitchell, Nebraska, that was offered at the July 10, 1986, hearing on the defendant's "Motion to Demand Post Trial Hearing." The motion alleged in part that the defendant was

> claiming violation of the following Civil and, or Constitutional Rights: A. . . . and Unrecored [sic] Witness

> for the State, Police Chief William Smith of The City of Mitchell, Scottsbluff [sic] County, Nebraska, who was not confronted nor heard publicly by the defendant either before or during trial, on 3-7-86 in County Court.

Smith testified that he was present at the courthouse on March 7, 1986, at the request of the county attorney so that he might be called as a rebuttal witness; that he had seen the defendant walk without the use of canes or crutches; and that he did not talk to the trial court or conspire with the court about the sentence that should be imposed on the defendant.

The defendant called Eldora DeOllos, who testified she had seen the defendant run without a cane a long time ago, but throughout the day he usually uses a cane or walker to get around. No other evidence was presented. The trial court overruled the motion.

Apparently, the defendant believed that somehow the police chief had intervened or interfered in his trial. There was no evidence to support that claim, and on the record presented the ruling on the motion was correct.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MANFORD ALTON THORNTON, APPELLANT.

408 N.W.2d 327

Filed July 2, 1987. No. 86-936.

1. **Sentences: Probation and Parole.** The language in Neb. Rev. Stat. § 29-2260(2) (Cum. Supp. 1986) which provides that the court "may withhold sentence of imprisonment" is merely a guideline and does not mandate a sentence of probation.
2. **Mentally Disordered Sex Offender: Words and Phrases.** A mentally disordered sex offender shall mean any person who has a mental disorder and who, because of the mental disorder, has been determined to be disposed to repeated

commission of sexual offenses which are likely to cause substantial injury to the health of others. Neb. Rev. Stat. § 29-2911 (Reissue 1985).

Appeal from the District Court for Dawes County: ROBERT R. MORAN, Judge. Affirmed.

David E. Veath, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

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

BOSLAUGH, J.

Upon pleas of guilty to two counts of sexual assault on a child, the defendant, Manford Alton Thornton, was sentenced to concurrent terms of 5 years' imprisonment on each count, with credit for time served between June 6 and June 24, 1986, and with the sentences commencing on the latter date. Since the trial court had determined that the defendant was a mentally disordered sexual offender (MDSO), that his disorder was treatable, and that sufficient treatment was available in the state, he was further ordered committed to the Lincoln Regional Center for treatment until such time as the court determined he was no longer mentally disordered or until he had received the maximum benefit of treatment.

At the sentencing hearing, defense counsel argued for a sentence of probation in conjunction with inpatient treatment at the Lincoln Regional Center. The court ultimately agreed with the State's argument against probation, stating: "[T]his is a case which, under the statutes, does not permit probation. The legislature is very, very, clear in my judgment, and mandates a sentence to imprisonment."

On appeal, the defendant asserts two assignments of error: (1) "The trial court erred in its statutory interpretation and resultant determination that pertinent statutes precluded judicial discretion by mandating only a sentence of imprisonment and proscribing a sentence of probation of appellant"; and (2) "The court erred in its statutory interpretation and resultant determination that the related statutes were in conflict and repugnant causing effectual repeal

by implication and thereby constraining it to imposing a prison sentence thus denying its discretion to sentence the appellant to probation."

The record shows that prior to the imposition of sentence at the sentencing hearing, the county attorney made the following comments in arguing against probation:

> BY MR. CONNEALY: Thank you, Your Honor. May it please counsel and the Court. Your Honor, it is the state's position that the defendant must be sentenced to a term of incarceration in this case. Subsection 292260 of the Nebraska Statute, "The Court may only order a sentence of imprisonment and grant the sentence of probation if the risk is not substantial that during the period of probation, that the offender will engage in additional criminal conduct." It seems to me that the Court has already made that finding that the defendant in this case would engage in additional criminal conduct, I think, in finding that the defendant is a mentally disordered sex offender.
>
> 292911 of the statutes defines a mentally disordered sex offender as meaning a person who is mentally disordered and who, because of the mental disorder, has been determined to be disposed to repeat a commission of sexual offenses. That finding seems to state that the defendant in this case, that there is a likelyhood [sic]; a strong likelyhood [sic] in this case, that Mr. Thornton is going to engage in additional criminal conduct, specifically, sexual offenses. So, Your Honor, I think that once the Court makes the finding that Mr. Thornton is treatable; is a treatable mentally disordered sex offender, it precludes granting any probation.

At the conclusion of the sentencing hearing, the following discussion occurred between defense counsel and the court:

> BY MR. VEATH: Your Honor, if it please the Court, do I understand the Court correctly to have determined that by reason of statute that this Court could not impose or grant probation?
>
> BY THE COURT: That's my determination. Yes.
>
> BY MR. VEATH: Thank you, Your Honor.

Also, in its written journal and order regarding this hearing, the court noted: "On due consideration of the evidence and the statements of the parties, the Court found that it does not have the discretion to sentence the defendant to a term of probation and that the defendant should be sentenced to a term of incarceration . . . ."

The defendant's major complaint on appeal is that the court failed to exercise its discretion in sentencing, by virtue of its finding that it had no discretion to impose a sentence of probation. This is perceived by Thornton as an error of law requiring vacation of the sentence. More specifically, Thornton contends that under Neb. Rev. Stat. § 29-2260 (Cum. Supp. 1986), absent a specific requirement for mandatory imprisonment, the sentencing court has *absolute discretion* to impose either a sentence of imprisonment or a sentence of probation.

Section 29-2260(2) does not provide the sentencing court with the absolute discretion claimed by Thornton. The express language of the statute provides that the court may withhold a sentence of imprisonment

> *unless*, having regard to the nature and circumstances of the crime and the history, character and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct . . . .

(Emphasis supplied.) § 29-2260(2).

In this case the court, prior to sentencing, made the determination that the defendant was a mentally disordered sex offender. By definition, a mentally disordered sex offender is someone who, because of a mental disorder, is disposed to repeated commission of sexual offenses likely to cause substantial injury to the health of others. Neb. Rev. Stat. § 29-2911 (Reissue 1985).

At the times of the offenses, the defendant was a minister working with the victim's parents in church-related activities at Chadron, Nebraska. The female victim was then 7 years of age. Evidence in the presentence investigation indicates that the

defendant admitted to a lengthy history of similar assaultive acts directed at some 15 minor children. The defendant made some effort to change his behavior through counseling prior to the episodes involved in the present case. Despite these attempts at counseling and his own awareness of the wrongfulness of his acts, the defendant was unable to control his assaultive behaviors. Thus, the trial court had good reason for its determination that the defendant could not be considered for probation. Clearly, "having regard to the nature and circumstances of the crime and the history, character and condition of the offender," imprisonment of Thornton was necessary for the protection of the public. § 29-2260(2). There was a substantial risk that during a period of probation he would engage in similar additional criminal conduct. § 29-2260(2)(a).

Thornton responds that the automatic commitment to treatment provision of Neb. Rev. Stat. § 29-2915 (Reissue 1985) alleviates any public protection concern which might have proscribed the imposition of probation under § 29-2260(2)(a). This view would have required the court to assume one of two things, either (1) that treatment of the defendant would be successful or (2) that if treatment was unsuccessful, the State would be able to successfully prove a case for civil commitment of the defendant at the end of treatment. The assumption of either position would have required speculation on the court's part. The sentencing court was not required to assume either the possibility of the success of treatment or of civil commitment proceedings after failed treatment in reaching its determination as to whether to place the defendant on probation.

Further, the cases cited by defendant of *State v. Bovill*, 223 Neb. 764, 393 N.W.2d 715 (1986), and *State v. Todd*, 223 Neb. 462, 390 N.W.2d 528 (1986), did not require the sentencing court to reach a contrary result on this issue. Based on these cases, the defendant contends that the meaning of "the court shall sentence the defendant as provided by law" language found in Neb. Rev. Stat. § 29-2914 (Reissue 1985) is that the sentencing court does have discretion to impose either a sentence of probation or imprisonment pursuant to the relevant

mentally disordered sex offender statutes. Those decisions do not control the case at bar.

In both *Bovill, supra*, and *Todd, supra*, the defendants, who had been convicted of sexual offenses against children, claimed that their sentences to incarceration constituted excessive sentences. Both argued that they should have been granted probation instead. In both cases, this court held that the sentencing courts did not commit abuses of discretion in sentencing the defendants to incarceration instead of probation.

In *Todd, supra*, where the defendant was determined to be a treatable mentally disordered sex offender, the court never expressly considered whether the defendant could have been sentenced to probation pursuant to § 29-2260(2). Instead, this court noted only that the sentence to imprisonment was not an abuse of discretion.

In *Bovill, supra*, the court found that the defendant was *not* a mentally disordered sex offender, and stated: "[W]e have repeatedly held that the granting of probation as opposed to imposing of a sentence is a matter left to the sound discretion of the trial court, and absent a showing of abuse, this court will not on appeal disturb the trial court's denial of probation." *Bovill, supra* at 767, 393 N.W.2d at 717. The discretion standard applied in *Bovill* was appropriate there because the defendant in that case was not a mentally disordered sex offender. As such, the public protection concerns precluding the possibility of probation in this case (i.e., the substantial risk of repeated criminal conduct during the period of probation) were not involved in *Bovill*.

Under the circumstances of this case the trial court committed no error in interpreting the relevant statutes to preclude the possible imposition of probation.

The defendant's second assignment of error is also without merit. Thornton contends that because the sentencing court concluded that §§ 29-2911 (the statute defining a mentally disordered sex offender), 29-2915 (the statute describing the sentencing procedure for sex offenders determined to be treatable mentally disordered sex offenders), and 29-2260 (the probation statute), when read together, preclude the discretion

to impose probation, the former statutes in effect repeal by implication the latter.

The record does not support a conclusion that the sentencing court found the relevant statutes to be in conflict or repugnant to each other.

Section 29-2260 (Cum. Supp. 1986) in part provides:

> (2) Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or
>
> (c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.

The language in § 29-2260(2) which provides that the court "may withhold sentence of imprisonment" is merely a guideline and does not mandate a sentence of probation. *State v. Gillette*, 218 Neb. 672, 357 N.W.2d 472 (1984).

Also of relevance is that portion of § 29-2911 which defines the meaning of a mentally disordered sex offender: "(2) Mentally disordered sex offender shall mean any person who has a mental disorder and who, because of the mental disorder, has been determined to be disposed to repeated commission of sexual offenses which are likely to cause substantial injury to the health of others."

After the completion of both parties' arguments, the sentencing court indicated it agreed with the State that this was a case in which the statutes did not permit probation.

Section 29-2260(2) does not grant absolute discretion to sentence to probation or imprisonment in every instance.

Under the facts in this case and the express terms of § 29-2260(2), the court did not have discretion to impose a sentence of probation. There was no repugnancy or conflict between the statutes, and there was no repeal by implication.

The judgment is affirmed.

AFFIRMED.

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1. In order for consent of a parent to an adoption to be unnecessary under Neb. Rev. Stat. § 43-104(3)(b) (Reissue 1984), abandonment must be shown in the 6-month time period

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2. Abandonment must be proven by clear and convincing evidence. Neb. Rev. Stat. § 43-104(3)(b) (Reissue 1984).
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3. If there is evidence to sustain the findings and action of the Public Service Commission, the Supreme Court cannot intervene. Where the commission's finding is against all evidence, the Supreme Court may hold that such finding by the commission is arbitrary.
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4. A motion for a continuance of a trial is addressed to the sound discretion of the trial court, and that ruling will not be disturbed on appeal in the absence of a showing of an abuse of that discretion.
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25. The determination as to the admissibility of an excited utterance generally rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
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26. The district court shall hear appeals and cross-appeals, taken from action of a board of equalization, as an equity case and without a jury, and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. Neb. Rev. Stat. § 77-1511 (Reissue 1986).
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Gordman Properties Co. v. Board of Equal. 169
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36. This court ordinarily will not consider issues not properly raised in the pleadings nor litigated at trial.
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38. A party is barred from asserting a different ground for his objection to the admission of evidence on appeal than was offered before the trier of fact.
Rocek v. Department of Public Institutions 247

39. When reviewing decisions of the State Personnel Board, the Supreme Court conducts its review of the findings de novo on the record. Neb. Rev. Stat. § 84-918 (Reissue 1981).
Rocek v. Department of Public Institutions 247

40. In the absence of plain error, where a specific issue is raised for the first time on appeal such issue will ordinarily not be determined.
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41. A taxpayer who has first sought an exemption under Neb. Rev. Stat. § 77-202.01 (Reissue 1981), which was denied and from which no appeal pursuant to Neb. Rev. Stat. § 77-202.04 (Reissue 1986) was taken, may not thereafter pay the tax and seek a refund under the provisions of Neb. Rev. Stat. § 77-1736.10 (Reissue 1986).
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42. While a trial court may admit, if it believes such may assist the jury, expert testimony in areas where laymen have competence, it is not error to exclude expert testimony relating to matters which are not complicated and embrace matters of common knowledge.
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43. The existence or contents of affidavits filed with the clerk of the trial court but not preserved in the bill of exceptions cannot be known by this court.
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44. Errors predicated on occurrences during the course of closing an argument cannot be shown by affidavit; the proper procedure, when the full arguments are not being reported, is to call in the official reporter and make a record of what occurred part of the bill of exceptions.
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45. One may not take the chance of a favorable verdict and then complain of the result; thus, in order to assign error based on occurrences during the course of a closing argument, the complaining party must have objected to the occurrence and moved for a mistrial prior to submission of the cause.
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46. Whenever any person shall appeal to the district court from the assessment of his property as fixed by the county board of equalization, and the appeal shall be sustained in whole or in part, the cost of such appeal, including costs of witnesses, if any, shall be paid by the county wherein such property is situated. Neb. Rev. Stat. § 77-1513 (Reissue 1986).
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47. A breath test result which is subject to a margin of error must be adjusted so as to give the defendant the benefit of that margin. However, when there is a conflict in the evidence as to what that margin of error actually is, we will affirm the decision of the trier of fact so long as there is sufficient evidence in the record, if believed, to sustain its finding of guilt.
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48. In determining whether the evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on credibility of witnesses, or evaluate the evidence. Those determinations are within the province of the jury, and its verdict must be sustained if the evidence, when viewed in the light most favorable to the State, is sufficient to support the verdict.
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Brunken v. City of Omaha 410

51. Where errors assigned require review of evidence in error proceedings, they cannot be considered in the absence of a bill of exceptions.
Brunken v. City of Omaha 410

52. In error proceedings taken from findings and orders of an administrative agency or body acting in a quasi-judicial capacity, as in the case at bar, only two questions are ordinarily presented for decision. The general rule is that if it appears in such cases that such agency or body has acted within its jurisdiction and that all of the jurisdictional facts essential to uphold its findings and orders are sustained by some competent evidence, such findings and orders will be upheld in error proceedings to the district court and on appeal to this court.
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53. In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly incorrect.
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54. One cannot challenge the constitutionality of a statute for the first time on appeal to this court.
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55. On appeal from a juvenile court's determination to assume jurisdiction of a minor pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986), we will review the findings of the lower court de novo.
In re Interest of C.R.S. 436

56. On appeal, the record of an equity action is reviewed de novo, and it is the duty of this court to reach independent conclusions as to the findings required by the pleadings and evidence.
Lincoln East Bancshares v. Rierden 440

57. In an appeal of an equity case, we give proper consideration to the fact that the trial court inspected the property.
Lincoln East Bancshares v. Rierden 440

58. Generally, the reception of evidence is within the broad discretion of the trial court, and to obtain reversal on the grounds of the exclusion of evidence, a clear abuse of discretion must be shown.
Lincoln East Bancshares v. Rierden 440
State v. Wilson 466
State v. Threet 682
Misle Chevrolet Co. v. Kometscher 804

59. In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted

for disposition.
State v. Vrtiska 454
Norquay v. Union Pacific Railroad 527

60. In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress.
State v. Vrtiska 454

61. A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion.
State v. Vrtiska 454

62. In an appeal involving a proceeding for postconviction relief, the lower court's findings will be upheld unless clearly erroneous.
State v. Rubek 477

63. On appeal from the county court, the district court is to review the case for error appearing on the record. In a law action the disposition of the trial court has the effect of a jury verdict and is not to be disturbed on appeal unless it is clearly wrong. However, when such judgment is not supported by the evidence, it is clearly wrong and must be set aside.
Chilton Accts. Rec. Mgmt. v. Project Life Min. 482

64. On appeal from the county court, if the district court reverses the judgment appealed from, it may enter judgment in accordance with its findings.
Chilton Accts. Rec. Mgmt. v. Project Life Min. 482

65. On appeal from the county court, the district court is required to review the case for error appearing on the record.
Hammond v. Streeter 491

66. In a law action the disposition of the trial court has the effect of a jury verdict and is not to be disturbed on appeal unless it is clearly wrong. When such judgment is not supported by the evidence, it is clearly wrong and must be set aside.
Hammond v. Streeter 491
Boren v. State Farm Mut. Auto. Ins. Co. 503

67. Even though a contract for sale of property was a mixed one, for the sale of both "goods" and "nongoods," where the case was presented to the trial court and to this court on appeal on the theory that the sales article of the Uniform Commercial Code applied, Neb. U.C.C. §§ 2-101 et seq. (Reissue 1980), the Supreme Court will dispose of the case on appeal on that theory.
Hammond v. Streeter 491

68. In disciplinary proceedings, the Supreme Court reviews the evidence de novo on the record to determine if discipline of a lawyer should be imposed and, if it should, the extent of the sanction.
State ex rel. NSBA v. Roubicek 509

69. On appeal from an action at law, this court will not reweigh the facts. Instead, the court is obligated to examine the evidence to determine whether, under a view most favorable to the successful party, the facts support the trial court's judgment.
Malerbi v. Central Reserve Life 543

70. The issues set out in a pretrial order supplant the issues raised in the pleadings. Failure to object to the specification of issues in a pretrial order waives error claimed in that regard on appeal.
Malerbi v. Central Reserve Life 543
Misle Chevrolet Co. v. Kometscher 804

71. Appeals to this court under the provisions of the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984), are reviewed de novo on the record. It is the duty of this court to retry the issues of fact involved in the findings complained of and to reach an independent conclusion.
Great Plains Container Co. v. Hiatt 558

72. Where a case is tried on a particular theory, the Supreme Court will dispose of the case on appeal on that theory.
First West Side Bank v. Hiddleston 563

73. A party cannot be heard to complain of error which such party was instrumental in bringing about.
First West Side Bank v. Hiddleston 563

74. Jury instructions are to be read as a whole, and when they fairly submit the case and do not mislead the jury, there is no prejudicial error.
First West Side Bank v. Hiddleston 563

75. It is not error for the trial court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
First West Side Bank v. Hiddleston 563

76. While it is the duty of the trial court, without any request to do so, to instruct the jury on issues raised by the pleadings and supported by the evidence, failure of counsel to object to the giving of certain instructions after they have been submitted to counsel for review will preclude raising an objection to the instructions on appeal, unless there is plain error indicative of a probable miscarriage of justice.
First West Side Bank v. Hiddleston 563

77. Where the Supreme Court receives no additional evidence in a judicial discipline proceeding, the scope of review is de novo on

the record.
In re Complaint Against Kelly 583

78. In an original action on a complaint against a judge by the Commission on Judicial Qualifications, the Supreme Court must first determine if the allegations are supported by the evidence; second, the canons of the Code of Judicial Conduct and subsections of Neb. Rev. Stat. § 24-722 (Reissue 1985) which were violated; and third, the appropriate discipline.
In re Complaint Against Kelly 583

79. The law in the State of Nebraska concerning review of an order terminating parental rights is well settled. Such an order will be reviewed by this court de novo on the record, while according great weight to the findings of the trier of fact, the juvenile court, because that court heard and observed the parties and witnesses.
In re Interest of K.L.N. and M.J.N. 595

80. This court reviews orders terminating parental rights de novo on the record and will not consider evidence which is erroneously admitted.
In re Interest of C.G.C.S. 605

81. In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
Gerber v. Gerber 611

82. Errors assigned but not discussed will generally not be considered by this court.
State v. Burke 625

83. A defendant may not permit questionable or incompetent evidence to be admitted without objection, take the chance of a favorable result, and after an unfavorable outcome complain that the evidence was received.
State v. Burke 625

84. A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with the stipulation.
State v. Burke 625

85. Generally, this court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated.
State v. Burke 625

86. An assignment of error requiring an examination of the evidence cannot prevail on appeal in the absence of a proper bill of exceptions.
State v. Burke 625
87. When an order appealed from is the order of the Crime Victim's Reparations Board, and not the recommendation of the hearing officer, the "county where the action is taken" for purposes of filing an appeal is the county in which the board acted, not the county where the hearing took place. Neb. Rev. Stat. § 84-917 (Reissue 1981).
Gilmore v. Nebraska Crime Vict. Rep. Bd. 640
88. The requirements of a statute governing the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction.
Gilmore v. Nebraska Crime Vict. Rep. Bd. 640
89. A transcript of the proceedings in the lower tribunal must be filed with the petition in error in order to confer jurisdiction upon the district court.
Jackson v. Jensen 671
90. Error may not be predicated upon a ruling unless a substantial right of the party is affected.
State v. Threet 682
91. Error may not be predicated upon a ruling which excludes evidence unless a substantial right is affected and the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.
In re Interest of L.H. 706
92. In reviewing questions of law, this court has an obligation to reach an independent conclusion with respect to such issues without regard to the findings of the trial court.
Johnston v. Panhandle Co-op Assn. 732
93. In reviewing a case wherein summary judgment has been granted, we are bound by the rule that where the pleadings, depositions, admissions, stipulations, and affidavits on file disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law, summary judgment should be granted.
Seagren v. Peterson 747
94. Error cannot be predicated on rulings permitting answers to questions properly propounded to plaintiff's witness on redirect examination to explain opinions expressed in answer to similar questions propounded to the same witness on cross-examination.
State v. Walker 794
95. The extent to which a witness on redirect examination may explain testimony elicited on cross-examination lies primarily in the

discretion of the court.
State v. Walker 794

96. The trial court has broad discretion over the general conduct of the trial and decisions on matters relating to the conduct of the trial will not be set aside on appeal absent an abuse of the court's discretion.
Misle Chevrolet Co. v. Kometscher 804

97. In determining whether a claimant of title by adverse possession has met the required burden of proof, we review the record de novo and reach conclusions independent of the trial judge.
Nichol v. Hettinger 812

98. A finding that an owner of property protected by the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1984), did not act willfully or maliciously as described in § 37-1005 is a finding of fact which will not be disturbed unless clearly wrong.
Thies v. City of Omaha 817

99. A motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's sound discretion, and an order overruling such a motion will ordinarily be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
State v. Bird Head 822

100. A motion for a change of venue is addressed to the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed absent a clear abuse of that discretion.
State v. Bird Head 822

101. The factors to be evaluated in determining whether a change of venue is required because of pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn.
State v. Bird Head 822

102. A trial court's determination of a defendant's indigency, requiring court-appointed counsel for a defendant in a criminal case, will be upheld on appeal, unless the trial court has abused its discretion in such determination.
State v. Richter 837

103. In the absence of a sentencing court's abuse of discretion, the sentencing court's procedure utilized for presentation of information at a hearing for imposition of the habitual criminal penalty prescribed by Neb. Rev. Stat. § 29-2221 (Reissue 1985)

will be sustained on appeal.
State v. Jackson 843
104. Child custody determinations are matters initially entrusted to the sound discretion of the trial court, and, on appeal, although we review these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of a clear abuse of discretion. Additionally, we give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.
Staman v. Staman 864

Appurtenances

1. 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.
Pick v. Fordyce Co-op Credit Assn. 714
2. Where a fixture annexed to a freehold is tortiously severed, the owner of the realty, at his option, may treat the fixture as personalty and recover the same by the action of replevin.
Pick v. Fordyce Co-op Credit Assn. 714

Arrests

1. A person commits the crime of escape if he unlawfully removes himself from official detention. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes. Neb. Rev. Stat. § 28-912(1) (Reissue 1985).
State v. Hicks 322
2. Some degree of custody is essential before one can be considered to be in official detention.
State v. Hicks 322
3. Constructive, as distinguished from physical, restraint sufficient to constitute a constructive seizure or detention of an arrestee exists where an officer has the intention to effect an arrest, that intention has in some way been communicated to the arrestee, the arrestee understands that he is under legal restraint, and the officer has the apparent present power to control the person even though he has not yet asserted physical control.
State v. Hicks 322

Assignments

One who purchases an automobile and obtains possession thereof but does not obtain a duly assigned certificate of title thereto acquires

no ownership interest in the automobile.
Boren v. State Farm Mut. Auto. Ins. Co. 503

Attorney and Client

1. Representation of multiple parties is not prohibited per se, but this court disapproves the actions of an attorney in representing conflicting interests in litigation, even with the consent of the clients involved.
Wendell's, Inc. v. Malmkar 341

2. Because the task of assessing the potential for conflict of interest well in advance of trial is such a difficult one, the standards applicable to making that assessment must be flexible.
State v. El-Tabech 395

Attorney Fees

1. As construed by this court, Neb. Rev. Stat. § 48-125 (Reissue 1984) authorizes a 50-percent payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation.
Mendoza v. Omaha Meat Processors 771

2. Whether a reasonable controversy exists pertinent to Neb. Rev. Stat. § 48-125 (Reissue 1984) is a question of fact.
Mendoza v. Omaha Meat Processors 771
Tlamka v. Goodyear Tire & Rubber Co. 789

3. For the purpose of Neb. Rev. Stat. § 48-125 (Reissue 1984), a reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.
Mendoza v. Omaha Meat Processors 771

Attorneys at Law

A cause of action for malpractice accrues upon the violation of a legal right.
Seagren v. Peterson 747

Blood, Breath, and Urine Tests

1. A breath test result which is subject to a margin of error must be adjusted so as to give the defendant the benefit of that margin. However, when there is a conflict in the evidence as to what that margin of error actually is, we will affirm the decision of the trier of fact so long as there is sufficient evidence in the record, if believed, to sustain its finding of guilt.
   State v. Hvistendahl 315
2. A test made in compliance with Neb. Rev. Stat. § 39-669.11 (Reissue 1984) is sufficient to make a prima facie case on the issue of blood alcohol concentration.
   State v. Hvistendahl 315
3. An appeal from an order of the Director of Motor Vehicles entered under the provisions of Neb. Rev. Stat. § 39-669.18 (Reissue 1984) relating to a refusal to take a blood, breath, or urine test must be filed in the district court of the county in which the alleged events occurred for which the operator was arrested.
   Jackson v. Jensen 671
4. The venue requirements of Neb. Rev. Stat. § 39-669.18 (Reissue 1984) governing the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction.
   Jackson v. Jensen 671
5. There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine.
   Guerzon v. Jensen 712
6. A driver is not entitled to consult with an attorney nor is a delay in a requested blood, breath, or urine test required should a driver request to consult with an attorney prior to taking such test.
   Guerzon v. Jensen 712
7. The test as to whether a driver has refused to submit to a breath test is whether the driver conducted himself in such a way that a reasonable person would have been justified in believing the driver had understood he had been asked to take the test but refused to do so.
   State v. Richter 871

Brokers

Before a broker may recover a commission, the broker must establish that he produced a purchaser ready, willing, and able to buy on the terms fixed by the owner.
Shanks v. Johnson Abstract & Title 649

Burglary

1. In proving the crime of burglary, no actual theft or asportation of property is required.
   State v. Vaughn 38

2. Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate.
State v. Vaughn 38

Case Disapproved

In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. To the extent that *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), suggests that a handbook issued after an employee is hired cannot become part of that employee's contract, it is disapproved.
Johnston v. Panhandle Co-op Assn. 732

Certificate of Title

One who purchases and obtains possession of an automobile but does not obtain a duly assigned certificate of title acquires no ownership interest in the automobile.
Boren v. State Farm Mut. Auto. Ins. Co. 503

Child Custody

1. Psychiatric testing or psychological evaluations of a parent may be required to determine the best interests of children when issues of custody and visitation are presented.
In re Interest of R.A. and V.A. 157
2. In placing a child's custody with a parent in a dissolution proceeding, a court's primary and paramount consideration is the best interests of the child. Some factors or circumstances which may be considered in a court's determination of a child custody issue include considerations of the fitness of the parents; the respective environments offered by each parent; the emotional relationship between a child and each parent; the child's age, general health, welfare, and social behavior; the effect on a child, if a particular parental relationship is continued or disrupted; parental attitude and stability of character; parental capacity to furnish physical care, education, and other reasonable needs of a child; and, when appropriate, the desires and wishes of a child.
Gerber v. Gerber 611
Staman v. Staman 864
3. In determining whether a noncustodial parent will have visitation rights and the nature of such visitation rights, the best interests of a child are the primary and paramount consideration by a court.
Gerber v. Gerber 611
4. Ordinarily, a noncustodial parent's visitation rights are exercisable within the jurisdiction, unless the best interests of the child require otherwise.
Gerber v. Gerber 611

5. In proceedings to dissolve a marriage, placing a child in the custody of a parent does not prevent the custodial parent's departure from the jurisdiction at the risk of losing child custody.
Gerber v. Gerber 611
6. Before a court will permit removal of a child from the jurisdiction, generally, a custodial parent must establish that such removal is in the best interests of the child and must demonstrate that departure from the jurisdiction is the reasonably necessary result of the custodial parent's occupation, a factually supported and reasonable expectation of improvement in the career or occupation of the custodial parent, or required by the custodial parent's remarriage.
Gerber v. Gerber 611
7. Child custody determinations are matters initially entrusted to the sound discretion of the trial court, and, on appeal, although we review these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of a clear abuse of discretion. Additionally, we give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.
Staman v. Staman 864

Circumstantial Evidence

1. Circumstantial evidence is sufficient to support a conviction if the evidence and reasonable inferences that may be drawn from such evidence establish the defendant's guilt beyond a reasonable doubt.
State v. Donnelson 41
State v. Laue 57
2. Circumstantial evidence can be sufficient to sustain a conviction of a minor in possession in violation of Neb. Rev. Stat. § 53-180.02 (Reissue 1984).
State v. Laue 57
3. 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.
State v. Laue 57
State v. Bird Head 822
4. The identity of the perpetrator of a criminal offense may be proven by inference and circumstantial evidence.
State v. Mecum 293
5. Circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other than the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. The evidence must be such as to make the plaintiffs' theory of causation reasonably

probable, not merely possible.
Ditloff v. State Farm Fire & Cas. Co. 375
6. Conjecture, speculation, or choice of quantitative possibilities is not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other. However, when there is direct evidence sufficient to refute all theories of the cause of damage except the one established solely by circumstantial evidence, there then remains but one inference deducible from the facts under the circumstances, and it is within the province of the trier of fact to make this determination.
Ditloff v. State Farm Fire & Cas. Co. 375
7. 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.
State v. El-Tabech 395

Conflict of Interest

1. Representation of multiple parties is not prohibited per se, but this court disapproves the actions of an attorney in representing conflicting interests in litigation, even with the consent of the clients involved.
Wendell's, Inc. v. Malmkar 341
2. Because the task of assessing the potential for conflict of interest well in advance of trial is such a difficult one, the standards applicable to making that assessment must be flexible.
State v. El-Tabech 395

Conspiracy

An overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act.
State v. Lafler 362

Constitutional Law

1. A person's capacity to claim the protection of article I, § 7, of the Nebraska Constitution as to unreasonable searches and seizures, like its counterpart, the fourth amendment to the U.S. Constitution, depends upon whether the person who claims such protection has a legitimate expectation of privacy in the invaded place.
State v. Hodge and Carpenter 94
2. An unreasonable search within the meaning of the fourth amendment occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.
State v. Hodge and Carpenter 94

3. Generally, a person who has relinquished control and vacated the premises has no reasonable expectation of privacy in the premises.
State v. Hodge and Carpenter 94
4. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his fourth amendment rights infringed.
State v. Hodge and Carpenter 94
5. Neb. Rev. Stat. § 28-512(2) (Reissue 1985) is constitutional.
State v. Scott 146
6. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property. Neb. Const. art. VIII, § 1.
Gordman Properties Co. v. Board of Equal. 169
7. Attached to every constitutional challenge is the presumption that acts of the Nebraska Unicameral are constitutional, with all reasonable doubts resolved in favor of constitutionality.
In re Guardianship and Conservatorship of Sim 181
State v. Burke 625
8. The presumption of constitutionality continues until the statute under review clearly appears to contravene some constitutional provision.
In re Guardianship and Conservatorship of Sim 181
9. Because statutes are presumed to be constitutional, the burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
In re Guardianship and Conservatorship of Sim 181
10. The subject of a proceeding to determine the need for a guardian or conservator has no fifth amendment right to remain silent during the course of a psychiatric examination.
In re Guardianship and Conservatorship of Sim 181
11. Neb. Rev. Stat. § 25-222 (Reissue 1985) is constitutional.
Williams v. Kingery Constr. Co. 235
12. Neb. Rev. Stat. § 25-223 (Reissue 1985) is constitutional.
Williams v. Kingery Constr. Co. 235
13. The relationship between a parent and child is a constitutionally protected one, and although the father of a child born out of wedlock need not be treated in all respects as is the father of a child born in wedlock, the relationship between an unwed father and his child is not devoid of constitutional protection.
White v. Mertens 241
In re Application of S.R.S. and M.B.S. 759
14. The proper way to conduct a group arraignment is to call each person being arraigned before the bench, identify the defendant, advise him or her that the remarks of the court apply to each person individually, and ascertain on the record that the defendant was present throughout the conduct of the

arraignment, heard the remarks, and understood them.
State v. Miller 269
15. Where counsel is court appointed, the defendant does not have a constitutional right to counsel of his choice.
State v. El-Tabech 395
16. The warning specified in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is required only when there has been a restriction on a person's freedom as to render such person in custody. The mere fact that an investigation has focused on a suspect does not trigger the need for the *Miranda* warning in a noncustodial setting.
State v. Brown 418
17. Whether a person is in custody, in a constitutional sense, is a question of fact to be determined by the trial court.
State v. Brown 418
18. One cannot challenge the constitutionality of a statute for the first time on appeal to this court.
In re Interest of C.R.S. 436
19. Regarding a motion to suppress, the initial burden of proof (burden of going forward) is on the movant to establish a prima facie case of an unconstitutional search and seizure, and when such prima facie case has been established, the burden of proof (burden of going forward) shifts to the State to establish that the search and seizure were constitutionally permissible.
State v. Vrtiska 454
20. Entry through a window of a dwelling is an intrusion subject to the safeguard of the fourth amendment to the U.S. Constitution.
State v. Vrtiska 454
21. A nonconsensual and unannounced entry by a police officer for execution of a search warrant within an unoccupied dwelling is not, by itself and necessarily, an unreasonable intrusion prohibited by the fourth amendment to the U.S. Constitution.
State v. Vrtiska 454
22. A search of premises must be directed in good faith toward the object specified in a search warrant or for other means and instrumentalities by which a crime charged has been committed. Such search must not be a general exploratory search through which officers merely hope to discover evidence of wrongdoing.
State v. Vrtiska 454
23. When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, the officers may seize such articles whether those items are initially in plain sight or come into plain sight subsequently as a result of the officers' efforts.
State v. Vrtiska 454

24. Generally, this court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated.
State v. Burke 625
25. A defendant who would receive no benefit from a declaration of invalidity does not have standing to challenge the constitutionality of a statute.
State v. Burke 625
26. The traditional rule is that one to whom a statute may be applied constitutionally does not have standing to challenge that statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the court; however, an exception to that rule is made when a statute is overbroad. In the latter instance one is allowed to assert the rights of others and attack the overbreadth of a statute even though the behavior of the person making the attack clearly may be unprotected and could be proscribed by a law drawn with the requisite narrow specificity.
State v. Burke 625
27. Where conduct and not merely noncommercial speech is involved, the overbreadth of the statute attacked must not only be real but substantial as well, judged in relation to the statute's plainly legitimate sweep.
State v. Burke 625
28. Where a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted.
State v. Burke 625
29. A statute challenged as overbroad should be construed so as to avoid constitutional problems if it is subject to such a limiting construction.
State v. Burke 625
30. Unconstitutionality must be clearly established before this court is authorized to declare a statute void.
State v. Burke 625
31. One who has engaged in conduct which is clearly prohibited by the questioned statute cannot complain that the statute is vague when applied to the conduct of others.
State v. Burke 625
32. What will amount to forbidden generality, or, to put it another way, insufficient particularity in a warrant necessarily depends upon the facts and circumstances of each case. Thus, to say that general warrants are outlawed by the federal and state Constitutions merely initiates the inquiry. The same may be said of their expressed requirement of probable cause and their

ultimate mandate of reasonableness. Like "particularity," these depend upon the facts and circumstances.
State v. Pecha 673
33. The right to trial by jury is personal, and a defendant may waive that right.
State v. High 690
34. In order to waive the right to trial by jury, a defendant must be advised of the right to jury trial, must personally waive that right, and must do so either in writing or in open court for the record.
State v. High 690
35. In order for a court to permit a defendant to waive the right to trial by jury, it is not necessary that the defendant be informed of the precise role which the jury fulfills in a particular prosecution.
State v. High 690
36. When an unwed father evidences a commitment to the responsibilities of raising the child and participates in the care of the child, his interest in continuing his relationship with his child merits substantial constitutional protection.
In re Application of S.R.S. and M.B.S. 759
37. A venireperson whose views on capital punishment are such as to prevent or substantially impair the performance of his or her duties as a juror may, under the provisions of Neb. Rev. Stat. § 29-2006(3) (Reissue 1985), be constitutionally excused from jury service in a capital case.
State v. Bird Head 822
38. Regarding a hearing to determine whether a convicted defendant is a habitual criminal as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1985), the defendant is entitled to be present with counsel, have an opportunity to be heard at such hearing, be confronted with witnesses against the defendant, exercise the right of cross-examination, and offer evidence.
State v. Jackson 843

Construction Contracts

1. Architects and engineers are professionals for purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), and the period of repose applicable to an architect who has a duty to inspect throughout construction under the provisions of § 25-222 begins to run when the construction is completed.
Williams v. Kingery Constr. Co. 235
2. The phrase "[a]ny action to recover damages" in Neb. Rev. Stat. § 25-223 (Reissue 1985) includes an action in tort for damages caused by the negligent construction of a building.
Williams v. Kingery Constr. Co. 235

Contempt

1. Criminal contempt is a prosecution to preserve the power and

vindicate the dignity of the court and to punish for disobedience of the court's orders.
State ex rel. Kandt v. North Platte Baptist Church 657
2. A criminal contempt order is in the nature of a final order in that the sentence imposed is absolute and unconditional.
State ex rel. Kandt v. North Platte Baptist Church 657
3. In contempt proceedings it is necessary to establish guilt beyond a reasonable doubt.
State ex rel. Kandt v. North Platte Baptist Church 657

Contracts

1. Generally, when a contract does not provide a time for performance, a reasonable time will be implied by law.
Chilton Accts. Rec. Mgmt. v. Project Life Min. 482
2. What constitutes a reasonable time for the performance of a contract must be determined from the general nature and circumstances of each case.
Chilton Accts. Rec. Mgmt. v. Project Life Min. 482
3. Neb. U.C.C. § 2-709 (Reissue 1980) applies to the sale of goods, which are generally defined in the code as things which are movable at the time of identification to the contract for sale.
Hammond v. Streeter 491
4. Even though a contract for sale of property was a mixed one, for the sale of both "goods" and "nongoods," where the case was presented to the trial court and to this court on appeal on the theory that the sales article of the Uniform Commercial Code applied, Neb. U.C.C. §§ 2-101 et seq. (Reissue 1980), the Supreme Court will dispose of the case on appeal on that theory.
Hammond v. Streeter 491
5. Where each of multiple applicable automobile insurance policies contains mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance, the owner's policy provides primary coverage and the driver's policy provides excess coverage.
Boren v. State Farm Mut. Auto. Ins. Co. 503
6. Absent ambiguities, language in a policy of insurance is to be given its plain and ordinary meaning.
Boren v. State Farm Mut. Auto. Ins. Co. 503
7. An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning.
Malerbi v. Central Reserve Life 543
8. Where a clause in an insurance contract can be fairly interpreted in more than one way, the ambiguity is to be resolved by the court as a matter of law. In the case of such ambiguities, the construction

favorable to the insured prevails so as to afford coverage.
Malerbi v. Central Reserve Life 543
9. The insurer as drafter of the policy is responsible for language creating an ambiguity.
Malerbi v. Central Reserve Life 543
10. Resolution of an ambiguity in a policy of insurance turns not on what the insurer intended the language to mean, but what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made.
Malerbi v. Central Reserve Life 543
11. Provisions in an insurance policy which limit the benefits payable thereunder are generally defensive in character and must be pleaded and proved by the insurer.
Malerbi v. Central Reserve Life 543

Conversion

While an attorney's restitution of a client's converted funds prior to being faced with accountability may not exonerate such misconduct, restitution prior to complaint or prospective accountability is a significant mitigating factor to be considered in determining an appropriate sanction for an attorney's conversion of a client's funds.
State ex rel. NSBA v. Miller 261

Convictions

1. A trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that conviction based thereon could not be sustained.
State v. Donnelson 41
State v. Meints 335
2. Circumstantial evidence is sufficient to support a conviction if the evidence and reasonable inferences that may be drawn from such evidence establish the defendant's guilt beyond a reasonable doubt.
State v. Donnelson 41
State v. Laue 57
3. In determining the sufficiency of 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 trier of fact, and a verdict made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Laue 57
State v. Hvistendahl 315

4. Circumstantial evidence can be sufficient to sustain a conviction of a minor in possession in violation of Neb. Rev. Stat. § 53-180.02 (Reissue 1984).
State v. Laue 57

5. 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.
State v. Laue 57
State v. Bird Head 822

6. In determining whether the evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on credibility of witnesses, or evaluate the evidence. Those determinations are within the province of the jury, and its verdict must be sustained if the evidence, when viewed in the light most favorable to the State, is sufficient to support the verdict.
State v. Meints 335
State v. Brown 418
State v. Walker 794

7. 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.
State v. El-Tabech 395

8. In determining the sufficiency of the evidence needed to sustain a criminal conviction, the Nebraska Supreme Court is obligated to view the evidence in the light most favorable to the State.
State v. Bird Head 822

9. In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the function of the Nebraska Supreme Court to weigh the evidence; a verdict of guilt must be affirmed if the evidence, viewed and construed most favorably to the State, sufficiently supports some rational theory of guilt.
State v. Bird Head 822

10. To sustain a conviction for the offense of criminal attempt in violation of Neb. Rev. Stat. § 28-201(1)(a) or (b) (Reissue 1985), evidence must establish beyond a reasonable doubt that the defendant intentionally engaged in conduct which (1) would constitute a particular crime, if the attendant circumstances were as the defendant believes such circumstances to be, or (2) under the circumstances as the defendant believes such circumstances to be, constitutes a substantial step in a course of conduct intended to culminate in the defendant's commission of the crime.
State v. Jackson 843

Corporations

A corporation is a complete entity separate and distinguishable from its stockholders and officers and may, if it sees fit, have one of the latter serve it in the capacity of an ordinary employee.
Bituminous Casualty Corp. v. Deyle 82

Costs

Whenever any person shall appeal to the district court from the assessment of his property as fixed by the county board of equalization, and the appeal shall be sustained in whole or in part, the cost of such appeal, including costs of witnesses, if any, shall be paid by the county wherein such property is situated. Neb. Rev. Stat. § 77-1513 (Reissue 1986).
Fremont Plaza v. Dodge County Bd. of Equal. 303

Courts

1. A district court has the inherent power to vacate its own judgment anytime during the term in which it is rendered.
Fredericks v. Western Livestock Auction Co. 211
2. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court on appeal.
Brunken v. City of Omaha 410
3. On appeal from the county court, if the district court reverses the judgment appealed from, it may enter judgment in accordance with its findings.
Chilton Accts. Rec. Mgmt. v. Project Life Min. 482
4. On appeal from the county court, the district court is required to review the case for error appearing on the record.
Hammond v. Streeter 491
5. Courts have a duty to treat the rich and the poor equally.
State v. Heaton 702

Crime Victims

When an order appealed from is the order of the Crime Victim's Reparations Board, and not the recommendation of the hearing officer, the "county where the action is taken" for purposes of filing an appeal is the county in which the board acted, not the county where the hearing took place. Neb. Rev. Stat. § 84-917 (Reissue 1981).
Gilmore v. Nebraska Crime Vict. Rep. Bd. 640

Criminal Attempt

1. To sustain a conviction for the offense of criminal attempt in violation of Neb. Rev. Stat. § 28-201(1)(a) or (b) (Reissue 1985), evidence must establish beyond a reasonable doubt that the defendant intentionally engaged in conduct which (1) would constitute a particular crime, if the attendant circumstances were

as the defendant believes such circumstances to be, or (2) under the circumstances as the defendant believes such circumstances to be, constitutes a substantial step in a course of conduct intended to culminate in the defendant's commission of the crime.
State v. Jackson 843

2. Whether a defendant's conduct constituted a substantial step toward commission of a particular crime is, generally, a question for the trier of fact.
State v. Jackson 843

3. To commit the crime of attempted sexual assault in any degree, actual sexual penetration or sexual contact between the victim and the defendant is not required.
State v. Jackson 843

4. In the offense of a criminal attempt, Neb. Rev. Stat. § 28-201 (Reissue 1985), a substantial step in a course of conduct intended to culminate in a sexual assault in the first degree (sexual penetration) may include a substantial step in a course of conduct intended to culminate in achievement of sexual contact as well, that is, commission of a sexual assault in the second degree.
State v. Jackson 843

5. Within the offense of "criminal attempt," Neb. Rev. Stat. § 28-201 (Reissue 1985), an attempt to commit a particular crime may also include an attempt to commit a lesser-included offense in reference to the designated crime alleged to have been attempted.
State v. Jackson 843

Criminal Law

1. Where a judge serves as the trier of fact in a criminal case, the factual findings will not be disturbed on appeal unless clearly wrong.
State v. Laue 57

2. The proper way to conduct a group arraignment is to call each person being arraigned before the bench, identify the defendant, advise him or her that the remarks of the court apply to each person individually, and ascertain on the record that the defendant was present throughout the conduct of the arraignment, heard the remarks, and understood them.
State v. Miller 261

3. The identity of the perpetrator of a criminal offense may be proven by inference and circumstantial evidence.
State v. Mecum 293

4. A penal statute is required to be strictly construed and should be given a sensible construction. A statute should be construed in the context of the object sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purpose for

which it serves.
State v. Hicks 322
State v. Burke 625

5. Although a penal statute is required to be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence.
Wounded Shield v. Gunter 327

6. Pursuant to the Nebraska Treatment and Corrections Act, Neb. Rev. Stat. §§ 83-170 to 83-1,135 (Reissue 1971, Cum. Supp. 1972 & Cum. Supp. 1974), there may be a forfeiture of credit for meritorious behavior earned before release on mandatory parole.
Wounded Shield v. Gunter 327

7. Prosecutions for felonies, including murder, may be had on informations filed by the county attorney.
State v. El-Tabech 395

8. Alibi, in Nebraska, is not an affirmative defense.
State v. El-Tabech 395

9. In the context of a criminal prosecution, "alibi" denotes an attempt by the defendant to demonstrate he did not commit the crime because, at the time, he was in another place so far away or in a situation preventing his doing the thing charged against him. Alibi evidence is merely rebuttal evidence directed to that part of the State's evidence which tends to identify the defendant as the person who committed the alleged crime.
State v. El-Tabech 395

10. A defendant, to establish an alibi, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place.
State v. El-Tabech 395

11. If the offenses charged are of the same or similar character, or are based on the same act or transaction, the offenses may be joined in one trial pursuant to Neb. Rev. Stat. § 29-2002(3) (Reissue 1985).
State v. Vrtiska 454

12. A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion.
State v. Vrtiska 454

13. A penal statute is construed strictly and must be sufficiently clear so that a person of ordinary intelligence has fair notice of exactly what conduct is forbidden.
State v. Burke 625

14. Where a single act violates more than one statute, a prosecutor is free to prosecute under any statute he or she chooses, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.
State v. Burke 625
15. In a criminal case, a defendant may establish a prima facie showing of purposeful racial discrimination solely on evidence concerning the State's use of peremptory challenges.
State v. Threet 682
16. When prima facie showing of racial discrimination is established, the burden then shifts to the State to come forth with a neutral explanation for the peremptory challenge.
State v. Threet 682
17. A trial court's determination of a defendant's indigency, requiring court-appointed counsel for a defendant in a criminal case, will be upheld on appeal, unless the trial court has abused its discretion in such determination.
State v. Richter 837
18. Under Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), to determine whether a defendant in a criminal case is indigent, requiring court-appointed counsel, a court must consider various 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. Richter 837
19. While a situation where expenses exceed income, considered by itself, may or may not constitute indigency of a defendant in a criminal case, an unintended absence of income and lack of property may be considered in determining whether a defendant is an indigent entitled to court-appointed counsel.
State v. Richter 837

Damages

1. A jury verdict which is wholly inadequate as to amount of damages, and therefore is not supported by the evidence, must be set aside and a new trial granted.
Havlicek v. Desai 222
2. Conjecture, speculation, or choice of quantitative possibilities is not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other. However, when there is direct evidence sufficient to refute all theories of the cause of damage except the one established solely by circumstantial evidence, there then remains but one inference deducible from the facts under the circumstances, and it is within

the province of the trier of fact to make this determination.
Ditloff v. State Farm Fire & Cas. Co. 375
3. Malice may be presumed from an intentional act if damage of some kind to some property should or could have been reasonably expected to result from such act. This presents a question of fact for the jury.
Ditloff v. State Farm Fire & Cas. Co. 375
4. The measure of damages in a replevin action where the property is not returned is the value of the property, together with interest, from the date of the unlawful taking.
Pick v. Fordyce Co-op Credit Assn. 714
5. When property is returned in a replevin action, the party recovering possession of the property is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention.
Pick v. Fordyce Co-op Credit Assn. 714
6. For the purpose of extending a statute of limitations, discovery does not mean the final resolution of damages; it can be triggered at some time before the full extent of the damages is sustained.
Seagren v. Peterson 747

Death

Contradictory medical opinions as to the cause of death in a criminal case do not establish, of themselves, that the State has failed to prove the cause of death beyond a reasonable doubt.
State v. Donnelson 41

Death Penalty

1. While a prospective juror's attitudes about capital punishment are irrelevant to sentencing in Nebraska, they may be relevant to his ability to fairly determine the defendant's guilt or innocence.
State v. El-Tabech 395
2. A venireperson whose views on capital punishment are such as to prevent or substantially impair the performance of his or her duties as a juror may, under the provisions of Neb. Rev. Stat. § 29-2006(3) (Reissue 1985), be constitutionally excused from jury service in a capital case.
State v. Bird Head 822
3. Mere proof that an offender was previously convicted of two assaults of unspecified degree and of an attempted second degree assault does not in and of itself establish beyond a reasonable doubt the existence of the aggravating circumstance defined in Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1985).
State v. Bird Head 822

Debtors and Creditors

1. All payments are presumed to be voluntary until the contrary appears, and the burden rests on the party seeking to recover a

payment to prove that it was involuntary.
Wendell's, Inc. v. Malmkar 341

2. An involuntary payment is one springing from accident or impulse rather than conscious exercise of the will, or unintentional.
Wendell's, Inc. v. Malmkar 341

3. When a unilateral mistake is made and a party receives the benefit of that mistake, before the mistaken payor can recover the mistaken payment, it must also show that the person receiving the payment has been unjustly enriched.
Wendell's, Inc. v. Malmkar 341

Decedents' Estates

1. The cardinal rule concerning a decedent's will is the requirement that the intention of the testator shall be given effect, unless the maker of the will attempts to accomplish a purpose, or to make a disposition, contrary to some rule of law or public policy.
In re Estate of Tjaden 19

2. To arrive at a testator's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will.
In re Estate of Tjaden 19

3. When intention is expressed in clear language used in a testator's will, a court must give full force and effect to the testator's intention so expressed.
In re Estate of Tjaden 19

4. Generally, a term of art used in reference to a devise or other testamentary disposition or provision has a technical but, nonetheless, clear meaning used in a decedent's will.
In re Estate of Tjaden 19

5. "By right of representation" means a devisee is entitled to take or receive a share of an estate on a per stirpes basis.
In re Estate of Tjaden 19

6. A distribution per stirpes is one in which the heirs or devisees take proportionate shares of the share of the ancestor through whom they claim as the ancestor's representatives. As such representatives, the heirs or devisees will be entitled to take just as much as such ancestor would have taken and no more.
In re Estate of Tjaden 19

7. In a per stirpes distribution, ordinarily applicable in an intestate's estate, there is a division of property among a class or group of distributees who take the share which a decedent would have taken if such decedent were alive, taking such share by the right of

representing the decedent.
In re Estate of Tjaden 19
8. While a nonexpert witness who is shown to have had intimate acquaintance with a deceased may be permitted to state an opinion concerning the mental condition of the deceased, the person testifying must give the facts and circumstances upon which the opinion is based.
In re Estate of Thompson 643

Declaratory Judgments

1. In the absence of any other statutory remedy, an unwed father has recourse to the declaratory judgment statutes to establish his paternal rights.
White v. Mertens 241
2. Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute.
Boren v. State Farm Mut. Auto. Ins. Co. 503
Johnston v. Panhandle Co-op Assn. 732
3. A declaratory judgment action is sui generis and may involve questions of both law and equity.
Johnston v. Panhandle Co-op Assn. 732

Deeds

Parol evidence must be clear, unequivocal, and convincing to overcome recorded legal title and the recitals in the deed that purport to convey title to both of the parties.
Blaser v. Blaser 104

Default Judgments

1. The vacation of a default judgment rests in the discretion of the district court. The burden rests on the person adversely affected by the court's order to affirmatively establish an abuse of discretion.
Fredericks v. Western Livestock Auction Co. 211
2. In considering a request to set aside a default judgment, a court may consider promptness of the motion to vacate, negligence or want of diligence of the party moving to vacate, and avoidance of unnecessary delays and frivolous proceedings in the administration of justice.
Fredericks v. Western Livestock Auction Co. 211
3. Regarding a refusal to set aside a default judgment, an abuse of discretion may exist where the defaulted party tenders an answer or other proof disclosing a meritorious defense to the action which is the subject of the default.
Fredericks v. Western Livestock Auction Co. 211
4. A default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want

of diligence, has failed to protect his own interest. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation.
Fredericks v. Western Livestock Auction Co. 211

Directed Verdict

1. A trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that conviction based thereon could not be sustained.
State v. Donnelson 41
State v. Meints 335

2. On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom.
Havlicek v. Desai 222

3. A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence.
Lambelet v. Novak 229

4. The parties against whom the verdict is directed are entitled to have every controverted fact resolved in their favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the parties against whom the motion is made, the case may not be decided as a matter of law.
Lambelet v. Novak 229
Ditloff v. State Farm Fire & Cas. Co. 375

5. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
Ditloff v. State Farm Fire & Cas. Co. 375

6. In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
State v. Brown 418

Disciplinary Proceedings

1. A proceeding to discipline a lawyer is a trial de novo on the record.
State ex rel. NSBA v. Miller 261
State ex rel. NSBA v. Roubicek 509
2. In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
State ex rel. NSBA v. Miller 261
State ex rel. NSBA v. Roubicek 509
3. To determine whether and to what extent discipline should be imposed, it is necessary that the Supreme Court consider 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. NSBA v. Miller 261
State ex rel. NSBA v. Roubicek 509
4. Mitigating circumstances shown in the record should be considered in determining an appropriate discipline.
State ex rel. NSBA v. Miller 261
5. To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in the light of the particular facts and circumstances.
State ex rel. NSBA v. Miller 261
6. While an attorney's restitution of a client's converted funds prior to being faced with accountability may not exonerate such misconduct, restitution prior to complaint or prospective accountability is a significant mitigating factor to be considered in determining an appropriate sanction for an attorney's conversion of a client's funds.
State ex rel. NSBA v. Miller 261
7. Similarity of the substance of a complaint, charge, or formal charge to the material allegations of pending criminal or civil litigation shall not in itself prevent or delay disciplinary proceedings against the member involved in such litigation.
State ex rel. NSBA v. Roubicek 509
8. In disciplinary proceedings, the charges must be established by clear and convincing evidence.
State ex rel. NSBA v. Roubicek 509
9. An attorney before a court violates his oath as an attorney if he willfully conceals or misrepresents facts or law material to the court's decision.
State ex rel. NSBA v. Roubicek 509
10. In disciplinary proceedings, the extent of the sanction imposed by this court upon an offending lawyer cannot be controlled by the sanction imposed upon an equally offending lawyer in the same

case in a local proceeding before a committee on inquiry.
State ex rel. NSBA v. Roubicek 509

11. Where the Supreme Court receives no additional evidence in a judicial discipline proceeding, the scope of review is de novo on the record.
In re Complaint Against Kelly 583

12. In an original action on a complaint against a judge by the Commission on Judicial Qualifications, the Supreme Court must first determine if the allegations are supported by the evidence; second, the canons of the Code of Judicial Conduct and subsections of Neb. Rev. Stat. § 24-722 (Reissue 1985) which were violated; and third, the appropriate discipline.
In re Complaint Against Kelly 583

13. The Commission on Judicial Qualifications must prove allegations of judicial misconduct by clear and convincing evidence.
In re Complaint Against Kelly 583

14. Crucial to the finding that a judge's misconduct is willful is a showing of bad faith. Willfulness involves more than an error of judgment or mere lack of diligence. Neb. Rev. Stat. § 24-722(1) and (2) (Reissue 1985).
In re Complaint Against Kelly 583

15. A certain amount of honest error is expected and does not necessarily warrant discipline. However, blatant, flagrant, or repeated errors or failures in the performance of judicial duties will not be condoned. Neb. Rev. Stat. § 24-722(2) (Reissue 1985).
In re Complaint Against Kelly 583

16. A finding that a judge's conduct was prejudicial to the administration of justice, bringing the judicial office into disrepute, is not dependent on the judge's motives but upon the impact the conduct could have on knowledgeable observers.
In re Complaint Against Kelly 583

17. The object of the Code of Judicial Conduct adopted by this court is to delineate what conduct should be avoided for its prejudicial potential. Therefore, a finding that the code has been violated results in a finding that a judge committed conduct prejudicial to the administration of justice. Neb. Rev. Stat. § 24-722(6) (Reissue 1985).
In re Complaint Against Kelly 583

18. The purpose of judicial discipline is not vengeance; it is to preserve the integrity of and the public confidence in the judiciary.
In re Complaint Against Kelly 583

19. Sanctions should be imposed where necessary to safeguard the bench from those who are unfit. The discipline imposed must prohibit the respondent and others from engaging in prohibited

conduct.
In re Complaint Against Kelly 583

Discrimination

1. In a criminal case, a defendant may establish a prima facie showing of purposeful racial discrimination solely on evidence concerning the State's use of peremptory challenges.
State v. Threet 682
2. When prima facie showing of racial discrimination is established, the burden then shifts to the State to come forth with a neutral explanation for the peremptory challenge.
State v. Threet 682

Dismissal and Nonsuit

A plaintiff has the right to dismiss the action it has brought at any time prior to final submission.
United States Fire Ins. Co. v. Affiliated FM Ins. Co. 218

Divorce

1. Property divisions are not subject to a rigid mathematical formula. The division must, most of all, be reasonable.
Blaser v. Blaser 104
2. In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
Gerber v. Gerber 611

Drunk Driving

Evidence that the defendant had the odor of alcohol on his breath, he slurred his speech, he had bloodshot eyes, his recitation of the alphabet was unintelligible, he could not pass a second sobriety test, and he had swerved his vehicle over the centerline of the road is sufficient to sustain a finding that the defendant had ingested sufficient alcohol to impair his ability to operate a motor vehicle.
State v. Richter 871

Due Process

1. In order to subject a defendant to a judgment in personam, if the defendant is not within the territory of the forum, due process requires that such defendant have certain minimum contacts with the forum state so that maintenance of the suit does not offend

traditional notions of fair play and substantial justice.
McGowan Grain v. Sanburg 129

2. Within the concept of minimum contacts, due process protects against inconvenient litigation which imposes an unreasonable or unfair burden on a defendant.
McGowan Grain v. Sanburg 129

3. Fair warning that activity in a forum state may result in personal jurisdiction is satisfied if a defendant purposefully directs activities at the forum state and its residents and injury is caused by the defendant's activity within the forum state.
McGowan Grain v. Sanburg 129

4. Where a nonresident individual purposefully derives benefit from interstate activities, fairness requires such individual to account for the consequences arising proximately from the individual's activities in the forum state.
McGowan Grain v. Sanburg 129

5. The "fiduciary shield" doctrine is not a constitutional principle precluding personal jurisdiction over a nonresident officer, agent, or employee of a corporation. If a nonresident, as a corporate officer, agent, or employee, has contacts which satisfy standards imposed by a forum state's long-arm statute and the requirements of due process, personal jurisdiction over such nonresident may be obtained in the forum state.
McGowan Grain v. Sanburg 129

6. To have a property interest in employment, a person must have a legitimate claim of entitlement to it. Generally, an employee at will has no such reasonable expectation of continued employment or legitimate claim of entitlement to it.
Johnston v. Panhandle Co-op Assn. 732

Easements

A segment of a continuous right-of-way, once acquired for a stated purpose, continues to be used for that purpose during the period of time that the holder of the right continues in good faith its efforts to complete the acquisition of the entire right-of-way.
Nebraska Public Power Dist. v. Munderloh 205

Effectiveness of Counsel

1. When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
State v. Rubek 477

2. Where one claims that the alleged ineffective assistance of counsel resulted in prejudice, the defendant must show that, but for the ineffective assistance of counsel, there is a reasonable probability that the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
State v. Rubek 477

Employer and Employee

1. A corporation is a complete entity separate and distinguishable from its stockholders and officers and may, if it sees fit, have one of the latter serve it in the capacity of an ordinary employee.
Bituminous Casualty Corp. v. Deyle 82
2. Omaha Mun. Code § 22-35 (1980) does not permit one to receive disability payments if the employee is able to perform active duty services for the employer, even though not the same as performed before the injury. It is only where the employee is unable to perform at all that he or she may receive benefits.
Brunken v. City of Omaha 410
3. There are three considerations used to test the validity of a partial restraint of trade such as a covenant not to compete: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.
Polly v. Ray D. Hilderman & Co. 662
4. An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.
Polly v. Ray D. Hilderman & Co. 662
5. To distinguish between "ordinary competition" and "unfair competition," it is generally necessary to focus on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers.
Polly v. Ray D. Hilderman & Co. 662
6. A restrictive covenant not to compete must be no greater than is reasonably necessary before it will be enforced.
Polly v. Ray D. Hilderman & Co. 662
7. As a general rule, a covenant by an employee not to compete is valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact.
Polly v. Ray D. Hilderman & Co. 662

8. The Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), requires that employers subject to its provisions pay each employee engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise which is engaged in commerce or in the production of goods for commerce, specified wages for all hours worked, certain of which are to be compensated at overtime rates.
Banks v. Mercy Villa Care Center 751

9. The Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), is to be construed liberally so as to apply it to the furthest reaches consistent with congressional direction in recognition of the fact that broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency.
Banks v. Mercy Villa Care Center 751

10. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), an enterprise which provides a home to patients from other states is engaged in interstate commerce.
Banks v. Mercy Villa Care Center 751

11. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), the workweek ordinarily includes all the time during which an employee is necessarily required to be on the employer's premises, on duty, or at a prescribed workplace.
Banks v. Mercy Villa Care Center 751

12. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), bona fide meal periods are not worktime.
Banks v. Mercy Villa Care Center 751

13. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), work not requested but permitted is worktime and compensable.
Banks v. Mercy Villa Care Center 751

14. No matter how much time is designated as a meal period, if an employee is not free to follow pursuits of a purely private nature or the time is spent predominantly for the employer's benefit, the designated time is not, for the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), a bona fide meal period.
Banks v. Mercy Villa Care Center 751

Employment Contracts

1. When employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, generally, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability.
Johnston v. Panhandle Co-op Assn. 732

2. The fact that an employment contract was for an indefinite duration does not preclude job security provisions of an employee handbook from becoming a part of the employment contract.
Johnston v. Panhandle Co-op Assn. 732
3. If the language of an employee handbook constitutes an offer definite in form which is communicated to the employee, and the offer is accepted and consideration furnished for its enforceability, the handbook provision becomes part of the employment contract.
Johnston v. Panhandle Co-op Assn. 732
4. In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. To the extent that *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), suggests that a handbook issued after an employee is hired cannot become part of that employee's contract, it is disapproved.
Johnston v. Panhandle Co-op Assn. 732
5. Generally, an agreement to give permanent employment simply means to give a steady job of some permanence, as distinguished from a temporary job or temporary employment.
Johnston v. Panhandle Co-op Assn. 732
6. To have a property interest in employment, a person must have a legitimate claim of entitlement to it. Generally, an employee at will has no such reasonable expectation of continued employment or legitimate claim of entitlement to it.
Johnston v. Panhandle Co-op Assn. 732

Employment Security Law

1. Appeals to this court under the provisions of the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984), are reviewed de novo on the record. It is the duty of this court to retry the issues of fact involved in the findings complained of and to reach an independent conclusion.
Great Plains Container Co. v. Hiatt 558
2. Neb. Rev. Stat. § 48-628(b) (Reissue 1984) requires that misconduct for which a disqualification from receiving unemployment benefits may result must be committed in connection with the employee's work.
Great Plains Container Co. v. Hiatt 558
3. Conduct of an employee in so acting as to create a situation where garnishments are filed with his or her employer is not "misconduct connected with his or her work."
Great Plains Container Co. v. Hiatt 558
4. Suffering repeated garnishments is not generally such misconduct as to disqualify a discharged employee from receiving

unemployment compensation benefits.
Great Plains Container Co. v. Hiatt 558

Equal Protection

Courts have a duty to treat the rich and the poor equally.
State v. Heaton 702

Equity

1. On appeal, the record of an equity action is reviewed de novo, and it is the duty of this court to reach independent conclusions as to the findings required by the pleadings and evidence.
Lincoln East Bancshares v. Rierden 440
2. In an appeal of an equity case, we give proper consideration to the fact that the trial court inspected the property.
Lincoln East Bancshares v. Rierden 440

Escape

A person commits the crime of escape if he unlawfully removes himself from official detention. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes. Neb. Rev. Stat. § 28-912(1) (Reissue 1985).
State v. Hicks 322

Estoppel

1. Performance under a security agreement, including the failure of the secured party to rebuke the debtor or object to the debtor's conduct in selling collateral in violation of the terms of the security agreement, may amount to a waiver of the lender's contractual right to require its written consent to a sale of collateral.
Farmers State Bank v. Farmland Foods 1
2. Whether the secured party's conduct constitutes a waiver of its right to require written consent to a sale of collateral is a question of fact.
Farmers State Bank v. Farmland Foods 1
3. An insurer which gives one reason for its conduct and decision as to a matter in controversy cannot, after litigation has begun, defend upon another and different ground.
Boren v. State Farm Mut. Auto. Ins. Co. 503
4. Generally, if a plaintiff has ample time to institute an action after the inducement of delay has ceased to operate, he or she cannot excuse the failure to act within the statutory time on the ground of estoppel.
Seagren v. Peterson 747

Evidence

1. In a bench trial of a law action, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by witnesses; the extent to which testimony of various witnesses is corroborated; and the reasonableness or unreasonableness of testimony from the witnesses.
Lynn v. Metropolitan Utilities Dist. 121
2. The determination as to the admissibility of an excited utterance generally rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
In re Interest of R.A. and V.A. 157
3. Spontaneity is the key factor in determining whether a statement falls within the excited utterance exception. To qualify as an excited utterance, generally, a statement must meet the following criteria: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the event.
In re Interest of R.A. and V.A. 157
4. Generally, the common-law res gestae requirements that the statement be contemporaneous and spontaneous are relaxed where the statement is one made by a young victim of sexual abuse.
In re Interest of R.A. and V.A. 157
5. A party is barred from asserting a different ground for his objection to the admission of evidence on appeal than was offered before the trier of fact.
Rocek v. Department of Public Institutions 247
6. The doctrine of res ipsa loquitur is that where the instrumentality causing the injury is shown to be under the defendant's exclusive control and management and the accident is one that in the ordinary course of things does not occur if those who have its management or control use proper care, reasonable evidence is afforded, in the absence of an explanation by the defendant, that the accident arose from want of proper care.
Maly v. Arbor Manor, Inc. 276
7. One relying upon the doctrine of res ipsa loquitur must establish that the instrumentality causing the damage was in the exclusive control and management of the party sought to be held liable.
Maly v. Arbor Manor, Inc. 276
8. If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa

loquitur is not applicable. The doctrine is applicable only where the plaintiff is unable to allege or prove the particular *act of negligence* which caused the injury. However, the plaintiff may and must allege and prove the *physical cause* of the damage inflicted.
Maly v. Arbor Manor, Inc. 276

9. The court is not bound to accept a conclusion of an expert witness that certain evidence could not be used that would establish guilt beyond a reasonable doubt. Such a legal determination must be made by the trier of fact, not an expert witness.
State v. Hvistendahl 315

10. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
Ditloff v. State Farm Fire & Cas. Co. 375

11. Where several inferences are deducible from the facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover.
Ditloff v. State Farm Fire & Cas. Co. 375

12. Conjecture, speculation, or choice of quantitative possibilities is not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other. However, when there is direct evidence sufficient to refute all theories of the cause of damage except the one established solely by circumstantial evidence, there then remains but one inference deducible from the facts under the circumstances, and it is within the province of the trier of fact to make this determination.
Ditloff v. State Farm Fire & Cas. Co. 375

13. Alibi, in Nebraska, is not an affirmative defense.
State v. El-Tabech 395

14. In the context of a criminal prosecution, "alibi" denotes an attempt by the defendant to demonstrate he did not commit the crime because, at the time, he was in another place so far away or in a situation preventing his doing the thing charged against him. Alibi evidence is merely rebuttal evidence directed to that part of the State's evidence which tends to identify the defendant as the person who committed the alleged crime.
State v. El-Tabech 395

15. A defendant, to establish an alibi, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it

was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place.
State v. El-Tabech 395
16. New evidence is not permitted in the appellate court to determine if errors of law occurred in the tribunal giving rise to the error proceeding.
Brunken v. City of Omaha 410
17. Where errors assigned require review of evidence in error proceedings, they cannot be considered in the absence of a bill of exceptions.
Brunken v. City of Omaha 410
18. Generally, the reception of evidence is within the broad discretion of the trial court, and to obtain reversal on the grounds of the exclusion of evidence, a clear abuse of discretion must be shown.
Lincoln East Bancshares v. Rierden 440
19. Generally, it is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
State v. Wilson 466
State v. Threet 682
Misle Chevrolet Co. v. Kometscher 804
20. A presumption arises when questions of fact are tried by the court that it will consider only such evidence as is competent.
In re Interest of C.G.C.S. 605
21. A defendant may not permit questionable or incompetent evidence to be admitted without objection, take the chance of a favorable result, and after an unfavorable outcome complain that the evidence was received.
State v. Burke 625
22. A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with the stipulation.
State v. Burke 625
23. There must be a sufficient nexus between the criminal activity, the place of the activity, and the persons in the place to show probable cause. This nexus has been described as whether there is sufficient particularity in the probable cause sense, that is, whether the information supplied the magistrate supports the conclusion that it is probable anyone in the described place when the warrant is executed is involved in the criminal activity in such a way as to have evidence thereof on his person.
State v. Pecha 673
24. Where the inclusion in a warrant of the catchall phrase "John and/or Jane Doe" is not based upon any probable cause, and the premises to be searched is acknowledged to be a residence at which

both persons engaging in illegal activity and persons engaging in legal activity might be found, such a warrant cannot be condoned.
State v. Pecha 673

25. In order to revoke probation for the failure to make restitution, the evidence must clearly and convincingly show that the probationer has willfully refused to make restitution when he or she has the resources to pay or has failed to make sufficient bona fide efforts to seek employment and otherwise acquire the resources to make restitution.
State v. Heaton 702

26. Error may not be predicated upon a ruling which excludes evidence unless a substantial right is affected and the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.
In re Interest of L.H. 706

27. In order for consent of a parent to an adoption to be unnecessary under Neb. Rev. Stat. § 43-104(3)(b) (Reissue 1984), abandonment must be shown in the 6-month time period preceding the petition for adoption.
In re Application of S.R.S. and M.B.S. 759

28. Abandonment must be proven by clear and convincing evidence. Neb. Rev. Stat. § 43-104(3)(b) (Reissue 1984).
In re Application of S.R.S. and M.B.S. 759

29. Evidence that the defendant had the odor of alcohol on his breath, he slurred his speech, he had bloodshot eyes, his recitation of the alphabet was unintelligible, he could not pass a second sobriety test, and he had swerved his vehicle over the centerline of the road is sufficient to sustain a finding that the defendant had ingested sufficient alcohol to impair his ability to operate a motor vehicle.
State v. Richter 871

Expert Witnesses

1. Contradictory medical opinions as to the cause of death in a criminal case do not establish, of themselves, that the State has failed to prove the cause of death beyond a reasonable doubt.
State v. Donnelson 41

2. Absent an abuse of discretion, a trial judge's ruling regarding the admissibility of expert testimony will not be reversed.
Little v. Gillette 70

3. The general rule is that when a properly qualified expert witness testifies as to the value of property, the jury determines the weight and credibility of what the expert considers in coming to a conclusion.
Little v. Gillette 70

4. Expert testimony is usually required to prove that a specific manner of treatment or exercise of skill by a physician, surgeon, or other professional demonstrated a failure to use reasonable

care.
Marshall v. Radiology Assoc. 75
Smith v. Weaver 569
5. The admission or exclusion of expert testimony is left largely to the sound discretion of the trial court, which ruling will be upheld absent an abuse of that discretion.
Johannes v. McNeil Real Estate Fund VIII 283
6. While a trial court may admit, if it believes such may assist the jury, expert testimony in areas where laymen have competence, it is not error to exclude expert testimony relating to matters which are not complicated and embrace matters of common knowledge.
Johannes v. McNeil Real Estate Fund VIII 283
7. The court is not bound to accept a conclusion of an expert witness that certain evidence could not be used that would establish guilt beyond a reasonable doubt. Such a legal determination must be made by the trier of fact, not an expert witness.
State v. Hvistendahl 315
8. As a result of Neb. Ct. R. of Disc. 26(b)(4)(A)(i) (rev. 1983), the liberal discovery of potential testimony of an expert witness is not merely for convenience of the court and litigants, but exists to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact.
Norquay v. Union Pacific Railroad 527
9. Under Neb. Ct. R. of Disc. 26(e)(1)(B) (rev. 1983), there is an explicit duty seasonably to supplement a response to a request for discovery directed toward identity of an expert witness expected to be called at trial, the subject matter of expected testimony from such expert, and the substance of the expert witness' expected testimony. As a consequence of Rule 26(e) and within the purview of that rule, a litigant has the right to have interrogatories answered and the duty to supplement answers previously given in response to an adversary's interrogatories, which is a continuing duty to supplement prior responses.
Norquay v. Union Pacific Railroad 527
10. As a sanction for noncompliance with Neb. Ct. R. of Disc. 26(b)(4)(A)(i) (rev. 1983) and the duty to supplement required by Rule 26(e)(1)(B), preclusion of an expert witness' testimony, insofar as such testimony concerns an opinion or facts known in the witness' capacity as an expert, may be an appropriate sanction under Neb. Ct. R. of Disc. 37(d) (rev. 1983).
Norquay v. Union Pacific Railroad 527
11. In determining whether to exclude testimony of an expert witness called by a party who has failed to comply with a request for discovery, the trial court should consider the explanation, if any, for the party's failure to respond, or respond properly, to a request for discovery concerning an expert witness; importance of the

expert witness' testimony; surprise to the party seeking preclusion of the expert's testimony; needed time to prepare to meet the testimony from the expert; and the possibility of a continuance.
Norquay v. Union Pacific Railroad 527

12. Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury.
Mendoza v. Omaha Meat Processors 771

Final Orders

1. Generally, a dispositional order made by a juvenile court is a final order.
In re Interest of R.A. and V.A. 157
2. A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
Lemburg v. Adams County 289
3. A criminal contempt order is in the nature of a final order in that the sentence imposed is absolute and unconditional.
State ex rel. Kandt v. North Platte Baptist Church 657

Fraud

In order to maintain a cause of action for false representation, the plaintiff must allege and prove by a preponderance of the evidence (1) that a representation was made; (2) that the representation was false; (3) that, when made, the representation was known to be false, or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damages as a result.
Lambelet v. Novak 229

Garnishment

1. Conduct of an employee in so acting as to create a situation where garnishments are filed with his or her employer is not "misconduct connected with his or her work."
Great Plains Container Co. v. Hiatt 558
2. Suffering repeated garnishments is not generally such misconduct as to disqualify a discharged employee from receiving unemployment compensation benefits.
Great Plains Container Co. v. Hiatt 558

Good Cause

Any delay caused by the defendant's act or conduct, namely, those pretrial situations or matters described or characterized in Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1985), is automatically

excluded in computing the time when the defendant's trial must commence pursuant to the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985). Any period of delay resulting from a defendant's act or conduct specifically mentioned in reference to the pretrial matters or situations described or characterized in § 29-1207(4)(a) is computed without consideration whether such delay was reasonably necessary. However, a period of delay resulting from other than the defendant's act or conduct described or characterized in § 29-1207(4)(a) may be excluded in computing the time for commencement of a defendant's trial, if such delay occurred on account of "good cause," as provided in § 29-1207(4)(f).
State v. Lafler 362

Guardians and Conservators

1. The district court's and Nebraska Supreme Court's scope of review of proceedings to appoint a guardian or a conservator is for error appearing on the record made in the county court.
In re Guardianship and Conservatorship of Sim 181
2. One may not have his or her property taken away and placed in the hands of a conservator merely because potential heirs believe there will be more left for them if the owner is not free to deal with the property as he or she chooses.
In re Guardianship and Conservatorship of Sim 181
3. A conservator may be appointed for one who, because of advanced age, is unable to manage and will therefore waste or dissipate his or her property unless proper management is provided.
In re Guardianship and Conservatorship of Sim 181
4. Each case seeking the appointment of a guardian or conservator must be determined upon its particular facts, the question being whether the record is such as to establish that the statutory grounds for appointment of a guardian or conservator exist.
In re Guardianship and Conservatorship of Sim 181
5. The subject of a proceeding to determine the need for a guardian or conservator has no fifth amendment right to remain silent during the course of a psychiatric examination.
In re Guardianship and Conservatorship of Sim 181

Habitual Criminals

1. The habitual criminal penalty is not a separate criminal offense, but is an enhanced penalty permissible to punish repetitive criminal conduct after a defendant's conviction on a principal charge and a subsequent finding of the defendant's habitual criminal status.
State v. Jackson 843

2. Regarding a hearing to determine whether a convicted defendant is a habitual criminal as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1985), the defendant is entitled to be present with counsel, have an opportunity to be heard at such hearing, be confronted with witnesses against the defendant, exercise the right of cross-examination, and offer evidence.
State v. Jackson 843
3. While Neb. Rev. Stat. § 29-2221(2) (Reissue 1985) requires that an information contain allegations of facts concerning a defendant's status as a habitual criminal, names of witnesses who may testify at the enhancement hearing are not required to be endorsed on the information charging the defendant with the crime for which a conviction will be the basis to impose the habitual criminal penalty.
State v. Jackson 843
4. In the absence of a sentencing court's abuse of discretion, the sentencing court's procedure utilized for presentation of information at a hearing for imposition of the habitual criminal penalty prescribed by Neb. Rev. Stat. § 29-2221 (Reissue 1985) will be sustained on appeal.
State v. Jackson 843
5. Under Neb. Rev. Stat. § 29-2222 (Reissue 1985), an authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.
State v. Jackson 843
6. It is the term of a defendant's prior sentences, not time actually served, which controls applicability of the habitual criminal penalty found in Neb. Rev. Stat. § 29-2221 (Reissue 1985).
State v. Jackson 843

Hearsay

1. The determination as to the admissibility of an excited utterance generally rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
In re Interest of R.A. and V.A. 157
2. Spontaneity is the key factor in determining whether a statement falls within the excited utterance exception. To qualify as an excited utterance, generally, a statement must meet the following criteria: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the event.
In re Interest of R.A. and V.A. 157
3. Generally, the common-law res gestae requirements that the statement be contemporaneous and spontaneous are relaxed

where the statement is one made by a young victim of sexual abuse.
In re Interest of R.A. and V.A. 157
4. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 1985).
State v. Wilson 466

Highways

1. A pedestrian on a street or highway must use reasonable care to discover and avoid obvious defects or obstructions involving such street or highway. A pedestrian's failure to exercise reasonable care to discover and avoid an obvious defect or obstruction in the path or course traveled is, ordinarily, contributory negligence.
Lynn v. Metropolitan Utilities Dist. 121
2. Whether a pedestrian who walks on a street and falls as the result of the street's condition is contributorily negligent is, ordinarily, a question of fact.
Lynn v. Metropolitan Utilities Dist. 121

Homicide

1. Prosecutions for felonies, including murder, may be had on informations filed by the county attorney.
State v. El-Tabech 395
2. In homicide cases, photographs of the victim may be received for purposes of identification, upon proper foundation. The fact that the photographs may present a gruesome spectacle does not prohibit their admission into evidence.
State v. Threet 682

Implied Consent

1. An appeal from an order of the Director of Motor Vehicles entered under the provisions of Neb. Rev. Stat. § 39-669.18 (Reissue 1984) relating to a refusal to take a blood, breath, or urine test must be filed in the district court of the county in which the alleged events occurred for which the operator was arrested.
Jackson v. Jensen 671
2. The venue requirements of Neb. Rev. Stat. § 39-669.18 (Reissue 1984) governing the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction.
Jackson v. Jensen 671
3. There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine.
Guerzon v. Jensen 712

4. The test as to whether a driver has refused to submit to a breath test is whether the driver conducted himself in such a way that a reasonable person would have been justified in believing the driver had understood he had been asked to take the test but refused to do so.
State v. Richter 871

Indictments and Informations

1. While as a general rule the practice of endorsing additional witnesses just before or during the course of a trial is to be avoided, the trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after trial has begun when doing so does not prejudice the rights of the defendant.
State v. Mecum 293
2. Prosecutions for felonies, including murder, may be had on informations filed by the county attorney.
State v. El-Tabech 395
3. The purpose of the 24-hour waiting period provided for by Neb. Rev. Stat. § 29-1802 (Reissue 1985) is to ensure that the defendant has a reasonable amount of time to prepare his or her defense.
State v. High 695
4. The 24-hour waiting period between service of the information and requiring the defendant to plead may be waived by the defendant, and the failure of the record to show that the defendant made any objection to proceeding with the trial on the charge raises the presumption that he or she waived that right.
State v. High 695
5. The purpose of an information, Neb. Rev. Stat. § 29-1602 (Reissue 1985), is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.
State v. Jackson 843
6. Endorsement of witnesses' names on the information is required to provide a defendant with the identity of persons who may testify against the defendant and to afford the defendant an opportunity to investigate concerning such witnesses, if necessary to prepare a defense at trial.
State v. Jackson 843
7. While Neb. Rev. Stat. § 29-2221(2) (Reissue 1985) requires that an information contain allegations of facts concerning a defendant's status as a habitual criminal, names of witnesses who may testify at the enhancement hearing are not required to be endorsed on the information charging the defendant with the crime for which a conviction will be the basis to impose the habitual criminal

penalty.
State v. Jackson 843

Informed Consent

1. Before there may be recovery in a medical negligence case based upon the failure of a medical care provider such as a physician to obtain an informed consent to the treatment, the plaintiff must establish that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed. Neb. Rev. Stat. § 44-2820 (Reissue 1984).
Smith v. Weaver 569
2. Informed consent is consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Neb. Rev. Stat. § 44-2816 (Reissue 1984).
Smith v. Weaver 569

Insurance

1. In order to recover upon a policy of insurance of limited liability, the insureds must bring themselves within its express provisions.
Ditloff v. State Farm Fire & Cas. Co. 375
2. An insurer which gives one reason for its conduct and decision as to a matter in controversy cannot, after litigation has begun, defend upon another and different ground.
Boren v. State Farm Mut. Auto. Ins. Co. 503
3. Where each of multiple applicable automobile insurance policies contains mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance, the owner's policy provides primary coverage and the driver's policy provides excess coverage.
Boren v. State Farm Mut. Auto. Ins. Co. 503
4. Absent ambiguities, language in a policy of insurance is to be given its plain and ordinary meaning.
Boren v. State Farm Mut. Auto. Ins. Co. 503
5. An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning.
Malerbi v. Central Reserve Life 543
6. Where a clause in an insurance contract can be fairly interpreted in more than one way, the ambiguity is to be resolved by the court as a matter of law. In the case of such ambiguities, the construction favorable to the insured prevails so as to afford coverage.
Malerbi v. Central Reserve Life 543

7. The insurer as drafter of the policy is responsible for language creating an ambiguity.
Malerbi v. Central Reserve Life 543
8. Resolution of an ambiguity in a policy of insurance turns not on what the insurer intended the language to mean, but what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made.
Malerbi v. Central Reserve Life 543
9. Provisions in an insurance policy which limit the benefits payable thereunder are generally defensive in character and must be pleaded and proved by the insurer.
Malerbi v. Central Reserve Life 543

Intent

1. The cardinal rule concerning a decedent's will is the requirement that the intention of the testator shall be given effect, unless the maker of the will attempts to accomplish a purpose, or to make a disposition, contrary to some rule of law or public policy.
In re Estate of Tjaden 19
2. To arrive at a testator's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will.
In re Estate of Tjaden 19
3. When intention is expressed in clear language used in a testator's will, a court must give full force and effect to the testator's intention so expressed.
In re Estate of Tjaden 19
4. Generally, a term of art used in reference to a devise or other testamentary disposition or provision has a technical but, nonetheless, clear meaning used in a decedent's will.
In re Estate of Tjaden 19
5. Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate.
State v. Vaughn 38
6. As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
Wounded Shield v. Gunter 327
7. In order for an action to be willful or wanton, the evidence must show that one acted with actual knowledge that a danger existed and that he intentionally failed to act to prevent the harm which

was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or omission to act, and a constructive intention as to the consequences.
Gallagher v. Omaha Public Power Dist. 354

8. To constitute willful misconduct there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury. To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.
Gallagher v. Omaha Public Power Dist. 354

9. Malice is an intention or desire to harm another through doing something unlawful or otherwise unjustified. However, malice can in certain situations be presumed from the mere doing of an act.
Ditloff v. State Farm Fire & Cas. Co. 375

10. Malice may be presumed from an intentional act if damage of some kind to some property should or could have been reasonably expected to result from such act. This presents a question of fact for the jury.
Ditloff v. State Farm Fire & Cas. Co. 375

11. An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning.
Malerbi v. Central Reserve Life 543

12. Recognition that legislators typically vote on the language of a bill generally requires the Nebraska Supreme Court to assume that the legislative purpose is expressed by the ordinary meaning of the words used.
Lawson v. Ford Motor Co. 725

13. It is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of a statute.
Lawson v. Ford Motor Co. 725

Interest

It is within the discretionary power of the district court to award the payment of interest, and such awards will be upheld on appeal absent an abuse of discretion.
Seemann v. Seemann 116

Investigative Stops

During an investigatory stop, officers may search a suspect's vehicle in order to secure their safety or the safety of another if they have a reasonable belief, based on articulable facts, that they or other persons are in danger.
State v. Gross 798

Invitor-Invitee

1. A failure to provide a business invitee with adequate lighting on a stairway may support an action for negligence.
Havlicek v. Desai 222
2. The proprietor of a business establishment generally has a legal duty to exercise ordinary care to keep his or her premises reasonably safe for use by a business invitee.
Havlicek v. Desai 222
3. In cases when liability for injuries suffered on business premises is being predicated on the owner's or operator's failure to remove or remedy a hazardous condition, unless the evidence shows that the alleged hazardous condition existed and was known to exist by the defendant, the party injured must prove either that the condition was created by the defendant or that it had existed a long enough time prior to the accident to charge the defendant or the defendant's servants with notice to afford them a reasonable opportunity to remedy such condition. However, when a business proprietor is under an affirmative obligation to provide proper lighting to reveal a hazardous condition, such proprietor has in effect created the condition and it is not necessary to prove that he or she had actual or constructive knowledge of the situation.
Havlicek v. Desai 222
4. Where a business proprietor has an affirmative duty to provide adequate lighting, and there is some reasonable explanation why such was not accomplished, it is incumbent upon that proprietor to produce that evidence as part of his or her defense.
Havlicek v. Desai 222

Joinder

1. If the offenses charged are of the same or similar character, or are based on the same act or transaction, the offenses may be joined in one trial pursuant to Neb. Rev. Stat. § 29-2002(3) (Reissue 1985).
State v. Vrtiska 454
2. A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion.
State v. Vrtiska 454

Judges

1. Where the Supreme Court receives no additional evidence in a judicial discipline proceeding, the scope of review is de novo on

the record.
In re Complaint Against Kelly 583
2. In an original action on a complaint against a judge by the Commission on Judicial Qualifications, the Supreme Court must first determine if the allegations are supported by the evidence; second, the canons of the Code of Judicial Conduct and subsections of Neb. Rev. Stat. § 24-722 (Reissue 1985) which were violated; and third, the appropriate discipline.
In re Complaint Against Kelly 583
3. The Commission on Judicial Qualifications must prove allegations of judicial misconduct by clear and convincing evidence.
In re Complaint Against Kelly 583
4. Crucial to the finding that a judge's misconduct is willful is a showing of bad faith. Willfulness involves more than an error of judgment or mere lack of diligence. Neb. Rev. Stat. § 24-722(1) and (2) (Reissue 1985).
In re Complaint Against Kelly 583
5. A certain amount of honest error is expected and does not necessarily warrant discipline. However, blatant, flagrant, or repeated errors or failures in the performance of judicial duties will not be condoned. Neb. Rev. Stat. § 24-722(2) (Reissue 1985).
In re Complaint Against Kelly 583
6. A finding that a judge's conduct was prejudicial to the administration of justice, bringing the judicial office into disrepute, is not dependent on the judge's motives but upon the impact the conduct could have on knowledgeable observers.
In re Complaint Against Kelly 583
7. The object of the Code of Judicial Conduct adopted by this court is to delineate what conduct should be avoided for its prejudicial potential. Therefore, a finding that the code has been violated results in a finding that a judge committed conduct prejudicial to the administration of justice. Neb. Rev. Stat. § 24-722(6) (Reissue 1985).
In re Complaint Against Kelly 583
8. The purpose of judicial discipline is not vengeance; it is to preserve the integrity of and the public confidence in the judiciary.
In re Complaint Against Kelly 583
9. Sanctions should be imposed where necessary to safeguard the bench from those who are unfit. The discipline imposed must prohibit the respondent and others from engaging in prohibited conduct.
In re Complaint Against Kelly 583
10. A motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's sound discretion, and an order overruling such a motion will ordinarily be affirmed on appeal

unless the record establishes bias or prejudice as a matter of law.
State v. Bird Head 822
11. A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
State v. Bird Head 822

Judgments

1. In reviewing a judgment awarded in a bench trial, the Supreme Court does not reweigh evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
Lynn v. Metropolitan Utilities Dist. 121
Kimberling v. Omaha Public Power Dist. 744
2. A district court has the inherent power to vacate its own judgment anytime during the term in which it is rendered.
Fredericks v. Western Livestock Auction Co. 211
3. A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
Lemburg v. Adams County 289
4. On appeal from the county court, the district court is to review the case for error appearing on the record. In a law action the disposition of the trial court has the effect of a jury verdict and is not to be disturbed on appeal unless it is clearly wrong. However, when such judgment is not supported by the evidence, it is clearly wrong and must be set aside.
Chilton Accts. Rec. Mgmt. v. Project Life Min. 482
Hammond v. Streeter 491
5. On appeal from the county court, if the district court reverses the judgment appealed from, it may enter judgment in accordance with its findings.
Chilton Accts. Rec. Mgmt. v. Project Life Min. 482
6. On appeal from an action at law, this court will not reweigh the facts. Instead, the court is obligated to examine the evidence to determine whether, under a view most favorable to the successful party, the facts support the trial court's judgment.
Malerbi v. Central Reserve Life 543

Juries

1. The general rule is that when a properly qualified expert witness testifies as to the value of property, the jury determines the weight and credibility of what the expert considers in coming to a conclusion.
Little v. Gillette 70

2. The value of the thing involved in a theft case must be established by the jury.
State v. Scott 146
3. In a criminal case, a defendant may establish a prima facie showing of purposeful racial discrimination solely on evidence concerning the State's use of peremptory challenges.
State v. Threet 682
4. When prima facie showing of racial discrimination is established, the burden then shifts to the State to come forth with a neutral explanation for the peremptory challenge.
State v. Threet 682

Jurisdiction

1. In order to subject a defendant to a judgment in personam, if the defendant is not within the territory of the forum, due process requires that such defendant have certain minimum contacts with the forum state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice.
McGowan Grain v. Sanburg 129
2. Within the concept of minimum contacts, due process protects against inconvenient litigation which imposes an unreasonable or unfair burden on a defendant.
McGowan Grain v. Sanburg 129
3. Fair warning that activity in a forum state may result in personal jurisdiction is satisfied if a defendant purposefully directs activities at the forum state and its residents and injury is caused by the defendant's activity within the forum state.
McGowan Grain v. Sanburg 129
4. Where a nonresident individual purposefully derives benefit from interstate activities, fairness requires such individual to account for the consequences arising proximately from the individual's activities in the forum state.
McGowan Grain v. Sanburg 129
5. The "fiduciary shield" doctrine is not a constitutional principle precluding personal jurisdiction over a nonresident officer, agent, or employee of a corporation. If a nonresident, as a corporate officer, agent, or employee, has contacts which satisfy standards imposed by a forum state's long-arm statute and the requirements of due process, personal jurisdiction over such nonresident may be obtained in the forum state.
McGowan Grain v. Sanburg 129
6. The requirements of a statute governing the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction.
Gilmore v. Nebraska Crime Vict. Rep. Bd. 640
7. A court which never acquires jurisdiction permitting it to act has no authority to transfer venue under the provisions of Neb. Rev.

Stat. § 25-410 (Reissue 1985).
Jackson v. Jensen 671

Juror Misconduct

1. As a ground for setting aside a verdict in view of alleged misconduct by a juror, one must show that the questioned conduct entered into a verdict prejudicial or adverse to the party alleging such misconduct.
Norquay v. Union Pacific Railroad 527
2. Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that the juror's conduct was of such character that prejudice may be presumed.
Norquay v. Union Pacific Railroad 527
3. When a new trial is sought for juror misconduct, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing.
Norquay v. Union Pacific Railroad 527

Juror Qualifications

1. While a prospective juror's attitudes about capital punishment are irrelevant to sentencing in Nebraska, they may be relevant to his ability to fairly determine the defendant's guilt or innocence.
State v. El-Tabech 395
2. The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court.
State v. Bird Head 822
3. A venireperson whose views on capital punishment are such as to prevent or substantially impair the performance of his or her duties as a juror may, under the provisions of Neb. Rev. Stat. § 29-2006(3) (Reissue 1985), be constitutionally excused from jury service in a capital case.
State v. Bird Head 822

Jury Instructions

1. Generally, it is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.
State v. Brown 418
2. Jury instructions are to be read as a whole, and when they fairly submit the case and do not mislead the jury, there is no prejudicial error.
First West Side Bank v. Hiddleston 563
3. It is not error for the trial court to refuse a request for additional instructions where it has, on its own motion, fairly and fully

instructed the jury on a party's theory of the case.
First West Side Bank v. Hiddleston 563
4. While it is the duty of the trial court, without any request to do so, to instruct the jury on issues raised by the pleadings and supported by the evidence, failure of counsel to object to the giving of certain instructions after they have been submitted to counsel for review will preclude raising an objection to the instructions on appeal, unless there is plain error indicative of a probable miscarriage of justice.
First West Side Bank v. Hiddleston 563
5. It is the duty of the trial court, upon the request of the accused, to instruct the jury on her theory of the case if there is evidence to support it.
State v. Threet 682
6. 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. Threet 682
7. Jury instructions must be read together, and if the instructions when taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error in not reading the defendant's proposed instruction.
State v. Threet 682
8. Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence.
Pick v. Fordyce Co-op Credit Assn. 714
9. In a prosecution for sexual assault in the first degree, Neb. Rev. Stat. § 28-319 (Reissue 1985), where there is a factual dispute concerning an element of first degree sexual assault, but there is evidence which reasonably may establish a sexual assault in a degree less than first, a defendant is entitled to an instruction on the lesser degree of sexual assault as a lesser-included offense concerning the charge of sexual assault in the first degree.
State v. Jackson 843

Jury Trials

1. The right to trial by jury is personal, and a defendant may waive that right.
State v. High 690
2. In order to waive the right to trial by jury, a defendant must be advised of the right to jury trial, must personally waive that right, and must do so either in writing or in open court for the record.
State v. High 690
3. In order for a court to permit a defendant to waive the right to trial by jury, it is not necessary that the defendant be informed of the precise role which the jury fulfills in a particular prosecution.
State v. High 690

4. Neb. Rev. Stat. § 24-536 (Reissue 1985) does not provide a right to a jury trial for the violation of a municipal ordinance where the offense charged is petty.
State v. Richter 871

Juvenile Courts

1. The standard of review applicable to a juvenile proceeding under Neb. Rev. Stat. § 43-247 (Cum. Supp. 1986) is de novo on the record.
In re Interest of R.A. and V.A. 157
2. The findings of fact made by the juvenile court are accorded great weight because the court observed the parties and witnesses and could better judge their credibility.
In re Interest of R.A. and V.A. 157
3. Generally, a dispositional order made by a juvenile court is a final order.
In re Interest of R.A. and V.A. 157
4. The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984 & Cum. Supp. 1986), must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it.
In re Interest of R.A. and V.A. 157
5. A juvenile court has broad discretion as to the disposition of those who fall within its jurisdiction.
In re Interest of R.A. and V.A. 157
6. Juvenile courts have broad discretion to accomplish the purpose of serving the best interests of the children involved.
In re Interest of R.A. and V.A. 157
7. Psychiatric testing or psychological evaluations of a parent may be required to determine the best interests of children when issues of custody and visitation are presented.
In re Interest of R.A. and V.A. 157
8. A juvenile court may, within its discretion, require parents to make reasonable efforts to rehabilitate themselves.
In re Interest of R.A. and V.A. 157
9. On appeal from a juvenile court's determination to assume jurisdiction of a minor pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986), we will review the findings of the lower court de novo.
In re Interest of C.R.S. 436
10. The law in the State of Nebraska concerning review of an order terminating parental rights is well settled. Such an order will be reviewed by this court de novo on the record, while according great weight to the findings of the trier of fact, the juvenile court, because that court heard and observed the parties and witnesses.
In re Interest of K.L.N. and M.J.N. 595

Landlord and Tenant

A landlord has a duty to protect a tenant against the foreseeable criminal acts of a third person.
K.S.R. v. Novak & Sons, Inc. 498

Legislature

1. Attached to every constitutional challenge is the presumption that acts of the Nebraska Unicameral are constitutional, with all reasonable doubts resolved in favor of constitutionality.
In re Guardianship and Conservatorship of Sim 181
State v. Burke 625
2. The presumption of constitutionality continues until the statute under review clearly appears to contravene some constitutional provision.
In re Guardianship and Conservatorship of Sim 181
3. Because statutes are presumed to be constitutional, the burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
In re Guardianship and Conservatorship of Sim 181
4. As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
Wounded Shield v. Gunter 327
5. Recognition that legislators typically vote on the language of a bill generally requires the Nebraska Supreme Court to assume that the legislative purpose is expressed by the ordinary meaning of the words used.
Lawson v. Ford Motor Co. 725
6. It is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of a statute.
Lawson v. Ford Motor Co. 725

Lesser-Included Offenses

1. Generally, it is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.
State v. Brown 418
2. A trial court can on its own motion instruct the jury on a lesser-included offense if the giving of the instruction is proper, and the fact that neither the prosecution nor the defense requests the instruction is of no significance.
State v. Rubek 477

3. In a prosecution for sexual assault in the first degree, Neb. Rev. Stat. § 28-319 (Reissue 1985), where there is a factual dispute concerning an element of first degree sexual assault, but there is evidence which reasonably may establish a sexual assault in a degree less than first, a defendant is entitled to an instruction on the lesser degree of sexual assault as a lesser-included offense concerning the charge of sexual assault in the first degree.
State v. Jackson 843

4. In the offense of a criminal attempt, Neb. Rev. Stat. § 28-201 (Reissue 1985), a substantial step in a course of conduct intended to culminate in a sexual assault in the first degree (sexual penetration) may include a substantial step in a course of conduct intended to culminate in achievement of sexual contact as well, that is, commission of a sexual assault in the second degree.
State v. Jackson 843

5. Within the offense of "criminal attempt," Neb. Rev. Stat. § 28-201 (Reissue 1985), an attempt to commit a particular crime may also include an attempt to commit a lesser-included offense in reference to the designated crime alleged to have been attempted.
State v. Jackson 843

Liability

1. In cases when liability for injuries suffered on business premises is being predicated on the owner's or operator's failure to remove or remedy a hazardous condition, unless the evidence shows that the alleged hazardous condition existed and was known to exist by the defendant, the party injured must prove either that the condition was created by the defendant or that it had existed a long enough time prior to the accident to charge the defendant or the defendant's servants with notice to afford them a reasonable opportunity to remedy such condition. However, when a business proprietor is under an affirmative obligation to provide proper lighting to reveal a hazardous condition, such proprietor has in effect created the condition and it is not necessary to prove that he or she had actual or constructive knowledge of the situation.
Havlicek v. Desai 222

2. Subject to the provisions of Neb. Rev. Stat. § 37-1005 (Reissue 1984), an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby (1) extend any assurance that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.
Gallagher v. Omaha Public Power Dist. 354

3. Subject to the provisions of Neb. Rev. Stat. § 37-1005 (Reissue 1984), an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.
Gallagher v. Omaha Public Power Dist. 354
4. Where each of multiple applicable automobile insurance policies contains mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance, the owner's policy provides primary coverage and the driver's policy provides excess coverage.
Boren v. State Farm Mut. Auto. Ins. Co. 503

Licenses and Permits

The revocation of a license to operate a motor vehicle is not a penalty.
Guerzon v. Jensen 712

Limitations of Actions

1. Neb. Rev. Stat. § 25-222 (Reissue 1985) is constitutional.
Williams v. Kingery Constr. Co. 235
2. Neb. Rev. Stat. § 25-223 (Reissue 1985) is constitutional.
Williams v. Kingery Constr. Co. 235
3. Architects and engineers are professionals for purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), and the period of repose applicable to an architect who has a duty to inspect throughout construction under the provisions of § 25-222 begins to run when the construction is completed.
Williams v. Kingery Constr. Co. 235
4. A cause of action for malpractice accrues upon the violation of a legal right.
Seagren v. Peterson 747
5. For the purpose of extending a statute of limitations, discovery does not mean the final resolution of damages; it can be triggered at some time before the full extent of the damages is sustained.
Seagren v. Peterson 747
6. Generally, if a plaintiff has ample time to institute an action after the inducement of delay has ceased to operate, he or she cannot excuse the failure to act within the statutory time on the ground of estoppel.
Seagren v. Peterson 747

Medical Malpractice

1. Whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony.
Smith v. Weaver 569

2. Before there may be recovery in a medical negligence case based upon the failure of a medical care provider such as a physician to obtain an informed consent to the treatment, the plaintiff must establish that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed. Neb. Rev. Stat. § 44-2820 (Reissue 1984).
Smith v. Weaver 569
3. Informed consent is consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Neb. Rev. Stat. § 44-2816 (Reissue 1984).
Smith v. Weaver 569

Mental Distress

The elements of a cause of action based upon the intentional infliction of emotional distress are (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.
Pick v. Fordyce Co-op Credit Assn. 714

Mental Health

The subject of a proceeding to determine the need for a guardian or conservator has no fifth amendment right to remain silent during the course of a psychiatric examination.
In re Guardianship and Conservatorship of Sim 181

Mentally Disordered Sex Offender

1. A sentencing court has a mandatory duty under Neb. Rev. Stat. § 29-2912 (Reissue 1985) to order an evaluation of one convicted of a felony sexual offense for the purpose of determining whether he or she is a mentally disordered sex offender.
State v. Burke 625
2. A mentally disordered sex offender is one who, because of a mental disorder, has been determined to be disposed to repeated commission of sexual offenses which are likely to cause substantial injury to others.
State v. Burke 625
3. One found to be a treatable mentally disordered sex offender shall be committed for treatment if treatment is available in this state, as well as sentenced in accordance with law.
State v. Burke 625

4. A sexual offense within the meaning of Neb. Rev. Stat. § 29-2911 (Reissue 1985) includes any felony in which the sexual excitement of the offender is a motivational factor.
State v. Burke 625
5. A mentally disordered sex offender shall mean any person who has a mental disorder and who, because of the mental disorder, has been determined to be disposed to repeated commission of sexual offenses which are likely to cause substantial injury to the health of others. Neb. Rev. Stat. § 29-2911 (Reissue 1985).
State v. Thornton 875

Minors

1. Circumstantial evidence can be sufficient to sustain a conviction of a minor in possession in violation of Neb. Rev. Stat. § 53-180.02 (Reissue 1984).
State v. Laue 57
2. Generally, the common-law res gestae requirements that the statement be contemporaneous and spontaneous are relaxed where the statement is one made by a young victim of sexual abuse.
In re Interest of R.A. and V.A. 157
3. The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984 & Cum. Supp. 1986), must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it.
In re Interest of R.A. and V.A. 157

Miranda Rights

1. The warning specified in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is required only when there has been a restriction on a person's freedom as to render such person in custody. The mere fact that an investigation has focused on a suspect does not trigger the need for the *Miranda* warning in a noncustodial setting.
State v. Brown 418
2. There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine.
Guerzon v. Jensen 712

Motions for Continuance

A motion for a continuance of a trial is addressed to the sound discretion of the trial court, and that ruling will not be disturbed on appeal in the absence of a showing of an abuse of that discretion.
State v. Donnelson 41
State v. Mecum 293
In re Interest of C.G.C.S. 605

Motions for Mistrial

One may not take the chance of a favorable verdict and then complain of the result; thus, in order to assign error based on occurrences during the course of a closing argument, the complaining party must have objected to the occurrence and moved for a mistrial prior to submission of the cause.
Johannes v. McNeil Real Estate Fund VIII 283

Motions for New Trial

1. The granting or refusal of a motion for a new trial is left to the sound discretion of the trial court.
State v. Donnelson 41
2. Evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for new trial on the grounds of newly discovered evidence.
In re Interest of S.H., L.H., and A.H. 452

Motions to Dismiss

1. When a trial court sustains a motion to dismiss at the close of a plaintiff's case in chief, the Supreme Court must treat as admitted the truth of all relevant evidence favorable to the plaintiff and must give the plaintiff the benefit of all permissible inferences deducible from the properly admitted evidence to determine whether a prima facie case has been established.
Gordman Properties Co. v. Board of Equal. 169
2. A pretrial motion to dismiss another's action is not a permissible pleading.
United States Fire Ins. Co. v. Affiliated FM Ins. Co. 218
3. Under certain circumstances, and where by stipulation of the parties or court rule it is allowed, a pretrial motion to dismiss may be treated as a demurrer.
United States Fire Ins. Co. v. Affiliated FM Ins. Co. 218
4. A pretrial motion to dismiss made by a plaintiff may be treated as a voluntary dismissal of the plaintiff's petition at plaintiff's costs.
United States Fire Ins. Co. v. Affiliated FM Ins. Co. 218

Motions to Suppress

1. In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly incorrect.
State v. Brown 418
2. In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such

motion to suppress.
State v. Vrtiska 454
3. A defendant who seeks to suppress evidence obtained under a legally issued search warrant has the burden of establishing that the search was improper and that the evidence secured thereby should be suppressed.
State v. Vrtiska 454
4. If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable; but, if police acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.
State v. Vrtiska 454
5. Regarding a motion to suppress, the initial burden of proof (burden of going forward) is on the movant to establish a prima facie case of an unconstitutional search and seizure, and when such prima facie case has been established, the burden of proof (burden of going forward) shifts to the State to establish that the search and seizure were constitutionally permissible.
State v. Vrtiska 454

Motions to Vacate

1. In considering a request to set aside a default judgment, a court may consider promptness of the motion to vacate, negligence or want of diligence of the party moving to vacate, and avoidance of unnecessary delays and frivolous proceedings in the administration of justice.
Fredericks v. Western Livestock Auction Co. 211
2. Regarding a refusal to set aside a default judgment, an abuse of discretion may exist where the defaulted party tenders an answer or other proof disclosing a meritorious defense to the action which is the subject of the default.
Fredericks v. Western Livestock Auction Co. 211
3. A default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interest. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation.
Fredericks v. Western Livestock Auction Co. 211

Motor Carriers

1. An applicant for a certificate issuable pursuant to Neb. Rev. Stat. § 75-311 (Reissue 1986) has the burden to prove that the proposed service is or will be required by the present or future public convenience and necessity.
In re Application of Renzenberger, Inc. 30

2. Regarding a proposed service to be authorized pursuant to Neb. Rev. Stat. § 75-311 (Reissue 1986), existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of a public need and demand for added service by another carrier.
In re Application of Renzenberger, Inc. 30

3. Public demand or need, which an applicant must prove to obtain a certificate from the Public Service Commission pursuant to Neb. Rev. Stat. § 75-311 (Reissue 1986), is a present actual need or a need which will likely occur within the reasonably immediate or foreseeable future. A certificate of public convenience and necessity cannot be granted on the basis of future needs which are speculative or improbable.
In re Application of Renzenberger, Inc. 30

Motor Vehicles

1. One who purchases an automobile and obtains possession thereof but does not obtain a duly assigned certificate of title thereto acquires no ownership interest in the automobile.
Boren v. State Farm Mut. Auto. Ins. Co. 503

2. Drivers of motor vehicles are obligated to maintain a proper lookout and have the duty to see what is in plain sight.
Kimberling v. Omaha Public Power Dist. 744

3. During an investigatory stop, officers may search a suspect's vehicle in order to secure their safety or the safety of another if they have a reasonable belief, based on articulable facts, that they or other persons are in danger.
State v. Gross 798

Municipal Corporations

Omaha Mun. Code § 22-35 (1980) does not permit one to receive disability payments if the employee is able to perform active duty services for the employer, even though not the same as performed before the injury. It is only where the employee is unable to perform at all that he or she may receive benefits.
Brunken v. City of Omaha 410

Names

Under Neb. Rev. Stat. § 29-2222 (Reissue 1985), an authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.
State v. Jackson 843

Negligence

1. Expert testimony is usually required to prove that a specific manner of treatment or exercise of skill by a physician, surgeon, or other professional demonstrated a failure to use reasonable care.
   Marshall v. Radiology Assoc. 75
2. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury.
   McMullin Transfer v. State 109
3. In the face of the defense of contributory negligence and to recover on a claim of negligence, a plaintiff must prove the defendant's negligence and must be free from contributory negligence more than slight in comparison with the defendant's negligence.
   Lynn v. Metropolitan Utilities Dist. 121
4. Contributory negligence is an affirmative defense which must be proved by the party asserting such defense.
   Lynn v. Metropolitan Utilities Dist. 121
5. A pedestrian on a public thoroughfare must exercise the degree of care that an ordinarily prudent person would exercise under similar circumstances.
   Lynn v. Metropolitan Utilities Dist. 121
6. To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in conduct and may vary depending on the circumstances.
   Lynn v. Metropolitan Utilities Dist. 121
7. Entering a darkened area requires one to exercise caution greater than that ordinarily required in an illuminated area.
   Lynn v. Metropolitan Utilities Dist. 121
8. One who is capable of understanding and discretion but fails to exercise ordinary care and prudence to avoid obvious dangers is negligent or contributorily negligent.
   Lynn v. Metropolitan Utilities Dist. 121
9. A pedestrian on a street or highway must use reasonable care to discover and avoid obvious defects or obstructions involving such street or highway. A pedestrian's failure to exercise reasonable care to discover and avoid an obvious defect or obstruction in the path or course traveled is, ordinarily, contributory negligence.
   Lynn v. Metropolitan Utilities Dist. 121
10. Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of

the defendant; and (3) his actions contribute to his injuries as a proximate cause.
Lynn v. Metropolitan Utilities Dist. 121

11. Whether a pedestrian who walks on a street and falls as the result of the street's condition is contributorily negligent is, ordinarily, a question of fact.
Lynn v. Metropolitan Utilities Dist. 121

12. Where the negligence charged furnishes only a condition by which the injury is made possible, and a subsequent independent act of a third party causes the injury, the two acts are not concurrent, and the existence of the condition is not the proximate cause of the injury.
Havlicek v. Desai 222

13. A failure to provide a business invitee with adequate lighting on a stairway may support an action for negligence.
Havlicek v. Desai 222

14. The proprietor of a business establishment generally has a legal duty to exercise ordinary care to keep his or her premises reasonably safe for use by a business invitee.
Havlicek v. Desai 222

15. In cases when liability for injuries suffered on business premises is being predicated on the owner's or operator's failure to remove or remedy a hazardous condition, unless the evidence shows that the alleged hazardous condition existed and was known to exist by the defendant, the party injured must prove either that the condition was created by the defendant or that it had existed a long enough time prior to the accident to charge the defendant or the defendant's servants with notice to afford them a reasonable opportunity to remedy such condition. However, when a business proprietor is under an affirmative obligation to provide proper lighting to reveal a hazardous condition, such proprietor has in effect created the condition and it is not necessary to prove that he or she had actual or constructive knowledge of the situation.
Havlicek v. Desai 222

16. Where a business proprietor has an affirmative duty to provide adequate lighting, and there is some reasonable explanation why such was not accomplished, it is incumbent upon that proprietor to produce that evidence as part of his or her defense.
Havlicek v. Desai 222

17. The doctrine of res ipsa loquitur is that where the instrumentality causing the injury is shown to be under the defendant's exclusive control and management and the accident is one that in the ordinary course of things does not occur if those who have its management or control use proper care, reasonable evidence is afforded, in the absence of an explanation by the defendant, that

the accident arose from want of proper care.
Maly v. Arbor Manor, Inc. 276

18. One relying upon the doctrine of res ipsa loquitur must establish that the instrumentality causing the damage was in the exclusive control and management of the party sought to be held liable.
Maly v. Arbor Manor, Inc. 276

19. If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable. The doctrine is applicable only where the plaintiff is unable to allege or prove the particular *act of negligence* which caused the injury. However, the plaintiff may and must allege and prove the *physical cause* of the damage inflicted.
Maly v. Arbor Manor, Inc. 276

20. It is not necessary to prove that an owner or operator of premises who created a hazardous condition had actual or constructive knowledge of its existence; however, such proof, as well as proof that the owner or operator of the premises had a reasonable opportunity to correct the condition, is necessary where the hazard was created by a third person.
Johannes v. McNeil Real Estate Fund VIII 283

21. In negligence actions there is but one standard of care, that of reasonable prudence under the circumstances.
Johannes v. McNeil Real Estate Fund VIII 283

22. Subject to the provisions of Neb. Rev. Stat. § 37-1005 (Reissue 1984), an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby (1) extend any assurance that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.
Gallagher v. Omaha Public Power Dist. 354

23. In order for an action to be willful or wanton, the evidence must show that one acted with actual knowledge that a danger existed and that he intentionally failed to act to prevent the harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or omission to act, and a constructive intention as to the consequences.
Gallagher v. Omaha Public Power Dist. 354

24. To constitute willful misconduct there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury. To constitute willful negligence the act done or omitted must be intended or must

involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.
Gallagher v. Omaha Public Power Dist. 354

25. Subject to the provisions of Neb. Rev. Stat. § 37-1005 (Reissue 1984), an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.
Gallagher v. Omaha Public Power Dist. 354

26. A landlord has a duty to protect a tenant against the foreseeable criminal acts of a third person.
K.S.R. v. Novak & Sons, Inc. 498

27. Questions of foreseeability, negligence, and proximate cause are questions for the trier of fact.
K.S.R. v. Novak & Sons, Inc. 498

New Trial

1. A jury verdict which is wholly inadequate as to amount of damages, and therefore is not supported by the evidence, must be set aside and a new trial granted.
Havlicek v. Desai 222

2. As a ground for setting aside a verdict in view of alleged misconduct by a juror, one must show that the questioned conduct entered into a verdict prejudicial or adverse to the party alleging such misconduct.
Norquay v. Union Pacific Railroad 527

3. Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that the juror's conduct was of such character that prejudice may be presumed.
Norquay v. Union Pacific Railroad 527

4. When a new trial is sought for juror misconduct, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing.
Norquay v. Union Pacific Railroad 527

Nuisances

The use made by one of his or her property which works an irreparable injury to the property of his or her neighbor, the use made by one of his or her property whereby the unwritten but accepted law of decency is violated, the use made by one of his or her property whereby his or her neighbor is deprived of the reasonably comfortable use and enjoyment of his or her own property, and the use made by one of his or her property which will probably or

likely endanger the health and the life of his or her neighbor are private nuisances.
Maly v. Arbor Manor, Inc. 276

Ordinances

1. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court on appeal.
Brunken v. City of Omaha 410
2. Omaha Mun. Code § 22-35 (1980) does not permit one to receive disability payments if the employee is able to perform active duty services for the employer, even though not the same as performed before the injury. It is only where the employee is unable to perform at all that he or she may receive benefits.
Brunken v. City of Omaha 410
3. Neb. Rev. Stat. § 24-536 (Reissue 1985) does not provide a right to a jury trial for the violation of a municipal ordinance where the offense charged is petty.
State v. Richter 871

Other Acts

1. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule which permits the use of evidence of relevant other crimes, wrongs, or acts if such is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged.
State v. Wilson 466
2. Although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
State v. Wilson 466

Parental Rights

1. In the absence of any other statutory remedy, an unwed father has recourse to the declaratory judgment statutes to establish his paternal rights.
White v. Mertens 241
2. One may forfeit his or her parental rights by conduct.
White v. Mertens 241
3. Parental rights may be terminated when such action is in the best interests of a child because the parent has substantially and continuously or repeatedly neglected the child and has refused to give the child necessary parental care and protection.
In re Interest of S.H., L.H., and A.H. 452

4. The law in the State of Nebraska concerning review of an order terminating parental rights is well settled. Such an order will be reviewed by this court de novo on the record, while according great weight to the findings of the trier of fact, the juvenile court, because that court heard and observed the parties and witnesses.
In re Interest of K.L.N. and M.J.N. 595

5. The right of parents to maintain custody of their children is a natural one, and the order terminating that right must be supported by clear and convincing evidence and should only be issued as a last resort when no other alternative exists.
In re Interest of K.L.N. and M.J.N. 595

6. The primary consideration in a termination proceeding is the best interests of the children.
In re Interest of K.L.N. and M.J.N. 595

7. When a rehabilitation plan is implemented, the plan must be reasonable and conducted under the direction of the juvenile court before failure to comply with the plan can be an ndependent reason for termination.
In re Interest of K.L.N. and M.J.N. 595

8. This court reviews orders terminating parental rights de novo on the record and will not consider evidence which is erroneously admitted.
In re Interest of C.G.C.S. 605

9. It is not necessary that a juvenile court await the time that a child shows permanent scars of a parent's inabilities and shortcomings before acting to terminate the relationship.
In re Interest of C.G.C.S. 605

10. Generally, it is in the best interests of a child that a final disposition be made without undue delay. A court should not gamble with a child's future, awaiting uncertain parental maturity.
In re Interest of C.G.C.S. 605
In re Interest of L.H. 706

11. As a general rule, parents should make reasonable efforts on their own to bring about a rehabilitation so as to resume a parental role.
In re Interest of C.G.C.S. 605

12. While there is no requirement that the juvenile court implement a rehabilitation plan for the parent of a child coming within its jurisdiction, the failure to comply with a reasonable court-ordered plan of rehabilitation is an independent ground justifying termination of parental rights.
In re Interest of L.H. 706

13. If a parent does not become rehabilitated within a reasonable time, the prognosis for rehabilitation is poor, and it is in the best interests of the child, then a final disposition terminating parental

rights should be made without delay.
In re Interest of L.H. 706
14. The relationship between parent and child is constitutionally protected.
In re Application of S.R.S. and M.B.S. 759
15. When an unwed father evidences a commitment to the responsibilities of raising the child and participates in the care of the child, his interest in continuing his relationship with his child merits substantial constitutional protection.
In re Application of S.R.S. and M.B.S. 759

Parol Evidence

1. Parol evidence must be clear, unequivocal, and convincing to overcome recorded legal title and the recitals in the deed that purport to convey title to both of the parties.
Blaser v. Blaser 104
2. Once an agreement is found to be a complete agreement and is not challenged as ambiguous or as the result of mistake or fraud, the written agreement is the only competent evidence of the agreement between the parties, and any negotiations by the parties prior to the execution are excluded by the parol evidence rule.
Lincoln East Bancshares v. Rierden 440

Paternity

1. The relationship between a parent and child is a constitutionally protected one, and although the father of a child born out of wedlock need not be treated in all respects as is the father of a child born in wedlock, the relationship between an unwed father and his child is not devoid of constitutional protection.
White v. Mertens 241
2. In the absence of any other statutory remedy, an unwed father has recourse to the declaratory judgment statutes to establish his paternal rights.
White v. Mertens 241
3. The 5-day claim provision of Neb. Rev. Stat. § 43-104.02 (Reissue 1984) does not apply to a dispute between the biological father and mother of a child born out of wedlock.
White v. Mertens 241
4. Visitation of a child born out of wedlock is to be decided on the basis of what is in the best interests of the child and depends upon the existence of a familial relationship with the child.
White v. Mertens 241

Pedestrians

1. A pedestrian on a public thoroughfare must exercise the degree of care that an ordinarily prudent person would exercise under

similar circumstances.
Lynn v. Metropolitan Utilities Dist. 121
2. A pedestrian on a street or highway must use reasonable care to discover and avoid obvious defects or obstructions involving such street or highway. A pedestrian's failure to exercise reasonable care to discover and avoid an obvious defect or obstruction in the path or course traveled is, ordinarily, contributory negligence.
Lynn v. Metropolitan Utilities Dist. 121
3. Whether a pedestrian who walks on a street and falls as the result of the street's condition is contributorily negligent is, ordinarily, a question of fact.
Lynn v. Metropolitan Utilities Dist. 121

Photographs

In homicide cases, photographs of the victim may be received for purposes of identification, upon proper foundation. The fact that the photographs may present a gruesome spectacle does not prohibit their admission into evidence.
State v. Threet 682

Physicians and Surgeons

Expert testimony is usually required to prove that a specific manner of treatment or exercise of skill by a physician, surgeon, or other professional demonstrated a failure to use reasonable care.
Marshall v. Radiology Assoc. 75

Pleadings

1. The fact a party may be entitled to require a more definite statement from a petitioner does not necessarily mean that the statement as originally made was not sufficient to state a cause of action.
In re Guardianship and Conservatorship of Sim 181
2. The failure to make a timely demand for a more definite statement from a petitioner waives the right to such a statement.
In re Guardianship and Conservatorship of Sim 181
3. A pretrial motion to dismiss another's action is not a permissible pleading.
United States Fire Ins. Co. v. Affiliated FM Ins. Co. 218
4. Under certain circumstances, and where by stipulation of the parties or court rule it is allowed, a pretrial motion to dismiss may be treated as a demurrer.
United States Fire Ins. Co. v. Affiliated FM Ins. Co. 218
5. A pretrial motion to dismiss made by a plaintiff may be treated as a voluntary dismissal of the plaintiff's petition at plaintiff's costs.
United States Fire Ins. Co. v. Affiliated FM Ins. Co. 218
6. This court ordinarily will not consider issues not properly raised in the pleadings nor litigated at trial.
White v. Mertens 241

7. The issues set out in a pretrial order supplant the issues raised in the pleadings. Failure to object to the specification of issues in a pretrial order waives error claimed in that regard on appeal.
Malerbi v. Central Reserve Life 543
8. Provisions in an insurance policy which limit the benefits payable thereunder are generally defensive in character and must be pleaded and proved by the insurer.
Malerbi v. Central Reserve Life 543
9. A pleading should not be amended to conform to the proof where the proposed amendment substantially changes the nature of the claim or defense.
Malerbi v. Central Reserve Life 543
10. Where an issue is not raised by the pleadings, it will not be addressed for the first time on appeal.
Aldridge v. School Dist. of North Platte 580
11. The issues set out in the pretrial order supplant the issues raised in the pleadings. Failure to object to the specification of the issues in the pretrial order waives error claimed in that regard on appeal.
Misle Chevrolet Co. v. Kometscher 804
12. Where the plaintiff has not been misled to her prejudice, the variance between an allegation in the pleading and the proof at trial is immaterial. Neb. Rev. Stat. § 25-846 (Reissue 1985).
Thies v. City of Omaha 817

Pleas

1. The taking of the steps set out by this court in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), is sufficient to assure that a plea represents a voluntary and intelligent choice among the alternate courses of action open to a criminal defendant.
State v. Wiley 55
2. In order to support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, the record must establish, among other things, that there exists a factual basis for the plea.
State v. Sianouthai 62
3. The proper way to conduct a group arraignment is to call each person being arraigned before the bench, identify the defendant, advise him or her that the remarks of the court apply to each person individually, and ascertain on the record that the defendant was present throughout the conduct of the arraignment, heard the remarks, and understood them.
State v. Miller 269
4. The purpose of the 24-hour waiting period provided for by Neb. Rev. Stat. § 29-1802 (Reissue 1985) is to ensure that the defendant has a reasonable amount of time to prepare his or her defense.
State v. High 695

5. The 24-hour waiting period between service of the information and requiring the defendant to plead may be waived by the defendant, and the failure of the record to show that the defendant made any objection to proceeding with the trial on the charge raises the presumption that he or she waived that right.
State v. High 695

Police Officers and Sheriffs

1. A nonconsensual and unannounced entry by a police officer for execution of a search warrant within an unoccupied dwelling is not, by itself and necessarily, an unreasonable intrusion prohibited by the fourth amendment to the U.S. Constitution.
State v. Vrtiska 454
2. A search of premises must be directed in good faith toward the object specified in a search warrant or for other means and instrumentalities by which a crime charged has been committed. Such search must not be a general exploratory search through which officers merely hope to discover evidence of wrongdoing.
State v. Vrtiska 454
3. When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, the officers may seize such articles whether those items are initially in plain sight or come into plain sight subsequently as a result of the officers' efforts.
State v. Vrtiska 454
4. An officer could not manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. A warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.
State v. Pecha 673

Political Subdivisions Tort Claims Act

A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), will not be set aside unless such findings are clearly incorrect.
Lynn v. Metropolitan Utilities Dist. 121
Kimberling v. Omaha Public Power Dist. 744

Postconviction

1. Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief

was not available at the time of the filing of the prior motion.
State v. Harper 300
2. Postconviction relief may not be used to secure a review of issues which were capable of being raised in a direct appeal.
State v. Harper 300
3. When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
State v. Rubek 477
4. Where one claims that the alleged ineffective assistance of counsel resulted in prejudice, the defendant must show that, but for the ineffective assistance of counsel, there is a reasonable probability that the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
State v. Rubek 477
5. In an appeal involving a proceeding for postconviction relief, the lower court's findings will be upheld unless clearly erroneous.
State v. Rubek 477
6. The person seeking postconviction relief bears the burden of establishing the basis for relief.
State v. Rubek 477
7. A motion for postconviction relief may not be used to obtain a further review of issues already litigated, and the mere fact that the issues are rephrased does not change that rule.
State v. Rubek 477

Preliminary Hearings

A preliminary hearing on theft in one form is sufficient to bind a defendant over to the district court for trial on theft performed in a different manner.
State v. Scott 146

Presentence Reports

A sentencing court has a mandatory duty under Neb. Rev. Stat. § 29-2912 (Reissue 1985) to order an evaluation of one convicted of a felony sexual offense for the purpose of determining whether he or she is a mentally disordered sex offender.
State v. Burke 625

Presumptions

1. Attached to every constitutional challenge is the presumption that acts of the Nebraska Unicameral are constitutional, with all

reasonable doubts resolved in favor of constitutionality.
In re Guardianship and Conservatorship of Sim 181
2. The presumption of constitutionality continues until the statute under review clearly appears to contravene some constitutional provision.
In re Guardianship and Conservatorship of Sim 181
3. Because statutes are presumed to be constitutional, the burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
In re Guardianship and Conservatorship of Sim 181
State v. Burke 625
4. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment, which presumption remains until there is competent evidence to the contrary. Such presumption disappears when there is competent evidence on appeal to the contrary. From that point on the reasonableness of the valuation fixed by the board of equalization becomes an issue of fact based upon the evidence.
Fremont Plaza v. Dodge County Bd. of Equal. 303
5. All payments are presumed to be voluntary until the contrary appears, and the burden rests on the party seeking to recover a payment to prove that it was involuntary.
Wendell's, Inc. v. Malmkar 341
6. Malice is an intention or desire to harm another through doing something unlawful or otherwise unjustified. However, malice can in certain situations be presumed from the mere doing of an act.
Ditloff v. State Farm Fire & Cas. Co. 375
7. Malice may be presumed from an intentional act if damage of some kind to some property should or could have been reasonably expected to result from such act. This presents a question of fact for the jury.
Ditloff v. State Farm Fire & Cas. Co. 375
8. A search pursuant to a warrant is presumed to be valid.
State v. Vrtiska 454
9. A presumption arises when questions of fact are tried by the court that it will consider only such evidence as is competent.
In re Interest of C.G.C.S. 605
10. An officer could not manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. A warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.
State v. Pecha 673

11. The 24-hour waiting period between service of the information and requiring the defendant to plead may be waived by the defendant, and the failure of the record to show that the defendant made any objection to proceeding with the trial on the charge raises the presumption that he or she waived that right.
State v. High 695
12. A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
State v. Bird Head 822

Pretrial Procedure

1. Without objection or exception to the report of pretrial conference, there is nothing preserved for appellate review regarding the trial court's specification of issues to be resolved at trial.
Little v. Gillette 70
2. A purpose of the discovery process is exploration of all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute.
Norquay v. Union Pacific Railroad 527
3. The discovery process provides adequate pretrial preparation as a basis for an informed cross-examiner and informative cross-examination. Further, the discovery process enables litigants to prepare for a trial without the element of an opponent's tactical surprise.
Norquay v. Union Pacific Railroad 527
4. As a result of Neb. Ct. R. of Disc. 26(b)(4)(A)(i) (rev. 1983), the liberal discovery of potential testimony of an expert witness is not merely for convenience of the court and litigants, but exists to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact.
Norquay v. Union Pacific Railroad 527
5. Under Neb. Ct. R. of Disc. 26(e)(1)(B) (rev. 1983), there is an explicit duty seasonably to supplement a response to a request for discovery directed toward identity of an expert witness expected to be called at trial, the subject matter of expected testimony from such expert, and the substance of the expert witness' expected testimony. As a consequence of Rule 26(e) and within the purview of that rule, a litigant has the right to have interrogatories answered and the duty to supplement answers previously given in response to an adversary's interrogatories, which is a continuing duty to supplement prior responses.
Norquay v. Union Pacific Railroad 527
6. Sanctions under Neb. Ct. R. of Disc. 37 (rev. 1983) exist not only to punish those whose conduct warrants a sanction but to deter

those, whether a litigant or counsel, who might be inclined or tempted to frustrate the discovery process by their ignorance, neglect, indifference, arrogance, or, much worse, sharp practice adversely affecting a fair determination of a litigant's rights or liabilities.
Norquay v. Union Pacific Railroad 527

7. To avoid sanctions under Neb. Ct. R. of Disc. 37(d) (rev. 1983), an interrogated party must either answer or object to the interrogatories or move for a protective order relieving the interrogated party from answering the interrogatories.
Norquay v. Union Pacific Railroad 527

8. As a sanction for noncompliance with Neb. Ct. R. of Disc. 26(b)(4)(A)(i) (rev. 1983) and the duty to supplement required by Rule 26(e)(1)(B), preclusion of an expert witness' testimony, insofar as such testimony concerns an opinion or facts known in the witness' capacity as an expert, may be an appropriate sanction under Neb. Ct. R. of Disc. 37(d) (rev. 1983).
Norquay v. Union Pacific Railroad 527

9. In determining whether to exclude testimony of an expert witness called by a party who has failed to comply with a request for discovery, the trial court should consider the explanation, if any, for the party's failure to respond, or respond properly, to a request for discovery concerning an expert witness; importance of the expert witness' testimony; surprise to the party seeking preclusion of the expert's testimony; needed time to prepare to meet the testimony from the expert; and the possibility of a continuance.
Norquay v. Union Pacific Railroad 527

10. For preclusion of testimony as a sanction for noncompliance with Neb. Ct. R. of Disc. 26(b)(4)(A)(i) (rev. 1983) (interrogatories) and Rule 26(e)(1)(B) (supplemental responses), Neb. Ct. R. of Disc. 37(d) (rev. 1983) does not require noncompliance with a prior order for discovery.
Norquay v. Union Pacific Railroad 527

11. When a party has not complied with Neb. Ct. R. of Disc. 26(b)(4)(A)(i) (rev. 1983) (interrogatories) or Rule 26(e)(1)(B) (supplemental responses), the adverse party must make an appropriate objection, move to strike certain testimony, request a continuance, or move for a mistrial.
Norquay v. Union Pacific Railroad 527

12. Pretrial conferences are conducted to simplify the issues, amend pleadings, and avoid unnecessary proof of facts at trial. They are also conducted to avoid traps and surprises at trial.
Malerbi v. Central Reserve Life 543
Misle Chevrolet Co. v. Kometscher 804

13. Issues specified at a pretrial conference control the course of an action and, unless altered by the court, constitute the issues on

which the case is tried.
Malerbi v. Central Reserve Life 543
Misle Chevrolet Co. v. Kometscher 804
14. The issues set out in a pretrial order supplant the issues raised in the pleadings. Failure to object to the specification of issues in a pretrial order waives error claimed in that regard on appeal.
Malerbi v. Central Reserve Life 543
Misle Chevrolet Co. v. Kometscher 804

Principal and Agent

1. The "fiduciary shield" doctrine is not a constitutional principle precluding personal jurisdiction over a nonresident officer, agent, or employee of a corporation. If a nonresident, as a corporate officer, agent, or employee, has contacts which satisfy standards imposed by a forum state's long-arm statute and the requirements of due process, personal jurisdiction over such nonresident may be obtained in the forum state.
McGowan Grain v. Sanburg 129
2. In the absence of a specific statute, a valid release of either of the parties to the principal-agent relationship releases the other.
Mallette v. Taylor & Martin, Inc. 385

Prisoners

Pursuant to the Nebraska Treatment and Corrections Act, Neb. Rev. Stat. §§ 83-170 to 83-1,135 (Reissue 1971, Cum. Supp. 1972 & Cum. Supp. 1974), there may be a forfeiture of credit for meritorious behavior earned before release on mandatory parole.
Wounded Shield v. Gunter 327

Probable Cause

1. The duty of the Supreme Court in determining whether probable cause to issue a search warrant exists is only to ensure that the magistrate had a substantial basis for concluding that such existed:
State v. Hodge and Carpenter 94
2. Probable cause is a reasonable suspicion founded on articulable facts.
State v. Hodge and Carpenter 94
3. In evaluating the showing of probable cause necessary to support the issuance of a search warrant, only the probability, and not a prima facie showing, of criminal activity is required.
State v. Hodge and Carpenter 94
4. A search warrant may be issued for a location where it is probable that the property described would be found.
State v. Hodge and Carpenter 94
5. A magistrate's determination of probable cause should be paid great deference by reviewing courts, and warrants should not be invalidated by interpreting the supporting affidavit in a

hypertechnical, rather than a commonsense, manner.
State v. Hodge and Carpenter 94
6. To invalidate a warrant on grounds that the supporting affidavit was false, the defendant bears the burden of showing that the affiant made a deliberate falsehood or acted with reckless disregard for the truth and that the challenged information was material or necessary to a finding of probable cause.
State v. Hodge and Carpenter 94
7. The proof of probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof satisfies this test is determined by the circumstances in each case.
State v. Hodge and Carpenter 94
8. There must be a sufficient nexus between the criminal activity, the place of the activity, and the persons in the place to show probable cause. This nexus has been described as whether there is sufficient particularity in the probable cause sense, that is, whether the information supplied the magistrate supports the conclusion that it is probable anyone in the described place when the warrant is executed is involved in the criminal activity in such a way as to have evidence thereof on his person.
State v. Pecha 673
9. Where the inclusion in a warrant of the catchall phrase "John and/or Jane Doe" is not based upon any probable cause, and the premises to be searched is acknowledged to be a residence at which both persons engaging in illegal activity and persons engaging in legal activity might be found, such a warrant cannot be condoned.
State v. Pecha 673
10. An officer could not manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. A warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.
State v. Pecha 673

Probation and Parole

1. The granting of probation as opposed to imposing a jail sentence is a matter left to the sound discretion of the trial court.
State v. Donnelson 41
2. Pursuant to the Nebraska Treatment and Corrections Act, Neb. Rev. Stat. §§ 83-170 to 83-1,135 (Reissue 1971, Cum. Supp. 1972 & Cum. Supp. 1974), there may be a forfeiture of credit for meritorious behavior earned before release on mandatory parole.
Wounded Shield v. Gunter 327

3. The revocation of probation is a matter entrusted to the sound discretion of the trial court.
State v. Heaton 702
4. Unless a probationer admits to a violation, the fact that a condition of probation has been violated must be proved by clear and convincing evidence.
State v. Heaton 702
5. In order to revoke probation for the failure to make restitution, the evidence must clearly and convincingly show that the probationer has willfully refused to make restitution when he or she has the resources to pay or has failed to make sufficient bona fide efforts to seek employment and otherwise acquire the resources to make restitution.
State v. Heaton 702
6. A sentencing court's initial decision to place a criminal defendant on probation reflects a determination that the State's penological interests do not require imprisonment.
State v. Heaton 702
7. A probationer's failure to make reasonable efforts to seek employment or otherwise acquire the resources required to repay his debt to society may indicate that the original determination to withhold imprisonment needs reevaluation, and imprisonment may now be required to satisfy the State's penological interests.
State v. Heaton 702
8. A probationer who has made sufficient bona fide efforts to make restitution, and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms.
State v. Heaton 702
9. Only if alternative measures of punishment are not adequate to meet the State's interests in punishment and deterrence may a court imprison a probationer who has made sufficient bona fide efforts to make restitution.
State v. Heaton 702
10. The language in Neb. Rev. Stat. § 29-2260(2) (Cum. Supp. 1986) which provides that the court "may withhold sentence of imprisonment" is merely a guideline and does not mandate a sentence of probation.
State v. Thornton 875

Proof

1. An applicant for a certificate issuable pursuant to Neb. Rev. Stat. § 75-311 (Reissue 1986) has the burden to prove that the proposed service is or will be required by the present or future public convenience and necessity.
In re Application of Renzenberger, Inc. 30

2. Public demand or need, which an applicant must prove to obtain a certificate from the Public Service Commission pursuant to Neb. Rev. Stat. § 75-311 (Reissue 1986), is a present actual need or a need which will likely occur within the reasonably immediate or foreseeable future. A certificate of public convenience and necessity cannot be granted on the basis of future needs which are speculative or improbable.
In re Application of Renzenberger, Inc. 30
3. In proving the crime of burglary, no actual theft or asportation of property is required.
State v. Vaughn 38
4. Contradictory medical opinions as to the cause of death in a criminal case do not establish, of themselves, that the State has failed to prove the cause of death beyond a reasonable doubt.
State v. Donnelson 41
5. Expert testimony is usually required to prove that a specific manner of treatment or exercise of skill by a physician, surgeon, or other professional demonstrated a failure to use reasonable care.
Marshall v. Radiology Assoc. 75
Smith v. Weaver 569
6. The proof of probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof satisfies this test is determined by the circumstances in each case.
State v. Hodge and Carpenter 94
7. In the face of the defense of contributory negligence and to recover on a claim of negligence, a plaintiff must prove the defendant's negligence and must be free from contributory negligence more than slight in comparison with the defendant's negligence.
Lynn v. Metropolitan Utilities Dist. 121
8. Contributory negligence is an affirmative defense which must be proved by the party asserting such defense.
Lynn v. Metropolitan Utilities Dist. 121
9. Venue may be proved as any other fact.
State v. Scott 146
10. In a theft charge, the value of the thing involved is an element of the charge against defendant and must be proved by the State beyond a reasonable doubt.
State v. Scott 146
11. In a taxpayer's appeal from action of a county board of equalization, the burden is on the taxpayer to prove the contention that the value of the taxpayer's property has not been fairly and proportionately equalized with all other property,

resulting in a discriminatory, unjust, and unfair assessment.
Gordman Properties Co. v. Board of Equal. 169
Fremont Plaza v. Dodge County Bd. of Equal. 303

12. The vacation of a default judgment rests in the discretion of the district court. The burden rests on the person adversely affected by the court's order to affirmatively establish an abuse of discretion.
Fredericks v. Western Livestock Auction Co. 211

13. Regarding a refusal to set aside a default judgment, an abuse of discretion may exist where the defaulted party tenders an answer or other proof disclosing a meritorious defense to the action which is the subject of the default.
Fredericks v. Western Livestock Auction Co. 211

14. In cases when liability for injuries suffered on business premises is being predicated on the owner's or operator's failure to remove or remedy a hazardous condition, unless the evidence shows that the alleged hazardous condition existed and was known to exist by the defendant, the party injured must prove either that the condition was created by the defendant or that it had existed a long enough time prior to the accident to charge the defendant or the defendant's servants with notice to afford them a reasonable opportunity to remedy such condition. However, when a business proprietor is under an affirmative obligation to provide proper lighting to reveal a hazardous condition, such proprietor has in effect created the condition and it is not necessary to prove that he or she had actual or constructive knowledge of the situation.
Havlicek v. Desai 222

15. Where a business proprietor has an affirmative duty to provide adequate lighting, and there is some reasonable explanation why such was not accomplished, it is incumbent upon that proprietor to produce that evidence as part of his or her defense.
Havlicek v. Desai 222

16. If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable. The doctrine is applicable only where the plaintiff is unable to allege or prove the particular *act of negligence* which caused the injury. However, the plaintiff may and must allege and prove the *physical cause* of the damage inflicted.
Maly v. Arbor Manor, Inc. 276

17. It is not necessary to prove that an owner or operator of premises who created a hazardous condition had actual or constructive knowledge of its existence; however, such proof, as well as proof that the owner or operator of the premises had a reasonable opportunity to correct the condition, is necessary where the

hazard was created by a third person.
Johannes v. McNeil Real Estate Fund VIII 283

18. The identity of the perpetrator of a criminal offense may be proven by inference and circumstantial evidence.
State v. Mecum 293

19. In proving disproportionate assessment, the key requirement is that the evidence establish an actual disparity in assessment which indicates the principle of uniformity has been violated, and not a mere difference of opinion as to valuation.
Fremont Plaza v. Dodge County Bd. of Equal. 303

20. A test made in compliance with Neb. Rev. Stat. § 39-669.11 (Reissue 1984) is sufficient to make a prima facie case on the issue of blood alcohol concentration.
State v. Hvistendahl 315

21. All payments are presumed to be voluntary until the contrary appears, and the burden rests on the party seeking to recover a payment to prove that it was involuntary.
Wendell's, Inc. v. Malmkar 341

22. Under Nebraska's speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985), it is unnecessary to show factually that delay actually prevented commencement of trial, that is, a demonstration of a cause-and-effect relationship between a condemned delay and failure to commence a defendant's trial within 6 months as prescribed by § 29-1207(2).
State v. Lafler 362

23. To obtain absolute discharge under Neb. Rev. Stat. § 29-1208 (Reissue 1985) of the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985), a defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within 6 months in accordance with § 29-1207(2).
State v. Lafler 362

24. The primary burden is on the State to see that an accused is brought to trial within the time prescribed by the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985).
State v. Lafler 362

25. To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1985), the State, by a preponderance of evidence, must prove existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial in accordance with the Nebraska speedy trial act, or "6-month rule." Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985).
State v. Lafler 362

26. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
Ditloff v. State Farm Fire & Cas. Co. 375

27. Where several inferences are deducible from the facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover.
Ditloff v. State Farm Fire & Cas. Co. 375

28. Conjecture, speculation, or choice of quantitative possibilities is not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other. However, when there is direct evidence sufficient to refute all theories of the cause of damage except the one established solely by circumstantial evidence, there then remains but one inference deducible from the facts under the circumstances, and it is within the province of the trier of fact to make this determination.
Ditloff v. State Farm Fire & Cas. Co. 375

29. A defendant, to establish an alibi, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place.
State v. El-Tabech 395

30. A defendant who seeks to suppress evidence obtained under a legally issued search warrant has the burden of establishing that the search was improper and that the evidence secured thereby should be suppressed.
State v. Vrtiska 454

31. If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable; but, if police acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.
State v. Vrtiska 454

32. Regarding a motion to suppress, the initial burden of proof (burden of going forward) is on the movant to establish a prima facie case of an unconstitutional search and seizure, and when such prima facie case has been established, the burden of proof (burden of going forward) shifts to the State to establish that the

search and seizure were constitutionally permissible.
State v. Vrtiska 454

33. When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
State v. Rubek 477

34. Where one claims that the alleged ineffective assistance of counsel resulted in prejudice, the defendant must show that, but for the ineffective assistance of counsel, there is a reasonable probability that the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
State v. Rubek 477

35. The person seeking postconviction relief bears the burden of establishing the basis for relief.
State v. Rubek 477

36. In disciplinary proceedings, the charges must be established by clear and convincing evidence.
State ex rel. NSBA v. Roubicek 509

37. As a ground for setting aside a verdict in view of alleged misconduct by a juror, one must show that the questioned conduct entered into a verdict prejudicial or adverse to the party alleging such misconduct.
Norquay v. Union Pacific Railroad 527

38. Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that the juror's conduct was of such character that prejudice may be presumed.
Norquay v. Union Pacific Railroad 527

39. When a new trial is sought for juror misconduct, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing.
Norquay v. Union Pacific Railroad 527

40. Before there may be recovery in a medical negligence case based upon the failure of a medical care provider such as a physician to obtain an informed consent to the treatment, the plaintiff must establish that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed. Neb.

Rev. Stat. § 44-2820 (Reissue 1984).
Smith v. Weaver 569
41. The Commission on Judicial Qualifications must prove allegations of judicial misconduct by clear and convincing evidence.
In re Complaint Against Kelly 583
42. In contempt proceedings it is necessary to establish guilt beyond a reasonable doubt.
State ex rel. Kandt v. North Platte Baptist Church 657
43. In a criminal case, a defendant may establish a prima facie showing of purposeful racial discrimination solely on evidence concerning the State's use of peremptory challenges.
State v. Threet 682
44. When prima facie showing of racial discrimination is established, the burden then shifts to the State to come forth with a neutral explanation for the peremptory challenge.
State v. Threet 682
45. Unless a probationer admits to a violation, the fact that a condition of probation has been violated must be proved by clear and convincing evidence.
State v. Heaton 702
46. Abandonment must be proven by clear and convincing evidence. Neb. Rev. Stat. § 43-104(3)(b) (Reissue 1984).
In re Application of S.R.S. and M.B.S. 759
47. An independent intervening cause, as the proximate cause of an injury, is, generally, a matter of defense and, as such, must be proved by the party asserting that defense.
Mendoza v. Omaha Meat Processors 771
48. Where the plaintiff has not been misled to her prejudice, the variance between an allegation in the pleading and the proof at trial is immaterial. Neb. Rev. Stat. § 25-846 (Reissue 1985).
Thies v. City of Omaha 817

Property

1. The general rule is that when a properly qualified expert witness testifies as to the value of property, the jury determines the weight and credibility of what the expert considers in coming to a conclusion.
Little v. Gillette 70
2. 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.
Pick v. Fordyce Co-op Credit Assn. 714
3. Where a fixture annexed to a freehold is tortiously severed, the owner of the realty, at his option, may treat the fixture as

personalty and recover the same by the action of replevin.
Pick v. Fordyce Co-op Credit Assn. 714

Property Division

1. Property divisions are not subject to a rigid mathematical formula. The division must, most of all, be reasonable.
Blaser v. Blaser 104
2. The division of the marital estate is initially left to the sound discretion of the trial court and will be reviewed de novo on the record and affirmed absent an abuse of discretion.
Seemann v. Seemann 116
Staman v. Staman 864

Prosecuting Attorneys

Where a single act violates more than one statute, a prosecutor is free to prosecute under any statute he or she chooses, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.
State v. Burke 625

Proximate Cause

1. Questions of foreseeability, negligence, and proximate cause are questions for the trier of fact.
K.S.R. v. Novak & Sons, Inc. 498
2. Determination of causation is, ordinarily, a matter for the trier of fact.
Mendoza v. Omaha Meat Processors 771
3. An independent intervening cause, as the proximate cause of an injury, is, generally, a matter of defense and, as such, must be proved by the party asserting that defense.
Mendoza v. Omaha Meat Processors 771

Public Service Commission

1. In an appeal from an order of the Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether evidence shows that the order in question was unreasonable or arbitrary.
In re Application of Renzenberger, Inc. 30
2. If there is evidence to sustain the findings and action of the Public Service Commission, the Supreme Court cannot intervene. Where the commission's finding is against all evidence, the Supreme Court may hold that such finding by the commission is arbitrary.
In re Application of Renzenberger, Inc. 30
3. An applicant for a certificate issuable pursuant to Neb. Rev. Stat. § 75-311 (Reissue 1986) has the burden to prove that the proposed service is or will be required by the present or future public

convenience and necessity.
In re Application of Renzenberger, Inc. 30
4. Regarding a proposed service to be authorized pursuant to Neb. Rev. Stat. § 75-311 (Reissue 1986), existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of a public need and demand for added service by another carrier.
In re Application of Renzenberger, Inc. 30
5. Public demand or need, which an applicant must prove to obtain a certificate from the Public Service Commission pursuant to Neb. Rev. Stat. § 75-311 (Reissue 1986), is a present actual need or a need which will likely occur within the reasonably immediate or foreseeable future. A certificate of public convenience and necessity cannot be granted on the basis of future needs which are speculative or improbable.
In re Application of Renzenberger, Inc. 30

Records

1. The existence or contents of affidavits filed with the clerk of the trial court but not preserved in the bill of exceptions cannot be known by this court.
Johannes v. McNeil Real Estate Fund VIII 283
2. Errors predicated on occurrences during the course of closing an argument cannot be shown by affidavit; the proper procedure, when the full arguments are not being reported, is to call in the official reporter and make a record of what occurred part of the bill of exceptions.
Johannes v. McNeil Real Estate Fund VIII 283
3. Where errors assigned require review of evidence in error proceedings, they cannot be considered in the absence of a bill of exceptions.
Brunken v. City of Omaha 410
4. An assignment of error requiring an examination of the evidence cannot prevail on appeal in the absence of a proper bill of exceptions.
State v. Burke 625
5. A transcript of the proceedings in the lower tribunal must be filed with the petition in error in order to confer jurisdiction upon the district court.
Jackson v. Jensen 671
6. Under Neb. Rev. Stat. § 29-2222 (Reissue 1985), an authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.
State v. Jackson 843

Recreation Liability Act

1. Subject to the provisions of Neb. Rev. Stat. § 37-1005 (Reissue 1984), an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby (1) extend any assurance that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.
   Gallagher v. Omaha Public Power Dist. 354
2. Subject to the provisions of Neb. Rev. Stat. § 37-1005 (Reissue 1984), an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.
   Gallagher v. Omaha Public Power Dist. 354
3. A finding that an owner of property protected by the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1984), did not act willfully or maliciously as described in § 37-1005 is a finding of fact which will not be disturbed unless clearly wrong.
   Thies v. City of Omaha 817

Recusal

1. A motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's sound discretion, and an order overruling such a motion will ordinarily be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
   State v. Bird Head 822
2. A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
   State v. Bird Head 822

Releases

In the absence of a specific statute, a valid release of either of the parties to the principal-agent relationship releases the other.
Mallette v. Taylor & Martin, Inc. 385

Replevin

1. Where a fixture annexed to a freehold is tortiously severed, the owner of the realty, at his option, may treat the fixture as personalty and recover the same by the action of replevin.
   Pick v. Fordyce Co-op Credit Assn. 714
2. The measure of damages in a replevin action where the property is not returned is the value of the property, together with interest, from the date of the unlawful taking.
   Pick v. Fordyce Co-op Credit Assn. 714

3. When property is returned in a replevin action, the party recovering possession of the property is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention.
Pick v. Fordyce Co-op Credit Assn. 714

Restitution

1. While an attorney's restitution of a client's converted funds prior to being faced with accountability may not exonerate such misconduct, restitution prior to complaint or prospective accountability is a significant mitigating factor to be considered in determining an appropriate sanction for an attorney's conversion of a client's funds.
State ex rel. NSBA v. Miller 261

2. In order to revoke probation for the failure to make restitution, the evidence must clearly and convincingly show that the probationer has willfully refused to make restitution when he or she has the resources to pay or has failed to make sufficient bona fide efforts to seek employment and otherwise acquire the resources to make restitution.
State v. Heaton 702

3. A probationer's failure to make reasonable efforts to seek employment or otherwise acquire the resources required to repay his debt to society may indicate that the original determination to withhold imprisonment needs reevaluation, and imprisonment may now be required to satisfy the State's penological interests.
State v. Heaton 702

4. A probationer who has made sufficient bona fide efforts to make restitution, and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms.
State v. Heaton 702

5. Only if alternative measures of punishment are not adequate to meet the State's interests in punishment and deterrence may a court imprison a probationer who has made sufficient bona fide efforts to make restitution.
State v. Heaton 702

Restrictive Covenants

1. A restrictive covenant is to be construed in connection with the surrounding circumstances which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the

property.
Lincoln East Bancshares v. Rierden 440

2. There are three considerations used to test the validity of a partial restraint of trade such as a covenant not to compete: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.
Polly v. Ray D. Hilderman & Co. 662

3. An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.
Polly v. Ray D. Hilderman & Co. 662

4. To distinguish between "ordinary competition" and "unfair competition," it is generally necessary to focus on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers.
Polly v. Ray D. Hilderman & Co. 662

5. A restrictive covenant not to compete must be no greater than is reasonably necessary before it will be enforced.
Polly v. Ray D. Hilderman & Co. 662

6. As a general rule, a covenant by an employee not to compete is valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact.
Polly v. Ray D. Hilderman & Co. 662

Revocation

The revocation of a license to operate a motor vehicle is not a penalty.
Guerzon v. Jensen 712

Right-of-Way

A segment of a continuous right-of-way, once acquired for a stated purpose, continues to be used for that purpose during the period of time that the holder of the right continues in good faith its efforts to complete the acquisition of the entire right-of-way.
Nebraska Public Power Dist. v. Munderloh 205

Right to Counsel

1. Where counsel is court appointed, the defendant does not have a constitutional right to counsel of his choice.
State v. El-Tabech 395

2. A driver is not entitled to consult with an attorney nor is a delay in a requested blood, breath, or urine test required should a driver

request to consult with an attorney prior to taking such test.
Guerzon v. Jensen 712

3. A trial court's determination of a defendant's indigency, requiring court-appointed counsel for a defendant in a criminal case, will be upheld on appeal, unless the trial court has abused its discretion in such determination.
State v. Richter 837

4. Under Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), to determine whether a defendant in a criminal case is indigent, requiring court-appointed counsel, a court must consider various 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. Richter 837

5. While a situation where expenses exceed income, considered by itself, may or may not constitute indigency of a defendant in a criminal case, an unintended absence of income and lack of property may be considered in determining whether a defendant is an indigent entitled to court-appointed counsel.
State v. Richter 837

Rules of Evidence

1. Error predicated on a ruling admitting evidence must be shown to affect a substantial right of a party and a timely objection stating a specific ground must have been made. Neb. Rev. Stat. § 27-103 (Reissue 1985).
Rocek v. Department of Public Institutions 247

2. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule which permits the use of evidence of relevant other crimes, wrongs, or acts if such is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged.
State v. Wilson 466

3. Although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
State v. Wilson 466

4. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless

presentation of cumulative evidence.
State v. Wilson 466

5. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 1985).
State v. Wilson 466

Sales

1. Neb. U.C.C. § 2-709 (Reissue 1980) applies to the sale of goods, which are generally defined in the code as things which are movable at the time of identification to the contract for sale.
Hammond v. Streeter 491

2. Even though a contract for sale of property was a mixed one, for the sale of both "goods" and "nongoods," where the case was presented to the trial court and to this court on appeal on the theory that the sales article of the Uniform Commercial Code applied, Neb. U.C.C. §§ 2-101 et seq. (Reissue 1980), the Supreme Court will dispose of the case on appeal on that theory.
Hammond v. Streeter 491

Search and Seizure

1. A person's capacity to claim the protection of article I, § 7, of the Nebraska Constitution as to unreasonable searches and seizures, like its counterpart, the fourth amendment to the U.S. Constitution, depends upon whether the person who claims such protection has a legitimate expectation of privacy in the invaded place.
State v. Hodge and Carpenter 94

2. An unreasonable search within the meaning of the fourth amendment occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.
State v. Hodge and Carpenter 94

3. Generally, a person who has relinquished control and vacated the premises has no reasonable expectation of privacy in the premises.
State v. Hodge and Carpenter 94

4. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his fourth amendment rights infringed.
State v. Hodge and Carpenter 94

5. The warning specified in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is required only when there has been a restriction on a person's freedom as to render such person in custody. The mere fact that an investigation has focused on a suspect does not trigger the need for the *Miranda* warning in a

noncustodial setting.
State v. Brown 418
6. Whether a person is in custody, in a constitutional sense, is a question of fact to be determined by the trial court.
State v. Brown 418
7. Generally, seizure of property is permissible under a validly authorized search warrant, under exigent circumstances, or under some other recognized exception to the warrant requirement.
State v. Vrtiska 454
8. A search pursuant to a warrant is presumed to be valid.
State v. Vrtiska 454
9. A defendant who seeks to suppress evidence obtained under a legally issued search warrant has the burden of establishing that the search was improper and that the evidence secured thereby should be suppressed.
State v. Vrtiska 454
10. If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable; but, if police acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.
State v. Vrtiska 454
11. Regarding a motion to suppress, the initial burden of proof (burden of going forward) is on the movant to establish a prima facie case of an unconstitutional search and seizure, and when such prima facie case has been established, the burden of proof (burden of going forward) shifts to the State to establish that the search and seizure were constitutionally permissible.
State v. Vrtiska 454
12. Entry through a window of a dwelling is an intrusion subject to the safeguard of the fourth amendment to the U.S. Constitution.
State v. Vrtiska 454
13. A nonconsensual and unannounced entry by a police officer for execution of a search warrant within an unoccupied dwelling is not, by itself and necessarily, an unreasonable intrusion prohibited by the fourth amendment to the U.S. Constitution.
State v. Vrtiska 454
14. A search of premises must be directed in good faith toward the object specified in a search warrant or for other means and instrumentalities by which a crime charged has been committed. Such search must not be a general exploratory search through which officers merely hope to discover evidence of wrongdoing.
State v. Vrtiska 454
15. When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not

included in the warrant, are reasonably identifiable as contraband, the officers may seize such articles whether those items are initially in plain sight or come into plain sight subsequently as a result of the officers' efforts.
State v. Vrtiska 454

16. During an investigatory stop, officers may search a suspect's vehicle in order to secure their safety or the safety of another if they have a reasonable belief, based on articulable facts, that they or other persons are in danger.
State v. Gross 798

Search Warrants

1. The duty of the Supreme Court in determining whether probable cause to issue a search warrant exists is only to ensure that the magistrate had a substantial basis for concluding that such existed.
State v. Hodge and Carpenter 94

2. Probable cause is a reasonable suspicion founded on articulable facts.
State v. Hodge and Carpenter 94

3. In evaluating the showing of probable cause necessary to support the issuance of a search warrant, only the probability, and not a prima facie showing, of criminal activity is required.
State v. Hodge and Carpenter 94

4. A search warrant may be issued for a location where it is probable that the property described would be found.
State v. Hodge and Carpenter 94

5. In determining the validity of a search warrant, the reviewing court may consider only information brought to the attention of the issuing magistrate.
State v. Hodge and Carpenter 94

6. A magistrate's determination of probable cause should be paid great deference by reviewing courts, and warrants should not be invalidated by interpreting the supporting affidavit in a hypertechnical, rather than a commonsense, manner.
State v. Hodge and Carpenter 94

7. To invalidate a warrant on grounds that the supporting affidavit was false, the defendant bears the burden of showing that the affiant made a deliberate falsehood or acted with reckless disregard for the truth and that the challenged information was material or necessary to a finding of probable cause.
State v. Hodge and Carpenter 94

8. The proof of probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof satisfies this test is

determined by the circumstances in each case.
State v. Hodge and Carpenter 94

9. In order to authorize the issuance of a search warrant for service during the nighttime under Neb. Rev. Stat. § 29-814.04 (Reissue 1985), the magistrate or judge must only be satisfied from a commonsense reading of the affidavit in support of such issuance that it reasonably supports the inference that the interests of justice are best served by the authorization of such nighttime service.
State v. Paul 432

10. An affidavit in support of the issuance of a search warrant which alleges facts which would lead a reasonable person to believe that a delay in service of the warrant would permit the possible destruction of contraband may be sufficient to authorize immediate nighttime service.
State v. Paul 432

11. Generally, seizure of property is permissible under a validly authorized search warrant, under exigent circumstances, or under some other recognized exception to the warrant requirement.
State v. Vrtiska 454

12. A search pursuant to a warrant is presumed to be valid.
State v. Vrtiska 454

13. A defendant who seeks to suppress evidence obtained under a legally issued search warrant has the burden of establishing that the search was improper and that the evidence secured thereby should be suppressed.
State v. Vrtiska 454

14. If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable; but, if police acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.
State v. Vrtiska 454

15. A nonconsensual and unannounced entry by a police officer for execution of a search warrant within an unoccupied dwelling is not, by itself and necessarily, an unreasonable intrusion prohibited by the fourth amendment to the U.S. Constitution.
State v. Vrtiska 454

16. A search of premises must be directed in good faith toward the object specified in a search warrant or for other means and instrumentalities by which a crime charged has been committed. Such search must not be a general exploratory search through which officers merely hope to discover evidence of wrongdoing.
State v. Vrtiska 454

17. When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, the officers may seize such articles whether those items are initially in plain sight or come into plain sight subsequently as a result of the officers' efforts.
State v. Vrtiska 454

18. What will amount to forbidden generality, or, to put it another way, insufficient particularity in a warrant necessarily depends upon the facts and circumstances of each case. Thus, to say that general warrants are outlawed by the federal and state Constitutions merely initiates the inquiry. The same may be said of their expressed requirement of probable cause and their ultimate mandate of reasonableness. Like "particularity," these depend upon the facts and circumstances.
State v. Pecha 673

19. There must be a sufficient nexus between the criminal activity, the place of the activity, and the persons in the place to show probable cause. This nexus has been described as whether there is sufficient particularity in the probable cause sense, that is, whether the information supplied the magistrate supports the conclusion that it is probable anyone in the described place when the warrant is executed is involved in the criminal activity in such a way as to have evidence thereof on his person.
State v. Pecha 673

20. Where the inclusion in a warrant of the catchall phrase "John and/or Jane Doe" is not based upon any probable cause, and the premises to be searched is acknowledged to be a residence at which both persons engaging in illegal activity and persons engaging in legal activity might be found, such a warrant cannot be condoned.
State v. Pecha 673

21. An officer could not manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. A warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.
State v. Pecha 673

Security Interests

1. Performance under a security agreement, including the failure of the secured party to rebuke the debtor or object to the debtor's conduct in selling collateral in violation of the terms of the security agreement, may amount to a waiver of the lender's contractual right to require its written consent to a sale of

that is, commission of a sexual assault in the second degree.
State v. Jackson 843

Speedy Trial

1. The purpose of Nebraska's speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985), sometimes called the "6-month rule," is protection of an accused from a criminal charge pending for an undue length of time.
State v. Lafler 362
2. Under Nebraska's speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985), it is unnecessary to show factually that delay actually prevented commencement of trial, that is, a demonstration of a cause-and-effect relationship between a condemned delay and failure to commence a defendant's trial within 6 months as prescribed by § 29-1207(2).
State v. Lafler 362
3. To obtain absolute discharge under Neb. Rev. Stat. § 29-1208 (Reissue 1985) of the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985), a defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within 6 months in accordance with § 29-1207(2).
State v. Lafler 362
4. The primary burden is on the State to see that an accused is brought to trial within the time prescribed by the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985).
State v. Lafler 362
5. To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1985), the State, by a preponderance of evidence, must prove existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial in accordance with the Nebraska speedy trial act, or "6-month rule." Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985).
State v. Lafler 362
6. Any delay caused by the defendant's act or conduct, namely, those pretrial situations or matters described or characterized in Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1985), is automatically excluded in computing the time when the defendant's trial must commence pursuant to the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985). Any period of delay resulting from a defendant's act or conduct specifically mentioned in reference to the pretrial matters or situations described or characterized in § 29-1207(4)(a) is computed without consideration whether such delay was reasonably necessary. However, a period of delay resulting from other than the

defendant's act or conduct described or characterized in § 29-1207(4)(a) may be excluded in computing the time for commencement of a defendant's trial, if such delay occurred on account of "good cause," as provided in § 29-1207(4)(f).
State v. Lafler 362

7. A defendant whose trial is set at the end of the 6-month period required pursuant to the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985), but who fails to appear for that trial, is not necessarily entitled to an immediate trial when he subsequently appears in court.
State v. Kriegler 486

Standing

1. A defendant who would receive no benefit from a declaration of invalidity does not have standing to challenge the constitutionality of a statute.
State v. Burke 625

2. The traditional rule is that one to whom a statute may be applied constitutionally does not have standing to challenge that statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the court; however, an exception to that rule is made when a statute is overbroad. In the latter instance one is allowed to assert the rights of others and attack the overbreadth of a statute even though the behavior of the person making the attack clearly may be unprotected and could be proscribed by a law drawn with the requisite narrow specificity.
State v. Burke 625

3. Where conduct and not merely noncommercial speech is involved, the overbreadth of the statute attacked must not only be real but substantial as well, judged in relation to the statute's plainly legitimate sweep.
State v. Burke 625

4. One who has engaged in conduct which is clearly prohibited by the questioned statute cannot complain that the statute is vague when applied to the conduct of others.
State v. Burke 625

States

1. Fair warning that activity in a forum state may result in personal jurisdiction is satisfied if a defendant purposefully directs activities at the forum state and its residents and injury is caused by the defendant's activity within the forum state.
McGowan Grain v. Sanburg 129

2. Where a nonresident individual purposefully derives benefit from interstate activities, fairness requires such individual to account for the consequences arising proximately from the individual's

activities in the forum state.
McGowan Grain v. Sanburg 129

Statutes

1. The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984 & Cum. Supp. 1986), must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it.
In re Interest of R.A. and V.A. 157
2. A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning.
Williams v. Kingery Constr. Co. 235
Lawson v. Ford Motor Co. 725
3. A penal statute is required to be strictly construed and should be given a sensible construction. A statute should be construed in the context of the object sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purpose for which it serves.
State v. Hicks 322
State v. Burke 625
4. Although a penal statute is required to be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence.
Wounded Shield v. Gunter 327
5. As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
Wounded Shield v. Gunter 327
6. One cannot challenge the constitutionality of a statute for the first time on appeal to this court.
In re Interest of C.R.S. 436
7. A defendant who would receive no benefit from a declaration of invalidity does not have standing to challenge the constitutionality of a statute.
State v. Burke 625
8. The traditional rule is that one to whom a statute may be applied constitutionally does not have standing to challenge that statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the court; however, an exception to that rule is made when a statute is overbroad. In the latter instance one is allowed to assert the rights of others and attack the overbreadth of a statute even though the

behavior of the person making the attack clearly may be unprotected and could be proscribed by a law drawn with the requisite narrow specificity.
State v. Burke 625
9. Where conduct and not merely noncommercial speech is involved, the overbreadth of the statute attacked must not only be real but substantial as well, judged in relation to the statute's plainly legitimate sweep.
State v. Burke 625
10. Legislative enactments are afforded a presumption of constitutionality.
State v. Burke 625
11. A penal statute is construed strictly and must be sufficiently clear so that a person of ordinary intelligence has fair notice of exactly what conduct is forbidden.
State v. Burke 625
12. Where a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted.
State v. Burke 625
13. A statute challenged as overbroad should be construed so as to avoid constitutional problems if it is subject to such a limiting construction.
State v. Burke 625
14. Unconstitutionality must be clearly established before this court is authorized to declare a statute void.
State v. Burke 625
15. One who has engaged in conduct which is clearly prohibited by the questioned statute cannot complain that the statute is vague when applied to the conduct of others.
State v. Burke 625
16. In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
State v. Burke 625
Lawson v. Ford Motor Co. 725
17. Where a single act violates more than one statute, a prosecutor is free to prosecute under any statute he or she chooses, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.
State v. Burke 625
18. A sentencing court has a mandatory duty under Neb. Rev. Stat. § 29-2912 (Reissue 1985) to order an evaluation of one convicted of a felony sexual offense for the purpose of determining whether he or she is a mentally disordered sex offender.
State v. Burke 625

19. The requirements of a statute governing the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction.
Gilmore v. Nebraska Crime Vict. Rep. Bd. 640
20. Recognition that legislators typically vote on the language of a bill generally requires the Nebraska Supreme Court to assume that the legislative purpose is expressed by the ordinary meaning of the words used.
Lawson v. Ford Motor Co. 725
21. It is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of a statute.
Lawson v. Ford Motor Co. 725
22. One is "within the age of twenty years" until he or she becomes 21 years old.
Lawson v. Ford Motor Co. 725
23. A heading, caption, or catchline is supplied in the compilation of the statutes and does not constitute any part of the law.
Lawson v. Ford Motor Co. 725

Stipulations

1. Parties are bound by stipulations voluntarily made and are granted relief therefrom only under exceptional circumstances.
White v. Mertens 241
2. A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with the stipulation.
State v. Burke 625

Summary Judgment

1. Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.
Marshall v. Radiology Assoc. 75
2. On a motion for summary judgment, the moving party must make a prima facie showing that if the evidence were uncontroverted at trial, he would be entitled to judgment as a matter of law. Such a showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. The court then views the evidence in a light most favorable to the party opposing the motion and decides only whether there is an issue of fact, not how such an issue should be decided.
Marshall v. Radiology Assoc. 75
Smith v. Weaver 569
3. An affidavit offered in resistance to a motion for summary judgment must be made on personal knowledge, must set forth

such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein.
Marshall v. Radiology Assoc. 75

4. A summary judgment is to be granted where there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law.
Smith v. Weaver 569
Aldridge v. School Dist. of North Platte 580

5. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.
In re Estate of Thompson 643
Seagren v. Peterson 747

6. In considering a motion for summary judgment the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence.
In re Estate of Thompson 643

Taxation

1. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property. Neb. Const. art. VIII, § 1.
Gordman Properties Co. v. Board of Equal. 169

2. The district court shall hear appeals and cross-appeals, taken from action of a board of equalization, as an equity case and without a jury, and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. Neb. Rev. Stat. § 77-1511 (Reissue 1986).
Gordman Properties Co. v. Board of Equal. 169

3. Neb. Rev. Stat. § 77-1511 (Reissue 1986) restricts a taxpayer's appeal to a consideration of questions raised before the board of equalization, and the court is without power to adjudicate any other factual question or issue in the taxpayer's appeal.
Gordman Properties Co. v. Board of Equal. 169

4. Equalization of assessments has for its general purpose to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. The object of the law of uniformity is accomplished if all of the property within the taxing jurisdiction is assessed at a uniform standard of value.
Gordman Properties Co. v. Board of Equal. 169

5. In a proceeding before a county board of equalization, a taxpayer may raise questions concerning the assessed value (actual value) of the taxpayer's real estate, the lack of proportionate and uniform valuation regarding the taxpayer's property, or both such aspects of valuation for tax purposes.
Gordman Properties Co. v. Board of Equal. 169
Fremont Plaza v. Dodge County Bd. of Equal. 303
6. An appeal from action by a county board of equalization is an equity action tried de novo in the district court.
Gordman Properties Co. v. Board of Equal. 169
Fremont Plaza v. Dodge County Bd. of Equal. 303
7. On appeal to the Supreme Court, an equity case involving action by a county board of equalization is a trial of factual questions de novo on the record, requiring the Supreme Court to reach a conclusion independent of the findings of the trial court.
Gordman Properties Co. v. Board of Equal. 169
8. In a taxpayer's appeal from action of a county board of equalization, the burden is on the taxpayer to prove the contention that the value of the taxpayer's property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.
Gordman Properties Co. v. Board of Equal. 169
Fremont Plaza v. Dodge County Bd. of Equal. 303
9. A taxpayer who has first sought an exemption under Neb. Rev. Stat. § 77-202.01 (Reissue 1981), which was denied and from which no appeal pursuant to Neb. Rev. Stat. § 77-202.04 (Reissue 1986) was taken, may not thereafter pay the tax and seek a refund under the provisions of Neb. Rev. Stat. § 77-1736.10 (Reissue 1986).
Campus Lt. Hse. Min. v. Buffalo Cty. Bd. of Equal. 271
10. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment, which presumption remains until there is competent evidence to the contrary. Such presumption disappears when there is competent evidence on appeal to the contrary. From that point on the reasonableness of the valuation fixed by the board of equalization becomes an issue of fact based upon the evidence.
Fremont Plaza v. Dodge County Bd. of Equal. 303
11. In proving disproportionate assessment, the key requirement is that the evidence establish an actual disparity in assessment which indicates the principle of uniformity has been violated, and not a mere difference of opinion as to valuation.
Fremont Plaza v. Dodge County Bd. of Equal. 303
12. Authorities charged with the duty of valuing property for taxation purposes may classify different types of property reasonably, and may use appropriate differing methods of assessing actual value in

the different classifications, but the results reached by such different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate and do not exceed the actual value of the property.
Fremont Plaza v. Dodge County Bd. of Equal. 303

13. A taxpayer is entitled to have its property in a county assessed uniformly and proportionately with other property in the county even though the result may be that it is assessed at less than actual value.
Fremont Plaza v. Dodge County Bd. of Equal. 303

14. Whenever any person shall appeal to the district court from the assessment of his property as fixed by the county board of equalization, and the appeal shall be sustained in whole or in part, the cost of such appeal, including costs of witnesses, if any, shall be paid by the county wherein such property is situated. Neb. Rev. Stat. § 77-1513 (Reissue 1986).
Fremont Plaza v. Dodge County Bd. of Equal. 303

Termination of Employment

When employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, generally, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability.
Johnston v. Panhandle Co-op Assn. 732

Testimony

1. A sequestration order alone does not automatically put the witnesses on notice that they are not to discuss their testimony with other witnesses.
State v. Hess 91

2. If a party desires to extend a sequestration order to prohibit discussion of proposed testimony between or among the various witnesses, such a request must specifically be made.
State v. Hess 91

Theft

1. Theft is a single offense.
State v. Scott 146

2. A preliminary hearing on theft in one form is sufficient to bind a defendant over to the district court for trial on theft performed in a different manner.
State v. Scott 146

3. Neb. Rev. Stat. § 28-512(2) (Reissue 1985) is constitutional.
State v. Scott 146

4. In a theft charge, the value of the thing involved is an element of the charge against defendant and must be proved by the State

beyond a reasonable doubt.
State v. Scott 146
5. The value of the thing involved in a theft case must be established by the jury.
State v. Scott 146

Time

1. The 5-day claim provision of Neb. Rev. Stat. § 43-104.02 (Reissue 1984) does not apply to a dispute between the biological father and mother of a child born out of wedlock.
White v. Mertens 241
2. Generally, when a contract does not provide a time for performance, a reasonable time will be implied by law.
Chilton Accts. Rec. Mgmt. v. Project Life Min. 482
3. What constitutes a reasonable time for the performance of a contract must be determined from the general nature and circumstances of each case.
Chilton Accts. Rec. Mgmt. v. Project Life Min. 482
4. In order for consent of a parent to an adoption to be unnecessary under Neb. Rev. Stat. § 43-104(3)(b) (Reissue 1984), abandonment must be shown in the 6-month time period preceding the petition for adoption.
In re Application of S.R.S. and M.B.S. 759
5. As construed by this court, Neb. Rev. Stat. § 48-125 (Reissue 1984) authorizes a 50-percent payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation.
Mendoza v. Omaha Meat Processors 771
6. Whether a reasonable controversy exists pertinent to Neb. Rev. Stat. § 48-125 (Reissue 1984) is a question of fact.
Mendoza v. Omaha Meat Processors 771
7. For the purpose of Neb. Rev. Stat. § 48-125 (Reissue 1984), a reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.
Mendoza v. Omaha Meat Processors 771

8. It is the term of a defendant's prior sentences, not time actually served, which controls applicability of the habitual criminal penalty found in Neb. Rev. Stat. § 29-2221 (Reissue 1985).
State v. Jackson 843

Tort Claims Act

The findings of fact of the trial court in a proceeding under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), have the effect of jury findings and will not be disturbed on appeal unless they are clearly wrong.
McMullin Transfer v. State 109

Torts

The phrase "[a]ny action to recover damages" in Neb. Rev. Stat. § 25-223 (Reissue 1985) includes an action in tort for damages caused by the negligent construction of a building.
Williams v. Kingery Constr. Co. 235

Trial

1. A sequestration order alone does not automatically put the witnesses on notice that they are not to discuss their testimony with other witnesses.
State v. Hess 91
2. If a party desires to extend a sequestration order to prohibit discussion of proposed testimony between or among the various witnesses, such a request must specifically be made.
State v. Hess 91
3. In a bench trial of a law action, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by witnesses; the extent to which testimony of various witnesses is corroborated; and the reasonableness or unreasonableness of testimony from the witnesses.
Lynn v. Metropolitan Utilities Dist. 121
4. The determination as to the admissibility of an excited utterance generally rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
In re Interest of R.A. and V.A. 157
5. Spontaneity is the key factor in determining whether a statement falls within the excited utterance exception. To qualify as an excited utterance, generally, a statement must meet the following criteria: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have

been made by the declarant while under the stress of the event.
In re Interest of R.A. and V.A. 157
6. Generally, the common-law res gestae requirements that the statement be contemporaneous and spontaneous are relaxed where the statement is one made by a young victim of sexual abuse.
In re Interest of R.A. and V.A. 157
7. A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.
Fredericks v. Western Livestock Auction Co. 211
State v. Vrtiska 454
State v. Richter 837
8. Parties are bound by stipulations voluntarily made and are granted relief therefrom only under exceptional circumstances.
White v. Mertens 241
9. This court ordinarily will not consider issues not properly raised in the pleadings nor litigated at trial.
White v. Mertens 241
10. Errors predicated on occurrences during the course of closing an argument cannot be shown by affidavit; the proper procedure, when the full arguments are not being reported, is to call in the official reporter and make a record of what occurred part of the bill of exceptions.
Johannes v. McNeil Real Estate Fund VIII 283
11. One may not take the chance of a favorable verdict and then complain of the result; thus, in order to assign error based on occurrences during the course of a closing argument, the complaining party must have objected to the occurrence and moved for a mistrial prior to submission of the cause.
Johannes v. McNeil Real Estate Fund VIII 283
12. While as a general rule the practice of endorsing additional witnesses just before or during the course of a trial is to be avoided, the trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after trial has begun when doing so does not prejudice the rights of the defendant.
State v. Mecum 293
13. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of

proof is imposed.
Ditloff v. State Farm Fire & Cas. Co. 375
14. If the offenses charged are of the same or similar character, or are based on the same act or transaction, the offenses may be joined in one trial pursuant to Neb. Rev. Stat. § 29-2002(3) (Reissue 1985).
State v. Vrtiska 454
15. A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion.
State v. Vrtiska 454
16. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
State v. Wilson 466
17. Generally, it is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
State v. Wilson 466
State v. Threet 682
Misle Chevrolet Co. v. Kometscher 804
18. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 1985).
State v. Wilson 466
19. A trial court can on its own motion instruct the jury on a lesser-included offense if the giving of the instruction is proper, and the fact that neither the prosecution nor the defense requests the instruction is of no significance.
State v. Rubek 477
20. Questions of foreseeability, negligence, and proximate cause are questions for the trier of fact.
K.S.R. v. Novak & Sons, Inc. 498
21. When a party has not complied with Neb. Ct. R. of Disc. 26(b)(4)(A)(i) (rev. 1983) (interrogatories) or Rule 26(e)(1)(B) (supplemental responses), the adverse party must make an appropriate objection, move to strike certain testimony, request a continuance, or move for a mistrial.
Norquay v. Union Pacific Railroad 527
22. Pretrial conferences are conducted to simplify the issues, amend pleadings, and avoid unnecessary proof of facts at trial. They are also conducted to avoid traps and surprises at trial.
Malerbi v. Central Reserve Life 543
Misle Chevrolet Co. v. Kometscher 804

23. Issues specified at a pretrial conference control the course of an action and, unless altered by the court, constitute the issues on which the case is tried.
Malerbi v. Central Reserve Life 543
Misle Chevrolet Co. v. Kometscher 804
24. A defendant may not permit questionable or incompetent evidence to be admitted without objection, take the chance of a favorable result, and after an unfavorable outcome complain that the evidence was received.
State v. Burke 625
25. A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with the stipulation.
State v. Burke 625
26. Error may not be predicated upon a ruling unless a substantial right of the party is affected.
State v. Threet 682
27. Error may not be predicated upon a ruling which excludes evidence unless a substantial right is affected and the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.
In re Interest of L.H. 706
28. In a case tried without a jury, the court, as trier of the facts, is the sole judge of the credibility of the witnesses and the weight to be given such testimony.
Kimberling v. Omaha Public Power Dist. 744
29. Determination of causation is, ordinarily, a matter for the trier of fact.
Mendoza v. Omaha Meat Processors 771
30. Error cannot be predicated on rulings permitting answers to questions properly propounded to plaintiff's witness on redirect examination to explain opinions expressed in answer to similar questions propounded to the same witness on cross-examination.
State v. Walker 794
31. The extent to which a witness on redirect examination may explain testimony elicited on cross-examination lies primarily in the discretion of the court.
State v. Walker 794
32. The trial court has broad discretion over the general conduct of the trial and decisions on matters relating to the conduct of the trial will not be set aside on appeal absent an abuse of the court's discretion.
Misle Chevrolet Co. v. Kometscher 804
33. Where the plaintiff has not been misled to her prejudice, the variance between an allegation in the pleading and the proof at

trial is immaterial. Neb. Rev. Stat. § 25-846 (Reissue 1985).
Thies v. City of Omaha 817
34. Whether a defendant's conduct constituted a substantial step toward commission of a particular crime is, generally, a question for the trier of fact.
State v. Jackson 843

Trusts

No trust instrument can relieve a trustee from a duty to account to interested persons.
In re Guardianship and Conservatorship of Sim 181

Uniform Commercial Code

1. Neb. U.C.C. § 2-709 (Reissue 1980) applies to the sale of goods, which are generally defined in the code as things which are movable at the time of identification to the contract for sale.
Hammond v. Streeter 491
2. Even though a contract for sale of property was a mixed one, for the sale of both "goods" and "nongoods," where the case was presented to the trial court and to this court on appeal on the theory that the sales article of the Uniform Commercial Code applied, Neb. U.C.C. §§ 2-101 et seq. (Reissue 1980), the Supreme Court will dispose of the case on appeal on that theory.
Hammond v. Streeter 491

Unjust Enrichment

When a unilateral mistake is made and a party receives the benefit of that mistake, before the mistaken payor can recover the mistaken payment, it must also show that the person receiving the payment has been unjustly enriched.
Wendell's, Inc. v. Malmkar 341

Valuation

1. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property. Neb. Const. art. VIII, § 1.
Gordman Properties Co. v. Board of Equal. 169
2. The district court shall hear appeals and cross-appeals, taken from action of a board of equalization, as an equity case and without a jury, and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. Neb. Rev. Stat. § 77-1511 (Reissue 1986).
Gordman Properties Co. v. Board of Equal. 169
3. Neb. Rev. Stat. § 77-1511 (Reissue 1986) restricts a taxpayer's appeal to a consideration of questions raised before the board of equalization, and the court is without power to adjudicate any other factual question or issue in the taxpayer's appeal.
Gordman Properties Co. v. Board of Equal. 169

4. Equalization of assessments has for its general purpose to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. The object of the law of uniformity is accomplished if all of the property within the taxing jurisdiction is assessed at a uniform standard of value.
Gordman Properties Co. v. Board of Equal. 169
5. In a proceeding before a county board of equalization, a taxpayer may raise questions concerning the assessed value (actual value) of the taxpayer's real estate, the lack of proportionate and uniform valuation regarding the taxpayer's property, or both such aspects of valuation for tax purposes.
Gordman Properties Co. v. Board of Equal. 169
Fremont Plaza v. Dodge County Bd. of Equal. 303
6. An appeal from action by a county board of equalization is an equity action tried de novo in the district court.
Gordman Properties Co. v. Board of Equal. 169
7. On appeal to the Supreme Court, an equity case involving action by a county board of equalization is a trial of factual questions de novo on the record, requiring the Supreme Court to reach a conclusion independent of the findings of the trial court.
Gordman Properties Co. v. Board of Equal. 169
8. In a taxpayer's appeal from action of a county board of equalization, the burden is on the taxpayer to prove the contention that the value of the taxpayer's property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.
Gordman Properties Co. v. Board of Equal. 169
Fremont Plaza v. Dodge County Bd. of Equal. 303
9. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment, which presumption remains until there is competent evidence to the contrary. Such presumption disappears when there is competent evidence on appeal to the contrary. From that point on the reasonableness of the valuation fixed by the board of equalization becomes an issue of fact based upon the evidence.
Fremont Plaza v. Dodge County Bd. of Equal. 303
10. In proving disproportionate assessment, the key requirement is that the evidence establish an actual disparity in assessment which indicates the principle of uniformity has been violated, and not a mere difference of opinion as to valuation.
Fremont Plaza v. Dodge County Bd. of Equal. 303
11. Authorities charged with the duty of valuing property for taxation purposes may classify different types of property reasonably, and may use appropriate differing methods of assessing actual value in the different classifications, but the results reached by such

different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate and do not exceed the actual value of the property.
Fremont Plaza v. Dodge County Bd. of Equal. 303
12. A taxpayer is entitled to have its property in a county assessed uniformly and proportionately with other property in the county even though the result may be that it is assessed at less than actual value.
Fremont Plaza v. Dodge County Bd. of Equal. 303
13. Whenever any person shall appeal to the district court from the assessment of his property as fixed by the county board of equalization, and the appeal shall be sustained in whole or in part, the cost of such appeal, including costs of witnesses, if any, shall be paid by the county wherein such property is situated. Neb. Rev. Stat. § 77-1513 (Reissue 1986).
Fremont Plaza v. Dodge County Bd. of Equal. 303

Value of Goods

1. In a theft charge, the value of the thing involved is an element of the charge against defendant and must be proved by the State beyond a reasonable doubt.
State v. Scott 146
2. The value of the thing involved in a theft case must be established by the jury.
State v. Scott 146

Venue

1. Venue may be proved as any other fact.
State v. Scott 146
2. When an order appealed from is the order of the Crime Victim's Reparations Board, and not the recommendation of the hearing officer, the "county where the action is taken" for purposes of filing an appeal is the county in which the board acted, not the county where the hearing took place. Neb. Rev. Stat. § 84-917 (Reissue 1981).
Gilmore v. Nebraska Crime Vict. Rep. Bd. 640
3. An appeal from an order of the Director of Motor Vehicles entered under the provisions of Neb. Rev. Stat. § 39-669.18 (Reissue 1984) relating to a refusal to take a blood, breath, or urine test must be filed in the district court of the county in which the alleged events occurred for which the operator was arrested.
Jackson v. Jensen 671
4. The venue requirements of Neb. Rev. Stat. § 39-669.18 (Reissue 1984) governing the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction.
Jackson v. Jensen 671

5. A court which never acquires jurisdiction permitting it to act has no authority to transfer venue under the provisions of Neb. Rev. Stat. § 25-410 (Reissue 1985).
Jackson v. Jensen 671

6. A motion for a change of venue is addressed to the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed absent a clear abuse of that discretion.
State v. Bird Head 822

7. The factors to be evaluated in determining whether a change of venue is required because of pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn.
State v. Bird Head 822

Verdicts

1. A jury verdict will not be disturbed on appeal unless it is clearly erroneous and against the preponderance of the evidence.
Farmers State Bank v. Farmland Foods 1
Havlicek v. Desai 222

2. A jury verdict which is wholly inadequate as to amount of damages, and therefore is not supported by the evidence, must be set aside and a new trial granted.
Havlicek v. Desai 222

3. In determining whether the evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on credibility of witnesses, or evaluate the evidence. Those determinations are within the province of the jury, and its verdict must be sustained if the evidence, when viewed in the light most favorable to the State, is sufficient to support the verdict.
State v. Meints 335
State v. El-Tabech 395

4. Circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other than the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. The evidence must be such as to make the plaintiffs' theory of causation reasonably probable, not merely possible.
Ditloff v. State Farm Fire & Cas. Co. 375

5. The verdict of a jury based on conflicting evidence will not and should not be set aside unless it is clearly wrong.
First West Side Bank v. Hiddleston 563

Visitation

1. Psychiatric testing or psychological evaluations of a parent may be required to determine the best interests of children when issues of custody and visitation are presented.
In re Interest of R.A. and V.A. 157
2. Visitation of a child born out of wedlock is to be decided on the basis of what is in the best interests of the child and depends upon the existence of a familial relationship with the child.
White v. Mertens 241

Wages

1. Wherever in the Nebraska Workers' Compensation Act the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. It shall not include gratuities received from the employer or others, nor shall it include board, lodging, or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring.
Bituminous Casualty Corp. v. Deyle 82
2. The Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), requires that employers subject to its provisions pay each employee engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise which is engaged in commerce or in the production of goods for commerce, specified wages for all hours worked, certain of which are to be compensated at overtime rates.
Banks v. Mercy Villa Care Center 751
3. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), an enterprise which provides a home to patients from other states is engaged in interstate commerce.
Banks v. Mercy Villa Care Center 751
4. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), the workweek ordinarily includes all the time during which an employee is necessarily required to be on the employer's premises, on duty, or at a prescribed workplace.
Banks v. Mercy Villa Care Center 751
5. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), bona fide meal periods are not worktime.
Banks v. Mercy Villa Care Center 751
6. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), work not requested but permitted is

worktime and compensable.
Banks v. Mercy Villa Care Center 751

7. No matter how much time is designated as a meal period, if an employee is not free to follow pursuits of a purely private nature or the time is spent predominantly for the employer's benefit, the designated time is not, for the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), a bona fide meal period.
Banks v. Mercy Villa Care Center 751

Waiver

1. Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
Farmers State Bank v. Farmland Foods 1
2. Performance under a security agreement, including the failure of the secured party to rebuke the debtor or object to the debtor's conduct in selling collateral in violation of the terms of the security agreement, may amount to a waiver of the lender's contractual right to require its written consent to a sale of collateral.
Farmers State Bank v. Farmland Foods 1
3. Whether the secured party's conduct constitutes a waiver of its right to require written consent to a sale of collateral is a question of fact.
Farmers State Bank v. Farmland Foods 1
4. The issues set out in a pretrial order supplant the issues raised in the pleadings. Failure to object to the specification of issues in a pretrial order waives error claimed in that regard on appeal.
Malerbi v. Central Reserve Life 543
Misle Chevrolet Co. v. Kometscher 804
5. The right to trial by jury is personal, and a defendant may waive that right.
State v. High 690
6. In order to waive the right to trial by jury, a defendant must be advised of the right to jury trial, must personally waive that right, and must do so either in writing or in open court for the record.
State v. High 690
7. In order for a court to permit a defendant to waive the right to trial by jury, it is not necessary that the defendant be informed of the precise role which the jury fulfills in a particular prosecution.
State v. High 690
8. The 24-hour waiting period between service of the information and requiring the defendant to plead may be waived by the defendant, and the failure of the record to show that the defendant made any objection to proceeding with the trial on the

charge raises the presumption that he or she waived that right.
State v. High 695

Wills

1. The cardinal rule concerning a decedent's will is the requirement that the intention of the testator shall be given effect, unless the maker of the will attempts to accomplish a purpose, or to make a disposition, contrary to some rule of law or public policy.
In re Estate of Tjaden 19
2. To arrive at a testator's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will.
In re Estate of Tjaden 19
3. When intention is expressed in clear language used in a testator's will, a court must give full force and effect to the testator's intention so expressed.
In re Estate of Tjaden 19
4. Generally, a term of art used in reference to a devise or other testamentary disposition or provision has a technical but, nonetheless, clear meaning used in a decedent's will.
In re Estate of Tjaden 19
5. "By right of representation" means a devisee is entitled to take or receive a share of an estate on a per stirpes basis.
In re Estate of Tjaden 19
6. A distribution per stirpes is one in which the heirs or devisees take proportionate shares of the share of the ancestor through whom they claim as the ancestor's representatives. As such representatives, the heirs or devisees will be entitled to take just as much as such ancestor would have taken and no more.
In re Estate of Tjaden 19
7. In a per stirpes distribution, ordinarily applicable in an intestate's estate, there is a division of property among a class or group of distributees who take the share which a decedent would have taken if such decedent were alive, taking such share by the right of representing the decedent.
In re Estate of Tjaden 19

Witnesses

1. A sequestration order alone does not automatically put the witnesses on notice that they are not to discuss their testimony with other witnesses.
State v. Hess 91
2. If a party desires to extend a sequestration order to prohibit discussion of proposed testimony between or among the various

witnesses, such a request must specifically be made.
State v. Hess 91

3. In a bench trial of a law action, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by witnesses; the extent to which testimony of various witnesses is corroborated; and the reasonableness or unreasonableness of testimony from the witnesses.
Lynn v. Metropolitan Utilities Dist. 121
Kimberling v. Omaha Public Power Dist. 744

4. While as a general rule the practice of endorsing additional witnesses just before or during the course of a trial is to be avoided, the trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after trial has begun when doing so does not prejudice the rights of the defendant.
State v. Mecum 293

5. While a nonexpert witness who is shown to have had intimate acquaintance with a deceased may be permitted to state an opinion concerning the mental condition of the deceased, the person testifying must give the facts and circumstances upon which the opinion is based.
In re Estate of Thompson 643

6. Error cannot be predicated on rulings permitting answers to questions properly propounded to plaintiff's witness on redirect examination to explain opinions expressed in answer to similar questions propounded to the same witness on cross-examination.
State v. Walker 794

7. The extent to which a witness on redirect examination may explain testimony elicited on cross-examination lies primarily in the discretion of the court.
State v. Walker 794

8. Endorsement of witnesses' names on the information is required to provide a defendant with the identity of persons who may testify against the defendant and to afford the defendant an opportunity to investigate concerning such witnesses, if necessary to prepare a defense at trial.
State v. Jackson 843

9. While Neb. Rev. Stat. § 29-2221(2) (Reissue 1985) requires that an information contain allegations of facts concerning a defendant's status as a habitual criminal, names of witnesses who may testify at the enhancement hearing are not required to be endorsed on the

information charging the defendant with the crime for which a conviction will be the basis to impose the habitual criminal penalty.
State v. Jackson 843

Words and Phrases

1. Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
Farmers State Bank v. Farmland Foods 1
2. *Any* usually means "all" or "every."
In re Estate of Tjaden 19
3. "By right of representation" means a devisee is entitled to take or receive a share of an estate on a per stirpes basis.
In re Estate of Tjaden 19
4. A distribution per stirpes is one in which the heirs or devisees take proportionate shares of the share of the ancestor through whom they claim as the ancestor's representatives. As such representatives, the heirs or devisees will be entitled to take just as much as such ancestor would have taken and no more.
In re Estate of Tjaden 19
5. In a per stirpes distribution, ordinarily applicable in an intestate's estate, there is a division of property among a class or group of distributees who take the share which a decedent would have taken if such decedent were alive, taking such share by the right of representing the decedent.
In re Estate of Tjaden 19
6. Public demand or need, which an applicant must prove to obtain a certificate from the Public Service Commission pursuant to Neb. Rev. Stat. § 75-311 (Reissue 1986), is a present actual need or a need which will likely occur within the reasonably immediate or foreseeable future. A certificate of public convenience and necessity cannot be granted on the basis of future needs which are speculative or improbable.
In re Application of Renzenberger, Inc. 30
7. The term "arising out of the employment" in the Workers' Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.
Bituminous Casualty Corp. v. Deyle 82
8. Wherever in the Nebraska Workers' Compensation Act the term wages is used, it shall be construed to mean the money rate at

which the service rendered is recompensed under the contract of hiring in force at the time of the accident. It shall not include gratuities received from the employer or others, nor shall it include board, lodging, or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring.
Bituminous Casualty Corp. v. Deyle 82

9. Probable cause is a reasonable suspicion founded on articulable facts.
State v. Hodge and Carpenter 94

10. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury.
McMullin Transfer v. State 109

11. A meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.
Fredericks v. Western Livestock Auction Co. 211

12. Architects and engineers are professionals for purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), and the period of repose applicable to an architect who has a duty to inspect throughout construction under the provisions of § 25-222 begins to run when the construction is completed.
Williams v. Kingery Constr. Co. 235

13. The phrase "[a]ny action to recover damages" in Neb. Rev. Stat. § 25-223 (Reissue 1985) includes an action in tort for damages caused by the negligent construction of a building.
Williams v. Kingery Constr. Co. 235

14. The use made by one of his or her property which works an irreparable injury to the property of his or her neighbor, the use made by one of his or her property whereby the unwritten but accepted law of decency is violated, the use made by one of his or her property whereby his or her neighbor is deprived of the reasonably comfortable use and enjoyment of his or her own property, and the use made by one of his or her property which will probably or likely endanger the health and the life of his or her neighbor are private nuisances.
Maly v. Arbor Manor, Inc. 276

15. A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
Lemburg v. Adams County 289

16. A person commits the crime of escape if he unlawfully removes himself from official detention. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes. Neb. Rev. Stat. § 28-912(1) (Reissue 1985).
State v. Hicks 322

17. Some degree of custody is essential before one can be considered to be in official detention.
State v. Hicks 322

18. Constructive, as distinguished from physical, restraint sufficient to constitute a constructive seizure or detention of an arrestee exists where an officer has the intention to effect an arrest, that intention has in some way been communicated to the arrestee, the arrestee understands that he is under legal restraint, and the officer has the apparent present power to control the person even though he has not yet asserted physical control.
State v. Hicks 322

19. An involuntary payment is one springing from accident or impulse rather than conscious exercise of the will, or unintentional.
Wendell's, Inc. v. Malmkar 341

20. In order for an action to be willful or wanton, the evidence must show that one acted with actual knowledge that a danger existed and that he intentionally failed to act to prevent the harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or omission to act, and a constructive intention as to the consequences.
Gallagher v. Omaha Public Power Dist. 354

21. To constitute willful misconduct there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury. To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.
Gallagher v. Omaha Public Power Dist. 354

22. An overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective

and does not have to be a criminal act.
State v. Lafler 362
23. Malice is an intention or desire to harm another through doing something unlawful or otherwise unjustified. However, malice can in certain situations be presumed from the mere doing of an act.
Ditloff v. State Farm Fire & Cas. Co. 375
24. In the context of a criminal prosecution, "alibi" denotes an attempt by the defendant to demonstrate he did not commit the crime because, at the time, he was in another place so far away or in a situation preventing his doing the thing charged against him. Alibi evidence is merely rebuttal evidence directed to that part of the State's evidence which tends to identify the defendant as the person who committed the alleged crime.
State v. El-Tabech 395
25. Cunnilingus, that is, stimulation by the tongue or lips of any part of a female's genitalia, is an act which may subject the actor to prosecution for first degree sexual assault under the provisions of Neb. Rev. Stat. § 28-319(1) (Reissue 1985). Once the perpetrator's lips or tongue touches any part of a female's genitalia, the act of cunnilingus is complete, irrespective of any actual penetration of the genitalia.
State v. Brown 418
26. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 1985).
State v. Wilson 466
27. Neb. U.C.C. § 2-709 (Reissue 1980) applies to the sale of goods, which are generally defined in the code as things which are movable at the time of identification to the contract for sale.
Hammond v. Streeter 491
28. Informed consent is consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Neb. Rev. Stat. § 44-2816 (Reissue 1984).
Smith v. Weaver 569
29. Crucial to the finding that a judge's misconduct is willful is a showing of bad faith. Willfulness involves more than an error of judgment or mere lack of diligence. Neb. Rev. Stat. § 24-722(1) and (2) (Reissue 1985).
In re Complaint Against Kelly 583
30. A mentally disordered sex offender is one who, because of a mental disorder, has been determined to be disposed to repeated commission of sexual offenses which are likely to cause

substantial injury to others.
State v. Burke 625
31. A sexual offense within the meaning of Neb. Rev. Stat. § 29-2911 (Reissue 1985) includes any felony in which the sexual excitement of the offender is a motivational factor.
State v. Burke 625
32. An action should be held to be frivolous only when it is prosecuted for an improper motive or when it indisputably has no merit. An action is frivolous when the result is obvious and the circumstances are so clear in fact and in law that competent counsel could not possibly fail to recognize it.
Shanks v. Johnson Abstract & Title 649
33. All doubts as to whether an action is frivolous should be resolved in favor of the petitioner. Sanctions should not be imposed except in the clearest cases.
Shanks v. Johnson Abstract & Title 649
34. Criminal contempt is a prosecution to preserve the power and vindicate the dignity of the court and to punish for disobedience of the court's orders.
State ex rel. Kandt v. North Platte Baptist Church 657
35. To distinguish between "ordinary competition" and "unfair competition," it is generally necessary to focus on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers.
Polly v. Ray D. Hilderman & Co. 662
36. What will amount to forbidden generality, or, to put it another way, insufficient particularity in a warrant necessarily depends upon the facts and circumstances of each case. Thus, to say that general warrants are outlawed by the federal and state Constitutions merely initiates the inquiry. The same may be said of their expressed requirement of probable cause and their ultimate mandate of reasonableness. Like "particularity," these depend upon the facts and circumstances.
State v. Pecha 673
37. 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.
Pick v. Fordyce Co-op Credit Assn. 714
38. The word "within" indicates enclosure or containment and means "inside of."
Lawson v. Ford Motor Co. 725
39. One is "within the age of twenty years" until he or she becomes 21 years old.
Lawson v. Ford Motor Co. 725

40. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), an enterprise which provides a home to patients from other states is engaged in interstate commerce.
Banks v. Mercy Villa Care Center 751

41. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), the workweek ordinarily includes all the time during which an employee is necessarily required to be on the employer's premises, on duty, or at a prescribed workplace.
Banks v. Mercy Villa Care Center 751

42. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), bona fide meal periods are not worktime.
Banks v. Mercy Villa Care Center 751

43. For the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), work not requested but permitted is worktime and compensable.
Banks v. Mercy Villa Care Center 751

44. No matter how much time is designated as a meal period, if an employee is not free to follow pursuits of a purely private nature or the time is spent predominantly for the employer's benefit, the designated time is not, for the purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), a bona fide meal period.
Banks v. Mercy Villa Care Center 751

45. For the purpose of Neb. Rev. Stat. § 48-125 (Reissue 1984), a reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.
Mendoza v. Omaha Meat Processors 771

46. A mentally disordered sex offender shall mean any person who has a mental disorder and who, because of the mental disorder, has been determined to be disposed to repeated commission of sexual offenses which are likely to cause substantial injury to the health of others. Neb. Rev. Stat. § 29-2911 (Reissue 1985).
State v. Thornton 875

Workers' Compensation

1. The Workers' Compensation Court is the sole judge of the weight and credibility of all of the evidence and, on appeal from an award of the Nebraska Workers' Compensation Court, the Supreme Court does not reweigh the facts but accords the findings of the compensation court the same force and effect as a jury verdict in a civil case. The findings will not be set aside where they are supported by the evidence and are not clearly wrong.
   Bituminous Casualty Corp. v. Deyle 82
   Hewson v. Stevenson 254
   Tlamka v. Goodyear Tire & Rubber Co. 789
2. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workers' 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.
   Bituminous Casualty Corp. v. Deyle 82
3. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved.
   Bituminous Casualty Corp. v. Deyle 82
4. In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard.
   Bituminous Casualty Corp. v. Deyle 82
5. The term "arising out of the employment" in the Workers' Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.
   Bituminous Casualty Corp. v. Deyle 82
6. Wherever in the Nebraska Workers' Compensation Act the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. It shall not include gratuities received from the employer or others, nor shall it include board, lodging, or similar advantages received from the employer, unless the money value of such advantages shall have

been fixed by the parties at the time of hiring.
Bituminous Casualty Corp. v. Deyle 82
7. The right of an injured worker to vocational rehabilitation depends on the inability to perform work for which the worker has previous training and experience.
Hewson v. Stevenson 254
8. Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the compensation court.
Hewson v. Stevenson 254
9. Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributed to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. If the second injury is but a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury.
Mendoza v. Omaha Meat Processors 771
10. To obtain an award for compensation on account of personal injury, an employee has the burden of proof to establish the causal relationship involving employment, an industrial injury, and disability.
Mendoza v. Omaha Meat Processors 771
11. Mere possibility of an independent intervening cause does not relieve an employer from liability for an employee's otherwise compensable claim for workers' compensation and benefits.
Mendoza v. Omaha Meat Processors 771
12. As construed by this court, Neb. Rev. Stat. § 48-125 (Reissue 1984) authorizes a 50-percent payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation.
Mendoza v. Omaha Meat Processors 771
13. Whether a reasonable controversy exists pertinent to Neb. Rev. Stat. § 48-125 (Reissue 1984) is a question of fact.
Mendoza v. Omaha Meat Processors 771
Tlamka v. Goodyear Tire & Rubber Co. 789
14. For the purpose of Neb. Rev. Stat. § 48-125 (Reissue 1984), a reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers'

compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.
Mendoza v. Omaha Meat Processors 771

15. Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury.
Mendoza v. Omaha Meat Processors 771